

19 June 2024

Tess Macrae  
Director | Competition Exemptions Branch | Mergers, Exemptions & Digital Division  
Australian Competition & Consumer Commission

**BY EMAIL –** [REDACTED]

Dear Ms Macrae

**AA1000661 - APRA AUTHORISATION – RESPONSE TO INTERESTED PARTY SUBMISSIONS**

I refer to Ms Hobbs' email dated 24 May 2024 requesting APRA's response to the third party submissions published on the ACCC website.

APRA does not propose to respond individually to each submission, but rather to address a number of themes that emerge from the submissions generally, and to address some specific issues. If the ACCC would be assisted by a different approach, or by a more detailed response to any particular submission, please let me know.

We note that many of the interested parties support or do not oppose APRA's continued authorisation. A number of those interested parties, including the Australian Hotels Association and Clubs Australia, represent significant numbers of licensees and potential licensees. The AHA says that "the information available and the licence application process is relatively easy to use and understand". Clubs Australia notes that "per negotiations in 2019, Clubs Australia was able to come to a mutually-acceptable outcome with APRA regarding the OneMusic tariff structure and fees for clubs".

A number of themes emerge from the interested party submissions, as follows:

**Transparency generally**

APRA understands the importance of transparency for governments, public authorities, and many other bodies. APRA accepts that its own operations are appropriately the object of certain transparencies and believes that the measures introduced by APRA, including as a result of its ACCC authorisations over many years, have significantly increased the transparency of APRA's processes. This is confirmed by a number of interested parties including the Australian Digital Alliance. Of course, APRA has dealings with many private organisations and individuals including members and licensees who have a reasonable expectation that their personal and commercial in confidence information will be protected.

APRA's submissions with respect to the form of conditions that are directed towards increased transparency are not intended to indicate that APRA in any way wishes to reduce the level of transparency that it currently provides over its operations. Rather, APRA seeks to reduce its administrative burden of complying with prescriptive conditions that by their nature do not permit the adaptation of practices to developments in communications practices and technology. APRA seeks to

adopt best practice in transparency to the extent it is compatible with the commercial interests of its individual members and licensees.

APRA's Distribution Rules and Practices are publicly available. The Report of the Code Reviewer is also published each year. In compliance with its conditions of authorisation, APRA also publishes plain English guides, including fee transparency guides, for each of its OneMusic licence scheme components, an annual transparency report (including in relation to distribution), and a report on the use of its ADR facility.

### **Transparency of licence fees**

Those interested parties who refer to transparency appear to be primarily concerned about transparency as to how APRA arrives at its tariffs and whether individual members are being appropriately compensated for music use. A number of interested parties state that APRA should be more transparent in its activities, but do not identify how that should be achieved.

To the extent that interested parties wish to see more transparent information about how tariffs are determined, APRA says that the process is necessarily complex. APRA seeks to value the rights it controls by reference to appropriate benchmarks including decisions of the Copyright Tribunal, other licence schemes, and overseas rates where applicable. It also consults with industry when reviewing tariffs. It has endeavoured to describe this process in the fee transparency guides. APRA's music licensing business is a sophisticated and complex one that is largely reflective of methods and approaches that exist in every Berne Convention country throughout the world. The mere fact that rate setting is complex does not mean that prices are unreasonable.

Whenever a licence scheme is referred to the Copyright Tribunal (**Tribunal**), APRA sets out its basis for the proposed charges and other terms in great detail – this is a complex and dense undertaking, and APRA submits it would be inappropriate and onerous to be required to provide that level of information for every licence component that it offers. When proposing licence fees, whether under licence schemes or individual licences, APRA always has regard to the approach that is likely to be taken by the Tribunal if the matter were to be referred, based on Tribunal jurisprudence. APRA notes that decisions of the Tribunal often reflect the matters contained in the ACCC Guidelines, which are also matters to which APRA has regard.

