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Adjudication Branch:

Attention Mr Gavin Jones

Australian Competition & Consumer Commission (ACCC)

By email: adjudication@accg.gov.au

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

## **The Group**

This submission is in response to the APRA application and is made by author on behalf of several companies, businesses, organisations and individuals (collectively known hereafter as The Group).

The Group is comprised of dance teachers, dance schools and entities that host Eisteddfods. Where possible authorities have been cited in this submission, and external documents have been included in order to substantiate the claims within the submission.

Group members have requested that they not be identified because of concerns about privacy and retaliation from parties impacted by this submission. However, they advise that this submission is intended to address the Australia-wide concerns of the dance industry, concerns which have not been adequately addressed until now.

If the ACCC has any queries related to particular issues raised in this submission, or requires any further information about particular issues, the author would be pleased to relay these concerns to The Group for a timely response.

## **What is an Eisteddfod?**

An Eisteddfod is a competitive or non-competitive event involving all types and styles of dance, vocal, instrumental, speech and drama. Eisteddfods are part of the cultural fabric in Australia. More

recently Eisteddfods have encouraged young people to put their iPods/Fortnite/Xbox/WhatsApp down and engage in physical and artistic activity, with other young people. They have also encouraged young people to bond with their communities.

From an organisational viewpoint, Eisteddfods are held around Australia, often raising funds for charity or non-profit ventures usually run by volunteers. Some Eisteddfods charge an entry fee for viewers, some charge competitors/entrants a performance fee, while others charge for both. Some Eisteddfods purport to involve parents in activities. Eisteddfods also range in size, from very small regional events to large, regular events in larger centres.

### **Acknowledgements**

The Group acknowledge the following:

- The original owners of this land.
- The validity and role of the system of copyright.
- That rights owners need to be rewarded for their creativity, and investment.
- The role of collecting societies, in particular APRA, who plays a valuable role connecting creators of music to members of The Group and their associates.

The Group have no objection to main body of this submission being published. They would like the attachments to be omitted from the published version of this submission as they contain personal and confidential information/correspondence.

### **Summary of The Group's position**

The Group's position is as follows:

- (a) APRA has behaved in anti-competitive manner with respect to the licensing of musical works.
- (b) APRA has engaged in unconscionable conduct in relation to the licensing of musical works.
- (c) APRA and its stakeholders have benefited financially from behaving in an anti-competitive manner and engaging in unconscionable conduct.
- (d) APRA and its stakeholders have benefited financially as a result of the authorisation of APRA in 2014.

- (e) The Group opposes the re-authorisation of APRA.
- (f) The Group opposes the authorisation of OneMusic Australia.
- (g) If APRA is determined to seek authorisation for the operations of OneMusic Australia, the Group seeks that the ACCC require the Australasian Mechanical Copyright Owners Society (AMCOS) and the Phonographic Performance Company of Australia (PPCA) to seek authorisation/re-authorisation (respectively) in a timely manner.
- (h) If the ACCC grants re-authorisation to APRA, the Group believes the authorisation period should be limited, being no more than two years, and it should be subject to strict conditions to be determined by the ACCC in consultation with affected parties.
- (i) The Group believes other restrictions and limitations should be placed on the behaviour of APRA by the ACCC, in order to increase competition in the sector, and protect would-be licensees of musical works including those in the dance and Eisteddfod sectors from unconscionable conduct and retaliation.
- (j) The Group also believes the ACCC should be more closely involved on a regular basis in monitoring APRA's activities, as they do with the fuel, telecommunications, franchising and other sectors. Such a level of compliance would ensure that APRA do not engage in anti-competitive behaviour.
- (k) The Group would like the ACCC to host regular meetings involving APRA, affected parties and groups representing licensees and would-be licensees of musical works, as part of a future consultation process. Such a forum would allow interested parties to raise any grievances they may have, and ensure that APRA address these grievances in a timely and effective manner.
- (l) The Group would like the ACCC to acknowledge that negotiations that resulted in the development and implementation of the Eisteddfod tariff were null and void. As a result, the Eisteddfod tariff is void, and all licence fees collected under that tariff should be returned to the payers.

The Group takes these views for the following reasons:

1. **APRA do not appear to be an organisation acting with the best interests of licensees or its members at heart**

APRA have a long history of operations and there might have been a time when they seemed to place the interests of licensees and members first, over their own organisational interests. However, that time seems to have passed.

In 2018 APRA and AMCOS earned over \$400 million while still describing themselves as a non-profit organisation. This continues a pattern of substantial earnings growth over a long period of time. With new deals with Facebook and others now in place they are on track to have group revenues exceed \$500 million this year.

In recent years, APRA have also accumulated a large network of Australian assets including a \$20 million property in Sydney, and an examination of their most recent published balance sheet indicates that they have retained a large amount of cash.

APRA have a duty (which may be fiduciary in nature) to its members. If retained revenues were used to purchase real property such as the property in Sydney, the opportunity cost of such a purchase is that those revenues were unable to be distributed to APRA's members.

APRA have also recorded a substantial increase in their costs in recent years which is an undesirable trend for an organisation that is already in receipt of an authorisation (which should be keeping their costs down). From the 2017 financial year to the 2018 financial year APRA's expenses increased by a substantial \$6.3 million or 12.6% from \$49.9 to \$56.2 million. This is far higher than the current rate of inflation in Australia.

APRA now has a large number of staff and contractors, and an information technology system which is very resource intensive.

**Questions for the ACCC to ask APRA:**

1(a)(i) What are APRA's current assets and liabilities?

1(a)(ii) Can these assets and liabilities be itemised?

1(b)(i) How much cash/deposits at bank does APRA currently have?

1(b)(i) What is the source of these cash/bank deposits?

1(c) If APRA own real property:

- (i) Where is the real property located? Please provide addresses.
- (ii) When was the real property purchased?
- (iii) What was the purchase price of the property?
- (iv) How was the purchase financed? Was it financed by retained revenues, loans or by some other means?
- (v) What consultation/approval processes did APRA go through with its members prior to purchasing of the properties described in 1(c)(i) to (iv)?
- (vi) What is the current value of the properties described in 1(c)(i) to (iv)? If unknown, please provide an estimate based on current information.

- (vii) Does APRA consider that in purchasing the properties described in 1(c)(i) to (iv) that it fulfilled its (fiduciary) duty to its members? If yes, how does it consider that it fulfilled its duty, given that any real property purchases actually reduced the pool of funds available to be distributed to members. If APRA had not purchased real property, how much more would APRA members had received?
- (viii) Does APRA lease any property described in described in 1(c)(i) to (iv) from itself?
- (ix) If yes, what are the terms and conditions of these leasing arrangements? What is the term of the lease(s)? How much rent does APRA pay itself? Does APRA lease any property to other parties? How much revenue does APRA earn from these leasing arrangements?

1(d)(i) How much does APRA pay its executives, including its Chief Executive?

1(d)(ii) How have these executive's payment levels changed since the last APRA authorisation?

1(e)(i) What perks/benefits are provided to executives?

1(e)(ii) Do executives receive interest free loans?

