

Australasian Performing Right Association Ltd – application for revocation of authorisation and substitution of new authorisation

Submission from Live Performance Australia

Live Performance Australia (LPA) is pleased to submit this submission in response to the Australasian Performing Right Association's (APRA's) application for revocation and re-authorisation.

1. About LPA

LPA is the peak body for Australia's live arts and entertainment industry, with over 400 members nationally. We represent licensees who use music in public. This may include as background music in a venue, and in live performances (e.g. music concerts, festivals, musical theatre, theatre, comedy, dance, opera, cabaret, and circus/physical theatre). Our Members include producers, promoters, venues, performing arts companies and festivals that collectively contribute a significant portion of royalty revenue collected for the public performance of music.

The licences which LPA Members typically seek or hold for the public performance of musical works include (but are not limited to):

- Ticketed Music Events
- Eligible Temporary Music Events
- Ticketed Special Purpose Performances
- Free Music Events
- Dramatic Context

LPA is a Consultative Committee member of Resolution Pathways, the alternative dispute resolution (ADR) scheme established by APRA as a condition of the 2014 and 2019 re-authorisations.

2. Context

An essential part of the live performance of music is ensuring that the performers have the right to publicly perform any music that remains protected by copyright.

Where the performer does not already hold those rights, whether through ownership or licence, licences must be sought from:

- a) APRA in respect of musical works and any literary works normally associated with those musical works where the right to perform in public is owned or controlled by APRA (**APRA Works**); and

- b) where commercial sound recordings are used (e.g. by DJs), record labels or the Phonographic Performance Company of Australia (**PPCA**), in respect of sound recordings owned and controlled by a PPCA licensor and which has been released on a label owned or control, as well as any associated music video (**PPCA Sound Recordings**).

APRA licences both the APRA Works and acts as agent for PPCA in respect of the PPCA Sound Recordings and licenses these together as OneMusic Australia (**OneMusic**).

Although it is the performer, such as a band, that makes the creative decision as to what music to perform, and it is the performer who does the act comprised in the copyright that may require a licence, APRA, both in its own name and as OneMusic creates licensing schemes directed at the promoters/presenters, not the performers.

The last authorisation consultation process occurred in 2019. At that time, OneMusic was newly established and therefore it was too soon for stakeholders to comment on how those arrangements were working.

Since 2019, LPA has been consulting and negotiating with APRA on a new OneMusic Events licensing scheme – i.e. a bundled licence for events. This scheme covers the licences such as Ticketed Music Events, Eligible Temporary Music Events, Ticketed Special Purpose Performances and Free Music Events (**the Events Licence Scheme**). The OneMusic Events consultation process was paused in March 2020 and resumed in November 2021. Negotiations on the OneMusic Events licensing scheme are ongoing.

Paragraphs 3.1 – 3.3 of this submission focuses on LPA's experience negotiating the Events Licence Scheme. Paragraphs 3.4 – 3.9 of this submission makes some more general observations from LPA and its Members about the way in which APRA and OneMusic operate and the difficulties dealing with APRA / OneMusic as effective monopolists causes.

3. Key issues

3.1 Insufficient consultation with industry

Since it was established in 2019, OneMusic has put in place some industry-wide licence schemes, pursuant to which a single licence agreement applies to the use of APRA Works and PPCA Sound Recordings by entire industries.

Between May 2019 and November 2022, OneMusic released a number of so-called 'consultation' papers in relation to the proposed Events Licence Scheme.

On 20 May 2019, OneMusic released its first consultation paper setting out the proposed licence scheme, including the rates, upon which APRA Works and PPCA Sound Recordings could be used at:

- promoted music events and festivals; and
- general entertainment events where music is used but not the primary focus.

On 15 December 2021, OneMusic released its second consultation paper, with a revised licence scheme upon which APRA Works and PPCA Sound Recordings could be used at:

- ticketed promoted events and eligible outdoor festivals;
- dance parties; and
- ticketed special purpose events.

On 31 August 2022, OneMusic released its final position paper, with a further revised licence scheme, upon which APRA Works and PCCA Sound Recordings could be used at:

- ticketed music events and eligible temporary music events; and
- general entertainment events and free music events.

