



# AUSTRALIAN HOTELS ASSOCIATION

24 Brisbane Avenue Barton ACT 2600 • PO Box 4286 Manuka ACT 2603 • Australia  
email: [aha@aha.org.au](mailto:aha@aha.org.au) • Facsimile: (02) 6273 4011 • Telephone: (02) 6273 4007  
Web: [www.aha.org.au](http://www.aha.org.au)

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5 June 2013

Dr R Chadwick  
General Manager – Adjudication Branch  
Australian Competition and Consumer Commission  
Via Email: [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

Dear Dr Chadwick

## Re: APRA application for revocation and substitution

Thank you for asking the Australian Hotels Association (AHA) to comment on the above Application by the Australasian Performing Rights Association (APRA).

The AHA had contemplated on leaving any comments until the draft ACCC determination but felt that it is best if it put some matters to the ACCC for preliminary consideration. In the interim we will continue to consult with AHA members and other industry stakeholders to examine appropriate conditions that should be attached to any authorisation.

## Summary of Recommendations

1. The AHA supports a conditional authorisation for APRA.
2. The authorisation should be for a further three year and six month period.
3. The authorisation conditions need to address alleged misleading or deceptive behaviour by APRA with respect to contractual negotiations and representations by requiring:
  - 3.1. Licence application forms to disclose range of tariff options open to user;
  - 3.2. Licence application form to disclose ability for user to negotiate terms with APRA;
  - 3.3. Licence application form to disclose basis for tariffs being determined; and
  - 3.4. Licence application forms to remove clauses relating to audit and play lists and to have a fairer payment reconciliation clause.
4. The authorisation conditions need to address the alleged coercive and bullying behaviour by APRA relating to enforcement by requiring:
  - 4.1. Requiring APRA to develop policies and procedure manual for staff and agents which are to be approved by the ACCC;
  - 4.2. Requiring APRA staff and agents to be trained in APRA policies and procedure;
  - 4.3. Requiring APRA to adopt a small claims procedures for claims less than \$20,000; and
  - 4.4. Requiring APRA to adopt a fairer alternative dispute resolution procedure for claims above \$20,000.

5. The authorisation conditions should require ACCC to set guidelines on price fixing tariff with tariff and background tariff and independent enquiry at the cost of APRA to be conducted as follows:
  - 5.1. An Independent Review Board should be set up at the expense of APRA to investigate and set tariff classifications and fees.
  - 5.2. The Independent Review Board should be made up of 1 representative with an APRA background, one representative with a user background in hospitality and retails and three independent experts appointed by ACCC (one of these persons to be Chair another to be other Deputy Chair).
  - 5.3. ACCC should provide independent review board with guidelines on tariff price fixing.
  - 5.4. Independent Review Board would be a board of enquiry and would act on its own motion (commissioning its own research) and also inviting submissions from interested stakeholders.
  - 5.5. The decision of the Independent Review Board would be ratified by the ACCC and become part of the terms of the authorisation.
6. The authorisation should allow Licence assessment procedures to be performed by agents subject to APRA providing transparent policies and procedures.
7. Contemporaneously with the release of the Draft Authorisation, APRA should release details of its Repertoire of Works and Distribution Revenues.

## Response to Authorisation Application

The AHA is the national voice of Australia's hotel industry. The AHA represents more than 5,000 members across Australia serviced by a network of branches based in every state and territory and a Canberra based National Office. The majority of the AHA's members are pubs and taverns, and a significant number are accommodation hotels. A smaller proportion of the AHA's membership is comprised of bars, restaurants, licensed clubs, casinos and function/conference centres. The overwhelming majority of Australian hotels are owner-operated small businesses.

AHA members are a major client of the music industry and very much involved with both collecting societies, APRA and PPCA. As can be expected the AHA is primarily concerned with 'output' arrangements in this area.

The AHA is aware of submissions from the Queensland Hotels Association, AHA Victoria, the ALH Group and the Caxton Hotel (referred to collectively in this document as 'the Hotels Submissions') and notes the allegations of specific APRA behaviour detrimental to the hotels contained in these submissions.

