

BPM Ltd

Background Providers of Music Association Ltd ACN: 631 831 831

Adjudication Branch: Attention Mr Gavin Jones
Australian Competition & Consumer Commission (ACCC)
By email: adjudication@acc.gov.au

28/06/2019

Dear Mr Jones,

Submission in response to the Draft Determination relating to the APRA Application for Revocation of Existing Authorisation A91367-A91375 and Substitution of a New Authorisation.

This submission is in response to the APRA application. The Background Providers of Music (BPM) Association represents Australian commercial background music service (BMS) providers and is currently comprised of the following companies:

Member	ACN
Australian Radio Network Pty Ltd	065 986 987
Marketing Melodies Pty Ltd	058 174 628
Mood Media Australia Pty Ltd	058 714 177
Mustard Music Pty Ltd	161 731 675
Nightlife Music Pty Ltd	052 079 277
Qsic Pty Ltd	155 394 719
Satellite Music Australia Pty Ltd (t/a Stingray Business)	072 378 986
Soundproof Australia Pty Ltd	408 767 669

The BPM notes the recent correspondence from Kate Haddock on behalf of APRA (dated 15th May 2019), requesting an interim authorisation from the ACCC on the basis that the final determination may not be finalised before the expiration of the current authorisation period on 28th June 2019. The BPM is of the view that interim authorisation is appropriate given that the extent of public benefit and detriment resulting from APRA exercising its market power could materially change as a result of finalising the OneMusic Australia (OMA) scheme (that is, a Final Determination should consider the impact of the finalised OMA scheme). The BPM contends that APRA's market power will increase due to OMA for the reasons summarised below:

- PPCA will sub-license rights to APRA AMCOS under OMA.
- An increase in collective bargaining will result in an increase in market power.
- Mechanisms to constrain market power will be constrained under OMA.
- The OMA Copying License demonstrates an increase in APRA's market power even prior to the launch of OMA.

The BPM position on the Draft Determination is summarised below:

- The BPM supports the conditions of authorisation proposed by the ACCC in the Draft Determination.
- The BPM contends that transparency conditions should be extended to require that reporting is segmented by stakeholder groups.
- The BPM welcomes the ACCC inviting APRA to provide information regarding the “...**risk of inadvertent unlicensed use of recorded music, [and] what measures it proposes to take to address this issue**” (Item 4.129). The BPM seeks clarification on whether the proposed Copying License is or is not a legitimate alternative to current licensing schemes. If it is not, then the license should not be implemented. If it is being implemented, then the BPM seeks a competitive environment by APRA/OMA offering the same license to the whole of the BMS.
- The BPM contends that accuracy of royalty distribution can be improved dramatically and cost effectively to the benefit of industry where: (a) authorised background music suppliers are empowered to collect all public performance tariffs on behalf of OMA for venues they service and provide play data to APRA that is tied to revenue collected at the end-user level; and (b) APRA use this data to distribute royalties generated by background music sector based on “**actual usage of works**”.

BPM Ltd has no objection to this submission being published on the ACCC website. The BPM thank the ACCC for giving due consideration to these matters and sincerely look forward to further contribution in this process.

Kind regards,

Dean Cherny
BPM Chair

1. Submissions under this Authorisation Process

The BPM has submitted the responses listed in the table below to the ACCC under this authorisation process. The BPM has included key extracts of these submissions in this document for the consideration of the ACCC in making a final determination in relation to APRA's request for authorisation.

Responded To	Date sent	Reference
BPM response to APRA feedback (ACCC RFI)	29/05/2019	Appendix 1
BPM response to APRA interim authorisation request	12/06/2019	Appendix 2
BPM response to APRA feedback (Interested Parties)	17/06/2019	Appendix 3

2. BPM Position on APRA's Application for Reauthorisation

On 29/05/2019 the BPM submitted a document to the ACCC entitled 'Response to ACCC RE APRA v1.0 FINAL'. This document set out the position of the BPM in relation to APRA responses to requests for information made by the ACCC. The below summarises the position of the BPM regarding APRA's application for reauthorisation as set out in that submission (see Appendix 1 for a full extract) and maps recommendations to the key sections of this document (e.g. see 'S3' in the table below):

#	Recommendation	Mapping
01	It is in the public interest to review the changes that OMA will bring to APRA's market power when considering reauthorisation	S3, S4
02	The public interest test should be applied to the increase in market power conferred to APRA under OMA	See Appendix 1 ¹
03	Authorisation should be required and only issued on an interim basis until all OMA licence schemes are finalised	S3
04	Increased efficiency can be achieved through reauthorisation with conditions that encourage industry partnerships	S8, S9
05	Partnering with industry to promote licenced services will reduce cost and infringement for users whilst also reducing uncertainty	S7, S9
06	A possible reduction in members' assignment is not grounds for exclusivity	See Appendix 1
07	The risk of an 'Australia tax' is reduced through competition	See Appendix 1
08	In absence of market forces, there should be independent assessment of proposed tariff increases (including economic modelling) imposed by reauthorisation conditions	See Appendix 1

¹ Some recommendations made in 'Response to ACCC RE APRA v1.0 FINAL' are not pursued further in the body of this document. However, these recommendations continue to accurately reflect the position of the BPM and are referenced in Appendix Items as set out in the above table.

#	Recommendation	Mapping
09	Reauthorisation conditions placed on APRA should include efficiency KPIs in the public interest	S6, S9
10	Partnership with industry will assist APRA in meeting efficiency KPI targets	S9
11	CLEF's ability to improve distribution processing is dependent on APRA's ability to partner with industry	S9
12	MRT on its own is not the complete solution and requires additional inputs from industry for effective distribution	S9

3. APRA's Application for Interim Authorisation

We note the recent correspondence from Kate Haddock on behalf of APRA (dated 15th May 2019), requesting an interim authorisation from the ACCC on the basis that the final determination may not be finalised before the expiration of the current authorisation period on 28th June 2019. The BPM is of the view that interim authorisation is appropriate given that the extent of public benefit and detriment resulting from APRA exercising its market power could materially change as a result of finalising the OneMusic Australia (OMA) scheme (that is, a Final Determination should consider the impact of the finalised OMA scheme).

CLARIFICATION QUESTIONS

- The ACCC state at item 7.6 of the Draft Determination that they propose to “grant conditional authorisation for five years”. At item 2.55 of the Draft Determination, the House of Representatives Standing Committee is quoted as stating “it is essential that the ACCC has access to the finalised OneMusic Australia scheme in order to properly assess and consider the conditions under which to grant reauthorisation of APRA”. Why has conditional authorisation been proposed at item 7.6 ahead of the ACCC being provided with access to the finalised OneMusic Australia scheme as recommended in item 2.55?
- In light of APRA's emergent request for interim authorisation, will the ACCC now wait to assess the finalised OneMusic Australia scheme before making a Final Determination?
- The Draft Determination proposes additional conditions of authorisation to mitigate public detriment. The BPM assumes that the existing conditions of authorisation alone will apply during the period of interim authorisation. How long does the ACCC consider is a reasonable period for interim authorisation, given that no reduction to public detriment can be actioned through new or amended conditions during this period?

4. The impact of OMA on APRA's Market Power

Position in the Draft Determination on the impact of OMA on APRA's market power

The ACCC state at item 4.121 that they do “...not consider that the extent of APRA's market power, and the public detriment resulting from APRA exercising this market power, will be materially enhanced by APRA adopting the OneMusic licensing system”. It is the view of the BPM that this position fails to address the issues outlined below.

