

Adjudication Branch: Attention Mr Gavin Jones

Australian Competition & Consumer Commission (ACCC)

By email: adjudication@acc.gov.au

6 March 2019

Dear Mr Jones,

**Submission in response to the Australasian Performing Right Association Limited (APRA)
Application for Revocation of Existing Authorisation A91367-A91375 and Substitution of a New
Authorisation (the APRA Application).**

Nightlife Music ('Nightlife') appreciates the opportunity to submit a response to the ACCC in relation to APRA's Application to the ACCC.

We believe that the current authorisation period has highlighted major issues in the operation of APRA as a monopoly and we welcome the opportunity to collaborate with all stakeholders and the ACCC to create an optimal landscape for a vibrant Australian music industry.

The core focus of our submission is on how we can create genuine career prospects for Australian artists by featuring more of their content and fixing the flow of revenue to maximise their returns when their content is used. As a service provider, our very future relies on a healthy local music community and we see it as our responsibility to ensure that the chain from creator to user is fair and equitable and we do not believe the current authorisation of APRA placed an onus on them to do so.

APRA is in a very challenged position, trying to balance their exclusive licences with the competing priorities of the global rights owners and the Australian community as a whole. We appreciate that this is not an easy task but we believe there is a solution and it all comes down to using the data.

In the end, Australia needs to become an open music market to truly unlock competition and to foster genuine innovation both for the creator and the service provider. This is already evidenced on the sound recording side where there are numerous examples of parties (Nightlife included) licensing content directly as an alternative to PPCA to create healthy competition and to inflate the value of smaller subsets of content, namely local Australian music. Solutions made possible because PPCA is not an exclusive licensor of public performance sound recordings.

Conversely the Australian music publishing landscape is basically a closed book, controlled entirely by one party and plagued with massive data issues with an impossible trail to unpick and identify the right copyright owners in every track. APRA serve a critical role during this phase, taking the unenviable task of matching song use to ever changing owners, but the world is changing. Right now there is a genuine impetus to solve this global data problem by many parties around the world and the solution is coming soon and parts of it are already here now.

Our goal is to highlight real changes that can be mandated now as conditions of a new authorisation and as a pre-cursor to the full open market that we expect to be realised in the next few years when data transforms the global publishing market and makes exclusive licensing irrelevant.

At a minimum, the following conditions should be considered as part of APRA's re-authorisation or if not re-authorised, these could become the conditions around which APRA operates their non-exclusive licences in a free market.

1. APRA needs to work with industry to develop custom licenses to utilise Australian music only in certain public performance instances, as an alternative to blanket licencing. This will increase the value of Australian songs.
2. APRA needs to provide a real License Back – Opt Out process, this will provide a genuine (rather than the current token) framework for creators to take control of their content and how it is represented by APRA.
3. The ACCC needs to create a mandate preventing APRA from issuing licenses that knowingly place the end user in a position of copyright infringement. That is, rebuking the copying tariff that currently legitimises (from a publishing perspective) the use of consumer services such as Apple Music and Spotify in commercial spaces despite concrete proof that the use is still a broader copyright infringement.
4. A commitment by APRA to reform the distribution of royalties collected from the public use of music to use real play data from licensed background music providers as the primary (rather than token) source. The ACCC could require KPIs to provide regular reporting highlighting the accuracy of distributions using real play data as the source of truth for comparison. Similarly, the ACCC could encourage APRA to partner with licenced background music suppliers to aid in the collection of all OneMusic tariffs or at least to match OneMusic tariffs to the play data.
5. The establishment of an independent third party with representatives from all key stakeholder groups to sanction each new OneMusic tariff. This arbiter should include representatives from rights owners, users and suppliers to set realistic tariffs that reward creators and encourage the use of licensed Australian music.

Nightlife is committed to full and open collaboration with all stakeholders to evolve our local music industry and to take advantage of the wonderful creative and technical talent that resides here in Australia. We appreciate the opportunity to work towards creating the right marketplace now and into the future to support this healthy and vibrant ecosystem.

