

**COLLECTIVE BARGAINING NOTIFICATION BY:  
MOOD MEDIA AUSTRALIA PTY LTD AND STINGRAY GROUP INC**

**Notifying party**

**1. Details of the notifying party**

**1.1 Name, address (registered office), telephone number, and ACN**

**Name:** Mood Media Australia Pty Limited, on behalf of itself and Stingray Group Inc. (together, the **Notifying Parties**)

**Address:** Wharf 10, Pirrama Rd, Pyrmont NSW 2009

**Telephone:** + 61 2 8514 8400

**ACN:** 058 714 177

**1.2 Contact person's name, telephone number, and email address**

Ross Zaurrini  
Partner, Ashurst  
+61 2 9258 6840

[ross.zaurrini@ashurst.com](mailto:ross.zaurrini@ashurst.com)

Tihana Zuk  
Senior Associate, Ashurst  
+61 2 9258 6343

[tihana.zuk@ashurst.com](mailto:tihana.zuk@ashurst.com)

**1.3 Description of business activities**

**Mood Media Australia Pty Limited**

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 system solutions. It operates in over 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.

**Stingray Group Inc.**

Stingray Group Inc. (**Stingray**) is a global provider of curated direct-to-consumer and business-to-business music, media and technology services. Stingray's head office is in Montreal, Canada and as at November 2018 Stingray had around 1,200 employees worldwide. Stingray has business units dedicated to providing the following offerings: karaoke products, audio channels, concerts and shows, music and videos, radio channels, music apps and business services. Relevantly, Stingray's business services unit supplies, among other things, background music services to businesses.

Since, and as a result of, the following acquisitions in Australia, Stingray has been able to offer a portfolio of music products and services (including background music services) across all platforms to Australian businesses and industries operating in the retail, hospitality and fitness sectors:

- In December 2015, Stingray acquired Digital Music Distribution Pty Ltd (**DMD**), a leading provider in Australia of digital music services to broadcasters and other media suppliers and brand partners. DMD offers linear, subscription and brand promotion services across a wide range of music catalogues from leading major and independent record labels. DMD currently operates 29 audio television channels for Foxtel, Australia's largest Pay-TV provider.
- In July 2017, Stingray acquired two Australian providers of in-store media solutions, SBA Music Pty Ltd and Satellite Music Australia Pty Ltd.

#### 1.4 Email address for service of documents in Australia

Documents can be sent care of Ross Zaurrini at [ross.zaurrini@ashurst.com](mailto:ross.zaurrini@ashurst.com).

#### Details of notified conduct

#### 2. Type of conduct

The notified conduct is for collective bargaining (section 93AB of the *Competition and Consumer Act 2010* (Cth)). The notified conduct does not include a collective boycott.

#### 3. Details of notified conduct

##### 3.1 Description of notified conduct

Mood Media and Stingray are, relevantly, background music suppliers (**BMS**). This involves supplying background music that is played in retail outlets, venues, business reception and customer waiting areas or hold-music on the telephone, via various delivery platforms including physical delivery (eg CDs), digital downloads and streaming.

The supply of background music requires BMS to have relevant rights to musical works that they, in turn, supply as part of their offering to their customers. BMS obtain such rights by entering into licence agreements with rights-holders.

BMS operating in Australia must negotiate music licences with APRA AMCOS, consisting of the Australasian Performing Rights Association Limited (**APRA**) and Australasian Mechanical Copyright Owners Society Limited (**AMCOS**), historically two separate organisations, but today operating as a joint alliance<sup>1</sup>. The ACCC has previously found that APRA "has a virtual monopoly in respect of performing rights licences in Australia".<sup>2</sup> Further relevant background is set out below.

Mood Media and Stingray propose to collectively negotiate the terms and conditions of music licence agreements to be entered into between each of them and APRA AMCOS, including as to licence fees.