Both APRA and PPCA are monopolies in the Australian market and hence the operations of both are of concern to the AHA. The AHA is significantly concerned about how the conduct of the monopoly collecting societies impacts on its members, which are primarily small businesses and often do not understand the complexities of the copyright regime. The impact on AHA members of collecting society activity has been exacerbated in recent years by the steep increase in licence fees and the introduction of new and amended tariff structures.

It should be noted that the annual income APRA receives from its licensing regime puts it in a position to be able to afford to pay for reasonable measures associated with compliance and dispute procedures contained in any authorisation.

We reiterate extracts of our previous 2010 authorisation submission in noting collecting societies have been treated differently under Australian competition law than in other jurisdictions, such as North America. Australia has been relatively benign in relation to what are anti competitive agreements amongst competitors and resulting in substantial market power for the collecting societies.

In its 2001 decision the Australian Competition Tribunal stated:

*“ ..... , the input arrangements of APRA, which require an exclusive assignment of performing rights subject only to Article 17(b), could be modified in the manner that we have mentioned without creating undue risk to the essential elements of APRA's role as a collecting society and should be modified in that manner. Similarly, we think a case for a simplified dispute resolution process has been established.*

*Whilst we consider that the public benefits arising from APRA's collective administration of performing rights exceed the anti-competitive detriments flowing from its operations, we consider that authorisation should be withheld until these two matters have been put in order by APRA. We think the appropriate course is to adjourn the proceedings to enable APRA to design rules for a non-exclusive opt-out system on a work-by-work basis, and an alternative dispute resolution procedure. A similar course was followed by the Tribunal in Re Media Council (No 2)”*

The Tribunal accepted that there was the requisite public benefit but that there should be safeguards. That was in 2001, since then the ACCC and the Tribunal have demanded more of authorisation applicants.

Those who are represented by APRA can, under the authorisation, act collectively yet the users of the services (including AHA members) cannot unless they too seek their own collective bargaining authorisation or notify collective bargaining arrangements. The AHA now has that authorisation.

It may be appropriate for other groups of users to seek such protection and that as part of the APRA authorisation that APRA be required to collectively negotiate with such groups. Further, it is suggested that groups representing users as well as individuals should be able to utilise the Alternative Dispute Resolution (ADR) regime that is part of the current and any future APRA authorisation.

In the past the AHA has submitted that it is important that APRA members can withdraw from universal coverage as long as efficiencies are maintained. This remains the AHA's view and we note that in the past the ACCC has attempted, unsuccessfully, to build that ability into the regime. The AHA also notes that in its 2010 determination the ACCC stated:

*“The ACCC considers that APRA's licensing arrangements:*

- significantly hamper direct negotiation between copyright owners and users*
- are unnecessarily restrictive and do not strike an appropriate balance between facilitating the administration of copyright and allowing flexibility in licensing as appropriate*
- do not allow adjustments to blanket licences in appropriate circumstances, including an appropriate adjustment to the fee*

- *do not provide an effective alternative dispute resolution process to deal with pricing issues.”*

Despite this, the ACCC did, at the time, find sufficient public benefit to reauthorise the APRA arrangements. In fact, the Trade Practices Commission (TPC), the Copyright Tribunal and the ACCC have each determined that there is a public benefit in the APRA regime. However, in each case concern has been expressed about the resulting detriment and changes or conditions have been agreed or imposed. The AHA agrees with this general view but suggests that the public benefits must be improved to overcome the high level of detriment still being experienced by AHA members.

### **Recommendation 1: The AHA supports a conditional authorisation for APRA.**

AHA suggests three years and six months as the period of the authorisation. Any longer is not appropriate to the changing face of the industry. Further authorisations of monopolies should be for the shortest time necessary.

### **Recommendation 2: The authorisation should be for a further three years and six months.**

The Hotels Submissions outline the hotel industry experience and concerns held by AHA members about the APRA regime.

