

# **Australian Competition & Consumer Commission**

## **PRE-DECISION CONFERENCE**

### **Minutes**

**Applications for authorisation A91367 - A91375  
lodged by the Australasian Performing Right Association Ltd**

**21 March 2014**

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-determination conference but a record of the discussions sufficient to set out the matters raised by the persons participating in the conference. A copy of this document will be placed on the ACCC's public register.

**Pre-Decision Conference:  
Applications for authorisation A91367 - A91375  
lodged by the Australasian Performing Right Association Ltd**

21 March 2014

Australian Competition and Consumer Commission (ACCC), Melbourne.  
Videoconference facilities to the ACCC's Canberra and Sydney offices.

**Attendees:**

*Australian Competition and Consumer Commission*

Jill Walker, Commissioner (in Melbourne)  
Richard Chadwick, General Manager, Adjudication Branch (in Melbourne)  
Darrell Channing, Director, Adjudication Branch (in Canberra)  
Tess Macrae, Senior Project Officer, Adjudication Branch (in Melbourne)  
David Ball, Principal Lawyer (in Sydney)  
Annamie Hale, Senior Lawyer (in Melbourne)

*Australasian Performing Right Association Ltd*

Jonathan Carter, General Counsel (in Melbourne)  
Kate Haddock, Partner, Banki Haddock Fiora (in Melbourne)  
Jennifer Gome, Director Licensing (in Melbourne)

*Australian Hotels Association National Office*

Stephen Ferguson, CEO (in Melbourne)

*Association of Liquor Licensees Melbourne*

Nic Albon, Secretary (in Melbourne)  
Phil Ross (in Melbourne)  
Hank Oudendyk (in Melbourne)

*Wrokdawn*

Anita Monk, Producer (in Melbourne)

*Nightlife Music*

Stuart Watters, Licensing & Business Affairs (in Melbourne)  
Jay Mogis, Research Analyst (in Melbourne)

*Totem Onelove*

Marcus Walkom, Solicitor, Media Arts Lawyers (in Melbourne)

*Association of Australian Musicians*

John Prior (in Sydney)  
Tania Smith (in Sydney)

*Office of the NSW Small Business Commissioner*

Julie Giuffre, Senior Advisor, Advocacy (in Sydney)  
Georgos Papanastasiou, Assistant Advisor, Advocacy (in Sydney)

*Resolve Advisors*

Shirli Kirschner, Director (in Melbourne)

Conference commenced: 1.10pm AEST

Submissions received from interested parties, including submissions tabled by interested parties at the conference, are available at [www.accc.gov.au/authorisations](http://www.accc.gov.au/authorisations).

**Commissioner Jill Walker** welcomed attendees and made some introductory remarks outlining the purpose of the conference and procedures to be followed. Commissioner Walker noted that the conference was opened on 8 November 2013 and has been reconvened primarily for the purpose of discussing the Australasian Performing Right Association Ltd's (APRA) alternative dispute resolution (ADR) scheme. Commissioner Walker also asked whether attendees had any objections to **Ms Shirli Kirschner** (Director, Resolve Advisors) taking part in the conference. No objections were raised. Commissioner Walker then declared the pre-decision conference reconvened from 8 November 2013, and invited the Australian Hotels Association National Office (AHA), the party who called the conference, to make an opening statement.

**Mr Stephen Ferguson** (CEO, AHA) circulated a written submission, made some opening remarks and noted the AHA's main issues of concern:

- Mr Ferguson thanked APRA for its willingness to discuss changes to address the AHA's concerns and APRA's removal of commission payments to its licensing staff. The AHA supports the ADR scheme overall. The AHA considers that the ACCC needs to provide protection to licensees and members since APRA seeks to act as a monopoly cartel.
- Mr Ferguson noted that the AHA has issues with: the plain English guide to licence fees; the scope and cost of the ADR scheme; and access to APRA's repertoire. These matters are discussed in more detail below and are outlined in the written submission tabled by the AHA at the conference.