As part of a detailed submission about the OneMusic events licence, Live Performance Australia says that there was a lack of transparency about how the model was derived. In fact, there were detailed consultation materials. As LPA notes, the negotiations have been protracted and are ongoing. The whole of the LPA submission is inconsistent with the allegation that APRA acted as a monopoly and imposed terms on LPA members. LPA describes a process in which OneMusic released a first consultation paper in May 2019, and a second in December 2021 setting out a revised scheme following consultation. Following further consultation, the scheme was again revised in August 2022. LPA's dispute, as is clear from its submission, is with the PPCA component of the licence scheme. It is for that reason that APRA has agreed to license events on an APRA-only basis, contrary to the LPA claim. APRA will make available all materials associated with the events licence consultation and LPA negotiations.

In any event, as the LPA submission also makes clear, the APRA component of the licence scheme is unchanged from before OneMusic, and is not in dispute.

LPA's comments regarding the unavailability of direct licensing are not supported by evidence. Events promoted by LPA members are one of the licensing areas where direct licences are most often and

effectively utilised. APRA is unable to comment on unsubstantiated anecdotes about the experiences of unidentified individual LPA members.

To the extent that LPA raises issues about dramatic context licensing, APRA notes that it does not control dramatic context rights exclusively, but rather licenses as agent for certain of its members. A large number of musical works are licensed directly by music publishers, and in addition other publishers have lists of works for which publisher approval for use must be sought. There is no lack of transparency about what is and what is not dramatic context. The rights are excluded from the grant of rights under the APRA Constitution. APRA further notes that LPA's concerns regarding dramatic context are, again, primarily related to the PPCA rights.

In response to those interested party submissions that call for greater scrutiny of APRA's prices, APRA says that its public performance licence schemes have all been the subject of industry consultation as part of the OneMusic implementation. As part of that process, each tariff has been considered by APRA and discussed with industry. Any licensee is entitled to refer licence schemes and individual licences to the Tribunal, which is a fee free and generally no-cost jurisdiction. APRA's media and broadcast licences are negotiated with sophisticated and well resourced parties, who are also entitled to refer schemes and licences to the Tribunal.

### **Transparency of distribution arrangements**

The way that APRA allocates its net distributable revenue is published in its Distribution Rules and Practices. APRA also publishes a plain English guide to its distribution arrangements. For members, there has been a substantial improvement in the amount of distribution information that is available through the new writer and publisher member portal, as well as individual assistance for members with respect to understanding their distributions.

Those interested parties that wish to see more transparency over distribution do not explain what information they wish to see. Commercial Radio & Audio, for example, wishes to have more transparency around distribution. Its members overwhelmingly report music use on a census basis, and their licence fees are distributed accordingly.

It would be inappropriate for APRA to publish information about the amounts allocated to identified individuals and organisations, because that information is commercial in confidence information about their income and the value of their musical works.

### **Transparency of operating costs**

Some of the interested parties say that APRA's expenses are too high. None of the interested parties has indicated by what benchmarks they have reached this conclusion.

The APRA Board, being comprised of members, has an avid interest in the reduction of costs. Expenses are scrutinised by management, the Board (including an independent Board financial adviser), an independent internal auditor RSM, and the external auditor KPMG.

As a music rights management organisation participating in the worldwide system of performing rights licensing, APRA is judged by its members and affiliated societies, by its expenses to revenue ratio. There are powerful incentives for APRA to tightly control its costs. However, APRA notes that some interested parties also seek, for example, more transparent and accurate distributions including

through increased use of music recognition technology – this is an expensive undertaking and necessarily involves increased expenditure. APRA is dealing with unprecedented amounts of data, it is investing in cyber security, it is providing a more nuanced and accurate distribution and a better user experience for members and licensees, mostly through its technology expenditure.

### **Opt out/licence back**

APRA has a well-publicised and accessible opt out and licence back procedure. Members regularly avail themselves of the right to manage their own works, including for live events and uses such as music on hold. Most licensees do not want to deal with individual APRA members – LPA’s frustration with dramatic context licensing is evidence of that fact.