Participation in the notified conduct will be entirely voluntary and no party will be compelled to participate. Mood Media and Stingray will negotiate collectively with APRA AMCOS, and each will then decide whether to enter into a licence on the negotiated terms with APRA AMCOS. Mood Media and Stingray will also be able to negotiate individually with APRA AMCOS if they choose to do so. The notified conduct will not extend to Mood Media and Stingray engaging in any collective boycott conduct.

<sup>1</sup> Consisting of the Australasian Performing Rights Association Limited and Australasian Mechanical Copyright Owners Society Limited, historically two separate organisations, but today operating as a joint alliance. See: <http://apraamcos.com.au/about-us/what-we-do/>

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

### **Relevant background**

In Australia, APRA AMCOS (a music rights organisation and collecting society) provides a centralised means for granting copyright licences to organisations who wish to play, perform, copy, record or make available APRA AMCOS' members' music. APRA AMCOS represents over 100,000 members who are songwriters, composers and music publishers.<sup>3</sup> APRA AMCOS provides licences to organisations, including BMS, and distributes royalties to its members.

The Phonographic Performance Company of Australia Limited (**PPCA**) also licences BMS. PPCA is a national non-profit organisation that represents record companies and Australian recording artists. PPCA grants licences for the broadcast, communication or public playing of recorded music, such as CDs, records and digital downloads, or music videos. PPCA collects licence fees and distributes them to Australian recording artists registered with PPCA.

BMS require two types of music licences in order to supply background music to their customers:

- licences covering the copyright in a song, being the lyrics and composition. This licence is available from APRA AMCOS<sup>4</sup>; and
- licences covering the copyright in the recorded version of the musical work, such as the sound recording. PPCA provides this licence.

In mid-2019, a new joint initiative between APRA AMCOS and PPCA, OneMusic Australia (**OneMusic**), will commence. OneMusic will be a single public performance licence covering both sets of rights, aiming to simplify the process for obtaining, managing and paying for music licences. This is expected to further increase the market power (and bargaining position) currently held by APRA AMCOS (and PPCA).

On 6 June 2014, the ACCC granted APRA a five year authorisation to continue arrangements for the acquisition and licensing of music performance rights.<sup>5</sup> Relevantly, in the ACCC's Final Determination, it concluded the following:

*"APRA has a virtual monopoly in respect of performing rights licences in Australia because:*

- *virtually all music owners in Australia are APRA members*
- *members are required to make an assignment of all their current and future works*
- *...*

<sup>3</sup> See: <http://apraamcos.com.au/about-us/what-we-do/>

<sup>4</sup> Historically, APRA and AMCOS offered separate licences – the licence from APRA granted the right to perform the work and communicate it publicly (for example, for performances by cover bands, and communication via the internet), and the licence from AMCOS granted the right to reproduce the work (this covered the mechanical process of, for example, pressing a record or producing a CD with the work, which BMS would supply to their clients). The way that music is consumed has changed dramatically in recent years, with the advent of online streaming and downloads, and BMS have had to adapt their businesses accordingly. APRA AMCOS now offers BMS a single licence that covers the right to reproduce the work and communicate it publicly, which enables BMS to provide a stream or downloads of works to their clients (from BMS' customers' perspective, essentially the same services that they have historically acquired from BMS, but delivered digitally rather than via a CD).

<sup>5</sup> The authorisation expires on 28 June 2019. APRA has applied for re-authorisation of its arrangements for the acquisition and licensing of the performing rights in its music repertoire ("Australasian Performing Right Association Ltd application for revocation of authorisations A91367 – A91375 and substitution of new authorisation A1000433", submitted on 24 December 2018), for a period of five years.