#### Publication of determinations (condition C2)

Mr Ferguson submitted that the AHA would prefer that the reports required under this condition (in relation to any determinations made under APRA's existing dispute resolution process) be made publically available within a short period of time (such as 2-7 days) after the determination is made. **Mr Jonathon Carter** (General Counsel, APRA) indicated that APRA would be comfortable with this approach.

#### Plain English guides (proposed conditions C3 and C4)

Mr Ferguson submitted that the AHA would prefer that the plain English guide to licensing be completed under the interim authorisation, rather than after the ACCC's final determination. The AHA considers that APRA should also be required to produce the application forms and related materials in plain English.

Mr Carter submitted that it is appropriate for the ACCC to grant authorisation subject to conditions that require APRA to publish plain English guides and then if there are any concerns the ACCC can revoke the authorisation. APRA has engaged a plain English consultant and hopes to share drafts of some guides with industry bodies and the ACCC in the next couple of weeks. While APRA is committed to working with stakeholders, the guides and forms are ultimately matters for APRA – if there was a requirement to redraft the application forms then the current timeframe is not sufficient. Mr Carter noted that APRA is consulting with the AHA about simplified licence terms, conditions and forms but these may not be completed by 30 June 2014.

Mr Ferguson submitted that parties who were at the PDC on 8 November 2013 did not realise that the application forms would not be included in the plain English process. The forms and tariff structure need to be clear (a guide may not be necessary if the forms are clear).

**Mr Nic Albion** (Secretary, Association of Liquor Licensees Melbourne (ALLM)) noted that the forms are difficult to understand and need to be simpler, which would potentially curtail any disputes.

**Mr Stuart Watters** (Licensing & Business Affairs, Nightlife Music) considered that the plain English guides are very important, including at the annual renewal point, and will likely reduce the need for ADR.

**Ms Julie Giuffre** (Senior Advisor, Advocacy, Office of the NSW Small Business Commissioner) submitted that it is imperative that the plain English guide be accompanied by plain English application forms so that licensees do not enter into something that they are not sure about.

Mr Ferguson asked Ms Kirschner if there are less disputes if all documents are in plain English, and noted that one of the main areas of concern is the complexity of the forms. Ms Kirschner noted that she is not fully qualified to answer this, but what is important is to have a smart ADR system because then you can resolve all types of disputes.

#### Proposed condition C5 (ADR scheme)

Commissioner Walker noted that the ACCC wants an ADR condition (C5) that will deliver a successful ADR scheme and also have some flexibility, as requested by APRA.

#### Scope of the ADR scheme

Mr Ferguson submitted that the AHA is concerned that it is hard to define issues of fact as opposed to issues of reasonableness. Parties should be able to nominate any dispute to the ADR scheme and the facilitator can decide whether the dispute can be heard. The AHA considers that commercial negotiation is not always effective given APRA's monopoly status and resources.

Commissioner Walker noted that the ACCC does not want proposed condition of authorisation C5 to hamstring what matters can be considered under the ADR scheme.

Mr Carter agreed that all disputes ought to be able to be referred to the ADR scheme (no matters should be excluded); however this should not undermine the jurisdiction of the Copyright Tribunal, which has the ability to make decisions that bind the market (not just the parties to a particular dispute) or the right to refer matters to the Copyright Tribunal at any time. The ADR scheme should not be used to resolve disputes about the reasonableness of a licence scheme. APRA considers that the Copyright Tribunal is not necessarily more expensive than ADR.

**Mr Hank Oudendyk** (ALLM) submitted no topic should be excluded from the ADR scheme.

## Costs of the ADR scheme

Mr Ferguson submitted that:

