Live Performance Australia℠

Level 1, 15-17 Queen Street
Melbourne Victoria 3000
T 61 3 9614 1111
F 61 3 9614 1166
W www.liveperformance.com.au
ABN 43 095 907 857

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

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Dear General Manager

Submission in response to the Australasian Performing Right Association Limited (APRA) Application for Revocation of Authorisations A91187-A91194 & A91211 and Substitution of New Authorisations A91367-A91375 (the APRA Application)

About LPA

1. This submission is made by Live Performance Australia (**LPA**), the peak body for Australia's live entertainment and performing arts 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.

2. LPA's members are APRA licence holders for the public performance of musical works under a number of licence categories including the following:

   - Festivals (Licence Code: GCLF);
   - Concert Promoters (Licence Code: GCLB);
   - Featured Music Events (Licence Code: GCFM);
   - Live Performance (Licence Code: GCLN and GLA);
   - Recorded Music for Dance Use (Licence Code: GFN); and
   - Special Purpose Licence Scheme (Featured Music) (Licence Code: GCSF).

Submission

"Opt Out" and "Licence Back"

3. APRA has applied to the Australian Competition and Consumer Commission (**the Commission**) for revocation of the ACCC's existing authorisations of APRA's arrangements and substitution of new authorisations for a period of six years. While LPA has historically valued APRA's contribution to the collection and distribution of licence fees for the public

performance and communication of musical works in Australia, LPA would be opposed to the grant of Authorisation by the ACCC in the terms sought by APRA in the APRA Application on a number of grounds. LPA submits that the ACCC should grant conditional re-authorisation to APRA for a period of one year on revised terms that incorporate improvements to the "licence back" and "opt out" facilities and licensing conditions.

4. LPA submits that APRA is a monopoly whose current arrangements restrict dealing between composers and users. The Commission came to the view in its determination on 16 April 2010 that APRA's activities exhibit the characteristics of a natural monopoly, stating:

   "APRA is a monopoly whose rules generally restrict direct dealing between composers and users. The concentration of members' rights exclusively with APRA means that APRA is able to set prices for access to its repertoire without being subject to competitive constraints."

5. On 24 January 2013 LPA received a letter from APRA announcing its plans to review the terms of the Live Promoted Concerts licence scheme including increasing the current royalty rate of 1.5% of "gross" box office to 3%. LPA is currently in the process of consulting with our members in relation to this issue and is deeply concerned about the way in which APRA has arbitrarily proposed a 100 per cent increase in the royalty rate as the starting point for negotiations with users of the Live Promoted Concerts licence scheme and considers that such a proposition is a reflection on APRA's unconstrained market power. Further, LPA is aware that APRA has documented plans to introduce similar increases in the royalty rates of other licence schemes for concerts and events including Featured Music Events, Festivals and Live Venues. LPA is concerned that such increases would have a significant impact on our industry given that the users of these licence categories (many of whom are not-for-profit organisations) would have limited capacity to absorb the proposed additional costs.

6. APRA contends in its Application that since their conditional reauthorisation on 16 April 2010, more APRA members now enter into direct arrangements with users of their music through APRA'S "simplified and improved" licence back provisions. In particular, APRA submits that since steps were taken to decrease the notice periods and introduce the requirement that "members are now only required to give sufficient information to APRA to identify the works the subject of the licence, the licensee, and the scope of the licence", it has observed a "dramatic increase in the number of licences back granted". APRA goes further to state:

   "There has been no obstacle for those APRA members and music users who have wished to deal directly with each other in Australia and, as far as APRA is aware, the licence back facility in particular has enabled a number of licence arrangements to take place with which copyright owners and users are very satisfied".

