

Tess Macrae
Director, Competition Exemptions
Australian Competition and Consumer Commission

Email: [REDACTED], [REDACTED], [REDACTED]

23 August 2024

Dear Ms Macrae

Australasian Performing Right Association Ltd – application for revocation of authorisation AA1000433 and substitution of new authorisation AA1000661 – interested party submission

We refer to the ACCC's letter dated 19 February 2024 seeking interested party submissions with respect to the Australasian Performing Right Association Ltd.'s (**APRA's**) application for re-authorisation of terms of its arrangements for the acquisition and licensing of performing rights dated 5 February 2024 (**Application**).

Cinema Association Australia (**CAA**) sets out below its response to the ACCC's market inquiries letter.

By way of background, CAA is the peak industry body representing the majority of all cinema operators across Australia and New Zealand. The Australian market share from CAA members is estimated at 90% of annualised Australian box office, with members including Event Cinemas, HOYTS Cinemas, Village Cinemas Australia, Reading Cinemas Pty Ltd, as well as independent and regional operators Palace Cinemas, Dendy Cinemas, Ace Cinemas, Nova Cinema, Limelight Cinemas, and Wallis Cinemas.

Cinema operators are licensees or "users" of APRA member's musical works – they purchase copyright licences from APRA for the purposes of performing such musical works in its cinemas, on-site restaurants and bars.

As the ACCC is aware, the cinema industry is facing various challenges. Currently, there are only 460 cinemas nationwide, a reduction of 41 locations since 2021. The challenges faced by the industry include, the increasing operating costs for cinema operators, and the broader cost of living crisis currently experienced by its customers in a high interest rate environment. The COVID pandemic had a significant impact on the Australian box office due to a reduced number of films available for release by the major film studios, which was further impacted by the 2023 actors and writers strikes. The Australian national box office in 2023 was \$A985.1 million which was 20% below 2019's Australian box office and the impact of the actors and writers strikes has continued into 2024.

Cinema operators are therefore particularly concerned to ensure that the re-authorisation of the conduct set out in APRA's Application (which effectively gives it a substantial degree of market power as a collecting society for musical works in Australia) is balanced by appropriate constraints and mechanisms that require transparency. Licence fees represent a significant proportion as compared to overall industry profits. Any increase in licence fees would likely be passed on to customers through higher ticket prices to maintain a sustainable level of return on its investment. Any price increases would also reduce the competitiveness of CAA members, who remain constrained by other market participants like Subscription Video on Demand providers, such as Netflix, Disney+ and Amazon Prime, among others.

For the reasons set out below, CAA is concerned that the Application, which seeks to remove and soften certain conditions imposed by the ACCC as part of its conditional authorisation dated 13 July

2020 (**2020 Authorisation**), if authorised would result in significant public detriment that is not outweighed by a corresponding public benefit.

Authorisation of the conduct identified in the Application creates significant public detriment.

Authorisation of APRA's ability to require the exclusive assignment of rights to APRA by its members provides APRA with a near monopoly in both acquiring and supplying the rights to almost all commercially popular music works.¹ As such, APRA would obtain substantial degree of market power in relation to its dealings with users in terms of licensing arrangements.²

As the ACCC has recognised, this would likely raise the risk that APRA would be unconstrained in its ability to charge higher prices for businesses that want to play music (such as CAA's cinema members), inefficient under-utilisation of APRA's repertoire, and significant problems associated with commercial dealing with APRA.³ Many cinema operators are small independent cinemas, and have limited ability to dispute the level of APRA's licence fees and other aspects of APRA's arrangements with the Copyright Tribunal of Australia as such processes are costly and time consuming.

Absent any mitigating conditions, the conduct is likely to result in significant public detriments not outweighed by any corresponding public benefit.

The conditions imposed as part of the 2020 Authorisation are an essential and effective constraint on APRA's ability to raise prices and ensure there is fair and reasonable negotiations – there is no justification for removing certain conditions.

To date, the conditions imposed as part of the 2020 Authorisation have resulted in a reasonably effective means of constraining the public detriments that would arise from APRA's conduct. APRA now seeks to remove those conditions.

