

# **Association of Liquor Licensees Melbourne**

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The Association of Liquor Licensees Melbourne (ALLM) represent the interests of Victorian liquor licensed venues. Our members are predominantly the proprietors of bars and nightclubs. Our sphere of influence and degree of recognition is ever increasing so that we now have an Australia wide reach.

The ALLM welcomes the opportunity to comment on the above applications for authorisation as part of the Australian Competition and Consumer Commission's process of consultation with interested parties. We are disappointed however, that many valid points of view on APRA's claims have been excluded through the extremely limited timeframe for response. This public consultation has been further limited due to APRA's timing this to clash with the Australian Law Reform Commission paper on Copyright and the Digital Economy.

The ALLM takes a very serious perspective on APRA's authorisation application. To this extent, it has formed a sub-committee to assess the APRA application. What follows is that assessment.

Yours sincerely,

Nicholas Albon  
Lawyer  
ALLM – Secretary  
ALLM – APRA Sub Committee

## EXECUTIVE SUMMARY

We have comprehensively deconstructed APRA's application to separate their fabricated assertions from hard facts, and this has left very little of their application to rely on as substantiated tangible evidence. We therefore have had to systematically navigate through APRA's narrative, to constructively offer them a chance to provide a transparent application that addresses the balance between the public interest and detriment. Should APRA address these concerns, the public would be able to offer an honest assessment, but if the claims represented in this application are final, then authorisation must be rejected. APRA summarises this best themselves:

*'[t]he commission should be entitled to assume that statements of fact made in submissions to it are fundamentally accurate, and should only have to deal with arguments advanced on that basis'.<sup>1</sup>*

In summary, this response does not support APRA's applications for authorisation for the following reasons:

- APRA is a monopoly that abuses its market power
- APRA abuses its exclusive input agreements to perpetuate its autocracy
- APRA fosters a corporate culture of aggression and intimidation
- APRA does not repatriate royalties to its members in a transparent and effective manner
- APRA only applies conditions under C1 and C2 in a token, non-effective nature
- APRA neglects the needs of the independent users that forms its charter
- APRA is consistently misleading in justifying its actions under the public interest

If APRA is to be authorised, pending further tangible evidence, the following conditions should apply:

- a two year authorisation period
- an independent, affordable and equitable moderation process
- complete transparency on the distribution of royalties
- independent community, commercial and global non-exclusive licensing
- the full extent of APRA's repertoire to be published progressively
- an independent review of licensing schemes, in true consultation with content users
- a clear breakdown of legal, infrastructure, development and administration costs

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<sup>1</sup> APRA's Comments On Submissions To The ACCC By Interested Parties, 2010, p. 5

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## PART A

### 1. INTRODUCTION

**Para 1.1.2** APRA highlights the ACCC's determination, but the validity of the statement *'there has been no development or change since 2010 that would justify the ACCC reaching a different conclusion in 2013'* is misleading.

Firstly, APRA is asking for six years, not the approximately three and a half previously granted. This is not transparent at all. Secondly, the ACCC granting authorisation does not mean that any previous arguments cease to be valid. In fact, throughout this response it is proven that the 2010 findings are used at will by APRA when it suits them, and discarded when it does not.

APRA must substantiate how the public benefit would not be best served with non-exclusive input agreements, given the ACCC itself have highlighted repealing section 51(3) of the Competition and Consumer Act, in light of APRA's behavior. Especially significant to this application is the argument put forward by the ACCC that there is no erosion of creator's rights and unreasonable costs associated with non-exclusive licensing.<sup>1</sup>

**Para 1.2.1** Attached is a detailed assessment highlighting concerns with APRA's operations statement.<sup>2</sup> In brief, there are many unsubstantiated claims made by APRA within the operations statement, and they must address each response directly before the public can comment effectively. It is anticipated from the tone of the 2010 responses to submissions, that APRA will try and disqualify these comments with broad sweeping politicised rhetoric, and APRA must provide clear and substantiated evidence to the ACCC and interested parties.

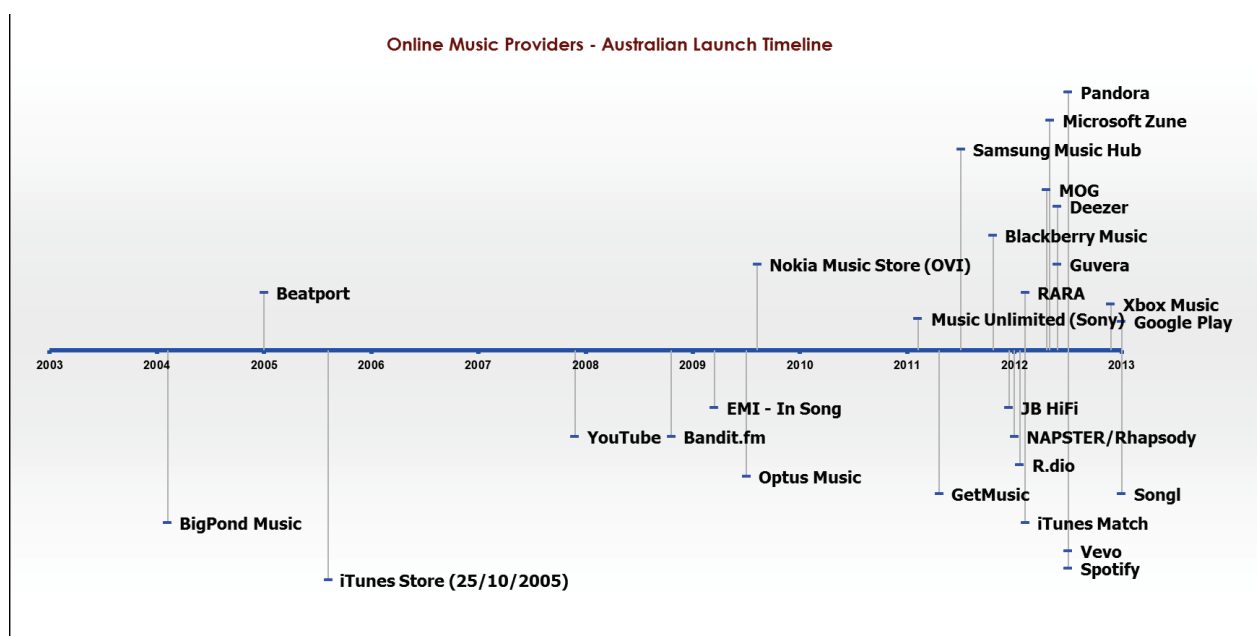
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<sup>1</sup> See: [http://www.alrc.gov.au/sites/default/files/subs/165.\\_org\\_accc.pdf](http://www.alrc.gov.au/sites/default/files/subs/165._org_accc.pdf)

<sup>2</sup> Statement on APRA's operations, p. 29

**Para 1.2.2** A period of six years is excessive, should the authorisation be granted at all. Given the accelerated transformation of technology over the last six years, it would be irresponsible to APRA's members to expect fewer changes in the market place. By way of example, we refer to the table below that outlines the rapid diversification of digital music services in Australia over the last decade. In simple terms, if APRA is suggesting that the current framework is prepared to account for what may happen in the next six years, a detailed outline should be publicly provided. It is also deeply concerning that their technology strategy has been made confidential.

**Figure 1: Timeline of the introduction of digital services in Australia<sup>3</sup>**



**Para 1.2.3** This statement is not accurate.

**Para 1.2.4** APRA's has no right to claim what the correct course of action is for the ACCC.

**Para 1.2.5** APRA's attempt to claim certain parts of the 2010 determination as justification of their actions, yet other more critical parts as not applicable, is typical of their arrogant and autocratic behavior. All of these issues are currently under public scrutiny, irrespective of how APRA choose to frame the process.

<sup>3</sup> ARIA ALRC submission, 2012, [http://www.alrc.gov.au/sites/default/files/subs/241\\_org\\_aria.pdf](http://www.alrc.gov.au/sites/default/files/subs/241_org_aria.pdf)

## **2. 2010 FINDINGS THAT CONTINUE TO BE VALID**

### **2.1 INTRODUCTION**

**Para 2.1.1 – 2.1.2** We reserve the right to provide a more detailed submission if the insufficiencies throughout APRA's application are ever supported with hard evidence.

### **2.2 BACKGROUND**

**Para 2.2.1** In principle, these definitions are still valid, with two exceptions; licence back/opt out (2.20) and the Code of Conduct for Copyright Collection Societies (2.30 – 2.31). It needs to be stressed that the public should have the right to investigate and further define these provisions through practical application.

It is still unclear how APRA determines 'reasonable costs' with licence back/opt out. In many cases this fee (capped at \$200 per transaction)<sup>4</sup> makes the option unworkable. Also of note, the Code of Conduct for Copyright Collection Societies is voluntary, and therefore APRA must clarify if any of this charter is actually enforceable, namely what power the Code Reviewer has to affect change?

