



Australian
Competition &
Consumer
Commission

Assessment

Collective bargaining notifications

lodged by

**Australian Independent Record
Labels Association**

Date:

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Notification no. CB0005 - CB0006

Commissioners:

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Summary

The ACCC does not object to the collective bargaining notifications lodged by the Australian Independent Record Labels Association (AIR) and its participating members, for AIR to collectively bargain on behalf of 61 participating members with Telstra, Optus, BigPond, Austar, Foxtel, MTV Networks, XYZ Networks and Fuel TV in relation to the licensing of its members' audio and visual rights in respect of public performance and transmission of music videos.

The small business collective bargaining notification process

Collective bargaining refers to two or more competitors collectively negotiating terms and conditions with a supplier or customer. Without protection, it can raise concerns under the competition provisions of the *Trade Practices Act 1974* (the Act).

Small businesses can obtain protection from legal action under the Act for collective bargaining arrangements by lodging a notification with the ACCC. Provided the ACCC does not object to the notified arrangement, protection commences 28 days after lodgement.

The ACCC will only object to and remove the immunity provided by a collective bargaining notification when it is satisfied that any public benefits from the proposed collective bargaining arrangement would not outweigh the public detriments (and substantially lessen competition for notifications that do not concern price fixing or exclusionary conduct).

The notifications

On 15 December 2008, eight collective bargaining notifications were lodged by AIR on behalf of 61 of its members (CB00059 – CB00066). AIR proposes to negotiate, on behalf of its participating members, with each of Telstra, Optus, BigPond, Austar, Foxtel, MTV, XYZ and Fuel TV in relation to the licensing of its members' audio and visual rights in respect of public performance and transmission of music videos.

AIR members propose to offer each of the targets a non-exclusive licence covering the right to broadcast all music videos over which participating AIR members hold copyright.

The collective bargaining notification process is transparent and involves public registers and interested party consultation. The ACCC received three submissions in respect of the notifications. While two submissions raised some issues in respect of some elements of the notified arrangements, none of the submissions objected to the notified arrangements.

ACCC assessment of the notifications

The ACCC is satisfied that the proposed arrangements are likely to result in significant public benefits.

The proposed arrangements provide for the administration of AIR members' rights with respect to the broadcast of music videos in their repertoire far more effectively

than would be the case under either of the alternative scenarios for the administration of these rights: direct negotiation between individual AIR members and users (licensees); and/or AIR members' rights with respect to the broadcast of their music videos not being effectively enforced at all in many cases.

More effectively and efficiently managing these rights will generate cost savings for both AIR members and users, and assist in maintaining the viability of the Australian independent music sector.

The proposed joint licensing arrangements will also facilitate greater compliance, and increased ease of compliance, with copyright law for users.

The ACCC considers that AIR's proposed collective bargaining arrangements have the potential to generate some public detriment. While the scope of the proposed bargaining group is limited to independent record labels, the substitutability of AIR members' repertoire with that of potential competitors outside the group, in particular the major record labels, is somewhat limited. Accordingly, the jointly licensing of broadcast rights for music videos by AIR members has some potential to strengthen the market power of AIR members in negotiating with users.

Licensees and AIR members will maintain the freedom to negotiate licences directly, in competition with the proposed bargaining group. However, the attractiveness of the joint offer, in particular, the scope of the repertoire offered under the proposed joint licence and the cost savings in using collective arrangements, limits the extent to which the option of direct dealing imposes a competitive constraint on the bargaining group. However, the option of direct dealing will place some constraint on the collective bargaining group.

In addition, the costs associated with AIR members and users negotiating directly mean that in many cases AIR members do not currently receive a fee from many users for the broadcast of music videos over which they hold copyright. This, combined with the fact that the notified conduct does not allow for any collective boycott activity by AIR members, will also constrain the price and other terms and conditions of the joint licences offered by AIR members.

ACCC Decision

On the information available, the ACCC is satisfied that the benefits likely to arise from the notified arrangements would outweigh the identified detriments. Accordingly, it does not object to the notifications.

Protection afforded by these notifications will commence on 12 January 2009 and will cease 3 years from the date of lodgement (15 December 2011). As with any notification, the ACCC may act to remove the immunity afforded by the notifications at a later stage should concerns arise.