In late September 2022, APRA notified the industry that it was unilaterally terminating the existing industry blanket licence and that ticketed music events would thereafter be subject to a new OneMusic licensing scheme (which was provided by OneMusic in December 2022).

The Final Position Paper did not adequately address issues raised by industry (e.g. an ability to pro rate music use), which led to an addendum being issued in November 2022. In addition, LPA was not provided with any opportunity to provide feedback on the long form licence agreement.

This is in contrast to the Hotel, Pub Tavern or Bar Licence, where there were three rounds of consultation over a three-year period (October 2017, November 2018 and October 2020) and two Final Position Papers (May 2019 and March 2021).

OneMusic then rushed the introduction of the Events License Scheme provided in December 2022, which, amongst other things, was structured so industry participants had to acquire both an APRA Works and PCCA Sound Recordings licence, which imposed additional obligations on licensees in relation to PCCA Sound Recordings even if a licence of those recordings was not required. That scheme came into effect on 1 January 2023, despite some critical issues remaining unresolved.

LPA expressed to OneMusic its concern that OneMusic rushed to implement a licensing scheme without more fulsome consultation and wider industry acceptance of the scheme. The lack of genuine consultation by OneMusic led LPA to apply in March 2023 for authorisation from the ACCC to collectively bargain on behalf of its Members. LPA was subsequently granted authorisation in June 2023.

3.2 Ability to unilaterally exercise market power

As outlined above, in September 2022, shortly after releasing its Final Position Paper, APRA notified the live music industry that the APRA Blanket Event Licence held by National Event Promoters would be terminated on 31 December 2022.

At that time, there was no broad acceptance of the scheme outlined in the Final Position Paper, which had been communicated to OneMusic by LPA and some of its Members. Many of LPA's Members were not prepared to sign the agreement, which was provided in December 2022 to come into effect in January 2023, because they were:

- provided little time to review the new licence terms before the commencement of the new scheme; and
- not prepared to accept terms relating to the use of PCCA Sound Recordings when:
 - it was unclear whether the sound recordings it purported to license were controlled by PCCA Licensors; or
 - no PCCA Sound Recordings are used during the event; or
 - the decision to use sound recordings rests with the artist/performer, and promoters have no control over this; or
 - artists may already hold the rights to use sound recordings, but promoters have no line of sight to these commercial arrangements.

There was no option for an APRA-only licence, and this placed National Event Promoters in a very challenging position of not having a licence to cover the use of musical works during Ticketed Music Events from 1 January 2023.

In circumstances where the ultimate responsibility for whether and how sound recordings are used in a performance and what rights they have in such sound recordings rests with the performer, OneMusic sought to impose new and unreasonable obligations on promoters to demonstrate why no licence was required for the vast majority of live performances.

3.3 Lack of transparency about how the proposed OneMusic Events licensing model was derived

When OneMusic released consultation papers with respect to Events licences, in most cases, the licensing scheme put forward did not revise APRA rates. However, significant changes were proposed for PPCA rates. Despite repeated requests to APRA (on behalf of OneMusic) for further detail, the rationale for setting rates at the proposed level and the underlying modelling about how OneMusic derived the licensing/rates model, this information was not forthcoming.

It was therefore difficult for LPA and its Members to determine whether the proposals put forward by OneMusic were reasonable. The lack of transparency led to protracted (and ongoing) negotiations with OneMusic about the form of the licence scheme.

The lack of transparency from APRA has neutralised any efficiencies that would otherwise have been achieved by the OneMusic licensing model.

3.4 APRA as effective monopolist – unavailability of direct licensing for musical works

LPA Members generally prefer a single point of contact to gain clearances for musical works used within a performance. As such, LPA Members will seek one via OneMusic/APRA.

LPA Members will only deal directly with copyright owners where APRA has advised they do not have the rights to provide clearance. This is often the case with respect to dramatic context, the use of recorded music in a live performance or synchronisation rights for digital broadcast.

While direct dealing may be an option available to licensees in some cases, the reality is some artists/agents do not wish to engage in direct licensing. One Member who tried to do so was referred by the artist/agent back to OneMusic/APRA. Presumably, the artist/agents consider APRA royalties to be more favourable. Thus, given the lack of alternatives, APRA operates ostensibly as a monopoly as a licensing provider.

