



INDEPENDENT
HIGHER EDUCATION
AUSTRALIA

IHEA SUBMISSION

**CONSULTATION ON THE
AUSTRALASIAN PERFORMING RIGHT
ASSOCIATION'S APPLICATION FOR
AUTHORISATION BY THE AUSTRALIAN
COMPETITION AND CONSUMER
COMMISSION**

18 March 2024

IHEA Submission

Consultation on the Australasian Performing Right Association's Application for Authorisation by the Australian Competition and Consumer Commission

Introduction

Independent Higher Education Australia (IHEA) welcomes the opportunity to provide feedback on the Australian Competition and Consumer Commission (the ACCC) received an application for authorisation from the Australasian Performing Right Association Ltd (APRA).

The application for authorisation relates to APRA's proposed arrangements for the acquisition and licensing of the performing rights in its music repertoire. The proposed arrangements cover:

- **Input Arrangements:** APRA requires its members to assign to it the performing rights in all the works owned and controlled by the member, subject to the resignation, opt-out and licence back provisions of APRA's Constitution.
- **Reciprocal Terms:** APRA's reciprocal arrangements with overseas collecting societies by which, in large part, the collecting societies grant each other the exclusive right to license works they respectively control.
- **Blanket Licenses:** APRA grants licences for users to perform in public or communicate to the public any of the works in its repertoire; and
- **50% rule:** As a member of the International Confederation of Societies of Authors and Composers, APRA is required to allocate at least 50% of royalties in relation to any work to the composer/author of the work.

Licensing Arrangements

Education and Training Providers (including private and independent providers)

In addition to providing music licenses to schools, universities, and TAFEs, APRA AMCOS (Australasian Mechanical Copyright Owners Society (AMCOS) Performing Right, together with PPCA (Phonographic Performance Company of Australia Limited) and ARIA (Australian Recording Industry Association) have in place an Education and Training Providers Music Licence to ensure these institutions are appropriately licensed for the use of music in their classrooms, on their campuses and at their events.

The institutions covered by this agreement include a range of private and/or independent education and training providers, which offer a variety of courses and programs, from higher education to vocational training and skills development.

Activities Covered by the License

Playing music on campus and at education provider events:

- Live music performances and background music at your ticketed concerts and events (for example open days and student events) with a ticket price of \$40 or less.
- Live music performances and background music at graduation ceremonies (no ticket price cap).
- Background music in teaching spaces and around campus, including office and administration areas
- Telephone on-hold music.

Event recordings and audio-visual content:

- Making recordings of provider events where music is played.

- Including music in audio–visual content for use in courses.
- Sharing event recordings and audio–visual content with students and staff, including via secure online platforms.
- Streaming provider events on your own website and/or posting certain event recordings to websites and social media pages.

Cost of License

Licence Fees are based on the aggregate of annual rates multiplied by either student enrolment numbers or fulltime–equivalent students (FTE), whichever is greater.

Different rates applied to students enrolled in general courses and students enrolled in Music, Media and Creative Arts Courses (MMCAC).

General Courses (All Students enrolled across all courses, other than those enrolled in Music, Media and Creative Arts Courses)

The greater of:

- \$1.54 per General Enrolment; and
- \$3.85 per General FTE.

Music, Media and Creative Arts Courses (MMCAC) (Students enrolled in performing arts, creative arts, dance, music technology, music production, animation, gaming, media and film courses and any course that includes the use of music as part of its formal curriculum)

The greater of:

- \$3.74 per MMAC Enrolment; and
- \$9.35 per General FTE.

The licence is subject to an annual minimum fee of \$125.

Rates include 10% GST. The GST–exclusive component of the rates will be increased by CPI each Licence Year after the first Licence Year in accordance with clause 6.5 of the Terms and Conditions (The Licensors may increase the GST–exclusive component of any fees or rates on 1 January of each Licence Year in accordance with the increase in the Consumer Price Index between the two previous September Quarters).

This information is available on the APRA AMCOS website.

Universities

APRA AMCOS, together with ARIA and PCCA have a licence agreement, called the Universities Music Licence, in place with Universities Australia to cover all 39 member universities for a broad range of music uses.