1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. In the context of the Act, collective bargaining involves two or more competitors agreeing to collectively negotiate terms and conditions (which can include price) with a supplier or a customer (the target or counterparty).
- 1.3. Arrangements will amount to collective boycott where the collective bargaining group agrees not to acquire goods or services from, or not to supply goods or services to, the counterparty unless it accepts the terms and conditions offered by the group.
- 1.4. Collective bargaining and collective boycott arrangements can have a detrimental effect on competition and consumers and are likely to raise concerns under the competition provisions of the Act.
- 1.5. The Act, however, allows businesses to obtain protection from legal action in relation to collective bargaining and collective boycott arrangements in certain circumstances. One way in which small business bargaining groups may obtain protection is to lodge a collective bargaining notification with the ACCC.
- 1.6. Provided the ACCC does not object to the notified arrangement, protection commences 28 days after lodgement. The immunity from a collective bargaining notification expires three years from the date it was lodged.
- 1.7. The ACCC may object to a collective bargaining notification if it is satisfied that any public benefits from the proposed collective bargaining arrangement would not outweigh the public detriments (and substantially lessen competition for notifications that do not concern price fixing or exclusionary conduct).
- 1.8. The collective bargaining notification process is transparent involving public registers and interested party consultation. Where the ACCC proposes to object, it must first issue a draft objection notice setting out its reasons and providing an opportunity for interested parties to request a conference. If the ACCC issues a draft objection notice before the expiration of the 28 day statutory period, legal protection from the notification does not commence.

2. Background

The proposed arrangement

- 2.1. The ACCC considers that notifications CB00059 – CB00066 were effectively lodged by AIR on behalf of 61 of its members on 15 December 2008 when AIR provided evidence of participating members consent to the notifications being lodged on their behalf.
- 2.2. The 61 members on whose behalf the notifications were lodged are listed in an annexure to the notification available on the ACCC's public register and at www.accc.gov.au.
- 2.3. AIR proposes to collectively bargain on behalf of relevant members, with each of Telstra, Optus, BigPond, Austar, Foxtel, MTV, XYZ and Fuel TV in relation to licensing of its members' audio and visual rights in respect of public performance and transmission of music videos.
- 2.4. Under the proposed arrangements a joint licensing arrangement will be entered into whereby each participating member of AIR will licence their relevant rights to each participating target. The proposed arrangements differ from the collective licensing model adopted by copyright collecting societies such as the Phonographic Performance Company of Australia (PPCA) in that no collective licence will be issued by AIR.
- 2.5. Participating members will each grant to each target a non-exclusive licence covering the right to broadcast all music videos over which the participating AIR member holds copyright.
- 2.6. It is proposed that licence fees be paid quarterly based on usage and revenue reports.
- 2.7. In the event that a proposed target declines to enter into a joint licence agreement each AIR member will decide for itself independently of other members the future nature of its relationship with the target.

The Applicant

- 2.8. AIR is a national industry association representing the interests of its independent recording label members. AIR states that its primary focus is to foster an ever increasing marketplace for Australian independent music and assist in the long-term development, growth and success of Australia's independent recording industry both in Australia and overseas.
- 2.9. AIR states that the independent music industry makes up around 85% of the entire Australian recording industry. AIR estimates that the independent sector represents around 25% to 30% of the Australian music industry in economic terms.
- 2.10. AIR submits that independent recording labels produce the vast majority of work by Australian artists in all genres, but particularly in niche genres such as

jazz, electronic and dance music. AIR estimates the turnover of the independent sector at around \$50 million.

- 2.11. AIR submits that within the broader music industry it is independent labels that primarily fulfil the role of supporting new artists and developing new markets. AIR states that in contrast, major recording companies tend to focus on artists that already have market recognition and are more likely to generate a substantial return.
- 2.12. Artists represented by the independent recording industry include Savage Garden, the John Butler Trio, Killing Heidi, Vanessa Amorosi, Missy Higgins, James Morrison and AC/DC.

