



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
APPLICATIONS FOR AUTHORISATION**

**AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION
DRAFT DETERMINATION**

**SUBMISSION
BY
FREE TV AUSTRALIA LIMITED**

11 October 2005

Table of Contents

1	SUMMARY OF SUBMISSION	1
2	INTRODUCTION	2
3	FREE TV'S POSITION	2
4	MEMBER OPT OUT AND LICENCE BACK PROVISIONS	3
5	BLANKET LICENSING	5
6	OVERSEAS ARRANGEMENTS	8

1 SUMMARY OF SUBMISSION

- 1.1 Free TV Australia Limited (**Free TV**) generally agrees with the Australian Competition and Consumer Commission's (**ACCC**) conclusions in paragraphs 7.8 and 7.11 of the ACCC's Draft Determination dated 31 August 2005 (**Draft Determination**), that the Australasian Performing Right Association's (**APRA**) arrangements generate significant anti-competitive detriments.
- 1.2 Free TV disagrees with the ACCC's decision in the Draft Determination not to assess now whether refinements to the APRA member opt out and licence back provisions are warranted, and instead wait and see whether the existing provisions will be used as a result of the Copyright Tribunal determining to require APRA to grant a modified blanket licence allowing direct dealing.
- 1.3 Free TV submits that the Copyright Tribunal is unlikely to be requested to make a modified blanket licence determination allowing direct dealing, given the impractical nature of the current member opt out/licence back provisions. Therefore, it is appropriate for the ACCC to only grant APRA authorisation if such authorisation is conditional upon APRA's member opt out and licence back provisions being modified so as to improve the practical utility and efficacy of the operation of such provisions.
- 1.4 Free TV submits that the ACCC should not, in reaching its Determination, place significant weight upon the role of the Copyright Tribunal in reducing the anti-competitive detriment of APRA's blanket licence arrangements. Free TV submits that, by contrast to the Copyright Tribunal, it is clear that the ACCC has jurisdiction under the Trade Practices Act 1974 to consider and address the anti-competitive detriment arising from APRA's blanket licence arrangements.
- 1.5 Free TV submits that it is appropriate for the ACCC to only grant APRA authorisation if such authorisation is conditional upon APRA granting modified blanket licences and/or per-program licences to appropriate end users which take account of direct dealing.
- 1.6 Free TV notes that the ACCC does not appear to express a direct view in relation to Free TV's previous submissions regarding the anti-competitive detriment of APRA's exclusive reciprocal arrangements with overseas collecting societies, and instead refers to APRA's arguments in this respect. Free TV notes that there are several errors of fact and incorrect assumptions made in APRA's arguments on this point. Free TV's responses are detailed at heading 6 below.

2 INTRODUCTION

- 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 previously made submissions on 2 August 2004 (**Original Submission**) in respect of the applications made by APRA to the ACCC, for authorisation of APRA's standard arrangements for the acquisition and licensing of the performing rights in its music repertoire (**APRA Application**). Free TV's position as representative of commercial television industry licensees of the broadcast rights in APRA's repertoire is further described in the Original Submission.
- 2.3 The ACCC has now issued the Draft Determination in respect of the APRA Application. The ACCC proposes under the Draft Determination to grant re-authorisation to APRA on the same terms as the previous authorisations granted respectively by the ACCC on 14 January 1998 and the Australian Competition Tribunal (**Competition Tribunal**) on 20 July 2000, for a further period of 4 years from the date of its final Determination.
- 2.4 Free TV makes the following submissions in relation to the Draft Determination.

3 FREE TV'S POSITION

- 3.1 Free TV does not propose to analyse and respond to the entirety of the contents of the Draft Determination. Free TV limits its response to the particular matters set out below.
- 3.2 Free TV generally agrees with the conclusions of the ACCC expressed at paragraph 7.8 of the Draft Determination, that:
- (1) APRA has a virtual monopoly in respect of performing rights licences in Australia;
 - (2) Music owners and users are prevented from negotiating the terms and conditions or performance rights licences other than through APRA;
 - (3) APRA is a monopoly whose membership rules prevent "cheating" in the form of direct dealing; and
 - (4) APRA is able to set prices for access to its repertoire without consideration as to what the economically efficient price of those rights would be.
- 3.3 FreeTV also agrees with the conclusion expressed by the ACCC at paragraph 7.11, that, by entrenching its monopoly in the market for performing rights in Australia APRA's arrangements generate significant public detriments.
- 3.4 FreeTV is concerned over certain other assumptions and conclusions of the ACCC in the Draft Determination regarding APRA's arrangements the subject of the APRA Application. Free TV notes in particular that it does not agree with certain of the ACCC's assumptions and conclusions regarding:
- (1) The existing member opt out and licence back provisions implemented by APRA;

- (2) The use of blanket licensing by APRA, and the jurisdiction of the Copyright Tribunal and the ACCC in this respect; and
- (3) The current reciprocal licensing arrangements in place between APRA and overseas collecting societies.

