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10 August 2007

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
GPO Box 313
Canberra ACT 2601

Dear Sir,

RE: Phonographic Performance Company of Australia application for revocation and substitution A91041 & A91042 – PRE-DECISION CONFERENCE

1. This submission is made on behalf of the WA Nightclub Association Inc (WANA) formerly known as the Cabaret Owners Association of Western Australia.
2. WANA is a not for profit incorporated association that represents the interests of Nightclub Licensees in the State of Western Australia. As the Cabaret Owners Association we were a party to the recent proceedings in the Copyright Tribunal in which the PPCA obtained significant increases in the Copyright license fees our members are required to pay.
3. Our members are from such diverse places as Broome, Karratha, Geraldton, Albany, Kalgoorlie, Rockingham, Bunbury and Fremantle. Each of those licenses operates within its own fairly unique micro economy, and we all operate within the Western Australian market subject to the relevant Liquor Licensing and other applicable laws in this State.
4. WANA has not made a submission previously in this matter. To the extent that it might be relevant we adopt and support the submissions previously made by the AHA.

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5. WANA has read the Draft Determination of the Commission in relation to the ongoing status of the PPCA. We make the following submissions in relation to the draft recommendations.

PPCA amend its Complaints Handling and Dispute Resolution Policy

6. WANA agrees strongly with this recommendation. The current system which resulted in the litigation that took place in the Copyright Tribunal last year (and to which WANA was a party) is extremely costly and cumbersome. We were surprised to see that the Copyright Tribunal was meant to be a “low cost” alternative. Nothing could be further from the truth. In all respects the proceedings in the Copyright Tribunal were indistinguishable from a complex commercial court proceeding. Each side appointed solicitors and counsel, including senior counsel. Experts were called at enormous expense. The case involved two and a half weeks of hearing over a number of months (along with numerous direction hearings before the case even started.) The costs were, despite the fact that we were attempting to mount our case on a shoestring budget, enormous.
7. Had not WANA been able to join forces with the AHA and Clubs Australia it would simply not have been able to appear at, or be represented in, the Copyright Tribunal hearing. As it was because of the cost pressures the case that was presented on behalf of the Nightclubs was necessarily limited. We were astonished to read in the Tribunals reasons that it had discounted the evidence of operators as being “unrepresentative” when calling a smaller number of operators as witnesses was forced on us by the cost and time constraints of the proceedings.
8. Had we the same unlimited resources that were evidently available to the PPCA we would have called numerous licensees from regional and metropolitan Western Australia. One of the tragedies of the Tribunals conclusions is that it has imposed a universal rate around Australia based on evidence that focused very much on the Sydney/Melbourne markets without considering how applicable such a rate would be in say Bunbury or Albany or Geraldton.
9. A good example that applies generally to Western Australia relates to Sunday trading. Under the provisions of our applicable Liquor Licensing laws Nightclubs on a Sunday are only able to trade between the hours of 8.00 pm and midnight. (s98A Liquor Control Act WA). In practice most nightclubs do not get any trade until after the

hotels close at 10.00 pm leaving only two hours of trading to make any return. The imposition of a license fee of \$1.05 per person per licensed numbers for only two hours trade (or four for that matter) means that no Nightclub in Western Australia will open for trade on a Sunday as it will simply be uneconomic to do so. The application of a universal rate around Australia has resulted in a consequence that will frustrate and prohibit normal commercial activity for our members on at least one day a week and clearly disadvantage the public. This point was made in a submission to the PPCA in July 2004. We have never received a response from them as to how they propose to deal with this inequity.

10. It is hoped that WANA can discuss this issue direct with the PPCA and negotiate a different rate for members in Western Australia on a Sunday. We sincerely hope that such negotiation can be done in a manner that results in a quick and relatively cost free solution as the prospect of going back to the Copyright Tribunal is just too daunting for words.

Each PPCA licensor develop and publish the circumstances in which they would consider entering into direct licenses with the users of public performance rights.