- the ACCC should require applicants to pay a modest filing fee, however all other fees should be paid by APRA. The AHA accepts that there should be the ability to pass on costs if there are vexatious claims. The AHA submits that small unsophisticated businesses are worried about the costs and repercussions of using the existing ADR system, due to APRA's disproportionate degree of market power and its skill in copyright matters. The AHA submits that the volume and scale of disputes is largely in APRA's control.
- APRA recently reported annual distributable income of \$243m, while most licensees have licences costing less than \$10,000. Licensees therefore have no scope to fund legal actions, or pay \$2000 in ADR fees. Because APRA is a monopoly, there is no option to get a second quote from an alternative provider. Mr Ferguson disagreed with APRA's submission that providing for fees to be shared between APRA and applicants is a meaningful way of addressing concerns about bias in the process. The real issue in relation to bias is the independence of the decision maker where the decision maker is appointed by the other party, and is therefore potentially under the control of the other party.
- the Racing NSW Appeals Panel/Tribunal (which hears 40-50 appeals per year) has a similar process of initial contact followed by expert determination.
- licensees will need to be convinced that the ADR scheme is different this time. Offering a very low cost process would assist with this, but at this stage a complicated fee table is proposed. Mr Ferguson proposed resolving this now so that it is not raised as an issue in future reauthorisations.

Mr Carter submitted that APRA supports the Resolve Advisors model under which APRA would bear the bulk of the costs (while this may raise some concerns about independence this could be mitigated by putting in place safeguards, such as having both parties contribute to the fees). While there are a number of very small business licensees, there are also some very large licensees such that a tiered system of fees would apply. APRA is open to discussion on tiers and simplification of fees, and APRA agrees that while the cost should be shared the split may not be equal. Mr Carter hoped that the AHA and APRA will find further common ground on these issues in the next seven days.

Ms Kirschner explained that there are differences between the proposed APRA system and other systems (e.g. NSW Racing). Ms Kirschner submitted that as soon as you have a person making a determination, it is expensive. Although mediation is empirically more effective, people tend towards wanting a determination. The best way to encourage people to resolve at the mediation stage (rather than then relying on escalation as a "fall-back" option) is to provide a fee that is less than an expert type process, is clear, upfront and capped, so that there is a sufficient incentive to take the mediation stage seriously. The hope is that this process would require minimal legal advice in preparation and therefore less cost to the parties. In the few cases that a matter escalates to expert determination, the expert can split the fees 50/50 or the parties can decide that the expert decide the split of costs. What is in the ADR scheme documentation is just the starting point – in the mediation parties will usually discuss how fees should be split.

Mr Ferguson submitted that parties are concerned that the mediators/experts are under the control of APRA (regardless of the fee applicants do or do not pay). AHA members do not

agree that paying a fee will help with bias. Mr Ferguson submitted that at a minimum, the ACCC consider making disputes free of charge for applicants with licence fees below \$10,000 (as compared with large licensees/monopolies).

Mr Ferguson submitted that there is no other avenue if a dispute is not resolved in the first instance, noting that it is unrealistic for licensees to escalate disputes to the Copyright Tribunal. Mr Ferguson asked how many matters go to ADR now and how many can be expected in the future.

Ms Kirschner noted that matters would be escalated through the ADR scheme, but with an incentive to resolve at the mediation stage because the determination process is more formal. Ms Kirschner considered that there is a shift in the APRA culture and therefore people will be better placed to resolve matters with APRA directly or in an initial conversation with the facilitator (which is important for small matters to save applicants and APRA the cost of escalating to ADR). There will probably be three categories of matters under the ADR scheme.

Mr Ferguson noted that 95% of public performance licensees pay less than \$3000 in licensing fees (which is relevant when compared to the proposed \$1650 cap for small claims under the ADR scheme). Further, it remains to be seen if the culture at APRA is changing.

Mr Albon asked Ms Kirschner to explain the tiers of fees. Ms Kirschner noted that there are different process options as well as tiers of fees for small and non-small businesses.

Commissioner Walker noted that while Ms Kirschner has proposed fees, it is ultimately the ACCC that will decide on the appropriate structure of the fees.

Mr Watters submitted that there is often some degree of legal advice that clients still need to get.

#### Independence of ADR scheme

Mr Carter submitted that one of the main concerns with the current ADR system is that APRA pays for it (in addition to the issue that the process is internal to APRA). Further, the existing system is focused on judges/barristers. APRA has come to understand that there are three models of ADR systems – internal, external (e.g. government funded) and hybrid. APRA has no strong objection to an external model, however: the experts may not have expertise in the relevant industries, when compared to using a pool of selected experts; in the case of state-based government funded schemes, there may be differences between jurisdictions; and some external schemes may not provide the level of reporting that is being contemplated in this particular case.