Thank you,

Mark Brownlee
Managing Director

**Submission in response to the Australasian Performing Right Association Limited (APRA)
Application for Revocation of Existing Authorisation A91367-A91375 and Substitution of a New
Authorisation (the APRA Application).**

This submission is in response to the APRA application. Nightlife Music Pty Ltd (Nightlife) ACN 052 079 277 welcomes the opportunity to provide input into this process and requests this submission be published on the ACCC website or shared with any other parties. Where possible we have provided evidence in support of our submission. Our submission is as follows:

1. Who is Nightlife?

- (a) Nightlife has been operating since 1989, employs over 120 people and is one of the largest background music suppliers in the Australian market with approximately 4000 clients. Nightlife is a Business2Business¹ platform servicing bars, hotels, clubs, gyms, bowling alleys, restaurants, retail outlets and others.
- (b) Nightlife has a blanket agreement with APRA and the Australasian Mechanical Copyright Owners Society (AMCOS) enabling it to communicate and reproduce, respectively, its member's content for commercial use. We require this license to operate as a commercial background music provider in Australia.
- (c) Nightlife has direct licensing agreements with over 130 record companies for reproduction of the sound recordings and music video enabling it to communicate and reproduce for commercial use. Again, this license is required for us to operate as a commercial background music provider in Australia.
- (d) Of those 130 record companies, a further 80 have provided a non-exclusive licence for the right to distribute sound recordings and music videos for public performance enabling Nightlife to create Public Performance licenced products (PPC). These products, when used by Nightlife clients, provide near 100% accurate royalty distributions based on song plays per venue. This license allows us to license the public use of music on behalf of a business in certain circumstances and in such cases, negates the need for an equivalent PPCA license.
- (e) Nightlife also collects public performance fees for its client base on behalf of the Phonographic Performance Company of Australia (PPCA), covering virtually all PPCA tariffs, and has done so for eight years. When used by Nightlife clients, the associated data enables the PPCA to provide near 100% accurate royalty distributions based on song plays per venue. PPCA have provided the assurance that they use this data for distributions.
- (f) Nightlife also collects public performance fees for its client base on behalf of APRA covering a small subset of APRA tariffs (namely retail and restaurant), and has done so for five years. When used by Nightlife clients, the associated data enables APRA to provide near 100% accurate royalty distributions based on song plays per venue. APRA have advised they do not use this data for distributions.

¹ Nightlife has no business to consumer interface.

- (g) Nightlife's clients hold over 10,000 APRA licences for the public performance of musical works under a range of concurrent licence categories.²
- (h) Nightlife is a member of the background music industry sector represented by the Background Providers of Music (BPM) and supports their submission to the ACCC on this matter.
- (i) In Nightlife's submission in response to APRA's 2013 re-authorisation application (the 2013 Submission) Nightlife wrote:

*Background music suppliers such as Nightlife maintain and increase value in music ... we are directly connecting content users with the copyright owners through a sophisticated understanding of their clients' needs, demographics and entertainment scope ... we are able to increase revenue and continue to leverage the value of music ...*³

- (j) Nightlife's background places it in a unique position to provide information regarding its dealings with APRA, and the impact of APRA's activities on the broader Australian society where music is in use.

2. Nightlife's Position on Issues

- (a) Nightlife respects music creators and users, and believes Australian music creators are inadequately rewarded, and should be further rewarded for their creativity and efforts.
- (b) Nightlife has long supported the role of collecting societies. Nightlife functioned as APRA's agent and continues as the PPCA's agent. Yet, historically Nightlife had concerns regarding APRA's operations. In their 2013 Submission, Nightlife advised it supported APRA's re-authorisation subject to the following conditions being met:
 - (i) APRA provide improved and more transparent public performance licensing arrangements for commercial music suppliers,
 - (ii) APRA make publicly available its full repertoire of musical works,
 - (iii) More detail be provided regarding APRA's royalty distribution model, and
 - (iv) That the APRA authorisation be limited to a maximum three-year period,⁴
- (c) Nightlife contends that since APRA's 2014 re-authorisation by the ACCC it has been permitted to operate in a manner that is consistent with a monopoly but lacks an acceptable level of accountability that creates an anti-competitive environment to the detriment of content owners, end users and the wider community.
- (d) The problem of APRA's anti-competitive behaviour under authorisation is likely to be exacerbated in the future by the development and implementation by APRA, AMCOS and PPCA of OneMusic Australia, a proposed collecting society partnership/joint venture where APRA is the only authorised entity with the sole responsibility of its management.