OMA constitutes an increase in APRA's market power

The ACCC has recently noted that collecting societies enable “**...copyright owners to act collectively rather than individually**” and as a result this “**raises concerns about the potential creation and exercise of market power**”².

The OMA website³ states that “**PPCA will sub-license on a non-exclusive basis certain rights to APRA AMCOS**”, which will result in an increase in APRA's reach to now incorporate PPCA members and associated rights.

The OMA Copying License demonstrates an increase in APRA's market power

PPCA have historically maintained a policy of not issuing end user copying licences for use of consumer streaming services in public performance. However, under OMA we are seeing a drastic change in the PPCA's position to align with that of APRA.

The legitimacy of APRA's Copying Licence being applied to consumer digital services has been widely contested. However, the sub-licensing of PPCA rights to APRA for this purpose creates a false assumption among end users that such a licence is legitimate, amplifying market confusion regarding use of such services. This is contrary to conditions of authorisation designed to promote transparency and describe tariffs in plain English.

Mechanisms to constrain market power will become increasingly inaccessible under OMA

The ACCC has said that the “**Copyright Tribunal is intended to act as a constraint on the exercise of market power by collecting societies, by making decisions with respect to the reasonable terms and conditions of copyright licences**”⁴.

The BPM is concerned that the formation of OMA may undermine this intended constraint in the following ways:

- It has been well established that many small businesses do not have the resources or knowledge to pursue licensing issues via the Copyright Tribunal⁵. Alternative Dispute Resolution (ADR) attempts to bridge this gap through its informal resolution processes and accessibility. What ADR fails to do though, is curtail APRA's exercise of market power, largely owing to the confidential nature of the process (i.e. other licensees are unable to benefit by obtaining knowledge of decisions made). Therefore, it is crucial that insofar as is reasonably possible, the ACCC impose conditions on APRA's reauthorisation that attempt to mimic the aspects of the Copyright Tribunal that constrain the exercise of APRA's market power. It is the view of the BPM that transparency of ADR decisions which relate to tariff schemes be extended to licensees that aren't a party to the ADR process. Having an Independent Mediator publish ADR decisions/resolutions, with the permission of the licensee, is one possible way to achieve this.
- APRA and the PPCA will be able to combine financial resources under OMA to bring claims to or defend claims brought against them at the Copyright Tribunal, effectively increasing the existing imbalance of power between APRA and its licensees.

² See ACCC guidelines to assist the Copyright Tribunal in the determination of copyright remuneration (p1).

³ See <http://www.onemusic.com.au/faqs/>.

⁴ ACCC guidelines to assist the Copyright Tribunal in the determination of copyright remuneration (p1).

⁵ As per 'Don't Stop the Music! A Report of the inquiry into copyright, music and small business'.

CLARIFICATION QUESTIONS

- But for the formation of OMA, APRA would not see an increase in members' rights, collective bargaining power and financial resources. Can the ACCC please help the BPM to understand how APRA's market power, and the public detriment resulting from APRA exercising this market power, will not be materially enhanced by APRA adopting the OneMusic licensing system?

5. Summary of BPM Position on the Draft Determination

The BPM position on the Draft Determination is summarised below:

- The BPM supports the conditions of authorisation proposed by the ACCC in the Draft Determination.
- The BPM contends that transparency conditions should be extended to require that reporting is segmented by stakeholder groups.
- The BPM welcomes the ACCC inviting APRA to provide information regarding the “...**risk of inadvertent unlicensed use of recorded music, [and] what measures it proposes to take to address this issue**” (Item 4.129). The BPM seeks clarification on whether the proposed Copying License is or is not a legitimate alternative to current licensing schemes. If it is not, then the license should not be implemented as proposed and there should be full disclosure by APRA to business of the risks involved. If it is being implemented, then the BPM seeks a competitive environment by APRA/OMA offering the same license to the whole of the BMS⁶.
- The BPM contends that accuracy of royalty distribution can be improved dramatically and cost effectively to the benefit of industry⁷ where: (a) authorised background music suppliers are empowered to collect all public performance tariffs on behalf of OMA for venues they service and provide play data to APRA that is tied to revenue collected at the end-user level; and (b) APRA use this data to distribute royalties generated by background music sector based on “**actual usage of works**”⁸.

6. Transparency of APRA's licensing and distribution arrangements

BPM Position 1 (Transparency)

The BPM contends that transparency conditions should be extended to require that reporting is segmented by stakeholder groups.

Reporting must be cross-representative of stakeholder interests to be transparent

The BPM wholly supports the proposed conditions of authorisation that will increase transparency in relation to APRA's licensing and distribution arrangements. The BPM is concerned that transparency will not be achieved unless APRA's reporting is segmented by stakeholder groups (that is, by industry and market sectors⁹). Such segmentation would provide clear visibility of:

⁶ OneMusic NZ offers BMS operators blanket mechanical licenses for both publisher and sound recording rights that serve the same purpose as what is being proposed here.

⁷ Collecting societies will incur less overhead to know who to pay and rights' holders (artists, record labels and publishers) will be paid for actual usage of their works.

⁸ As per s18A of the CISAC Professional Rules and Binding Resolutions.

⁹ For example, industry segmentation would separate live performance from commercial background music. Similarly, market segmentation would separate hospitality from fitness.

- efficiencies by sector as well as in the aggregate. This will increase capability to quickly reach informed decisions and provide a basis for remediating efficiency shortfalls by exception; and
- the impact of OMA on different stakeholder groups. This will assist in realising benefits and managing detriments associated with authorisation.

It is critical that the impact of public detriments are monitored during the next authorisation period given the volume of submissions voicing concerns that authorisation may undermine the sustainability of certain sectors (for example, those sectors that are disproportionately disadvantaged by pricing changes under OMA, the Copying Licence and a reduction in those public performance tariffs that can be collected on behalf of OMA).

Reporting trends have exchanged transparency for simplicity

Historically, APRA provided segment-specific reporting as is evidenced on pages 10 and 12 of [APRA's 2010 Year In Review](#) which respectively outline the APRA's various revenue verticals based on industry and a breakdown of public performance revenue streams. More recently however, reporting trends have shifted toward abstraction by combining data from multiple sectors as is evidenced on page 7 of [APRA's 2018 Year In Review](#). This trend towards abstraction has decreased APRA's levels of transparency during a period whereby an operational commitment to greater transparency for performing rights organisations is considered an essential governance KPI. While such abstraction makes for a simplified narrative, it does not disclose with full transparency the true performance of industry as it relates to the operations of APRA. Further, there have been broader observations by members of the Productivity Commission noting that:

“...you need to be able to follow the money. And [the Commission] couldn't and nor could rightsholders or rights users”

Review into the efficacy of the Code of Conduct for Australian Copyright Collecting Societies, Discussion paper, August 2017

It has also been routinely acknowledged by both the Department of Communications and the Arts and the collection societies themselves that the administrative costs associated with achieving transparency are at times significant. However, an operational commitment to improve transparency measures should be implemented and it should be acknowledged that this investment will lead to a longer-term reduction in transactional costs as has also been acknowledged as a key principle underpinning the EU CRM Directive.

In order for the ACCC, APRA members, licensees and other interested parties to have confidence in APRA's adherence to the transparency measures proposed under the current reauthorisation, the BPM advocates for conditions that go beyond APRA's 2010 Year In Review reporting.