These concerns are discussed in more detail under headings 4, 5 and 6 below.

3.5 Free TV previously expressed concerns in the Original Submission in respect of APRA's member opt out and licence back provisions, reciprocal overseas licensing arrangements, and blanket licences. Those concerns are strengthened in light of the contents of the ACCC's Draft Determination, and the ACCC's proposal to grant re-authorisation to APRA on the same terms as the previous authorisations for a further period of four years. Free TV previously submitted that any authorisation granted by the ACCC should be for a shorter period. On present indications, the ACCC's proposal means that APRA's current arrangements are likely to be authorised until 2010.

3.6 The Competition Tribunal stated in its Reasons For Decision dated 16 June 1999 (**Reasons For Decision**) that:

“...if aspects of APRA's collective administration which are identified as anti-competitive can be modified so as to remove or lessen the potential for detriment without impairing essential components of APRA's operations, then authorisation should be granted on terms that bring about those modifications.” (paragraph 311)

3.7 Free TV submits that, in light of the matters discussed below, it is appropriate for the ACCC to only grant APRA authorisation if such authorisation is, at a minimum, conditional upon:

- (1) APRA's member opt out and licence back provisions being modified so as to improve the practical utility and efficacy of the operation of such provisions; and
- (2) APRA granting modified blanket licences or per-program licences to end users which take account of licensing of works by the end user direct from the copyright owner or from third parties.

3.8 Free TV considers that these aspects of APRA's collective administration are anti-competitive and, as has been demonstrated by overseas experience, can be modified so as to remove or lessen the potential for detriment without impairing essential components of APRA's operations.

4 MEMBER OPT OUT AND LICENCE BACK PROVISIONS

4.1 Free TV agrees with the following conclusion of the ACCC expressed at paragraph 7.15 of the Draft Determination, regarding APRA's opt out and licence back provisions:

“The specific conditions with which APRA members must comply before being able to avail themselves of APRA's opt out and/or licence back provisions limit their practical utility. In effect, they foreclose the possibility of music

composers and users negotiating performing rights directly, except in very limited instances.”

Free TV also agrees with the analysis of the ACCC in this respect set out at paragraphs 6.31, and 6.33 to 6.36 of the Draft Determination. That analysis is not repeated here.

4.2 Free TV also agrees with the following statement of the ACCC at paragraph 7.24:

“...there is likely to be merit in further refining the conditions with which APRA members must comply before they are able to avail themselves of the opt out and/or licence back provisions.”

4.3 However Free TV notes that the ACCC's conclusions expressed at paragraphs 7.25 and 7.26 of the Draft Determination, have the consequence that the ACCC will not consider whether the APRA member opt out and licence back provisions should be altered, unless and until such time as:

- (1) a matter is referred to the Copyright Tribunal involving the licensing of a user or users of works in APRA's repertoire;
- (2) the user or users determine to argue before the Copyright Tribunal that a modified blanket licence should be granted, to take account of the possibility of direct dealing by the user or users;
- (3) the Copyright Tribunal determines in its discretion that a blanket licence for the particular user or users should be modified to take account of the possibility of direct dealing by the user or users;
- (4) following receipt of a modified blanket licence from APRA in accordance with the directions of the Copyright Tribunal, such user or users then “test” the APRA member opt out or licence back provisions;
- (5) the user or users find that the member opt out/licence back provisions are ineffective; and
- (6) the experience of that particular user or users, combined with the experience of any other licensees of APRA who may choose to undertake the same process, enables the ACCC to extrapolate as to:
 - (a) the practical utility of the member opt out/licence back provisions for all or a significant proportion of users of APRA's repertoire; and
 - (b) whether refining the opt out/licence back provisions may improve the practical utility of those provisions without undermining the essential features of APRA's system of collective administration of performing rights.