² Licence categories include: Recorded Music for Dancing, Feature Recorded Music, Background Music, Radio, TV Screens, Audio Jukebox, Video Jukebox, Restaurants, Fitness Centres, Music on Hold, Live Performance, Karaoke, and Retail.

³ The 2013 submission. page 3.

⁴ Submission in response to the APRA Application for Revocation of Authorisations A91187-A91194 & A91211 and Substitution of New Authorisations A91367-A91375 (the APRA Application), page 1.

(e) Nightlife notes Dr Jill Walker's comments: "APRA is a virtual monopoly ... has significant market power in relation to its dealings with users and its arrangements can ... create inefficiencies for its members." ⁵ Nightlife contends these comments remain relevant.

3. Play Data is the Solution

As a monopoly, APRA has the sole responsibility for the collection and distribution of all publishing revenues associated with the use of music in public places. For many valid reasons, APRA has historically leaned heavily on analogous data from sources like commercial radio, to decide on who to distribute the immense sums of money to. Whilst this practise was both appropriate and the best plausible solution in years gone by, times have changed, and the lack of accurate data is no longer a valid excuse for paying the wrong creator.

All modern background music services routinely capture and provide accurate play data to rights holders as just a fundamental business as usual practice. So, the challenge now is simply making the use of this data a requirement on APRA as part of their exclusive license and to collaborate to make the process as efficient as possible.

APRA will contend, and fairly, that in the case of some tariffs the administration costs for achieving 100% accuracy will leave no money to distribute, but surely at least mandating play data from licensed background music sources as the primary source for analogous distributions is a far better solution in 2019 than leaning on commercial radio where a mere fraction of the content is mirrored in public use. To highlight the point, Nightlife has completed some data analysis measuring plays from radio against plays from Nightlife's clients over a three-month period and at least 90% of artists played on Nightlife received no radio airplay at all, and hence would receive no or very limited revenue from APRA's distributions where commercial radio is a primary factor.

And for the more expensive tariffs, a move to mandate the use of actual play data from the licensed background provider used in that venue will for the first time ensure the right creators are paid the right amount and give the business owner certainty that their license fees went to the right place.

Nightlife contend that this is possible and practical right now and that this mandate would actually assist APRA in convincing businesses to pay their license fees because they can demonstrate end to end transparency.

In fact, Nightlife can demonstrate real world use of such data already in the form of our directly licensed restaurant solution known as PPC (described in Attachment 1). This product, created as an alternative to the PPCA restaurant tariff placed the onus on Nightlife to collect and distribute royalties accurately based on the use of content in each venue. It required us to manage a discrete library of content, identify ownership and usage and to then distribute revenues on a pro-rata of plays basis each quarter. As a small business we have managed this entirely in-house and delivered proportionally higher revenue streams to

⁵ <https://www.accc.gov.au/media-release/accc-requires-improved-dispute-resolution-in-performing-rights-arrangements>.

a smaller set of rights holders for more than 5 years. The benefits to user and creator are clear and the technology is available from Nightlife and our peers now.

4. Non-Licensed and Copyright Infringement is the Problem

The use of non-licensed music sources is rampant in public performance and is a major threat to the broader Australian music industry. APRA did not create the problem and APRA will contend that is not their responsibility to fix it, but that they are entitled, based on their exclusive rights, to create licenses that fairly compensate their members when such infringements occur.

Nightlife contend that no party should be able to financially benefit from a license they issue that knowingly creates a broader copyright infringement.

The license in question is known as the copying tariff and again is spawned from a prior license that had a far more legitimate use case. This license was initially created to allow a business owner who had purchased a CD to now use this CD in their business by adding the additional reproduction right (i.e. the copying) from APRA. The practice was common but with the transition to digital it is now all but obsolete.