It is reasonable to provide a total amount of revenue collected for a category. For example, the 'background music' and 'live' segments are both part of the 'public performance' category. However, when a total category amount is not supplemented by a breakdown of the contributory amounts of revenue collected from each segment, and where these segments are subject to different benefits and detriments associated with authorisation, there is a risk that benefits and detriments will not be fully disclosed until it is too late to exploit opportunities or mitigate risks. For example, if revenue collected for use of background music dropped significantly in the next financial year but other segments increased (e.g. live), the current reporting format used by APRA would not disclose that. Such transparency measures are of equal importance when reporting on mechanical revenue to distinguish between each contributing revenue source (e.g. the BMS and end user Copying Licenses). This will ensure that insights are provided on the impact of changes to licensing schemes and the benefits or detriments this has on each effected sector of the Australian music industry.

The BPM contends that any total amount of revenue reported by category must be supplemented with a breakdown of revenues collected by segment, along with a summary of how this is different from the position last Financial Year (i.e. plus or minus X dollars). This will ensure transparency on the performance of different sectors within the Australian music industry.

The BPM also contends that a breakdown of revenue collected per tariff must be provided for APRA to report transparently on the background music segment, along with a summary of how this is different from the position last Financial Year (i.e. plus or minus X dollars). This will ensure transparency on use of and expenditure on music in different business verticals.

Finally, the BPM contends that the basis of calculation for royalty distributions should be disclosed for each tariff. This will ensure that there is increased awareness of distribution accuracy amongst APRA members and licensees.

The advent of OneMusic makes the proposed transparency measures all the more crucial to avoid further obfuscation of revenue distribution and reporting. In order to 'follow the money' under OneMusic, reauthorisation conditions need to provide for clear delineation between PPCA and APRA revenue pools, as well as adequate breakdown of public performance revenue where licence schemes bundle different types of uses.

CLARIFICATION QUESTIONS

- Will transparency conditions require that reporting is segmented by stakeholder groups?
- Will transparency conditions require that the basis for calculating royalty distributions is disclosed for each tariff?

7. Inadvertent unlicensed use of recorded music

BPM Position 2 (Copying Licence)

Clarification is required on whether the Copying License is a legitimate alternative to current licensing schemes. Changes to the license itself or the scope of its use is required.

Is the Copying License a legitimate alternative to current licensing schemes?

The BMS seeks clarification as to the legitimacy of the Copying License on four fronts:

- APRA's duty of care to not expose businesses to the risk of inadvertent unlicensed use of recorded music.
- The specific use of music covered by the Copying License when a consumer streaming service is used in a commercial context.
- Whether issuance of a Copying License undermines the rights of copyright owners to exploit their works as they see fit.
- Whether the volume of uncertainty and ambiguity created by the Copying License mean that APRA has not provided a plain English explanation of the scheme to interested parties.

The position of the BMS is to seek one of two outcomes in relation to the Copying License:

- If the Copying License **IS NOT** a legitimate alternative to current licensing schemes, then the BMS seeks assurance that APRA/OMA will act in good faith and not license consumer services for public performance.

- If the Copying License **IS** a legitimate alternative to current licensing schemes, then the BMS seeks a competitive environment by APRA/OMA offering the same license to the BMS.

If a position of certainty cannot be reached regarding the legitimacy of the Copying License, then APRA must:

- disclose to businesses in plain English the risks involved and the availability of licensed alternatives from the BMS, and;
- offer the Copying License to businesses to cover use of background music services from any music provider (consumer and commercial).

It is unacceptable to the BPM that all risk is transferred to businesses¹⁰ for the operational convenience of APRA.

If the Copying License is not a legitimate alternative to current licensing schemes

The ACCC state at 4.128 of the Draft Determination that “...there is a risk that by bundling blanket licences over APRA and the PPCA’s repertoires into a single licence through OneMusic, some licensees will assume that they are being granted a licence over equivalent repertoires in respect of the rights APRA holds and the rights the PPCA licenses on a non-exclusive basis” [emphasis added]. If the Copying License is not a legitimate alternative to current licensing schemes, then businesses will be subjected to confusion as result of information asymmetry and will become exposed to the risk of legal action by service providers and/or rights' holders¹¹.

If the Copying License is a legitimate alternative to current licensing schemes

If the Copying License is a legitimate alternative to current licensing schemes, it should be made available to all (including the BMS). Extension of the Copying License to the BMS would confer operational conveniences, such as removing the requirement to source and manage direct deals with record labels. Equally, if customer-requested content was not available in the repertoire of a BMS provider, then the addition of the Copying License would enable that provider to ingest and use that content as part of their solution under license.

CLARIFICATION QUESTIONS

- Has APRA provided a response to the ACCC invitation to provide further information about the concern raised by the ABSFEO that there is a risk of inadvertent unlicensed use of recorded music created by the Copying License?
- What test will be applied to determination suitability of the measures proposed by APRA to address the issue of inadvertent unlicensed use of recorded music?

¹⁰ The following statement published in ‘APRA Submissions in response to interested parties’ submissions’ (at item 42) does not demonstrate a duty of care toward licensees or the broader industry as it creates an environment of legal contention and transfers risk to small businesses: “**If a Spotify customer uses the service to perform music in public, and if that use is contrary to the Spotify terms of service, APRA regards that as a contractual matter between Spotify and its customer**”. The BPM contends that APRA know the Spotify EULA prohibits commercial use (e.g. see <http://apraamcos.com.au/music-customers/background-music-suppliers/>), and that APRA’s position on this matter is in conflict with the spirit underpinning the voluntary Code of Conduct for Collecting Societies.

¹¹ This is contrary to the position in Europe where CISAC note that “**CMOs have been evolving their business models to make it easier for venue and store owners**”.

- Are other stakeholder groups able to assist the ACCC in forming a concluded view about this issue (for example, service providers, rights' holders and CISAC¹²)?
- Where there is a shortfall in licensing between the repertoires of APRA and the PPCA, does it represent an adequate duty of care on behalf of an authorised monopoly to expose businesses to the risk of inadvertent unlicensed use of recorded music?
- Does the issuing of a Copying License undermine the rights of copyright owners to exploit their works as they see fit? For example, how many rights' holders would have negotiated more favourable commercial terms with digital service providers if they knew their works would be exploited in a public performance context and not just for personal use? Similarly, what about the rights holders/artists who specifically exclude their recordings from public performance but not from consumer services (such as Macklemore)?
- Does the volume of uncertainty and ambiguity relating to the Copying License mean that APRA has not provided a plain English explanation of the scheme to interested parties?
- Will APRA extend the copying license to any music use in public places including the BMS providers?
- In absence of certainty that the Copying License **IS** a legitimate alternative to current licensing schemes, will introduction of the Copying Licence reduce the public benefit arising from monitoring and enforcement efficiencies¹³ gained through authorisation if businesses are exposed to legal risks?¹⁴
- Is it within the scope of the ADR process for a dispute to be raised if the Copying License proceeds as proposed by APRA?

8. BMS to collect all Public Performance Tariffs on behalf of OMA

BPM Position 3 (Tariff Collection)

The BPM contends that all authorised background music suppliers should be empowered to collect all public performance tariffs on behalf of OMA for venues serviced by the BMS.

The public benefits of collection by the BMS for venues they service include (but are not limited to):

- Play data can be provided to APRA that cross-references actual usage of works against revenue collected at the end-user level (see s9 below).
- Businesses are provided with choice.
- Businesses do not have to deal with two separate entities to access music.
- Authorised BMS agents are well positioned to ensure consistent and uniform application of tariffs, curtailing potential abuse of market power (unintentional or otherwise).