Mr Oudendyk submitted that the ADR scheme needs to be unbiased and independent. Mr Oudendyk submitted that a levy should be applied to APRA to pay for the ADR scheme. Mr Oudendyk suggested that the ADR scheme be run by a Government agency and paid for by APRA.

Mr Carter agreed that the ADR scheme needs to be independent. Whether a levy should be charged could be considered if more detail is provided, but he is not sure if it makes much difference having a third party in the middle.

**Dr Richard Chadwick** (ACCC) noted the role of the ACCC and the limits on requiring other Government bodies to take action.

**Mr Philip Ross** (ALLM) submitted that when reauthorisation comes up, licensees are going to want to know that the process is not too close to APRA. The model being proposed will have a perception of conflict of interest.

Commissioner Walker noted that having been involved with APRA matters over a long period of time, she sees that there is a big cultural shift in the organisation and that there is now a commitment from APRA to make the ADR scheme arms-length.

Mr Watters agreed that there are a number of documents that suggest there is a cultural change within APRA. Mr Watters submitted that addressing KPIs and reporting is important. Mr Watters noted that in regards to state based discrepancies between Small Business Commissioners, there is an option for licensees to refer back to the Australian Small Business Commissioner.

#### Independence of ADR facilitator

Mr Ferguson submitted that the AHA considers that Ms Kirschner is well suited to the role of facilitator.

Mr Carter noted that if a party is dissatisfied with the ADR facilitator, the party can ask that the matter be assigned directly to the expert or another member of the pool. APRA has no concern with the setting of public KPIs and reporting to the ACCC. The model of engagement of the dispute facilitator can also be structured to assist (for example, remuneration that is not related to the outcomes of disputes).

#### Member access to ADR scheme

Mr Carter noted that the discussion of the ADR scheme has been focused on licensee matters but will later move to disputes between APRA and its members or between members. APRA always intended to design a second ADR system to resolve these disputes, but it was decided that the most efficient process was to finalise the licensee system and apply the learning in consulting APRA members. APRA will make the systems as consistent as possible, noting some differences between the two (APRA will take into account the submissions of the Arts Law Centre and members).

Ms Kirschner noted that once the conditions of authorisation are known, APRA will roll-out the licensee ADR scheme and then start working on an adjusted members system with the aim of implementing by the end of the year. Ms Kirschner noted that the skills required in the member context are different.

**Mr John Prior** (Association of Australian Musicians (AAM)) has proposed the inclusion of a peer-review process (and Mr Brett Cottle, CEO of APRA has taken this suggestion on board). Mr Prior submitted that members cannot afford to use the Copyright Tribunal or the ADR scheme (\$1650 is too much for members). Mr Prior noted that when he participated in ADR with APRA both parties paid \$300 and APRA paid the difference.

Ms Kirschner noted that if members feel they are not getting enough information from APRA then the ADR process is available to get this resolved, e.g. what is the nature of the dispute, what can be done etc.

Mr Prior submitted that there is a lot to learn about how ADR will work as the current system has been difficult and expensive. Having a company to manage the process seems to be a step backwards because at present the parties agree on who will hear the matter.

Commissioner Walker clarified that the ACCC will look to make a condition of authorisation that has certain features with some flexibility and the nature of the ADR scheme is open to be discussed.

#### Access to APRA repertoire and parallel importing

Mr Ferguson noted that the AHA has asked that APRA make its repertoire available to parties upon request; however the AHA is not focussed on this issue, noting that APRA has explained to the AHA that this would be complicated.

Mr Oudendyk and Mr Albon submitted that APRA's repertoire should be made available, noting that this can be pivotal to a dispute and recognising the changes in technology. Mr Oudendyk submitted that the existing search function on APRA's website is not useful. There should also be the possibility of parallel importing of copyright from overseas.

Commissioner Walker noted that the parallel importing issue may be an issue related to the *Copyright Act*, whereas the role of the ACCC is to consider competition issues under the *Competition and Consumer Act*. Parallel importing is only relevant to the extent that it relates to the conduct for which authorisation is sought.

