

25 September 2019

Ms Tessa Cramond - Senior Analyst

Adjudication/Merger and Authorisation Review Division

Australian Competition & Consumer Commission (ACCC)

RE: APRA'S REQUEST FOR AUTHORISATION BY THE ACCC

Dear Tessa,

I refer to my earlier submission to the above process lodged on behalf of "A group of dance teachers, dance schools, and Eisteddfod/competition organisers" on 25 February 2019, and note my background.¹

OneMusic Australia (OMA) commenced operations on 1 July 2019 (see Annexure 1 – Music Network article discussing three months of OMA operations). OMA is described as a **joint venture** between PPCA and Australasian Performing Right Association Limited (APRA)/the Australasian Mechanical Copyright Owners Society (AMCOS) (see Annexure 2 – screen shot from PPCA website, accessed 24 Sep 2019). While not tabled in this Application, joint ventures are typically created by joint venture agreements.

At this time, APRA continues to operate under the interim authorisation granted by the ACCC on 27 June 2019.² In the interim authorisation the ACCC noted at paragraph 10: "APRA considers that (OMA) does not materially change the legal basis on which it will acquire rights from its members or grant rights to licensees, and the ACCC understands that APRA considers (OMA) therefore falls within the scope of its existing arrangements for which re-authorisation is sought." With respect, paragraph 10 of the interim authorisation is incorrect, and any prospective authorisation by the ACCC of APRA under this Application should not include any coverage of OMA or include OMA's activities, for the following reasons:

(a) Types of copyright protection

Previously APRA licensed the public performance and communication of musical works. Under the current OMA joint venture APRA can not only licence the public performance and communication of musical works, but can also license:

¹ I am a former General Counsel of the Phonographic Performance Company of Australia (the PPCA), a collecting society, and the Australian Recording Industry Association (ARIA), an organisation that licences the reproduction of sound recordings, a former Senior Investigator in the NSW office of the ACCC, and a holder of a PHD in Law from the University of Technology, focused on intellectual property rights enforcement.

² Australasian Performing Right Association Ltd – Application for revocation of A91367-A91375 and the substitution of authorisation AA1000433 – Interim authorisation decision 27 June 2019.

- (i) the public performance/communication of sound recordings (previously administered by the PPCA),
- (ii) the reproduction of musical works (previously administered by AMCOS), and
- (iii) in some instances, the reproduction of sound recordings (previously administered by ARIA/rights owners directly).

At this time, APRA is the sole legal entity that has sought to be authorised by the ACCC,³ and the only rights where the applicant has sought to be authorised are rights in relation to the communication and public performance of musical works.⁴ Yet, under this application APRA seeks to have any authorisation extend to **all** rights administered by APRA include those purportedly administered by OMA,⁵ being the public performance and communication of musical works as well as those listed above from (i) to (iii).

The intellectual property rights attached to the public performance and communication of musical works are **fundamentally** different to the collective intellectual property rights attached to the public performance and communication of musical works **and** sound recordings, **and** the reproduction of musical works and sound recordings. It is these differences that resulted in the continued long term operation of two separate collecting societies, APRA and PPCA, since 1926 and 1969, respectively.

Accordingly, any authorisation of APRA (covering the communication and public performance of musical works) should not automatically extend to the **fundamentally** different Intellectual property rights listed from (i) to (iii) above. In support of the claim that these intellectual property rights are different, the following words of APRA's music industry joint venture/business partners are noted:

- (i) PPCA states "there are two separate rights (one for the song / composition and a separate one for the sound recording)" (see Annexure 3 - screen shot from PPCA website, accessed on 24 Sep 2019), and
- (ii) ARIA states "there is generally more than one owner of rights in any given track. The people who wrote the tune and the lyrics and/or their publishers own copyright in the song, whilst the maker of the recording (typically a record company) owns a separate copyright in the actual recording".⁶

³ See AA1000433 - APRA Application for Revocation and Substitution par 1.1, which indicates that the sole applicant is APRA, and par 3.1 which indicates that there are no other applicants under this Application.

⁴ See AA1000433 - APRA Application for Revocation and Substitution par 1.3, which indicates that the sole business activities covered by this Application are the communication and public performance of musical works, and par 3.3 which indicates that there are no other activities (including intellectual property rights) to be covered by this Application.

⁵ See AA1000433 - APRA Application for Revocation and Substitution Application and supporting submission par 8(c) where APRA states as OMA "will be operated by APRA, conditions of APRA's authorisations ... will apply to its activities".

⁶ <http://www.aria.com.au/pages/faq.htm>

(b) Quantity of items subject to copyright protection

The number of copyright protected items that OMA will licence is potentially far more than APRA licensed under its previous authorisation. APRA CEO Dean Ormston acknowledged that “of the 3,000 licence agreements put in place since launch (of OMA) 500 are brand new licensees”.⁷ As the number of licenses potentially able to be issued by OMA substantially exceeds the number issued by APRA, the scope of any authorisation potentially applying to OMA will far exceed the existing authorisation in favour of APRA.