**Para 2.2.2** In principle, the role of collection societies is necessary. However, between sections 2.1 – 2.7 of the 2010 Determination there are issues with the following points:

**Re Para 2.1 – 2.7 (2010 ACCC Determination)** A collection society with such adequate protection under Australian legislation, and a tax free income in the hundreds of millions, should be directly repatriating accrued royalties flowing from upwards of 49% of their small business licensees, not just by analogy.<sup>5</sup> APRA takes great pride in highlighting a 12.82% administration to cost ratio.<sup>6</sup> Given the staggering amount of licenses repatriated by analogy, APRA must provide further cost expenditure analysis so the public can understand the true value of the efficiency-to-accuracy ratio.

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<sup>4</sup> <http://www.apra-amcos.com.au/musiccreators/managingyourrights.aspx>

<sup>5</sup> APRA's Distribution and Practices document, 2012

<sup>6</sup> APRA's Annual Report 2012, p.4

Worth noting is the fact that APRA does not state in this section that they require the exclusive use of performance rights, which contrasts with the use of their term 'voluntary'. The ACCC are correct in their 2012 ALRC submission that there will be no detriment to creators if these agreements were non-exclusive.

**Para 2.2.3** While sections 90(5A), (5B), (6), (7) and (8) in the *Competition and Consumer Act (CCA)* provide the basic framework for this authorisation application, the ACCC's suggestion that section 51(3) of the *CCA* be repealed must be considered. Of most concern to us is the ambiguity around section 46(1), especially (b) (*'preventing the entry of a person into that or any other market'*) and (c) (*'detering or preventing a person from engaging in competitive conduct in that or any other market'*) that would appear inherent in this application. It is concerning that section 48 (*'A corporation or other person shall not engage in the practice of resale price maintenance'*) is compromised by APRA's conduct.

## **2.3 MARKET**

**Para 2.3.1** This definition is sufficient for this application, but it should be noted that the term 'competition' has particular relevance.

**Para 2.3.2** In terms of bargaining power, the philosophy behind the ACCC's findings needs to be considered. It should be noted that the grass roots context of this has been lost. With APRA having a distinct advantage in bargaining power, the whole process would appear to favor high-end commercial entities. It is common knowledge that APRA repatriates to major label artists and their subsidiaries primarily, while independent artists are incidental in APRA's business model. The fact that many independent artists are mostly played in independent venues that cater for creative and individual works, highlights the problematic nature of the current authorisation. The result is a fragmented industry where major record companies, who can afford to assert their rights, have the protection of these arrangements. By comparison, independent artists see a smaller benefit and venues are forced to negotiate with an organisation that has almost unparalleled legal resource.

As stressed by the ACCC in the 2010 determination, and their ALRC submission, APRA is able to exploit this monopoly position to generate significant public detriment. They further note that the degree of bargaining power APRA exercise goes far beyond that which would be necessary to redress any imbalance between individual members and users.

Having venue operators being forced to negotiate, out of their depth, with a corporate entity like APRA, has no bearing on the future of musical creativity. Peer-reviewed research must be provided to substantiate any benefits to independent composers' welfare in Australia through APRA membership, should any claim to this be made in this application.

## **2.4 THE MOST LIKELY COUNTERFACTUAL**

**Para 2.4.1** An ideal model is having one non-exclusive central collection society for composers rights while also allowing true and transparent competition. The ability to establish direct deals with users of musical content is in the best interest of a fair and equitable market. The current system of license back/opt out deters usage by its token nature.

**Para 2.4.2** The fact that 125 composers over the last three years used APRA's license back/opt out concessions highlights nothing about their validity. This does, however, indicate that they are still very bureaucratic in nature and under-utilised. Competition should be supported through non-exclusive input agreements, and APRA's claims that this will adversely affect the rights of composers must be rejected, based on the ACCC's previous findings.

## 2.5 PUBLIC BENEFITS

**Para 2.5.1** This is a potentially valid definition of public benefit, but there is an issue with balancing general community values with the aims pursued by society, and the achievement of the economic goals of efficiency and progress.

**Para 2.5.2** While there is public benefit flowing from blanket licensing, in some contexts, direct dealing is more in the public benefit in other uses. One important distinction is that blanket licensing and APRA are different entities. It must be acknowledged that APRA should not be the only access point for compliant musical content, in order to be competitive. An ends justifies the means approach is no longer a valid model, given the digital repatriation technology and platforms in the current marketplace.

**Para 2.5.3** APRA's self-assessment that all financial information from the previous authorisation period remain valid is purely their assertion and in no way reflects the reality of the current marketplace. APRA must publicly provide detailed financial information to prove that these points remain valid. The financial particulars of their monitoring and development activities, statistical formulas used and significance should be provided, if APRA is to base claims on them.

APRA's annual reports suggest sharp increases in revenue since 2010, which warrants a complete audit in order to holistically understand the impact of these changes. Especially, given that public performance is not broken down accurately and the analogous nature of repatriation at the board's discretion.<sup>7</sup>

**Para 2.5.4** As stated previously, blanket licensing can produce public benefit, in some contexts. However, APRA should have more than a copy-paste argument in regard to non-exclusive licensing.

If APRA's argument is that non-exclusive licensing would be financially '*unreasonable*', when clearly it works for the PPCA, and the ACCC contradict this in the 2010 determination, APRA should provide transparent financial models to prove it.

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<sup>7</sup> APRA Distribution and Practices document, 2013

**Para 2.5.5** APRA, again, say fees ‘might’ be increased in non-exclusive licensing. In order to make these claims, APRA must publicly substantiate their position, especially in the context of the last authorisation period. APRA incorrectly claims in chapter 8 of their application that non-exclusive licensing would not be ‘*unreasonable*’ and that any findings in the course of the present re-authorisation process would not be well founded.

It is concerning that APRA is of the view that implemented changes and developments since 2010 had the effect of significantly reducing anti-competitive detriments flowing from their operations and behavior in the marketplace. These assertions do not warrant authorization.

**Para 2.5.6** Irrespective of APRA’s argumentation in chapter 9 of their application, the presence of exclusive licensing arrangements is not proven to equate to higher revenue streams for copyright owners by APRA’s application. Evidence of non-exclusive input arrangements in other territories (e.g United States of America), and with local collection agencies (i.e. PPCA), do not demonstrate any lessening of the copyright owner’s ability to leverage equivalent income levels.

**Para 2.5.7** Please provide this as requested above.

**Para 2.5.8** Any comment is reserved until the draft determination stage.

## **2.6 FACTORS THAT EFFECTIVELY MITIGATE DETRIMENT**

**Para 2.6.1** With only 125 members using this option in the last three and a half years, it would appear that the license back and opt out concessions, and their marketing, are not effective. Again, a detailed and specific breakdown in comparison to non-exclusive licensing needs to be publicly provided to substantiate this claim and to further demonstrate the practicality for creators and users in today’s industrial landscape.

**Para 2.6.2** If there is greater competition flowing from these provisions, as asserted by APRA, substantiated information on the greater benefits to musicians, must be publicly produced. This is especially relevant for independent musicians, with little to no support

from corporate publishers and record companies, as asserting their rights with equity was the genesis of APRA's public benefit.

**Para 2.6.3 – 2.6.12** Any further comment on this section appears to be pointless until APRA publicly validate their claims and take this process seriously. APRA is specifically required to prove that the internally managed and administered Alternate Dispute Resolution (ADR) process has not further deterred licensees from complaining about APRA's practices and behavior.

## **2.7 THE WEIGHING OF BENEFIT AND DETRIMENT**

**Para 2.7.1 – 2.7.5** With limited participation in the ADR process, and limited participation in the opt out/licence back facilities, there is no clear argument that these mechanisms have been applied with transparency. It must be acknowledged that the application of these provisions is token in nature, and does not reflect any positive impact on the public benefit. These facilities are, by all intents and purposes, imposed upon APRA as an attempt to reduce detrimental effects resulting from APRA's operation. As stated previously, the actual effectiveness and viability of said provisions needs to be demonstrated by third-party research, and detailed market analysis, in order to ascertain any positive impact on reducing public detriment.

It is disconcerting that APRA claim, in an unsubstantiated manner, developments in the market have eroded any scope for them to behave unconstrained and with increased efficiency. This statement contradicts QC Lindgren's findings under the C2 conditions report of APRA's current authorisation, submitted with this application.<sup>8</sup> Of most concern is that APRA appear to abuse their market power by reducing any incentives for music suppliers, acquirers and competitors. APRA must provide public, non-confidential evidence with respect to pricing arrangements made in regard to direct dealing, and how this has enhanced any public benefits.

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<sup>8</sup> See supporting documentation of APRA's application.

## PART B

### PART B CHANGES IN MARKETS SINCE 2010

#### 3. CHANGES IMPLEMENTED BY APRA

##### 3.1 CHANGES AND DEVELOPMENTS IN APRA'S CONDUCT AND PROCEDURES

**Para 3.1.1 – 3.1.21** APRA appears to claim the license back and opt out facilities as their own concepts, even though these provisions were, in fact, enforced as part of the review process or as APRA describes '*a regulatory constraint*'. Again, a comprehensive financial comparison between the reasonable costs of exclusive and non-exclusive arrangements should be provided to enable informed comment on the perceived implications to the public benefit. The paragraphs kept confidential should not be considered in the draft determination.

