

APRA SUBMISSIONS IN RESPONSE TO DRAFT DETERMINATION

1. Introduction

- 1.1 APRA has considered in detail the Draft Determination released on 15 October 2013. APRA respectfully acknowledges the thoroughness with which all submissions made to the ACCC have been considered.
- 1.2 There are a number of matters raised in the Draft Determination that relate to matters to which the ACCC expects to have regard when APRA next applies for renewal of its authorisations. While APRA does not necessarily agree that these matters are or will be relevant to APRA's anticipated future applications, APRA considers that the time to engage with the ACCC in relation to those matters is at the time of making a new application for revocation and substitution, with the benefit of evidence from the three years of operating under the new conditions of the proposed authorisations.
- 1.3 Accordingly, in this document APRA intends to make submissions only in relation to the proposed conditions. This approach is intended as a pragmatic one that will lead to the early finalisation of the authorisation process, and should not be taken as agreement by APRA to all of the matters discussed in the Draft Determination.

2. Third party submissions

- 2.1 APRA notes that a number of submissions have been received from interested third parties in response to the Draft Determination. The essence of all of these submissions is that APRA should be granted an interim authorisation until 30 June 2014 (distinct from the interim authorisation that has already been granted), but that the documents (such as the plain English guides) required to be created under the proposed conditions should be completed by 15 April 2014. The purpose of this interim authorisation would be to ensure that the implementation of the additional conditions referred to in the Draft Determination was complete and had the desired effect.
- 2.2 APRA understands that the details of some of the proposed conditions require certainty before the conditions can be implemented and compliance with them monitored. APRA hopes that the submissions in this document will go a long way towards achieving that certainty. APRA has no objection to the delay of the final Determination pending the clarification of the language of these conditions.
- 2.3 However, APRA strongly objects to the suggestion that an interim authorisation could be granted incorporating the new conditions as finalised, with the interim status of the authorisation being a mechanism to monitor compliance with a view to altering the conditions if interested parties are not satisfied that the conditions have been complied with, or that the conditions do not achieve their desired effect.
- 2.4 APRA also does not accept that interested parties should have the opportunity to have input into the form of APRA's plain English guides and other materials, other than to the extent that the content of the guides is set out in the conditions themselves.
- 2.5 APRA submits that if implemented, the extended "interim" authorisation that has been suggested by some interested parties would in fact amount to a six-month authorisation, and would effectively require APRA to undertake the renewal process immediately. The intention of the conditional authorisation is that APRA has the period of the authorisation to operate under the new conditions, and the ACCC will apply the usual tests at the end of that period after receipt of applications for revocation and

substitution. The ACCC also has the power to revoke the authorisations for breach or in changed circumstances.

- 2.6 During the course of the application process, APRA submitted that the authorisations should be granted for a period of six years. Most of the interested third parties submitted that the authorisation should be granted for a much shorter period. Having considered those submissions, the ACCC has determined that a period of three years is appropriate.
- 2.7 APRA submits that it should have the benefit of the full period of the authorisation determined by the ACCC (that is, three years) to offer its changed arrangements, so that their impact on APRA's operations can be reviewed at the end of that three year period.

3. Condition C1

This condition is identical to the existing C 1 of APRA's 2010 authorisations. APRA has no comments to make regarding this condition.

4. Condition C2

This condition is identical to the existing C 2 of APRA's 2010 authorisations. APRA has no comments to make regarding this condition.

5. Condition C3 – Transparency of licence fees

- 5.1 APRA understands the rationale for the imposition of this condition, and has no substantive comments.
- 5.2 APRA has already made all of its general public performance licence schemes available on the website at <http://www.apra-amcos.com.au/musicconsumers/findalicensetosuityourneeds.aspx>. APRA has also put a link to its Alternative Dispute Resolution procedures on the homepage of its website under the "Music Consumers" section, at <http://www.apra-amcos.com.au/default.aspx>. APRA has also made international benchmarking information available on its website, under "about" – "About APRA|AMCOS" at <http://www.apra-amcos.com.au/about/aboutapraamcos.aspx>. APRA submits that these actions will increase transparency during the six-month period that APRA has to implement Condition C3.
- 5.3 In relation to sub-paragraph (e) of this condition, APRA seeks to clarify that its licence fees under general public performance licence schemes are not negotiable. APRA does not negotiate the licence fee base (such as the per device or per person amount, or the percentage of relevant revenue that applies) with any licensee. APRA does meet with licensees to discuss the variables that apply to licence fee calculation, such as the annual number of attendees, or the relevant number of screens at a particular premises, however these are matters of fact not properly the subject of negotiation. This process is more properly described as verification through discussion.
- 5.4 Accordingly, APRA submits that Condition C3e should be amended to read: "*e. Guidance on how APRA will work with you to verify the variables used in calculating your licence fees*", and a new sub-paragraph (h) should be added to read: "*h. A statement that clearly sets out that, after initial stakeholder consultation and implementation of its public performance licence schemes, APRA does not negotiate*

the licence fees under those public performance licence schemes with individual licensees”.