The modern equivalent of a CD is a consumer streaming service, like Spotify or Apple Music. But the relevant music licenses are now far more complex with some 40m+ tracks accessible from a single monthly subscription. Appropriately, each service takes out a license appropriate to its use, which in this case is a domestic license. As such, they clearly state that in their terms and conditions that they grant a “revocable license to make personal, non-commercial, entertainment use of the Content”. Users agree to use “Content for your own personal, non-commercial, entertainment use”⁶

Despite the obvious differences, APRA have morphed the copying tariff to now become a legitimate publishing license that takes a consumer streaming service and licenses it for commercial use, a world first. As an exclusive, authorised licensor, they are within their rights to create this license for the publishing, but that does not mean that the end user is now compliant because the licenses are bigger than just publishing. That is why APRA point the user to consult their service terms and conditions to confirm they can use the service, knowing that in every single example that these terms and conditions will expressly forbid the use case. i.e. it is a partial license where no other license exists to make it a completely compliant solution and hence places all of the licensing risk on the end user⁷. We contend that this is mis-leading and opportunistic and not in the best interests of the end user, service providers, record labels, creators or the broader Australian music industry.

A study published by Nielsen Music in conjunction with global streaming service Soundtrack Your Brand showed that 29.4 million small businesses around the world stream music in their venues. Of these, 21.3 million small businesses use personal streaming services instead

⁶ See <https://www.spotify.com/us/legal/end-user-agreement/>

⁷ Section 101(1) of the Copyright Act 1968 provides that copyright is infringed by a person “who not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright”.

of using business streaming licenses.⁸ While this is a global problem, this report was commissioned as an opportunity for the global music industry to create licencing and technical solutions. While other territories are trying to create solutions to get rid of infringement, APRA is unique because they have created this partial “copying” licence that does nothing to stamp out infringement.

The consequences of allowing the use of personal services in public performance are:

1. **Businesses pay less for music.** Consumer services are priced at \$10.99/month. The background music licenced services are priced between \$50-\$200 per month, driving those businesses out of the industry,
2. **Background music companies will be squeezed out of the market** as APRA becomes an unintended competitor, licensing consumer services in commercial locations at uncompetitive costs,
3. **Australian music creators will suffer**, because with fewer local background music companies and hence less access to actual play data in venues, less Aussie content will be promoted or paid for,
4. **APRA will suffer** because long term they will have reduced the perceived value of music and as such the public performance tariffs will have to drop because businesses won't pay them.

As Nightlife has previously stated, “... music suppliers are at the forefront of diminishing piracy in commercial settings. It is in every music suppliers’ interest to ensure that the content they are providing commercially, is legal and cannot be copied. This allows predictable and controlled use of music, by protecting and sustaining performance rights through a transparent model that reports accurately on what is played, where it is played and the exact tariff applicable. Music suppliers have a vested interest in protecting copyright ... music suppliers can and do play an integral role in detection of piracy matters and could further support collection agencies in their enforcement endeavours.”⁹

5. APRA’s Opt Out/Licence Back Provisions Has Not Worked

As an authorisation condition, the ACCC required APRA to “take certain steps to increase awareness of the Licence Back and Opt Out provisions ... including publishing a plain English guide and ... education campaign”.¹⁰ APRA contends that they have met the ACCC’s requirements, but a closer examination of APRA’s operational reporting suggests otherwise.

According to the 2018 Collecting Society Code of Conduct review APRA received/approved 17 License Back and one Opt Out application from 1 July 2017 to 30 June 2018.¹¹ This low

⁸ The study was based on interviewing 5,000 small business owners in 7 markets – Germany, US, UK, Sweden, Spain, Italy, and France. See <https://www.digitalmusicnews.com/wp-content/uploads/2011/07/Soundtrack-report-The-hidden-value-in-music-for-business.pdf>. The study did not include interviews with Australian businesses, but in 2014 the ABS noted there were 771,000 businesses that employed 1 to 19 employees. See: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Count.

⁹ See the 2013 Submission, at page 3.

