



FreeTV
Australia

44 Avenue Road
Mosman NSW
Australia 2088

T : 61 2 8968 7100
F : 61 2 9969 3520
W : freetvaust.com.au

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION
("APRA")**

APPLICATIONS FOR AUTHORISATION

**SUBMISSION TO ACCC
BY
FREE TV AUSTRALIA LIMITED
("FREE TV")**

2 AUGUST 2004

Table of Contents

1	Summary of submission	1
2	Free TV	2
3	Background	2
4	Free TV's position.....	3
5	Technological Advances in Digital Rights Management.....	6
6	Australia Mass Media Communications Industry in Flux	8
7	Developments Overseas	9
8	Opt-out Arrangements and Blanket Licensing.....	12

1 Summary of submission

Free TV considers that the public benefits of APRA's operations, in particular those the subject of the current APRA applications for authorisation (**Current APRA Application**), may have decreased and the anti-competitive effects may have increased, since the time of the previous authorisation by the Australian Competition Tribunal (**Tribunal**) on 20 July 2000. However ongoing technological, regulatory, and other market changes and developments mean the most appropriate time to conduct a full review of this matter is likely to be in two years time (around 30 June 2006) because:

1.1 Technological Advances

Technological advances in digital rights management (**DRM**) are gaining traction and current indications are that there may be wide spread commercial deployment of DRM systems by 2005/2006. DRM is relevant to the Current APRA Application as:

- DRM has the potential to allow for efficient, competitive direct licensing of music and will have a significant impact on collective licensing practices of organisations like APRA; and
- APRA's traditional blanket licensing arrangements penalise parties that make direct licensing deals with creators (eg using DRM), consequently the deployment of DRM in Australia will be significantly impeded by APRA's current practices.

1.2 Australian Mass Media Communications Industry in Flux

The Australian mass media communications (**MMC**) industry, including the free to air (**FTA**) broadcast industry, is in a state of transition due to various factors, including:

- the Digital Television Broadcasting Review;
- platform proliferation due to alternative distribution channels such as mobile phones and the internet; and
- the introduction of "timeshifting" with the deployment of "Personal Video Recorders".

These matters will impact greatly the way in which participants in the MMC industry use and distribute music. There is likely to be much greater clarity around these issues by mid-2006.

1.3 Overseas Developments

The monopoly position of various copyright collecting societies around the world has been coming under increasing scrutiny from competition regulators. Recent developments include:

- the European Commission has accused music collecting societies in 16 countries of cartel behaviour as a result of the so-called "Santiago Agreement"; and
- the European Commission's Internal Market division published its Communication on the management of copyright and related rights. This Communication favours legislation to ensure the proper governance and transparency of collecting societies.

Australia will benefit from watching international developments on the regulation of collecting societies, especially as new platforms such as the internet offer global (rather than territory-specific) distribution opportunities. Current indications are that two years is likely to be an appropriate time to review how developments in other countries play out.

Given the above, it is clear that there are major ongoing issues affecting the Current APRA Application, and current indications are that the impacts of those issues on APRA's operations are likely to be able to be properly assessed and understood within a two-year time horizon. To wait for four years for a further review will risk delaying important innovations for the Australian public and potentially result in significant anti-competitive effects for Australia.

2 Free TV

- 2.1 These submissions are made by Free TV on behalf of its members, which comprise the licensees of all commercial television-broadcasting services in Australia.
- 2.2 Free TV is the industry association of commercial television stations licensed to broadcast throughout Australia under the *Broadcasting Services Act 1992 (BSA)*. All commercial stations are members of Free TV. There are 48 members of Free TV in all. Free TV is the successor to the Federation of Australian Commercial Television Stations (**FACTS**) and Commercial Television Australia (**CTVA**).
- 2.3 FACTS was a participant in the proceedings of the Australian Competition Tribunal, pursuant to which authorisation was granted to APRA in July 2000, as described further at heading 3 below.
- 2.4 During the financial year ended 30 June 2004, the commercial television industry paid approximately \$24.5 million to APRA under the terms of the licence agreements in place between APRA and Free TV members. Free TV understands that the licence fees paid by the commercial television industry constitute the largest single sector contribution to APRA's revenue.

