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Ms Tess Macrae
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BY EMAIL

Dear Ms Macrae

AUTHORISATION A91367 – A91375 SUBMITTED BY AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED – FURTHER INFORMATION

We refer to your email dated 25 November 2013 requesting further information arising from submissions and the Pre-Determination Conference held on 8 November 2013.

1. Plain English guidelines

1.1 A number of interested third parties have expressed the view that APRA should be required, as a condition of authorisation, to consult with third parties regarding the content of the plain English guidelines to be produced pursuant to proposed conditions C3 and C4. APRA does not agree that this is an appropriate condition to be imposed on APRA, for a number of reasons. However, as stated by Mr Cottle during the course of the conference, APRA is willing and intends to engage with interested third parties during the course of development of the guidelines.

1.2 APRA believes a condition imposing a requirement to consult regarding the content or form of the guidelines is problematic and inappropriate for the following reasons:

(a) Conditions need to be able to be complied with, and certainty of language is essential. "Consultation" encompasses a broad range of activities. Would APRA be required to circulate drafts? To meet with licensees? Would those consulted with have a right of approval over materials? What if different licensees expressed different views? What if the advice of third party experts was contrary to the views of licensees?

(b) APRA has some 80,000 licensees. Some are members of representative bodies, other are not. It would be onerous indeed if APRA were required to consult with all licensees. The AHA and the LPA have been vocal participants during this authorisation process, but they are by no means representative of APRA's licensee body. APRA also licenses thousands of retailers (ranging from large corporations to sole traders), professional services organisations, schools, dance schools, local councils – all of whom will have different capacities to consult, and different interests.

(c) The drafting of plain English materials is a task for communications experts. APRA understands from the ACCC the types of information that will need to be included in the guidelines (for example, transparent comparisons of all licence categories, and worked examples of licence fee calculations). APRA wants to avoid the drafting of the guidelines by committee, particularly a committee consisting only of vocal licensee representative bodies that are actively involved in negotiating new licence schemes with APRA. APRA hopes that the plain English guidelines will be a valuable resource for the whole licensee body, not documents that are used as negotiating tools in the development of particular licence schemes.

1.3 APRA proposes to engage a third party expert in plain English drafting to develop the guidelines, in conjunction with senior APRA management.

1.4 APRA proposes to publish the guidelines in draft form on its website, and invite comment from any interested parties. APRA proposes to notify those representative bodies of which it is aware, that the materials are available for comment. APRA will consider any comments received, and take those into account on the advice of its communications expert. This process will be commenced in sufficient time to allow third parties to consider the draft materials and make comments, so that the materials can be revised and finalised by 30 June 2014.

1.5 APRA confirms that the guidelines will be finalised and published by 30 June 2104.

2. ADR

APRA confirms that the revised ADR scheme will be finalised and implemented (including for disputes with members) by 30 June 2014.

3. Comparisons with overseas licence schemes

3.1 The ACCC has asked for more detailed information regarding this issue, in particular regarding the differences between the rates offered in Australia and overseas.

3.2 APRA agrees that when valuing music, it is relevant for a collecting society or the Copyright Tribunal to have regard to the rates offered by the society's international affiliates. Generally, in matters where APRA has been before the Tribunal, it has proffered evidence of overseas rates where possible. The Tribunal has, as a general proposition, considered those rates but has not found them to be determinative. Ultimately, the rates payable for the public

performance of music in Australia need to be determined in the context of the relevant Australian market.