1(e)(iii) Do executives receive free business class travel?

1(e)(iv) Do executives receive free parking?

1(e)(v) Do executives receive car allowances?

1(e)(vi) How have these perks/benefits provided to executives changed since the last APRA authorisation?

1(f) How much did APRA pays its long term previous Chief Executive to facilitate his departure from APRA/AMCOS?

1(g) How much is APRA spending annually on new technology?

1(h) What activities are APRA's staff and contractors engaged in? APRA should provide job descriptions of all staff and contractors.

1(k)(i) How many of APRA's 100,000 members had nil earnings in 2017-2018?

1(k)(ii) How many APRA members earned less than \$500 in 2017-2018?

#### **Contention 1(a):**

If APRA are putting the interests of its stakeholders and executives ahead of its members and would-be licensees, APRA should not be the beneficiary of an ACCC authorisation which allows it to behave in an uncompetitive manner, where that authorisation effectively adds to APRA's net revenues.

#### **Contention 1(b):**

APRA should be prevented from making large asset purchases unless and until the purchases are approved by their members in advance.

**Contention 1(c):**

APRA claims to be part of the non-profit sector, so there should be no objection by APRA to them listing all key executive salaries/salary packages in their annual reports. There should also be no objection to APRA providing job descriptions for all staff and contractors.

**Contention 1(d):**

Given APRA is part of the non-profit sector, and revenues have increased substantially in recent years, APRA should:

- (i) Place an immediate freeze on all tariff rate increases,
- (ii) Investigate how recent substantial tariffs rate increases have impacted on licensees, especially educational institutions, (genuine) non-profit organisations, and charities, and
- (iii) Consider how the music industry might benefit from a reduction in some tariffs, particularly if such a reduction results in an increase in the use of music accompanied by a promotional benefit associated with the additional use of music.

**Contention 1(e):**

APRA administrative and management fees have increased in recent years. APRA should consult with its stakeholders and devise and implement a plan to keep their costs under control.

**Contention 1(f):**

As APRA administrative and management fees have increased, this has placed pressure on APRA to earn more money – through higher tariffs, tariff restructuring, and more licensees. This has had many flow on effects which are discussed elsewhere in this submission– such as APRA not consulting with relevant interest groups, APRA ignoring the results of its consulting with relevant interest groups, and APRA acting in an unconscionable manner.

**Contention 1(g):**

The interests of songwriters, and in particular Australian songwriters are not a high enough APRA priority, and should be a greater concern to the organisation.

## **2. APRA systems are inherently complex and lack transparency**

APRA controls an inherently complex system over 40 tariffs. It is not always clear in any given set of circumstances which tariffs will apply, when they will apply and how much the licensee is required to pay. One member of The Group has supplied three documents, being Attachments 1, 2 and 3 which advise of different tariff rates applied to Eisteddfods from 1 January 2017, being:

- 66 cents plus a 10 cent levy paid to AESA members (see Attachment 1),
- 88 cents paid to APRA/AMCOS (see Attachment 1),
- 76 cents for AESA members (see Attachment 2),
- 99 cents for non-AESA members (see Attachment 2),
- 77 cents for AESA members (being 90 cents less a 20 cent discount, plus GST) = (90-20+7 cents)(see Attachment 3), and
- 90 cents excluding GST for non-AESA members (see Attachment 3) <sup>1</sup>

Some of these amounts are GST inclusive, other amounts are GST exclusive which is confusing since the ACCC and Government has required GST inclusive pricing since 2000.<sup>2</sup>

### **Contention 2a:**

APRA's tariff system is confusing and unclear. Ordinary business people including people who run dance schools and Eisteddfods often do not understand which tariff or tariffs apply to them. This is an inequitable situation with undesirable circumstances. Tariff uncertainty results in budgetary uncertainty for businesses and personal stress for business proprietors.

### **Contention 2b:**

APRA's tariff system is confusing and unclear. Ordinary business people including people who run licensees are sometimes forced to call APRA staff to ask them which tariffs apply to them. Group members advise that in some instances they have called APRA, explained their personal situation, and on occasion even APRA staff seemed unsure which tariff(s) applied to them. (See Attachment 10 for a demonstration of the behaviour of one APRA staff member who seemed confused by the new Eisteddfod tariff structure and how it applied to dance improvisations).

<sup>1</sup> Also <http://www.dancetrain.com.au/music-copyright-what-do-eisteddfods-and-competitions-need-to-know/>.

<sup>2</sup> See for example <https://www.business.gov.au/products-and-services/fair-trading/displaying-prices>.

**Contention 2c:**

Group members suggest that APRA should replace its system of tariffs with a system of transparent, verifiable flat licence fees, payable by all businesses. The administrative savings attached to such a system would be substantial.

**Contention 2d:**

Generally, would-be licensees cannot use the principles of self-assessment to determine how much they should have to pay APRA in advance of being billed by APRA. As a result, businesses have no way of determining if their APRA bill has been assessed correctly, and they have no chance of instituting policies to minimise their potential liability to APRA.

**Contention 2e:**

According to Group members, the Eisteddfod licence fee is calculated based on previous year Eisteddfod attendance numbers. This is an inequitable situation as many Eisteddfods have identified a sharp decrease in 2018-2019 participation and attendance levels due to increased costs associated with the Eisteddfod tariff. Yet fees are based on 2017-2018 attendance levels.

**Contention 2f:**

Group members have also identified concerns about the timing of payments, with some reporting that payments are being required by APRA in advance of revenue actually being earned by the Eisteddfod.

**Contention 2g:**

According to Group members, APRA staff behave in an inappropriate manner when speaking to businesses. They typically go on “fishing expeditions” asking businesses intrusive questions requiring detailed answers, so they can assess the amount payable by the businesses. This is similar to APRA licence application forms that typically also ask intrusive questions about revenue, business activities and other matters that go well beyond the use of music.

**Contention 2h:**



APRA takes advantage of market confusion and uncertainty over tariffs, by attempting to maximise their revenues from typically uninformed licensees.

### **3. APRA's consultation attempts represents no more than empire building**

APRA is in the business of developing new tariffs and then engaging with parties who purport to be representative bodies, with the view that in return for a commission they will market the licensing scheme on APRA's behalf, and collect licence fees on APRA's behalf. While developing the Eisteddfod tariff, APRA identified the existence of Association of Eisteddfod Societies of Australia (AESAs). Members of the Group advise that APRA believed that AESAs represented Australian Eisteddfods nationally because they had the name "Australian" in the title and could not identify any other group who might potentially serve that role. Group members add that while AESAs may have been well intentioned, APRA failed to correctly identify that AESAs were a small, rurally based organisation, with few if any members who conduct Eisteddfods in state capital cities. Also, a search of the ASIC website reveals that AESAs does not appear to be registered for GST purposes, which raises the issue of how they can charge would be members GST inclusive licensing fees.<sup>3</sup>

APRA purported to conduct negotiations with AESAs on behalf of all parties that host Eisteddfods. This was done without APRA conducting any checks regarding the extent of AESAs's representative authority. APRA had and have the contact details of many dance schools, as well as parties that historically have conducted Eisteddfods, yet they made no attempt to contact these schools or Eisteddfod hosts until after they had "done a deal" with AESAs. Indeed, APRA wrote to Eisteddfod hosts as late as 5 December 2016 advising parties that host Eisteddfods that the new tariff structure would commence on 1 January 2017 – less than a month later!