Activities Covered by the Licence

Playing or performing live or recorded music:

- At university events where the ticket price does not exceed \$40.
- At graduation ceremonies (no limit on ticket price).
- As background music in university spaces and businesses that are 100% owned by the university or an affiliated institution.
- In fitness centres and childcare centres that are open only to staff and students.
- By student unions, associations, guilds and clubs that are 100% owned by the university, so long as those activities are permitted within the agreement.
- For educational purposes.
- As on hold music on the university telephone system.

Making audio and video recordings that capture live and recorded music:

- Of university events and graduations.
- To live stream university events and performances on the university's website and official social media channels.*
- To use for university purposes, including in a course of instruction or for engaging with the university community.
- By synchronising music with unrelated visual elements in post-production, i.e.: incorporating recorded music into another unrelated visual work.*
- To be shared on the university's website or learning management system.*

* Sharing videos online is subject to some important limitations that are set out below

The optional print music licence available in the Universities Music licence covers universities that have opted into the licence to:

- Reproduce print music, lyrics and tablature in physical or digital formats for use by students and staff for educational purposes or performance at a university event.
- Store digital copies of sheet music on university platforms.
- Share digital and physical copies with students and staff.

Activities that are Not Covered Under the Licence

Play and perform live or recorded music:

- At university events where the ticket price exceeds \$40.
- In a Dramatic Context.

Perform in its entirety:

- A Grand Right Work. Grand Right Works are dramatico-musical works, or ballets, where the music and lyrics have been expressly written for the production, e.g.: musicals like *Cats* or *Wicked*.
- A choral work longer than 20 minutes in duration.

Audio–visual recordings and productions:

- Share videos on university social media channels that capture ARIA sound recordings being played at university events and performances
- Share videos on the university website or social media channels where a sound recording has been synchronised with unrelated visual elements in post–production (e.g.: where a slide show of photos from O–Week or a virtual tour of the campus is overlaid with a sound recording)
- Make any audio or video recordings available for download
- Make or share audio or video recordings for commercial activities, commercial research, advertising, promotion of the university, or any third–party business, organisation, product or service (promotion of student work or in–house research is covered).

The optional Print Music Licence does not include the right to:

- Make copies, transcriptions or transpositions of AMCOS Works from any score other than a legal original owned by the University
- Make arrangements of AMCOS Works, including but not limited to changes of harmonic structure, melody or instrumentation
- Make alterations of any kind to the lyrics associated with an AMCOS Work
- Sell, hire or otherwise make available any copies made under the licence

Recommendation

The information regarding the coverage of licensing agreements for Education and Training Providers and Universities is available on the APRA AMCOS website. However, while there are similarities, there are also a number of differences, of which there may be good reasons and justifications. However, in the interest of transparency, we believe that APRA AMCOS should display information on their website that articulates:

- Why the agreements differ depending on what part of the (tertiary) sector the provider is in.
- Whether the arrangement in place for the 39 universities only pertain to 'public universities'? If so, how are private universities, such as Bond University, Torrens University, University of Divinity, Avondale University treated, and what agreement do they fall under? Clarity about which providers fall where would be beneficial.
- Include cost information to the same level of detail for universities as is articulated for Education and Training Providers. If the costs are different, this should be clearly explained.
- As part of the ACCC's previously granted authorisation to APRA on 13 July 2020 for a period of 4 years (until 4 August 2024), it required APRA to publish its methodology for calculating its licence rates for each licence category. It does not appear that this has been occurring, but we support the publication of the methodology for determining licence rates for each licence category.

Who We Are

Independent Higher Education Australia Ltd. (IHEA) is a peak body established in 2001 to represent Australian independent (private sector) higher education institutions. Our membership spans independent universities, university colleges and other institutes of higher education, all of which are registered higher education providers accredited by the national higher education regulator, TEQSA or associate members seeking registration.

Our Vision is that: students, domestic and international, have open and equitable access to world class independent higher education in Australia, built on the foundations of equity, choice, and diversity.