6. Condition C4 – Comprehensive plain English guide and education campaign for the opt out and licence back provisions

- 6.1 APRA understands the rationale for the imposition of this condition, and has only a small number of comments in relation to its terms.
- 6.2 First, APRA submits that the timeframe for the implementation of this condition should be six months from the date of authorisation. If APRA is to ensure that the guide produced under this Condition C4 is substantively and stylistically consistent with its plain English guide to licences under Condition C3, it is preferable that the documents be produced concurrently. It is APRA’s experience that such documents can take a considerable period of time to finalise, with the assistance of experts in plain English drafting.
- 6.3 APRA has already taken steps to ensure that information about opt out and licence back are available through a link on the homepage of its website under the “Music Creators” section, headed “Dealing directly with copyright owners.” The information can be seen at <http://www.apra-amcos.com.au/MusicConsumers/Dealingdirectlywithcopyrightowners.aspx>. This information also contains a link to the information provided to members (under “Managing your rights”, at <http://www.apra-amcos.com.au/MusicCreators/ManagingYourRights.aspx>), which contains links to the relevant forms. APRA submits that these changes to the website should give the ACCC reassurance that music users have access to the relevant information during the period that APRA requires to finalise the documentation required by Condition C4, such that a six month period is acceptable.
- 6.4 In relation to sub-paragraph (b), APRA does not send renewal correspondence to members. APRA communicates regularly with its members through its e-newsletter Antenna which is published every 2 months and its monthly email update Aprap. APRA submits that Condition C4b should be amended to read: “*...in renewal correspondence sent to licensees each year, and in at least one edition of each of its regular member publications Antenna and Aprap each year, outlining.....*”.

7. Condition C5 – Alternative Dispute Resolution

- 7.1 APRA has engaged Resolve Advisors to design an improved ADR system for all disputes between APRA and its licensees and potential licensees; and between APRA and its members. The design process has commenced, initially in consultation with APRA, its licensees and their representative bodies.
- 7.2 A system for members will follow. After initial consultations with APRA, Resolve Advisors has recommended that the ADR system be designed and implemented insofar as it applies to disputes between APRA and its licensees, before work commences on that part of the system that will deal with disputes between APRA and its members.
- 7.3 Resolve Advisors has already commenced the process of consultation with external licensee stakeholders, including the AHA and LPA, with the expectation that the design and initial implementation of the system will be complete by the end of February 2014. This will not include that part of the system related to disputes with members, which will be designed and implemented by 30 June 2014.

- 7.4 Resolve Advisors has asked to meet with the ACCC to discuss the precise wording of Condition C5, taking into account Resolve Advisors' expertise and the early feedback received from external stakeholders.
- 7.5 In relation to some specific key elements of the ADR system as set out in the Draft Determination under Condition C5, APRA submits:
- (a) a three tiered mechanism, including a "small claims" element is consistent with APRA's expectations of the ADR system the subject of the current consultations;
 - (b) the requirement that the system be managed by an independent manager would be satisfied if the system were to be managed by an ADR expert such as Resolve Advisors, whose fees would at least in large part be paid by APRA, provided the system itself were external to and independent of APRA (that is, any electronic resources would be located outside of APRA, and the system would not be managed by APRA staff); and
 - (c) it is unclear to APRA what is meant by an "independent body". APRA understands that there is no independent peak ADR body that offers responsive case management systems. APRA is willing to engage external dispute resolution advisors to manage the ADR process (for example, on a three year contract to be reviewed at the end of the term).
- 7.6 As noted above, APRA has asked Resolve Advisors to consult directly with the ACCC in relation to specific aspects of the wording of Condition C5, and in relation to the design of the system. APRA expects that these consultations will take into account matters raised by APRA and by external stakeholders. APRA respectfully asks the ACCC to consider any submissions made by Resolve Advisors in this regard.
- 7.7 APRA would like an opportunity to make full submissions, including regarding any fees to be attached to the ADR process, when a full design structure is proposed after the consultation process has been completed.
- 7.8 APRA submits that a more realistic timeframe for the system to be fully implemented (including as it relates to disputes with members) would be by 30 June 2014. APRA would be happy to report to the ACCC at regular intervals during that six month period as to the progress of the implementation.