11. We agree strongly with the submission recorded at para 4.14 of the draft determination that the aggregation of rights give PPCA monopoly power in the various markets for the acquisition of rights in recorded works. Whilst PPCA makes a virtue of the fact that its licenses are non-exclusive the reality is that they are exercised collectively and as the AHA submission revealed amongst the four majors there is little incentive to deal individually with the market of users. This in itself is a severe inhibition against fair competition amongst the various providers.
12. Whilst the PPCA makes a virtue of the fact that it has numerous input licensees it also admits 80 to 90 percent of music comes from just the four major record companies (and their numerous subsidiary labels). There is no real evidence, other than this admission, as to the real market dominance of the four major record companies. There is no question that consolidation over the last 10 to 15 years has meant that the four majors hold significant dominance in the market place just by their size and the number of labels they own or control either directly or indirectly. Our own estimation is that the figure of 80% to 90% is conservative and that their real dominance is far greater.

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13. The vast majority of other licensees are small to very small and have emerged largely over the last ten years as a result of the spread of digital recording into the home market which has lead to a proliferation of small home based recording studios. It is our belief that given the opportunity many of these small studios would leap at the chance to licence their music direct to our members and in our submission every incentive should be given to allow that to occur in a free and unfettered way. There is simply no mechanism at present to allow industry bodies such as the WANA or its members to approach the individual input licensees of the PPCA.
14. The reality is that many nightclubs now cater for niche or specialty genres of music either generally or on specific nights. Likewise there are some smaller labels that deal solely in specific genres of music such as dance or R & B. There has never been the freedom in the past to deal direct with such labels and any ability to do so must, in our submission, be encouraged and supported.
15. We do have a real concern that notwithstanding any such condition the terms upon which the individual input licensees would be prepared to negotiate direct licenses will be indistinguishable from the PPCA licence rates and conditions in any event. We do not want any condition to result in a pyrrhic victory rather than a meaningful attempt to enable real competition into this market place.

PPCA is to publish and maintain an updated list of those sound recordings in its repertoire which are protected under Australian Copyright law.

16. It is inevitable that the PPCA will oppose this recommendation. We have heard the arguments from the PPCA during the course of the Copyright Tribunal hearing and read their submissions to you. They were disingenuous then and remain so for the following reasons.
17. First, the PPCA has within its power the ability to obtain the necessary information. Under the terms of its input license agreements each licensee is required to provide to the PPCA the following information:-
- Name of the artist and title for each track
 - Label under which the recording is released by the Licensor
 - Catalogue number of the recording
 - Country in which each track on the recording was originally made
 - Year in which each track on the recording was originally released

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- Label under which each track on the recording was originally released
 - Country of citizenship, residence or incorporation of the original maker of each track on the recording

Annexed are the relevant pages from the standard PPCA input licensing agreement.

18. Contractually therefore the PPCA is already supplied with, and should already have access to, most of the information required to determine whether or not a particular recording is protected. When questioned about this during the course of the Copyright Tribunal hearing Stephen Peach on behalf of the PPCA nevertheless maintained that notwithstanding the above being a condition of the input licence agreement most licensees did not provide that information to the PPCA. Accordingly the PPCA found it difficult to be certain whether a particular recording was protected or not. Why should our members have to suffer for the inability of the PPCA to enforce its own agreements and the tardiness of its own input licensees in providing to the PPCA what they are contractually obliged to provide in any event?
19. Further in its submission of 31 July 2007 the PPCA says that during the recent Copyright Tribunal hearing it examined a sample of 125 tracks to determine whether each track was protected or unprotected. They say that this task took 140 hours. As to this we make the following points:-
- Whilst ultimately it may be for the PPCA to know whether a particular track is protected or not as set out above the licence fee is claimed on behalf of the input licensee who is and should be contractually required to supply the necessary information to the PPCA. The PPCA already demand most of the relevant information. Rather than taking 140 hours (which we very much doubt) it should simply have required a pro-forma letter to each label asking for the information they were required to supply in the first place and any additional information necessary to make the determination. What is so hard about asking an input licensee (who is seeking a license fee for their recording) to justify that their recording is protected?
 - PPCA has solely within its power the ability to know and determine the true position (and it should publish how it came to that conclusion). We note that the PPCA also indicated that it had concluded as a result of its survey that approximately 80% of US sound recordings are protected because of some connecting factor. Our feedback from members and DJ's is that this vastly
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overrates the degree of protection and that the percentage is in fact far lower. It is, however, difficult to be precise, again because the relevant information is mostly solely in the hands of the PPCA and its input licensees. Apart from the small sampling exercise undertaken by the PPCA there is no large scale survey evidence. Even for the survey conducted by the PPCA insufficient information has been provided about the nature and method of the survey conducted to confidently rely upon the conclusions reached.