Mr Carter relied on APRA's previous submissions on these matters. Mr Carter noted that there is a search facility on the APRA website to check if works are in APRA's repertoire. APRA is also happy to search titles for members etc. to confirm whether works are within their repertoire. Mr Carter submitted that APRA cannot publish a comprehensive list of the millions of works at a point in time, noting that the database is connected to other databases around the world and updates in real-time. While the work-search tool does not claim to be definitive, Mr Carter submitted that if a party can provide a list of works, then APRA is willing to research whether the works are in its repertoire.

Ms Kirschner noted that an imbalance in the information available to the parties is the biggest cause of dispute when one of them is a monopoly. However, in the case of asking for a chain of ownership, parties need to be reasonable and this is where an expert can help.

#### Other member issues

Mr Prior provided a written submission (a public version is available on the ACCC's public register) and raised a number of member concerns, submitting that:

- there are a large number of APRA members but that APRA is not fulfilling its obligations to its members and APRA has the skills and funding to do more. However Mr Prior noted that APRA and the AAM are working together. Mr Prior submitted that APRA should operate transparently and listen to the views of musicians.
- most APRA members earn less than \$400 of royalties annually and the Arts Council has found that the median income of musicians is below the poverty line. Many musicians, record labels etc. are mum and dad businesses with limited ability to deal with APRA. In this context, the fees proposed for APRA's revised dispute resolution system are too expensive.
- Instead of APRA's proposed scheme, disputes should be resolved by peer review.
- APRA has significant market power and can create inefficiencies for musicians. There is limited member input into the decision making of APRA as there is an oligopoly of the major publishers. The major publishers have disproportionate power



and pay to be played so that Australian musicians cannot compete. Only a small proportion of works played are Australian and most are signed to major labels. As a result, the 88% of APRA members who are not signed to a major label feel underrepresented by APRA (for example, on APRA's Board). Most of the money APRA collects goes overseas.

- there are many benefits to having an Australian music industry. Community radio and Triple J support Australian musicians, with 45% local content. Many venues also support Australian music (although due to rising APRA fees, live performances are decreasing). However APRA does not sufficiently record the music actually played in these forums.
- the AAM is looking to the ACCC for radical change, including a plain English policy for members. Mr Prior considered that the AAM is the most representative body for Australian musicians, and has connections with a number of other relevant bodies and agencies.
- royalties payments are dropping. However APRA has not responded to Mr Prior's request for statistics from APRA about the amount that his music is played (for example, member statements only break royalties down by country).

Mr Carter noted that APRA is happy to consider any issues raised in a written submission, and is continuing a dialogue with Mr Prior – some of the issues raised can be addressed, but the accuracy of some of the statements made by Mr Prior is disputed.

Ms Kirchner noted that the proposed ADR scheme could potentially be used as a way of identifying and addressing concerns about the availability of information to APRA members.

Commissioner Walker suggested Mr Prior make a written submission addressing, for example, APRA's distribution rules and noted that this also ties back to the ADR scheme (discussed above).

#### Chair's closing comments

Commissioner Walker noted that the independence of the ADR scheme has been a big issue. There has been a suggestion to introduce an independent committee to oversee the ADR scheme. Commissioner Walker invited submissions on this issue (now or after the conference):

- Mr Ferguson submitted that he supports a committee that enables review with licensees and APRA to see if we've got the system right rather than having to go through the current process again in three years. Mr Ferguson has a fear that the ACCC will not go far enough whereas a committee would enable any adjustments to the scheme to be made sooner.
- Mr Carter noted that APRA will need to give it thought but is not opposed.
- Ms Kirchner submitted that it has been tried by the ACCC in other areas – the main stumbling block is who funds it. If it is APRA then it gets back to the same conflict problem. An alternative is to have some money available to measure KPIs, and to have independent verification.
- Mr Prior is supportive of a committee that would include Australian independent musicians (noting 88% of APRA members are independent).

Commissioner Walker closed the conference with some final statements. Commissioner Walker noted that submissions following the conference are due by 28 March 2014. Commissioner Walker noted that staff will prepare a summary of the day's proceedings.

Conference closed: 3.40pm AEST