3 Background

- 3.1 Following an extensive process, on 20 July 2000 the Australian Competition Tribunal (**Tribunal**) determined to grant authorisation to APRA until 30 June 2004 in respect of its input arrangements, output arrangements and distribution arrangements the subject of applications:
 - (1) A30187;
 - (2) A30188;
 - (3) A30190;
 - (4) A30191; and
 - (5) A30193,(**Tribunal Determination**).

3.2 Prior to the Tribunal Determination, on 14 January 1998, the Australian Competition and Consumer Commission (**ACCC**) had determined to deny authorisation to the above applications, and to grant authorisation to APRA until 31 December 2002 in respect of its arrangements with overseas collecting societies the subject of applications:

- (1) A30189; and
- (2) A30192

(**ACCC Determination**). The ACCC's authorisations of the above applications were not set aside by the Tribunal, and the authorisations came into force on the day of the Tribunal Determination.

3.3 The Tribunal stated in its Reasons for Decision¹ that it considered that the public benefits arising from APRA's collective administration of performing rights exceeded the anti-competitive detriments flowing from its operations. However authorisation was made conditional on:

- (1) APRA modifying its input arrangements to allow any member to require APRA to grant to the member a non-exclusive licence in Australia of all or part of the performing rights in respect of any work; and
- (2) APRA implementing an alternative dispute resolution procedure, as further described in the Tribunal Determination.

3.4 The Tribunal also stated in its Reasons for Decision that:

"We do not think the authorisation should be for longer [than 30 June 2004] as technological and other changes are constantly having an effect on aspects of the relevant market."²

3.5 APRA seeks in the Current APRA Application to revoke the Tribunal authorisations and obtain re-authorisation of the applications in respect of its input, output, distribution and overseas arrangements, on identical terms. Whilst it is not made entirely clear in the Current APRA Application, we assume for the purposes of this submission that the Current APRA Application includes the (expired) authorisations of the ACCC referred to above.

3.6 The ACCC determined on 30 June 2004 to grant interim authorisation to APRA in respect of the relevant arrangements.

4 Free TV's position

4.1 Free TV does not oppose the granting of re-authorisations to APRA on identical terms to the authorisations granted by the Tribunal and the ACCC in their Determinations, provided the re-authorisations are for a more limited period of two years to 30 June 2006.

¹ Re: Applications by Australasian Performing Right Association [1999] ACompT 3 paragraph 360.

² Re: Applications by Australasian Performing Right Association [1999] ACompT 3 paragraph 362.

- 4.2 Free TV notes that, under section 91C of the *Trade Practices Act 1974 (TPA)*, the ACCC must not make a determination revoking an authorisation and substituting another authorisation, unless the ACCC is satisfied that the arrangements or conduct the subject of the re-authorisation application comply with the applicable public benefit/detriment tests under section 90 of the TPA, as if the applications were new applications.
- 4.3 It is therefore incumbent upon the applicant, APRA, to satisfy the ACCC that the arrangements or conduct the subject of APRA's re-authorisation applications comply with the relevant public benefit/detriment tests set out in section 90. In *Re Queensland Co-op Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169 at 185; [1976] ATPR 40-012 at 17, 242, the Tribunal stated:

"It is not sufficient for an applicant to point to a clear public benefit and then leave it to others to try to show that, nevertheless, the authorisation would not be justified. The onus is upon the applicant to satisfy the Tribunal that there is [sufficient] ... public benefit to outweigh the detriment, especially anti-competitive detriment, and so justify authorisation. Given the value placed upon the promotion and preservation of competition by the Act as a whole, it is a heavy onus."

