



22 February 2019

Mr Gavin Jones
Director – Adjudication
Australian Competition and Consumer Commission
By email: adjudication@acc.gov.au

Dear Mr Jones,

AA 10004333 - Submission

I refer to your letter dated 9 January 2019 inviting submissions on the Australasian Performing Right Association Ltd (APRA) application for revocation of authorisations A91367 – A91375 and substitution of new authorisation A1000433.

1 Conditional Support

The Australian Hotels Association (AHA) conditionally supports the reauthorisation of APRA, but on the basis of the various conditions below being included.

General Conditions

Conditions related to the usual balancing of public benefits versus detriments:

1. Condition C1 “Transparency of licence fees” remains
2. Condition C2 “Comprehensive plain English guide and education campaign for the opt out and licence back provisions” remains
3. Condition C3 “Alternate Dispute Resolution” remains – but to be reformatted to improve readability as set out later in this document and to also include a plain English guide
4. Schedule A “Fees and Charges” (condition C3.5) remains
5. Schedule B - “Objective and functions of the Committee” (Condition C3.7) remains
6. Schedule C – “Objective and functions of the Facilitator” (Condition C3.9) remains
7. Schedule D – “Independent Reviewer” (Condition C3.11) remains
8. Schedule E – “Relevant Matters” (condition C3.4) remains
9. The Authorisation conditions bind APRA to adopting the Copyright Code of Conduct on a mandatory basis, rather than the current voluntary basis

Conditions relating to OneMusic Australia (OneMusic)

Conditions based on the circumstances relating to OneMusic Australia, especially as it relates to completing licence negotiations and the intended commencement date of any new authorisation:

10. A satisfactory agreement has been finalised between AHA and OneMusic Australia regarding licence agreements including terms, conditions, definitions, fees and plain English guides
11. The redacted material in the APRA application is made available to the AHA, especially as it relates to OneMusic and Alternate Dispute Resolution.

2 The AHA and music use

The Australian Hotels Association (AHA) is a Registered Organisation under the Fair Work (Registered Organisations) Act 2009. The AHA has branches in each state and offices in each capital city. The AHA represents a diverse membership of more than 5,000 licensed hotel businesses includes pub-style hotels, bars, taverns, accommodation hotels and casinos. AHA members are located across a wide range of cities, towns and places in each state and territory. Over 65% of hotels are family owned. The complexities of the music licensing regime can often be well beyond the reasonable understanding of many small and family business licensees.

Hotels and the Australian music industry supply chain

The AHA acknowledges the great importance of Australian music to our way of life and also to the intrinsic enjoyment by patrons of music in hotels. The payments by AHA members go towards financially supporting Australian composers, songwriters, performers, and producers. Hotels are a valuable partner and contributor in the supply chain of Australian Music:

- 74% of hotels provide entertainment in some form each week
- Hotels support over 6,300 live entertainment performances each week
- AHA members employ over 215,000 people
- In SA for example, 80% of live music is played in pubs

Hotels contribute millions of dollars in direct revenue to the music industry. Based on the extrapolation of the limited data provided by OneMusic, AHA estimates:

- An average of \$9,000 in current music licence fees per AHA member
- Approximately \$45,000,000 in total current music licence fees paid by AHA members (estimated at more than 10% of total APRA AMCOS revenue)

How music is used in hotels

Music in hotels is played in a range of ways. Hotels continue to be one of the main “providers” of live music (e.g. in South Australia, 80% of live music is played in hotels). AHA members are required to acquire various licences from APRA and PPCA enabling them to play music in their venues. The current types of licence paid for by a standard hotel include, e.g.