- The PPCA then argue that the decision of the Copyright Tribunal to discount the licence fee by 20% for unprotected music indicates an acceptance that this is the extent of unprotected music played in nightclubs. In our defence we point out that this matter was never explored in detail at the Tribunal. The reality is that most nightclubs tend to play cutting edge music. Our belief is that 20% is a modest or conservative estimate of the true level of unprotected music played on any one particular night.

20. It is singularly within the power of the PPCA and its input licensees to determine whether a particular recording is protected or not. The PPCA already demand considerable information of their licensees to determine the question and if additional information is required it should not be difficult to seek and obtain it. The response of the PPCA to date has been to argue that as it is difficult (for them) to determine whether a particular recording is protected or not why not take out a blanket licence with them because at least then they can give our members some sort of security and certainty. That is an extraordinary proposition. They are in effect conceding that they don't know for sure that music for which they are demanding licence fees is music for which they can validly claim licence fees. This is just nonsense. If the PPCA cannot publish a list as proposed they do not deserve to act as a collecting society.

21. Another excuse used is the difficulties thrown up by the US Free Trade agreement. Whilst there might be some additional work required those difficulties are by no means insurmountable. It also needs to be appreciated that it is not just the USA that is not a signatory to the international copyright convention. Of the 192 nation states that are members of the United Nations on our understanding only 52 are signatories to the Copyright convention. A random selection of countries that are not signatories includes France, Morocco, Egypt, China, Indonesia, Singapore, Portugal and South Africa (indeed just about every African nation state is not a signatory). Whilst the

USA is undoubtedly important due to the amount of recordings that take place there in a global market place it is becoming less relevant. It is technologically possible now to have the music at a venue in Australia played by a DJ in France (for example) and beamed by satellite to a venue here in Australia (it has already been done). Such is the digital age in which we live the technology exists to play music at any time from anywhere in the world but what is needed is the information that enables those playing it to be sure that it is unprotected.

22. Further in our submission there should be a facility for anyone to quickly and easily check whether or not a particular recording is protected. With it our members have the ability to plan their nights more effectively. For example a venue may wish to enter into a licence agreement with the PPCA to play protected music on some nights but to elect on other nights to play purely unprotected music. There is certainly sufficient demand for some nightclubs to play unprotected music of a particular style or genre and which will attract its own patronage if not every night of the week at least on some nights.
23. We cannot emphasise how important for our members this condition is. Released from this condition our members and licensees around Australia are completely at the mercy of the PPCA.

David Wallace

President

WA Nightclub Assoc Inc

PUBLIC PERFORMANCE AND TRANSMISSION INPUT AGREEMENT

PARTY DETAILS

Licensor	PPCA
[insert name]	Phonographic Performance Company of Australia (ACN 000 680 704)
[insert address]	Suite 3, Level 4 19 Harris Street Pyrmont NSW 2009
Telephone: [insert number]	Telephone: 02 8569 1100
Fax: [insert number]	Fax: 02 8569 1183

AGREEMENT DETAILS

Item 1 Rights in Controlled Sound Recordings (see clause 2.1 and the Definitions in Attachment A)	(a) Sound Recording Transmission Rights – Rights to communicate the Controlled Sound Recordings to the public by means of: <ul style="list-style-type: none"> (i) a Broadcast; (ii) an Internet Simulcast; (iii) a Webcasting Service; (iv) an On-Demand Streaming Service; (v) a Datacasting Service; and/or (vi) a Music On Hold Service. (b) Sound Recording Public Performance Rights – Rights to cause the Controlled Sound Recordings to be heard in public.
Item 2 Rights in Controlled Music Videos (see clause 2.1 and the Definitions in Attachment A)	(a) Music Video Transmission Rights – Rights to communicate the Controlled Music Videos to the public by means of: <ul style="list-style-type: none"> (i) a Broadcast; (ii) an Internet Simulcast; (iii) a Webcasting Service; (iv) an On-Demand Streaming Service; (v) a Datacasting Service; and/or (vi) a Music On Hold Service. (b) Music Video Public Performance Rights – Rights to cause the Controlled Music Videos to be seen and/or heard in public.