Currently, APRA restricts the BPM agency agreements to three (3) tariffs on the basis that it is too complicated to extend agency to all tariffs. The following public detriments will result if this position is adopted under OMA:

¹² APRA are quoted in the Draft Determination as referencing the standards and guidelines of CISAC.

¹³ As per item 4.55 of the Draft Determination.

¹⁴ As observed by Justice French, '**The other side of the public benefit coin is the risk of 'detriment to the public' under s 90(6) and 90(7). This covers...any impairment to the community generally**'.

- The public benefits that extend from PPCA’s current model of permitting the BMS to act as agents for a significant number of their tariffs will be eroded.
- The issue of APRA designing tariffs considered ‘too complicated’ to collect for will be allowed to perpetuate instead of being managed appropriately through simplification and/or supplementation by Plain English Guides.

CLARIFICATION QUESTIONS

- The BMS have expertise in interpretation and application of tariffs. If a tariff is deemed to be ‘too complicated’ for the BMS to collect for, how can a business reasonably be expected to understand the tariff?
- If APRA deem tariffs ‘too complicated’ to collect for, does it follow that they have not complied with the intent of the 2014 conditions of authorisation which require plain English explanations of tariffs?
- Is it within the scope of the ADR process for a dispute to be raised if non-exclusive agency arrangements are not protected across all tariffs?

9. Minimum Standards for Royalty Distribution Accuracy

BPM Position 4 (Distribution Accuracy)

The BPM contends that authorisation conditions should be implemented that protect non-exclusive agency arrangements across all tariffs and require minimum standards of accuracy for royalty distribution. Such conditions would encourage partnership between APRA and the BMS for the benefit of broader industry.

Reduced effectiveness of transparency if not coupled with accountability for efficiency

The BPM wholly supports the proposed conditions of authorisation that will increase transparency in relation to APRA’s licensing and distribution arrangements. However, the BPM remains concerned that transparency in absence of conditions that require minimum standards of efficiency will represent a lost opportunity to improve outcomes for industry. Key performance indicators (KPIs) could be introduced to encourage a percentage of distributions to be based on actual usage of Works¹⁵. This could take the form of an ‘accuracy quota’ that is increased gradually over time in order to enable APRA to effectively balance the competing imperatives of quality and cost.

The BPM recognise that transparency in of itself may prove to be a catalyst for some efficiency improvement by APRA in response to a heightened level of scrutiny. However, the BPM contends that transparency without success criteria (KPIs) will only disclose a baseline measurement of efficiency – it will not provide clarity to interested parties reviewing these new reports whether targets have been achieved.

Innovative and cost-effective technology is available now to increase efficiency

At Item 4.95 in the Draft Determination it is stated that **“Some types of innovation, for example, in relation to monitoring usage of works, would likely improve the efficiency of APRA’s operations”**. APRA state in their response to information requests from the ACCC that they continue **“...to invest heavily in music recognition technology and automated data matching technology to make its**

¹⁵Such an approach would be consistent with s18A of the CISAC Professional Rules and Binding Resolutions.

processing of music usage reports as efficient as it is able to within the cost parameters set by the APRA Board and expected by APRA's membership”.

The BPM recognises that MRT and AI technologies are fit-for-purpose solutions for solving the problem of knowing what has been played at a venue and who to distribute royalties to. However, APRA have only deployed this technology to a fraction of licensees (at significant cost) and then apply the results by analogy to a significantly larger pool of revenue.

Technology developed by the BPM is currently used by the PPCA but will cease under OMA by virtue of APRA restricting the scope of tariffs that the BMS can collect for. This technology provides efficiencies for end users (obtaining all their music requirements from one source) as well as APRA and PPCA (through the provision of data tied to revenue collected at the end-user level). This technology could be leveraged under OMA if non-exclusive agency arrangements were permitted across all tariffs and would represent a practicable pathway to APRA improving distribution arrangements.

The BPM contests that technology solutions already deployed by the BMS to around 50,000 venues throughout Australia could provide a far more cost-effective and efficient solution than MRT and AI for enabling royalty distribution based on actual usage of works.

Why isn't technology developed by the BPM targeted for use by OMA?

OMA state on their website¹⁶ that “**We look forward to the day that someone invents a feasible device that sends live usage data back to us for every song played in every business in Australia**”. The BPM recognises both the benefits and the operational conveniences that this idealist future state will one day deliver. However, proactive steps can be taken to establishing this vision by OMA partnering with the BMS:

The BMS can provide OMA with a feasible product that sends usage data¹⁷ back for every song played in every business we service.

The most accurate play data should be used wherever it is available. Cost benefit ratio (CBR) arguments to the contrary will not hold up to scrutiny given the number of venues across the BMS for which this data is available.

The BPM contests that key performance indicators (KPIs) should be introduced as conditions of authorisation to encourage a percentage of distributions to be based on actual usage of works in accordance with s18A of the CISAC Professional Rules and Binding Resolutions.

The BPM would welcome APRA/OMA encouraging, incentivising or even mandating BMS suppliers to provide play data that details actual usage of works at a venue-level in order for APRA/OMA to meet KPIs. The BPM welcomes sharing responsibility with APRA/OMA to meet performance based KPIs in for the public benefit and sustainability of the music industry.

If it is too great a near-term leap for APRA to distribute royalties based on actual usage of works at a venue level, then the BPM welcomes any opportunity to assist APRA in developing interim practices to improve royalty distributions derived from public performance. For example, a gym will typically

¹⁶ See <http://www.onemusic.com.au/faqs/>

¹⁷ The BPM is open to discussion with OMA regarding the format of usage reports we can provide. This can be in alignment with that prescribed in the agency agreements of our members.

play more upbeat music than a day spa or fine dining restaurant, but APRA's distribution practices will assume that all of these verticals played the same works. If APRA and the BMS partner, then opportunities exist to develop vertical-specific play calculation and distribution methodologies that will improve outcomes for industry.

A best practice perspective on a minimum standard of accuracy for royalty distribution

The BPM look to CISAC¹⁸, the International Confederation of Societies of Authors and Composers, for guidance on what might constitute a minimum standard of accuracy for royalty distribution. This would seem appropriate given that APRA are quoted in the Draft Determination as adopting a number of CISAC practices¹⁹. The CISAC Professional Rules and Binding Resolutions state at 18A that each member shall **"base its distributions on actual usage of Works [emphasis added] or, if not practicable, on the basis of a statistically valid sample of actual usage of Works"**. The BPM is able to provide APRA with play data for actual usage of works at each premises that their members provide services to. CISAC also state that:

- **"...authors and performers must get a fair share of all the revenues generated by their work...[and] various mechanisms exist today to warrant their proportionate remuneration across cultural and creative sectors worldwide. The proportionate remuneration of authors and performers and the principle asserting it must encompass all such mechanisms";**
- **"...the availability of reliable data [is] crucial to the proper collection and distribution of royalties to songwriters and composers"**
(press release dated 4/2/19, ISWC system overhaul);
- **"When works are distributed digitally...The CMO's²⁰ task is to identify when its repertoires are used by the platform and to invoice accordingly. This process can involve billions of individual transactions. CMOs have invested heavily in infrastructure to manage this volume and guarantee the accurate and prompt distribution of royalties to creators and publishers"**
(2018 Global Collections Report); and
- **"The rise of data volume has been met with increasing investments from CMOs to adapt their systems to the new market conditions and deliver better, quicker and more accurate distributions. Amid competition among CMOs, rights societies have looked at collaborations to improve systems"**
(2018 Global Collections Report).