##### 3.2 ADR (ALTERNATE DISPUTE RESOLUTION)

**Para 3.2.1 – 3.2.7** While expert determination as part of the ADR process is available in disputes, it is common for APRA to use '*threatening confrontational language*' before mentioning the ADR process in their pre-legal correspondence with music users seeking compliance.<sup>9</sup>

As the ADR is administered by APRA, this kind of outwardly aggressive behavior intimidates compliance seekers, and the threat of a Copyright Tribunal hearing infers a prohibitive amount of money. The minimal usage of the ADR process is not a sign of satisfaction, but a sign of intimidation by a '*super-monopoly*'.<sup>10</sup>

It is also of great concern that there is no forum for justice outside APRA's Complaints Officer. In short, there are likely hundreds of disputes that will never make it to APRA's Complaints Officer, as there is no guarantee that APRA will not use this information against the licensees. Again, the fact that this process is little used, is just as much a sign of fear, than it is a sign of satisfaction, as APRA claims in their application.

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<sup>9</sup> Quote QC Lindgren, 2013 Collection Societies Code Review Report

<sup>10</sup> Owen Royal Commission

## 4. OTHER CHANGES IN THE MARKET

### 4.1 IN AUSTRALIA

**Para 4.1.1** It is problematic that on one hand APRA claim not much has changed since 2010, yet on the other hand the whole industrial landscape has shifted significantly. It is also concerning, that much of this information is withheld from the public and kept confidential. This makes a balanced response all the more difficult.

**Para 4.1.2- 4.1.27** It needs to be stressed, again, that blanket licensing *per se* is crucial and beneficial to the positive development of the music industry in Australia and worldwide. The fact that there are 30 different digital music services currently operating in the Australian market is a positive indicator that this is a functional approach on a business to consumer level and needs to be welcomed.

However, there is concern as to why larger licensees '*seek to depart significantly from the terms of these licence schemes*'. While QC Lindgren's foresight in giving the Copyright Tribunal the scope to address issues like licensing fees, terms and conditions needs to be respected, it should also be noted that the confidential nature of commercial agreements give APRA a 'strong hand' in negotiating outside the scrutiny of both the Copyright Tribunal and the public.<sup>11</sup> If the Copyright Tribunal provided equity in terms of legal costs, then QC Lindgren's honorable attempts to provide a transparent forum for these issues would be further enhanced. In short, these companies would rather negotiate with APRA directly on the balance of the perceived and real legal costs associated with the Copyright Tribunal. The contrary position is to accept and negotiate on an arbitrary commercial license, as this is more economically viable than mounting a legal defense against APRA, who have unparalleled access to legal resources. This may also explain APRA's issues with potential licensees finding it difficult to adopt APRA's standard sets of agreements for their commercial offerings, and the language contained within them.

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<sup>11</sup> <http://worldlii.austlii.edu.au/au/journals/FedJSchol/2007/8.html>

**Para 4.1.28 – 4.1.31** APRA | AMCOS claims to never refuse a license.<sup>12</sup> However, it is crucial to understand that APRA and its sister organisation AMCOS can make it financially unviable for independent and small operators to legally enter the domestic market with a licence. Given the history of file-sharing and the hard lessons learned, the value of this strategy to APRA members is disputable.

It is also detrimental to try and directly account for the costs of online piracy through those who are willing to pay for music, as APRA attempt to frame in this section. APRA pride itself on its sharp increases in revenue when it suits them, but again plays it down when they need leverage. The danger of this process is treating license seekers as ‘potentially criminal’, when they are the ones trying to pay for the use of copyrighted musical content. It needs to be acknowledged that there are instances of users that have a reduced willingness to licence music for certain reasons, but these reasons are shared. However, APRA’s licensing officers should focus on this target group in a positive way, not treat those who are willing to pay for the use of music with negativity. If APRA was competitive, there would be an influx of licensees, as with any other regulated industry not protected as a monopoly.

## **Distribution Technology**

**4.1.32 – 4.1.36** APRA’s initiatives with regard to implementing the international DDEX reporting standard are welcomed and appreciated. However, it is also understood and accepted that the international DDEX reporting standard would potentially provide the framework for manageable non-exclusive licensing. While APRA made an effort to cater for new digital consumer services and adequate reporting in that regard, it needs to be questioned why APRA still repatriate accrued royalties for over 40,000 of their approximately 80,000 licensees by analogy. DDEX-compliant technology for direct ‘pay for play for use’ has been facilitated in the local marketplace for years, and would significantly contribute to a more transparent and efficient royalty distribution method. This approach directly benefits APRA’s members and enables a more accurate calculation of accrued royalties.

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<sup>12</sup> APRA’s operations document, para 82

In the distribution reports provided by APRA, there is no clear way of ascertaining how these 'analogies' are calculated, except at the Board's discretion. APRA must publicly provide specific information to substantiate this claim, and to prove that at least 50% of collected royalties are getting to the rights holder, as per their international reciprocal agreements. Not substantiating this argument would be unacceptable for a corporation with such low overheads, such high tax-free copyright income, and a charter that puts their members first.

Furthermore, it needs to be made clear whether APRA forces licensees to install proprietary music recognition technology (i.e DJ Monitor), or if this is voluntary? APRA should also publicly provide the cost-benefit-accuracy ratio for this foreign technology to date. To be completely transparent to their own members, more information on the practical application of this technology and its potential accuracy needs to be provided.

### **Discounted Blanket Licenses**

**Para 4.1.37 – 4.1.48** APRA state that they are able to provide examples of the technology that allows their contribution to the public benefit through these discounts to be made clear, but fail to provide it. The public needs to be able to review this material, as most of these paragraphs are vague and non-specific, and with most of the material either confidential or withheld, it reads as an unsubstantiated claim more so than fact.

APRA inhibit the negotiation process by not publicly disclosing the extent of their repertoire. This makes discounted blanket licensing unworkable in a practical sense.

There are many situations that could benefit from discounted blanket licenses, especially in fitness, hospitality and retail environments. It is, however, evident in the Report under Condition C2 from QC Lindgren that APRA is trying to squeeze those with the ability to provide accurate data out of the market (see dispute report 4).<sup>13</sup>

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<sup>13</sup> Report under Condition C2, QC Lindgren, 2012

## Code of Conduct for Australian Collection Societies

**4.1.49 – 4.1.64** There are a number of issues that are apparent with the Code of Conduct Review, but the most damning is that only information submitted through APRA makes its way to the code reviewer. This in itself should be a warning sign, as it gives APRA the discretion to frame disputes, and if a licensee was intimidated, would act as a deterrent.

APRA's claim that the lack of disputes through the code review process since the last authorisation might be seen as a sign of satisfaction with their conduct, is grossly unsubstantiated. This could also signal that there is complete dissatisfaction with, and or fear of the process. The points raised by the ADA and ALCC in 2010 about QC Burchett and his inability to publicly criticise APRA are initially evident in the fact APRA omitted QC Lindgren's 2013 Collection Society Code Review from this application. This would be further substantiated if submissions to the ACCC, and complaints under the new code reviewer increase significantly. This dismissive relationship was highlighted in the ADA & ALCC submission in 2010 (*para 27-32*), and APRA's response at the time was again 'dismissive' (*para 15*).<sup>14</sup> Instead of proving their case, APRA overburdened the ACCC with information that had no impartial content, blaming the ADA & ALCC.

There is also a common misconception that APRA cover all costs associated with the Alternate Dispute Resolution process of Expert Determination. The public should be made aware of the true legal costs surrounding this process. While APRA pay for the costs of the 'expert' in some cases, which is a concern in itself, the legal costs surrounding the process are substantial. APRA disclose their legal costs in the Code Review, which makes it appear they cover all expenses involved in this process and the venues costs are withheld. This may make it appear that the process is actually affordable or equitable, when in practice it is prohibitively expensive, excluding many licensees.

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<sup>14</sup>

<http://transition.accc.gov.au/content/trimFile.phtml?trimFileTitle=D09+185078.pdf&trimFileFromVersionId=1061990&trimFileName=D09+185078.pdf>

## **4.2 Internationally – Existing International online licensing agreements**

**Para 4.2 – 4.2.11** It is increasingly hard to provide meaningful comment when so much is made confidential. It is disappointing there is no license back for commercial online use. It would be common sense that to best serve APRA members, all options should be available to them, not just non-commercial, regardless of how APRA package and frame this as technically compliant with the terms of authorisation.

Obviously, non-exclusivity would be preferential. APRA's distribution model does not guarantee a true repatriation of 50% to all publishers and they are not able to repatriate the full amount of accrued royalties in a clear and transparent manner. A detailed breakdown of how APRA have calculated this difference must be provided, as this is rhetoric and not substantiated fact.

### **Global Repertoire Database (GRD)**

**Para 4.2 – 4.2.12** While there 'may' be benefits flowing from the GRD, the fact that APRA cannot determine the future implications highlights the fact that a shorter authorisation period is justified, if any.