Removal of certain alternative dispute resolution (ADR) conditions

APRA proposes to remove the conditions requiring structured options for ADR, namely to remove the obligation for APRA to engage in the dispute resolution and negotiation process in good faith. The current conditions ensure that licensees can rely on a predictable format of dispute resolution via Resolution Pathways, if an agreement with the APRA cannot be reached,⁴ and provide counterparties with countervailing leverage through the fall-back to seek a binding determination if a dispute is not adequately resolved via informal dispute resolution or external mediation.

APRA seeks to replace the above conditions with a general condition requiring it to provide 'reasonable and efficient' options for the resolution of disputes. What is 'reasonable and efficient' is left to APRA's discretion. The justification for this removal is that the conditions are proscriptive in nature and are not directed to achieving measurable dispute resolution outcomes.⁵

There is no evidence or logical coherency to this submission. As submitted by Resolution Pathways, the dispute resolution has provided effective and efficient resolution of disputes. The growing reliance by users on the Current Conditions is evident in the increase in referrals to Resolution Pathways since

¹ 2020 Authorisation, 4.58 – 4.59.

² 2020 Authorisation, Summary, page 1.

³ 2020 Authorisation, 5.3-5.7.

⁴ 2024 Application, paragraph 199.

⁵ 2024 Application, paragraphs 203 and 204.

the 2020 Authorisation, from 15 in 2020 to 23 in 2023. That the conditions have resulted in successful resolution of disputes through negotiation is admitted by APRA itself.⁶

APRA also claims in its 2024 Application that 'many resources' are wasted engaging with licensees to attempt to resolve disputes that will never be resolved unless the APRA agrees to accept lower license fees for particular licensees than are paid by the majority of other licensees in the same class.⁷ However, the ability for undue and unreasonable increases in prices is precisely why a rigorous ADR process is needed in order constrain APRA's near monopoly power.

The ACCC should therefore maintain the ADR conditions as they are set out in the 2020 Authorisation.

Removal of certain fee transparency conditions

APRA also seeks to decrease the fee transparency conditions imposed as part of the 2020 Authorisation, namely:

- limit the fee methodology information and description provided in Information Guides;⁸ and
- remove ACCC oversight and any independent review or independent report.

The fee transparency conditions have been essential in ensuring that any fee increases are properly understood by users at a level that sufficiently allows CAA's members to meaningfully consider and assess whether to exercise its other rights in the event of a price increase – including whether to seek ADR. The softening of the fee transparency conditions therefore has a related effect of weakening the ADR conditions. Furthermore, ACCC oversight and independent review is a basic tenet of ensuring the efficacy of any transparency provisions and should not be removed without compelling reasons. It is therefore essential that the conditions in the 2020 Authorisation as to fee transparency be retained in their existing form.

Removal of the consultative committee (**Committee**) conditions

APRA proposes removing the Committee, without providing an alternative forum for licensees or its members to provide feedback in respect of the ADR scheme.

The Committee is an important avenue for industry to 'be heard' on issues with APRA. The removal of these conditions would significantly hinder the ability to constrain or mitigate the public detriments as noted above.

This is because the Committee provides a standing forum for industry to get together and raise wholesale feedback and issues directly with APRA in a formal environment. It ensures greater accountability from APRA in respect of its conduct during the ADR process, as the Committee would keep a formal record of complaints and would require a formal response from the APRA if they do not engage with the scheme in good faith.

A good faith obligation should be introduced.

In addition to retaining the Current Conditions, the CAA considers that a requirement of good faith should be introduced, that requires APRA to negotiate or consult in good faith with industry

⁶ 2024 Application, paragraphs 64 and 199.

⁷ 2024 Application, paragraph 64.

⁸ 2024 Application, paragraph 181(g).

participants and members. This would add an important safeguard to ensure that APRA exercises its market power reasonably and not arbitrarily.

Absent the conditions, the public detriments would outweigh the public benefits and authorisation should not be granted.

As the ACCC correctly analysed in 2020, without appropriate conditions, the conduct would result in a significant public detriment by entrenching an enduring near monopoly of APRA. The conduct could only ever be authorised with sufficiently robust conditions that mitigate the ability for significant unjustified increase in prices, ensuring the opportunity for fair negotiation, and transparency.

In conclusion, CAA considers that should the ACCC be minded to authorise the Application, it should only do so with the preservation of the conditions imposed as part of the 2020 Authorisation, at a minimum.

Should you have any queries, please do not hesitate to contact me.

Yours sincerely

Cameron Mitchell
Executive Director
CAA