The recording industry and copyright

Copyright

- 2.13. Copyright protection in Australia arises under the *Copyright Act 1968*. The *Copyright Act* provides for both ‘economic’ rights, including exclusive rights to reproduce or communicate copyright material, and ‘moral’ rights, including the rights of attribution of authorship and integrity. Ideas themselves are not protected by copyright; copyright applies to expression of those ideas.
- 2.14. The *Copyright Act* accords protection to original literary, dramatic and musical works, as well as published editions of such works.¹ Protection also extends to films, sound recordings and television and sound broadcasts.² It applies automatically without the need for registration and lasts for the period of time set out in the *Copyright Act*.
- 2.15. Copyright is infringed when a person who is not the copyright owner in Australia, and without the licence of the owner, does any act which the copyright owner has the exclusive right to do.³
- 2.16. The precise nature of the acts comprised in the copyright differs according to the nature of the work or subject matter. In the case of literary, dramatic, artistic and musical works, the copyright may, depending upon the nature of the work, include the right to:
 - reproduce the work
 - publish the work
 - perform the work in public
 - communicate the work in public
 - make an adaptation of the work

¹ *Copyright Act*, Parts III and IV.

² *ibid.*, Part IV.

³ *ibid.*, ss 36(1) and 101(1).

- reproduce, publish, perform in public or communicate to the public an adaptation of an original work
- make a copy of a published edition of the work, and
- enter into a commercial rental arrangement in respect of the work reproduced in a sound recording.⁴

2.17. In the case of films, sound recordings and television and sound broadcasts, copyright may, depending upon the nature of the work, include the exclusive right to:

- make a copy of the subject-matter
- cause the subject-matter to be seen or heard in public
- communicate the subject-matter to the public, and
- enter into a commercial rental arrangement in respect of the subject-matter.⁵

2.18. There are at least two types of copyright in music:

- the copyright in the song, being the lyrics and composition (i.e. the ‘musical work’) and
- the copyright in the recorded version of the musical work, the ‘sound recording’ (eg CDs, tapes, DVDs – including music videos).

Collective administration of copyright in musical works and sound recordings

2.19. Copyright collecting societies act on behalf of certain copyright owners to facilitate the administration of copyright licences. Such organisations grant licences to use copyright material, collect royalties from users of copyright material and distribute revenue to owners of copyright. Collecting societies provide copyright users (licensees) with relatively easy access to a large volume of copyright material.

2.20. Licences in relation to musical works are primarily available from the Australasian Performing Rights Association (APRA). APRA administers the rights of public performance and communication to the public of music and lyrics for composers, music publishers and other copyright owners. In particular, APRA provides licences for live and recorded music and lyrics to be performed publicly, and licences radio and TV stations, webcasters and organisations playing music on hold.

2.21. Licences relating to the recorded version of the musical work may be available through a collective licence issued by the PPCA or directly from individual copyright owners.

⁴ *ibid.*, ss 31 and 88.

⁵ *Copyright Act*, ss 85, 86 and 87.

- 2.22. Both APRA and the PPCA's collective licensing arrangements offer access to a repertoire of its wide range of sound recordings through the provision of a blanket licence. Blanket licences cover all the repertoire of the particular collection society. Collecting societies do not generally grant licences in respect of individual works and other subject matter.
- 2.23. Businesses that want to play protected music may be required to obtain a licence from both APRA (in respect of musical works) and the PPCA or individual copyright owners (in respect of sound recordings). Both APRA and the PPCA's collective licensing arrangements are currently authorised by the ACCC.⁶
- 2.24. The *Copyright Act* gives a user the right to publicly perform or broadcast a sound recording or music video, provided equitable remuneration is paid for its use.⁷

Transmission rights

- 2.25. Broadcasters, such as commercial and community radio broadcasters, and commercial and pay television providers, also require a licence in relation to transmission rights.
- 2.26. There is no standard licence or tariff for licensees who wish to broadcast or transmit a sound recording. Licences for broadcast rights are typically negotiated directly between the PPCA or the individual copyright owner and the licensee or between the PPCA or the individual copyright owner and a relevant industry association. For example, the PPCA negotiates licences with industry representative bodies, including FreeTV⁸ and Commercial Radio Australia Ltd (CRA).⁹ The PPCA also has individual broadcast and transmission agreements with the Australian Broadcasting Corporation (ABC), SBS Corporation (SBS), Foxtel, Optus, Austar and Sky Channel.
- 2.27. More generally, AIR submits with respect to the counterparties to its proposed collective bargaining arrangements, that these broadcasters generally have licence agreements with the PPCA in relation to the use of sound recordings but not in relation to video rights. AIR submits that negotiations with respect to these rights, to the extent that they do take place, are usually directly with channels.
- 2.28. The ACCC also understands that it is currently industry practice to negotiate for the public performance and transmission rights of music videos directly with copyright owners.