- 4.4 Free TV does not propose to re-cavass matters in this submission that were already dealt with in detail by the Tribunal and the ACCC in their respective Determinations. However Free TV notes that APRA asserts as follows:

"...while there have been changes in the relevant market since the existing authorisations were granted, none of the changes would alter the conclusions reached by the Tribunal in respect of the benefits and detriments of APRA's operations."³

- 4.5 APRA goes on to assert that changes to the market that have occurred since the Tribunal's decision have promoted competition and public benefit, and have decreased the detrimental effect of APRA's monopoly.⁴
- 4.6 In Free TV's views these assertions are unsubstantiated in the Current APRA Application.
- 4.7 Free TV considers that APRA has failed to address adequately, or at all, the possible impacts on the Tribunal's assessment of public benefits and detriments that result from the arrangements and conduct the subject of its re-authorisation applications, as a result of:
- (1) further information and experience in respect of APRA's operations from the time of the Tribunal Determination;
 - (2) technological advances such as DRM;
 - (3) changes in the MMC industry; and
 - (4) developments overseas.

³ Current APRA Application 2 June 2004, paragraph 2.1.3

⁴ Current APRA Application 2 June 2004, paragraphs 2.1.4 and 2.11.7

- 4.8 Free TV disagrees with APRA's assertion in paragraph 2.11.7(e), that section 9 of the Current APRA Application contains a comprehensive economic analysis of APRA's operations. Section 9 contains very little economic analysis and sets out unsubstantiated conclusions. Free TV considers the conclusions in paragraph 9.2 in particular, that higher costs to the public would inevitably result from the introduction of competitors to APRA, to be incorrect. It is also incorrect to assert, as APRA does in paragraph 2.11.7(e), that such analysis as does exist in section 9 establishes that it is in the public interest and public detriment is prevented or minimised.
- 4.9 It is not incumbent upon Free TV, and Free TV does not provide, a full analysis or any concluded view as to the impact of the matters referred to in paragraph 4.7 upon the Tribunal's assessment of the public benefit/detriment balance of APRA's operations. However, contrary to APRA's assertions, Free TV considers that such evidence as does exist suggests that the impact of those matters may have been negative. That is, such evidence as is available indicates that the public benefit of APRA's operations may have decreased, and the anti-competitive and other detriments may not have altered or may have increased. These impacts are discussed in more detail in sections 5, 6, 7 and 8 below.
- 4.10 Free TV considers that the market, technological and regulatory changes referred to at paragraphs 4.7(2), (3) and (4) are substantial, and are continuing to occur at a rapid (and in some cases, accelerating) pace. In particular, certain technological changes have not yet fully emerged, and certain regulatory changes have not yet crystallised, as discussed further at sections 5, 6 and 7 below. This means that the impacts of many of those changes may be difficult to fully assess or predict at this point in time. Free TV considers that current indications are that such changes will be more likely to have crystallised and/or manifested themselves in approximately 2 years time.
- 4.11 Given that:
- (1) further experience of APRA's operations since authorisation, and such evidence of market and regulatory changes as exists has not been adequately assessed, or assessed at all, by APRA in the Current APRA Application;
 - (2) such evidence of market, technology and regulatory changes as exists indicates, in Free TV's view, that the public benefit/detriment balance of APRA's operations; may have been negatively affected to date;
 - (3) such changes are continuing to occur at a rapid pace and may have unpredictable or further negative impacts on the public benefit/detriment balance of APRA's operations, and
 - (4) certain important changes will be more likely to have crystallised and/or manifested themselves in approximately 2 years time,

Free TV submits that reassessment is warranted in a shorter timeframe than requested by APRA, and it is inappropriate to grant authorisation to APRA for a period of 4 years. Free TV submits that, for the reasons set out above, a re-authorisation period of 2 years is appropriate.

5 Technological Advances in Digital Rights Management

5.1 APRA, in the Current APRA Application, asserts as follows:

*"...because the probability of a new technology enabling the market to change in such a way as to enable APRA's centralised operations to be superseded is less than or the same as it was when the existing authorisations were granted, the term of the new authorisation should...be for a period not less than that previously granted."*⁵

Free TV does not agree.