4.4 With respect, Free TV submits that the hypothetical sequence of events referred to in paragraph 4.3, on which the ACCC relies in its Draft Determination, is not likely to occur, or in any event is not likely to occur in a manner or to an extent that will usefully inform the ACCC as to whether the existing opt out/licence back provisions should be modified or refined.

4.5 This is primarily because, as the ACCC has itself acknowledged, the existing opt out/licence back provisions have little practical utility. Free TV submits that no APRA

licensee or prospective licensee is likely to be prepared to commit the time and expense required to bring a matter before the Copyright Tribunal and argue for a modified blanket licence, in the knowledge that, even if the Copyright Tribunal determines in its discretion to order the granting of such a licence on appropriate terms, there will be little commercial utility in making use of the modifications to the licence by attempting to undertake direct dealing.

- 4.6 Free TV submits this situation may well explain the fact, noted by the ACCC at paragraph 7.23 of the Draft Determination, that to date no party has sought to argue before the Copyright Tribunal that its blanket licence for access to APRA's repertoire should contain provision for a discount to accommodate direct dealing.
- 4.7 Free TV submits that the Competition Tribunal's objective of testing the opt out/licence back provisions (referred to in paragraph 356 of the Competition Tribunal's Reasons for Decision) will not be achieved unless the opt out/licence back provisions are modified to be of greater practical utility.
- 4.8 Free TV therefore disagrees with the ACCC's decision in the Draft Determination not to assess whether further refinements to the opt out/licence back provisions are warranted, and instead wait for the Copyright Tribunal to have matters referred to it whereby it is requested to consider the reasonableness of modified blanket licences.
- 4.9 Free TV considers that APRA's member opt out and licence back provisions are anti-competitive and can be modified so as to remove or lessen the potential for detriment without impairing essential components of APRA's operations.
- 4.10 Free TV submits that, in light of the matters discussed above, it is appropriate for the ACCC to only grant APRA authorisation if such authorisation is conditional upon APRA's member opt out and licence back provisions being modified so as to improve the practical utility and efficacy of the operation of such provisions.

5 BLANKET LICENSING

- 5.1 Free TV agrees with the ACCC's conclusion in paragraphs 7.18 and 7.19 of the Draft Determination as follows:

"...APRA's propensity to only offer users blanket licences is a fundamental impediment to music composers and users dealing directly. So long as users are only able to obtain a blanket licence in respect of APRA's repertoire there is no incentive for a user to acquire rights from a composer directly unless there is a corresponding adjustment to the price the user pays for its APRA licence. Currently, licences offered by APRA provide for no such adjustment.

In the absence of provision for such adjustments any prospect of direct dealing is foreclosed as the user is still forced to pay a licence fee to APRA which not only covers any works where it has negotiated alternative arrangements, but is calculated to reflect use of these works. In effect, the user would be paying to use the works twice."

- 5.2 Free TV considers APRA's submission, referred to at paragraph 6.80 of the Draft Determination, that it has always been (and remains) willing to consider other licence

proposals and has never indicated that it is not prepared to consider licensing on terms other than blanket licences, to be self serving. To Free TV's knowledge, APRA first volunteered this information in the context of its current authorisation application, and has never in the past indicated any willingness to consider alternative licensing models to the unmodified blanket licence.

5.3 Free TV agrees with the ACCC's statement at paragraph 6.81 of the Draft Determination, that:

"Currently, the blanket licences offered by APRA provide for no [adjustment for rights acquired directly], nor is their (sic) any incentive for APRA to provide for such adjustments, as facilitating direct dealing would both undermine its revenue base and its position as the monopoly supplier of performance rights licences in Australia."

5.4 Free TV also agrees with the ACCC's conclusion in paragraph 7.21, that APRA's blanket licensing arrangements could be easily modified to account for instances where performing rights have been negotiated directly, without placing an undue administrative burden on APRA.

