



OUT19/8706

Gavin Jones
Director, Adjudication
Australian Competition and Consumer Commission
By email: adjudication@accc.gov.au

Dear Mr Jones

Australian Performing Right Association – draft determination

The NSW Small Business Commission (NSWSBC) is focused on supporting and improving the operating environment for small businesses throughout NSW. The NSWSBC advocates on behalf of small businesses, provides mediation and dispute resolution services, speaks up for small business in government, and makes it easier to do business through policy harmonisation and reform.

The NSWSBC appreciates the role played by copyright collecting societies in supporting efficient collection and distribution of royalties on behalf licensors. Absent collecting societies, license administration would be highly impractical. Furthermore, a great many licensors that benefit from these activities are artists operating as small businesses.

However, the equitable and transparent administration of licenses is also vital to small licensees - particularly as most operate under considerable resource constraints. We have consistently noted concerns in regarding the latter cohort – most notably in relation to licence formulation, and the distribution of revenue to licensor artists.¹

We are therefore pleased to provide feedback to the draft determination concerning the Australian Performing Right Association's (APRA) application for reauthorisation. The NSWSBC is broadly satisfied with the ACCC's proposed approach to reauthorisation. We suggest it is appropriate that the regulator make reauthorisation contingent on the organisation supporting increased disclosure around licensing formulation and revenue distribution processes.

However, we submit that, in some respects, the proposed conditions are insufficient to drive fair and transparent outcomes for small licensees. To that end, we provide the following commentary and recommendations.

Commercial-in-confidence information exclusions

The NSWSBC welcomes the ACCC's proposal to make APRA's reauthorisation dependent on multiple conditions designed to improved transparency around its activities. We are firmly of the view that these represent an improvement on current arrangements.

¹ See, for example, NSW Small Business Commissioner (2018), '[Submission: Review of the Code of Conduct of Copyright Collecting Societies](#)'.

However, we note that multiple conditions – that is, C1.2, C1.6, and C2.2 – afford APRA the discretion not to disclose information on the grounds that it is ‘*commercial-in-confidence*’.

We suggest that this proviso is excessively general in its construction and potential application. It would afford APRA considerable discretion to obfuscate, particularly in relation to any detailed information sought by a licensee. As we noted in our previous submission regarding the proposed reauthorisation, without genuine transparency around licence formulation and administration, it is not possible to determine whether licensee fees might be lower but for inefficiencies in APRA’s operations.²

While of obvious concern to small licensees, this subversion may also represent a concern for licensors. Absent the requisite degree of transparency, creators will be unable to determine whether their royalties represent a reasonable return in light of the relevant licence.

Plainly, as APRA operates as a de facto monopoly, it will not be swayed by any competitive pressure to publish information of the type that conditions C1.2, C1.6, and C2.2 address. Furthermore, it is difficult to envisage how a licensee aggrieved at any such refusal might seek to compel disclosure. This is particularly so in relation to resource-strained small licensees.

For these reasons, we submit that the commercial-in-confidence proviso would severely limit the efficacy of proposed conditions C1.2, C1.6, and C2.2. However, we do not suggest that a refusal to disclose information on commercial-in-confidence grounds could not be justified under any circumstances. At a minimum, the ACCC should allow for refusal to disclose where reasonable, while preventing misuse of any such provision.

The necessary equilibrium could be achieved by providing a clear and exhaustive definition of what constitutes ‘commercial-in-confidence’, for the purpose of conditions C1.2, C1.6, and C2.2, in the final reauthorisation. However, this definition should be constructed with a view to prioritising transparency in licensing. In addition, an independent authority should be tasked with providing or denying APRA permission to refuse disclosure on commercial-in-confidence grounds, according to the definition. This decision-making role could be fulfilled by the ACCC, as the authority responsible for authorisation.

Recommendation 1: The final reauthorisation should include a precise and clear definition of which (if any) elements of the fee calculation methodology or any other factors that have been classified as commercial-in-confidence, for the purposes of conditions C1.2, C1.6 and C2.2.

Recommendation 2: The final reauthorisation should provide that an independent authority must determine whether APRA may refuse disclosure on commercial-in-confidence grounds.

² NSW Small Business Commission (2019), [‘Submission: APRA – application for reauthorisation’](#).



Length of reauthorisation

The NSW SBC welcomes the 'OneMusic' venture between APRA AMCOS and the Phonographic Performance Company of Australia (PPCA) - to the extent that it delivers efficiencies to the licensing processes applied to small licensees. However, we note that the pending launch of the scheme necessitates considerable additional regulatory oversight, given the large-scale changes it will bring to licensing arrangements. This is especially true in relation to licence fees. Moreover, the draft determination notes stakeholder concern around minimal or ineffective consultation by APRA AMCOS and PPCA throughout the development of OneMusic.

The NSW SBC submit that these circumstances necessitate a shorter reauthorisation period than the five years granted in the draft reauthorisation. A three-year reauthorisation would represent a more appropriate balance. That is, it would afford stakeholders time to assess the ongoing impact of OneMusic. Equally, it would allow the ACCC to implement the conditions of the reauthorisation presently under consideration, as well as address new concerns arising out of OneMusic in a timely manner.

Recommendation 3: The ACCC should grant the requested reauthorisation for a period of three years.

The NSW SBC appreciates the ACCC's commitment to stakeholder engagement across the reauthorisation process. Should you wish to discuss this matter further, please contact Stephanie Croft, Principal Advisor, Advocacy and Strategic Projects, on (02) 9338 6642 or Stephanie.Croft@smallbusiness.nsw.gov.au.

Yours sincerely

Robyn Hobbs OAM
NSW Small Business Commissioner

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