Similarly, the International Federation for the Phonographic Industry (IFPI) state in their Code of Conduct for Music Industry Music Licensing Companies ("MLCs") that **"MLCs shall strive to effectively collect remuneration or license fees on behalf of right holders and distribute the collective revenue to correct right holders expeditiously and accurately"** [emphasis added].

CLARIFICATION QUESTIONS

¹⁸ CISAC is the world's leading network of authors' societies and protects the rights and promotes the interests of creators worldwide. CISAC enables collective management organisations (CMOs) to seamlessly represent creators across the globe and ensure that royalties flow to authors for the use of their works anywhere in the world.

¹⁹ Similarly, APRA state in the May 2019 update of their International Distribution Practices that **"The Board endeavours as far as possible to comply with resolutions of CISAC related to principles governing the fair and equitable distribution of royalties"**.

²⁰ Collective Management Organisation (CMO).

- How many of the 147,000 licenses issued by APRA are directly matched to play data in alignment with the preferred basis of distribution under s18A of the CISAC Professional Rules and Binding Resolutions?
- How many of the 147,000 licenses issued by APRA are supported by music recognition technology?
- How many of the 147,000 licenses issued by APRA are paying the Copying License?
- Where the BMS is able to provide innovative technology that will enable royalty distribution based on “**actual usage of works**” (CISAC 18A), resulting in an improvement in “**the efficiency of APRA’s operations**” (Item 4.95), what can the ACCC do to encourage APRA to partner with industry to realise increased efficiencies?
- Is it within the scope of the ADR process for a dispute to be raised if play data is not used to ensure accurate distribution of royalties?

Appendix 1: BPM response to APRA feedback (ACCC RFI)

Introduction

Our considered responses effectively result in 3 key recommendations for the ACCC:

- APRA and PPCA are intrinsically linked with the formation of OneMusic Australia and through APRA's own admission, will act as a pseudo authorised entity following any re-authorisation of APRA. For those reasons, it is essential that any authorisation of APRA is contingent on the finalisation of all of the OneMusic tariffs including the high value Live performance, recorded music for dance, featured music and karaoke tariffs. Any prior authorisation should only be granted on an interim basis to ensure no stakeholders are disadvantaged by a premature authorisation that negates proper and effective consultation on these crucial outstanding tariffs;
- We agree OneMusic is the ideal solution for the efficient centralisation and distribution of all public performance revenue and on that basis, we support re-authorisation (subject to point 1). However, we contend that equally all authorised background music suppliers should be empowered to collect all public performance tariffs on OneMusic's behalf for venues they service. Thereby removing the need for business owners to deal with two separate entities to access music. Ensuring efficiency, maximising returns and endorsing licensed service providers to work collaboratively with OneMusic.
- We acknowledge the proliferation of unlicensed music services into the public performance landscape and OneMusic's right to collect for this use on behalf of its members. Similarly, we are aligned with OneMusic and all other stakeholders that the preferred solution is for users to access licensed services when they use music in their businesses. Hence, we recommend that any re-authorisation of APRA provides conditions that create a pathway for businesses to migrate to licensed background music suppliers over time. Conditions including clearer information in plain English guides about the role of background suppliers and the risks around using a consumer service, to migrating to distributions based on play data from licensed providers, with the ultimate goal of stemming the demand and availability of unlicensed services in public performance.

The BPM is a thriving example of a responsible and functioning marketplace where competition thrives on a level playing field, supported by appropriate licences. We welcome any further questions you may have pertaining to our submission and look forward to working collaboratively with OneMusic on what proves to be an exciting new phase and opportunity for the Australian music industry.

BPM Response to Point 1

It is in the public interest to review the changes that OMA will bring to APRA's market power when considering reauthorisation

- APRA will become the sole and exclusive provider of PPCA general licences under OMA and is the only viable option for users. The alternative suggested by APRA of licensing direct with record labels on an individual basis is too great an administrative burden for businesses using music in public performance contexts. In addition to this, licensing direct reduces the opportunity to develop a quality solution as it cannot compete with a blanket license.
- The background music sector (BMS) have been able to licence sound recordings directly with record labels in Australia for many years and while this can technically continue under OMA, it will no longer be commercially feasible to provide this as a service.

- Currently, the BMS can act as non-exclusive agents to the PPCA. The benefits of this non-exclusive relationship include increased market choice for users, increased revenue for the BMS, accurate play data for the PPCA and transparent and efficient royalty distributions for PPCA members.
- Given APRA will become the sole and exclusive provider of most PPCA licences under OMA, this will remove the benefits delivered by the BMS.
- Effectively by authorising APRA and acknowledging that they become the exclusive provider of PPCA umbrella licenses, a further barrier is instilled that inhibits the practical ability for an end user or a qualified service provider to directly license or represent public performance rights, hence removing their reliance on OneMusic. This further enhances the market power of APRA and in turn OneMusic by reducing competition.
- There is an opportunity for the ACCC to consider these benefits in the public interest during the reauthorisation process. Conditions could be imposed to allow the BMS to act as unrestricted, non-exclusive agents for OMA. This will create efficiencies that will enable OMA to partner with industry to deliver increased benefits to users and all APRA and PPCA members.

CLARIFICATION QUESTIONS

- While the OMA venture does not constitute a merger, it will create a monopoly from a rights' perspective given that APRA will act as exclusive agent for PPCA. What level of consideration will the ACCC give to this matter as part of the APRA reauthorisation process and what tests must be satisfied to grant reauthorisation given APRA's increase in market power?

BPM Response to Point 5

The public interest test should be applied to the increase in market power conferred to APRA under OMA

- APRA's market power will increase under OMA to now include PPCA members and sound recordings and therefore there should be a commensurate increase in accountability via conditions of authorisation.
- It is unclear as to whether the scope of the reauthorisation process is limited to APRA and the functions it performs today, or the intended scope of functions under OMA. If the latter, this may establish an unsanctioned and anti-competitive environment.

CLARIFICATION QUESTIONS

- Can the ACCC confirm the scope of the reauthorisation process in the context of OMA?
- Given that the nature of the agreement between APRA and PPCA will increase APRA's market power under OMA, does the ACCC require that authorisation is necessary?

BPM Response to Point 6

Authorisation should be required and only issued on an interim basis until all OMA licence schemes are finalised

- There are numerous cases whereby OMA tariffs have not yet been finalised.
- Consultation has been proactively delayed on tariffs such as Nightclubs, Feature Recorded, Live and Karaoke (as evidenced by APRA's own published communications).

- There have been no communications published by APRA which indicate if and when they intend to finalise these tariffs.
- APRA should provide a position on these tariffs prior to conclusion of the reauthorisation process and any such authorisation should be interim only.
- Previous conditions imposed by the ACCC including ADR and Plain English Guides (PEG) will need to be re-examined to determine applicability to PPCA under OMA.

CLARIFICATION QUESTIONS

- Can the ACCC authorise conduct of which it is not aware given OMA is yet to be finalised?
- Will there be a requirement to finalise agreement on these tariffs with stakeholders prior to a grant of reauthorisation?
- Will there be a condition imposed on APRA to control tariff prices under OMA in absence of market forces?
- Given APRA is not seeking authorisation with respect to the granting of non-exclusive licenses to perform PPCA sound recordings, yet will tie those rights into APRA's ADR process, will the ADR Resolution Pathways process enable PPCA members to access that service in the same way APRA members are currently able to do so?