Our Mission is to represent independent higher education and promote recognition and respect of independent providers as they contribute to Australian education, the Australian economy, and to society in general. We achieve this by promoting continuous improvement of academic and quality standards within member institutions, by advocating equity for their staff and students, and by delivering services that further strengthen independent providers' reputations as innovative, sustainable, and responsive to the needs of industry and other relevant stakeholders in both higher education and vocational education and training. IHEA's commitment is to excellence, productivity and growth in independent higher education being delivered through a trusted Australian education system underpinned by equity, choice, and diversity.

IHEA members have different missions, scales, and course offerings across the full AQF range (Diplomas to Doctorates). Members comprise:

- Four private universities (Bond University, Torrens University, University of Divinity, Avondale University).
- Five University Colleges (Alphacrucis University College, Moore Theological College, Australian College of Theology, Sydney College of Divinity and SAE Institute).
- Seventy two not-for-profit and for-profit institutions of Higher Education; and related corporate entities.

IHEA members teach approximately 74 percent of the students in the independent sector (i.e., more than 130,000 students) and educate students in a range of disciplines, including law, agricultural science, architecture, business, accounting, tourism and hospitality, education, health sciences, theology, creative arts, information technology, and social sciences.

IHEA holds a unique position in higher education as a representative peak body of higher education providers. Membership in IHEA is only open to providers registered with the Australian regulator –TEQSA. However, some IHEA members are dual and multi-sector providers who also deliver VET and/or English Language Intensive Courses for Overseas Students (ELICOS) courses.

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Appendix: Terms of Reference



Our ref: AA1000661
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Contact phone: 02 6243 1029 / 03 9290 1414

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19 February 2024

exemptions@acc.gov.au
www.acc.gov.au

Dear Interested Party

Australasian Performing Right Association Ltd – application for revocation of authorisation AA1000433 and substitution of new authorisation AA1000661 – interested party consultation

On 6 February 2024, the Australian Competition and Consumer Commission (the **ACCC**) received an application for authorisation from the Australasian Performing Right Association Ltd (**APRA**). This letter is to invite you to comment. You are welcome to pass this letter on to others who may wish to make submissions.

The application for authorisation relates to APRA's proposed arrangements for the acquisition and licensing of the performing rights in its music repertoire. The proposed arrangements cover:

- **Input Arrangements:** APRA requires its members to assign to it the performing rights in all the works owned and controlled by the member, subject to the resignation, opt-out and licence back provisions of APRA's Constitution;
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A full copy of the application is available on the ACCC's [authorisations public register](#).

Interim authorisation

APRA has also requested interim authorisation to enable it to continue with the arrangements (as described above) in the event the ACCC is still considering the application after 4 August 2024, being the expiry of authorisation AA1000433.

Background

The ACCC previously granted conditional authorisation to APRA on 13 July 2020 for a period of 4 years, until 4 August 2024.

The conditions of this authorisation required APRA to:

- Publish a comprehensive plain English guide that outlines all of the licence categories individually and includes other specified information. (Condition C1)
- Publish its methodology for calculating its licence rates for each licence category. The conditions also provide that if the ACCC is not satisfied that the information published by APRA about how it sets its licence rates is sufficiently clear and detailed, the ACCC can require APRA to appoint an independent person to prepare an independent report explaining APRA's methodologies. The independent report was completed in February 2023 and is available on [APRA's website](#). APRA was also required to publish an explanation of the matters it has taken into account any time it increases a licence rate by more than the rate of growth in the CPI. (Conditions C1 and C5)
- Publish details of accounting and distribution of licence revenue and report on how it monitors music played (including the technology used) and how APRA uses this data for the purpose of determining royalty distributions. APRA was also required to report on the distribution of royalties among its members. (Condition C2)
- Take certain steps to increase awareness of the licence back and opt out provisions provided by APRA, including publishing a plain English guide and maintaining relevant information on its website. (Condition C3)
- Publish an annual transparency report which includes information on rights revenue, APRA's operating costs, distributions to members and amounts received from and paid to overseas collecting societies. (Condition C4)
- Maintain the alternative dispute resolution (ADR) scheme to be managed by an independent facilitator. The scheme must offer informal resolution, mediation, expert opinion and binding determination to APRA licensees and members. The ADR scheme must incorporate a consultative committee, with an independent chair, to provide feedback and other advisory input to APRA and to the facilitator, and to review any complaints about the facilitator or the scheme. APRA was required to take steps to better publicise the availability of the scheme. APRA was also required to arrange an independent review of the ADR scheme after it had been in operation for three years. The final report of the independent review of the ADR scheme is due to be completed in March 2024. (Condition C6)

A copy of the ACCC's 2020 determination granting conditional authorisation is available [here](#).