Not only did APRA not conduct Eisteddfod negotiations with the appropriate parties, but they provided hosts of Eisteddfods with a very short notification period for the commencement of the operation of the new Eisteddfod tariff. This had the following effects on Eisteddfod hosts:

- It provided Eisteddfod organisers with a very limited amount of time to collect the information APRA required for the assessment of the new tariff,
- It provided Eisteddfod organisers with a very limited amount of time to identify and analyse the financial implications, in relation to the Eisteddfod of the purported tariff fee increase, and
- It provided a very limited amount of time for Eisteddfod organisers to determine if their Eisteddfod would continue to be financially viable.

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<sup>3</sup> Current details for ABN 84 248 789 088: THE ASSOCIATION OF EISTEDDFOD SOCIETIES OF AUSTRALIA INC; Active from 01 Nov 1999; Not currently registered for GST.

A copy of the letter advising interested parties of the commencement date is included as Attachment 4.

That “deal” as it was described was not a good deal for Eisteddfod hosts. It introduced a new Eisteddfod levy, which would increase rapidly over subsequent years.

APRA incorrectly asserted that the levy was necessary and essential because Eisteddfod hosts currently did not pay rights holders for the use of their music. This was despite the existence of the dance school levy, which expressly included Eisteddfods according to its terms and conditions. APRA’s misleading assertions meant that AESA believed it had to complete a deal with APRA, and that there was no choice available to them other than completing a deal (or face legal proceedings for copyright infringement).

The “deal” benefits AESA in two ways. The deal encouraged members to join AESA – because AESA members are entitled to preferential APRA licence fees (72 cents licence fee per entrant compared to 99 cents licence fee for non AESA members). Each new AESA member must pay AESA \$75.<sup>4</sup>

The deal also benefits AESA because of the 72 cents licence fee per entrant that AESA collects, it only pays APRA 62 cents, and is able to retain the 10 cent difference as an administrative charge. That means AESA are earning a 10 cent commission on every 72 cent sale – which is a rate of almost 14%.

Since the deal was completed by AESA and APRA, which APRA now claims covers the entire industry, AESA membership has grown substantially. The AESA empire has been constructed, and APRA is responsible for its development.<sup>5</sup>In the meantime, APRA have an agent “on the ground” marketing copyright licenses on APRA’s behalf and undertaking revenue collection for APRA.

**Questions for the ACCC to ask APRA:**

3(a) Is APRA’s agent AESA registered for GST purposes? If yes, has evidence of AESA’s registration been provided to APRA? If yes, please provide documentary evidence of this registration.

3(b)(i) How many organisations have signed agency agreements with APRA, with APRA providing incentives to these organisations for the registration of would-be licensees?

3(b)(ii) Which industries are covered by these agreements?

3(b)(iii) What are the names of these organisations?

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<sup>4</sup> See Attachment 12.

<sup>5</sup> Despite that, some Group members are still critical of AESA’s operations. One member noted “AESA do not invoice its members or provide receipts to their members for the Eisteddfod tariff”.

3(b)(iv) What incentives have been provided to these organisations?

3(b)(v) What are the other terms of these agreements?

3(c)(i) How many complaints have these agents received regarding the licensing process?

3(c)(ii) What steps are in place to ensure that all complaints agents receive are passed onto APRA for resolution?

#### **Contention 3a:**

APRA rewards organisations who are willing to collect levies for them on their behalf, even if those organisations aren't necessarily representative of anyone in particular. This is because under these deals APRA obtains a financial benefit, without incurring any additional management, administrative or technological expenses. Further, APRA don't have to "sell" or market the need for these licences to would-be licensees. That is left to the supposedly representative organisation who profits from each new "member" they sign up, and therefore has an incentive to sell these licences to members.

#### **Contention 3b:**

In the above example, AESA has been declared to be the organisation representative of Eisteddfods,<sup>6</sup> even though Group members indicate they are not and have never been representative of them. APRA should be prevented from executing deals with representative organisations or groups who purport to represent other entities in the future, where they provide an incentive to those groups. These agency agreements are open to abuse and manipulation. In the above example, there is an incentive for APRA agents to engage in misleading or deceptive conduct in trying to sign up new would be licensees. That incentive is the commission they earn from every new licensee, and the fee paid by every new member of AESA. In the meantime, APRA can claim deniability in relation to any conduct by its agents, since it is the agents (in this case AESA) undertaking any conduct – not APR..

#### **Contention 3c:**

APRA's deal with AESA is not a good deal for the Dance and Eisteddfod industries as it represents a huge increase in payments without the provision of any additional benefits, value or services.

#### **Contention 3d:**

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<sup>6</sup> According to APRA, "at the time when the parameters and rates of the licence were being developed, the Association of Eisteddfod Societies of Australia (AESA) was the most prominent industry body, representing the largest number of Eisteddfodau in Australia. AESA and their board worked with APRA ... over a period of time to develop this licence and were consulted for feedback on this proposal." See: <http://apraamcos.com.au/media/customers/Eisteddfod-FAQ.pdf>.

APRA's deal with AESA is not a valid deal because it was based on a misleading and deceptive premise promoted by APRA to AESA. That premise is that at the time of negotiations the parties that hosted Eisteddfod industries were *not* covered by existing licences that were in place, whereas it is clear that they were covered by the existing Dance school tariff.

Group members point to the document known as "2017 AMCOS-ARIA DANCE SCHOOL ASSESSMENT", included as Attachment 7. Under "important provisions of your licence agreement", the following statement is included:

*"Your school may only make audio recordings of AMCOS Works and ARIA Sound Recordings for the purposes of: ... (b) **public performance** under the dance school banner at **eisteddfods** ..."* (emphasis added).

**Contention 3e:**

APRA's deal with AESA is not a fair deal, because although APRA had the opportunity over two years to conduct bona fide negotiations with the many Dance and Eisteddfod licensees on their books, they chose not to. In the words of one Group member:

*"AESA only represent a select few of the not for profit Eisteddfods. At no time was any consultation done with commercial Eisteddfods regarding the Eisteddfod tariff. At no time was a consultation regarding the Eisteddfod tariff done with other not for profit Eisteddfods that are not members of AESA. At no time was a consultation done with Dance schools who run Eisteddfods as a local fundraiser. At no time was any consideration given by APRA for the Eisteddfods that operate in order to fundraise for charities or Eisteddfods that only charge fees to cover costs and not to make a profit – this being done to provide a platform for children to perform. Especially in the rural remote areas. These Eisteddfods are still forced to pay the Eisteddfod fee set by APRA regardless of any of their circumstances".*

**Contention 3f:**

APRA also chose to virtually ignore complaints from members of the Group and other individuals regarding the consultation period. In one instance an individual asked for a consultation period to be extended from 27 November 2017 to at least February 2018. After escalating the process through to their Head of Legal, Corporate & Policy APRA finally agreed to accept submissions 19 January 2018 (see Attachment 15). Ultimately, it made no difference to the result – the submissions did not appear to substantively change APRA's position on the tariffs.