5.5 Free TV notes in this respect that:

- (1) modified blanket broadcast licences which take account of direct dealing are offered to commercial television licensees by the Society of Composers, Authors and Music Publishers of Canada (**SOCAN**). The modified blanket licence permits broadcasters and other licensees to reduce the amount of royalties they pay to SOCAN when they use non-SOCAN music, either because the music is not in SOCAN's repertoire or because the rights have otherwise been cleared. SOCAN was first required to introduce such modified blanket licences by decision of the Copyright Board in 1997. Having had the benefit of experience of the introduction and implementation of such modified blanket licences, the modified blanket licence structure was recently maintained by the Board in its 1998-2004 tariff decision (released 19 March 2004); and
- (2) pursuant to Consent Decrees with the United States Government, per-program commercial television licences are offered by the American Society of Composers, Authors and Publishers (**ASCAP**) and Broadcast Music, Inc. (**BMI**) in the United States of America as an alternative to blanket licences. Such per-program licences are currently utilised by a large number of local television stations in preference to blanket licences. The per-program licence takes account of actual use of the collecting society's repertoire in the licensee's television programming, thereby allowing for direct licensing (i.e. from a composer or music publisher) and source licensing (i.e. from a program's producer or distributor) by the licensee. Following completion of a lengthy investigation by the Department of Justice (referred to by the Competition Tribunal as being underway in its Reasons for Decision at paragraph 282), the ASCAP Consent Decree was modified in 2001 and the per-program licence provisions were retained and strengthened.

Free TV submits that the experience in Canada and the United States of America indicates that the use of licensing models that take account of direct or third party dealing are efficacious and practical to implement. Free TV considers that both the Canadian modified blanket licence and the United States per-program licences offered by the respective collecting societies in those countries, provide an important limitation

on the market power that would otherwise be enjoyed by those collecting societies by virtue of offering only blanket licences to end users. They do so by enabling and creating an incentive for direct and third party licensing transactions in competition with the offering of the collecting society.

- 5.6 Free TV agrees with the ACCC's conclusion, at paragraph 6.117 of the Draft Determination, that:

“...while the Copyright Tribunal constrains APRA's (sic) to some extent, it is still far from completely constrained by the Copyright Tribunal in its ability to set prices to extract monopoly rents from users and offer licences on terms which foreclose any real possibility of copyright owners and users exploring means of dealing with each other, other than through APRA.”

- 5.7 As noted by the ACCC in its discussion at paragraphs 6.86 to 6.117 of the Draft Determination, the scope of the considerations that the Copyright Tribunal may or will currently take into account in making a determination in respect of a licence scheme is unsettled and subject to dispute. In particular, Free TV submits that the role competition issues can or will play in any determination by the Copyright Tribunal is uncertain. It is conceivable that what the Copyright Tribunal may consider “reasonable” in any particular case may involve little weight being given to competition issues.
- 5.8 Consequently, Free TV submits that the ACCC should not, in reaching its Determination, place significant weight upon the role the Copyright Tribunal might play in constraining APRA's monopoly power and reducing the anti-competitive detriment of APRA's arrangements the subject of the APRA Application.
- 5.9 Free TV submits that, by contrast, it is clear that the ACCC has jurisdiction under the Trade Practices Act to consider the competition issues that arise from the APRA Application, and in particular APRA's output arrangements, being blanket licences.
- 5.10 Free TV does not disagree with the ACCC's statement at paragraph 7.23, that it is not for the ACCC to determine the reasonableness of licence fees, or other licence terms and conditions, for public performance of APRA's repertoire in each instance. However Free TV submits that it is appropriate for the ACCC to impose suitable conditions of general application upon the form of licences granted by APRA to end users. Free TV considers that APRA's blanket licensing is anti-competitive and, as has been demonstrated by overseas experience, can be modified in general terms so as to remove or lessen the potential for detriment without impairing essential components of APRA's operations.
- 5.11 By way of example, Free TV refers to the Consent Decrees entered into by the United States Government with ASCAP and BMI, and notes that such Decrees contain conditions which apply to the general form of the output arrangements that must be offered by ASCAP and BMI to appropriate licensees (i.e. per-program licences must be offered).
- 5.12 Free TV submits that it is appropriate for the ACCC to only grant APRA authorisation if such authorisation is conditional upon APRA granting modified blanket licences and/or

per-program licences to end users, which must take account of licensing of works by the end user direct from the copyright owner or from third parties.

6 OVERSEAS ARRANGEMENTS

6.1 Free TV notes APRA's response to Free TV's Original Submission regarding APRA's exclusive reciprocal arrangements with overseas collecting societies. Free TV notes that the ACCC refers to Free TV's arguments and APRA's responses in this respect at paragraphs 7.40 to 7.42 of the Draft Determination.