### **OneMusic selling practices**

The Australian Childcare Alliance has made detailed allegations regarding OneMusic selling practices. In relation to the ACA submission, APRA notes that the “Fact Sheet” attached to the submission is not a document that was prepared by OneMusic. In fact, it appears to have been created by lawyers who presumably act for the ACA. OneMusic was provided with a copy of the document, but not with an opportunity to correct its errors. APRA notes that there are limited opportunities for OneMusic staff to obtain factual information regarding music use in childcare centres, and that social media use and music on hold are publicly available evidence of usage.

### **Member submissions**

The third party submissions from APRA members relate to individual disputes that have been resolved either through negotiation or through ADR. APRA has more than 119,000 members and believes that the extremely low number of negative member submissions suggests broad member satisfaction with APRA’s conduct.

### **Independent review of the ADR scheme**

APRA has a number of comments in relation to the Report.

### Terminology

*Dispute/complaint:* Although the Report discusses the treatment of complaints under the Code of Conduct for Collecting Societies, there are places in the Report where the terms “complaint” and “dispute” appear to be conflated (for example on p31). The delineation between complaints and disputes is clear – the Scheme was established for the purpose of resolving disputes and the Code was established for the purpose of disclosing complaints, and both terms are defined. Accordingly, it is APRA’s respectful view that in discussions of the current function of the Scheme, only “disputes” should be considered.

### Purpose of the Report

The 2020 Authorisation sets out the objectives and functions of the Independent Reviewer, in Schedule D. APRA accepts that the review can have a broad scope, but notes that the Report must include a review of the operation and performance of the Scheme and the performance of the Facilitator, in accordance with Condition C3 *and the Scheme’s objective*

*of resolving Disputes in a timely, efficient, and effective manner* (emphasis added). APRA is respectfully concerned that the Report focuses less on whether disputes that were in fact referred to the Scheme were resolved in a timely, efficient, and effective manner, and more on the efficacy of those criteria, and the Scheme's performance against "more conceptual expectations that are less easily quantifiable" (p19). In short, the "input this Review has received from Scheme users and from others is unanimous in its reported satisfaction with the Scheme itself and the way in which the Scheme and its Facilitation team handle matters referred to it" (p27). APRA notes that the responses to the Review were extremely limited.

### Other matters

#### *Complaints handled by APRA and/or referred to the Code Reviewer*

APRA notes that the Reviewer has identified a benefit in effectively broadening the scope of matters referred to the Scheme, even if only for information purposes. APRA does not agree that complaints about APRA's compliance with the Code of Conduct are an appropriate matter for consideration by the Scheme. The Code of Conduct is an industry negotiated and accepted framework for dealing with complaints of a specific nature. It is unclear what the benefit would be to have materials duplicated for the Scheme, with potential conflicting analyses of the relevant complaints by the Scheme and the Code Reviewer.

In relation to potential disputes that are resolved internally by APRA, APRA does not understand what information the Reviewer is seeking to identify. If a dispute is not referred to the Scheme, by definition it is not a dispute. In relation to the suggestion that the Scheme could be expanded to include debt recovery matters, APRA does not understand the benefit of such a proposal. APRA's debt collection activities are limited to instances where existing licensees have failed to pay amounts owing, after lengthy attempts to secure payment, including by entering into payment plans. They are not matters where there is a dispute regarding the basis for payment. Collection of monies owed is a normal part of the operations of any business. For such matters to be required to be referred to the Scheme would be to cause further delay in the recovery of monies owed. APRA does not share the Reviewer's belief that the costs of the Scheme would be lower than the costs of debt recovery.

### Knowledge of the Scheme

APRA is always keen to provide readily accessible information regarding the Scheme to as wide a group of licensees as possible, and regularly reviews its activities in that regard. It is grateful for the suggestions for improvement set out in the Report.

The Review sets out the information that is available on the APRA and OneMusic websites, and notes that APRA extensively communicates information about the Scheme to members and licensees. APRA is concerned that the reported "feedback' regarding a lack of awareness amongst licensees does not reflect the actual extent of information provided to licensees.



Yours sincerely

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Partner

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