Item 3 Labels (see clause 2.4 and Schedule 1)	The labels under which the Licensor releases catalogues of Controlled Sound Recordings, being the labels identified in Schedule 1 as amended from time to time in accordance with clause 2.4.
Item 4 Information to be supplied to PPCA in relation to Controlled Sound Recordings (see clause 2.3)	(a) Name of the artist and title for each track (b) Label under which the recording is released by the Licensor (c) Catalogue number of the recording (d) Country in which each track on the recording was originally made (e) Year in which each track on the recording was originally released (f) Label under which each track on the recording was originally released (g) Country of citizenship, residence or incorporation of the original maker of each track on the recording
Item 5 Information to be supplied to PPCA in relation to Controlled Music Videos (see clause 2.3)	(a) Name of the artist and title of the music video (b) Label under which the music video is released by the Licensor (c) Catalogue number of the music video (d) Country in which the music video is made (e) Year in which the music video is made (f) Country of citizenship, residence or incorporation of the maker of the music video (g) Country in which the sound recording embodied in the music video was originally made (h) Label under which the sound recording embodied in the music video was originally released
Item 6 Licence (see clause 2.1)	A non-exclusive licence to exercise the Rights described in Item 1 and/or Item 2, or any of them, in Australia.
Item 7 Term (see clause 9.1)	An initial period of five (5) years commencing on the Effective Date, and any additional periods during which this Agreement is continued in accordance with clause 9.1.
Item 8 Effective Date (see clause 12.1)	

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SCHEDULE 1 - LABELS**ATTACHMENT A - DICTIONARY**

BACKGROUND

- A.** PPCA is a company established for the purpose of, and having among its objects, the licensing of the Rights in Sound Recordings and Music Videos.
- B.** The Licensor owns or controls the Rights and is entitled to grant a licence of those Rights to PPCA.
- C.** The Licensor is prepared to grant, and PPCA is willing to accept, a licence of the Rights on the terms and conditions set out in this Agreement.

THE PARTIES AGREE

1. DICTIONARY

The Dictionary in Attachment A:

- (a) defines some of the terms used in this Agreement; and
- (b) sets out the rules of interpretation that apply to this Agreement.

2. LICENCE AND APPOINTMENT

2.1 Subject to the terms and conditions of this Agreement, the Licensor grants to PPCA for the Term a Licence and authorises PPCA to grant a Licence to others.

2.2 Without limiting the generality of clause 2.1, the Licensor grants to PPCA the following rights:

- (a) subject to clause 3 – to negotiate, settle and agree with Licensees the terms and conditions of any Licences;
- (b) to make applications to the Copyright Tribunal in respect of the exercise by Licensees of any of the Rights over which the Tribunal has jurisdiction and, for this purpose, the Licensor appoints PPCA its attorney and authorises it to make and conduct any such applications in the name of the Licensor;

- (c) to collect and recover all Licence Fees payable by Licensees and any remuneration payable by any person pursuant to any order of the Copyright Tribunal;
- (d) to institute and conduct such legal proceedings as PPCA in its discretion considers necessary or desirable to:
 - (i) collect or recover Licence Fees or other monies due and payable by any person in respect of the exercise in Australia of any of the Rights; or
 - (ii) prevent the unauthorised exercise or exploitation in Australia by any person of any of the Rights;

and, for this purpose, the Licensor appoints PPCA its attorney and authorises it to institute and conduct any such proceedings in the name of the Licensor.

2.3 The Licensor must supply to PPCA:

- (a) the information specified in Item 4 of the Agreement Details in relation to the Controlled Sound Recordings that the Licensor owns or controls as at the Effective Date and the Controlled Sound Recordings that the Licensor produces or acquires during the Term; and
- (b) the information specified in Item 5 of the Agreement Details in relation to the Controlled Music Videos that the Licensor owns or controls as at the Effective Date, and the Controlled Music Videos that the Licensor produces or acquires during the Term.