## **5. CHANGES IN THE MARKET – LIKELY DURATION**

**Para 5.1.1-5.1.3** The concerns were already highlighted with license back and opt out procedures, participation in the ADR and compliance with the code of conduct throughout Part B of this response. This directly contrasts APRA's claim.

With APRA also unable to predict any implications of the GRD, their claim to an extended period of authorisation would appear based more on rhetoric than substantiated evidence. The combination of these elements means that there should be a reduced period of authorisation, if any.

## **PART C**

### **PART C EFFECT OF CHANGES IN MARKETS ON WEIGHING OF BENEFIT AND DETRIMENT**

#### **6. EFFECT OF CHANGES FOR BENEFIT AND DETRIMENT ANALYSIS**

##### **6.1 INTRODUCTION**

**Para 6.1.1** No substantial efficiency or flexibility benefits that promote competition were established in Part B of APRA's application. The extent of APRA's lack of transparency has been highlighted in great detail in this response so far. With the appropriate information publicly provided by APRA, a more detailed response could be submitted at a later stage.

**Para 6.1.2** Unless these claimed changes are substantiated, there is no argument for APRA here, and this section (Part C) is mostly repeating the previous section (Part B), while creating unnecessary workload for the ACCC.

##### **6.2 THE CHANGES**

**Para 6.2.1** These parts are summarised (a through h) in Part B of this document. However, APRA has failed to sufficiently substantiate them. Thus, each point mentioned in Part B needs to be substantiated based on the current environment, with tangible first hand evidence.

##### **6.3 EFFECT OF CHANGES ON ANALYSIS OF BENEFITS AND DETRIMENTS**

**Para 6.3 – 6.3.4** The summaries of these arguments refer to data from the 2010 determination, when it is the current information that should be under review during this authorisation application. The ACCC did authorise APRA in 2010, but also acknowledged that many of their practices on these issues are in the public detriment.

The ACCC never stated that by granting the 2010 authorisation that APRA's detriment was negated. The ACCC simply state in 2010 that there is no 'competing' option. APRA try and claim that only the positive points from the 2010 authorisation apply to them now, while claiming all the demonstrated negative behavior cannot be considered. APRA is trying to make up their own rules and this should be treated with contempt.

This detriment has increased while the benefit has reduced in correlation with the growth in licensees and the lack of accuracy in repatriation of royalties since 2010. There are a lot of unsubstantiated links between the 2010 findings, and any potential balance between the public benefit and detriment that seem to act as a mechanism to exclude many potential views on this process. This is an equity concern for many of the licensees that cannot afford representation equipped to counter such a loaded document. APRA used a similar technique in the 2006 Copyright Tribunal decision on the Background Music Tariffs and Music on Hold, and this was reprimanded by QC Lindgren as being potentially deceptive.<sup>15</sup>

### ***The Streamlining and promotion of APRA's license back procedures***

**Para 6.3.5** The non-commercial nature of these provisions, exclude the very applications that would create competition. Any claim that this has created competition contradicts APRA's own statement that there have been only 125 cases over the last three and a half years. APRA's attempts to market the procedure are directly contradicted by these usage statistics. As is the argument that it has been of any public benefit, given the non-commercial nature, and the definition of benefit surrounding transactional expenses. If APRA claims that this is what 'tips the balance' of the public detriment and public interest, then a thorough investigation of the application of this process, and member sentiment surrounding it, should be independently undertaken. APRA must also make transparent how they calculate the \$200 administration fee, and if this makes any impact on the viability of the process for members.<sup>16</sup>

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<sup>15</sup> <http://www.judgments.fedcourt.gov.au/judgments/judgments/tribunals/acopyt/2006/2006acopyt0003>

<sup>16</sup> [http://www.apra-amcos.com.au/downloads/file/Music%20Creators/Summary-of-differences-between-OO\\_LB.pdf](http://www.apra-amcos.com.au/downloads/file/Music%20Creators/Summary-of-differences-between-OO_LB.pdf)

### ***Enhanced alternate dispute resolution procedures***

**Para 6.3.6** This has been discussed in great detail in Part B of this response, and APRA are confusing things here deliberately. It is already been demonstrated how flawed this process is under APRA's administration. It could also be argued that further public detriment has been created, not through the creation of these procedures, but in APRA's application of them.

### ***The growth of digital music markets in Australia***

**Para 6.3.7-6.3.8** APRA's statements here are unsubstantiated, and this has already been addressed in Part B of this response. APRA, again, provides no tangible evidence of the effect on the balance of public interest.

### ***More sophisticated technology enabling piracy***

**Para 6.3.9** This has also been addressed in Part B. Peer-reviewed independent research around the correspondence between APRA's high fees, technology strategy, and music piracy and copyright infringement must be provided to be completely transparent, to make any claims around these issues.

### ***Distribution efficiency improved through technology***

**Para 6.3.10** This is a vague and broad statement that could be misleading, as it does not directly refer to any substantial information. This was addressed in this response to Part B and APRA must provide further public information on what their administration costs would be if their accuracy in remitting royalties was higher. In particular, it needs to be asked if they would maintain the same figure of around 12.82%, if their 40,000

background music license royalties were remitted directly, as opposed to by analogy, and at the discretion of the Board of Directors.

#### ***More flexible blanket licenses through technological developments***

**Para 6.3.11 – 6.3.12** Again, a response has already been made in the comments on Part B of APRA's application. For a best practice model, APRA must follow the PPCA's lead in providing a document that discloses the annual extent of their member's works.

#### ***More effective compliance to the Code of Conduct for Australian collection societies***

**Para 6.3.13** Any claims about benefits that flow from APRA's conduct in this statement needs to be rejected. A response was already provided in our comments on Part B of APRA's application. It is worth noting to the investigator that the omission of the new Code Reviewer QC Lindgren's 2013 Collection Societies Code of Conduct Report, and the submission by the ADA and ALCC about the previous Code Reviewers QC Burchett's inability to criticise APRA.

#### ***Existing limitations on international licensing, development of the Global Repertoire Database and potential solutions.***

**Para 6.3.14** A response was already provided in our comments on Part B of APRA's application. The apparent lack of future strategy in this statement highlights the need for a reduced authorisation period, if any.

#### ***6.4 Conclusion on the effect of the changes on benefit and detriment***

**Para 6.4.1 – 6.4.2** A response was already provided in our comments on Part B of APRA's application. Further, most of these changes were forced upon APRA, not undertaken out of good will.

## **6.5 Duration of Authorisation**

**Para 6.5.1 – 6.5.5** In this response, a consistent argument against APRA's statements has been established for a shorter authorisation period, if any. While APRA complains of their legal costs, it is apparent in their application that if their model was more transparent, there would not be a need for complex legal documents. This is APRA's choice, not that of its members or licensees.

Throughout this response to Part A, B and C of this document, it is clear that a longer authorisation period would be detrimental to APRA's members, licensees and the general public. APRA must be forced to substantiate how they can predict technological developments a decade into the future.

Given the information provided (and withheld by APRA), a period of two years would be appropriate, if granted at all.

## **7. CONCLUSION**

**Para 7.1.1 (a)** Through Part A-C of this response to APRA's application, the points of difference with this broad statement have been highlighted in great detail. Further, QC Lindgren's comments on APRA's strategy of ambiguity on these matters highlights their systemic attitude towards transparency.<sup>17</sup>

**Para 7.1.1 (b)** APRA's direct dealing facilities have been addressed in detail through parts A-C of this response to APRA's application. There was no evidence supporting the practical and positive benefits to the point of adding to the public interest, especially in relation to international dealings.

**Para 7.1.1 (c)** APRA's conduct and the limits of its regulation have been discussed through part A-C of this response to their application. There is no evidence that APRA is willing to apply flexible licensing agreements within this application. Further, APRA

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<sup>17</sup> <http://www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acopyt/2006/2006acopyt0003>

makes no effort to detail the extent of their catalogue. There are inconsistencies with these points both individually, and as applied collectively in this paragraph.

**Para 7.1.1 (d)** The following assumptions are misleading in regard to:

1: how the structure of the market will remain unchanged for the next six years;

2: how APRA view any kind of transparency as a '*regulatory constraint*', especially this negative connotation;

3: a perceived lack of incentives, and ability to restrict supply or increase prices as being the only points of consideration in this application, i.e. there is the conduct of licensing representatives and the management of this by the executive; APRA can negotiate license fees, terms and conditions outside of the Copyright Tribunal by consulting only with certain parts of a sector, then keep the terms confidential as part of the commercial agreement. As highlighted in the 2013 Code of Conduct review under condition C2 by QC Lindgren, APRA have abused their market power in regard to agents that have existed for over 20 years.

**Para 7.1.2** APRA's structure and operation does not outweigh any competitive detriment through its input, output and distribution arrangements and conduct as evidenced in this response. While APRA administers both C1 and C2, these conditions carry little concession to competition. If any authorisation is to be granted, these conditions should be expanded upon and administered by an independent body. APRA's reporting on international developments should already be done on a voluntary basis, not used as an ambit point for negotiation. There is no valid argument in this application for an extended authorisation of any kind. Again, two years would be more appropriate, if granted at all.