**Contention 3g:**

Negotiations by APRA over the Eisteddfod tariff were not real negotiations. Rather, negotiations actually took the form of a notification process, and that notification process was conducted over a very short time period. In fact, the new Eisteddfod tariff was presented as a fait accompli to licensees and would-be licensees.

**Contention 3h:**

APRA should declare their Eisteddfod deal with AESA as null and void, with the following consequences:

- APRA are not bound by the results of whatever past negotiations they have purported to have conducted in relation to Eisteddfods,
- If APRA wishes to introduce a new Eisteddfod licence, they must re-commence the entire process of discussions with members of the Dance and Eisteddfod industries who are more representative of these industries (which *may* include AESA, but should not be limited to AESA),
- Existing tariffs should to revert to their pre-January 1 2017 levels, and
- All license fees collected by APRA on the basis of the void Eisteddfod licence should be refunded in full to the businesses concerned.

**Contention 3i:**

The ACCC should investigate all of APRA's "deals" where they have representative organisations collecting licensing fees on their behalf in return for a discount. The experience with AESA demonstrates that the system is very open to abuse and misleading/deceptive conduct by representations of the agency. APRA should not be in the business of "king making".

**4. APRA tariffs are expensive and increasing**

APRA tariffs are expensive, compared to other countries and are increasing. For example, the rate for Eisteddfods was publicised as increasing from 99 cents to \$2.75 from 2017 to 2020. That represented an increase of 178% over 3 years (See Attachment 2). More recently APRA announced they have modified their tariff increase. Rates will increase from \$0.99 to \$1.71 per entrant from 2018 to 2020.<sup>7</sup> This represents an increase of only 73% over that time period.

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<sup>7</sup> <http://apraamcos.com.au/music-customers/licence-types/eisteddfods/>.

There is also little or no consistency in tariff rates, even though APRA claim “the rates are fair and equitable, and relevant to all Eisteddfodau”.<sup>8</sup> For example, while Eisteddfod tariffs are priced as described above, dance competitions are priced at \$0.495 per entry (See Attachment 5). Why are Eisteddfod tariffs so much higher than dance competition tariffs? Both take place at venues, and both rely on fees payable by entrants.

APRA also claim that in absolute terms Eisteddfod fees are currently very low. APRA state:

*“The new licence fee represents a relatively small increase per entry, which if passed onto participants is unlikely to represent more than a tiny part of the total cost of Eisteddfod participation when you consider what is spent by entrants on costumes, travel, photos, hair and make-up, lessons and instruments. If you are considering the best way to introduce this to your participants, please contact your Account Manager at APRA AMCOS.”<sup>9</sup>*

**Questions for the ACCC to ask APRA:**

4(a) How did APRA calculate its tariffs in the first instance?

4(b) How did APRA determine by how much to raise its tariffs?

4(c)(i) What is APRA’s rationale for raising its tariffs?

4(c)(ii) Has the value of music increased?

4(c)(iii) If yes, is this increase in the value of music sufficient to justify APRA’s increase in tariffs?

4(c)(iv) Are APRA providing a value-added service to justify the tariff increase?

4(c)(v) If yes, is the value of this value-added service sufficient to justify APRA’s increase in tariffs?

4(c)(vi) Why are APRA tariffs rising at a rate faster than inflation?

4(d) What advice is APRA providing to holders of Eisteddfods who are having difficulties in introducing “this” (“this” being the new tariff? Or the entire scheme?) to “new” participants? Is there a script APRA staff use?

**Contention 4a:**

APRA tariffs are expensive and increasing, and this price rise can’t be justified on economic or any other grounds.

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<sup>8</sup> <http://apraamcos.com.au/media/customers/Eisteddfod-FAQ.pdf>.

<sup>9</sup> <http://apraamcos.com.au/media/customers/Eisteddfod-FAQ.pdf>.

**Contention 4b:**

APRA tariffs lack transparency, and have no relationship to their economic value, or any other objective measures or valuations.

**Contention 4c:**

APRA claims that Eisteddfod payments are small and affordable is self serving, and unsupported by any evidence.

**Contention 4d:**

It is unclear how APRA arrived at a tariff of 99 cents per entrant in any event. Why not more? Or less? Why a 20 cent discount for AESA members? Why not more? Or less?

**Contention 4e:**

APRA's tariffs are simply based on an assessment by APRA management as to how much the market can bear in licence fees for musical works. Some key questions in this context include the following:

- If APRA raise tariffs for Eisteddfods will there be a community backlash?
- Will people protest to APRA or external parties?
- Will they complain to the ACCC?
- What if they raise tariffs for Eisteddfods gradually?
- Over 5 years?
- Will the backlash be diminished?
- If there is a backlash how will APRA respond?
- Maybe they will freeze rates for 12 months before they increase them?
- Will that placate affected parties?

**Contention 4f:**

Group members can point to numerous examples of Eisteddfods who passed on their costs to parents who then sadly withdrew their children from the event because of personal financial difficulties.

**Contention 4g:**

APRA are only able to raise tariffs because they operate in a non competitive environment. APRA have a virtual monopoly on the licensing of musical works. Despite the theoretical options of opt-out and licence back, there are no other licensing choices for dance music teachers or Eisteddfod hosts. If APRA are re-authorised they will continue to restructure and reorganise their tariffs so that they are able to raise already expensive tariffs to even more unreasonable levels, in order to maximise their revenue.

#### **Contention 4h:**

In assessing whether or not to increase tariffs, APRA consider the level of opposition they are likely to meet. Historically, dance teachers and organisers of Eisteddfods have been poorly organised. Group members advise that they lack a genuine representative organisation. In the past, APRA has used their lack of organisation and management skills to push through tariff restructures and excessive rate rises. There is no reason to expect that this won't continue in relation to Eisteddfods or groups impacted by other tariffs where those groups do not have a representative body or formal structure.

#### **5. APRA licence fees, death and taxes**

Some Group members have in the past been confused about the basis on which APRA levies tariffs on businesses. While it is not in dispute that APRA have a legal *right* to collect licence fees on behalf of copyright owners and this power is authorised by the Copyright Act some Group members have advised that they, or others in the dance industry believed that APRA licence fees were actually Government payments for the use of musical works. They continued to hold that view until they were informed by better informed parties that APRA is a private organisation and APRA fees are not Government taxes.

This perception of APRA licence fees being akin to taxes is encouraged by APRA themselves who compare their activities to the activities of Government authorities. For example, APRA advise "businesses and other organisations must comply with Australian copyright law in the same way they would other laws and regulations, such as consumer laws, privacy laws and fair trading laws."<sup>10</sup> In effect APRA are comparing their licensing activities to the ACCC, who regulate consumer laws, the Australian Information Commissioner, who regulate privacy laws, and Fair Trading NSW (and other state Fair Trading departments), who regulate state fair trading laws.