⁶ See Applications for revocation and substitution and applications for authorisation A90918, A90919, A91921, A91922, A91924, A91925, A91944 & A91945, Australasian Performing Rights Association Limited – 8 March 2008 and Applications for revocation and substitution A91041 7 A91042 Phonographic Performance Company of Australia – 27 September 2007.

⁷ *Copyright Act*, ss 108 and 109.

⁸ FreeTV represents the interests of commercial free-to-air television.

⁹ Commercial Radio Australia Pty Ltd represents the interests of commercial radio broadcasters.

- 2.29. As noted, under the proposed arrangements AIR proposes to collectively bargain on behalf of relevant members, with each of Telstra, Optus, BigPond, Austar, Foxtel, MTV, XYZ and Fuel TV in relation to licensing of its members' audio and visual rights in respect of public performance and transmission of music videos.
- 2.30. A joint licensing arrangement will be entered into whereby each participating member of AIR will licence their relevant rights to each participating target. Unlike the collective licensing model adopted by copyright collecting societies such as the PPCA, no collective licence will be issued by AIR.

ACCC consultation

- 2.31. The ACCC sought submissions from interested parties, including the eight proposed counterparties to negotiations and APRA and the PPCA. Submissions were received from the Australian Subscription Television and Radio Association (ASTRA), APRA and the Special Broadcasting Service Corporation (SBS).
- 2.32. ASTRA is an industry body representing satellite and television services, program channel providers, subscription television operators and communications companies. ASTRA's members include Telstra (operating BigPond), Optus, Austar, Foxtel, Premier Media group (operating Fuel TV), MTV Networks Australia and XYZ Networks.
- 2.33. ASTRA does not object to the proposed arrangements. However, ASTRA did raise concerns with the timing of the applications and provide comments on some elements of the proposed arrangements.
- 2.34. APRA and SBS support the proposed arrangements. While supportive of the arrangements, SBS also raised concerns with some elements of the arrangements.
- 2.35. Interested party submissions, and AIR's submission in support of the notifications, are discussed in greater detail in section three.

Important dates

DATE	ACTION
15 December 2008	Lodgement of collective bargaining notifications.
16 December 2008	Public consultation process commenced.
24 December 2008	Closing date for submissions from interested parties.
8 January 2009	ACCC assessment of notified arrangement issued.

Public benefit test

- 2.36. The ACCC may revoke a collective bargaining notification where the relevant test in section 93AC of the Act is satisfied.

- 2.37. For notifications that involve collective boycott, conduct within the meaning of s 45(2)(a)(i) or (b)(i) of the Act (exclusionary provisions), or a collective arrangement under which competitors will negotiate prices, the ACCC may object to a collective bargaining notification if it is satisfied:
- that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public.
- 2.38. For notifications that do not involve collective boycotts (or other exclusionary provisions) or price fixing but involve conduct that may otherwise substantially lessen competition within the meaning of s 45(2)(a)(ii) or (b)(ii) of the Act, the ACCC may object to a collective bargaining notification if it is satisfied:
- that in all the circumstances the conduct would, or would likely result in a substantial lessening of competition, and
 - the conduct has not resulted or is not likely to result in a benefit to the public or the benefit to the public would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.
- 2.39. The proposed collective bargaining arrangement involves an agreement on price and is therefore subject to the test described in paragraph 2.37.