- ... by generally offering users blanket licences (albeit that users may be able to negotiate discounts off blanket licence fees) APRA reduces incentives for music owners and users to negotiate performing rights other than through it, as long as those users still have some residual requirement to access APRA's repertoire
- ... there are still significant entry barriers to alternative collective societies being established. ..."<sup>6</sup>

In the ACCC's Final Determination of APRA's authorisation, it also noted that a number of licensees submitted that a lack of competitive constraints on APRA would result in APRA setting unfair licence fees and terms. The ACCC considered pricing to be a public detriment, stating that:

- "APRA's exclusive licensing arrangements strengthen its monopoly position and ability to impose terms relatively free from competitive constraint."<sup>7</sup>
- The ACCC also noted that, as a consequence of being a single entity to administer rights collectively, and other barriers to entry, "APRA will have market power in both the acquisition and supply of performing rights."<sup>8</sup>

### **APRA AMCOS' proposed introduction of a new licence fee formula**

APRA AMCOS' music licences have historically been granted on a 'blanket basis', in that they give the user, such as Mood Media or Stingray, rights in respect of APRA AMCOS' entire repertoire. Licence agreements are typically several years' duration, and for BMS, 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.

Mood Media's licence agreement with AMCOS was terminated by AMCOS with effect from 20 September 2018, and Stingray's expired on 30 September 2018, and each of the parties is in the process of negotiating new licences with APRA AMCOS (with an initial term of 2 years, and rolling 1 year periods thereafter).

In early 2018, APRA AMCOS informed Mood Media, Stingray and other BMS that it was proposing to introduce a new licence fee structure based on "per venue" rates, and subsequently provided draft agreements to each of Mood Media and Stingray based on such a structure and rates. Mood Media and Stingray expect that the new proposed licence fee structure (and rates) proposed by APRA AMCOS will require them to pay substantially higher licence fees to APRA AMCOS than has historically been the case (and than is the case in other countries in which the parties operate). They are concerned that this will have a significant, detrimental impact on each of their businesses in Australia because fee increases of this magnitude cannot be passed on to their customers in the current environment (as to which, see section 7 below), potentially rendering certain activities and arrangements with customers uneconomical.<sup>9</sup>

APRA AMCOS have sought to explain and justify the proposed increase in licence fees by saying that the basis on which the previous licence fee was derived is out of date and the uses permitted under the new licence will be broader than permitted under the previous licence (for example, it will allow the supply of music via digital means such as downloads

<sup>6</sup> The ACCC's Final Determination for Authorisation numbers A91367-A91375, lodged by APRA, page 31, paragraph 207.

<sup>7</sup> The ACCC's Final Determination for Authorisation numbers A91367-A91375, lodged by APRA, page 36, paragraph 220.

<sup>8</sup> The ACCC's Final Determination for Authorisation numbers A91367-A91375, lodged by APRA, page 32, paragraph 209.

<sup>9</sup> **CONFIDENTIAL INFORMATION REDACTED**

and streaming). Ultimately, however, the means by which BMS customers receive their BMS service will not change the amount that those customers are willing to pay for the service. Indeed, many customers will expect that a digitally delivered service will be cheaper and more efficient to provide than a physical service.

Mood Media and Stingray have each, separately, informed APRA AMCOS of their concerns with the proposed new licence fees, including that APRA AMCOS is seeking to impose significant increases in licence fees in circumstances where there has been no equivalent increase in the revenue that Mood and Stingray have been able to secure from use of the music. It is not clear to what extent APRA AMCOS has taken these concerns into account. To date negotiations between Mood Media and APRA AMCOS, and Stingray and APRA AMCOS, have been conducted separately, without success.

Mood Media and Stingray wish to negotiate licence fees and other licence terms with APRA AMCOS collectively, in an endeavour to negotiate more favourable terms than they may be able to negotiate individually, to ensure the ongoing viability of their operations in Australia.

Mood Media and Stingray have delayed any further negotiations with APRA AMCOS until the ACCC has considered this notification.

### **3.2 Relevant documents detailing the terms of the notified conduct**

Not applicable.

