

**31 May 2013**

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We believe that APRA has abused the monopoly powers handed to it by the ACCC and that the checks and balances put in place have proven to be ineffective.

In the triennial report of the Code Reviewer conducted by the Hon JCS Burchett QC issued in June 2011 Burchett QC said at page 2:

“Of course, the ultimate statutory remedy for a conflict in this area is the Copyright Tribunal, which was constituted to resolve such conflicts. But resort to it may prove costly, and the alternative of negotiation (where seen feasible) is often preferred.”

The Copyright Tribunal is indeed prohibitively expensive as was seen in the recent case wherein APRA in our opinion used the Copyright Tribunal, and it's own superior organisational and financial firepower, to justify huge rises in fees in light of it's obligation under Clause 2.3(d) of it's Code of Conduct to keep fees fair and reasonable.

In the most recent Code of Conduct Report by Code Reviewer The Hon KE Lindgren AM, QC dated March 2013 his only comment about whether APRA had satisfied the obligation set out in Clause 2.3(d) was that he asked them whether they had and they said yes. We suggest a review of all Code of Conduct Reports on this particular point is appropriate.

At page 7 Lindgren QC said:

“APRA/AMCOS report that they “always have regard to the matters set out in Clause 2.3 of the Code when setting or negotiating licence fees and tariffs.””

The ACCC now has the opportunity to rectify this distortion of market power by either introducing competition (although this may be difficult if the apparent behaviour of Record Companies is any indication) or by introducing more effective checks and balances.

As we saw with the Global Financial Crisis the way people in positions of power are remunerated can have a profound effect on markets.

We would recommend a rigorous examination of how APRA employees are remunerated and in particular the presence of any bonus structures that would create a conflict with Clause 2.3(d) of the Code of Conduct.

We would also recommend an examination of how and by whom the Code Reviewer is paid. It may be more appropriate that a portion of licence fees be put aside in a fund specifically for this purpose, so that he is in fact retained not only by APRA but also by Licensees. It may also be appropriate that there be more than one Code Reviewer.

Finally, we strongly recommend that the Copyright Tribunal be made more accessible and less expensive. It should also have the power and the means to make it's own enquiries, just as the ACCC does. We do not believe that the Copyright Tribunal should be exclusively an adversarial forum, as it currently is. Especially when the rights of copyright owners are grouped into associations and given monopolistic powers through exemptions by the ACCC.

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