3.5 Dramatic context licensing continues to cause frustration

APRA does not have the automatic right to provide a licence for musical works used in dramatic context. APRA is only able to act on behalf of those songwriters, composers and music publishers who have agreed for APRA to do so. Otherwise, LPA Members must seek permission directly from the copyright owner.

LPA Members are frustrated by the uncertainty of whether they will receive clearance to use the musical work. This results in a great deal of uncertainty of whether licensees will receive clearance to use a musical work. Oftentimes, approvals or denials are not received until close to the first performance, causing a great deal of stress about whether the show can go ahead.

If a licence is denied for a particular musical work, then:

- a different musical work must be found at the last minute, again causing uncertainty about whether approvals will be received in time; or
- the production needs to be revised to account for the removal of the musical work, creating lots of stress for those involved.

Where a producer knows what works they would like to use in the production, they would like the ability to seek clearances sooner rather than later (rather than six weeks before the first performance).

There is also a lack of transparency about what constitutes dramatic context and the basis on which certain contexts are or are not classified as dramatic. For example:

- All ballet works are automatically classified as dramatic context, including an excerpt of a ballet used in another context; and
- Contemporary dance works fall within dramatic context, but other dance styles do not.

There are instances whereby a show has been developed, in good faith and following consultation with APRA about the show's concept, as a concert/music event, only to find out in the lead up to the first performance that APRA considers the show to be dramatic context. LPA Members feel there is an arbitrary classification of shows as dramatic context, based primarily on marketing material and no consideration given to additional information such as running sheet or script.

LPA dance company members have noted the substantial increase in licensing fees since OneMusic was established. Previously, dance companies could access a blanket PPCA dance company licence, paid as a yearly subscription and which provided coverage for the use of master recordings in PPCA's repertoire. This PPCA licence no longer exists and there is no OneMusic blanket licence for this, as the music use is considered dramatic context. In addition, LPA Members found that they were bounced around between OneMusic and PPCA, as one entity would advise the LPA member to seek a licence through the other entity, and *vice versa*. This caused confusion about the licensing process and where to go to seek licensing approval.

3.6 Confusion about licensing requirements and costs

Some LPA Members have reported that they find the licensing requirements complex and confusing. There is often confusion, particularly amongst independent producers and artists, about who is responsible for securing a licence and what information is required to be submitted.

Some Members also advised they found the information provided online confusing, in terms of determining which licence applies and how to calculate licence fees.

Many LPA Members believe licensing costs are too high. All licences are subject to a minimum fee. For small shows, the minimum fee (particularly if the minimum fee for use of PPCA sound recordings also applies) represents a significant cost relative to the average takings. Members (principally those that present works considered dramatic context) have also queried the disparity in rates between Ticketed Music Events and dramatic context.

3.7 Distribution of royalty fees

LPA Members raised concerns about the distribution of royalty fees.

One Member was shocked to learn that the independent artists and musicians they had chosen to be in the performance did not receive royalties from that performance. This Member was not asked

to provide a set list, and therefore the artists/musicians whose musical works were used in the performance could not be identified for distribution of any royalties. This Member was advised by OneMusic that the licensing fees collected were amortised into the greater budget.

3.8 Potential to streamline licensing administration

Some LPA Members present many shows through the year. They believe the licensing process could be streamlined if there was a portal, in which 'standard' information (e.g. name of organisation, ABN, address) is captured in the licensee's account. This would make the process of seeking a licence more efficient, as licensees would no longer need to input the same information for each event.

3.9 Alternative Dispute Resolution scheme

LPA is not aware of any circumstances since the last reauthorisation of the ADR scheme being used by an LPA Member or licensee that presents live events.

Some Members reported being unaware of the ADR scheme.

Therefore, we are unable to comment on the effectiveness of the ADR scheme.

4. Conclusion

The lack of transparency and poor consultation process throughout the OneMusic licensing negotiation are of significant concern to our Members and must be considered in the process of a new authorisation. This process has incurred unavoidable and significant expense and time for our Members. We request the ACCC carefully consider OneMusic's conduct throughout this process and apply stringent consultation and transparency requirements in any reauthorisation.

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