5.2 Free TV submits that advances in DRM technology and its commercialisation, means that APRA members and music users have less need of APRA's centralised operations than at the time of authorisation by the Tribunal. DRM will continue to reduce the need for collecting societies in the future as it provides alternative routes to market for songwriters, producers and publishers.

5.3 Accordingly, given that DRM systems may enable a reduction in administrative costs and barriers to entry over time, it is submitted that the anti-competitive effect of restraints imposed on competition by APRA's existing input and output arrangements may increase over time. As noted at section 8 below, Free TV does not consider that the introduction by APRA of the opt-out option as required by the Tribunal has adequately enabled the development of competitive alternatives to APRA, for the reasons discussed there. APRA has failed to address the development and use of DRM in the Current APRA Application.

5.4 The Department of Communications, Information Technology and the Arts (DCITA) provides the following relevant description of the nature and functionality of DRM:

"...DRM has been described as 'a way of addressing the description, identification, trading, protecting, monitoring and tracking of all forms of rights usages over tangible and intangible assets, including management of rightsholders' relationships.'

Dr Renato Iannella, Chief Scientist, IPR Systems...

*...For producers and publishers, more complex DRM systems can record, track and monitor rights for a range of existing and newly created materials. Where producers, publishers and creators are also traders, the content itself can be made available in digital format, protected by security features which are unlocked after agreements for use have been reached and payment made."*⁶

5.5 The adoption and commercialisation of DRM is predicted to greatly facilitate direct dealing between copyright content producers/publishers and end users, and indirect dealing through third parties other than existing collecting societies. Producers and publishers may choose to develop and install their own DRM systems, or enter into a hosting agreement or rights agreement with a third parties who have set up DRM systems (such third parties may include but are not limited to collecting societies). The

⁵ Current APRA Application 2 June 2004, paragraph 2.1.7

⁶ DCITA, A Guide to Digital Rights Management, p.2

development and adoption of uniform standards and interoperability will, it is submitted, reduce or eliminate the increased administrative costs commonly associated by APRA and others with a multiplicity of licensing parties.

- 5.6 The European Union has recognised the importance of DRM since 2001 when it set out in its Directive 2001/29/EC a basic framework for dealing with DRM systems.
- 5.7 The Commission of the European Communities has also recently specifically addressed the issue of DRM in a Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee⁷ (the **EC Communication**). In the EC Communication it is stated that:

*"...(DRM) has become a key issue. The availability of DRM services through a technological infrastructure for the management of copyright and related rights is relevant to both individual and collective management....DRM systems are a means to an end, and as such, clearly are an important, if not the most important, tool for rights management in the Internal Market of the new digital services."*⁸

- 5.8 The EC Communication goes on to state that:

*"...the establishment of a global and interoperable technical infrastructure on DRM systems based on consensus among the stakeholders appears to be a necessary corollary to the existing legal framework and a prerequisite for the effective distribution and access to protected content in the Internal market."*⁹

- 5.9 DRM has the potential to significantly impact upon the need for and use of collecting societies as they will find themselves disintermediated by the DRM systems which link creators and users directly. As such it is unlikely a monopoly such as APRA will foster the deployment of innovative technologies such as DRM. Additionally APRA's traditional approach of blanket licences does not provide any refund or similar where a blanket licence holder acquires rights directly from a creator. Therefore there is no incentive for blanket licence holders to deal directly with creators. This means APRA's blanket licence approach will retard the implementation of DRM in Australia.
- 5.10 DCITA refers to an article released by Gartner in 2001, which contains the following predictions. It will not be until 2004, or more likely 2005, that revenue models start to mature and mainstream adoption of DRM becomes commonplace. By 2006, the DRM market will consolidate and a standard rights description language will emerge.¹⁰
- 5.11 The abovementioned EC Communication of the European Commission echoes these predictions, indicating that as of April 2004, there are commercially available solutions that have been deployed in the market.