### **3.3 Rationale for the notified conduct**

The notified conduct will enable Mood Media and Stingray to pool their currently very limited bargaining power in their negotiations with APRA AMCOS, which the ACCC has recognised has a virtual monopoly in respect of performing rights licences in Australia, and with whom Mood Media, Stingray and other BMS operating in Australia must contract in order to provide their services to customers. It is noted that APRA AMCOS itself is an aggregation of bargaining power, allowed by reason of the ACCC's authorisation process.

It is hoped that, by negotiating collectively with APRA AMCOS, Mood Media and Stingray:

- (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 each of them individually; 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 (see section 7 below for further details).

### **3.4 Time period relevant to the notified conduct**

Mood Media and Stingray are proposing to negotiate licence agreements with APRA AMCOS in the immediate to short term, which are expected to be of at least two years' duration, with licence fees to be set up-front for the term.

### **4. Provide documents submitted to the notifying party's board or prepared by or for the notifying party's senior management for purposes of assessing or making a decision in relation to notified conduct and any minutes or record of the decision made**

Not applicable.

**5. Provide the names and/or a description of the persons or classes of persons who may be directly impacted by the notified conduct (including targets in collective bargaining) and detail how or why they might be impacted**

APRA AMCOS will be impacted (see description above, in section 3.1). Together, Mood Media and Stingray will have greater bargaining power, and may be able to achieve lower licence fees and more favourable licence terms, than if they were to negotiate with APRA AMCOS separately.

Customers of BMS services will be positively impacted if collective negotiation results in lower licence fees payable by Mood media and Stingray than is currently proposed by APRA AMCOS. This is because any such result will allow Mood Media and Stingray to make more competitive offerings in its supply of background music services to customers, than would otherwise be the case. Lower operating costs for customers of BMS may be passed on to consumers in the form of lower prices of products offered by customers.

Other existing and potential BMS may be positively impacted if collective negotiation results in lower licence fees payable by Mood Media and Stingray than is currently proposed by APRA AMCOS. Even though other BMS will not be part of the negotiations, the licence fees payable by Mood Media and Stingray may be relevant to setting future rates by APRA AMCOS, and in any future proceedings in the Copyright Tribunal that require rate setting by reference to market rates.

**Market information and concentration**

**6. Describe the products and/or services supplied, and the geographic areas supplied, by the notifying parties. Identify all products and services in which two or more parties to the notified conduct overlap (compete with each other) or have a vertical relationship (eg supplier-customer)**

As described in section 3 above, Mood Media and Stingray provide in-store media solutions on a global scale. Relevantly, in Australia, Mood Media and Stingray are BMS, providing background music services to a wide range of business customers, ranging from large ASX-listed organisations with multiple venues to small businesses with one site.

**7. Describe the relevant industry or industries. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process**

***Relevant industry participants***

As described in section 3.1, APRA AMCOS is the intermediary body that supplies music licences to BMS, enabling them to use content created by music artists in the background music services offerings. In turn, APRA AMCOS pays royalties to the music creators whose music was used by BMS.

There are many BMS in Australia, including:

- 8Track
- ARN
- Aurora Jukeboxes
- Band Trax
- Birdland Music Library
- Go Llama/Habitat
- Imagesound (Music Styling)
- Instore Sound
- Mall Audio
- Profile Audio Branding
- Profile Music Australia
- QSIC
- Readymade
- Rhythmic Bytes

- Buzz Digital Multimedia
- CEAD FM
- Craig Williams
- crowdDJ
- DAT Media
- Deluxe Pax Entertainment
- Digijuke
- DMD
- Eat Musik
- eJukebox
- Encore;
- Go Go On Hold
- Mandoe Media Pty Ltd
- Marketing Melodies
- MCG (McGirvan Media)
- Mediaheads
- Mediaplay
- Messages On Hold
- Mighty Music Machine
- Music Concierge
- Mustard Music
- Nightlife Music
- PC Music
- Playnetwork
- POS Music
- Smartpay Australia
- Soundmark
- Sound Proof
- Soundtrack Your Brand
- Stewart Jukeboxes
- storePlay
- StreamLink
- Superjuke
- Twenty5eight
- Visual Sounds
- Zoo Business Media<sup>10</sup>