**Para 7.1.3** APRA clearly stated that the balancing of the public benefit is the role of the ACCC, not APRA.<sup>18</sup> APRA further state that their sole objective is to put forward the best interests of their own members. Further, APRA incorrectly claim that as long as there is some benefit, regardless of scale, they should be free to operate in this context.

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<sup>18</sup> APRA Comments on Submissions, 2010

APRA have again tried to enforce their own alternate logic here, and any corporation with such 'entitlement' to power, should be regulated and constrained.

**Para 7.1.4** The summary of this analysis of APRA's application provides a strong framework to contradict this statement. APRA has not provided sufficient evidence to ground their claims, regardless of the legal jargon that surrounds many of these concluding statements.

**Para 7.1.5** This statement is unsubstantiated. The ACCC imposed conditions C1 and C2 in 2010, because they were not satisfied with APRA's operations, and their responses to submissions critiquing their operations. It is hard to imagine how APRA perceived this as complete justification of the public detriment flowing from their behavior. Therefore, this claim cannot be taken seriously. Although, a shorter period of authorisation with non-exclusive input agreements of around two years would be considered a reasonable compromise, if authorisation is granted.

## PART D

### **PART D – THE ACCC’S PREVIOUS FINDINGS ON THE EXTENT OF THE DETRIMENT AND THE REASONABLENESS OF THE COSTS OF ENFORCEMENT IN THE COUNTERFACTUAL SHOULD NOT BE ACCEPTED IN THE CURRENT CIRCUMSTANCES**

#### **8. ACCC’S FINDINGS THAT SHOULD NOT BE ACCEPTED FOR THE PURPOSES OF RE-AUTHORISATION APPLICATIONS.**

**8.1.1. – 8.1.4** There is no claim, grounds or warrant to support APRA’s fallacy that the comments rejecting the ACCC’s position on ‘*unreasonable costs*’ should be excluded from any discourse, at any stage, relating to APRA’s authorisation applications.

It is hard to imagine how APRA even conceive that this is a valid argument, when the ACCC have more recently repeated these claims in their submission to the ALRC paper on Copyright and the Digital Economy in 2012.

*1.24 The ACCC submits that section 51(3) of the CCA should be repealed. The ACCC notes that in other jurisdictions, such as the United States, IP rights are subject to the same competition laws as all other property rights. The ACCC further notes that in these jurisdictions, there has been neither an erosion of IP rights for creators nor any apparent impact on the incentives for the production of copyright material.<sup>19</sup>*

This is a fundamental flaw in their application and the public must disregard any notion that APRA has the power to dictate what can be and cannot be used as evidence throughout this process. This attempt offers an insight into how APRA operates through deceptive and misleading conduct. APRA do not only criticise the ACCC’s findings, but try to undermine their authority.

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<sup>19</sup> [www.alrc.gov.au/sites/default/files/subs/165.\\_org\\_accc.pdf](http://www.alrc.gov.au/sites/default/files/subs/165._org_accc.pdf)

Further, APRA state themselves that: *'[t]he commission should be entitled to assume that statements of fact made in submissions to it are fundamentally accurate, and should only have to deal with arguments advanced on that basis'*.<sup>20</sup> Therefore, section 8 – 10 should be rejected by the ACCC.

## **9. ANTI-COMPETITIVE DETRIMENT FROM APRA INPUT ARRANGEMENTS COMPARED TO NON-EXCLUSIVE COUNTERFACTUAL**

APRA aggressively and misleadingly assert that a combination of its licence back and opt out facilities, combined with the exclusion of substantiated data surrounding the reasonable costs of non-exclusive licensing, validate their authorisation. Due to the fact that this whole section relies on the deceptive and arbitrary use of the 2010 findings, as in section 8 of APRA's application, the comments on 'anti-competitive detriment from APRA input arrangements compared to non-exclusive counterfactual' should be regarded as false and rejected in their entirety.

## **10. COSTS OF DETECTION AND ENFORCEMENT WITH NON-EXCLUSIVE INPUT LICENSING**

APRA aggressively and misleadingly assert that a combination of its licence back and opt out facilities, combined with the exclusion of substantiated data surrounding the reasonable costs of non-exclusive licensing, validate their authorisation. Due to the fact that this whole section relies on the deceptive and arbitrary use of the 2010 findings, as in section 8 of APRA's application, the comments on 'costs of detection and enforcement with non-exclusive input licensing' should be regarded as false and rejected in their entirety.

Beyond this, APRA have provided only speculative assertions and no tangible evidence to support their authorisation.

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<sup>20</sup> <http://transition.accc.gov.au/content/trimFile.phtml?trimFileTitle=D10+1000.pdf&trimFileFromVersionId=1061990&trimFileName=D10+1000.pdf>

## 11. CONCLUSION

In summary, it has been established that:

- (a) it is concerning that APRA predict Part D will be rejected, although this is obvious
- (b) the lexical mechanism '*when properly assessed*' is used in a '*confrontational and threatening*' manner
- (c) this section is based purely on speculative assertions and withholding valid information

Nonetheless, even with Part D rejected, the lack public benefits identified in Parts A and B above no longer continue to outweigh any competitive detriment of the types identified by the ACCC in the 2010 Determination. The information provided in the response to Part C further substantiates this.

## SUPPLEMENTARY DOCUMENTS

### Comments on APRA's Operations Statement

There are a number of items that are of concern in this document, and they are not formatted in order of importance.

#### Re para 4:

*"Performance in public" is not defined in the Copyright Act, but has been taken to mean any performance that is not in a domestic or quasi-domestic context. Communicate is defined in the Copyright Act as to make available online or to transmit electronically. The right to communicate works to the public is exercised by broadcasters, by those who operate websites that contain music, and by those who transmit music over telephone systems. (APRA Operations Statement)*

This statement is misleading and there are some interesting concerns over broadcasts. 'Public Performance' is an ambiguous term due to the fragmented legal interpretation. 'Performance' is defined by the Copyright Act, but 'public' is not. The term 'public' relies on the interpretations of the courts. Performance seems to be very broad in this definition, and applies to almost any context when music is played. This means the onus is on how 'public' the performance is. The clearest definition of 'Public' seems to infer being 'in the company of more than one person'; however there is a focus in the courts decisions that infer business use of any kind is public. This makes the definition more confusing, and it must be assumed it would have to be argued before a court on a case by case basis.

There are also exceptions for Sections 46 and 106(1)(a) of the Copyright Act allowing music to be played at premises where persons reside or sleep without infringing the copyright in the work or sound recording. Section 199(2) of the Copyright Act provides that a person who causes music to be played in public via radio or television broadcasts, does not have to have a licence for the playing of the sound recording.

A person playing music in these circumstances would still need a license for the performance of musical and literary works under APRA in Australia. This puts APRA at a major advantage compared to the Phonographic Performance Company of Australia (PPCA), which is nearly ten times smaller by comparison. These exceptions also make it possible for companies to infer that there are no PPCA public performance fees required in these circumstances.

### ***The APRA Repertoire***

The Creative Commons submissions from 2010 in regard to APRA's input agreements remain unresolved. A creator is still legally obliged to apply for a license to publically use their own music, even on their own website. Creators and users should have access to non-exclusive options that do not require the permission of APRA.<sup>21</sup>

There are also concerns that with data collection technology to account for random usage, royalties are still distributed by analogy at the discretion of APRA's Board. Many of the 40,000 Background Music licensees included in APRA's latest distribution document have no transparency in their transaction, i.e. when they pay their license fee there is no guarantee that this money will eventually filter back at the international standard minimum of 50% to the rights owner.

Further, in 2010 the ACCC determined the following in regard to predictable requirements:

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<sup>21</sup>See: <http://www.apraamcos.com.au/downloads/file/Music%20Creators/INTERACTIVE%20Comp%20Licence%20for%20Personals%20Website%20%20APRA%20member%20only.pdf>

**4.123** The ACCC notes that for many users with unpredictable requirements for access to a large repertoire of music, direct dealing with composers is unlikely to be a desirable alternative for either party. Transaction and enforcement costs would be considerably inflated and likely to wipe out the gains from competitive pricing.

**4.124** The ACCC considers, however, that for certain users with, for example, predictable requirements (either in part or in total) for access to musical works, direct dealing can present an attractive option. For example, performing rights for films, television programs and advertisements (for television, radio and cinema) could be negotiated at source (along with synchronization rights) and often at the same time as commissioning the works. Other possibilities for direct or source licensing would appear to be the use of pre-packaged music in, for example, cinema foyers or fitness classes.<sup>22</sup>

It is worth noting that cinemas could positively benefit from provisions that account for predictable uses. Fitness Centers already have these systems, but APRA are unwilling to reveal the extent of their repertoire to enable effective discount blanket licensing.