3. ACCC assessment

Affected markets

- 3.1. In considering the benefits and detriments associated with collective bargaining arrangements, it often assists to identify the markets affected by the arrangements. Where a market starts and finishes will be influenced by the degree of substitutability of different products and across different geographic areas.
- 3.2. AIR submits that the relevant market is the market for the acquisition and supply of licences for public performance and transmission rights for sound recordings and music videos in Australia.
- 3.3. AIR submits that the main suppliers of these rights are record labels, artists artist managers and managers. AIR submits that the main acquirers of these rights (licensees) are television broadcasters, music channels, online broadcasters and terrestrial and digital radio.
- 3.4. Submissions from interested parties did not address the issue of market definition.
- 3.5. Broadly, for the purpose of considering the current notifications, the ACCC considers that AIR's proposed arrangements are relevant to the acquisition of public performance and transmission rights for sound recordings and music videos. In particular, AIR members propose to offer joint licences for the right to broadcast music videos in their repertoire to certain users.
- 3.6. Relevant to consideration of the proposed arrangements, the ACCC notes the following key features that apply to the acquisition of public performance and transmission rights for sound recordings and music videos:
 - They are a non-rivalrous product. Once a particular music video has been created, it is able to be used by numerous persons at the same time so that the consumption of the work by any one person does not limit the consumption of that same work by another person.
 - They are non-excludable given the compulsory licensing provisions under section 108 and 109 of the *Copyright Act*.
 - In many cases, public performance or broadcast of a music video will generate additional revenue for the owner by encouraging further use of the product, including other broadcasts and performances for which a licence fee is payable, and other uses such as record sales.
 - Users generally demand a licence in relation to multiple public performance and transmission rights. Thus while one sound recording or music video may be a substitute for another recording to some users it is often likely to be complementary to other recordings. As a result, many users require the rights to publicly perform or transmit a wide range of recordings.

- Users prefer a flow of sound recordings and music videos to be developed over time. In other words, users would not be satisfied with a limited stock of rights that can be used again and again. Users gain extra utility by being able to consume the rights to use new recordings that are produced over time.
- While licences are available from the PPCA, individual copyright owners and, potentially under the proposed arrangement from AIR members collectively, licences cover different repertoires which may limit the extent of substitutability between them.
- Under the proposed arrangements AIR members will seek to negotiate joint licensing arrangements only with a limited range of potential licensees.

The future with or without test

- 3.7. The ACCC uses the ‘future-with-and-without-test’ established by the Australian Competition Tribunal to identify and measure the public benefit and anti-competitive detriment generated by proposed arrangements.
- 3.8. AIR submits that a joint licensing model has not previously been offered by participating members or any other members of AIR. AIR states that while some of its members have previously entered into direct licensing arrangements with respect to relevant rights, such arrangements are the exception given the transaction costs involved in entering into multiple licensing arrangements.
- 3.9. Accordingly, AIR states, in most instances the targets of the proposed collective bargaining arrangements have not, in the past, paid any fee to participating AIR members in relation to the public performance and transmission of music videos for which AIR members hold copyright.
- 3.10. ASTRA states that in some instances its members have arrangements in place with some AIR members.
- 3.11. The ACCC notes that direct negotiations between AIR members and the proposed targets in respect of the public performance and transmission of music videos appears to be the exception rather than the norm.
- 3.12. The ACCC also notes that the proposed collective bargaining arrangements are at risk of breaching the Act. Given this risk, the ACCC considers it unlikely that collective negotiation by AIR members with the proposed targets would take place absent the legal protection afforded by the notifications.
- 3.13. The ACCC considers that, in the absence of the legal protection afforded by the notifications, the most likely counterfactual would be the continuation of the present situation. That is, limited direct licensing between some AIR members and the proposed targets in some cases, with the relevant rights of many AIR members not being effectively managed or enforced at all.

Public benefits

- 3.14. AIR submits that the proposed collective bargaining arrangements will result in a public benefit by helping support the independent music sector by creating an avenue for the collection of copyright fees, to which the copyright holders are entitled, but which have not been collected in the past. APRA also submits that the proposed arrangements will help sustain a commercially viable independent recording sector.
- 3.15. APRA submits that joint licensing as proposed by AIR is an efficient means of ensuring that users of copyright material have legal access to that material on reasonable terms. APRA submits that such arrangements significantly reduce the administrative costs that would otherwise be associated with negotiating licensing agreements.
- 3.16. SBS similarly submits that the proposed arrangements will provide a 'one-stop shop' for users to access relevant copyright material.
- 3.17. The ACCC's view on potential public benefits of the proposed arrangements is discussed below.