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<sup>10</sup> <http://www.onemusic.com.au/faqs/>



APRA also tie their activities to the Federal Constitution, so anyone who doesn't pay their licence fees is not just in breach of the law but is potentially in breach of the Constitution!<sup>11</sup>

#### **Contention 5a:**

APRA actively encourages licensees to believe that copyright licence fees are the same as Government taxes, council rates, parking fees and a range of other compulsory fees and charges. This suggests that the APRA opt-out and licence back options are illusory, and that APRA exercises monopoly power.

#### **Contention 5b:**

APRA don't wish parties to challenge the basis of any tariff rates, because they can't justify the or even explain the applicable rates.

### **6. The rationale for the Eisteddfod tariff**

Historically, Eisteddfod organisers did not have to pay stand alone tariffs for Eisteddfods. Eisteddfods were covered by the APRA venue tariffs and Dance School tariffs. However, that changed in January 2017, when APRA, AMCOS, the PPCA and the Australia Recording Industry Association (ARIA) introduced a stand alone Eisteddfod tariff.<sup>12</sup>

APRA's rationale for the introduction of the tariff was and remains a little unclear. According to an email from APRA (see Attachment 6) Eisteddfods are different to other types of concerts/events. According to APRA:

*"... aside from the public performance of musical works, eisteddfods often require licensing for:*

- *making reproductions of music as backing tracks;*
- *public performance of sound recordings, and*
- *the making and distribution of audio and video recordings.*

*Further, eisteddfods usually charge an entry fee as well as a ticket price on the door. For these reasons, eisteddfods are not eligible to be covered under our annual venue tariffs."*

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<sup>11</sup> According to APRA "securing an APRA AMCOS/ARIA/PPCA licence will help in meeting your legal obligations under the Copyright Act. The Australian legislation is based on the authority of the Australian Constitution." See: [http://apraamcos.com.au/media/Customers/PEG\\_eisteddfods.pdf](http://apraamcos.com.au/media/Customers/PEG_eisteddfods.pdf).

<sup>12</sup> [http://apraamcos.com.au/media/customers/Non-Association\\_Eisteddfods.pdf](http://apraamcos.com.au/media/customers/Non-Association_Eisteddfods.pdf).

So, to summarise according to APRA, Eisteddfods needed their own stand-alone tariff for the following reasons:

- (a) they reproduce music for backing,
- (b) they undertake the public performance of sound recordings,
- (c) they involve the making and distribution of recordings, and
- (d) they have two sources of revenue – entry fees and ticket prices.

Of these reasons:

- (a) could have been covered by existing arrangements, with Eisteddfod organisers applying for a licence from AMCOS if needed,
- (b) could have been covered by existing arrangements, with Eisteddfod organisers applying for a licence from the PPCA if needed,
- (c) could have been covered by existing arrangements, with Eisteddfod organisers applying for a licence from the PPCA/APRA if needed, or directly from the record company that produces the sound recording, and
- (d) Is the only valid reason for the separate Eisteddfod licence, noting that there are two sources of revenue rather than one source of revenue. However, this reason for the new tariff is not based on any legal rationale. Rather, it is based on financial reasons particular to APRA.

**Questions for the ACCC to ask APRA:**

- 6(a) How much has APRA/AMCOS/PPCA/ARIA earned from the Eisteddfod tariff since its institution?
- 6(b) How many Eisteddfod licenses have been issued?
- 6(c) How do APRA/AMCOS/PPCA/ARIA share the revenue earned from the Eisteddfod tariff?
- 6(d) How many Eisteddfod licensees reproduce music for backing?
- 6(e) How many Eisteddfod licensees undertake the public performance of sound recordings?
- 6(f) How many Eisteddfod licensees make and distribute recordings?
- 6(g) How did APRA/AMCOS/PPCA/ARIA arrive at the Eisteddfod tariff rate?
- 6(h) What is the APRA/AMCOS/PPCA/ARIA rationale for raising its Eisteddfod tariffs?

**Contention 6a:**

There was no legal basis or underlying legal rationale for the introduction of Eisteddfod tariff.

**Contention 6b:**

All licensing activities in relation to Eisteddfods could have continued as per pre-2017 arrangements, with the APRA venue tariff continuing to cover the public performance of the musical works used in Eisteddfods.

**Contention 6c:**

APRA described the tariff as “a new blanket licence solution”<sup>13</sup> but there is no evidence that pre-2017 there was a problem.

**Contention 6d:**

The development of the Eisteddfod tariff represents no more than a cash grab by the collecting societies led by APRA, with APRA identifying that Eisteddfods earned income from two sources – the price of admission and entry fees.

**Contention 6e:**

The increase in the Eisteddfod tariff represents a continuation of the APRA cash grab described in 6(d).

**Contention 6f:**

The announcement by APRA that Eisteddfod fees under OneMusic Australia would increase, but by not as much as previously announced represents a tokenistic attempt to placate angry Eisteddfod organisers including Group members.

**Contention 6g:**

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<sup>13</sup> [http://apraamcos.com.au/media/Customers/PEG\\_eisteddfods.pdf](http://apraamcos.com.au/media/Customers/PEG_eisteddfods.pdf).

There is no need for an Eisteddfod tariff. I am advised by a Group member, that:

- (i) Eisteddfod operators hire venues that in almost all instances have APRA public performance licences (although APRA do not disclose to Eisteddfod operators when venues do or do not have APRA public performance licences),
- (ii) Dance schools typically have APRA licences that cover Eisteddfods,
- (iii) Videographers used by Eisteddfods have an APRA licence, and
- (iv) Musicians have an APRA licence for the use of sheet music.

#### **Contention 6h:**

APRA purport to charge Eisteddfod operators on the basis of the number of paid entrants, yet the Group contends that the fee if any should be audience based not participant based. In many instances such as for solos there is sometimes only a few people in the audience watching the performance, often just the child's parent and a dance teacher.

#### **Contention 6i:**

As discussed in Contention 3(h) the Eisteddfod tariff should immediately be abandoned.

### **7. Duplication and double dipping under the Eisteddfod tariff**

Group members have expressed the concern that they believe that in introducing the Eisteddfod tariff APRA is an example of what they describe as "double dipping", with licensees paying duplicate fees covering the same subject matter or activities. APRA have attempted to address this issue in their FAQs:

*Question: Dance schools also pay for a licence, isn't the copying of backing tracks already covered by their music licence for other events like Eisteddfodau?*

*Answer: In some instances the Proposed Dance School Scheme and the new Eisteddfod Scheme may license the same use – that is the right for a dance school to make a reproduction of a track for the purpose of use at an event licensed under the Eisteddfod Scheme. However, we note that many entries, if not most to eisteddfodau, are not dance schools. Nonetheless, in the medium term this has been addressed in the proposed OneMusic dance school licence scheme and in the short term is acknowledged within the more favourable pricing and phase-in structure outlined above. APRA AMCOS propose to address this issue through a variation to the Proposed Dance School Scheme.*<sup>14</sup>

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<sup>14</sup> <http://apraamcos.com.au/media/customers/Eisteddfod-FAQ.pdf>.