¹⁰ <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australasian-performing-right-association-ltd-revocation-substitution-a91367-a91375>

¹¹ Report of Review of Copyright Collecting Societies’ Compliance with their Code of Conduct for the Year 1 July 2017 to 30 June 2018, par 42.

number of License Back/Opt Out requests demonstrates the impracticality and complexity of these systems, and the requirements that need to be completed in order for owners to take advantage of these options. The complexity of the system is shown by the following:

According to Articles 17(b) and (c) of the APRA constitution, the following are the conditions which allow the applicant to reserve to himself/herself rights through the Opt Out process:

- Provide a minimum of 3 months' notice to APRA (Article 17b). It is unclear why 3 months is required in all instances – surely in some instances an opt-out request can be actioned in less than three months after the request is lodged with APRA.
- Provide notice in writing (Article 17b).
- (Abide by) reasonable pre-conditions prescribed by the Board from time to time (Article 17ci). It is unclear, what are these pre-conditions? Where are they listed? How are the reasonableness of these pre-conditions assessed?
- Provide APRA with a written consent and release (in a form prescribed by the Board from time to time) from all Interested Parties consenting to the opt-out, and releasing APRA from collecting royalties (Article 17cii). It is unclear, what are the consent and release form requirements? Who are the interested parties – presumably co-writers? Publishers?
- Provide APRA with a written indemnity (in a form prescribed by the Board from time to time). An indemnity protects APRA from any actions arising if an APRA licensee uses the works (Article 17ciii). It is unclear, what are the written indemnity form requirements? Indemnities are one-sided and oppressive in their operation. Any party agreeing to an indemnity would require independent legal advice.
- An Opt Out can't be terminated within 12 months of its commencement (Article 17d). So typically, a party applying to Opt Out must plan its business affairs at least 15 months in advance, which is not always a simple task.
- An arbitration dispute resolution mechanism applies (Article 17e).

There may also be an APRA charge attached to using the Opt Out process. According to APRA "if the Opt Out arrangement is complex, we may charge an administration fee (capped at \$200)."¹² It is unclear in what circumstances APRA imposes a portion of this fee or this fee in its entirety.

APRA's Licence Back provisions are also inflexible, containing similar terms to the Opt Out pro-forma agreement including:

- A one-sided indemnity,
- Up to a \$200 APRA charge with an uncertain criteria for its imposition, and
- Automatic adoption of the APRA privacy policy.¹³

Adding to the impracticality of Opt Out/Licence Back is the complex ownership structures in publishing. Nightlife contends that the Opt Out/Licence Back system is inherently flawed because the provisions associated with the Opt Out/Licence Back process only apply to Australian repertoire. So, if an individual seeks to Opt Out of APRA representation (because for example, there are more opportunities available to that rights owner outside of the APRA system), the individual can only do so if all of that individual's rights are held by an

¹² <http://apraamcos.com.au/about-us/alternatives-to-apra-amcos/managing-your-rights/apra-members/>

¹³ http://apraamcos.com.au/media/3524/17g-request-for-licence-back_distributed.pdf

Australian record company/publisher. If an Australian song writer wishes to licence back the entirety of their repertoire, and some rights are held by an overseas party (say through an overseas based publisher), then the option of using the Opt Out/License Back process to obtain repertoire from APRA will simply be unavailable to that artist.

Nightlife contends that APRA provides the Opt Out/License-Back options on terms that are so restrictive, the ACCC needs to develop with APRA a fundamentally new scheme. In addition to making it simpler, Nightlife suggests that a better world would allow content to be licensed into different public performance products akin to our PPC solution to foster innovation and competition in the marketplace,

The Opt Out process, even if refined, is a binary process. An artist is in or they are out of the APRA arrangement. So if any user (for example a small business wanting to use just one or a couple of songs) wants to use music and they can't afford or accept the established APRA tariff, their only recourse is to convince a creator to remove their content from every service linked to APRA to give them the right to use the content without APRA. This is impractical and hence why it rarely happens.

