

APRA SUBMISSIONS 12 MARCH 2010

Introduction

Thank you for the opportunity to provide detailed comments on the wording of the proposed conditions for APRA's authorisations.

As set out in APRA's submissions dated 8 February 2010, APRA has no comments in relation to proposed condition C3, has submissions and comments in relation to proposed condition C2, and has proposed wording for proposed condition C1.

APRA also has further submissions in relation to the requested authorisation for an amended ADR system, and length of authorisation.

APRA has reviewed the further submissions made by interested parties, and to the extent that the issues raised in those submissions are new issues or unrelated to the matters under consideration by the ACCC, does not respond. In particular, APRA notes that the submissions by FreeTV dated 9 March 2010 raise new issues that appear to be primarily directed towards current proceedings in the Copyright Tribunal in which APRA is not a party. It is APRA's view that the FreeTV proposals, if adopted by the ACCC, would interfere with the jurisdiction of the Copyright Tribunal. The comments made by FreeTV in relation to rights in "music" being granted by more than one collecting society reflect the structure of the *Copyright Act 1968* (and most copyright legislation worldwide). If the ACCC were to impose conditions on APRA that required it to take particular account of PPCA licence schemes, APRA's rights as a copyright owner would be affected to the detriment of APRA and its members, and the effect would be to discriminate against APRA with respect to its relationship with other societies.

1. **APRA must offer new streamlined licence-back arrangements for Members in certain circumstances (C1).**

APRA believes its licence-back requirements, as set out in Article 17(g), are not overly restrictive. In practice, APRA requires its members to provide the minimum amount of information necessary to identify the performances or communications the subject of the licence.

Attachment 1 CONFIDENTIAL comprises copies of forms submitted by members or completed by APRA staff in conference with APRA members in connection with actual licences-back.

APRA accepts that a person reading Article 17(g) without having actually approached APRA regarding licence-back might think that APRA required, for example, information regarding the dates and locations of communications from a website, where a licence-back had been obtained for a member's works to be communicated from that website. APRA believes this shows an overly technical approach to Article 17(g), which is not reflected in commercial reality. For APRA to require such information would be to vastly increase the administrative burden already placed on APRA by licence-back, and would be counterproductive to APRA's interests.

Nevertheless, APRA has attempted to propose changes to Article 17(g) that would clarify the information required by APRA for licence-back – see attachment 2.

Attachment 2 also contains a proposal for a reduced notice period for licence-back. The notice requirements for licence-back are difficult to predict for all uses, and are related to the licensing activities connected to the performance or communication the subject of the licence-back. APRA must receive sufficient notice of a licence-back to ensure

that appropriate licensing mechanisms are in place for the relevant performance. In some cases, this will mean that APRA does not license the performance at all. In other cases, APRA will need to negotiate alternative arrangements to the blanket licence to ensure that performances of other works are licensed, and that the directly licensed works are not included in the APRA licence. Of primary concern is that music users should not infringe.

APRA considers that for public performance, it requires two weeks' notice of the licence-back. This enables APRA to ensure that appropriate licensing arrangements are in place that take account of the direct licence, and also avoid the inefficiency of attempting to license a performance that is to be the subject of a direct licence. However, for live performances of a member's own works, APRA requires less notice – a live tour by singer songwriters is easier to identify in advance and is more predictably the subject of a licence-back than a performance of works by multiple writers. For those performances, performances by means of film, and for all communications (whether broadcast or online), APRA proposes to reduce the notice period to one week. This is also on the basis that the majority of cinemas and significant users of the communication right are already licensed by APRA and the risk of infringement is consequently lower.

APRA acknowledges that, without notice to APRA, some of its members may be directly licensing their works in the online environment and in doing so are consequently in technical legal breach of their APRA membership agreement. APRA believes that most of its members are well informed regarding the legal effect of their APRA membership. Whenever APRA is made aware of such instances, it liaises with the member and explains the legal position and the options available to the member. APRA is willing to provide improved information for APRA members and licensors on the legal implications of APRA's input and output arrangements and its policies with respect to common online activities. APRA also proposes to make its licence-back forms accessible to non-members on the APRA website, and to include comprehensive information about licence-back in its membership educational programs.

