



AUSTRALIAN HOTELS ASSOCIATION

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26 February 2010

Mr Gavin Jones
Director – Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

Dear Mr Jones

Re: Australasian Performing Rights Association Ltd – applications for revocation and substitution A91187 to A91194 and A91211 – draft determination

Thank you for your letter to Bill Healey of 8 February 2010 asking the AHA to comment on the above draft determination.

The AHA is an organisation of employers registered under the *Fair Work Act 2009* representing the interests of over 5,000 members and operating branches in every state and territory as well as a Canberra-based national office. The AHA's membership base is made up of both general licensed premises as well as accommodation hotels.

The hotel and hospitality industry is a major client of the music industry and therefore the AHA is very interested in the process of authorisation for both APRA and PCCA. Both are monopolies in the Australian market and hence the operations of both are of concern to the AHA, particularly with regard to the impact of monopoly collecting societies on AHA members. Licence fees in some categories (such as nightclubs) have increased exponentially in the last three years, exposing the industry to rising costs of business with little recourse to alternative sources of music. In saying this, it must also be said that the AHA enjoys a good relationship with APRA.

Collecting societies have been treated differently under Australian competition law than in other jurisdictions, such as North America. Australia has been relatively benign in relation to what are anti-competitive agreements amongst competitors and resulting in market power for the collecting societies.

In its 2001 decision the Australian Competition Tribunal stated.

“... the input arrangements of APRA, which require an exclusive assignment of performing rights subject only to Article 17(b), could be modified in the manner that we have mentioned without creating undue risk to the essential elements of APRA's

role as a collecting society and should be modified in that manner. Similarly, we think a case for a simplified dispute resolution process has been established.

*Whilst we consider that the public benefits arising from APRA's collective administration of performing rights exceed the anti-competitive detriments flowing from its operations, we consider that authorisation should be withheld until these two matters have been put in order by APRA. We think the appropriate course is to adjourn the proceedings to enable APRA to design rules for a non-exclusive opt-out system on a work-by-work basis, and an alternative dispute resolution procedure. A similar course was followed by the Tribunal in *Re Media Council (No 2)*".*

The Tribunal accepted that there was the requisite public benefit but that there should be safeguards. That was in 2001, since then the ACCC and the Tribunal have demanded more of authorisation applicants.

Those who APRA represents can, under the authorisation, act collectively yet the users of the services cannot unless they too seek their own collective bargaining authorisation or notify collective bargaining arrangements.

It may be appropriate for groups of users to seek such protection and that as part of the APRA authorisation that APRA be required to collectively negotiate with such groups. Further, it is suggested that groups representing users as well as individual should be able to utilise the ADR regime that is part of the current and any future APRA authorisation.

In the initial consultation process the AHA submitted that it is important that APRA members can withdraw from universal coverage as long as efficiencies are maintained. This remains the AHA view and we note that the ACCC has built that ability into the regime.

The AHA notes that in its draft determination the ACCC states:

"The ACCC considers that APRA's licensing arrangements:

- Significantly hamper direct negotiation between copyright owners and user.*
- Are unnecessarily unrestrictive and do not strike an appropriate balance between facilitating the administration of copyright and allowing flexibility in licensing as appropriate.*
- Do not allow adjustments to blanket licences in appropriate circumstances, including an appropriate adjustment to the fee.*
- Do not provide an effective alternative dispute resolution process to deal with pricing issues."*

Despite these statements the ACCC does find sufficient public benefit to re-authorise the APRA arrangements. The AHA has generally had a good relationship with APRA and would wish that to continue. The AHA agrees with the ACCC view but submits that the public benefits be improved to overcome the high level of detriments acknowledged by the ACCC and outlined above.

AHA Comments on the ACCC's proposed conditions for re-authorisation of APRA's arrangements:

At the outset the AHA submits that the Conditions should both minimise the public detriment and increase the public benefit. An exemption from the TPA that creates a monopoly should not be taken lightly and public benefit should be maximised and those who must deal with the monopoly should be safeguarded.

As can be expected the AHA is primarily concerned with the 'output' arrangements.

Condition C1

The AHA supports the proposed condition but is not in a position to suggest detailed rules. However it would welcome an opportunity to be able to comment on rules suggested by others and before the ACCC issues its final determination.

Condition C2

The AHA supports the proposed condition. The AHA does not support the changes to the ADR regime proposed by APRA. We are firmly of the view that the current regime should largely stay as it is, subject to the proposed condition C2. In particular, the AHA is of the view that APRA should always pay the reasonable costs of the ADR process.

Condition C3

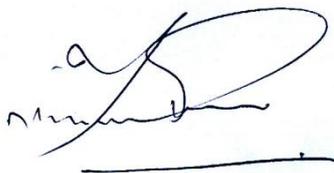
The AHA agrees with the proposed condition but suggests that a copy of the public version of the ADR report be sent to all that register an interest with APRA in receiving that report.

Length of the authorisation

The AHA agrees with the three-year authorisation proposed by the ACCC. Our view is that a re-authorisation of any longer than three years is not appropriate to the changing face of the industry. Further authorisations of monopolies should be for the shortest time necessary.

The AHA is pleased to provide further information in support of this submission if required. All enquiries should be directed to Mr Des Crowe, National Chief Executive Officer in our Canberra office by email to crowe@aha.org.au or by post or telephone using the details supplied above.

Yours sincerely



Tom McGuire
National President