Making a submission

The ACCC invites you to make a submission on the application for interim authorisation and the substantive authorisation. In making your submission, please provide information, evidence and views about the likely effect on competition and any likely public benefit or detriment, from the proposed arrangements.

Further, the ACCC invites you to outline your experience of the arrangements in place from 13 July 2020 to 4 August 2024 under the previous conditional authorisation. The ACCC would also welcome your views on the public benefits and detriments you consider have actually resulted from the arrangements during the previous authorisation period and the effectiveness of the conditions of authorisation imposed by the ACCC.

Attachment A contains a list of specific questions for APRA's members and licensees (music users) on which the ACCC invites submissions.

If you intend to provide a submission, please do so by **Monday, 11 March 2024**. If you wish to request an extension, please contact us on the details below as early as possible. Submissions after the due date (or after any extension granted) may not be taken into account.

Submissions should be lodged via this [web form](#). Alternatively, if you would like to provide comments orally, please contact Tanya Hobbs or Andrew Ng via the details at the end of this letter to arrange a time.

Your submission is published on the ACCC's Authorisations Public Register unless you have made a request (with reasons) for us to exclude part or all of the submission from the public register – see [Guidelines for Excluding Information from the Public Register](#) for further information about these processes.

Timetable

The ACCC will progress its assessment of the application in a timely manner. An indicative timetable is set out below for your information, and an up-to-date version (including any changes) will be posted on the public register.

Indicative date	Stage in assessment process
6 February 2024	Lodgement of application and supporting submission.
19 February 2024	Public consultation process begins.
11 March 2024	Closing date for submissions from interested parties.
April 2024	Applicant responds to issues raised in the public consultation process.
May/June 2024	Draft determination.
June/July 2024	Public consultation on draft determination including any conference if called.
August/September 2024	Final determination.

This letter has been placed on the ACCC's public register.

If you have any questions or wish to discuss any aspect of this matter, please contact Tanya Hobbs on (02) 6243 1029, Andrew Ng on (03) 9290 1414, or exemptions@acc.gov.au.

Yours sincerely



Tess Macrae Director
Competition Exemptions

Attachment A

This attachment provides a list of specific questions for APRA's members and licensees on which the ACCC invites submissions.

The ACCC also invites comments on any other issues you consider relevant to the ACCC's assessment of this matter.

General:

1. In relation to the ADR scheme which is available for members and licensees to resolve disputes with APRA, please indicate:
 - a. whether you were aware of the existence of the scheme, including the resolution options available to you and the potential costs involved;
 - b. the factors you take into account when considering whether or not to try to resolve a dispute through the scheme; and
 - c. if you decided to try to resolve a dispute through the scheme, whether you were satisfied with the handling and outcome of your matter.
2. The ACCC imposed multiple conditions in its 2020 authorisation that were aimed at improving transparency, including in relation to transparency of licence fees (Condition C1) and distribution of fee income (Condition C2), and clarity regarding resignation, opt out and licence back provisions (Condition C3). In addition, the ACCC required APRA to publish an annual Transparency Report (Condition C4) and could require APRA to provide an independent report about its methodologies for determining licence fees (condition C5). Please explain:
 - a. To what extent have these conditions:
 - i. helped you to make better-informed decisions about your dealings with APRA;
 - ii. improved your ability to negotiate with APRA; or
 - iii. improved APRA's accountability?
 - b. To the extent that the aims of these conditions have not been achieved, what alternative or additional condition/s could be imposed to address this?
3. In 2018, the APRA AMCOS membership voted to change members' voting entitlements in board elections and annual general meetings. Please explain:
 - a. the impact of this change on the composition of APRA's board since 2018;
 - b. whether the current composition of APRA's board (as of the date of this letter) is representative of all APRA members; and
 - c. any suggested further changes to voting entitlements which would improve the representation of smaller, independent members to APRA's board.
4. Have the public benefits of the conduct authorised in 2020 (such as transaction cost savings in negotiation of rights, avoiding costs of having to make changes to APRA

systems, and efficiencies in enforcement and compliance monitoring) changed in recent years, especially given the technological changes in the last 4 years?