2. **That, as part of its dispute resolution process, APRA must require the independent expert to provide a written report to APRA stating whether APRA offered the user a genuine discount on the user's blanket licence to take into account any direct dealing between the user and the copyright owner; and whether any amendment could be made to the user's licence so that the licence provides a genuine and workable alternative to the user relying on a blanket licence (C2).**

APRA has no objection in principle to the independent expert being required to provide this report, if the user has requested an alternative form of licence or there are direct dealings or the potential for direct dealings. APRA acknowledges that not all users will be sufficiently aware of APRA's systems to directly request an alternative form of licence.

APRA believes the expert should be required to report on these matters only if the expert considers circumstances of the case indicate that the need for an alternative to the blanket licence is raised by the issues in dispute. APRA resolves most disputes with licensees by negotiation. The majority of disputes involve matters such as the number of attendees at a premises, or whether the use of music is featured or background. The availability or otherwise of an alternative to the blanket licence is simply not a factor in such disputes.

If the ACCC intends that the expert would be required in all circumstances to consider an alternative licence, it appears that the condition amounts to a de facto requirement for APRA to offer all users an alternative to the blanket licence, whether appropriate or not. This is an enormous task. Variations to the blanket licence require detailed reporting by licensees, and will require comprehensive assessment of the additional administrative costs incurred by APRA in connection with such a scheme. APRA would also need to ensure that such costs would not only be borne by those licensees who first requested such an alternative, if the licence scheme is to be applied across industry groups. If APRA is required to develop such licence schemes to offer to all licensees, it could take many years. APRA has previously provided the ACCC with information regarding the licence schemes operated by APRA, and the number of licensees with which APRA has agreements. APRA licensees include cinemas, television stations, radio stations, nightclubs, theatres, pubs, karaoke bars, digital music suppliers, ringtone operators, telecommunications companies, fitness centres; retail premises, sporting fixtures, educational institutions, and businesses using music on hold. If APRA were required to develop alternative licensing arrangements for each of these groups, it would need to negotiate and draft alternatives for each current scheme. It is likely that these negotiations would require some form of ADR, including multiple proceedings in the Copyright Tribunal. Once agreed or determined, each new licence scheme would need to be implemented, which would include negotiations with individual licensees. APRA would also need to consider its distribution arrangements for each new scheme. APRA does not believe that a suite of modified blanket licences can be negotiated and approved within the next three years, for all licensees.

The requirement for the expert to consider such alternative licences, even in the absence of any actual direct licences to the user, would add significantly to the cost of the expert determination, and to the time taken to resolve even simple disputes.

APRA notes the cinemas' acknowledgement that for a discounted cinemas licence to work, licensees would need to provide information to APRA to permit quantification of appropriate reductions and, where required, evidence as to rights directly held (par 15, cinemas' submission, 3 March 2010). APRA has concerns regarding whether cinemas would be able to provide such information in an accurate and timely manner, prior to the release of films in Australia. While APRA acknowledges the cinemas' view that there is little incentive for users to enter into direct deals if there is no commensurate reduction in the licence fee paid to APRA, it also needs to be acknowledged that the implementation and administration of a discounted blanket licence scheme for cinemas would involve introducing significant complexities and administrative costs to an otherwise relatively simple and efficient licence model. APRA often does not receive cue sheets for films until well after the release of the film. If a licence scheme is to apply that incorporates a discount from a blanket licence scheme, APRA would require cue sheet information from cinemas, as the calculation of any discount will inevitably involve consideration of the particular music not controlled by APRA in comparison with APRA controlled music in the film (for example, by reference to duration).

APRA proposes the following wording for the condition:

That, as part of its alternative dispute resolution process ... APRA must require any independent expert appointed to determine a dispute to provide a written report to APRA stating as applicable:

- **whether the user has obtained any direct licences from APRA members for the performances or communications the subject of the dispute.**

- **if so, whether, in the expert's opinion, APRA offered the user (being a licensee or potential licensee) a licence that reflects a genuine and workable commercial alternative to the user's blanket licence to take into account the direct dealing between the user and a copyright owner. In expressing this opinion, the expert must have regard to whether any increase in administrative costs, charges and expenses reflected in the licence offered are reasonable, having regard to the administrative costs to APRA of offering and providing the licence offered.**
 - **whether any amendments could be made to the user's licence (or if the user is not a licensee, to the blanket licence offered) so that the licence provides a genuine and workable alternative to the user relying on a blanket licence.**
3. **That APRA must provide the ACCC with annual reporting in relation to disputes notified to APRA under its alternative dispute resolution process (C3).**

APRA has no objection to this condition.

