

Gavin Jones
Director, Adjudication
Australian Competition and Consumer Commission
By email: adjudication@accc.gov.au

8 March 2019

Dear Mr Jones

Australasian Performing Right Association (APRA) – Application for Reauthorisation (AA1000433)

Thank you for the opportunity to comment on APRA's application for revocation of authorisations A91367 – A91375 and substitution of new authorisation A1000433 (**APRA Application**).

Mood Media Australia Pty Limited (**Mood Media**) is a global in-store media solutions company dedicated to elevating customer experience through sight, sound, scent, social and systems solutions, with operations in more than 100 countries. Mood Media's main focus is the supply of background music services to businesses. This involves the supply of both generic and customised playlists that are targeted to the particular business' brand and customers' tastes, that are uninterrupted by advertisements, can carry in-store / other specific messaging, and can be updated regularly.

Mood Media's interest in the APRA Application relates primarily to APRA's licence arrangements for the use of music in background music services (**BMS**).

Mood Media is a member of Background Providers of Music Association Ltd (**BPM Ltd**), and endorses the views expressed by the association in its submission to the ACCC regarding the APRA Application, dated 22 February 2019.¹ The comments made in this letter are supplementary to BPM Ltd's submission.

Mood Media submits that if the ACCC is minded to approve the APRA Application, the ACCC should not do so without imposing conditions on APRA to ensure that it does not abuse its monopoly position to the detriment of background music suppliers and other licensees. Additionally, it may be appropriate for the authorisation to be granted for a shorter period of time, such as three years.

The need for these conditions is apparent from APRA's monopoly position, and the opportunities for exploitation which that position provides, and APRA's dealings with BMS suppliers over the last 12 months, described below.

1. APRA'S MONOPOLY POSITION AND OPPORTUNITIES FOR EXPLOITATION

The ACCC has recognised that APRA "has a virtual monopoly in respect of performing rights licences in Australia".²

¹ Available at: <https://www.accc.gov.au/system/files/public-registers/documents/AA1000433%20-%20Revocation%20and%20Substitution%20of%20A91367%20-%20A91375%20-%20Australasian%20Performing%20Right%20Association%20Limited%20-%20Submission%20by%20Background%20Providers%20of%20Music%20Ltd%20-%202022.02.19%20-%20PR.pdf>

² The ACCC's Final Determination for Authorisation numbers A91367-A91375, lodged by APRA, page 31, paragraph 207.

BMS suppliers operating in Australia must negotiate music licences with APRA AMCOS³. The supply of background music requires BMS suppliers to have relevant rights to musical works that they, in turn, supply as part of their offering to their customers. Virtually all music owners in Australia are APRA AMCOS members⁴, and APRA AMCOS also has reciprocal arrangements with overseas collecting societies. In effect, BMS suppliers operating in Australia have no choice but to deal with APRA AMCOS.

APRA's "Licence Back" process, which allows members to license one or more of their songs to a particular user for a particular purpose, does not assist BMS suppliers. BMS suppliers require access to a wide range of music, and it would not be realistic or practical for BMS suppliers to approach music publishers individually in respect of licences for one or more of their songs.

Additionally, it is often the case that for an album or catalogue of music there are many stakeholders, some of whom would not be Australian. The fragmented ownership of music and APRA's ability to grant licence back permissions to its Australian members only, means that it is almost impossible for effective licensing back deals to be made.

The consequence of this is that BMS suppliers have very little bargaining power in their negotiations with APRA AMCOS, and APRA AMCOS, as an effective monopoly, can simply dictate the terms on which it will offer licences to BMS suppliers. APRA AMCOS has the ability and incentive to increase fees, without any commensurate increase in the scope or quality of its services, because it faces no competitive constraint.

2. **EVIDENCE THAT APRA IS EXPLOITING ITS MONOPOLY POSITION**

APRA AMCOS' music licences have historically been granted on a "blanket basis", in that they give the user, such as Mood Media, rights in respect of APRA AMCOS' entire repertoire. Licence agreements are typically several years' duration, and for BMS suppliers, fees have traditionally been a flat tariff rate, or a rate based on gross revenue or the number of tracks, rather than being tied to the number of venues using the service.

In early 2018, APRA AMCOS informed Mood Media and other BMS suppliers that it was proposing to introduce a new licence fee structure based on "per venue" rates, and subsequently provided draft agreements to Mood Media and other BMS suppliers based on such a structure and rates. The proposed fee structure and rates would see Mood Media paying substantially higher licence fees than has historically been the case. The rates are also vastly disproportionate to the fees that Mood Media pays to collecting societies in other countries where it operates, and it is not apparent why that should be the case.

Fee increases of the magnitude APRA AMCOS is proposing cannot be passed on to Mood Media's customers and cannot be absorbed by Mood Media, and would render certain activities and arrangements with customers simply uneconomical.

Mood Media and other BMS suppliers voiced concerns about APRA AMCOS' proposed new fee structure and draft agreements. APRA AMCOS did not engage in any meaningful or constructive consultation with Mood Media in relation to these changes, nor did it explain adequately why fees should increase when there is no commensurate benefit flowing to licensees and their customers. Instead, to put pressure on Mood Media to agree to the new arrangements, APRA AMCOS terminated its licence agreement with Mood Media with effect from 20 September 2018.