Nightlife accepts and understands the need for APRA to be the exclusive distribution engine for publishing rights for the foreseeable future, however this should not derail the potential for unique licensing solutions to be created by service providers (or end users) and rights holders, they should simply be administered and distributed by APRA. So for example, a service provider should be free to license the publishing rights directly with one or several creators/rights holders on terms agreed by those parties and then administer this via the exclusive APRA distribution engine. APRA continue to license and provide access to all content via their standard licenses but allow third parties to agree their own sub licenses (akin to what Nightlife does on the sound recording side with our PPC product described in Attachment 1) as long as the distribution flows through APRA and that their administration costs are factored in. This allows APRA to maintain exclusivity whilst resolving any contention around APRA promoting Australian over any international content. Nightlife contends that this fundamental change is in the best interest of creators, users, service providers and even APRA and can live inside an exclusive licensing regime authorised by the ACCC. It gives the Australian music industry the benefit of an open market but preserves the role of APRA and simplifies the distribution process.

6. Impact of OneMusic Australia

OneMusic Australia is a welcome simplification to the public performance sector of Australia and a real opportunity to make the whole process better for everyone. However, Nightlife is concerned that its implementation is designed to further empower APRA and PPCA and leaves the background providers and the end users significantly exposed.

Under OneMusic, background music providers will only be authorised to collect public performance in the retail and dining tariffs and are provided very limited recompense for managing this on behalf of OneMusic. This is consistent with the current APRA position but is a significant reduction in the role we play for PPCA today where we collect for a wide range of tariffs. The knock-on impact is that we will no longer be providing play data for the tariffs we were collecting, hence pushing APRA and now the broader OneMusic to more

analogous sources for distributions. So rather than seizing on an opportunity to instantly improve accuracy, the opposite is likely to occur. The ACCC needs to create conditions for APRA to incentivize Background Music Companies for the collection of all tariffs or at least, create incentives for APRA to work with the Background Music Companies to match their readily available data to OneMusic revenue to ensure the correct artists are paid when their music is played.

The other major impact for creators, should OneMusic alienate the end users, is the likely move to not use music at all or to seek full rights inclusive solutions. The PCCA has seen first-hand the negative impact of tariffs that are perceived as unaffordable by the market and have lost significant revenue from businesses that have found genuine, cheaper alternatives to their license. APRA has largely been immune to this based on their exclusive license and the lack of quality content outside their remit. However, that is no longer the case as there is now an extensive, high quality library of content that can and will be used in many Australian businesses that will feature no Australian content and no revenue for OneMusic, if businesses can't see value in the final tariffs OneMusic publishes. Providers like Nightlife don't want to see this happen, but we and our peers will react to the market and deliver solutions for our customers that align to their business and commercial needs. The net result for the Australian music industry is significant (as demonstrated in the UK) and avoidable should OneMusic agree to the establishment of an independent body comprised of creators, management, rights holders, societies, service providers and end users. And time is running out with OneMusic set to start on 1 July.

7. Comparisons between OneMusic Australia and OneMusic New Zealand

According to APRA, OneMusic Australia is based on the successful New Zealand model with the same name. The APRA application states the Australian "system" was "successfully trialled" in New Zealand.¹⁴ APRA's Chief Executive said "OneMusic Australia will build on the ground-breaking success of OneMusic New Zealand – now going into its sixth year".¹⁵

Nightlife contends that there are substantial differences between OneMusic Australia and OneMusic New Zealand, but the success of OneMusic New Zealand is reflective of what the market is capable of paying rather than what it can bear.

While Australian tariff prices have increased over time due to tariff creep, New Zealand tariff prices have remained largely unchanged.¹⁶ As a result tariff prices in Australia including the proposed tariff prices under OneMusic Australia are now far higher than in New Zealand. For example, a licensed café/restaurant with an area of 155 to 199 metres sq is charged the equivalent of AUD\$522 by OneMusic New Zealand, whereas OneMusic Australia charge a café/restaurant with 75 to 100 seats (these capacities are comparable) the amount of \$2000. An examination of tariff differences for a large bar/pub with over 10 screens and a

¹⁴ See page 7 of the Application.

¹⁵ <https://themusicnetwork.com/apra-amcos-breaks-400m-revenue-barrier-as-digital-eclipses-broadcast-for-first-time/>.