Similarly:

*Question: What happens when a theatre or concert venue already holds an annual licence?*

*Answer: Some venues hold an annual APRA licence that covers certain eligible events. Eisteddfodau are not eligible to be covered by these licences due to their pricing structure and the additional rights involved - such as copying of print music and backing tracks, and making recordings of the events for entrants and adjudicator."*

To paraphrase the above, APRA doesn't deny that double dipping can and does arise, but they excuse it with offers of "more favourable" pricing and on the basis of trying to distinguish Eisteddfods from other types of activities.

Group members also point to the document known as "2017 AMCOS-ARIA DANCE SCHOOL ASSESSMENT", included as Attachment 7, which as discussed above demonstrates that at the time of the introduction of the Eisteddfod tariff dance schools were already covered for Eisteddfods.

**Contention 7a:**

Double dipping under the Eisteddfod tariff is a reality. As one Group member states:

*"This is our current issue with APRA, studios where we rehearse pay an APRA levy, theatres/venues where we play pay an APRA levy, and now we have to pay a separate Eisteddfod levy ... that's paying three times for the same piece of music".*

APRA denied that any twice or thrice payment was occurring covering the same activities in a letter to a Group member:

*"The fact that a dance schools is using music in classes, and paying a small annual fee for that, shouldn't mean songwriters are not paid for the use of music in eisteddfods. If I employ a photographer to take photos at my wedding, I can't then assume he will take photos at an eisteddfod for no extra cost."*

and

*“The dance school licence is for classes, rehearsals at the dance school and does not cover public performance at an eisteddfod. There is only one licence fee being charged for use of music at an eisteddfod” (see Attachment 16).*

The photographer analogy is incorrect and misleading. The Wedding and Eisteddfod in APRA’s example are unrelated to each other, whereas the rehearsal studio, theatre and Eisteddfod are all closely related to each other, and involve a use of the same musical works in the same manner.

**Contention 7b:**

Double dipping under the Eisteddfod tariff is such a serious problem and has such inequitable results, that APRA should abandon the Eisteddfod tariff entirely and rely on pre-2017 licences as they apply to Eisteddfods.

**Contention 7c:**

Group members believed their prior dance school agreement covered Eisteddfods, and as a result, any subsequent Eisteddfod agreement requiring the payment of fees to APRA is an unequivocal example of double dipping.

**8. Confusion over definition-based issues**

APRA has indicated that the Eisteddfod events “deemed to be commercial in nature will not be licensed under the new scheme”<sup>15</sup> Yet Group members advise that both commercial and non commercial Eisteddfod events have been licensed by APRA since 2017. This is very confusing. In any event, members of the Group contend that the distinction between commercial and non commercial (which seems to be based around a \$40 entry fee) is meaningless and contrived.

**Contention 8a:**

In an environment of confusion and certainty, it is clear that APRA exercises significant power over which Eisteddfods are licensed, and the manner in which they are licensed.

**9. In absolute terms, businesses are worse off as a result of APRA’s actions**

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<sup>15</sup> See Attachment 4, page 2.

For the period 2014-2015 a particular Eisteddfod paid APRA a licence fee amount of \$82.50 (see Attachment 8). This is the same amount that used to be paid by all other Eisteddfods.

This figure was based on the information the company provided to APRA, and there was no attempt by the company to minimise its fees or portray its operations in such a manner that it resulted in it incurring a reduced fee. Indeed, there was no need for that Eisteddfod to try to minimise the fee. The fee was reasonable, and APRA's actions in relation to the fee was transparent. From a policy viewpoint that Eisteddfod and other Eisteddfods were and are happy to pay reasonable copyright fees and reward Australian musical artists.

So, that Eisteddfod paid the fee in a timely manner. In subsequent years the fee for that Eisteddfod and other Eisteddfods has increased to hundreds or even thousands of dollars. As one Group member stated, "the increase in fees in 2017 was applied and they were charged 49.5 cents per competitor plus GTS in addition to the \$82.50, and APRA also wanted a percentage of the door takings." Another Group member pointed out that they knew of a bigger Eisteddfod that ran several weeks with around 3000 competitors, resulting in an APRA fee in excess of \$3,000. Still, another Group member noted that the following fees would be applicable to their Eisteddfod:

- 2016: \$85 – APRA
- 2017: \$759 - AESA
- 2018: \$1210 estimate - AESA (see Attachment 14).

Another Group member reported that these were their fees from the last three years:

- 2016: \$85.27
- 2017: \$1,910.70
- 2018: \$3,821.40 (see Attachment 17).

According to some of the media statements attributed to them, APRA apparently took view that they had been "undercharging" for licence fees in the past, which members of the Group contend may or may not correct. However, even if true that does not provide APRA with a justification to increase fees by hundreds of per cent over as little as a two year period.

So how can Eisteddfods respond to such a large increase in fees? And how have Eisteddfods responded to such a large increase in fees?

Well, for Eisteddfods the choices have been stark, and they have been clear. Due to the uneven bargaining power of APRA (supported by AESA) and each, unaffiliated Eisteddfod, either the Eisteddfods have paid the higher fee, or they have simply folded. And unfortunately, some Eisteddfods have folded while others report they are under threat.

The Group are also aware of small businesses in rural areas that unexpectedly received substantial bills from APRA that they were unable to pay. This caused the proprietors great stress and financial hardship. When contacted by these proprietors, APRA staff were typically unable or unwilling to negotiate over the payment of these fees. Typical staff comments were “it’s out of my hands”, “just pay it over time”, or “pay some now and the rest later.”

**Contention 9a(i):**

APRA’s actions have resulted in a substantial increase in fees payable by Eisteddfods. This resulted in some Eisteddfods ceasing operations, others scaling back their operations, and where operations have been maintained, passing the costs onto parents. See Attachment 9 for an example of an Eisteddfod that has ceased due to APRA charges.

**Contention 9a(ii):**

As far back as 10 May 2018 a Group member warned APRA that their tariff increases would result in the cessation of Eisteddfod operations. APRA were advised:

*“(we are) ... trying to illustrate that the higher fees will reduce the profit margin and ultimately the viability of some eisteddfodau. X`x`As these eisteddfodau become less profitable, their contingency funds are eroded and ultimately they will be forced to close. This doesn't mean that competitors automatically enter the next closest eisteddfod, in rural areas the travelling distance would be too far and not manageable” (see Attachment 10).*

APRA, having been made aware of the impacts of their actions continued with the tariff increases anyway.

**Contention 9b:**

Eisteddfods are not marketed to wealthy socio-economic groups. They are marketed to the wider community, including disadvantaged and vulnerable community members, including welfare recipients. There are several Eisteddfods that offer sections for special needs children to participate.



They are not charged an entry fee and all participants receive a prize to boost their personal confidence. Other Eisteddfods also accommodate the needs of special needs children.<sup>16</sup>

**Contention 9c:**

After Eisteddfod fees were increased by APRA, entry fees to participants were raised, which caused some parents to withdraw their children. This also impacted directly on disadvantaged members of the community, which is of interest to the ACCC.<sup>17</sup>

**Contention 9d:**

Many Eisteddfods in rural areas raise money for local community groups, such as the local volunteer fire brigades, yet are charged these fees. Last year several raised funds for victims of drought. These fee increases impacted on the ability of Eisteddfods to undertake these charitable endeavours.