### **Relevant industry background**

#### *Introduction of customer based streaming models*

Technological developments in the background music supply industry have resulted in the growth of digital music markets in Australia, impacting the supply and operation of traditional background music services. The background music services industry is highly competitive with low barriers to entry. This has been heightened by digital disruption in Australian and overseas markets.<sup>11</sup>

However, not all customers have yet moved to new and growing technologies and, therefore, the current market contains a wide range of music delivery platforms. Relevantly, some customers continue to demand physical supply of background music, and Mood Media and Stingray are able to cater to that demand.

Disruption in the background music industry has resulted in the introduction of new customer based interactive streaming models. Spotify is an example of a customer based streaming service, which benefits from a simplistic service model and lower fixed costs. The rise of and increase in customer based streaming models has resulted in streaming providers supplying instant and an unlimited availability of music. This has impacted the industry for background music services by placing enormous pressure on the price of background music services.

#### *Viability of more traditional BMS models*

More traditional background music services models, such as those employed by Mood Media and Stingray, are finding it increasingly difficult to compete with non-traditional

<sup>10</sup> See: <http://apraamcos.com.au/music-customers/background-music-suppliers/background-music-suppliers-list/>

<sup>11</sup> For example, in the ACCC's Final Determination of APRA's authorisation it was recognised that "music recognition technology is rapidly evolving and will become increasingly affordable". See the ACCC's Final Determination for Authorisation numbers A91367-A91375, lodged by APRA, page iii.

models, particularly due to increases in fixed costs and reduction in users, subscriber rates and average revenue per user (**ARPU**). Traditional BMS are experiencing reductions in price points, and reduced margins. There is constant and increasing pressure to reduce fees to retain existing customers and attract any new customers in an increasingly competitive market.

In this context, increases in licence fees sought to be imposed by APRA AMCOS cannot be passed onto customers and would need to be absorbed by Mood Media and Stingray in order for Mood Media and Stingray's offerings to remain competitive in the market. In order to continue to offer competitive services and operate viably in Australia, it is important that reasonable licence fees are negotiated now, including so as to set a reasonable benchmark for future negotiations. If uneconomical licence fees are introduced, the entirety of the background music industry will suffer now and in the future.

#### *Overseas response*

APRA AMCOS' proposed licence fees are significantly higher than overseas counterparts. Overseas collecting societies are aware of the increasing difficulty for BMS to compete with non-traditional models. In the United States, by way of example, publishers, composers and songwriters demand and earn between 2% and 4% of music revenues in consideration for the mechanical right in the musical composition. Unlike its overseas counterparts, APRA AMCOS appears to have been unwilling to take into account the business models of (and pressures faced by) traditional BMS and the lower comparative rate schemes that exist throughout the world.

### **8. In respect of the overlapping products and/or services identified, provide estimated market shares for each of the parties where readily available**

There are no available public metrics of market shares of BMS in Australia, or data on which the parties could reliably estimate their market shares.

### **9. Describe the competitive constraints on the parties to the proposed conduct, including any likely change to those constraints should authorisation be granted. You should address:**

#### **9.1 Existing or potential competitors**

The parties face, and will continue to face, vigorous competition from a large number of BMS currently operating in Australia (see section 7 above), as well as those employing new technologies and digital modes of delivery.

#### **9.2 The likelihood of entry by new competitors**

As noted above, the barriers to entry are low, as evidenced by the large number of BMS currently operating in Australia.

The negotiation of lower licence fees by Mood Media and Stingray may increase the likelihood of new competitors entering the market.