Efficient administration of copyright owners' rights and viability of the independent sector

- 3.18. Effective administration of copyright owners' rights is essential to ensuring that a functional market for those rights exists. Absent efficient administration of copyright owners' rights, users are likely to free ride with the effect that music creators would not be appropriately remunerated for their works, reducing incentives to create new works.
- 3.19. The ACCC notes that, for the most part, AIR members' rights with respect to the broadcast of music videos over which they own copyright are not currently effectively enforced. The main reason cited for the lack of enforcement of these rights is the costs involved in doing so.
- 3.20. The ACCC considers that joint licensing of the type proposed by AIR provides the creators of copyright material, in this instance, music videos, with the opportunity to efficiently and effectively gain returns for use of their music videos, in particular, by minimising the costs of negotiating and administering licences for the use of copyright.
- 3.21. Joint licensing of the type the subject of the current notifications also provides music video broadcasters with relatively easy access to the large volume of music videos in the repertoire of participating AIR members. Users are not required to identify and negotiate with individual copyright owners and may gain rights to a wide range of music videos through one licence, thereby significantly reducing transaction costs compared to the situation where licences were negotiated separately with each rights holder.
- 3.22. Accordingly, the ACCC considers that the proposed arrangements generate a public benefit by achieving administration of AIR members' rights with

respect to the broadcast of music videos in their repertoire far more effectively than would be the case under either of the alternative scenarios for the administration of these rights: direct negotiation between AIR members and users; and/or AIR members' rights with respect to the broadcast of their music videos not being effectively enforced at all in many cases.

- 3.23. Through administering AIR members' rights with respect to the broadcast of music videos more efficiently and effectively the proposed joint licensing arrangements are likely to generate cost savings for both AIR members and users, and assist in maintaining the viability of the Australian independent music sector.

Access to copyright material and compliance with the Copyright Act

- 3.24. Joint licensing arrangements such as those proposed by AIR members allow users to be certain that they are licensed to broadcast music videos contained within relevant AIR members' repertoires. This would assist users to comply with their obligations under the *Copyright Act*.
- 3.25. If AIR members and users were to engage in direct licensing arrangements it may be burdensome on both copyright owners and users to ensure this level of compliance. As such, the ACCC considers that the proposed joint licensing arrangements generate a public benefit by facilitating greater compliance, and increased ease of compliance, with copyright law for users.
- 3.26. Further, the ACCC considers greater compliance and the efficient enforcement of copyright law also contributes to realisation of the public benefits identified above, maintaining the viability of the Australian independent music sector, by ensuring that copyright holders are remunerated for use of their works.

Public detriments

- 3.27. Under collective bargaining arrangements, competitors come together to negotiate terms and conditions, which can include price, with a supplier or customer.
- 3.28. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to inefficiencies. The capacity of new entrants to compete for the rights to undertake the business of existing market participants subject to the collective bargaining agreement also has implications for how competition is affected. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 3.29. AIR submits that the proposed collective bargaining arrangements are pro-competitive as the arrangements will facilitate the adoption of a commercially negotiated, reasonable, fee for relevant rights instead of users 'free-riding.'

- 3.30. AIR states that the joint licences proposed are non exclusive with proposed targets able to deal with:
- licensors or groups of licensors that are not AIR members, such as for example, major record labels
 - the PPCA
 - AIR and its participating members, and/or
 - members of AIR who wish to enter into separate licensing agreements.
- 3.31. SBS and ASTRA raise concerns that the proposed arrangements may preclude direct dealing between AIR members and the proposed targets.
- 3.32. In addition ASTRA raises concerns with the lack of a dispute resolution mechanism in AIR's proposed arrangements and that the notifications contemplate specific terms that AIR members will seek to have included in any agreements negotiated.
- 3.33. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies is likely to be more limited where:
- there are restrictions on the coverage and/or composition of the bargaining group
 - participation in the collective bargaining arrangement is voluntary
 - the current level of negotiations between members of the bargaining group, with respect to those terms and conditions on which they are seeking to negotiate, is low, and
 - there is no boycott activity.
- 3.34. With respect to these four features as they relate to the AIR notifications, the ACCC notes the following:

Coverage or composition of the group

- 3.35. Collective bargaining, in the context of licensing of copyright, has the potential to strengthen copyright owners market power through the aggregation of competitors' rights. Specifically, allowing copyright owners to pool their rights reduces the competitive pressure that would otherwise exist if copyright owners were competing individually to licence their rights.
- 3.36. However, where the size of the bargaining group is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers outside the group.