We note that the ACCC has been asked to authorise APRA behaviour which amounts to a cartel and exclusionary conduct. Given that unauthorised cartel behaviour attracts criminal sanctions we understand the serious duty that the ACCC must perform in considering applications for authorisations.

Currently, the music licensing system allows owners of copyright to assign their rights to APRA and then allows APRA on behalf of the copyright owners to set market fees/tariffs for users wishing to use the copyright. To the end user there is a complete lack of transparency as to how these prices are set by APRA on behalf of the assigning copyright owners. There are no opportunities for many end users to negotiate with a supplier on music licensing.

Given the large number of copyright owners, the AHA understands the need for some form of authorisation for APRA. However, the AHA contends that as the conduct authorised is genuinely anti-competitive conduct, the public benefits must be real and the detriments minimised. Past authorisations have sought the latter but in the view of the AHA have not been successful in achieving this. In particular the AHA submits that the conditions imposed on APRA's reauthorisation by the ACCC in 2010 have had only limited impact.

The AHA has opened up a dialogue with APRA in an attempt to address the concerns of its members but this is in a very early stage. It is hoped that many of these concerns may be addressed through the reauthorisation process. In any event AHA will continue to work with APRA on the issues raised and APRA have indicated a willingness to consult with the AHA.

## **APRA behaviour detrimental to AHA members**

It is the experience of AHA members that APRA representatives are inflexible and do not explain issues to customers. APRA material and licence documentation does not assist in that regard either. APRA representatives often do not fully communicate to licensees what fees apply, how they are set, and why. APRA appears content to allow end users to believe its tariffs are prescribed by law.

APRA needs to improve its education processes to customers. AHA members are confused and often frustrated about the lack of transparency in the APRA regime. The issues causing irritation are the fee levels and the categorisation of users, particularly in the category of nightclub type operations. AHA members often feel they are singled out for 'exploitation'. If there was a fairer and more independent way on how the tariffs were set including proper consideration of user submissions then the frustrations current concerns understanding of how fees are set and categories prescribed would dissipate.

The APRA fairness to its consumers has come under scrutiny from AHA members and some examples of this experience includes:

- APRA's preference to send out details on only those tariffs they would like licensees to complete and not the full range of options available for them to decide. This has the effect of APRA representing higher tariffs rather than canvassing cheaper tariff option.
- APRA manipulating the declaration of a licensee's tariff to apply an assessment in another tariff. Information provided for tariffs in Featured Recorded Music yet an invoice is sent for "Recorded Music for Dance Use in Nightclubs".
- APRA sending renewal invoices containing more expensive tariffs than have previously been agreed. In one case APRA attempted to charge a licensee for a Foreground Tariff when the previous licence was for Background Tariff.
- APRA licence fee calculation of a TV Screen Tariff. The licence assessment form seeks misleading information on the TV screens "used to show" music which is inconsistent with the copyright they can charge and collect which relates to sound. No attempt is made by APRA to gather information on screens not used as a sound device. This has the effect of APRA misrepresenting to licensees that higher tariffs are applicable.
- There are re-occurring disputes relating to the application of the "Recorded Music for Dance Use in Nightclubs". In recent years APRA has commenced classifying many pubs as nightclubs.
- APRA has targeted hotels with mixed uses and areas where one of those areas includes a space which "Recorded Music for Dance" tariff is applicable.
- APRA use online media and gig guides to coerce licensees into agreeing to be classified as a venue type subject to more expensive licence tariffs.
- Disputes arise frequently between APRA and licensees over the application of certain tariffs. APRA staff do not assist licensees with the initial complaint process. The initial response from APRA is usually an aggressive letter of demand attempting to enforce a contract that each party has not yet intended to create. APRA then harasses licensees as if they are in breach of contract.
- The AHA is aware that many of its members will not pursue any legal address, complain to ACCC, complain to state consumer affairs, complain to Copyright Tribunal, or claim a breach of the Copyright Collecting Societies' Code of Conduct to the Code Reviewer.
- Part of the APRA spin, inference and representation to users is that APRA is enforcing rights under the Copyright Act pursuant to determinations under the Copyright Tribunal. The reality is that the tariffs and classifications APRA seeks to enforce have not been approved by the Copyright Tribunal and the tariffs themselves are not statutory charges.