BPM Response to Point 9

Increased efficiency can be achieved through reauthorisation with conditions that encourage industry partnerships

- It is in the public interest that any authorised monopoly can demonstrate capability to operate with efficiency.
- APRA's response above asserts that they cannot operate with efficiency without exclusivity and monopoly.
- It is not in the public interest to use a regulatory mechanism to reauthorise a monopoly that is not efficient and effective in their operations but for reauthorisation.
- APRA stipulate above that non-exclusivity would result in requirements for APRA '...to maintain information about works...and to keep that information current'. APRA's primary role is to efficiently collect and distribute revenue for their members, regardless of their authorisation status, and such information about works is required to achieve this.
- Industry is capable of supporting APRA to achieve increased operational efficiency that is in the broader public interest (for example, accurate distribution of royalties). It is recommended that conditions are applied to reauthorisation which encourage partnership between APRA and industry.
- The ACCC should seek further information from APRA on whether publisher members have opted out of segment arrangements from APRA due to transactional inefficiencies.

CLARIFICATION QUESTIONS

- Given there is an expectation on the BMS to track, report and pay for exploited copyrights, what conditions can the ACCC place on APRA to ensure they are also upholding best practice standards?

Partnering with industry to promote licenced services will reduce cost and infringement for users whilst also reducing uncertainty

- APRA state above that ‘having to obtain rights from different sources increases costs for users...as the user must satisfy itself that the licence it is obtaining is a valid one... (resulting in) a consequential increase in infringing use’.
- Contrary to this, APRA state on their website that when licensing businesses which use services such as Spotify to perform music in public at their premises, such businesses ‘need to check with your supplier if you can pay our fees via them, or you need to obtain a licence directly with us to ensure you are legally using music’, ‘businesses should refer to the Terms & Conditions of the music service’s end user agreement as to whether there are other permissions they require’ and if ‘you do not receive the proper authorisation you can be held liable for damages’.
- This practice is not in the public interest as it increases infringement and creates confusion in the market place for the end users who are seeking to use music in public performance contexts but are receiving mixed messages from the bodies representing rights owners (who permit use) and consumer service providers (who prohibit use).
- However, it is recognised that in collecting revenue for this use case, APRA are attempting to mitigate an issue of market failure to the benefit of its members where consumer use is ubiquitous in commercial contexts.
- The copying tariff under OMA seeks to extend this position to include PCCA members repertoire which also further compounds market confusion and impact.
- The ACCC needs to compel APRA to create a better practice environment which provides certainty, transparency and efficiency for end users and disincentivises the use of unlicensed services in public performance.

CLARIFICATION QUESTIONS

- Can conditions to APRA’s reauthorisation (and subsequently OMA) be imposed which encourage the use of licensed services in public performance and disincentivise the use of unlicensed services for the long-term benefit of end users?

BPM Response to Point 10

A possible reduction in members’ assignment is not grounds for exclusivity

- It is in the public interest that artists are free to exercise choice in how they exploit their rights to generate income. Therefore, any possible reduction in member rights assignment is not grounds for exclusivity and should not be given consideration under this reauthorisation process.

BPM Response to Point 15

The risk of an ‘Australia tax’ is reduced through competition

- APRA assert that the price of music in Australia is set by ‘market conditions’. A similar position was adopted by Apple, Microsoft and Adobe when questioned by Australian authorities in 2013 during an examination into unfair pricing strategies to the disadvantage of Australians.

- APRA are authorised and not subject to market forces (in a traditional sense) and not required to evidence the value of their tariffs. Therefore, the ACCC should not accept this position put forward by APRA.

CLARIFICATION QUESTIONS

- Will there be a condition imposed on APRA to control tariff prices under OMA in absence of market forces?

BPM Response to Point 17

In absence of market forces, there should be independent assessment of proposed tariff increases (including economic modelling) imposed by reauthorisation conditions

- Tariff prices must be controlled under OMA in absence of market forces. This is particularly pertinent to those tariffs which APRA states will not be finalised prior to reauthorisation.
- It is acceptable for Commercial-in-Confidence information to be protected. However, such information could reasonably be disclosed to an independent governance body to ensure there is a reasonable basis for any increase in price.
- The only mechanism that exists in relation to tariff setting where consultation hasn't been able to achieve an amenable result is the Copyright Tribunal, which is cost prohibitive in many circumstances.

CLARIFICATION QUESTIONS

- Will there be a condition imposed on APRA to control tariff prices under OMA in absence of market forces?
- Is there scope for the introduction of independent monitoring that can bridge the gap between tariff scheme consultation and the Copyright Tribunal?

BPM Response to Point 22

Reauthorisation conditions placed on APRA should include efficiency KPIs in the public interest

- The ACCC should look to the implementation of CLEF to date as an example of why conditions need to be set around APRA's efficiency. If such conditions existed, CLEF may not have proceeded in the way it did.

CLARIFICATION QUESTIONS

- Will the ACCC impose conditions on APRA in the form of KPIs to assist APRA in achieving efficiency?

BPM Response to Points 23 & 24

Partnership with industry will assist APRA in meeting efficiency KPI targets

- The BMS recognises that MRT and AI technologies will provide limited benefits in terms of play reporting accuracy, which aims to be more effective and improve equitability of royalty

distribution. However, it does so at significant cost with questionable outcomes that can be better achieved through use of play data and technology already available from the BMS.

- At no stage in 24(c) do APRA articulate their own responsibility to distribute revenue based on use, while simultaneously limiting PPCA's capacity to do so as well when they have previously enjoyed the benefit of non-exclusive agency arrangements that have provided this benefit to its members.

CLARIFICATION QUESTIONS

- Why are APRA investing in costly offshore MRT and AI technologies when it would be far more cost-effective and efficient to use locally sourced BMS technologies and play data made available across thousands of venues?
- Given the ready availability of data to support distribution of public performance revenue, how will the ACCC ensure APRA will utilise these sources to improve its distributions practices and accuracy?

BPM Response to Point 26

CLEF's ability to improve distribution processing is dependent on APRA's ability to partner with industry

- The BMS has been creating technology to distribute music and therefore as a consequence has been gathering the data required by APRA and CLEF to improve their distribution practices.
- This technology is currently used by the PPCA but will cease under OMA by virtue of APRA restricting the scope of tariffs the BMS can collect for.
- This technology provides efficiencies for end users (obtaining all their music requirements from one source) as well as APRA and PPCA (through the provision of data tied to revenue collected at the end-user level).
- This technology could be leveraged under OMA if non-exclusive agency arrangements were permitted across all tariffs.

CLARIFICATION QUESTIONS

- What can the ACCC do to ensure APRA are proactively seeking to use all available resources across industry to improve distribution processes in a cost-effective manner?

BPM Response to Point 27

MRT on its own is not the complete solution and requires additional inputs from industry for effective distribution

- The BMS represents approximately 50,000 licensed premises in Australia and captures venue-specific play data daily.
- MRT and other technologies are expensive and have only been trialled in venues that generate significant revenue (such as nightclubs). This music usage is not representative of broader use cases.
- Collectively, license revenue in public performance contexts where MRT is not being employed should utilise those services that are already available.

CLARIFICATION QUESTIONS

- Why are APRA investing in costly MRT and AI technologies in a handful of venues when it would be far more cost-effective and efficient to use actual BMS play data made available across thousands of venues?
- What can the ACCC do to ensure APRA are proactively seeking to use all available resources across industry to improve distribution processes in a cost-effective manner?

