



Australian  
Competition &  
Consumer  
Commission

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Our Ref: C2004/763  
Contact Officer: Gavin Jones  
Contact Phone: 03 9290 1959

31 August 2005

sect to attached  
list of 20/08/05

Dear

**Re: Australasian Performing Rights Association (APRA) applications  
for authorisation<sup>1</sup> - draft determination**

The Australian Competition and Consumer Commission (the ACCC) has issued a draft determination in respect of the applications for authorisation lodged by APRA on 2 June 2004 and 23 November 2004.

APRA is seeking authorisation for its standard arrangements for the acquisition and licensing of the performing rights in its musical repertoire.

APRA's arrangements broadly cover:

- input arrangements – being the assignment of performing rights by members to APRA and the terms upon which membership of APRA is granted;
- output arrangements – being the licensing arrangements between APRA and the users of musical works;
- distribution arrangements – being the arrangements pursuant to which APRA distributes to its members the fees that it has collected from licensees/users; and
- overseas arrangements – being the reciprocal arrangements between APRA and overseas collecting societies pursuant to which each grants the other the right to licence works in their repertoires.

**Summary of ACCC considerations**

Having considered the applications and submissions from APRA and interested parties, the ACCC proposes to grant authorisation for four years.

The ACCC considers that APRA's arrangements generate significant public detriment. APRA has a virtual monopoly in respect of performance rights licences in Australia. Its input

<sup>1</sup> Authorisation application numbers A90918, A90919, A90921, A90922, A90924, A90925, A90944 & A90945.



and overseas arrangements effectively foreclose any realistic prospect of music composers and users dealing directly in respect of performing rights in most instances. This concentration of members rights exclusively with APRA means that APRA would be able to set prices for access to its repertoire without consideration as to what the economically efficient price of those rights would be.

APRA is constrained, to some extent, in its exercise of its monopoly power by the Australian Copyright Tribunal (Copyright Tribunal) which is empowered to determine the 'reasonableness' of licence terms and conditions. However, for many users the utility of seeking recourse to the Copyright Tribunal, and consequently, the constraint the Copyright Tribunal places on APRA, is limited.

However, it is not clear that, absent APRA's arrangements – that is, where a number of collection societies each managed part of APRA's existing repertoire – that the outcome would be prices and/or other licence terms and conditions which more closely accorded with the efficient price for performing rights for each category of user. For users where different bundles of works are not close substitutes (i.e. where a user requires access to a large part of APRA's existing repertoire such that different works are complimentary goods) there would, at best, be limited price competition between collection societies. In contrast, for users where different bundles of works are close substitutes, there may be significant price competition between societies.

Consequently, while the ACCC considers that APRA's arrangements generate significant public detriment, given the uncertainty as to how the market would react if a number of collecting societies each licensed performing rights in respect of limited repertoires of works, the level of public detriment generated by APRA's arrangements relative to the situation which would prevail absent its arrangements is less clear.

The ACCC also considers that APRA's arrangements generate significant public benefits. It is far more efficient for APRA to administer performing rights than it would be for a number of competing societies to do so. Cost to composers in administering performing rights and monitoring use of works are reduced. Similarly, users' costs are reduced as they enjoy unfettered access to virtually any work in the world musical repertoire through a single performing rights licence.

APRA's arrangements also result in significant negotiation cost savings for both its members and the overwhelming majority of users as both members and music users only have to deal with one organisation.

APRA's arrangements, and in particular its grant of blanket licences, also generates significant public benefits through containing enforcement costs, as there would be greater incidents of copyright infringement, and associated costs of enforcing copyright, if different composers rights were administered by different collection societies. By reducing incidents of infringement of copyright, APRA's arrangements also protect incentives for the creation of new works more effectively than would otherwise be the case.

In addition, significant costs would be incurred in the transition to an alternative system or systems of performing rights administration if APRA was to discontinue its present arrangements.

Overall, given the uncertainty about how the market would react absent APRA's arrangements, the ability of the Copyright Tribunal to constrain APRA's exercise of its monopoly power to some extent, and in particular its ability to facilitate direct dealing between music creators and users in some circumstances under APRA's existing arrangements, and the significant public benefits generated by APRA's arrangements, the ACCC considers that APRA's arrangements are likely to result in a public benefit that will outweigh any public detriment. Accordingly, the ACCC proposes to grant authorisation to APRA's arrangements for four years.