- APRA employees will often use bullying telephone marketing techniques to persuade licensees to complete tariff forms in a manner that is advantageous to APRA. These telephone calls are of a high frequency in nature and have a coercive effect on members.
- The nature of the assessment surrounding live music is fundamentally flawed. Licensees are asked to predict the number of people attending the venue a year in advance. Given that an annual reconciliation is required this tariff classification emphasises the problems associated with APRA attitudes towards tariff recovery.
- There are examples of APRA seeking to collect several classes of tariffs for the one event when only one tariff is applicable.
- The standard licence agreement includes a provision that the licensee must provide APRA with a list of all music performed or reproduced at the venue in the form and for the period specified by APRA. In most cases this is an impossible clause for a hotel operator to comply with.
- The licence agreement also includes an audit clause that requires payment by the licensee where any amount is understated by more than 10 per cent.

Accordingly, the authorisation conditions need to address alleged misleading or deceptive behaviour by APRA with respect to the contractual negotiations and representations by APRA.

By comparison, the process of an APRA sale is not too different from a door to door salesperson in that an APRA salesperson is selling a product to an unsuspecting consumer. In this instance the consumer knows they need to pay for the product (music licensing) but does not understand the alternative contracts available. A typical consumer doesn't understand copyright law, including the differences between approved Copyright Tribunal schemes and schemes proposed by APRA only. Consumers certainly do not comprehend the range of tariff options nor are they familiar with various options to be considered. Accordingly the consumer is subject of the influence of the APRA salesperson who is on a sales commission. The authorisation needs to ensure any representations are fair and that full disclosure is made by APRA to the user.

The ACCC needs to provide an authorisation with appropriate safeguards in this sales area. The concerns are best addressed by requiring APRA to make full and frank disclosure to users of the full range of tariffs available. Such a disclosure would also give clear guidance and examples of what steps can be taken to minimise tariff imposition including:

- Whether TV screens have sound;
- Whether background tariffs or foreground tariff is applicable;
- Differences between licences for Featured Music and Recorded Music for Dance in a Nightclub;
- Delineation of tariffs in venues with multiple areas of mixed use; and
- Options for tariffs for one off or minimal occasions of dance use.

APRA represents to users that the terms and conditions of a tariff are not negotiable. The reality is that some users are able to negotiate better terms and conditions than others. Accordingly, all licence application forms should disclose that users can negotiate terms and conditions with APRA.

Furthermore, APRA should disclose to the user the basis on which the tariff and its classification has been formulated. In particular it needs to indicate whether or not the tariff

has been approved by an independent body to APRA such as the ACCC or the Copyright Tribunal.

Concern has been expressed on the specific terms of the standard licence terms and conditions. Accordingly, the reasonableness of conditions relating to the current audit provisions, requirements to upon request produce play lists and the right for APRA to retain over payments following reconciliations need specific attention.

When APRA advises customers of the relevant fees, it should do so in a more open and transparent (and hopefully more neutral) manner. APRA should give preliminary advice to customers and then discuss any concerns with the customer, instead of its current 'take it or leave it' approach. APRA should be willing to negotiate with appropriate customers.

**Recommendation 3: The authorisation conditions need to address alleged misleading or deceptive behaviour by APRA with respect to contractual negotiations and representations by requiring:**

- 3.1 Licence application forms to disclose range of tariff options open to user;**
- 3.2 Licence application form to disclose ability for user to negotiate terms with APRA;**
- 3.3 Licence application form to disclose basis for tariffs being determined; and**
- 3.4 Licence application forms to remove clauses relating to audit and play list and to have a fairer payment reconciliation clause.**

## **Dispute and complaints process**

Most AHA members are unaware of the ADR process, and the remaining few are daunted by it. Little is said APRA about the ADR process in the licence documentation.