5. How do you consider technological changes have impacted on the ability of competitors to APRA to enter the Australian industry? For example:
 - a. Has technological changes lowered barriers to entry for a collecting society operating with a similar or different business model to APRA's?
 - b. Do you consider that the sunk costs to establish specialised knowledge and systems have been lowered, given new technologies available?
 - c. Do you consider that economies of scale and scope, and network effects, have become lower, perhaps for new innovative business models for the granting of copyright licenses in return for royalties paid to owners of the musical works? This could also include a business model that facilitates direct dealing between users and owners of the musical works.
6. Please comment on any other issues you consider relevant to the ACCC's assessment of this matter.

APRA members:

7. In 2020, the ACCC imposed conditions of authorisation requiring APRA to provide transparency about its distribution arrangements (these conditions are summarised in the background section of this letter). This was intended to assist in making APRA accountable to its members, making it more likely that APRA members are remunerated in proportion to the value of actual performance of their works. Please explain:
 - a. to what extent do you think the conditions achieved this objective;
 - b. whether you are better able to understand the relationship between distribution and the value of the performance of your work; and
 - c. any specific information that APRA should provide members to enable them to better understand APRA's distribution arrangements.
8. In relation to the opt out, licence back and resignation arrangements which are available to facilitate direct dealings between APRA members and licensees, please indicate:
 - a. whether you were aware of the availability of these arrangements;
 - b. if applicable, your experience withdrawing your rights through these arrangements; and
 - c. any limitations of the arrangements which may deter or impede your ability to withdraw your rights and engage in direct dealing, including suggested changes which could be implemented to address the concerns.
9. Considering direct dealing as an alternative to obtaining licenses from APRA:
 - a. If you have used APRA's opt out and license back provisions since 2020 to facilitate direct dealing, please indicate the main factors that made direct dealing in those cases a better alternative than obtaining licenses from APRA.

- b. How do you consider technological advances in this area since 2020 impact on the desirability or feasibility of direct dealing as an alternative to obtaining licenses from APRA, e.g. lowering transaction costs of direct dealing?

Licensees:

10. Describe your experience when negotiating and obtaining a music licence(s) from OneMusic, including:
 - a. whether APRA provided a reasonable explanation for the terms and conditions and fees associated with your licence;
 - b. any material changes to the terms and conditions and fees of your licence since OneMusic was introduced and, if so, whether OneMusic provided a reasonable explanation for that change and the outcome of any further negotiations; and
 - c. any issues arising from OneMusic offering a bundled performing rights licence (for example, inadvertent infringement as a result of the discrepancies between APRA's and the PPCA's respective repertoires of performing rights).
11. In 2020, the ACCC imposed conditions of authorisation aimed at requiring APRA to provide transparency about its licensing arrangements (these conditions are summarised in the background section of this letter). Please explain:
 - a. the extent to which the conditions of authorisation have provided greater transparency about APRA's licences and the underlying methodology it uses when setting its licence fees; and
 - b. to the extent the conditions have not improved transparency in this regard, what alternative or additional condition/s could be imposed to address this, including (for example) any further specific information that APRA should provide licensees to enable them to better understand APRA's licensing arrangements.
12. Considering direct dealing as an alternative to obtaining licenses from APRA:
 - a. If you have chosen direct dealing since 2020, what key factors have driven this decision, e.g. specific usages that require access to only a small repertoire of music, ability to negotiate terms and conditions, and/or lower fees paid than going through APRA?
 - b. If you have not chosen direct dealing since 2020, what key factors have driven this decision, e.g. requiring access to a large repertoire of music and/or higher transaction costs than going through APRA?
 - c. How has technological advances in this area since 2020 changed your consideration of direct dealing, e.g. lowering costs of direct dealing making it more desirable or feasible?