(c) A different organisation

Many former APRA activities have been undertaken by OMA since 1 July 2019.⁸ OMA appears to be owned by APRA. It is certainly a different entity. However, ACCC authorisations are not inherently transferable from one entity to another, but even if they were transferable there is no evidence that APRA have purported to transfer its authorisation to OMA. Rather, APRA has requested that any authorisation granted to it simply be allowed to apply to OMA. There is no reason provided by APRA for the ACCC to accede to this request, and no evidence provided by APRA that an authorisation granted to OMA would have the same effect as an authorisation granted to APRA and should be provided as a matter of course.

(d) Failure to include OMA in the application

At the time of their application, APRA was aware of the impending commencement of OMA. APRA’s application includes references to OMA. OMA had long existed as a separate entity as at December 2018 (when this Application was lodged. See Annexure 4 – ASIC extract: APRA business names registered). The business names “1MUSIC” and “ONEMUSIC” were registered by ASIC as long ago as 3 August 2016. Accordingly, if APRA sought that this purported authorisation apply to OMA, OMA should have been named as a co-applicant under Clause 3.1 of this application. OMA was a person/class of persons “who also propose(s) to engage ... in the proposed conduct” and **should** have been covered by this Application. Clause 3.3 of this application should have listed OMA’s business activities as:

“The acquisition of the right to grant, and the granting of licences to:

⁷ See the extract from Annexure 1.

⁸ A list of OMA licence areas can be seen here: <https://onemusic.com.au/licences/>.

- (a) communicate and to perform in public:
 - (i) musical and associated literary works, and (ii) sound recordings, and
- (b) reproduce:
 - (i) musical and associated literary works, and (ii) sound recordings”.

(e) Potentially misleading and deceptive conduct by APRA

In not applying to include OMA in their application, but seeking to include OMA’s activities through para 8(c) of this Application, APRA has sought to surreptitiously expand the coverage of their expected authorisation so that it covers a much wider range and far larger number of licences, without implementing the normal checks and balances provided by the ACCC’s authorisation process. Further, in failing to include OMA in its application, APRA has engaged in potentially misleading and deceptive conduct by applying for one type of clearance but seeking to implement another series of clearances.

This misleading and deceptive conduct is also apparent from an examination of this Application which includes various statements underplaying the impact of OMA on APRA’s operations in this authorisation:

- (a) Para 7 of this Application states that “practical changes to APRA’s systems”, being the introduction of OMA, has no impact on the “legal basis for APRA’s operations”.
- (b) Para 3 of this Application states that “the current Applications relate to substantially the same arrangements and conduct ... as the 2014 Determination”. Para 3 also implies that the only significant changes since 2014 are market-based. ¹These statements appear to be incorrect.

It is not open to APRA to contend that OMA’s operations are largely the same as APRA’s operations as OMA clearly purport to offer a far broader range and quantity of licenses to licensees. In their information dissemination APRA typically describe these changes as a “revolution” ⁹ or “game changer”.

It is also not open to APRA to contend that legal basis for OMA’s operations are the same as APRA’s legal basis. APRA’s heads of power is based on the input agreements with musical work rightsholders. OMA’s heads of power are not only the input agreements with musical work rightsholders, but also includes any and all agreements with the owners of sound recordings (such as the major and independent record companies), as well as agreements (whether written or not) with AMCOS, PPCA and ARIA, including sub-licensing agreements, and a joint venture agreement with the PPCA (see Annexure 2).

⁹ See for example par 8(c) of AA1000433 - APRA Application for Revocation and Substitution.

It is also not open to APRA to argue that at the time of their Application it was not foreseeable that OMA would commence operations and purport to replace APRA, and therefore OMA should in the future be allowed to absorb any and all Authorisations granted to it by APRA. Not only was OMA's commencement foreshadowed by APRA, but APRA planned for OMA's commencement during the life of its existing authorisation and acknowledged this in planning for this Application. ¹⁰

Conclusion

The ACCC cannot legally authorise the operations of OMA, as OMA has not sought to be authorised. Only APRA operating as a separate business entity to OMA has sought to be authorised by the ACCC, so the ACCC only has the power to authorise APRA. In the alternative, the ACCC can authorise OMA, but ONLY to the extent that its operations cover the public performance and communication of musical works (being the stated subject matter of this Application).