- Background music
- Dining
- Live music
- Featured music, e.g. DJ
- Recorded music for dance use
- Karaoke
- Function rooms
- Fitness centres
- Music in the workplace
- Music on hold
- Music on the website

The diversity of music use in amongst hotel licensees is broad and includes for example:

- Size
- Capacity to pay
- Attendance
- Geography
- Seasonality
- Population density v. venue capacity
- Music use
- Music sophistication

3 Public benefits v detriments

Behaviour

The experience of AHA members under this current authorisation has seen improved behaviour compared to the prior years, i.e. pre-2014. Many of the poor behaviours previously complained of have reduced significantly, e.g. misleading or deceptive behaviours, coercive and bullying behaviour, appeal structures and processes. This is evidenced by the fact there has been only one dispute related to hotels lodged with the Alternate Disputes Resolution Process since its inception in 2015 (Resolution Pathways conducted by Shirli Kirschener).

Public benefits

The AHA notes the public benefits of reauthorising APRA. Over 100,000 music creators rely on APRA to secure payment for the use of the copyright in their music. Also, as stated by the ACCC in its 2014 Authorisation, “there are significant transaction cost savings resulting from APRA’s licensing arrangements which provide instantaneous access to APRA’s entire repertoire.”

Public detriments

However, any public benefits must be balanced against the detriments to music user licensees as a consequence of the “virtual monopoly” enjoyed by APRA. In 2014, the ACCC stated “APRA has significant market power in relation to its dealings with users. The ability and incentive for users to source licences under competitive conditions is limited. [Users have] limited bargaining power. This can give rise to a number of public detriments. For example, it can translate into high fees and allocative inefficiency, a lack of transparency around licensing arrangements, and significant problems associated with commercial dealings with APRA.”

4 OneMusic

In October 2017, APRA AMCOS and PCCA formally announced a joint venture “OneMusic Australia”. The AHA has authorisation from the ACCC to conduct collective bargaining with APRA AMCOS and PCCA. OneMusic Australia has engaged with AHA on behalf of hotels, pubs, bars and taverns. A wide range of other music users are affected as well, e.g. fitness centres, eisteddfods, cruise ships, retail centres, dance schools, clubs and restaurants.

The aim of OneMusic Australia is “to provide a one-stop shop for music licence needs and remove the requirement for venues to obtain multiple licences”. Given the current complexity of the music licensing environment, AHA agrees in principle with any moves to simplify the process. However, at the same time, AHA must ensure that its members are at least no worse off. The AHA is also concerned that agreement may not be reached on the OneMusic licence model at the time of the expiry of the existing APRA authorisation, 28 June 2019.

Complexity and timing

As a result of the pending implementation of OneMusic Australia, there are various complexities relating to this reauthorisation. Unfortunately, the licence agreements, terms, conditions, definitions and plain English guides for OneMusic are still to be finalised. OneMusic advises that it will commence as from 1 July this year, which roughly coincides with the commencement of a new authorisation for APRA.

The OneMusic dilemma

The dilemma for the AHA (and other music user groups) therefore is that:

- OneMusic is an extremely significant transformational change to music licensing, especially from the perspective of music users such as AHA members
- AHA conditional support for reauthorisation gives APRA the benefit of certainty of APRA's environment for the period of its next authorisation
- However at the time of lodging this submission, the AHA is stuck with the detriment of having no licence scheme certainty. Having said that, the AHA and OneMusic are a long way down the path of finalising agreement. But the devil is in the detail and we aren't there yet.

The AHA is uncertain as to how this dilemma is solved, but suggests:

- prior to any draft conditions being released, that the ACCC convene a forum of APRA and all music users to discuss the treatment of OneMusic as part of any authorisation
- an interim authorisation may suffice in the event OneMusic licence schemes are not in place by the expiration of the current authorisation

5 Conditions

The AHA requests the following conditions be inserted in any reauthorisation of APRA.

5.1 General Conditions

Conditions C1 and C2 plus Schedules A to E

The following conditions were inserted by the ACCC into the current APRA authorisation. The AHA believes these conditions have served a useful purpose and should remain as is. I am happy to expand upon the benefits of these conditions if required.