⁷ Communication on the Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final, 16 April 2004

⁸ Ibid, p.10

⁹ Ibid, p.11

¹⁰ DCITA, A Guide to Digital Rights Management, p.15

5.12 Free TV submits that the implementation of DRM systems will be of benefit to the Australian public but such benefits may not be realised in the context of APRA's current operations. Consequently APRA's current operations may actually have an anti-competitive detriment that outweighs the public benefit, as a result of the technology. Based on current predictions and developments, the effects of DRM systems are likely to be better understood in the next two years. Free TV submits that in light of such likely short term developments in the market, and the potential significance of the impact of DRM systems on collecting societies like APRA, it is appropriate that a review be undertaken in 2 years time and that it is inappropriate to grant re-authorisation for a period of 4 years or more.

6 Australia Mass Media Communications Industry in Flux

6.1 Free TV submits that the Australian regulatory and commercial environment relevant to the use and distribution of copyright content by MMC participants is currently in a state of flux. Free TV considers that the impacts of such ongoing changes are difficult to predict at this time. However, given the proposed timing of certain changes in regulations and market dynamics, as discussed below, Free TV submits it is appropriate to grant APRA re-authorisation for a period of no more than 2 years.

6.2 Free TV submits that convergence issues are of particular importance, given the current proliferation of new content distribution channels (for example, wireless, satellite, digital broadcasting, datacasting and multi-channelling) and the global reach of online services. Convergence will impact, in Free TV's view, on the public benefits and detriments of APRA's territorial licensing and exclusivity arrangements in particular.

6.3 MMC industry participants are faced with increasing opportunities to use non-traditional distribution methods. For example, programming content can be made available on mobile phones. Further advances are being made in distribution via the internet where simulcasting of TV programs via traditional methods and internet are becoming popular. For example the BBC and Canadian TV have successful simulcast programmes. The increase in the number of distribution platforms raises the issue of how music should be licensed for distribution on these platforms, especially where distribution is outside Australia. Current indications are that the effects of this platform proliferation are likely to be much better understood in the next two years.

6.4 Personal Video Recorders (**PVR**) give users the ability to "timeshift" programme schedules by simultaneously recording multiple channels for significant time periods. PVR's may also offers users the ability to skip advertisements. Consequently PVR's may impact how MMC participants use and licence music. Foxtel has announced plans to deploy set top boxes with PVR capability in 2005, and set top box and home media server manufacturers are currently releasing products with PVR capability. Consequently a review date for APRA's operations in mid-2006 would give MMC participants an opportunity to more fully assess the effect of PVR's on music use and licensing requirements.

6.5 Proposed regulatory changes will also have an effect on how MMC participants use and distribute copyright material. A selection of relevant regulatory changes is set out below.

6.6 DCITA commenced a series of reviews of the regulation of digital television broadcasting and datacasting in May 2004, under the *Broadcasting Services Act, 1992 (BSA)*. The bulk of those reviews are due to be completed by 1 January 2005, although further reviews are to be completed by 1 January 2006. Those reviews include:

- (1) whether the prohibition on the provision by broadcasters of subscription television services, and of other kinds of broadcasting services currently not permitted, should be amended or repealed;
- (2) the competitive and regulatory arrangements that apply to a datacasting transmitter; and
- (3) allocation of broadcasting services bands and additional broadcasting licences.

The outcome of these reviews will have an impact on how MMC participants use and distribute music. As they will all finish by early 2006, this fits with a review of the APRA operations in mid-2006.

6.7 The Australian Government has announced that it will merge the Australian Broadcasting Authority (ABA) and the Australian Communications Authority (ACA) to establish the Australian Communications and Media Authority (ACMA).¹¹ In recognition of the trend towards convergence, the ACMA will be responsible for regulating telecommunications, broadcasting, radiocommunications and online content. It remains to be seen how the ACMA will affect the regulatory landscape, but by mid-2006, it is more likely to be clear.