APRA are one of the most important participants in the Australian music industry, and take the authorisation process extremely seriously, ¹¹and for this they are to be commended. However, if APRA wishes for OMA to be covered by the ACCC's prospective authorisation they should amend this Application to cover OMA, or seek to lodge a fresh application which expressly covers not only OMA but also all of the licenses that OMA purports to offer. Of course, if APRA were to purport to make such a fundamental amendment to this Application, all interested parties would wish to be given the opportunity to comment on such an amendment.

Kind Regards,

Alex Malik (Dr)

Solicitor



¹⁰ See par 37 of AA1000433 - APRA Application for Revocation and Substitution.

¹¹ See <http://apraamcos.com.au/news/2019/july/information-regarding-misleading-media-report-on-onemusic-and-apra-amcos/> where APRA states "Authorisation is a voluntary process that provides our stakeholders with the opportunity to raise any concerns with an independent third party and forms an integral part of our governance framework. We choose to participate in this process to help ensure we operate in the best interests of our members and customers at all times."



EXCLUSIVE NEWS September 17, 2019

OneMusic uptake “far more positive than anticipated” [exclusive]

Jake Challenor

Publisher & Editor

[The Music Network](#)



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By all accounts, [OneMusic Australia](#) is off to a rocking start.

“Three months in, I am happy to say all bets and forecasts were completely off the mark – in a good way,” head of media licensing Richard Mallett tells *TMN*.

“Two-thirds of OneMusic’s relicensing business is coming through the portal. The phone and live chat support are still there for queries, but the customer has spoken.



On July 1 OneMusic (finally) launched its industry-first [music licensing portal](#) that helps small businesses to ditch their APRA AMCOS and PPCA paper licences in lieu of a new web-based system.

It was the result of over [two year's hard work](#) from many people across the two organisations, in consultation with a range of peak body representatives and industry groups. A monumental undertaking that included technology, licensing and lobbying smarts.

APRA AMCOS chief [Dean Ormston](#) told *TMN* that 50% of licensees contacted to join the new system had made the switch, but the lead-up wasn't without its complications.

"What we were trying to do was reduce all the red tape and the administration," says Ormston.

"What it has meant is that we probably had to develop a lot more nuanced arrangement than we initially wanted to, to ensure that there's no bill shock moving from the old paradigm to the new paradigm.

"So that's been a really complicated process and it probably has a way to go.

Ormston also said that about a third of the revenue generated since July was derived from hospitality licences.

"Hospitality has been a lot stronger than we anticipated.

"So that means is people are finding their way to the website. They're navigating through, it's making sense and they're paying for it in real-time. So from our business point of view, the red tape reduction is enormous."

Consultation with other sectors continues, but by all accounts, OneMusic is moving at speed.

Of the 3,000 licence agreements put in place since launch, OneMusic says 500 are brand new licensees. Which ultimately will mean more revenue for rightsholders.

"We're ecstatic with those results, far more positive than anticipated," said Ormston.

He expects the 150,000 licensees on the old paper system to have migrated within 18 months. "There's definitely a material bottom-line impact."

OneMusic partner PPCA, who joined forces with APRA AMCOS six years ago on the initiative, also expect a cultural shift will follow.

"We hope to challenge the idea that [music licensing](#) is complicated, and to increase compliance by licensees with a streamlined modern process," PPCA boss [Dan Rosen](#) tells *TMN*.

“We also hope that everyone – the community at large – will benefit from increased use of incredible music all around us. We know how important that can be not only to businesses, but also to our culture.

“It has been a lot of work, and there is a lot more work to do. Two months in, it’s clear we are on the right path, and I’m confident we have the right team to continue the ensure OneMusic is an ongoing success.

What is OneMusic Australia?



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APRA AMCOS

Dan Rosen

Dean Ormston

music licensing

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Annexure 2 - screenshot from PPCA website, accessed on 24 September 2019

PPCA - Linking Business to Music

Phonographic Performance Company of Australia Ltd. [AU] | ppca.com.au

Real Music · Real Art

website search

ABOUT US | MUSIC USERS | ARTISTS | LABELS | ONE MUSIC AUSTRALIA

MUSIC USERS

Do you play music in your business?

Find out more

ARTISTS

Are you an Australian recording artist?

Find out more

LABELS

Do you hold rights?

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About

PPCA is a non-profit organisation that provides licences to Australian businesses to play recorded music in public. The net fees are distributed to record labels & registered Australian artists who create the recordings so they can continue to make music for us all to enjoy.