6.2 However the ACCC does not appear to express a direct view in relation to these issues. The ACCC expresses (at paragraph 7.45) concerns over the restrictive nature of APRA's arrangements, and in particular, its grant of blanket licences, which have the capacity to inhibit new forms of performing rights administration developing. The ACCC then notes that the Copyright Tribunal has the power to require APRA to offer licences on terms that the Copyright Tribunal considers reasonable. Free TV's position regarding blanket licensing and the role of the Copyright Tribunal is set out at heading 5 above.

6.3 By way of clarification, whilst Free TV is concerned over the inhibiting effect on competition of blanket licences (as to which see the discussion under heading 5 above), Free TV is separately and additionally concerned over the inhibiting effect on competition of APRA's input arrangements constituted by APRA's exclusive reciprocal licensing arrangements with overseas collecting societies. This is not a matter that can be dealt with by the Copyright Tribunal.

6.4 In this respect, the ACCC has referred at paragraph 7.40 to the following submissions by APRA:

"APRA submits that if there was an interest by any entity in competing with APRA in relation to licensing foreign works, the scope for that competition already exists through at least two means, neither of which to APRA's knowledge have ever been utilised:

- because APRA only has a non-exclusive licence from US collection societies, it would be open for another collection society to set up in Australia, and seek a licence from the same American societies; and
- it would be open to publishers in Australia to seek to cause the opt out of the copyright in the works which they control, and seek directly to licence those works."

6.5 In response to the first point made by APRA, Free TV notes:

- (1) APRA only has non-exclusive licences in respect of the use of United States' works in Australia. All of APRA's other licences in respect of overseas works are exclusive for Australia. This severely limits the ability of any competing licensor to compete effectively with APRA in Australia, as they would not be able to offer licenses to works from any overseas jurisdiction other than the United States;
- (2) In any event, Free TV has recently made enquiries as to whether ASCAP, the major performing rights collecting society in the United States, would be willing to licence the performing rights in its repertoire in Australia. ASCAP's response

was that it is unwilling to do so, and any person who wished to licence its repertoire in Australia should approach APRA.

- 6.6 In response to the second point made by APRA referred to at paragraph 6.4 above, Free TV notes, with respect, that the ability of publishers in Australia to seek to cause the opt out of copyright in works which they control relates only to Australian works of members of APRA, and is therefore entirely irrelevant to the question of whether it is possible to licence performing rights in foreign works direct in Australia in competition with APRA.
- 6.7 The ACCC has also referred at paragraph 7.41 to APRA's submission that it is not surprising that no existing foreign collection society has sought to set up in competition with APRA in Australia in relation to the licensing of foreign works. APRA contends that transaction costs associated with the establishment of a competitive business in a foreign country are minimised by the physical proximity of countries in Europe, and greatly exacerbated in Australia by its physical isolation from other jurisdictions.
- 6.8 In response to this point made by APRA, Free TV notes that, in fact, the primary reason no existing foreign collecting society has set up in Australia in competition with APRA is that (other than the United States collecting societies) no such society is legally capable of setting up in Australia and licensing its works in competition with APRA due to APRA's exclusive overseas licensing arrangements. Even the United States collecting societies have little incentive to do so, because (as noted at paragraph 6.5 above) they would be unable to licence any works other than their own repertoire in Australia, thus severely limiting their ability to compete with APRA. APRA's assertion is therefore completely unfounded and ignores the anti-competitive effect of its own arrangements with overseas collecting societies.
- 6.9 Essentially the same response can be made in relation to APRA's comments referred to at paragraph 7.42 of the Draft Determination, regarding "cross border" issues being of significant interest in Europe, whilst at the same time being of limited significance in Australia. Free TV does not disagree with the contention that greater competitive pressure may arise in Europe due to the European Market and the close physical proximity of countries in Europe. However Free TV does not agree that physical isolation of Australia prevents or inhibits the setting up of competing societies in Australia. After all, performing rights in works are intangible goods, and there are little or no physical barriers to the licensing and use of such works. There is no evident reason why transaction costs associated with establishment of a business in Australia should be significantly greater than in any other part of the world. Free TV submits that the essential impediment to any interest arising in relation to competition between collecting societies in Australia, is the anti-competitive overseas licensing arrangements put in place and maintained by APRA.
- 6.10 Additionally, Free TV notes that APRA's practice of blanket licensing means that currently there would, in any event, be no interest from Australian end users in obtaining licences to foreign works from competing licensors, for reasons already referred to under heading 5.