

1 November 2013

By E-Mail: adjudication@acc.gov.au

Dr Richard Chadwick
General Manager
Adjudication Branch
Australian Competition & Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Dear Dr Chadwick

**Submission in Response to Draft Determination
Application for Revocation and Substitution of Authorisations A91187-A91194 & A91211 by
the Australasian Performing Right Association Limited (APRA)**

About LPA

This submission is made by Live Performance Australia (LPA), the peak body for Australia's live performance industry. Established in 1917 and registered as an employers' organisation under the *Fair Work Act 2009* (Cth), LPA has over 390 members nationally. We represent producers, venues, music promoters, performing arts companies, festivals and industry suppliers such as ticketing companies and technical suppliers. Many of our Members are APRA licensees.

Submission

LPA agrees with the proposed conditions, particularly conditions C3 and C4, which directly address concerns raised by LPA in our submission in response to APRA's application for reauthorisation. We comment on each of the new conditions in turn below.

Condition C3: Transparency of Licence Fees

LPA has received consistent feedback during our ongoing Member consultation process that our Members find APRA's licence categories confusing. A plain English Guide that includes points (a)-(e) as outlined in the Draft Determination¹ should assist to clarify some of this confusion. However, we do not believe that the Guide should be developed by APRA in isolation, and suggest an additional element be added to the Condition requiring APRA to consult with licensees and relevant industry associations like LPA on the "user friendliness" of the Guide. LPA would be happy to assist

¹ p 61

with this task to ensure that the Guide achieves its purpose of making APRA's licence regime more transparent for current and prospective licensees.

We support the requirements for a copy of the final Guide to be provided to new or renewing licensees and for the APRA homepage to include a prominently displayed link to the guide. This link should include a plain English title like "Guide to APRA Licenses". In the interests of reducing paper wastage, LPA would be strongly supportive of the Guide being provided by email attachment or weblink, not in hard copy format.

We note that APRA will also be required to publish an updated version of the Guide by 30 June each year, and believe that the provision of the new version should also be made electronically wherever possible. We also request that an additional requirement be added that relevant industry associations such as LPA be informed when the Guide is updated each year, not just licensees.

Condition C4: Opt Out and Licence Back Provisions

We note the ACCC's finding that there has been no notable increase in the usage of opt out or licence back since improvements were made to the arrangements under the 2012 authorisation. As stated in our submission to APRA's Reauthorisation Application, there has been a low take up by LPA licensee holders of the opt out and licence options. Our ongoing Member consultation process around APRA subsequent to the preparation of our previous submission has further confirmed a poor level of awareness and understanding of these options.

We support the scope of C4, in particular the requirement for APRA to produce a comprehensive plain English Guide which explains the situations where using opt out and licence back provisions might be of benefit to APRA members and licensees; the steps involved in applying to make use of the provisions and examples of how the provisions have been used to date. As with Condition C3, we do not believe that the Guide should be developed by APRA in isolation, and suggest an additional element be added to the Condition requiring APRA to consult with licensees and relevant industry associations, like LPA, on the "user friendliness" of the Guide.

We are also in favour of the requirement for this information to be supported by an education campaign, although the exact format of the campaign requires careful consideration of the target audience(s). As LPA Members are time poor, and may also be reluctant to engage face to face with APRA, we recommend that any seminar be offered in a webinar format that can be accessed "on demand", perhaps augmented by semi-regular online discussion sessions where licensees or members can raise specific questions about the webinar content or plain English Guides.

Condition C5: Alternative Dispute Resolution

LPA notes that C5 will “require APRA to implement a revised ADR scheme” and that the ACCC invites interested parties to comment on the proposed features of that scheme before the ACCC finalises the wording of the proposed condition.²

We note that APRA has advised the ACCC that it will engage a third party expert in dispute resolution to advise APRA in the design of a bespoke ADR system.³ LPA will be meeting with the independent consultant engaged by APRA shortly after the due date for Draft Determination responses, and we may be in a better position to comment on the proposed features of the scheme after that meeting. We can make some preliminary comments now.

We are not aware of any cases of an LPA Member utilising APRA’s ADR process to date, and hence we did not make reference to it in our submission in response to APRA’s Reauthorisation. However, our Members are now more familiar with APRA’s suite of licences and dispute resolution procedures as a result of our recent consultations about the proposed tariff increase to the Concert Promoters Licence Fee scheme.

The Copyright Tribunal is an extremely cost prohibitive mechanism for the resolution of disputes, and places a significant onus on copyright users. A low cost and accessible alternative for smaller disputes is therefore imperative. APRA’s existing “expert determination” ADR process is still very legalistic in nature, given that the expert must be a barrister with expertise in intellectual property matters, a former judge trained in ADR methods or someone nominated by the Australian Commercial Disputes Centre⁴. We support the introduction of a tiered mechanism which allows for less formal consideration of complaints or disputes in the first instance, but provides a path for disputes to be handled and resolved by an external party (who does not need to be a barrister or a judge). We strongly support the appointment of an independent manager of the ADR process, and for this person, the tier 2 decision maker and the tier 3 expert to be completely independent of APRA. It is imperative that the the new ADR process be both transparent and independent.