AHA members are busy running a business and cannot go through a lengthy ADR or Copyright Tribunal process. Many of the issues could be resolved if a dispute was referred to a referee for a preliminary conference and, if this fails to achieve an outcome to a more formal ADR process.

APRA should adopt a policy that customer disputes must be resolved wherever possible. In most cases disputes involving AHA members are not around the hotel's refusal to pay but around the quantum of payment.

The AHA notes that the latest Code of Conduct review mentions only three disputes. The AHA submits that there are significantly greater levels of dissatisfaction in the hotel industry but few of its members are prepared to move to the formal stage of ADR. The ADR process needs to be improved, simplified and made accessible so that licensees are not intimidated or discouraged from utilising the process.

There should be separate treatment of smaller and larger disputes. The AHA suggests having a two-tiered ADR system, one for small claims dealing with disputes less than \$20,000 and another for larger disputes exceeding \$20,000.

Small claims should be referred to an independent accountant/auditor for expert determination at the expense of APRA. The determination process should be kept simple, informal and inexpensive. The decision should be binding on the parties.



Larger claims could use the existing ADR procedures. However, more information needs to be provided up front to users on the ADR procedures and this could be achieved by more detailed disclosures at the time of the sales transactions occurring.

APRA staff need to be trained and educated on the dispute systems available and how to deal fairly to resolve a dispute during complaint and dispute procedures.

In previous authorisations the ACCC has given APRA the opportunity to voluntarily self-regulate the complaints processes. The self-regulatory steps have been the combination of the implementation of the ADR process and the Code of Conduct reviews. Given the behaviour of APRA since the last consideration of an authorisation it is apparent that this self-regulatory model has failed. Accordingly, the ACCC needs to formally regulate APRA through the authorisation conditions.

**Recommendation 4: The authorisation conditions need to address the alleged coercive and bullying behaviour by APRA relating to enforcement by requiring APRA to:**

- 4.1 Develop policies and procedure manual for staff and agents which are to be approved by the ACCC;**
- 4.2 Train its staff and agents in APRA policies and procedure;**
- 4.3 Adopt a small claims procedure for claims less than \$20,000; and**
- 4.4 Adopt a fairer alternative dispute resolution procedure for claims above \$20,000.**

## **Independent review of tariff structure**

Given the lack of transparency regarding tariff classifications and fees it is appropriate that any authorisation be subject to the review of tariff structures generally and the development of guidelines on APRA fee setting and category allocation principles.

APRA should be directed to issue guidelines on its fee setting and category allocation principles. Until this occurs APRA should not be permitted collect any fees. Such guidelines should be approved by the ACCC after consultation with stakeholders. Following the development of the guidelines APRA should have an annual meeting with licensees to discuss tariff application issues.

Unless the ACCC authorisation deals with the major issue of tariff classifications and fees, the tariff issues outlined in the Hotels Submissions will continue. The Copyright Tribunal has been made redundant by APRA's current tariff setting process and users are unable to negotiate with APRA on the tariffs set. The ACCC authorisation needs to outline an independent procedure for reviewing tariffs and classifications.

As an industrial organisation, the AHA deals annually with the minimum wage process undertaken by the Fair Work Commission. The industrial system allows for an independent panel to set the minimum wage. Submissions are received from Employee Unions and Employer Associations, Government agencies and not-for-profit associations. The independent panel commissions research to assist it in its findings.

Importantly, the process is relatively informal and parties making submissions are not required to spend incur significant costs in the form of legal fees, as is the case with the Copyright Tribunal. The independent panel takes a common sense approach to balancing



the various issues of the employees and businesses. There are a range of experts on the independent panel including people with experience within or in dealing with union or employer groups.