3.3 Consideration given to international rates is always qualified. In *APRA; re Australian Broadcasting Corporation* (1985) 5 IPR 449, the Tribunal noted that the overseas material in evidence had been of assistance, despite differences between the Australian circumstances and those in the other countries (at 466). In *Fair Fitness Music Association v Australasian Performing Right Association Ltd (1998) 43 IPR 67* at 72, the Tribunal noted that, despite the variation in overseas rates, the rate payable under the licensing scheme considered in that case was broadly similar in effect to rates applying in comparable countries, such as the United States. In *APRA v Federation of Australian Radio Broadcasters Limited* [1999] ACopyT 4, the Tribunal found that "a broad comparison may provide a helpful pointer to what may be reasonable", but accepted that "precise comparisons are difficult." Difficulties in overseas comparisons were also noted by the Tribunal in *Reference by Australasian Performing Right Association under s 154 of the Copyright Act 1968* [1992] ACopyT 2 at 268, where the Tribunal stated:

In the course of our review of the evidence we were taken to material giving some information about what currently is charged for this type of use in the United Kingdom, Canada, the United States and South Africa. In some cases gross revenue is used as the base; in others it is not. Comparisons are very difficult to draw. The evidence does not enable us to be certain that the use is substantially similar to the use in question here. There are difficulties in selecting appropriate exchange rates and also in drawing comparisons when one is uncertain of the comparative purchasing power of money in different countries. And there is the fact that the existence of a rate elsewhere does not of itself establish that it is inherently correct. To rely on it as a benchmark may be productive of error.

3.4 Overseas rates may not always be directly comparable to rates offered by APRA, for a number of reasons:

(a) not all collecting societies have the same structure as APRA. For example, in many European territories the performing right society also controls mechanical (reproduction) rights and the rate represents both licences;

(b) in the United States, there are three collecting societies, and licensees require licences from each society if they want comprehensive coverage. It is therefore misleading to look at the rates offered by a single society;

(c) copyright laws differ from territory to territory. For example, in the United States, societies do not license the performance of music contained in films at cinemas, nor do they license the communication right that is exercised under Australian law during the delivery of a digital download;

(d) different societies use different bases for calculating licence fees for the same use of music;

(e) exchange rates are capricious, which can mean that what is a comparable rate by international standards might instantaneously cease to be so;

(f) it is not always clear whether a published rate is inclusive or exclusive of GST equivalent taxes, nor what the amount of that tax might be;

(g) not all societies publish their licences in English, and of those societies that do, the blanket licences that are offered differ from industry to industry, and the societies do not provide a uniform array of licences. For example, IMRO in Ireland offers specific licences for coaches and minibuses, whereas PRS for Music in the United Kingdom and APRA do not; PRS for Music offers specific licences for hair or beauty salons, which IMRO and APRA do not.

3.5 The information in the following paragraphs has been obtained from publicly available material, and is APRA's understanding of the way certain overseas licences operate. It is not information that has been provided directly to APRA by its sister societies.

3.6 In relation to nightclubs, effective 1 November 2013, APRA's GFN licence rate is 78c (including GST) per person admitted to the venue in the licence year. It is difficult to compare APRA's nightclub rate with that of other societies:

(a) IMRO has different rates depending on whether the performances were declared and licensed prior to the performance. It has different rate brackets, contingent on the licensed capacity of the venue, such that the licensee pays more per person attending a licensed capacity not exceeding 100 than per person attending one not exceeding 200, and so on. Also, whereas APRA charges per person over a given year, IMRO charges per session;

(b) in Canada, SOCAN determines its nightclub tariff by reference to the venue's capacity, the number of days the venue trades per week and the number of months the venue trades per year. Therefore no meaningful comparison may be made between the rates charged by APRA and those charged by IMRO and SOCAN, such that one could be said to be generally more expensive than the other;

(c) in the United Kingdom, effective 1 August 2013, the annual licence fee payable for performance of PRS for Music's repertoire covered by its nightclub tariff is £97.67 (previous year £94.83) for each unit of 1,000 persons (or part thereof) admitted to the establishment during a licence year. Again, this rate is set using a different methodology from the one used by APRA; however, a more meaningful comparison can be made with PRS for Music, than with IMRO or SOCAN. As at 29 November 2013, £97.67 is the equivalent of AU$175.39, which sum APRA would charge for approximately 225 patrons and not 1000. Leaving aside that APRA charges per actual person and not per thousand people or part thereof, which does change the analysis, it could be said that on those figures PRS for Music charges less than a quarter of what APRA charges for recorded music for dance use in nightclubs. Of course, the Australian dollar is high against the Pound by historical standards,

which means that the discrepancy might have been less pronounced in other years;

(d) however ASCAP, the leading performing right collecting society in the United States, charges US$1.89 per person, which is considerably higher than the AU$0.78 (including GST) charged by APRA. This returns our attention to the question of making an appropriate comparison between markets. That is, could it be said that the nightclub industry in Australia resembles that of the United Kingdom any more than that of the United States, such that it should mimic the licence schemes of one or the other?