News

One Music AUSTRALIA

OneMusic Australia is here

A joint venture between PPCA and APRA AMCOS, OneMusic Australia will consolidate Australia's music licensing

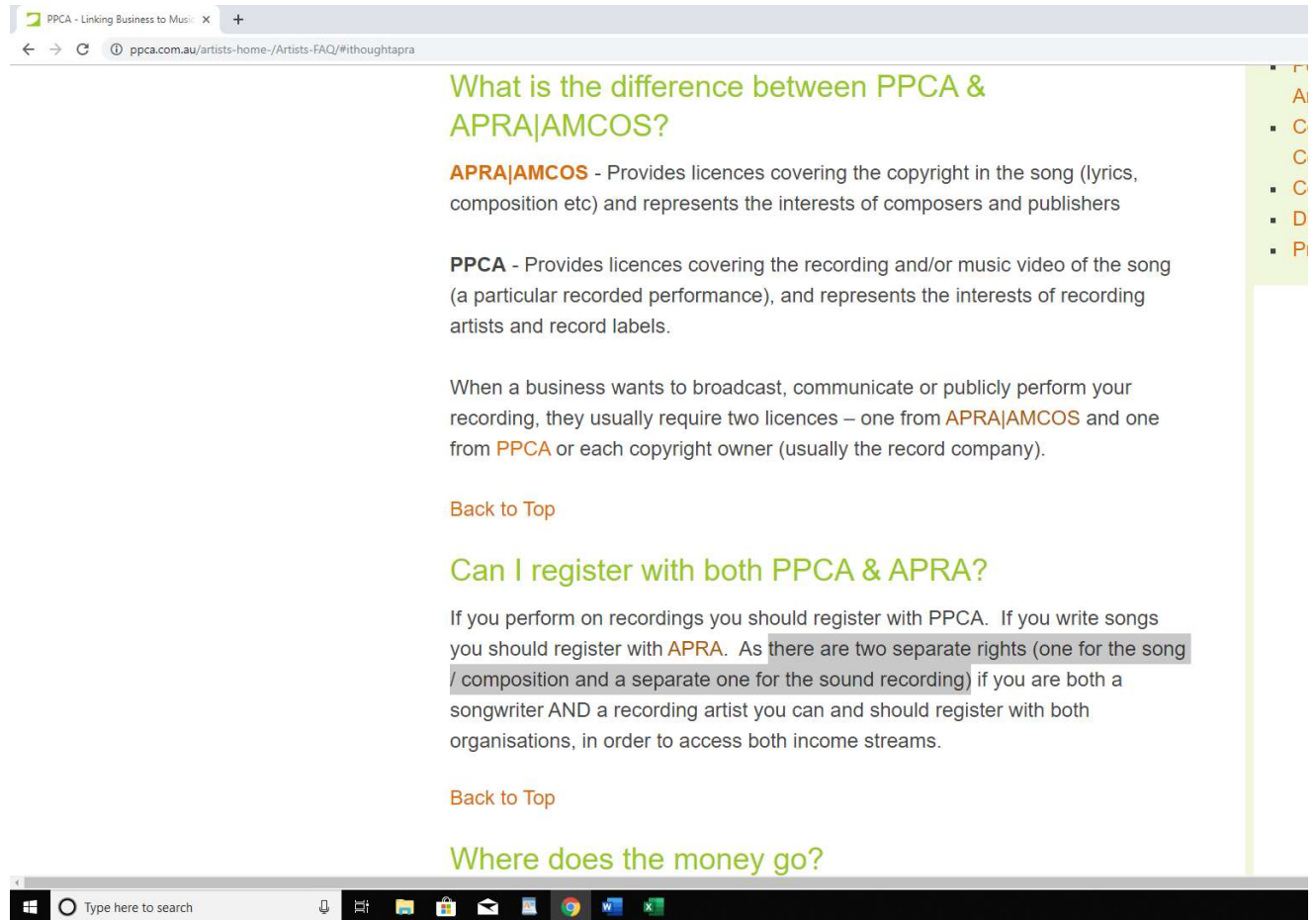
Tariff News

One Music AUSTRALIA

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fin:

Type here to search

Annexure 3 - screenshot from PPCA website (ii), accessed on 24 September 2019





ABN Lookup

Current details for ABN 42 000 016 099

ABN details

Entity name:	AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LTD
ABN status:	Active from 30 Mar 2000
Entity type:	Australian Public Company
Goods & Services Tax (GST):	Registered from 01 Jul 2000
Main business location:	NSW 2007

Business name(s)

Business name	From
1MUSIC 🔗	03 Aug 2016
ONEMUSIC 🔗	03 Aug 2016
Australasian Performing Right Association 🔗	08 Sep 2015
APRA AMCOS 🔗	26 Aug 2015
Sounds Australia 🔗	04 Jul 2012

Trading name(s)

From 1 November 2023, ABN Lookup will not display trading names and will only display registered business names. For more information, click [help](#).

Trading name	From
APRA	30 Mar 2000

ASIC registration - ACN or ARBN

000 016 099 [View record on the ASIC website](#) [🔗](#)

Deductible gift recipient status

Not entitled to receive tax deductible gifts

ABN last updated: 05 Dec 2016

Record extracted: 12 Feb 2019

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