

ASSOCIATION OF LIQUOR LICENSEES MELBOURNE
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26 May 2013

Tess Macrae
Senior Project Officer
Australian Competition & Consumer Commission
Level 35/360 Elizabeth Street
MELBOURNE VIC 3000

Dear Ms Macrae,

Association of Liquor Licensees Melbourne – interested party submission

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

This submission is prepared on behalf of and with the assistance of the Association of Liquor Licensees Melbourne (ALLM). The writer discloses, he is the Secretary of the ALLM.

The ALLM is an association incorporated in accordance with the Associations Incorporation Reform Act 2012. The ALLM is an industry body that represents the interests of Melbourne's bars and nightclubs: www.allm.org

The ALLM supports the existence of collecting societies conditional upon those societies providing an equitable licensing mechanism.

The ALLM assert, the APRA licensing mechanism is defective in numerous regards and should be overhauled or disbanded.

This submission is in conjunction with one prepared by the ALLM in their own right and another by the ALLM APRA subcommittee.

The purpose of this submission is to raise the application of the Australian Consumer Laws as embedded in the Competition and Consumer Act 2010, with respect to APRA and its licensees. The writer contends this should be put as a standalone issue, hence this submission.

Australian Consumer Laws – Competition and Consumer Act 2010

The Australian Consumer Laws (Laws) as embedded in the Competition and Consumer Act 2010 govern the supply of goods and services from businesses to consumers. The Laws apply to the relationship between APRA and ALLM members.

The threshold limit of \$40,000.00 is not relevant as almost all ALLM members pay licensing fees below this level.

The ALLM assert, the ACCC has an absolute obligation to assess any breach of the Act and the Laws. The ALLM calls upon the ACCC to assess the matters complained of and the allegations raised. The ALLM is willing to assist the ACCC as required.

Where by some quirk or anomaly APRA are not subject to the Laws, the ALLM asserts that this is untenable. In this instance, the ALLM would request a full explanation from the ACCC as to why such a scenario prevails and is permitted to continue.

The following are a small example of the Laws that are pertinent:

60 Guarantee as to due care and skill

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

61 Guarantees as to fitness for a particular purpose etc.

(1) If:

- (a) a person (the *supplier*) supplies, in trade or commerce, services to a consumer; and
- (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

23 Unfair terms of consumer contracts

(1) A term of a consumer contract is void if:

- (a) the term is unfair; and
- (b) the contract is a standard form contract.

(2) The contract continues to bind the parties if it is capable of operating without the unfair term.

(3) A *consumer contract* is a contract for:

- (a) a supply of goods or services; or
- (b) a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

24 Meaning of *unfair*

(1) A term of a consumer contract is *unfair* if:

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Fee Structure

In most simplistic terms, APRA and the Phonographic Performance Company of Australia (PPCA) divide any musical composition in two. APRA provides a license for one aspect of that composition and the PPCA the other. Both entities charge a fee to obtain a license – this being the only similarity between the two organisations. The PPCA have determined, via the courts and the presentation of evidence, a fee for licensing their aspect of any composition; whereas, APRA have not. APRA simply mirrored the PPCA's fee structure. The ALLM assert that this is not best practice, misleading and deceptive and in breach of the Laws.

It is not sufficient for APRA to mirror the PPCA because:

1. The PPCA license a different aspect of a composition; and
2. The evidence the PPCA relied upon to calculate their fees is evidence specific to them and their licenses.

For the purposes of transparency and fairness, the ACCC should require APRA to provide a factual basis and guarantees for their fee structure. These guarantees, were applicable, should also be provided in accordance with the Australian Consumer Laws.

Provision of Services – ‘blanket licensing’

The ‘blanket license’ is most utilised by ALLM members. Given that a venue broadcasts hundreds of compositions during any single period of trade, it is impractical for a venue to have individual agreements with each compositions creator. APRA’s solution is the ‘blanket license’. This license purportedly acts as some type of ‘catch-all’.

The dilemma is that APRA cannot guarantee that every or any composition broadcast is in APRA’s catalogue and so requires an APRA license. APRA cannot guarantee this because:

1. Compositions are produced at a faster rate than APRA can acquire and license them;
2. Composers whose works are utilised by our members often have no interest in being represented by a collecting society;
3. The very system that APRA permits to provide for greater competition means an increased propensity for composers to cancel their affiliation with APRA.

Therefore, the ‘blanket license’ whilst sound in theory ultimately fails in practice. Testing by the ALLM reveals that as few as 40% of the compositions played in a venue at any given time are in APRA’s catalogue.

APRA cannot guarantee the blanket license is an effective good or service that is fit for purpose. This variety of license breaches the Laws. However, this does not mean it should be disbanded, rather modification is required. The ALLM are prepared to assist in this regard.

APRA standard form contract

The APRA standard form contract is unfair and breaches the Laws.

APRA are able to dictate conditions in their contract by virtue of their monopoly. Clause 6.4 and Clause 6.5 of the Recorded Music for Dance Use in Nightclubs respectively state that in the case of underpayment of provisional fees the licensee ‘must pay the extra to APRA with 14 days’, however in the case where provisional fees exceed actual fees ‘APRA must at its option, either credit or refund the amount of difference’. ALLM members have validly asked ‘Why should APRA have the benefit of a more generous repayment plan?’ The ACCC are requested to ask this question of APRA.

Another example of unfairness is APRA’s right to audit or examine a licensee’s books of account. Clause 8.1 states that ‘APRA may on 14 days notice.....audit or examine the

Applicant's books of account.....' and Clause [add clause number] states that 'The Applicant must pay the cost of the audit.....'. This clause serves no purpose other than an attempt to intimidate licensees and should be deleted. There is no requirement for this type of clause and should it be permitted to remain, the ALLM would require greater ability to scrutinise APRA's financial information.

Overseas Collecting Societies

In 2010, ALLM members reported attempts to source licensing rights from foreign based collecting societies because the fees required by foreign societies are less exorbitant in comparison to APRA's.

Specifically, members approached the Canadian Collecting Society SOCAN and the United Kingdom's Collecting Society PRS. In both instances, members were told that these societies were not prepared to assist and that they should instead approach APRA with respect to the acquisition of any licence sought - in terms of the advantageous creation and continuation of an uncompetitive environment, APRA are the beneficiaries of a system *par excellence*.

This is still the case some three years later. It is categorically unacceptable that this still prevails.

Conclusion

The ALLM alleges flaws in the APRA model at a most basic level. The ALLM is prepared to work with APRA, the ACCC, and all interested parties in overcoming those flaws so as to assist APRA in providing a fairer product.

The ALLM believes the request for a six year authorisation should be denied until the matters raised in this submission and others are fully investigated by the ACCC and resolved to our satisfaction. In any event, the ALLM would be hesitant to approve anything other than a three year term of reauthorisation based simply on APRA's disproportionate market share.

We await your response.

Yours sincerely,
Nicholas Albon
Lawyer
ALLM - Secretary