(e) The question of international comparisons with respect to nightclubs is, however, merely academic. The issue has been considered at great length by the Tribunal, in *Phonographic Performance Company of Australia Limited under section 154(1) of the Copyright Act 1968* [2010] ACopyT 1. In that case PPCA referred its nightclub licence scheme to the Tribunal, which, in APRA's absence, considered the amount of money consumers are willing to spend on recorded music at nightclubs. The Tribunal accepted expert evidence that the estimated willingness of patrons to pay for music at a nightclub per night was $6.97. That sum was discounted 40% to account for evidence of non-protected recorded music; competition of other late night venues providing live or recorded music; and, actual patronage on the day or night being below or above capacity. That discounted sum, $4.19, was then distributed into three shares: 50% to the operator of the venue, and 25% each to APRA and PPCA. That is, the Tribunal examined the evidence and determined that it was appropriate for APRA to charge venues $1.05 per patron.

3.7 In relation to background music, APRA offers three distinct types of licences: (1) for retail and other businesses (BG); (2) for restaurants or cafes (BD); and (3) for hotels, motels, clubs, taverns or bars (BH). The three licences reflect the disparity between the appropriateness of businesses in certain industries to pay for the right to perform music in public. Applying the same method as the Tribunal, in examining the willingness of patrons to pay for music, APRA considers that the public's patronage of one type of business depends more heavily on the performance of music – that is, the right to perform music is of more commercial value for such a business – than it would for another type of business. Background music is arguably a less essential product for a retail store than for a restaurant, for which background music may in turn be a less essential product than for, say, a bar. Accordingly there are slightly different rates for each category of businesses. The rate is also dependent on the type and number of devices by which the music is performed, and on the size of the premises. Again, this is not readily comparable with the rates offered by other societies:

(a) SOCAN's background music licence applies to retail stores, and "eating/drinking establishments" alike. Its rate is determined primarily by the size of the premises. Its licensees pay CA$1.23 (AU$1.27) per square metre of the premises, with a minimum of CA$94.51 (AU$98.24) + taxes for each room where music is played. Because the equations are different, and the licences are of varied ambits, it is difficult to compare the two rates meaningfully. However, if we take for

example a retail store that is 140m^2, and in which a radio is played, APRA would charge AU$72.77 (including GST) per year and SOCAN would charge CA$184.50 (AU$191.77). If we were dealing with a retail store that was 4,000m^2, and with more than 5 devices, APRA would charge AU$1940.53 per year, and SOCAN would charge CA$4,920.00 ($5113.95). APRA would charge a restaurant or café that occupied 200m^2 AU$127.25 (including GST) per year, compared to SOCAN's CA$246.00 (AU$255.70). But it would be possible to find certain circumstances where APRA would be more expensive than SOCAN: APRA would license a bar that is 50m^2 but with a video jukebox for AU$385.90 (including GST), compared to SOCAN's CA$94.51 (AU$98.24). This is all to say that while SOCAN generally charges more for background music than APRA, it depends on the circumstances of the licensee; and

(b) IMRO's licence applies to performances in bars, lounges, cabaret rooms and similar premises but does not apply to such premises when they form part of a hotel, disco or restaurant. As with nightclubs, IMRO charges a different rate for background music performances that are declared and licensed from performances that are not. IMRO, like APRA, charges different rates depending on the devices used at the venue by which the music is performed. For background music – which by IMRO's definition, includes music by way of CD player, but does not include performances by way of television, video or radio – an establishment would have to pay €192.54 (AU$289.20) per year if declared and licensed, and 50% more if not. In many instances, this would be far more than what APRA would charge.