7. APRA contends that it has "prominently advertised the availability of opt out and licence back rights and that their availability is generally well known in the industry". While LPA commends APRA's attempt to make the potential for engaging in direct dealing more well known, for example through introducing a webpage dedicated to explaining the differences between the various "opt out" and "licence back" alternatives, LPA considers that more needs to be done to make the options for direct dealing more transparent and widely known in the industry among licensees and licensors. The overwhelming feedback from LPA's members is that they are either not aware of, or rarely pursue, the options of "opting out" or "licensing back" when dealing with artists/creators. The fact that APRA's members have only utilised the "opt out" and "licence back" facilities on 125 occasions as at 30 April 2013 when APRA represents over 232,055 songwriters, composers and music publishers[1], demonstrates this point. LPA submits that the low take-up rate of the "opt out" and "licence back" facilities is not necessarily indicative of a preference for dealing with APRA but rather that there is still insufficient awareness among licensees and licensors of the possibility of engaging in direct licensing negotiations.

8. LPA submits that the all or nothing "opt-out" provision has limited appeal to APRA members and the strict notice requirement of "not less than 3 months" continues to create very limited opportunities for "opting-out". LPA has raised this issue previously, as a party to "The Cinema Operators" submissions to the APRA Application for Authorisation Nos A90918-A90925. In its written submission to the ACCC dated 23 November 2005, The Cinema Operators submitted that "the opt out clause is of little practical utility, as a member cannot opt out in respect of a single work" and further that "opting out for a class of broadcast or performance means that the member will forego their rights in respect of performance or broadcast of *all* other works in that class". LPA notes that this is an issue that remains unresolved and therefore submits that amendments to the APRA Constitution to allow for greater flexibility for "opt out" arrangements are required.

9. APRA contends that "direct dealing is not likely to be something that all users find attractive". However, LPA considers that the option for users to deal directly with rights owners would constrain APRA's ability to exercise monopoly power. LPA has received feedback that APRA has demonstrated obstructive behaviour towards members who have negotiated "licence backs" to the extent that it has attempted to be involved in negotiations and dictate the terms and conditions of licensing agreements entered into between the creator and licensee. LPA submits that such behaviour is inappropriate and is designed to stifle competition in the market for the supply of performance rights for music in Australia, despite APRA's submissions to the contrary.

10. Finally, LPA considers that the $200 fee for "licensing back" or "opting out" may act as a barrier to APRA members with respect to entering into direct licensing arrangements with

1 Based on figures on the APRA website as at 2010.

individual licensees. LPA submits that such fees should be removed in order to reduce the financial disincentive to APRA members to use these facilities.

Other Administrative Issues

11. LPA has longstanding concerns about the inflexibility built into APRA's collection processing systems. It has become apparent during our recent consultations that the reporting and remittance obligations imposed on our members under the terms of the existing licensing agreements create a significant administrative burden for our members. LPA has also received feedback from our members that APRA is overwhelmingly compliance focused and not forthcoming with assisting the industry to navigate their rights and obligations.

12. LPA members have also reported instances where APRA has not performed adequate due diligence in respect of song lists that are submitted. For example, royalties have been collected for music that is "out of copyright" and APRA has not been proactive in investigating such oversights.

13. LPA has also received feedback that there is a lack of transparency with respect to APRA's royalty distribution practices and interaction with international collection agencies, with reported instances of royalties not being received by creators, despite amounts being collected by APRA for this purpose.

14. LPA submits that APRA's blanket approach to its licensing fee arrangements whereby total amounts payable are calculated as a percentage of "Gross Sums Paid for Admission" do not always reflect the needs of the particular licensee and do not adequately take into account the percentage of box office that is attributable to performance related activities. For example, many music festivals also include large non-music components in the ticket price (for example food, comedy, interviews with artists, children's activities, market stalls, educational sessions and theatre), but this is not taken into account in APRA's rate.

In conclusion, LPA submits that the ACCC should grant APRA a conditional authorisation for a period of one year to compel APRA to address the concerns raised in this letter in the near future. LPA would be pleased to work with the ACCC to explore the necessary amendments to the APRA Constitution and the revised terms of APRA's re-authorisation that incorporate improvements to the "licence back" and "opt out" facilities and licensing conditions.

Thank you for inviting us to make a submission on this important re-authorisation for our industry.

Yours sincerely

Evelyn Richardson
Chief Executive
E erichardson@liveperformance.com.au
T 61 3 9614 1111 **Ext** 1
M 0407 303 646