2.4 The Licensor may, from time to time during the Term, by written notice to PPCA, amend Schedule 1 by deleting or adding the name of any Label, and that amendment has effect immediately upon written notification to PPCA by the Licensor. The parties acknowledge and agree that:

- (a) upon the deletion of the name of a Label from Schedule 1, the Licence granted in respect of the Controlled Sound Recordings released on that Label is deemed to have been withdrawn; and

- (b) upon the addition of the name of a Label to Schedule 1, the Licence granted by clause 2.1 is deemed to extend to the Controlled Sound Recordings released on that Label.

2.5 If, during the currency of this Agreement, a Label not already listed in Schedule 1 comes under the control of the Licensor, the Licensor undertakes to add that Label to Schedule 1 by giving notice to PPCA in accordance with clause 2.4.

2.6 This Agreement is personal to PPCA and must not be assigned except with the written consent of the Licensor, which consent must not be unreasonably withheld.

3. PROVISIONS FOR GRANT OF LICENCES BY PPCA

3.1 PPCA must grant a Licence to a person who:

- (a) agrees to abide by all the terms and conditions of the Licence Agreement offered by PPCA for the granting of such a Licence;
- (b) satisfies PPCA's commercial and/or credit requirements for the granting of such a Licence; and
- (c) is not, and has not been within the period of two years prior to the date of application for the Licence, in breach of any of the terms and conditions of a previous Licence Agreement.

3.2 Notwithstanding clause 3.1, PPCA may grant a Licence to a person who had been in breach of any of the terms and conditions of a previous Licence Agreement, but has remedied that breach prior to the date of application for a Licence.

3.3 Subject to clauses 3.4 and 3.5, in granting a Licence, PPCA may charge such fee as is agreed between PPCA and the Licensee.

3.4 In granting a Licence to any person with respect to the exercise of the Transmission Rights in Controlled Sound Recordings, PPCA will charge a fee established in one of the following ways:

- (a) the fee determined by the Copyright Tribunal in an application under section 152 of the Act with respect to a particular Licensee; or

- (b) if paragraph (a) does not apply – the fee set by PPCA in accordance with a formula or other criteria determined by the Copyright Tribunal from time to time in any application under section 152 of the Act; or
- (c) if neither paragraph (a) nor paragraph (b) applies – the fee set by PPCA in accordance with principles set forth in any relevant decision of the Copyright Tribunal in proceedings under section 152 of the Act; or
- (d) in any case – by agreement between PPCA and the Licensee.

3.5 In granting a Licence to any person with respect to the exercise of the Public Performance Rights in Controlled Sound Recordings, PPCA will charge a fee established in one of the following ways:

- (a) the fee determined in accordance with a licence scheme confirmed or varied by the Copyright Tribunal from time to time under section 154 of the Act; or
- (b) the fee determined in accordance with an order of the Copyright Tribunal under section 151, 155, 156 or 157 of the Act; or
- (c) by agreement between PPCA and the Licensee.

3.6 When offering a Licence, PPCA must inform the Licensee or prospective Licensee in writing of the following matters:

- (a) if the Licence Agreement offered by PPCA entitles the Licensee to have the terms and conditions of that Licence Agreement reviewed in the manner specified in clause 10 of this Agreement – that the Licensee may seek such review;
- (b) that the Licensee is entitled to an indemnity from the Licensor in the terms set out in clause 4.3;
- (c) that the Licensee may negotiate directly with any or all of the Grantors to obtain a Licence of the Rights in Sound Recordings or Music Videos that are owned or controlled by those Grantors;
- (d) that the Licensee may rely on a statutory licence to cause Controlled Sound Recordings to be heard in public in accordance with section 108 of the Act or to

broadcast Controlled Sound Recordings in accordance with section 109 of the Act, as appropriate; and

- (e) that the Licensee may apply to the Copyright Tribunal under section 151 or 152 of the Act, as appropriate;

When PPCA informs the Licensee or prospective Licensee of these matters, PPCA must provide access to copies of whichever of sections 108, 109, 151 or 152 of the Act are relevant to that Licensee or prospective Licensee.