6.8 The Australia-United States Free Trade Agreement (FTA) has now been signed and the *US Free Trade Agreement Implementation Bill 2004* has been introduced to the Commonwealth Parliament. The FTA may impact upon copyright regulation, competition regulation, and the characteristics of relevant markets in Australia. Given the Bill has already been introduced to Parliament, those impacts will most likely occur in the near term.

6.9 Given that the above regulatory reviews and changes are expected to be completed, and the impacts of the above industry changes are, on current indications, likely to be better understood by 2006, Free TV submits that it is appropriate to grant APRA re-authorisation for a period of 2 years, following which the impacts of such regulatory and other industry changes on the benefits and detriments of APRA's operations can be more comprehensively and accurately assessed.

7 Developments Overseas

7.1 The European Commission in the EC Communication has raised the issue of the appropriate operation and regulation of collecting societies in the context of cross-border activities, specifically online licensing. The Commission's views in the EC Communication on DRM are discussed above. The Commission notes that, with the advent of the digital environment, cross-border trade in goods and services based on copyright and related rights has become very significant.¹² Free TV submits that such

¹¹ Minister for Communications, Information Technology and the Arts Media Release, 11 May 2004.

¹² Communication on the Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final, 16 April 2004, p.7

conditions also exist and continue to develop at a rapid pace in the context of the Australian markets. Areas of particular note are existing and emerging online distribution channels, satellite broadcasting and 3G mobile networks, cable retransmission, digital television and datacasting.

- 7.2 In the EC Communication, the Commission noted that stakeholders were already seeking contractual and technological solutions to ensure adequate access to protected works and other subject matter on a European and worldwide scale.¹³
- 7.3 The European Commission further notes the recent emergence of several Europe-wide licensing arrangements, notably:
- (1) agreements for Europe-wide licensing by collecting societies of webcasting (i.e. broadcasting of TV/radio programmes via the internet only) (**Webcasting Agreement**) whereby users may obtain a licence from a collecting society of their choice;
 - (2) agreements for the simultaneous transmission by radio and TV stations via the internet of sound recordings included in their broadcasts of radio and/or TV signals (**Simulcasting Agreement**), whereby users may obtain a Europe-wide licence from any collecting society; and
 - (3) a Europe-wide licensing scheme for online uses of works of art and photography, whereby licences can be obtained from any of the participating collecting societies and under the same conditions.¹⁴
- 7.4 Free TV notes that APRA's current reciprocal exclusive licensing arrangements with overseas collecting societies prevent multi-territorial licensing. According to the Current APRA Application, with the exception of ASCAP and BMI, APRA's licensing arrangements also prevent licensing by overseas collecting societies in Australia. The above mentioned trends in Europe suggest that the anti-competitive detriments of those exclusive arrangements may have increased and will continue to increase in the short term.
- 7.5 The EC Communication represents the conclusion of a lengthy consultation process, and (amongst other things) considers options for the management of Europe-wide and potentially worldwide licensing of rights, without coming to a concluded view. The European Commission states that continued close monitoring of market developments, notably through consultation of the stakeholders, remains essential.¹⁵ Free TV supports such continued close monitoring of collecting societies in Australia.
- 7.6 As a separate matter, the European Commission has recently issued a Statement of Objection to the collecting societies participating in the so-called "Santiago Agreement", warning them that the agreement could potentially breach European Union competition rules because the cross licensing arrangements lead to an effective

¹³ Ibid, p.8

¹⁴ Communication on the Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final, 16 April 2004, p.8; Commission Media Release IP/04/586, 3 May 2004.