- 3.37. In respect of the joint licensing arrangements proposed by AIR members, the collective bargaining group will consist of record labels covering around 85% of the Australian recording industry. However, the proposed bargaining group will only represent around 25% to 30% of the Australian music industry in economic terms, with the remainder of the industry controlled by the four large, multinational labels, Sony BMG, EMI, Universal and Warner.
- 3.38. Therefore, even in aggregate, the 61 participants in AIR's proposed collective bargaining arrangements will form a group not much larger than the largest major label.
- 3.39. However, while the size of the proposed bargaining group, in the context of the industry as a whole, is not particularly large, and the scope of its repertoire is limited, the licences offered by the bargaining group and its potential competitors, in particular the major labels, cover different repertoires. This may limit the extent of substitutability between repertoires, and accordingly, the competitive constraint that other suppliers of broadcast rights for music videos may place on the bargaining group.
- 3.40. Accordingly, the jointly licensing of relevant rights by AIR members has some potential to strengthen the market power of AIR members in negotiating with users.

Voluntary participation

- 3.41. If licensees have the option of negotiating a licence directly with the owners of copyright, it is likely to place some competitive constraint on the collective bargaining group in setting joint licence terms and conditions.
- 3.42. The nature of the joint licence proposed by AIR members involves a non-exclusive right to grant licences for the broadcast of music videos. The nature of the non-exclusive licence means that users are free to approach AIR members directly and negotiate for access to these rights. Similarly, AIR members are free to opt out of the collective arrangements and negotiate directly with users.
- 3.43. Direct dealing between owners of copyright and users is not generally appealing due to the attractiveness of both the coverage of blanket licences offered by collection societies (or the joint licence proposed by AIR members) and the cost savings experienced by both licensors and licensees by using collective arrangements.
- 3.44. However, the ACCC understands that direct licences are more prevalent for the broadcasting of music videos, as opposed to direct licences for public performance of sound recordings. The ACCC understands that in some instances users will negotiate directly with major record labels in respect of licences for the broadcast of music videos. Further, ASTRA states that some of its members who are the targets of AIR's proposed collective bargaining arrangements currently have direct licences and/or are in the process of negotiating such licences with some AIR members.

- 3.45. Accordingly, while the offer of a joint licence in itself provides a, potentially significant, disincentive to direct dealing between AIR members and the targets of the proposed arrangements, such direct dealing is possible if either the copyright owner or user does not wish to participate in the collective bargaining arrangements.
- 3.46. Overall, the ACCC considers that while the proposed arrangements do not preclude AIR members and users from dealing directly, the scope of the repertoire offered under the proposed joint licence and the cost savings in using collective arrangements limit incentives for direct dealing. Although, at the same time, it is noted that the needs of users may suit direct licensing in some circumstances.
- 3.47. To the extent that direct dealing is a viable or attractive option this places some constraint on the price and other terms and conditions of the joint licences proposed to be offered by AIR.

Current level of competition between AIR members

- 3.48. As discussed above, allowing copyright owners to pool their rights reduces competitive pressure that would otherwise exist if copyright owners were competing individually to licence their rights. Bringing together parties who would normally compete with each other in the supply of copyright material creates scope for the collective group to exercise market power in setting licence fees.
- 3.49. However, where the current level of individual bargaining between members of a proposed bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.
- 3.50. The ACCC notes that at present in many cases AIR members do not receive a fee from many users in relation to the broadcast of music videos for which they hold copyright due to the costs and difficulties involved in individual enforcement of these rights. In this sense, in many case AIR members do not currently compete with each other at all in respect of the terms and conditions on which the rights to broadcast music videos are offered.
- 3.51. Accordingly, the terms and conditions offered by AIR members in offering joint licences will be constrained by the likely alternative scenario if a suitable collective agreement with users can not be reached. That is, in many cases, no fee in respect of the public performance and transmission of music videos being collected.

Boycott activity

- 3.52. The notified conduct does not allow for members of the collective bargaining group to engage in collective boycott activity.