**Contention 9e:**

Many Eisteddfods have an educational purpose, yet are still charged the same amounts as non-educational Eisteddfods. This educational purposes is particularly important when the Eisteddfod participants are children of primary school age.

**Contention 9f:**

In its conduct directed towards Eisteddfods, APRA has used its superior bargaining power to engage in unconscionable conduct.

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<sup>16</sup> For example, one Eisteddfod has special needs sections including a section for school age solo or group performers with special needs. The children have a choice of solo or group presentation of vocal, verse speaking, mime, dance/movement, percussion, band etc. with a time limit up to 5 minutes. This is not unusual, as many other Eisteddfods also have special needs sections. One Eisteddfod has a "Dance Ability" section. Another has "Young people with disabilities", organised by Local Recreation and Sport. In the words of one organiser, "we don't just accommodate them, we celebrate them".

<sup>17</sup> The ACCC recognises that vulnerable and disadvantaged consumers can be disproportionately impacted by conduct in breach of the Act. The ACCC therefore prioritises conduct that impacts these consumers. See: <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>.

While there is no legislative definition of unconscionable conduct, as the ACCC is aware the following are some of the factors<sup>18</sup> the court will consider in assessing whether a party has engaged in unconscionable conduct:

- (a) the relative bargaining strength of the parties
- (b) whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party
- (c) whether the weaker party could understand the documentation used
- (d) the use of undue influence, pressure or unfair tactics by the stronger party
- (e) the requirements of applicable industry codes
- (f) the willingness of the stronger party to negotiate
- (g) the extent to which the parties acted in good faith.

Our analysis of the unconscionable conduct factors as applied by APRA is as follows:

- (a) APRA is in a superior bargaining position to individual Eisteddfod organisers. APRA control music from a virtual monopoly position. There are no viable alternatives to obtaining a licence from APRA for Eisteddfod organisers. Eisteddfod organisers:
  - Are unable to source music directly,
  - As a matter of practice are unable to have the rights owners use the opt out or licence back provisions so that they may obtain music directly,
  - Are (mostly) unable to use music that is in the public domain<sup>19</sup>, as music is usually a key part of the Eisteddfod performance and is selected on the basis of its suitability, and
  - Are unable to cease using music, as they clearly require music for public performance as part of the Eisteddfod performance.

In their negotiations with AESA, APRA also were in a superior bargaining position. In fact, looking at correspondence from AESA it seems that APRA actually dictated terms to AESA. In one letter, the Honorary Secretary of AESA explained that APRA decided to charge for each performance on stage. Her explanation of the copyright issues (included in full as Attachment 12) actually illustrates the negotiating process with APRA:

*“... when negotiating with APRA/AMCOS to get an easier system than the one they were bringing in, they came up with the idea of charging per performance on stage.”*  
*“the arrangement they came up with is that the licence you have foreach year will be based on the figures for the previous. So the cost is actually a cost for the licences for that year, it is just the calculation is based around another years figures. “*

<sup>18</sup> <https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>.

<sup>19</sup> In any event it would be very difficult for would-be licensees to identify what music is in the public domain, and what music is protected either by APRA or the PPCA. Several Group members have over time written to APRA asking them to publish a list of the music they currently represent. APRA has consistently refused to do so, and has instead pointed to a clunky search function they make available.

It is no coincidence that these changes would result in APRA receiving a much larger sum of money than under the prior system. It also no coincidence that the second explanation is very confusing and convoluted, like much if APRA's tariff based system.

- (b) APRA imposed various conditions on Eisteddfod organisers, including complying with reporting requirements and completion of a detailed application form. These requirements would be very time consuming.
- (c) Many Eisteddfod organisers could not understand the tariffs, the tariff calculations, and the tariff classification system. APRA's later plain English guides to tariffs did not resolve any of this confusion. Even when they were contacted APRA failed to explain various issues, and their responses contained errors. For example, their emails contained in Attachment 10 contain the following errors:
- APRA imply the AESA are incorporated and provide a level of service to their members – AESA are not actually incorporated although they have registered a business name.
  - APRA had an incorrect understanding of the nature of dance improvisations and the use of music in dance improvisations. It is still unclear how APRA can charge the same fee for improvisations which last for 1 minute duration and use no more than 1 minute of music, compared to a troupe dance that may last for a duration of 5 minutes.
- (d) APRA use high pressure, aggressive tactics to encourage Eisteddfod organisers to pay, including letters of demand and engaging external collection agencies. See Attachment 11 for an example of an APRA letter of demand. While this is a first letter of demand, and its tone is not particularly aggressive it can be seen that there is no contact person from APRA listed, which is a tool of intimidation (the recipient of the letter is fighting against an entire organisation, not an individual) and APRA's dispute resolution processes are not offered as an alternative.

APRA also regularly try to pressure actual and would-be licensees by posting on social media, and in the lead up to the re-authorisation process actually wrote to several Group members to try to put pressure on them to influence their submissions.

APRA has also responded negatively to past dance community attempts to raise awareness of the changes.<sup>20</sup>

- (e) Not applicable.
- (f) In their documentation. APRA's tariffs are listed as including GST and non negotiable. One Group member contacted APRA and noted that the annual fee approach to Eisteddfods had been abandoned in favour of a usage based fee. He asked:

*“Until now we have been paying an annual licence (in 2016 the amount ex-GST was \$77.52). The AESA information only mentions a per-performance approach of 76c in 2017. This has a massive impact on the total we would be paying (an 865% increase to \$671.08). Can you please advise if the approach outlined in the AESA information is the only one available (i.e. is pay-per-performance the only option now or is there still an annual option, and if so how much would that change from the current amount)?”*

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<sup>20</sup> <https://www.dancelife.com.au/new-music-licensing-fees/>.

APRA's response was:

*"We are now only executing licences under the new scheme"*, so the answer in effect was no negotiations will be entered into (see Attachment 13).

- (g) APRA's tariff fee rise is so substantial, over such a short period of time, and with so little notice, that members the Group individually and collectively suggests that it inherently demonstrates a lack of good faith.

APRA's unconscionable conduct has been to the detriment of Eisteddfod organisers and continues to be to the detriment of Eisteddfod organisers.

**Contention 9g:**

Despite repeated requests from Group members and other parties, APRA have failed to publish and keep maintained on line a list of current musical works they represent. This has made it difficult for would-be licensees to locate and identify music in the public domain and potentially royalty-free. Is this because APRA do not want licensees to use music in the public domain? APRA should be required to publish and maintain such a list.

**10. Failure of dispute resolution mechanisms**

While APRA have a dispute resolution system known as Resolution Pathways in place, it is seldom brought to the attention of would-be licensees who are confused and concerned by the imposition of tariffs and increase in fees. Even where the dispute resolution system is brought to the attention of concerned parties, it is viewed would-be licensees as being too expensive and not objective.