Once the details of the new ADR process are finalised, LPA strongly supports the requirement for APRA to educate licensees, potential licensees and industry bodies about the operation of the ADR process by preparing and publishing a plain English Guide to the process. As stated above, we are being consulted about the structure of the new ADR scheme, and would also be happy to assist APRA by reviewing the “user friendliness” of the plain English Guide. Lastly, we agree the new ADR process should be made fully available from 1 January 2014.

² ACCC Draft Determination, p 63

³ ACCC Draft Determination, point 291, p 48

⁴ ACCC Draft Determination, point 69, p 12

Proposed Additional Conditions – Transparency

Subsequent to making our submission to the ACCC on 24 May 2012, LPA became aware that APRA licensing representatives work on commission. We raised this matter with the Code Reviewer in our submission to the annual review of the Code of Conduct for Copyright Collection Societies on 31 July 2013, and APRA confirmed “the inclusion of a small commission component in the remuneration packages of certain licensing representatives” in its response to our submission.⁵ The commission component in remuneration package has the potential to create an incentive for licensing representatives to steer licensees towards licences with a higher tariff. LPA believes that an additional condition should be added to APRA re-authorisation requiring APRA’s licensing representatives giving advice to current or prospective licensees to declare that they receive a commission from licence fees collected.

LPA is also of the view that APRA should be more transparent about the license fees collected under each license category – rather than just reporting revenue in the broad categories of Broadcasting, General Public Performance, Live Events, Digital and Online, Cinema and Education. LPA requests that an additional condition be added to APRA’s reauthorisation requiring them to declare their annual revenue from each license category – either in the Year in Review document or a separate financial report.

Length of Authorisation

We strongly support the decision of the ACCC to have regard to “the level of concern raised by interested parties and the potential for the arrangements to generate significant public detriment”⁶ and find it appropriate to review the authorisation earlier than the six years sought by APRA.

LPA suggested that APRA should only be reauthorised for one year, and we remain concerned about APRA being authorised for a period of three years. As stated in our response regarding the planned Interim Reauthorisation of APRA on 22 October 2013, a three year authorisation period does not provide a timely opportunity for stakeholders to comment on the efficacy of the plain English Guides and education campaign required under C3 and C4. If the ACCC is committed to a three year authorisation, then it is even more imperative that our proposed conditions that APRA be required to consult on the development of the plain English Guides under C3,C4 and C5 be accepted and added to wording of each condition.

⁵ Brett Cottle to The Hon Kevin Lindgren AM, Response to submission from Live Performance Australia dated 31.07.13, Section C, point 3.

⁶ ACCC Draft Determination, p iii

ACCC Guidelines to Assist the Copyright Tribunal in the Determination of Copyright Remuneration

LPA became aware from reading the Draft Determination that the Copyright Act was amended in 2006 to provide that the Copyright Tribunal must, if requested by a party to proceedings concerning a voluntary licence scheme, consider relevant guidelines issued by the ACCC.⁷ We have now had the opportunity to review the 2006 consultation draft of the ACCC Guidelines, but are aware that they were never finalised. We also note with interest the ACCC view that once finalised, the ACCC Copyright Licence Guidelines may aid licence negotiations.⁸ We are advised that the Copyright Tribunal sits relatively infrequently as matters are not referred there often, and are of the view that any guidance which the ACCC can provide which may assist the Tribunal to determine the appropriate remuneration for the use of copyright material, could be very valuable to the licence negotiation process or matters before the Tribunal. It is not clear from the Draft Determination when such Guidance might be finalised, and given the significant lapse of time since the 2006 consultation draft phase, it is LPA's view that this Guidance should be finalised sooner rather than later.

Balance of Public Benefit and Detriment

LPA agrees with the conclusion of the ACCC that APRA's arrangements "continue to generate a significant level of public detriment compared to the likely alternative of a single collecting society with non-exclusive licensing from composers and alternative use licensing arrangements."⁹ We are encouraged by the ACCC's rigorous assessment of the public benefits and detriments of APRA's present arrangements, and the recognition that APRA's opt out and licence back arrangements need to be better understood and more widely utilised to better balance the present detriments. The reauthorisation process is an important regular assessment of APRA's role and power in the market and we hope that APRA and licensees alike will continue to be positively impacted by the ACCC's analysis and the reauthorisation conditions that result.

Thank you for inviting LPA to make a submission on this important matter for our industry. Please contact me as per below should you require clarification of any matter raised herein.

⁷ ACCC Draft Determination, point 46, p 8

⁸ ACCC Draft Determination, point 274, p 46

⁹ ACCC Draft Determination, point 353, p 57

Yours sincerely

A handwritten signature in black ink, appearing to read 'E. Richardson', with a long horizontal flourish extending to the right.

Evelyn Richardson

Chief Executive

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