In an endeavour to improve its bargaining position in negotiations with APRA AMCOS, Mood Media proposes to negotiate collectively, together with Stingray Music Group Inc, another

³ Consisting of APRA and Australasian Mechanical Copyright Owners Society Limited (AMCOS), historically two separate organisations, but today operating as a joint alliance: <http://apraamcos.com.au/about-us/what-we-do/>

⁴ APRA AMCOS represents over 100,000 members who are songwriters, composers and music publishers.

BMS supplier. Mood Media and Stingray submitted a collective bargaining notification to the ACCC on 11 February 2019.⁵ It is hoped that, by negotiating collectively, we:

- (a) may be able to obtain music licence rights on more reasonable terms (including licence fees) than APRA AMCOS is currently seeking to impose on Mood Media; and
- (b) will continue to be able to offer competitive background music services to businesses in Australia, and operate viably in a market that is facing increased pressure from digital disruption.

It is, however, unclear whether the aggregation of our limited bargaining power will enable us to achieve these outcomes.

3. **HOW CAN THE ACCC ASSIST?**

Mood Media acknowledges that collecting societies play an important role in the supply of music and that for BMS suppliers, like Mood Media, there is great benefit in dealing with collecting societies rather than individual music publishers. However, unlike in other markets, such as the United States and Europe, where there are multiple collecting societies which compete with each other for the supply of music rights to licensees, in Australia, APRA AMCOS occupies a coveted position – that of an effective monopoly provider, entirely unconstrained by competitive forces.

This means that APRA AMCOS has the ability (and incentive) to increase licence fees (which may not be passed back to rights holders, and may be used to cover and perpetuate inefficient operations), and that BMS suppliers have no option but to deal with APRA AMCOS on its terms.

Mood Media notes that the ACCC imposed some conditions on APRA in respect of its current authorisation, namely (in summary):

- (a) APRA must publish, within 3 months of the ACCC's final determination, a comprehensive plain English guide that outlines all of the licence categories individually and includes other specified information;
- (b) APRA must take certain steps to increase awareness of the licence back and opt out provisions provided by APRA, including publishing a plain English guide and launching an education campaign; and
- (c) APRA must implement a revised ADR scheme to be managed by an independent facilitator. The scheme must offer informal resolution, mediation, expert opinion and binding determination to licensees and members. The ADR scheme must incorporate a consultative committee to provide feedback and other advisory input to APRA and to the facilitator.

If the ACCC is minded to approve APRA's Application, it is critical that it imposes additional checks on APRA AMCOS' monopoly power. Mood Media believes that the following additional conditions should be imposed on APRA AMCOS:

- (a) an obligation on APRA to have regard to the following in determining proposed fee changes:
 - (i) whether any fee increases are driven by increases in costs;

⁵ See: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/collective-bargaining-notifications-register/mood-media-australia-pty-limited-stingray-group-inc>

- (ii) whether licensees will be receiving in essence the same services as they have in the past, or whether they will be receiving additional or enhanced services commensurate with any proposed fee increase; and
 - (iii) the impact on any proposed fee increases on licensees' operations, including the ability of licenses to pass on any fee increases to their customers; and
- (b) an obligation on APRA to provide more transparency to licensees about proposed fee changes and its fee setting methodology; and
- (c) an obligation on APRA to provide detailed reasons for any proposed price increases and engage in meaningful consultation with BMS suppliers about proposed price and non-price terms in licensing arrangements.

Additionally, Mood Media considers that it may be appropriate for:

- (d) APRA to submit its fee setting methodology to the ACCC for approval, or for the ACCC to otherwise have oversight of the appropriateness of APRA's fee setting methodology; and / or
- (e) for the ACCC to have a role in assessing the reasonableness of proposed price increases if agreement cannot be reached between APRA and BMS suppliers.

Mood Media has also had the benefit of reading the Australian Hotels Association's (**AHA**) submission regarding the APRA Application⁶, and is supportive of the recommendation that the current voluntary Copyright Collecting Societies Code of Conduct be made mandatory and enforceable, including with respect to the following terms:

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

Additionally, it may be appropriate for the authorisation to be granted for a shorter period of time, such as three years, given the uncertainty introduced by the upcoming "OneMusic" licence reforms. The impact of OneMusic is largely unknown, introducing additional uncertainty with respect to the effectiveness of proposed conditions.

⁶ See: <https://www.accc.gov.au/system/files/public-registers/documents/AA1000433%20-%20Revocation%20and%20Substitution%20of%20A91367%20-%20A91375%20-%20Australasian%20Performing%20Right%20Association%20Limited%20-%20Submission%20by%20Australian%20Hotels%20Association%20-%202022.02.19%20-%20PR.pdf>

Mood Media would welcome the opportunity for further engagement with the ACCC in relation to APRA's Application. Please let us know if you require further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Steve Hughes', written in a cursive style.

Steve Hughes
Managing Director