¹⁵ Communication on the Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final, 16 April 2004, p.12.

lock up of national territories, transposing into the internet the national monopolies the societies have traditionally held in the offline world.¹⁶

- 7.7 The Santiago Agreement provides a “one-stop shop” for licensing by participating collecting societies of online music downloading or streaming services for all territories across Europe.
- 7.8 The European Commission strongly supports the “one-stop shop” principle for online licensing, but considers that such crucial developments in online related activities must be accompanied by an increasing freedom of choice by consumers and commercial users.
- 7.9 Citing, by way of example, the Simulcasting and Webcasting Agreements, the Commission stated as follows:

“The lack of competition between national collecting societies in Europe... may result in unjustified inefficiencies as regards the offer of online music services, to the ultimate detriment of consumers. The Commission considers that the territorial exclusivity afforded by the Santiago Agreement to each of the participating societies is not justified by technical reasons and is irreconcilable with the world-wide reach of the Internet.”¹⁷

- 7.10 The Commission’s Statement of Objection represents a preliminary position and, accordingly, the collecting societies have the right to defend their views. The process is continuing.
- 7.11 In conclusion on this point, Free TV submits that APRA has failed to acknowledge or address the impacts of increasing cross-border activities, and in particular the emergence of online distribution channels, on the public benefit and anti-competitive detriment of APRA’s operations.
- 7.12 Free TV submits that such activities gives rise to a need to reassess APRA’s exclusive arrangements with overseas collecting societies and also APRA’s existing input and output arrangements.
- 7.13 Given the abovementioned recent developments in the European Union, which are of particular relevance to APRA’s current and future operations, and the likelihood of further detailed assessment and determinative action in the short term by the European Commission, Free TV submits that it is not appropriate to grant APRA re-authorisation for a period of more than 2 years. Free TV notes in this respect and endorses the European Commission’s view, set out above, that continued close monitoring of market developments, notably through consultation of stakeholders, is essential.

¹⁶ Commission Media Release IP/04/586, 3 May 2004.

¹⁷ Commission Media Release IP/04/586, 3 May 2004.

8 Opt-out Arrangements and Blanket Licensing

- 8.1 APRA claims in the Current APRA Application that the opt-out procedure required by the Tribunal has been used only 14 times since its inception (at 3.1.1) and that the procedure has “significantly eroded” APRA’s monopoly.
- 8.2 Free TV submits that the evidence to date indicates that the opt-out procedure has not in practice had the effect of eroding APRA’s monopoly. Contrary to APRA’s submissions at 3.1.6, Free TV does not consider the low level of usage demonstrates that APRA’s input, output and distribution arrangements are satisfactory for most members and users. This is speculation on APRA’s part and is not substantiated by any evidence.
- 8.3 FreeTV considers that a number of alternative explanations are available which support the position that the opt-out procedure is not sufficient in itself to adequately erode APRA’s monopoly position. These have not been addressed or explored by APRA.
- 8.4 Free TV notes the following limitations on the opt-out procedure which limit its effectiveness:
- (1) the opt-out procedures do not have any effect on licensing of works the subject of APRA’s exclusive reciprocal arrangements with overseas collecting societies; and
 - (2) in the experience of Free TV’s members, contrary to APRA’s suggestion in paragraph 6.2.14, the blanket licences offered by APRA do not take account of direct dealing between a user and a content producer. This ensures that users such as Free TV’s members, who find it necessary to obtain blanket licences and are not offered any alternative by APRA, do not have any incentive to directly deal with content producers. In effect, a user would be paying for relevant works twice, once under the blanket licence fee and secondly to the content creator directly.
- 8.5 Free TV submits that the opt-out procedure has not had the effect of stimulating competition or eroding APRA’s monopoly position for reasons including the above.
- 8.6 As noted at section 5 above, Free TV submits that the development and implementation of DRM systems may impact on the effectiveness of and any claimed need for blanket licences, with their associated clear anti-competitive detriment. It should also be noted in this respect that, should APRA’s exclusive arrangements with overseas collecting societies be altered in the future, the blanket licensing structure may inhibit effective competition from such collecting societies despite the removal of exclusive territorial licensing, for the same reasons as discussed at paragraph 8.4. As noted at sections 5 and 7 above, the current indications are that the impacts of such developments on APRA’s operations will be better understood in 2 years time, including in respect of any claimed public benefit, and the anti-competitive detriment of, APRA’s blanket licensing system.