Association of Liquor Licensees Melbourne

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29 November 2013

Dr Richard Chadwick
General Manager Adjudication Branch
Australian Competition & Consumer Commission

Dear Mr Chadwick,

RE: Australasian Performing Right Association Ltd application for revocation of authorisations A91187-A91194 & A91211 and substitution of new authorisations A91367-A91375 – interested party consultation

Please find following our further submission to ACCC in response to the ACCC Draft Determination dated 15th October 2013, and we also thank the Commission for permitting us to attend the conference held on 8 November 2013.

We remain of the opinion that APRA's monopoly power, and lack of competition resulting from this monopoly, provides a framework for APRA to exploit their dominant position.

It enables APRA to create licenses and apply license fees that meet their primary objective, which according to their annual reports over many years is to ***"Increase royalty distributions to members",*** not to set fees at affordable and sustainable levels.

As a result of this, prices paid by Australian businesses and Australian consumers, are excessively high when compared to APRA's overseas affiliates.

In our submission, dated 22 May 2013, we gave an example where a song by Swedish group ABBA, would currently attract fees of $0.78c in Australia, but only about $0.05c in the USA and $0.12c in the UK, and $0.13 in Ireland.

This disparity of license fees for the same product, can only be as a result of market dominance and lack of competition.

In Paragraph 92 of your Draft Determination, APRA claims that the current arrangement ***"does not lead to prices impermissibly above competitive levels"***. This statement by APRA is without foundation if the fees levied in Australia are 500 to 1000% higher than APRA's overseas affiliates. We therefore dispute this claim.

I would like to provide an example of how the implementation of new licenses can be introduced purely to maximise revenues.

APRA's fee for a live concert is based on a percentage of the door gross, currently 1.5%. This works out to $1,500 on $100,000 ticket sales. However where a DJ plays records, the applicable fee is based on an amount per person, not a percentage of the door gross as is the case with live music. Currently the rate is $0.78c per person, and increasing to $1.05. On a $15 entry fee, this works out to 5.2% and 7.0% of the door gross respectively, then increasing by CPI, noting that the PPCA rate, which APRA opportunistically adopted, is currently $1.22 per person. Combining both PPCA and APRA is $2 per person, or 13.3% of entry fees in the above example, compared to 1.5% for a live concert.

This difference between the live concert rate of 1.5% and night club rate of 5.2%/7.0% in the above example, clearly demonstrates APRA's preparedness to implement tariffs using differing calculation methods with the aim of maximising revenues.

Paragraph 67 of your Draft Determination acknowledges this, where it states that the different licensing schemes allow APRA to "**price discriminate between users".** The ALLM fully supports this view.

In our submission, we also suggested that ACCC look at the concept of **Parallel Importing of Music Copyright,** which would enable Australian businesses to purchase their copyright requirements from any of the overseas collection societies, such as BMI in the USA, PRS in the UK or IMRO in Ireland.

We understand the ACCC has previously dealt with parallel importing matters in a Federal Court case in 2003 against Universal Music which revolved around the importation of CD sound recordings by an Australian business from an authorised overseas distributor. Our understanding of the court findings in this case was that parallel importing was legal because the goods purchased were 'non-infringing' copies. That is, they were purchased by an overseas distributor authorised to sell those goods.

We are basically requesting the same outcome. That is, that we should be entitled to purchase 'non-infringing' music copyright from any overseas supplier.

ALLM believes it would be as simple as finding an appropriate license, such as music to accompany dancing which would be a generic license, applying for the license via an application form, and paying the appropriate fee.

Local licensees would only need to provide APRA with a copy of the license or receipt issued by an overseas supplier, to satisfy themselves that a legitimate license for that category of copyright was held by the licensee.

If APRA believe their tariffs are not impermissibly above competitive levels, ie they offer competitive tariffs, then even if parallel importing was permitted, one would expect local licensees would remain with them, which would negate any objection APRA might have to the concept of parallel importing.

In a speech to the United Nations Regional Seminar on Competition Law and Policy for Asia-Pacific, Parallel Imports and Intellectual Property Restraints, in India on 14th April 2000, headed "The Australian Competition and Consumer Commission's Perspective", the ACCC Commissioner, Mr Ross Jones, in the section headed *Arguments Against Parallel Importing,* listed three main arguments against. That is, to allow Parallel Importing would;

1. Permit free riding on authorised dealers sales promotions;
2. Increase likelihood of piracy;
3. Lead to inconsistent product quality.

We would respectfully argue that none of the above main impediments would be impacted if parallel importing was permitted.

For parallel importing of music to work, it would require an overseas collection agency to provide the necessary license. This may not be readily possible if all of APRA's affiliates are members CISAC (refer Section 87 of your Draft Determination) who provide exclusivity on a territorial basis, effectively making themselves a cartel.

Due to the relationship between Australian and Global Collection agencies, the opportunity for consumers to acquire licenses from foreign agency may prove difficult or be non-existent.

We therefore urge the ACCC to provide advice on the legality of Parallel Importing of music copyright and advise if Free Trade Agreements, if they exist with an overseas country such as the USA, can be relied on to enable parallel importing to occur free of the restraints of these cartel like organisations.

To enable parallel importing of music copyright would enable competition to occur at an international level, providing APRA and its affiliates do not collude to set standard prices.

It is the belief of our organisation and our members that if this price discrimination issue was resolved, and license fees set by APRA were competitive by international standards, we believe that the relationship between APRA and its licensees would be far more harmonious and with far less angst during the reauthorisation process.

The large number of submission received by the ACCC in this matter is a clear indication that a major problem exists which centres mainly on pricing and not on peripheral issues such as plain English guides and dispute resolution.

Thank you for opportunity to put our case forward and look forward to your responses to our queries.

Yours Sincerely

Vernon Chalker
President
Association of Liquor Licensees Melbourne