Appendix 2: BPM response to APRA interim authorisation request

RE: APRA Request for Interim Authorisation

We note the recent correspondence from Kate Haddock on behalf APRA (15th May 2019) requesting an interim authorisation from the ACCC on the basis that the final determination may not be finalised before the expiration of the current authorisation period on 28th June 2019.

The Background Providers of Music Ltd (BPM) provides in-principle support for APRA's interim authorisation request on the assumption the interim authorisation will:

- i) Remain in-place until the ACCC has access to the finalised OneMusic Australia scheme and notes the second recommendation of the recent House of Representatives Parliamentary Inquiry into the Australian Music Industry:

2.69 "The committee recommends that the Australian Competition and Consumer Commission incorporate an assessment of the finalised OneMusic Australia licensing scheme when considering the re-authorisation of the Australian Performing Rights Association"

- ii) Not remain in place for a significant duration after the final determination is handed down by the ACCC as this would offset implementation of conditions to the public detriment.

The BPM seeks confirmation that these assumptions and recommendations are in keeping with ACCC's remit.

Kind regards

Dean Cherny

Chair – BPM Ltd

Appendix 3: BPM response to APRA feedback (Interested Parties)

BPM Ltd

Background Providers of Music Association Ltd ACN: 631 831 831

Adjudication Branch: Attention Mr Gavin Jones

Australian Competition & Consumer Commission (ACCC)

By email: adjudication@acc.gov.au

Submission in response APRA's response to interested parties' submissions.

This submission is in response to APRA's published responses to submissions made to the ACCC by interested parties with respect to APRA's Application for re-authorisation (the Application).

The Background Providers of Music Association Pty Ltd (BPM) ACN 631 831 831 welcomes the opportunity to provide input into this process and has no objection to this submission being published on the ACCC website.

1. Summary Position

On the invitation of the ACCC, APRA has provided responses to interested party submissions in relation to the Application. In its correspondence with the ACCC, APRA has made several responses directed at the BPM's submission to the ACCC. In this paper, the BPM counter a number of these positions put forward by APRA.

As a broad overview, APRA asserts several key themes in its response that the BPM refutes:

- **The Background Music Sector's (BMS) business is being disrupted by the "competitive threat from digital music services" and is seeking "regulated preservation of the BMS business model"**
- **The BMS hasn't adapted to digital transformation**
- **Using personal digital music services is acceptable and even preferable to the use of background music services**

2. BPM Response to Issues

APRA: The Background Music Sector's (BMS) business is being disrupted by the "competitive threat from digital music services" and is seeking "regulated preservation of the BMS business model"

BPM: The "competitive threat" to the BMS is the APRA Copying Licence – not consumer digital music services.

Consumer music services do not compete with commercial music services

The BMS do not compete with consumer digital music services. The reality, which is well known to every BMS and each consumer digital music provider, is that we target very different customers, with very different needs and we operate at vastly different price points under completely separate licenses.

The concept of a central licensing body creating a license that incentivizes businesses to use a consumer service in a public place is akin to your local movie theatre being offered a low-cost license

to use Netflix for their movies. Preposterous in the movie realm, yet a reality in the Australian music industry.

The BMS welcomes and thrives on competition from other commercial digital music services. What we object to is any license that places the licensor in competition with the licensees and the erosion of a fair and equitable marketplace.

[Rights owners haven't agreed to commercial use of their works on consumer services](#)

None of the rights owners have given permission for the consumer digital music services to be used for commercial contexts. Any blanket license provided by APRA or OneMusic ignores this fact.

[The BMS are not seeking regulatory protection for their business model, we are seeking a regulated licensing framework for the use of music in public places](#)

APRA claim in Response 43 that the BMS seek regulatory protection for their business model:

Response 43: *The proposal of a regulated preservation of the BMS business model goes far beyond any other protection afforded to music industry stakeholders, in a way that would protect them from having to compete with other providers of music services.*

The BPM are not seeking for APRA to preserve the business model of its members. We are simply asking APRA to adhere to their role as the custodian of copyrights by not actively creating loophole licenses that bring unintended unregulated competitors into a sector where the only beneficiary is APRA and OneMusic.

The BMS rely on APRA (as an authorised monopoly) to create and preserve a regulated licensing framework for the use of copyrighted music in public places. Regulated licenses by their very definition assert an onus on each licensee to comply to licensing terms and conditions that ensure that each musical work represented in their service is appropriately licensed and each play reported so that the licensor preserves the copyright in the works and compensates the owner each time. In our industry the BMS rely on APRA as the regulator for the benefit of all stakeholders in the chain. Our concern is that APRA focus purely on the end user (i.e. the business customer) and the creator, but place little emphasis on the service provider, when we are the key link between the use in a venue and the ensuing payment to the copyright owner. Without the BMS, it is not possible to work out with any accuracy, what content was used and hence it is not possible to pay the right owner. When viewed through this lens, it is difficult to see how APRA's authorisation could possibly pass the public benefit test given the only real benefit is for APRA and not for the industry more broadly.

As part of the re-authorisation process, the BPM are seeking assurances that APRA will continue to uphold the regulated licensing framework that we see as their core responsibility. Our role is to then use this to perpetuate our business model(s).

[The Copying License is now being treated by APRA as a blanket mechanical license](#)

The Copying License was created in a different era. It was designed to give business owners a way to legitimately copy CDs and thereafter digital song purchases (from the likes of iTunes) in business contexts. It created a legitimate mechanism for the use of small numbers of purchased tracks to be performed in a business. In contrast, the BMS was regulated and hence required licenses for every track we used that required us to provide reporting data to the rights holders. But overall the impact to the BMS of the Copying License was minimal, because the use case was controlled.

However, in the past decade, technology has evolved and now the de facto consumer music service is a streaming product that provides access to every song in the world for a minimal monthly fee. Their market dominance highlighted by Apple's recent announcement of the closure of iTunes. The

challenge for the BMS is that whilst the consumer market has retired their defunct products, (CDs and digital music stores like iTunes) in the licensing realm APRA (and now OneMusic) have instead sought to evolve their Copying License for operational simplicity. Morphing a very discrete license for a small number of songs physically purchased into a blanket mechanical license to every song ever recorded.

APRA will assert that this is still a license to a discrete number of tracks (2,000 on any device) but the reality is that a license that previously allowed a small number of purchased songs to be played in your business now sanctions you to use a low cost consumer streaming service with access to every song in the world.

In contrast, the BMS remain regulated (as we should) and hence require a license to every track we utilize and are required to provide detailed reporting data for every song play. Or put simply, one set of operating rules for the BMS and no rules at all for APRA or the licensee under the Copying License.

If the Copying License is a legitimate alternative it should be made available to all

Whilst the BMS have lobbied extensively against the Copying License, it stands to reason that if this license is indeed legitimate and if it is going to be offered to cover any use of music in a public place where no other mechanical license is in place, then it needs to be available for the BMS as well. In fact, if this license delivers the blanket mechanical coverage that it purports to, then there is no need for direct licenses between the BMS and APRA or in turn OneMusic Australia at all and each venue should license all mechanical rights directly.

To date, this license has not been offered to any BPM member and upon request it was rejected with no explanation.

Commercial music services are delivered by technologically innovative digital companies

APRA: The BMS hasn't adapted to digital transformation

BPM: The Background Music Sector are technologically innovative digital companies

APRA's position on this issue misrepresents the role the BMS plays in underpinning their public performance business.