#### **9.3 Any countervailing power of customers and/or suppliers**

As noted above, APRA AMCOS has a virtual monopoly in the acquisition and supply of performing rights to music. The notified conduct will, it is hoped, help rebalance the bargaining power between APRA AMCOS, on the one hand, and Mood Media and Stingray, on the other.

#### **9.4 Any other relevant factors**





Not applicable.

### **Public benefit**

**10. Describe the benefits to the public that are likely to result from the notified conduct. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits**

The notified conduct is likely to result in the public benefits set out below.

- (a) Improved efficiency through sharing transaction costs, such as negotiation and music licence agreement drafting costs, between Mood Media and Stingray in respect of negotiations with APRA AMCOS.
- (b) Better inputs into licence terms relative to individual negotiations. Negotiating collectively may enable Mood Media and Stingray to have a greater ability to negotiate reduced fees and more favourable terms. In turn, Mood Media and Stingray will be able to offer more favourable terms to their end customers.
- (c) Lower licence fees will mean that Mood Media and Stingray can continue to offer competitive services to end customers and continue to viably operate in the background music industry. This will ensure that the market remains competitive resulting in greater choice and potential costs savings for customers.

### **Public detriment including any competition effects**

**11. Describe any detriments to the public that are likely to result from the notified conduct, including those likely to result from any lessening of competition. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the detriments**

There is unlikely to be any meaningful public detriment for the reasons set out below.

- (a) Participation in the notified conduct is voluntary. Mood Media and Stingray will be able to choose whether to participate in negotiations, enter into music licence agreements on negotiated terms, and will also be able to negotiate individually with APRA AMCOS if they choose to do so.
- (b) The notified conduct does not include any collective boycott conduct.
- (c) The notification is only on behalf of two BMS, and there are many other BMS operating in Australia.
- (d) Mood Media and Stingray will continue to negotiate with end customers separately on price and non-price terms, and otherwise continue to compete vigorously.

### **Contact details of relevant market participants**

**12. Identify and/or provide contact details (phone number and email address) for likely interested parties, such as actual or potential competitors, customers and suppliers, trade or industry associations and regulators**

The purpose of the notification is to engage in collective bargaining with APRA AMCOS. APRA AMCOS' details are as follows:

**Name:** APRA AMCOS  
**Telephone:** 02 9935 7900  
**Email:** [apra@apra.com.au](mailto:apra@apra.com.au)

Other BMS may be interested. Please see item 7 for a list of other BMS operating in Australia.

**Any other information**

**13. Provide any other information you consider relevant to the ACCC's assessment of the notified conduct**

Not applicable.

**Additional information for collective bargaining conduct only**

**14. Confirm that the notifying party is not a trade union, an officer of a trade union or acting at the direction of a trade union**

Mood Media is not a trade union, an officer of a trade union or acting at the direction of a trade union.

**15. Provide details (name, phone number, email address) of the persons who are current members of the group (contracting parties) on whose behalf the notification is lodged. If relevant, identify the classes of persons who may become contracting parties in the future and on whose behalf the notification is lodged**

**Name:** Stingray Group Inc.  
**Telephone:** 1800 025 687  
**Email:** [supportau@stingray.com](mailto:supportau@stingray.com)

Contact persons are listed in section 1.2 above.

**16. Confirm each contracting party reasonably expects to make one or more contracts with the targets for the supply or acquisition of the relevant goods or services and the value of each contract will not exceed A\$3 million (or any other amount prescribed by regulation) in any 12 month period. Provide details of the basis for that expectation**

Mood Media confirms that its music licence agreement with APRA AMCOS will not exceed A\$3 million in any 12 month period.

Stingray confirms that its music licence agreement with APRA AMCOS will not exceed A\$3 million in any 12 month period.

**Declaration by notifying party**

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).



Signature of authorised person

MANAGING DIRECTOR - MOOD MEDIA AUSTRALIA PTY LTD  
Office held

STEVE HUGHES  
(Print) Name of authorised person

This 1st day of February 2019