OTHER ISSUES IN DRAFT DETERMINATION:

4. **ADR System.**

APRA has submitted that two amendments to the ADR system approved by the Competition Tribunal should be authorised.

Costs of the expert

First, APRA feels strongly that disputes with major and well-resourced licensees should be treated differently from disputes with small businesses, in particular that APRA should not be responsible for all of the costs of the facilitator.

APRA has very few licensees who pay more than \$50,000 per annum in licence fees. Attachment 3 CONFIDENTIAL is a list of those of APRA's licensees that pay annual fees of \$50,000 or more. APRA notes that some of these individual licensees are controlled by single entities. APRA does not believe that it is appropriate that it should bear the entire cost of an expert used to determine disputes with such corporations. Having reviewed the list, APRA now proposes that the costs of expert determination where the annual licence fee exceeds \$50,000 (other than in the case of casual licences for single events, where APRA would continue to bear the expert's fees) should be borne equally by the parties or as directed by the expert.

APRA withdraws its request regarding offering mediation as an option for such licensees, as it considers it is open to the parties to provide for such an option contractually, provided the expert determination is an option for the licensee.

The identity of the expert

APRA has found it difficult to appoint former Federal Court judges to the role of expert. APRA proposes that the ADR process be amended to provide that the expert be a barrister with expertise in intellectual property, who has not been engaged to represent APRA or AMCOS in any legal proceedings or to give advice. APRA will offer users a choice between suitably qualified barristers, and if the user cannot choose, APRA will ask the Australian Commercial Disputes Centre to nominate a suitably qualified barrister.

Attachment 4 is an amended ADR policy submitted by APRA for authorisation.

5. **Length of Authorisation.**

APRA is disappointed that the ACCC has indicated an intention to make the authorisation for a period of three years only, in view of APRA's request for a six year term. APRA submits that the authorisation should be no shorter than previously granted, namely, for a period of four years. AIMIA also submit that the period of authorisation should not extend for a period longer than 4 years

The ACCC has given no reason for the shortened period of the authorisation proposed to be granted. APRA submits that there is nothing that would suggest it inappropriate to grant an authorisation that is no shorter than the authorisations previously granted – four years.

The previous authorisations have noted the possibility of technological developments occurring within a four year period that might mean that the market for performing rights is significantly altered. There is nothing in the submissions before the Tribunal that suggests that is the case here. In particular, no changes have been foreshadowed in relation to the administrative processes which APRA needs to undertake in order to verify use of copyright in particular cases.

The authorisation process is expensive and time consuming. In particular, it is very draining on internal management resources. In the absence of evidence of likely change (and noting in any event that the ACCC can revoke an authorisation if a material change in fact occurs), APRA submits the authorisation should be for a period of four years. APRA notes that a longer period is consistent with the majority of authorisations granted in the last 12 months.

(g) It is a pre-condition of the grant of a Licence Back that:

- (i) the purpose of the licence is to enable the member to grant a sub-licence of the Performing Right;
- (ii) the member provides the Association with ~~not less than 1 month's notice as set out on sub-paragraph (h)~~ (in a form reasonably determined by the Board from time to time). The notice must provide sufficient information to identify the works the subject of the licence, the licensee, and the scope of the licence, including (as appropriate): specify:
 1. the title/s of the relevant work or works;
 2. the name of the licensee and such other details as are reasonably necessary to identify whether a particular person has been granted a sub-licence;
 3. the term of the licence or if the licence is for particular performances only, such details regarding the date or dates of the performance as are reasonably necessary to identify the performances to which the sub-licence relates;
 4. the territory of the licence, or if the licence is for a public performance such details regarding the geographic location and venue of the performance as are reasonably necessary to identify whether the sub-licence extends to a particular area and venue;
 - 4-5. if the licence is for the performance of works by means of cinematograph film, the title of the film in which the work appears;
and
 6. where applicable, the broadcasting or on-line service and if the licence is restricted to particular programs or content segments, the program or content segment in respect of which the proposed sub-licence will be granted.