A copy of the draft determination is available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au).

### **Interim authorisation**

On 30 June 2004, the ACCC granted interim authorisation to APRA's input, output and distribution arrangements until the date of its draft determination. The ACCC has decided to extend interim authorisation until the date the ACCC's final determination comes into effect, or if circumstances warrant revocation or amendment of interim authorisation at an earlier stage, until such date as interim authorisation is revoked or amended.

### **Next steps**

Once the ACCC issues a draft determination, the Applicant or any interested party who may be dissatisfied with the ACCC's draft determination may request that the ACCC convene a 'pre-decision conference'. A pre-decision conference provides the opportunity for interested parties to make oral submissions in relation to the draft determination. Under the *Trade Practices Act 1974*, the ACCC must set a date within 14 days of which any pre-decision conference must be requested. Accordingly, if you wish the ACCC to hold a pre-decision conference in relation to the draft determination, you must notify the ACCC in writing by **on Friday 16 September 2005**. Conferences are conducted informally, without the participation of legal or other professional advisers. In the event of such a conference taking place it is likely that it would be held in Sydney in early to mid October.

Alternatively, you are also invited to make a written submission in response to the ACCC's draft determination. Written submissions should be lodged by **30 September 2005** at the following address:

The General Manager  
Adjudication Branch  
Australian Competition & Consumer Commission  
PO Box 1199  
DICKSON ACT 2602

Submissions can also be lodged by e-mail to [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au) or by facsimile on 02 6243 1211.

Any submission you make will be placed on the ACCC's Public Register. You may request that information you provide in a submission to the ACCC be treated as confidential and not placed on the Public Register. Information excluded from the Public Register for reasons of confidentiality will still be considered by the ACCC when reaching its decision. Guidelines for seeking confidentiality are attached for your information.

The ACCC will consider any submissions it receives, including any oral submissions made should a pre-determination conference be called, and will then release a final determination in relation to these applications.

This letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter, please do not hesitate to contact me on 03 9290 1959 or Michael Green on 03 9290 1960.

Yours

A handwritten signature in black ink, appearing to be 'GJ' or similar initials, written in a cursive style.

Gavin Jones  
Director  
Adjudication Branch

## GUIDELINES FOR CONFIDENTIALITY CLAIMS

The process whereby the Commission assesses applications for authorisation or notification is very public, transparent and consultative. The *Trade Practices Act 1974* (the Act) requires the Commission to maintain a public register in respect of authorisation and notification applications.

Applicants and interested parties can request that a submission, or part of a submission, be excluded from the public register.

The Commission is required under the Act to exclude from the public register upon request details of:

- (i) secret formulae or process;
- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
- (iii) the current manufacturing, producing or marketing costs of goods or services.

However, even if a document does not meet these technical requirements, the Commission may still grant confidentiality where, in the Commission's view, it is desirable to do so.

The Commission also has the discretion, under s89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The Commission expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

Under Regulation 24 of the *Trade Practices Regulations*, when a request for confidentiality is made to the Commission:

- (a) where the request is that a whole document be excluded, the words "**Restriction of Publication Claimed**" should appear in red writing near the top of each page; and
- (b) where the request is that part of a document be excluded, the words "**Restriction of Publication of Part Claimed**" should appear in red near the top of the first page of each document, and the part for which confidentiality is claimed should also be marked in red. A submission of more than 5 pages should also include a description of the whereabouts of the parts for which confidentiality is claimed.

Applicants, as a matter of course, should remove headers claiming "confidential communication" from all Emails and otherwise, unless they have a particular piece of information that they justify to the Commission deserves exclusion from the public register. If confidentiality is not requested but a header cannot be removed, it should be clearly stated at the beginning of the communication that confidentiality is not requested.

If the Commission denies a confidentiality request, the requesting party may ask that the material be returned. As a matter of practice, the Commission will specify a period (usually 14 days) in which they can request the return of such material. Upon response, the Commission will return the original material and destroy all associated copies. The Commission will not consider this material when reaching its decision.

If the Commission does not receive a response within the specified period, the original material will be placed on the public register.

Information or documents granted confidentiality may be used by the Commission pursuant to its powers generally under the *Trade Practices Act*.