This further illustrates how any authorisation period should be shorter than the previous three and half years, if granted at all. As has been demonstrated, six years ago there was no (music) video on demand (e.g. YouTube), no music subscription services (e.g. Spotify, Rdio) and even Facebook and smartphones were in their infancy. Six years in this environment has become an eternity, and would not represent the best interests of members.

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<sup>22</sup> ACCC 2010 Determination, page 33

## ***Collective administration of copyright***

APRA states in **Re para 11(a)**:

*APRA provides a mechanism which furthers the public interest inherent in copyright by:*

*(a) encouraging creativity, by ensuring that songwriters and publishers are adequately compensated for some uses of their works; and [...]*

APRA does not work in the best interests of its members, and the points raised by the Australian Digital Alliance and the Australian Libraries Copyright Committee (ADA and ALCC) in regard to the APRA Board being loaded in favor of industry, have never been proven untrue.

Furthermore, companies have been developing accurate pay for play data for years. Accurate play data would ensure that payments were distributed correctly for many background and foreground music uses, and reduce transactional costs while enhancing transparency. While APRA withhold their technology attachment from members and the public, it is not clear what system APRA's Board of Directors currently uses to distribute royalties to members. There is a concern that APRA will use their market power to determine the future of technology used in this area in an autocratic manner. The distribution and practices document states that APRA's Board, mostly professional publishers, have discretion to direct royalties with no accountability. This is of great concern to the public interest and contradicts APRA's own membership charter.

**Re para 11(b) :**

*(b) facilitating access to those works, by enabling members of the public to have ready and efficient access to the millions of musical works in APRA's repertoire by granting licenses*

*for the public performance and communication  
of those works. [...]*

In general, the role of collection societies does have certain benefits, and the legal use of music has a positive flow-through to the whole industry. However, in the future a more sensible solution that allows for competition is in the best interest of both creators and users.

**Re para 12:**

*12. APRA submits that collective administration  
remains the only practical way that this can be  
achieved.*

In principle, a blanket licensing system should reduce transactional costs for creators and users in many contexts, if administered effectively. Referring back to the previous paragraph, creators are not currently offered a transparent model to understand the distribution of royalties by APRA and its Board. Music users are also unable to account for music costs in a reliable manner. This point was raised in the 2010 authorisation submission by the ADA and ALCC, and remains valid and unresolved:

*“The conduct of APRA is the issue, not the concept of having a collecting society for music performance rights. We agree in principle with the model of collecting societies and the vital role that they play. However, we disagree with the corporate mentality of APRA, which departs from the concept of collecting societies as cooperatives acting for the public benefit. This mentality has resulted in the making of unreasonable proposals during license fee negotiations, continual monetisation of new uses, and an adversarial and combative nature with some licensees.”<sup>23</sup>*

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<sup>23</sup> ADA and ALCC 2010 Submission, p. 2

## **APRA's Board structure**

**Re para 14 – 16:** The following three points from APRA's operational document are addressed below:

*14. APRA acts on behalf of and is accountable to its members.*

*15. Management of APRA is vested in the board. The Board of Directors of APRA is elected by APRA's members. Six writer members are elected to the Board by the writer membership and six publisher members are elected to the board by the publisher membership.*

*16. This structure ensures that a mix of writer and publisher interests are represented on the Board. This mix ensures that APRA remains responsive and accountable to the users who interact with both writer and publisher members.*

The concerns and recommendations raised by the ADA and the ALCC in their 2010 submission remain valid and unresolved. Furthermore, the longer the ACCC continues to leave APRA's board unmonitored; exponential risk to the public is compounded.

Below are the passages from the ADA and ALCC 2010 submission to the ACCC on APRA's authorisation application that remain unresolved through the previous determination:

## ***Recommendation 6: Representation on APRA's Board***

### ***Concerns***

*91. We are concerned that the board membership of APRA only represents rightsholders. APRA's board consists of six publisher representatives elected by publisher members and six writer representatives elected by writer members. We submit that the interests represented on APRA's board are unbalanced. This has led to the troubled dynamic with most licensee groups, and resulted in a mentality where APRA operates less like a cooperative acting for the public benefit and more like a commercial profit driven organisation.*

*92. We are concerned that APRA has a tiered voting system whereby voters with more money get more votes. At annual general meetings, members of APRA receive an additional vote for every \$500 in earnings collected for the member.<sup>47</sup> We submit that smaller and independent musicians are not adequately represented on APRA's board. Some independent musicians have reported such poor results that they terminated their membership with APRA.*

### ***Recommendation***

*93. We recommend that APRA be required to amend its constitution to provide for broader stakeholder representation on its board. We consider that APRA's constitution should make provision for independent directors who are not associated with its major publisher and writer groups. Independent directors would provide a much needed element of balance on APRA's board. We consider that this would help to constrain the potential for APRA to engage in monopoly conduct.*

*94. We consider that independent directors should be elected as representatives of three categories. First, a member representative for independent musicians. They have no representation, because while they constitute the majority of APRA's membership, it is by number not by revenue. Second, a member representative for creators with a background*

*in the cultural sector. The issues facing cultural institutions and public broadcasters receive no prominence on APRA's board. Third, a licensee representative with experience in the broadcasting sector. This sector represents the majority of APRA's revenue, yet sector has no representation on APRA's board.*

*95. We note that the Copyright Agency Limited (CAL) has three independent directors and previously had a representative for the library sector. We acknowledge that CAL is a declared collecting society and is held to a higher standard. However, we submit that APRA should maintain the standards of its peers.*

## **Regulatory environment**

**Re para 17(a):**

*17. Since its establishment in 1926, APRA has been (and continues to be) subjected to various levels of scrutiny from competition powers including the Owen Royal Commission, the ACCC and the Australian Competition Tribunal, which have variously:*

*(a) confirmed the benefits of the APRA system;  
and*

This is an unsubstantiated claim, and it sharply contradicts both the referenced and substantiated points raised by the ADA and ALCC in their 2010 submission. Of more concern is the ACCC's recent statement on retail pricing and abuse of market power:

## ***Section 51(3) of the CCA***

*1.23 Currently, section 51(3) of the CCA provides a limited exception for certain licence conditions from the competition provisions of the CCA (misuse of market power and resale price maintenance are not excepted). While the extent of the exception is unclear, it potentially excludes significant anti-competitive conduct, with substantial detrimental effects on efficiency and welfare, from the application of the CCA. Arrangements which are considered to be potentially within the ambit of the exception include cross-licensing in Golden West<sup>7</sup> and collective licensing in APRA.<sup>8</sup>*

*1.24 The ACCC submits that section 51(3) of the CCA should be repealed. The ACCC notes that in other jurisdictions, such as the United States, IP rights are subject to the same competition laws as all other property rights. The ACCC further notes that in these jurisdictions, there has been neither an erosion of IP rights for creators nor any apparent impact on the incentives for the production of copyright material.*

*1.25 Licensing arrangements that are at risk of breaching Part IV of the CCA but which are likely to produce offsetting public benefits, can be granted an exemption from the relevant provisions of the CCA through the usual notification or authorisation processes.*

*The ACCC can grant protection from legal action under both processes for conduct that risks breaching the Part IV provisions of the CCA (with the exception of misuse of market power) if it is satisfied that the likely public benefit (which predominantly relates to efficiency considerations) from the conduct outweighs any likely public detriment.*

*1.26 The digital environment is creating the opportunity for new ways of creating, using and distributing copyright materials with commensurate opportunities to improve efficiency and welfare. Increasingly, copyright*

*materials are being used as intermediate inputs. This increases the potential for the use of copyright to have anticompetitive effects. Similarly, the solutions that are capable of addressing new market failures in the digital environment (including potentially new forms of collective licensing or copyright exchanges) may raise competition concerns. In order to fully exploit the substantial potential benefits arising in the digital economy, it is important that competition laws are able to complement IP laws, including copyright laws, by preventing anti-competitive conduct associated with copyright usage that is not in the public interest.*<sup>24</sup>

Further, below are the comments from the ADA and ALCC in their 2010 submission that APRA refused to address, claiming that only certain ‘educated’ parties deserve responses. APRA’s position that they were absolved in any way through the determination process is misleading and these issues remain current:

*46. Government reports have repeatedly expressed concern about the market power of collecting societies and the need for increased regulation. However, there have been no substantive outcomes other than the creation of the Code, and minor expansions of the Copyright Tribunal’s jurisdiction. We consider both to be ineffective mechanisms for constraining the monopoly conduct of collecting societies.*

*47. The Report of the Royal Commission on Performing Rights analysed the licence fees and terms and conditions demanded by APRA.<sup>22</sup> The Royal Commission was appointed after sustained complaints about the monopoly conduct of APRA – the only collecting society at the time.<sup>23</sup> The report concluded that APRA was a ‘super-monopoly’ and recommended the establishment of a tribunal to arbitrate disputes over licence fees. This recommendation was not acted on until 1968 with the creation of the Copyright Tribunal.*

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<sup>24</sup> [www.alrc.gov.au/sites/default/files/subs/165.\\_org\\_accc.pdf](http://www.alrc.gov.au/sites/default/files/subs/165._org_accc.pdf)

*48. The Review of Australian Copyright Collecting Societies report acknowledged that while collecting societies played a vital role, their conduct needed to be monitored.<sup>24</sup> The report recommended an industry ombudsman, but concluded that overall, collecting societies were acting appropriately.*

Beyond this, the work of Benedict Atkinson, LLB (*in: The True History of Copyright: The Australian Experience 1905-2005*, especially chapters 5 to 8) also contradicts this statement.