- 3.7 PPCA must, in every Licence Agreement that grants a Public Performance Right, ensure that the Licence is terminable at will by PPCA on not more than twelve (12) months written notice to the Licensee.
- 3.8 PPCA must, in every Licence Agreement, ensure that the Licence is terminable immediately on the occurrence of an Event of Insolvency in relation to the Licensee.

4. WARRANTY AND INDEMNITY

4.1 The Licensor warrants to PPCA that:

- (a) as at the Effective Date, the Licensor owns or controls the Rights in all Sound Recordings released on the Labels, and has full power and authority to grant a Licence to PPCA in accordance with this Agreement;
- (b) in granting a Licence to PPCA in accordance with this Agreement, and in performing its obligations and exercising its rights under this Agreement, the Licensor will not infringe the rights of any third parties; and
- (c) PPCA will not, if it grants Licences to others only in accordance with this Agreement, infringe the rights of any third parties.

4.2 The Licensor must at all times indemnify and hold PPCA harmless against all claims, demands, damages, costs, charges and expenses that may be made against, or suffered or incurred by, PPCA arising out of any breach of this Agreement, including without limitation any breach of the warranties in clause 4.1, or any defect in the title of the Licensor or of any third party in respect of any of the Rights licensed to PPCA by the Licensor pursuant to this Agreement, provided that:

- (a) such claim or demand does not arise out of the exercise of any Rights in respect of which, at the time or times of such exercise, the Licence had been withdrawn pursuant to clause 2.4 or terminated pursuant to clause 9; and
- (b) PPCA makes no admission of liability and takes no action that might prejudice the position of the Licensor without the prior written consent of the Licensor.

4.3 The Licensor must at all times indemnify and hold a Licensee harmless against all claims, demands, damages, costs, charges and expenses that may be made against, or suffered or incurred by, a Licensee arising out of any defect in the title of the Licensor or of any third party in respect of any of the Rights licensed to a Licensee by PPCA pursuant to a Licence Agreement, provided that:

- (a) such claim or demand does not arise out of the exercise of any Rights in respect of which, at the time or times of such exercise, the Licence had been withdrawn pursuant to clause 2.4 of this Agreement or terminated pursuant to the terms of the Licence Agreement;
- (b) the Licensee notifies PPCA within seven (7) days of becoming aware of any such claim or demand being made or threatened; and
- (c) the Licensee makes no admission of liability and takes no action that might prejudice the position of PPCA or the Licensor without the prior written consent of PPCA or the Licensor.

4.4 The Licensor may conduct at its own cost and expense all negotiations in respect of any claim or demand referred to in clause 4.2 or 4.3, and any proceedings that may arise from it, and to contest, settle or otherwise deal with any such claim, demand or proceeding in such manner as the Licensor may in its absolute discretion determine.

4.5 PPCA will, and will use its best endeavours to procure the Licensee to:

- (a) provide to the Licensor such evidence relating to any matter arising out of any claim, demand or proceeding referred to in clause 4.4 as PPCA or the Licensee may have at their disposal; and
- (b) attend and give evidence at any court hearing or other inquiry.

5. LICENCE FEES AND EXPENDITURE

5.1 PPCA may consolidate all Licence Fees and other remuneration received, collected or recovered by it with other moneys received, collected or recovered by PPCA.

5.2 Out of the consolidated moneys referred to in clause 5.1, PPCA may expend or appropriate amounts for any of the following purposes:

- (a) all reasonable administration, management, promotional and other expenses (including legal expenses) of PPCA;
- (b) any amounts necessary to satisfy any liability of PPCA to pay any Tax, including without limitation any GST payable in respect of Licences granted by PPCA pursuant to this Agreement;
- (c) such fees to the directors of PPCA as are fixed by the members of PPCA in general meeting;
- (d) such payments, subscriptions, donations or other disbursements to or for the benefit of:
 - (i) the owners of copyright in Music Videos or Sound Recordings, musical or literary works, artists or musicians, or any person or body representing them or any of them; or
 - (ii) trade exhibitions, research establishments or other organisations;

as the Board of PPCA considers necessary or desirable including without limitation the International Federation of the Phonographic Industry;