Response 43 states: *Digital music consumer services such as Spotify and Apple Music have been a phenomenal disruptor of the music industry, and it is apparent that businesses that began in the era of physical product, such as many BMS, are also experiencing disruption. Adjusting to digital has proven to be a challenge for many in the music industry, and it is not surprising that this challenge extends to BMS.*

The BPM refutes response 43.

Every single BMS is a digital music service and none have struggled to transition to digital. In fact, the move to digital was achieved by the BMS, which pioneered the very concept of music subscriptions at least 20 years before consumer streaming subscription services were conceived. Further, the BMS leveraged MP3 and digital video long before iTunes or YouTube existed, with most BMS companies moving to digital formats 10 years before the consumer space had arrived at the same destination.

Any assertion that the BMS struggle to adapt to digital is completely incorrect. The unfortunate reality is that the BMS do not get the support technically or via a regulatory licensing framework from APRA to maximize the immense potential of our segment. This is highlighted clearly through

their responses which show a lack of understanding of our segment and the positioning of a license that seeks to financially benefit from the slow dismantlement of our sector in favor of the consumer services, without their consent or support.

APRA are reducing opportunities for the BMS to maintain and grow market share

There is also evidence that many businesses using the services of the BMS have now reverted to using unlicensed consumer digital music services as a direct result of APRA's application of their Copying License.

Response 44 further states: ...The number of premises licensed through APRA 's agency agreements with the BMS (discussed below) as at the first quarter of 2018 is at 99.98% of the number of premises licensed as at the first quarter of 2014. That is, the customer base of BMS does not seem to be declining dramatically.....

This is misleading on several fronts:

1. The key word in this statement is "agency". And it would be true that a very high percentage of licensed premises under the BMS agency agreements would remain static. But, that would infer that the majority of BMS clients are licensed via the agency agreement when in fact there is a very limited scope of collections allowed for the BMS under this agreement and little incentive to use it. i.e. the bulk of the BPMs client base don't fall under the agency agreements.
2. Surely the number of APRA public performance licenses in the same period has grown and as such it would seem logical that the number of BMS clients would be growing, not staying static.
3. Client retention alone is not testament to a healthy marketplace. In the same period the ARPU has dropped significantly as the proliferation of low cost, unlicensed services have forced the BMS to do more for less.

APRA also state:

Response 44 states: It is APRA's experience that the overwhelming majority of businesses now using personal digital music services previously used radio or CDs for their background music.

This statement is incorrect.

There has been an omission of an entire technology platform in response 44. The majority of businesses that are presently using consumer streaming services were previously using other unlicensed services via laptops, MP3 players and other such devices that enable format shifting. Additionally, there were many businesses that were using BMS services that transitioned to using consumer digital music services and other businesses that went from radio to CD to MP3 to BMS companies.

In addition to all of the above, there is a marked change in how the Copying License is being promoted by APRA in the transition to OneMusic Australia that will have major impact on its market penetration.

Previously the Copy Tariff, as asserted by APRA, was largely confined to small business owners (albeit lots of them) as larger business owners understood that this was a partial license only and

would not take the risk of using an unlicensed service. However, based on the prominence and confidence with which the OneMusic tariffs promote the legitimacy and availability of this license, the BPM are already fielding far more enquires from large groups and franchisors all confused and seriously considering this as an option, based on the position asserted by OneMusic. Hence, it is naïve and a selective choice of data from APRA to represent that the Copying Tariff as purely for those migrating from Radio and CD and that there will be no impact to the BMS. They and we know that this license, offers a compelling commercial option that competes with the BMS.

But as a starting point the BPM would like to know how many Copying Licenses were provided in the 2014 vs. 2018 to see if this “static” growth is true in all scenarios or if this license is in fact the early warnings of competition stifling the growth of the BMS.

APRA: Using personal digital services is acceptable and even preferable to the use of background music services

BPM: Personal digital services are not an acceptable replacement for background music services

APRA repeatedly condones the use of consumer services in commercial settings as evidenced in both responses 41 and 45 outlined below:

Response 41 states: *“Many of the BMS have expressed concerns regarding the fact that APRA licenses businesses that use services such as Spotify to perform music in public at their premises. APRA understands that services such as Spotify make it easier for (particularly small) businesses to use relatively sophisticated playlists of music. The BMS generally see the digital music services as providing a significant and unwelcome degree of competition for the BMS businesses”.*

Response 45 states: *“For relatively small businesses that wish to use music to enhance the experience of their customers, the technological ease with which the personal digital music services can be used, and the availability of curated playlists on those services, means that many small businesses have opted to use such services”.*

APRA are a performing rights society. Their role is to create regulatory licensing frameworks that are in the best interests of the public. They are not qualified or authorized to decide what is the best fit for music use in a business, they are simply there to ensure copyright is upheld. Any further use of their power to license what they perceive as a better experience for the business is an overreach on their mandate. If consumer services want to be used in a business context, there is a clear and established licensing framework to achieve this and if they opt not to, then it is up to APRA and the rights holders to ensure the use is at best prohibited, at least discouraged, but never endorsed for their own financial gain.

Despite the fact that consumer streaming End User License Agreements (EULA) clearly state they are for personal use only, APRA disregards this by creating a license that is contrary to the EULA and also creates market confusion by pushing the onus to the end user as per the statement below:

Response 42 states: *“The BMS' concern is expressed to be because Spotify and other digital music services include as a term of service that the music is provided for personal use only. If a Spotify customer uses the service to perform music in public, and if that use*

is contrary to the Spotify terms of service, APRA regards that as a contractual matter between Spotify and its customer”.

Surely as a monopoly of publishing works in Australia some onus falls on APRA to work with Spotify and their peers to eliminate the unintended use rather than design a work around that hides behind a contract to push the responsibility away from themselves?

The reality is that we as an industry have a duty to uphold copyright in all segments, working collegially to maximize the success of our industry. It is clear that the BMS and the consumer services want to follow this path, but we need the support from APRA to work on real solutions rather than pushing the problem to the technology providers.

3. Conclusion

The BMS is an undervalued and misunderstood segment, but we are an essential link in the broader music ecosystem that connects millions of Australians to music every single day. For the consumer segment and in turn the rights holders and APRA to thrive, we need a strong BMS.

It is ironic that APRA rejects any support for the preservation of the BMS business model, given the very purpose of this entire process is to preserve theirs as a publishing monopoly in Australia. Compounded further when we look back at the support they demanded from government and the ACCC to protect them from a “safe harbor” from tech giants like YouTube, when now they are creating something very similar against us small tech companies via the Copying License. Made worse still when any offer of the same licensing terms to the BMS is rejected with no explanation.

The BPM is proof that a sector can come together to collaborate on issues that bind us whilst still operating in a competitive landscape. The partnerships between many of the background companies and the consumer services further demonstrates a respect and fundamental acknowledgement of the importance and intrinsic differences between our segments that we can mutually exploit through partnerships.

Our challenge, as it has been for a very long time, is to work collaboratively with APRA and the entire rights community to maximize the potential for music in Australia.

APRA's response to our submission demonstrates a complete disconnect and lack of understanding of the BMS, the challenges we face and the support that we need from them to thrive. The Copying Tariff is short sighted. It is motivated purely for financial gain and only serves to drive a further wedge between all digital (consumer and commercial) music providers and rights holders and it is the wrong solution to an acknowledged piracy problem. But, if it is here to stay, then it needs to be available to all.