**Re para 17(b):**

*(b) established the necessary mechanisms to ensure that APRA does not abuse its monopoly, including the Copyright Tribunal, the Collecting Society Code of Conduct and APRA's current dispute resolution procedures.*

It took over thirty years for the Australian government to establish the Copyright Tribunal after the Owen Royal Commission's recommendations. Unfortunately, it is still commonly regarded as extremely cost prohibitive, excluding the majority of licensees negotiations. It has only been since 2006, that the Copyright Tribunal has had the scope to mediate license fees, terms and conditions. By commonly using '*threatening confrontational statements*', APRA is threatening licensees with the Copyright Tribunal, under the ACCC's authority, and has little regard to the fiscal responsibility in relation to using their pool of the members royalties for legal costs incurred.

It is seriously concerning, that APRA omitted the recommendations of The Hon K E Lindgren AM, QC's 2013 Code of Conduct review for Collection Societies. It needs to be noted, that this is one of the only independent assessments of APRA's conduct in this submission. QC Lindgren seems to reprimand them for this kind of behavior, contradicting section 85 of this very operations statement. APRA did include the previous

year's reports of QC Burchett, who had administered this process for APRA for most of the last decade:

*There are different terms in which the possibility of legal action can be drawn to attention. A collecting society might make a threatening confrontational statement. [...]*<sup>25</sup>

Also, the ADA and ALCC made statements detailing the previous Code Reviewers inability to effectually criticise APRA, which further substantiates their claims.

In regard to Alternate Dispute Resolution it needs to be noted, that the ADA and the ALCC drew attention to the fact that this process was not performing effectively from its introduction until their submission for the 2009 authorisation. The conditions imposed in the 2010 authorisation, and the ambit and unsubstantiated claim by APRA in their 2013 authorisation application, that they have had any considerable change in circumstance, are unsubstantiated. Hence, this remains a flawed process, with no clear proven benefit.

The fact that APRA administers this process does not help its perceived credibility either, which potentially deters participation. Given the conditions imposed on APRA in 2010, the industry expects an increased amount of submissions in 2013, as the fear of APRA's retribution slowly rescinds under public scrutiny.

**Re para 18 (a):**

*18. In addition, APRA is constrained in exercising the power it has as a natural monopoly by, among other things, the following:*  
*(a) it grants blanket licences on equal terms to any person in Australia requiring a licence;*

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<sup>25</sup> Code Reviewer Report, QC Lindgren, 2012

It is evident from the submissions already made on the public register, that there is systemic dissatisfaction with APRA's behavior in the market place. There are contradicting interpretations of APRA's own tariff structure that suggests that the above unsubstantiated claim from APRA could be misleading.

**Re para 18 (b):**

*(b) members are entitled to license back and opt out in relation to their works;*

The implementation of APRA's opt out and license back mechanisms are welcomed, but it should be noted that the PPCA have a more accessible framework that further benefits its own members. There have been 125 instances (0.054% of APRA's 232,055 songwriters, composers and music publishers)<sup>26</sup> over said period of three years from its latest modification in 2010. While APRA keeps details of these applications confidential, the restrictive nature of these provisions still inhibits the true value of direct dealings for APRA members. More information must be publicly provided on the details kept confidential in APRA's authorisation application to assess the true nature of their conduct in direct relation to these agreements. Furthermore, APRA must disclose their method of calculating 'reasonable costs' associated with these provisions.

**Re para 18 (c):**

*(c) the terms of APRA's licences are subject to expert determination; and*

While expert determination as part of the Alternate Dispute Resolution (ADR) process is available in disputes, it is common for APRA to lead using '*threatening confrontational language*' (in reference to QC Lindgren) before mentioning the ADR process in their pre-legal correspondence with music users seeking compliance.

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<sup>26</sup> <http://www.apra-amcos.com.au/downloads/file/ABOUT/AboutAPRA8ppBrochISSUU.pdf>

As the ADR is administered by APRA, this kind of outwardly aggressive behavior intimidates compliance seekers, as the Copyright Tribunal is commonly known to be cost prohibitive. The minimal usage of this process is not as a sign of satisfaction, but a sign of intimidation by a ‘super-monopoly’.<sup>27</sup>

**Re para 18 (d):**

*(d) the terms of APRA’s licences are subject to the supervision of an independent statutory tribunal, the Copyright Tribunal.*

The Copyright Tribunal has only had a mandate to consider competition analysis and hence licenses fees, terms and conditions since 2006. Thus, it is a gross overstatement to expect this to account for the accelerated digital landscape, let alone the complex compliance issues surrounding public performance of musical works since the late 1920s.

However, in relation to the balance between the Copyright Tribunal and the ADR, the following passage of QC Lindgren’s ‘The Jurisdiction of the Copyright Tribunal of Australia: the 2006 Amendments’ determination (2007)’ needs to be acknowledged:

*[...]*

- *that the proceedings pending before the Tribunal at any one time have been few in number;*
- *that, generally speaking, they have involved parties of substance who are well advised; and*
- *that those proceedings that have gone to a hearing have, generally speaking, been on the complex and lengthy side.*

*It remains to be seen whether, as a result of the jurisdictional enlargement, more insubstantial and inexperienced parties will come*

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<sup>27</sup> Owen Royal Commission

*before the Tribunal, and, in any event, the extent to which the new power to refer a proceeding for a particular ADR process will prove useful. [...]*<sup>28</sup>

The integrity of such claims of transparency by APRA needs to be questioned and further substantiated. There is a distinct pattern emerging around the omission of QC Lindgren's 2013 Code of Conduct Review for Collection Societies in APRA's application. The aggressive nature with which APRA defended QC Burchett in the 2010 comments on submissions to the ACCC is part of this pattern.<sup>29</sup> APRA's rhetoric can be mirrored by questioning if the combination of these events amounts to 'incompetence and partiality'<sup>30</sup> and reintroduce ADA's argument that QC Burchett 'failed to engage in a systematic analysis of the governance and accountability of collecting societies operations'<sup>31</sup> as valid and substantiated.

### ***Membership assignment and Membership, Member services***

Non-exclusive input agreements are preferable for both creators and users.

APRA's current input agreements are exclusive and protecting this is the primary motivation behind APRA's authorisation. The mismanagement of the conditions imposed during the last authorisation process in 2010 further demonstrates this.

It needs to be clarified why APRA is so adamant about maintaining these exclusive rights when it is clear that their removal has positive benefits for their own members, and would eliminate a lot of the 'financial burn' surrounding their considerable legal arsenal.

The PPCA's non-exclusive input agreements allow members the freedom to directly deal with their own content without being penalized like the APRA model.<sup>32</sup>

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<sup>28</sup> <http://worldlii.austlii.edu.au/au/journals/FedJSchol/2007/8.html>

<sup>29</sup> APRA Comments On Submissions To ACCC by Interested Parties Document, 2010

<sup>30</sup> APRA's comments on submission 2010

<sup>31</sup> ADA 2010 ACCC submission, p.5

<sup>32</sup> [http://www.pcca.com.au/Labels--Indie-Artists/Label--Indie-Artists FAQ/#Direct\\_licensing](http://www.pcca.com.au/Labels--Indie-Artists/Label--Indie-Artists FAQ/#Direct_licensing)

Simply stating that APRA do have 'opt out and license back provisions' in no way guarantees that they are usable, effective, promoted and accessible. PPCA is very articulate in comparison.<sup>33</sup>

The PPCA initiative of having the Arts Law Centre of Australia provide the legal guidelines for direct dealing policies for licensors, allowing the licensors (creators) a free resource to best control their own content. This highlights how far behind APRA is terms of best practice. Research on how aware APRA members are of the implications of the current input agreements needs to be undertaken.

To ascertain if APRA members understand the 'monopolist nature' of these agreements would reflect directly on the quality and transparency of their administration under APRA.

### ***Blanket licences***

As stated before, blanket licenses by collecting societies provide certain benefits to the public. However, we note the retail agent agreements with the PPCA (noted under report on condition C2) facilitated exact play data supplied as part of these agreements to repatriate royalties with complete transparency to its members. The administration cost of 15% is extremely competitive with APRA's 12,82% figure, that provides a significant increased accuracy. Given well over 40000 of the 80000 small business licensees are repatriated by analogy, this would make a positive impact, and take the burden of directing accrued royalties away from APRA's Board.

APRA argue consistently in their comments on submissions to the ACCC in 2010 that their mandate as per APRA's charter is to look after the exclusive best interests of its members. Copyright law is for all users, which is in line with the ADA and ALCC's position from 2010 and suggest a support network for licensees.

