



OUT19/854

Gavin Jones
Director, Adjudication
By email: adjudication@accg.gov.au

Dear Mr Jones

Australasian Performing Right Association - application for reauthorisation

The Office of the NSW Small Business Commissioner (OSBC) is focused on supporting and improving the operating environment for small businesses throughout NSW. The OSBC advocates on behalf of small businesses, provides mediation and dispute resolution services, speaks up for small business in government, and makes it easier to do business through policy harmonisation and reform.

The OSBC is pleased to contribute to the consultation concerning the Australian Performing Right Association's (APRA) application to the ACCC for reauthorisation of its functions as a copyright collecting society.

APRA continues to occupy a position of market dominance to the point of monopoly in licensing the copyright in composition of published music in Australia. We recognise that the monopolies enjoyed by many copyright collecting societies, including APRA, are to a large extent functional if not natural. Certainly, the copyright licensing process would be unwieldy to the point of frustration in the absence of such bodies. Moreover, the overwhelming majority of artists on whose behalf APRA carries out these functions are small businesses for whom royalties are an important source of income.

But equal regard must be had to the hundreds of thousands of licensee businesses in NSW and across the country, relying on licensing for their own legitimate purposes. Most, too, are small operations.

It is therefore essential that license structures and administration strike an equitable balance between the interests of artists and licensees; and it is in the pursuit of this principle that we provide the following comments and recommendations.

'OneMusic' licence reforms

APRA's request for reauthorisation arrives in the shadow of 'OneMusic' – the ongoing licence consolidation and reform initiative led by APRA AMCOS and the Phonographic Performance Company of Australia. While OneMusic will not finalise its reforms until mid-2019,¹ the initiative appears certain to result in major change to music licensing across a multitude of industries.² The OSBC is supportive of OneMusic in that it aims to streamline the confusing, fractured licence requirements that many small business licensees must adhere to.

¹ OneMusic (2018), '[Licence info](#)'

² OneMusic (2019), '[Consultation documents](#)'

However, a number of licensee representative groups continue to express concerns with an increase in fees that would be payable under proposed OneMusic licences.³ OSBC has received complaints from individual small businesses to the same effect. We are also concerned by uncapped fee structures in some draft OneMusic licences, potentially affecting small licensees.⁴

Of course, the impact of OneMusic on licensees may only be properly assessed once new licences are finalised and in place. However, it may be appropriate that the ACCC impose new or varied conditions on the authorisation sought by APRA in light of outstanding issues arising from OneMusic following implementation.

We therefore recommend that the ACCC reauthorise APRA for a period of less than the five years provided in the current authorisation. We note that both the reauthorisation process and OneMusic are set to conclude in mid-2019.⁵ We suggest an authorisation of three years from that point in time would allow licensees ample time to properly identify recurring issues arising from OneMusic, and afford collecting societies and the regulator the opportunity to properly assess and take action as required.

Recommendation: The ACCC should grant the requested reauthorisation for a period of three years.

Licence methodologies and distribution

The OSBC is concerned that APRA does not disclose the methodologies it uses to design fee structure, either at present or under proposed OneMusic licences.⁶ Nor does it make public the monies it returns to artists as rights holders - choosing only to publish its overarching distribution rules and practices.⁷ The Productivity Commissioner has also expressed these concerns regarding collecting societies as a whole.⁸

The opaque approach taken by APRA to licence design and royalty distribution may allow it to exploit its monopoly status. As licensees have no practical choice but to contract with APRA,⁹ it may pass on inefficiencies, or increase fees without returning monies to creators proportionally. For example, under a draft OneMusic restaurant licence, a small dining room seeking to play background music would be required to pay \$4.13 per day of trading.¹⁰ It is not possible to determine whether this fee might not be lower but for inefficiencies in the operations of the relevant collecting societies, or whether it represents price gouging relative to the proportion of that fee returned to the relevant artists. Nonetheless, a small business would have little choice but to contract under the licence. Making fee methodologies and details of payments to creators available would expose any such practices to public and regulatory scrutiny. Exposure would serve as a clear disincentive against this behaviour.

³ OneMusic (2019), '[Hotels \(Including Accommodation Providers, Dedicated Music Venues And Casinos\) And Nightclubs - Notification Regarding Live, Featured, and Recorded Music for Dance Use](#)', p. 1; The Shout (2018), '[Proposed OneMusic licence fees a concern for hoteliers](#)'; Smart Company (2018), '[Music fees: New structure released for cafes and restaurants amid cost concerns](#)'; Smart Company (2018), '[Music in stores: Licensing fees set to increase as "illogical" system causes headaches for business owners](#)'

⁴ OneMusic (2018), '[Fitness, exercise and wellbeing providers and instructors consultation – final position paper](#)', p. 3; OneMusic (2018), '[Dance and performance instructors and schools – final position paper](#)', p. 2; OneMusic (2018), '[Function convention and conference centres – our consultation with you](#)', p. 2

⁵ OneMusic (2019), 'Licence info'

⁶ OneMusic (2019), '[Consultation documents](#)'

⁷ APRA AMCOS n.d., '[Distribution rules and practices](#)'

⁸ Australian Government Productivity Commission (2016), *Intellectual Property Arrangements, Productivity Commission Inquiry Report No. 78*, p. 160

⁹ ACCC (2014), '[Determination – Application for revocation and substitution of authorisations](#)', p. ii

¹⁰ OneMusic (2018), '[Dining - Music Licensing Second Consultation](#)', p. 5

Disclosure of the methodologies and the monies paid to creators would also allow small businesses and their representatives to engage more constructively in consultations on licence reforms. Under the present system, licensees are largely restricted to advocating around their capacity to pay under one proposed fee structure as opposed to another. Returning to the OneMusic dining licence example, it is impossible to determine why the nightly fee is \$4.13. However, if APRA were required to disclose their methodologies in designing fees, and the proportion they return to creator rights holders, licensees could advocate holistically around a fee's merit and equity. This would assist in making licensing fairer for all stakeholders.

In our engagement with the review of the Code of Conduct for Copyright Collecting Societies, the OSBC has supported potential reforms that would address these transparency issues.¹¹ Given the Code has significantly broader ambit than any conditional authorisation issued to a single collecting society, Code reform remains the OSBC's preferred response. However, both the outcome of the Code review, and the Commonwealth's response, remain indeterminate. In the absence of an eventual outcome supportive of reforms to address these uncertainties on a broader scale, the ACCC should consider doing so by way of conditions attached to the authorisations provided to collecting societies.

We note that the process relating to APRA's request for reauthorisation will likely include an additional consultation period in May 2019.¹² We anticipate that, at that point, the review of the Code of conduct will have concluded. This will allow the OSBC to make a specific recommendation in relation to any condition addressing transparency issues which might attach to the authorisation.

Recommendation: The ACCC should consider attaching conditions to the authorisation, to address issues around transparency in relation to licence design methodologies and revenue distributions (in lieu of reforms to the same effect arising out of the review of the Code of Conduct for Copyright Collecting Societies).

To discuss this submission, please contact Blane Simpson, Advisor, Advocacy and Strategic Projects, on [REDACTED] or [REDACTED].

Kind regards

[REDACTED]
Robyn Hobbs OAM
NSW Small Business Commissioner
15 February 2019

¹¹ Office of the NSW Small Business Commissioner (2018), *Review of the Code of Conduct for Copyright Collecting Societies*, pp. 4-5

¹² ACCC (2019), *Australasian Performing Right Association Ltd application for revocation of authorisations A91367 – A91375 and substitution of new authorisation A1000433 – interested party consultation*, p. 2