The notice ; and must contain:

1. where applicable, a signed consent to the proposed sub-licence and release and indemnity in a form reasonably required by the Board from time to time from all Interested Persons; and
2. and must be accompanied by:
 - a. an undertaking to pay reasonable costs to the Association, in accordance with the Board's published schedule of costs (if any), prior to the date of the first performance or the date on which the proposed sub-licence is to take effect; and
 - b. an undertaking to pay to the Association such further reasonable costs which may be actually incurred by the Association in connection with and/or arising out of the granting of the licence back to the member to the extent that such costs exceed the costs identified in the Board's published schedule;

(h) Notice

For live performances of the member's own works, performances by means of cinematograph films, and for all communications, the Association requires one week's notice. For all other public performances, the Association requires two weeks' notice.

ALTERNATIVE DISPUTE RESOLUTION AT APRA

From time to time, disputes arise between APRA and its licensees, or potential licensees.

The dispute might relate to the terms of the licence, whether a licence is required at all, or how much music is being played at the licensee's premises.

These disputes can nearly always be referred to the Copyright Tribunal or to the Federal Court to be resolved. APRA realises that the Copyright Tribunal and the Federal Court can be expensive and time consuming dispute resolution forums.

APRA has established a procedure to attempt to resolve disputes with licensees or potential licensees, which is cheaper and quicker than the Copyright Tribunal and the Federal Court. The process is called Expert Determination.

If you have a dispute with APRA regarding a licence or a proposed licence, you can refer the dispute to the Expert Determination procedure. The dispute will be determined quickly. If a licensing officer at APRA suggests that a dispute be referred to Expert Determination, you should seriously consider agreeing to the suggestion.

One of the issues which may be determined by the expert is the date from which any APRA licence may apply. The process is not intended to delay any obligation to obtain a licence.

If several licensees have similar substantive issues with APRA, APRA may suggest that the disputes be determined together. If the expert has previously determined a substantive issue and a similar issue arises at a later date, APRA may argue that the dispute resolution process should not apply.

The procedure for Expert Determination is as follows:

1. If during your negotiations with a licensing officer from APRA a dispute arises, either you or the licensing officer may suggest that the dispute be referred to Expert Determination. This should only occur if it seems unlikely that the dispute can be resolved by negotiation. If you are not already a licensee of APRA and you ask to have the dispute determined by an expert, APRA must agree. If you already have an APRA licence, you may be required to have the dispute referred to Expert Determination, under the terms of your licence.
2. Once you have agreed that the dispute should be referred to Expert Determination, APRA's licensing officer will refer the matter to APRA's ADR liaison officer. The liaison officer will take a detailed note of the matters in dispute, and will contact you to make arrangements for the Expert Determination.
3. Disputes will be determined by one of a panel of three independent experts. All members of the panel are former judges will be barristers with expertise in intellectual property matters, who have not been retained to advise APRA or to represent APRA in legal proceedings who have been trained in various methods of alternative dispute resolution. APRA will ask you to choose from three such barristers, and if you cannot choose, APRA will ask the Australian Commercial Disputes Centre to nominate a barrister with these qualifications.

4. On a date which is convenient to you, APRA and the independent expert will be appointed. The dispute will be dealt with at a venue which is as close to your place of business as possible (usually, the capital city in your state).

5. Before the date which has been set down for dealing with the dispute, you and APRA may submit any written statements or other documents which support your arguments relating to the dispute. These should be forwarded to the ADR liaison officer.

6. At the Expert Determination, you will be given an opportunity to present your arguments to the independent expert. APRA will also be given an opportunity to present its arguments. If both parties wish, they may have their solicitors present to assist them. If you agree to have a representation body appear on your behalf, you may.

7. The expert will then make a determination of the dispute. If either you or APRA is dissatisfied with the determination, the dispute may be referred to the Copyright Tribunal or the Federal Court (whichever is the appropriate body).

8. In most cases (including all casual licences), APRA will pay for the costs of the independent expert, including professional fees and travel expenses. Other than under casual licences, if your annual APRA licence fees are more than \$50,000, you and APRA will share the costs of the independent expert equally or as directed by the independent expert. The cost of the venue for the Expert Determination must be shared equally between the parties. You must pay your own costs associated with the determination.

If you would like any details about the process, please contact [*Person to be nominated by APRA*].