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<sup>33</sup> <http://www.pzca.com.au/PPCA-About-Us/Legal-Position>

There is a middle ground between blanket licensing and the impracticality of a non-centralised structure, which could be in the form of either discount blanket licensing or non-exclusive licensing.

There seems to be confusion between the need for blanket licensing and the existence of competition in the local marketplace. APRA's proposal that the Australian system should compromise the musical ecosystem by making exceptions for creators, while alienating users rights, does not provide an acceptable balance of public interest, given the alternate options already proposed in this response. The ACCC state the following in their 2012 ALRC submission:

*(1.23) Section 51(3) of the CCA provides a limited exception for certain licence conditions from the competition provisions of the CCA (misuse of market power and resale price maintenance are not excepted). While the extent of the exception is unclear, it potentially excludes significant anti-competitive conduct, with substantial detrimental effects on efficiency and welfare, from the application of the CCA. [...]*

*(1.24) The ACCC submits that section 51(3) of the CCA should be repealed. The ACCC notes that in other jurisdictions, such as the United States, IP rights are subject to the same competition laws as all other property rights. The ACCC further notes that in these jurisdictions, there has been neither an erosion of IP rights for creators nor any apparent impact on the incentives for the production of copyright material.*

*(1.25) Licensing arrangements that are at risk of breaching Part IV of the CCA but which are likely to produce offsetting public benefits, can be granted an exemption from the relevant provisions of the CCA through the usual notification or authorisation processes. The ACCC can grant protection from legal action under both processes for conduct that risks breaching the Part IV provisions of the CCA (with the exception of misuse of market power) if it is satisfied that the likely public benefit (which*

*predominantly relates to efficiency considerations) from the conduct outweighs any likely public detriment.*<sup>34</sup>

APRA stated in their 2010 comments on submissions that it is not their position to account for the greater public interest by considering all users. Part IV of the CCA can only be accepted by the ACCC if these greater interests needs pass the 'with-or-without test'. As part of a broad and sweeping statement, APRA explicitly state that the ADA and ALCC misinterpreted the authorisation process attempting to invalidate their whole submission.

Again, APRA's words can be differentiated from rhetoric to fact by addressing them back at them with the statement that *'[t]he commission should be entitled to assume that statements of fact made in submissions to it are fundamentally accurate, and should only have to deal with arguments advanced on that basis'*.<sup>35</sup> Therefore, the arguments inherent in the 2009 ADA and ALCC submission would need to be reassessed by the commission, based on APRA's misleading statements. By following APRA's own argumentation, this will indeed create more work for the commission before even considering the accuracy of their current, mostly unsubstantiated narrative.

## ***Public performance licensing***

### **Re para 80 - 123:**

*The fee paid to APRA by a licensee varies according to the licence scheme. The fee for live performances, for example, is based on a percentage of the gross annual expenditure by the licensee on performing artists and musicians. The fees under other schemes are based on such criteria as the number of persons gaining admission to a licensee's premises during a*

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<sup>34</sup> [http://www.alrc.gov.au/sites/default/files/subs/165.\\_org\\_accc.pdf](http://www.alrc.gov.au/sites/default/files/subs/165._org_accc.pdf)

<sup>35</sup> <http://transition.accc.gov.au/content/trimFile.phtml?trimFileTitle=D10+1000.pdf&trimFileFromVersionId=1061990&trimFileName=D10+1000.pdf>

*licence year or by reference to the equipment being used to effect public performances. In this way price differentiation for live performance and other schemes is determined by market forces (the venue and its customers). APRA's percentage, although fixed, will ensure that distributions to the relevant members reflect the market's price differentiation. Other licence schemes provide for fixed licence fees based on factors such as the type of music device and the size of the premises.*

While this is at the heart of APRA's operations, their word alone can no longer be taken on these issues. In fact, it cannot come from a singular voice but must be seen in the context of the whole industry. Until the current authorisation, the industry has been polarized by APRA's legal power. If there is a considerable shift in submissions to this authorisation, the following six points APRA claim are central to public performance licensing, must be investigated in great detail by the ACCC before the draft determination:

*Licensing representatives are required to:*

- (a) initiate contact with unlicensed music users;*
- (b) explain the nature and extent of APRA's rights to license;*
- (c) explain the nature of APRA's licensing schemes and methods of charging;*
- (d) establish the licence schemes under which the user requires licences;*
- (e) provide licence applications reflecting the user's actual usage of APRA's property; and*
- (f) correspond with licensees with respect to reassessment forms.<sup>36</sup>*

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<sup>36</sup> APRA Operation document, p. 13

## ***Enforcement***

**Re para 124:** While expert determination as part of the ADR process is available in disputes, it is common for APRA to use '*threatening confrontational language*' (QC Lindgren, 2013 Collection Societies Code Review Report) before mentioning the Alternate Dispute Resolution process in their pre-legal correspondence with music users seeking compliance.

As the ADR is administered by APRA, this kind of outwardly aggressive behavior intimidates compliance seekers, and the Copyright Tribunal is commonly known to cost a prohibitive amount of money. The minimal usage of this process is not as a sign of satisfaction, but a sign of intimidation by a '*super-monopoly*' (see Owen Royal Commission).

It is also of great concern that there is no forum for justice outside APRA's Complaints Officer. In short, there are likely hundreds of disputes that will never make it to APRA's Complaints Officer, as there is no guarantee that APRA will use this information against the licensees. Again, the fact this process is little used is just as much a sign of fear, than it is a sign of satisfaction, as APRA claims in their application.

Further, we have already provided explicit evidence that there would be no unreasonable costs in enforcement with non-exclusive licensing.

## ***Distribution***

**Re para 129:** Although APRA goes to great lengths allocating accrued royalties from radio and digital download services back to its members, it does not however specifically disclose the distribution method by analogy for its 40,000 background music licensees in the Australian market. This becomes even more significant when considering the fact that these licensees represent 49% of their overall licensed businesses.

The repatriation of public performance royalties should reflect the actual use of copyrighted content and be carried out in the most transparent and efficient way possible. Blanket licensing offers a practical and viable route, and produces benefits for certain stakeholders, but should be non-exclusive in nature as this would address both the public interest and the need for competition. The ACCC's statement on section 51(3) in their submission to the Australian Law Reform Commission paper on Copyright and the Digital Economy reinforces this perspective.

APRA would have to be more considerate, and need member's permission to continue with their seemingly unlimited usage of legal resource with non-exclusive agreements. APRA's activities need to be moderated to avoid a situation where they have a constant temptation to abuse market power, as at present APRA have both the ability to abuse their power and access to their member's funds to defend this abuse. There is also no clear evidence that they declare to extent of their legal expenses to members.

The ACCC, in the 2010 determination, highlighted several options for competition to emerge in the future. While it is unlikely that another collection society will emerge, the ACCC's forecast that these issues, and this technology will combine to offer independent solutions and a competitive market, is informed and impartial.

## ***Distribution Rules***

**Re para 143:** The ADA and ALCC submission in 2010 (p. 16) addressed this in great detail already and note that the nature of APRA's Board is balanced in favor of a 'commercially profit driven corporation', as opposed to a cooperative acting for the public benefit. With APRA clearly stating that all power relating to license fees, royalties received, and distribution resides with the Board of Directors, it must be asked: who is APRA responsible to? Are the members clearly and accurately informed of the exact processes in place? What information is given to members in regard to these activities? APRA stated in their comments on submissions in 2010 that it is, in fact, the organisation's predominant role to best represent their members and therefore APRA must proactively produce such royalty distribution reports in a transparent manner, without being formally requested to do so.

## ADDITIONAL INFORMATION

Due to the restrictive nature of the timeframe for response to APRA's applications, we would like to reserve our right to publicly comment on each of these documents as supplementary additions to this submission at a later stage, should it be required. We have provided our comments on APRA's operations already.

Comments on attachments:

1. Copyright
2. Statement on APRA's operations (*attached with submission*)
3. Comments on APRA's Constitution
4. Comments of APRA's 2010, 2011 and 2012 Annual reports
5. APRA Membership application forms
6. List of Affiliate Societies
7. Public performance license schemes
8. 'CONFIDENTIAL' Broadcast license schemes
9. Online communication license schemes
10. 'CONFIDENTIAL' online communication license agreements
11. Standard correspondence and education materials for licensees
12. Distribution rules and practices
13. History of regulation of APRA
14. Copyright Tribunal of Australia
15. APRA's opt out and license back information
16. CONFIDENTIAL - List of opt outs and license backs
17. CONFIDENTIAL – List of individual online licensees
18. Mini-Online licence agreement
19. ARIA Charts Top 100 2012 analysis
20. Code of Conduct and Triennial review of the code
21. Code Compliance Reports 2010, 2011 and 2012
22. CONFIDENTIAL GRD Shareholders' Agreement
23. CONFIDENTIAL GRD documentation
24. CONFIDENTIAL APRA Technology Strategy Statement
25. CONFIDENTIAL Pan-European digital music rights summary
26. Table of Pan-European digital music rights summary
27. CONFIDENTIAL – Senior Counsel's advice