



24 December 2008

By email

Gavin Jones
Director, Adjudication Branch
Australian Competition and Consumer Commission
Email: gavin.jones@accc.gov.au

Gina D'Ettorre
Australian Competition and Consumer Commission
Email: gina.d'ettorre@accc.gov.au

Dear Gavin and Gina,

Australian Independent Record Labels Association - Collective bargaining notifications

I refer to the collective bargaining notifications CB00059 – CB00066 (**Notifications**) lodged by the Australian Independent Record Labels Association (**AIR**) on 15 December 2008.

The Australian Subscription Television and Radio Association (**ASTRA**) is the peak industry body for subscription television. ASTRA represents satellite and television services; program channel providers; subscription television operators and communications companies. ASTRA's members include, amongst others, Telstra (operating Bigpond), OPTUS, AUSTAR, FOXTEL, Premier Media Group (operating Fuel TV), MTV Networks Australia and XYZnetworks.

ASTRA has previously negotiated on behalf of its members in relation to the collective acquisition of various goods and/or services, including copyright royalties with Screenrights (underlying copyright in retransmitted works), the Australasian Performing Right Association (**APRA**) and the Phonographic Performance Company of Australia Limited (**PPCA**).

1. Notifications and collective bargaining

ASTRA does not have any in-principle objection to the collective negotiation of the relevant licence terms and conditions by members of AIR.

However, ASTRA makes the following observations in relation to the Notifications. ASTRA notes that its members may also make separate submissions in relation to one or more of the Notifications.



2. Timing of Notifications

As the Commission would be aware, there is a tight statutory timeframe in which decisions must be made in response to a collective bargaining notification lodged under s 93AB(1) of the Trade Practices Act 1974 (Cth) (TPA).

Therefore it is unfortunate that the Notifications were lodged with the Commission when they were, as the (already tight) timetable for any response from interested parties and consideration of the issues by the Commission will be shortened considerably by the upcoming Christmas and New Year holiday period.

Accordingly, while ASTRA has raised a number of issues in response to the Notifications in this letter, because it has only had a very limited time in which to consider the Notifications, it reserves the right to raise further issues prior to 12 January 2009 if necessary.

3. Responses to Notifications

a. Dispute resolution mechanism

AIR states in response to paragraph 3(g)(iv) of each Notification that no dispute resolution mechanism is required in relation to its negotiations with the targets. ASTRA notes that the Notifications state that AIR represents up to 30% of the Australian market.¹ ASTRA is concerned that the proposed provisions in the Notifications do not provide for a dispute resolution procedure between participants and the target during the collective bargaining negotiation process, a concern which arises because AIR represents a significant number of Australian music participants. ASTRA considers that a dispute resolution procedure, covering the period of negotiation, should be required by the Commission.

b. Terms and conditions of the grant of any licence

The Notifications contain a number of references to the terms and conditions which AIR proposes to seek in any collective negotiations with the relevant targets. For example, in response to paragraph 3(g)(ii) of the Notifications, rather than listing the types of terms and conditions that are expected to be negotiated, the applicants have described the particular terms that they will be seeking to include in any agreement during the proposed collective negotiations. In particular, the applicants have included in Attachment 4 a summary of a number of terms that they will be seeking in collective negotiations.

ASTRA does not seek at this time to comment on these proposed terms, but this should not be taken to imply any approval of any of the terms by ASTRA or any of its members. ASTRA does not consider that the particular terms and conditions to be sought are relevant matters to be considered at the Notification stage of any collective bargaining. Instead such matters will be negotiated by the applicants with the targets or their relevant representatives in the event that the Commission allows the Notifications to stand and immunity for the proposed conduct commences.

¹ Attachment 1 of the Notifications.

c. Collective boycott conduct

In response to paragraph 3(i)(i) of the Notifications, the applicants state that:

No exclusionary provision is envisaged. In the event that the target declines to enter into a joint licence, it would be entirely up to each member of AIR to decide for itself and independently of each other the future nature of its relationship with the target.

ASTRA therefore understands that the applicants are not seeking, and will not receive, any immunity in relation to collective boycott conduct, ie conduct that may contravene s 45(2)(a)(i) or (b)(i) of the TPA.

ASTRA would be very concerned if the Notifications were to provide immunity to the applicants to engage in collective boycott conduct and if this were to be proposed ASTRA would want to make further detailed submissions in this regard.

d. Sections C and D of the Notifications

ASTRA does not seek to comment at this time in relation to sections C and D of the Notifications, including the market definition proposed and the assertion that the proposed collective negotiation conduct would not amount to price fixing under s 45A(1) of the TPA. However this does not indicate any acceptance by ASTRA or its members of the matters set out in those sections.

e. Individual Agreements

ASTRA understands that if the applicant is successful in obtaining immunity and the proposed conduct commences, that this will not preclude the targets from negotiating and entering separate licensing agreements with the applicant's members. ASTRA notes that there are some instances where targets already have arrangements in place with some of the applicant's members or have commenced discussions with a view to such arrangements.

Please contact me (02 9776 2685) or Matthew Deaner (02 9776 2688) if you have any questions in relation to this letter or if you would like to meet to discuss the issues raised in this letter.

Yours sincerely



Debra Richards
CEO