	<b>Name</b>	<b>End</b>	<b>Salutation</b>	<b>Address</b>
1	Managing Director	faithfully	Sir/Madam	Association of Independent Record Labels Inc PO Box 584 Surry Hills NSW 2012
2	Mr Lyn Maddock Acting Chair	sincerely	Ms Maddock	Australian Broadcasting Authority Level 15, Darling Park 201 Sussex Street, Sydney NSW 2000
3	The General Manager	faithfully	Sir/Madam	Australian Guild of Screen Composers 247 Oxford St Paddington NSW 2021
4	Managing Director	faithfully	Sir/Madam	Australian Music Association Inc 45 Glenferrie Road Malvern VIC 3144
5	Managing Director	faithfully	Sir/Madam	Australian Music Publishers Association Ltd Locked Bag 3456 St Leonards NSW 2065
6	The General Manager	faithfully	Sir/Madam	Australian Music Retailers Association MBE 148/45 Glenferrie Rd Malvern VIC 3144
7	Mr Stan Moore CEO	sincerely	Mr Moore	Australian Retailers Association Level 11, 45 Market Street Sydney NSW 2000
8	The General Manager	faithfully	Sir/Madam	Australian Screen Sound Guild Suite 360, 3 Holterman Street, Crows Nest NSW 2065
9	The General Manager	faithfully	Sir/Madam	Australian Subscription Television and Radio Association Wharf 8 Pyrmont NSW 2009
10	Mr David Costello Chief Executive Officers	sincerely	Mr Costello	Clubs NSW Level 1 499 Kent St Sydney NSW 2000
11	Managing Director	faithfully	Sir/Madam	Clubs Victoria Lvl 1/ 17 -21 Argyle Pl Sth Carlton VIC 3053
12	Mr Neil Pentecost President	sincerely	Mr Pentecost	COAA Secretariat PO Box 5009 Nowra DC NSW 2541
13	Managing Director	faithfully	Sir/Madam	Community Broadcasting Association of Australia POBox 564 Alexandria NSW 1435

14	The General Manager	faithfully	Sir/Madam	Copyright Agency Limited Level 19, 157 Liverpool Street Sydney NSW 2000
15	Mr Mike Potter Chief Executive Officer	sincerely	Mr Potter	Council of Small Business Organisations of Australia PO Box E445 Kingston Act 2604
16	Managing Director	faithfully	Sir/Madam	Country Music Association 21 Russell St Watsons Bay NSW 2030
17	Ms Anne Wilde General Counsel	sincerely	Ms Wilde	David Jones 86-108 Castlereagh Street Sydney NSW 2000
18	The General Manager	faithfully	Sir/Madam	EMI Music Publishing Australia Pty Ltd 1 Gurrigal St Mosman NSW 2088
19	The General Manager	faithfully	Sir/Madam	Federation of Australian Radio Broadcasters Level 5, 88 Foveaux St Surry Hills NSW 2010
20	Ms Libby Blakey	sincerely	Ms Blakey	Festival Mushroom Records PO Box 16 Pymont NSW 2009
21	Ms Carol Harrison Solicitor	sincerely	Ms Harrison	Coles Myer Ltd PO Box 41 Nth Geelong VIC 3215
22	Mr Stephen Peach Chief Executive Officer	sincerely	Mr Peach	Phonographic Performance Company of Australia Ltd Box Q20 QVB PO Sydney NSW 1230
23	Mr Con Castrisos President	sincerely	Mr Castrisos	Restaurant and Catering Australia Suite 32 401 Pacific Highway Artarmon NSW 2064
24	Mr Milton Cockburn Executive Director	sincerely	Mr Cockburn	Shopping Centre Council of Australia Property Council of Australia House Level 1, 11 Barrack Street Sydney NSW 2000
25	The General Manager	faithfully	Sir/Madam	Songseekers International Lvl 1/ 47 Murray St Pymont NSW 2009
26	Mr Robert Childs President	sincerely	Mr Childs	Songwriters, Composers and Lyricists Association PO Box 228 Kensington Park SA 5068
27	The General Manager	faithfully	Sir/Madam	The Australian Music Association

				BE 148/45 Glenferrie Road Malvern VIC 3144
28	The General Manager	faithfully	Sir/Madam	The Australian Music Centre PO Box N690 Grosvenor Place, NSW 1220
29	The General Manager	faithfully	Sir/Madam	The Australian Society of Authors PO Box 1566 Strawberry Hills NSW 2012