Other issues raised by interested parties

Dispute resolution mechanisms

- 3.53. ASTRA raises concerns that the proposed arrangements do not provide a mechanism for the resolution of disputes between AIR members and the proposed targets during the collective negotiation process. ASTRA submits that the ACCC should require AIR to adopt a dispute resolution process.
- 3.54. AIR states that if a dispute pursuant to a collective negotiation process can not be resolved then no joint licence agreement will be entered into.
- 3.55. As discussed above, under the proposed arrangements no party, be they an AIR member, or a target of the proposed arrangements, can or will be compelled to participate in the proposed collective bargaining arrangements. In the event that any party chooses not to participate in the arrangements, or where agreement as to joint licensing terms can not be reached between parties to negotiations, proposed targets and individual AIR members are free to consider their positions and enter into such alternative arrangements as they consider appropriate.
- 3.56. Further, the absence of a formal process for the resolution of disputes that may occur in the course of collective negotiations does not preclude parties from establishing and/or engaging in such dispute resolutions processes, be they formal or informal, as they consider appropriate to their specific negotiations. Indeed, to the extent that disputes do arise in negotiations it would remain in both parties' interest to do so and it would be expected that both parties would act in accordance with this interest.
- 3.57. In addition, even where a formal dispute resolution process is proposed by parties to proposed collective bargaining arrangements, the counterparty to the negotiations would be under no obligation to participate in the process in the event of a dispute.
- 3.58. The ACCC also notes that it is proposed that where a joint licensing agreements is negotiated, the agreement provide for mediation, conciliation and neutral evaluation in relation to disputes that may arise through the course of the agreement.
- 3.59. More generally, as provided by the statutory test outlined at paragraph 2.37 of this assessment document the ACCC may object to a collective bargaining notification only if it is satisfied that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public. The ACCC is not able to impose conditions or require changes to arrangements for which immunity is sought through the collective bargaining notification process.

Terms and conditions of joint licences

- 3.60. ASTRA raises concerns that the notifications lodged by AIR include a number of references to terms and conditions that AIR proposes to seek in any

collective negotiation with relevant targets. ASTRA submits that the particular terms of joint licences are a matter for AIR members and relevant targets to consider in negotiations.

- 3.61. The ACCC notes that the notifications lodged by AIR include an outline of the key terms AIR proposes for inclusion in joint licence agreements. However, these key terms are indicative only. The specific terms of any joint licences entered into will be a matter for negotiation between the parties.

4. Conclusion

- 4.1. The proposed collective bargaining arrangement involves an agreement on price and is therefore subject to the test described in paragraph 2.37.
- 4.2. Consistent with that test the ACCC will object to a notified arrangement where it is satisfied that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public.
- 4.3. The ACCC is satisfied that the proposed arrangements are likely to result in significant public benefits.
- 4.4. The proposed arrangements provide for the administration of AIR members' rights with respect to the broadcast of music videos in their repertoire far more effectively than would be the case under either of the alternative scenarios for the administration of these rights: direct negotiation between individual AIR members and users (licensees); and/or AIR members' rights with respect to the broadcast of their music videos not being effectively enforced at all in many cases.
- 4.5. More effectively and efficiently managing these rights will generate cost savings for both AIR members and users, and assist in maintaining the viability of the Australian independent music sector.
- 4.6. The proposed joint licensing arrangements will also facilitate greater compliance, and increased ease of compliance, with copyright law for users.
- 4.7. The ACCC considers that AIR's proposed collective bargaining arrangements have the potential to generate some public detriment. While the scope of the proposed bargaining group is limited to independent record labels, the substitutability of AIR members' repertoire with that of potential competitors outside the group, in particular the major record labels, is somewhat limited. Accordingly, the jointly licensing of broadcast rights for music videos by AIR members has some potential to strengthen the market power of AIR members in negotiating with users.
- 4.8. Licensees and AIR members will maintain the freedom to negotiate licences directly, in competition with the proposed bargaining group. However, the attractiveness of the joint offer, in particular, the scope of the repertoire offered under the proposed joint licence and the cost savings in using collective arrangements, limits the extent to which the option of direct dealing imposes a competitive constraint on the bargaining group. However, the option of direct dealing will place some constraint on the collective bargaining group.
- 4.9. In addition, the costs associated with AIR members and users negotiating directly mean that in many cases AIR members do not currently receive a fee from many users for the broadcast of music videos over which they hold copyright. This, combined with the fact that the notified conduct does not

allow for any collective boycott activity by AIR members, will also constrain the price and other terms and conditions of the joint licences offered by AIR members.

- 4.10. On the information available, the ACCC is satisfied that the benefits likely to arise from the notified arrangements would outweigh the identified detriments. Accordingly, it does not object to the notifications.
- 4.11. Accordingly, the ACCC does not object to notifications CB00059 – CB00066. Protection from legal action provided by notifications CB00059 – CB00066 will commence on 12 January 2009 and will expire three years after the date of lodgement (15 December 2011).
- 4.12. As with any notification, the ACCC may review these notifications at a later stage should concerns arise.