**Questions for the ACCC to ask APRA:**

- 10(a) How many times has the APRA dispute resolution system been used in the past year?
- 10(b) What types of disputes were dealt with by the dispute resolution system?
- 10(c) What was the result of these disputes?
- 10(d) What was the level of satisfaction of the participants in this dispute resolution procedure?
- 10(e) Why don't APRA include details of this scheme on their correspondence.

**Contention 10(a):**

The Resolution Pathways scheme is not *seen* as fair and independent. It is funded by APRA/AMCOS, and the Facilitator has an office located at the APRA/AMCOS premises which mitigates against the perception of impartiality.

**Contention 10(b):**

Many APRA staff are unaware of the Resolution Pathways scheme and do not advise dissatisfied APRA clients or complainants of its existence.

**Contention 10(c):**

Not all correspondence from APRA refers to the scheme's availability. For example, it does not appear on the APRA pro-forma letter of demand. This is because APRA do not view the Resolution Pathways scheme as an efficient mechanism of dispute resolution.

**Contention 10(d):**

There is scant information regarding the Resolution Pathways scheme on the Resolution Pathways website, and what information present appears to be dated. For example, the peer committee listed on the website does not appear to have been updated since 2014 and includes a former member of Mi-Sex who died in 2017.<sup>21</sup>

**Contention 10(e):**

The scheme is perceived to be expensive to potential users. While the initial fee for the facilitator is paid by APRA the complainant may be required to pay some or all of the costs of the independent mediators or experts involved in the dispute resolution process. Fees may potentially be as much as \$10,000.<sup>22</sup>

**11. OneMusic Australia's inefficiency**

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<sup>21</sup> [http://www.resolutionpathways.com.au/Dispute\\_Resolution\\_Committee\\_2014.pdf](http://www.resolutionpathways.com.au/Dispute_Resolution_Committee_2014.pdf)

<sup>22</sup> <http://www.resolutionpathways.com.au/Costs>

The development of OneMusic Australia will result in the creation of an organisation far larger than APRA's current organisation, with a larger labour force and higher expenses. The new organisation will apparently hold more than 140,000 public performance music licences.<sup>23</sup> The new organisation will also exercise even more market power than APRA who already exercises what is described as near monopoly power.

**Questions for the ACCC to ask APRA:**

11(a) How many staff will OneMusic Australia employ?

11(b) How much did APRA pay the PPCA for the right to their sound recording licences?

11(c) Why does APRA compare OneMusic Australia and OneMusic New Zealand when the two organisations are substantially different, and Australian tariffs are higher than New Zealand tariffs?

**Contention 11(a):**

In much of their documentation and correspondence APRA refer to APRA, APRA/AMCOS and OneMusic Australia. While APRA and AMCOS apparently have a commercial relationship and share management, this application for re-authorisation is an application lodged SOLELY by APRA. It appears that APRA wishes this re-authorisation, if approved, to cover OneMusic Australia activities in the future. Yet much of the documentation included in this application (including pro-forma contracts from around 2013) appears to be APRA/AMCOS information rather than (solely) APRA information. APRA should cease conflating issue concerning APRA, and issues concerning AMCOS.

**Contention 11(b):**

Much of the correspondence from APRA in recent times to licensees and would-be licensees appears to be either under a OneMusic Australia letterhead or from a OneMusic email address. See for example Attachment 10 which contains correspondence from an employee with a OneMusic Australia email address. It appears that APRA believes it is a certainty that the ACCC will approve of the use of the OneMusic Australia label/tag, and that any re-authorisation, if granted, will apply to Onemusic Australia.

**Contention 11(c):**

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<sup>23</sup> <https://www.smartcompany.com.au/industries/retail/licensing-fees-music-in-store-increase-illogical-system-causes-headaches-business-owners/>.

APRA should cease corresponding from and on behalf of OneMusic Australia at this time, as only APRA has been authorised by the ACCC, and OneMusic Australia, AMCOS and the PPCA have not been authorised by the ACCC.

**Contention 11(d):**

AMCOS has never sought an authorisation from the ACCC, and PPCA have not sought re-authorisation since their last authorisation expired on 31 March 2011.<sup>24</sup> All OneMusic Australia stakeholders should immediately apply for an authorisation from the ACCC.

**Contention 11(e):**

The PPCA should be investigated by the ACCC to determine if they complied with the ACCC's most recent set of conditions for authorisation.

**Contention 11(f):**

APRA should cease comparing OneMusic Australia and OneMusic New Zealand as comparisons between these organisations are misleading.

**12. APRA as an organisation with a Government-like persona**

APRA tariffs as well as being non-negotiable are expressed as set, taxation-like amounts. Copyright licence fees are compared by ARIA to other types of compulsory levies.

APRA also behaves like the Government in other regards – they are involved in enforcement activities (by undertaking court cases), public relations activities, lobbying and advocacy, and often behave with official agency-like secrecy. That secrecy is demonstrated by the lack of information in APRA/AMCOS annual reports, and the amount of information redacted/omitted from APRA's application for re-authorisation.

**Contention 12(a):**

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<sup>24</sup> <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/phonographic-performance-company-of-australia-ltd-revocation-substitution-a91041-a91042>.

APRA behaves like a Government authority without the protections that Government authorities provide. APRA should be required to be more open and transparent about their operations.

**Contention 12(b):**

APRA should re-submit their application for re-authorisation and include all of the information currently redacted or declared to be confidential.

**Contention 12(c):**

APRA currently have many key agreements/contracts that have not been published. Not only have these agreements/contracts not been published, but at a minimum the applicable key terms and conditions have not even been disclosed publicly. In the interests of transparency, as it applies to an organisation that purports to be a not for profit organisation, key agreements that should be disclosed, because they impact on licensees, would-be licensees and licensors (including Australian songwriters), including but not limited to the following:

- Employment agreements with key management (including salary and salary packaging),
- Director agreements,
- Agreements with contractors and consultants to the value of in excess of \$10,000, including information technology providers,
- Agreements with law firms, accountancy firms, public relations companies, and management consultants,
- Agreements for the purchase, sale or lease of key assets including real property,
- Agreements with other Australian collecting societies involving information sharing, and
- Agreements leading to the constituency, development and management of OneMusic Australia.

**13. Conclusion**

Most recently re-authorised by the ACCC in 2014, APRA is now an even more powerful and monopolistic organisation. Since 2014, APRA has been significantly enriched by their actions, which have been supported by the authorisation process. They have purchased substantial assets and recorded record income. They are answerable to no one, and are a law unto themselves, introducing and restructuring tariffs with impunity. Their

Consultation on tariffs is virtually non-existent. APRA appear to be and behave like a Government authority without any of the Government protections. APRA also engage in unconscionable conduct towards would be users of musical works, as a result of an imbalance in bargaining power. APRA's overall conduct has reduced competition in the market of musical works. Now APRA are working



with AMCOS and the PPCA on OneMusic Australia. Neither AMCOS and the PPCA have sought an authorisation.

There is simply no demonstrated public benefit in re-authorising APRA, and the Group contends that accordingly APRA should not be re-authorised.