The ACCC could require the independent review to be carried out during the next term of the authorisation. Accordingly we suggest the following recommendations:

**Recommendation 5: The authorisation conditions should require ACCC to set guidelines on price fixing tariff with tariff and background tariff and independent enquiry at the cost of APRA to be conducted as follows:**

- 5.1 An Independent Review Board should be set up at the expense of APRA to investigate and set tariff classifications and fees.**
- 5.2 The Independent Review Board should be made up of 1 representative with an APRA background, one representative with a user background in hospitality and retails and three independent experts appointed by ACCC (one of these persons to be Chair another to be other Deputy Chair).**
- 5.3 ACCC should provide independent review board with guidelines on tariff price fixing.**
- 5.4 Independent Review Board would be a board of enquiry and would act on its own motion (commissioning its own research) and also inviting submissions from interested stakeholders.**
- 5.5 The decision of the Independent Review Board would be ratified by the ACCC and become part of the terms of the authorisation.**

## Agency

With regard to the PPCA regime, concerns about price fixing remain but the application of the PPCA classification system has improved with the increased use of agents acting on behalf of PPCA. The PPCA regime is now less problematic as a consequence of agents being appointed to collect PPCA fees, as in appointing agents PPCA has had to issue instructions to the agents including guidelines on fees and categorisation.

Unlike with other customer-supplier relationships, music licensees cannot go elsewhere to obtain copyright licences if they are not happy with APRA. With this being the case there is a high responsibility to be transparent and accountable.

We have had an opportunity to peruse the submission from Nightlife Music on this application and we support their comments on ensuring that APRA provide Public Performance Licensing Arrangements for commercial music suppliers.

There should be a competitive offering to AHA members of the APRA's works from commercial music suppliers in addition to APRA. This would enable our members the opportunity for one stop shopping on music licensing.

**Recommendation 6: The authorisation should allow Licence assessment procedures to be performed by agents subject to APRA providing transparent policies and procedures**

## Counterfactual

In granting the 2010 authorisation, the ACCC considered that the “most likely counterfactual for the near to medium term is that there would still be one major collecting society but that it would obtain rights from composers or other right holders on a non-exclusive basis instead of the exclusive basis on which APRA obtains them now”. Notwithstanding this counterfactual the ACCC did recognise that innovation in the medium term will require other counterfactuals to be considered.

For the AHA to properly consider the counterfactual scenarios we would need details on APRA’s Repertoire of Works and APRA’s Distribution Revenues. This information would need to be part of facts to properly consider viable commercial alternatives to the current exclusive arrangement and blanket licensing system. There would be interest from some businesses to source specific lists for play and negotiate copyright tariffs on the use of that playlist only. The negotiation could be with the copyright holder direct, APRA, a new collection society focusing on niche markets, or through an agent of the copyright holder or collection society.

The lack of details and Repertoire of Works and Distribution Revenues is an impediment to the evolution of copyright licensing and does not encourage full consideration of counterfactual scenarios. The AHA recommends that, for the purposes of fully considering the draft authorisation, the ACCC require APRA to publicly provide this information.

**Recommendation 7: Contemporaneously with the release of the Draft Authorisation, APRA should release details of its Repertoire of Works and Distribution Revenues.**

## Conclusion

We note that some of the recommendations contained in this submission are at a concept stage and we will continue to develop these recommendations. Certainly, more information is required from APRA to probably assess the counterfactual. The AHA is also continuing to consider the best recommendations to progress issues with the Alternative Dispute Review.

We conclude by commenting that awareness of APRA issues amongst AHA members is increasing significantly as a consequence of the ACCC notifying the AHA of the authorisation application. Accordingly, it is likely that further matters will come to light that may be of assistance to ACCC in its deliberations and we will forward these to you.

The AHA would be pleased to elaborate on the above if required ahead of the draft determination. We understand this submission will be placed on the ACCC Public Register.

Yours sincerely



Des Crowe  
National Chief Executive Officer  
[crowe@aha.org.au](mailto:crowe@aha.org.au)