3.8 The rates of APRA's live performance licences (GLA) are dependent on the gross expenditure on live artist performers and the gross sums paid for admission. Specifically, the licence fee is calculated as 2.2% of the licensee's gross expenditure on the live artist performer plus 1.65% of the gross sums paid for admission. The annual fee is subject to a minimum annual fee of $27.50. By way of comparison:

(a) SOCAN grants its licences at a rate of 3% of the compensation paid for entertainment for the year, with a minimum fee of CA$84.65 (AU$87.38) + taxes for each room where music is played;

(b) PRS for Music publishes over 40 live public performance tariffs, appropriate to the different categories of premises and types of performances. Perhaps the most obvious comparison can be made with PRS for Music's *Popular Music Concerts Tariff "LP"*, which applies to live performances consisting almost entirely of popular music, where a charge is made for admission. PRS for Music's charge for such a licence is, subject to a minimum charge of £36.00 (AU$64.70) in respect of each performance, 3% of the gross receipts from the performances covered by the licence;

(c) IMRO's *Standard Tariff LP* applies to the public performance of music at events where a charge is made for admission, excluding multi-stage events and performances of classical music. IMRO charges different rates depending on whether the performance is indoors or outdoors, and – like with other IMRO licences – whether the performance is declared

and licensed at the time of the performance. The rate for indoor events changes depending on the amount received, such that different rates apply to different brackets of income. The unlicensed rate is 6% of the net revenue receipts, regardless of how much money is received or whether the event is indoors or outdoors. The licensed rate for an indoor event, where the net revenue receipts amounts to €157,123 (AU$234,270) or less is 3%. Where the net revenue receipts is between €157,123 and €314,245 (AU$468,539), the licensed rate is 4.5%. Where the revenue receipts exceeds €314,245, the licensed rate is 6%.

(d) Because SOCAN does not factor the premises' revenue into its licence rate, and PRS for Music and IMRO do not factor the premises' expenditure into their respective licence rates, a meaningful comparison between the societies' licence schemes is difficult. However, for a small premises that spends $50,000 on performers and receives $100,000 in revenue per year (or its foreign exchange equivalents), APRA would charge $1,950.00; SOCAN would charge $1,500.00; and IMRO and PRS for Music would charge $3,000. For a larger premises that spends $500,000 on performers and receives $1,000,000 in revenue per year, APRA would charge $19,500.00; SOCAN would charge $15,000.00; PRS for Music would charge $30,000.00; and, IMRO would charge $60,000.00.

3.9 It is APRA's respectful view that the approach taken by the Tribunal to international rates is the correct one: that is, that overseas rates can inform rate setting in Australia, but may not be determinative.

4. Proposals relating to live performance returns

4.1 APRA understands that the ACCC has been contacted by a number of APRA members regarding the proposals made by APRA in relation to live performances. This is apparently as the result of a large-scale consultation that APRA is undertaking with its members.

4.2 In October 2013 APRA published on its website an invitation to members seeking input in relation to specific issues related to certain licensing and distribution practices. A copy of the documents provided to members is CONFIDENTIAL Attachment A. In summary, APRA asked members to consider the proposals that:

(a) members performing at venues that pay higher licence fees should be paid at a higher rate than those performing at venues that pay lower licence fees;

(b) instead of deducting APRA's total costs from general revenue, APRA would deduct from each distribution pool the actual costs of collecting and distributing royalties for that pool; and

(c) APRA would use music recognition technology to collect data regarding the use of music in television and radio advertisements.

4.3 APRA discussed these proposed changes at a series of "roadshow" meetings conducted in November 2013. The closing date for members' comments is 20 December 2013. APRA has received a number of comments from members, and a summary of those comments is CONFIDENTIAL Attachment B.

4.4 APRA expects that it will revise the proposals to take into account the comments received from members, and will present the results of the consultation process to the Board in February or April for its consideration.

Yours sincerely

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