¹⁶ Matt Mullins, of Melbourne group Sand Hill Road said "Australia has one of the most expensive licence regimes on earth. A similar scheme in New Zealand ... sets fees at a fraction of Australia's," See: <https://www.theshout.com.au/australian-hotelier/proposed-onemusic-licence-structure-a-concern-for-hoteliers/>.

restaurant is even more startling. Based on the most recent hotels tariff, which we acknowledge has been withdrawn by OneMusic Australia for the first 12 months post launch following significant backlash from industry; If you include a nightclub operating twice per week with 400 customers the amounts payable to OneMusic New Zealand and OneMusic Australia are AUD\$2,479 and \$88,504, respectively. Finally, a fitness centre using background music for 800 members with 6 classes per day is charged AUD\$5,690 and \$11,848 by OneMusic New Zealand and OneMusic Australia, respectively.

There should be no reason for this scale of discrepancy. Music is not more valuable in Australia. APRA has not increased the value of music in Australia relative to New Zealand. When asked to explain the tariff price difference, an APRA handout stated “The fees and licensing schemes in both territories have been developed from a different historical basis and are not linked, indeed they have varied between the two countries for some considerable time. Licensing schemes and rates for dining businesses differ greatly ... due to historical, structural, and developmental variables, and a comparison of any two will reveal disparities for those reasons.”¹⁷ Many goods and services are priced similarly in Australia and New Zealand,¹⁸ yet licensing fees for musical works are higher in Australia than New Zealand.

Conclusion

Australian creators, service providers and end users all rely on APRA as a fundamental cog in the highly complex Australian music industry. We recognise the challenges they face to keep all stakeholders happy, whilst delivering an efficient and equitable service for all parties. But their current mode of operation makes it incredibly difficult to help them and to have real visibility into their core business practices.

For the public performance sector to thrive, the ACCC needs to create an environment that allows creators to have careers, that gives service providers confidence to invest in R&D to make great music services with licenses that support, rather than compete with them and that end users see value in paying for music now and in the future.

The current APRA authorisation period has been a challenge for many stakeholders and we need to collectively learn from these mistakes to set up a practical set of conditions that allows APRA to thrive whilst equally holding them accountable to all ends of the market and evenly distributing the power across the industry, not all in one party.

Technology is the answer to almost every challenge facing APRA, we simply need the ACCC to make it a priority for APRA to use it and to work together on long term solutions rather than seeking short term band-aids for massive global problems, like piracy. APRA has the structure and the personnel to implement change and to foster an environment of innovation and licensing flexibility that empowers creators, service providers and users and makes it easier for them to stay true to their local and global licensing charters.

Nightlife welcomes the opportunity to work with the ACCC, APRA and industry to deliver scalable solutions that maximise the success of our wonderful Australian music industry.

¹⁷ <http://www.onemusic.com.au/wp-content/uploads/2017/03/Dining-181031.pdf>.

¹⁸ See for example https://www.numbeo.com/cost-of-living/compare_countries_result.jsp?country1=Australia&country2=New+Zealand.

Attachment 1: Public Performance Compliant Solution Description

PUBLIC PERFORMANCE COMPLIANT SOLUTIONS (PPC)

PPC and PPC-X are Nightlife products that replace the need for PPCA's R1/R2 restaurant tariffs. In most venues, Nightlife's PPC coexists with PPCA's tariffs. (i.e. PPC is in use in the restaurant and PPCA's tariffs are in use in the main bar, nightclub, beer garden etc. where a collective license makes more sense) and with APRA licenses, which are addressed directly with the venue under exclusive arrangements. Nightlife is also currently able to collect both APRA and PPCA license fees on behalf of clients and return revenue and the associated play data to the respective organisations but this may not be available under the proposed OneMusic arrangement.

PPC

PPC contains content from over 100 independent labels that we have negotiated direct deals with. Of the available catalogue licensed from those labels (30 k plus) approximately 15k sound recordings are exploited for use in the product.

██████████

PPCX

PPCX contains PPC content (as per above) and includes ██████████ content. Of the available catalogue (22k plus) approximately 11k sound recordings are exploited for use in the product.

██████████

Repatriation

All revenue collected is distributed directly to rightsowners based on a venue centric collection and distribution model. (i.e. each play from each venue is attributed directly against the revenue collected from the venue). This is the most accurate and efficient model of revenue distribution from a public performance use in the market.