- Condition C1 "Transparency of licence fees"
- Condition C2 "Comprehensive plain English guide and education campaign for the opt out and licence back provisions"
- Schedule A "Fees and Charges" (condition C3.5)
- Schedule B – "Objective and functions of the Committee" (Condition C3.7)
- Schedule C – "Objective and functions of the Facilitator" (Condition C3.9)
- Schedule D – "Independent Reviewer" (Condition C3.11)
- Schedule E – "Relevant Matters" (condition C3.4)

Condition C3 - Alternate Dispute Resolution (ADR)

It would be helpful from a readability perspective if the ADR conditions related to how the scheme functions from a member or licences perspective could be rolled together. This would mean combining the following:

C3.1 to C3.4	Scheme requirements
C3.5	Fees and Charges
Schedule A (Condition C3.5)	Fees and Charges

It would also be helpful for members and licensees to have a plain English guides as to how the scheme works and the fees and charges apply. My understanding is that APRA agrees with this suggestion and also intends to work with the AHA on establishing an ADR plain English guide.

New Condition - Code of Conduct

As Copyright Collecting Societies, APRA AMCOS and PCCA enjoy special commercial privileges. One of the few tools available to AHA in ensuring the balance of competition remains fair is the Copyright Collecting Societies Code of Conduct. However, the current code of conduct is voluntary and has no appeal mechanism. In the view of the AHA, greater compliance might be achieved by making the code mandatory and enforceable. The copyright code provides protection in areas such as:

- Transparency, Confidentiality and Privacy
- Fair treatment & good faith
- Fair value

Specific terms that should be included to assist protecting licensees include, e.g.

- 2.3(b) Each Collecting Society will ensure that its dealings with Licensees are transparent.
- 2.1(e) - Each Collecting Society will comply with its obligations under the *Privacy Act 1988*, including the National Privacy Principles, or any Privacy Code that applies to the Collecting Society.
- 2.3(a) - Each Collecting Society will treat Licensees fairly, honestly, impartially, courteously, and in accordance with its Constitution and any licence agreement.
- 2.3(f) - Each Collecting Society will where appropriate consult in good faith with relevant industry associations in relation to the terms and conditions applying to licences or licence schemes offered by the Collecting Society.
- 2.3(d)(ii) - Each collecting society's policies, procedures and conduct in connection with the setting of licence fees for the use of copyright material will be fair and reasonable. In setting or negotiating such licence fees, a Collecting Society may have regard to the following matters: the value of the copyright material.

5.2 Conditions relating to OneMusic

OneMusic licence scheme agreed

If APRA is granted certainty of its environment, it is only fair that AHA members have the same certainty for the same term. Therefore the ACCC should place conditions on the APRA reauthorisation that mandate a satisfactory agreement having been finalised between AHA and OneMusic Australia. This includes agreement on licence agreements including terms, conditions, definitions, fees and plain English guides.

In the event that the OneMusic scheme is not resolved, the reauthorisation of APRA should be for an interim period. Having said that, core principles have been agreed and the detail is a long way to being completed. I expect an agreement should be in place before the expiry of the current authorisation on 28 June 2019.

Redacted material

51 of the 261 paragraphs in the APRA application have been redacted. In other words, nearly 20% of the material relied upon by APRA in its application is not available for consideration by licensees

such as the AHA. Of particular concern are the following direct impacts upon AHA members (there may be others):

Item	Paragraphs	Proportion
Alternate Dispute Resolution	93, 94, 95, 96, 97, 98	24%
OneMusic Australia	115, 116, 117, 118	25%

A key element of the Copyright Code of Conduct is transparency. There is no explanation as to the reasons behind the redacted material and consequent lack of transparency. The AHA requests a condition of any reauthorisation is that AHA is provided with the redacted information.

6 Conclusion

Whilst the AHA conditionally supports the reauthorisation of APRA, there must be a balance in the conditions of the authorisation that minimises the effects of any possible misuse of market power and anti-competitive pressures. In regards to OneMusic, AHA members are entitled to have certainty of the new licence scheme prior to APRA being fully reauthorised. The AHA thanks the ACC for the opportunity to have made a submission.



STEPHEN FERGUSON
NATIONAL CEO