



SUBMISSION TO THE ACCC
AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LTD
APPLICATION FOR NEW AUTHORISATION

A. About CRA

Thank you for providing this opportunity to Commercial Radio & Audio (**CRA**) to make a submission to the Australian Competition & Consumer Commission (**ACCC**) in relation to the application for authorisation (**Application**) by the Australasian Performing Right Association Ltd (**APRA**). The Application relates to APRA's proposed arrangements for the acquisition and licensing of the performing rights in its music repertoire. Pursuant to the Application, APRA is seeking the revocation of the ACCC's authorisation AA1000433 (**Existing Authorisation**) and its replacement with proposed authorisation AA1000661 (**Proposed Authorisation**).

CRA is the industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 260 member stations and represents the entire Australian commercial radio industry. 220 of CRA's member stations are based in regional and rural areas.

Commercial radio, whether AM, FM or DAB, plays an essential role in ensuring that Australian communities have access to local news, Australian music, emergency information, community information and entertainment. No other platform offers such a range of live, local and Australian voices in such a diverse range of Australian communities.

Commercial radio dominates commercial listening in Australia, noting:

- 87.2% of Australians aged 10 to 24 tune in to commercial radio weekly, for an average of 11 hours and 26 minutes per week;
- breakfast radio attracts nearly 8.7 million listeners; and
- overall, in 2023, 12.25 million Australians aged 10+ listened to commercial radio across the five major metro markets.¹

The Deloitte Access Economics 2023 Connecting Communities Report² highlights the important economic and social contribution that commercial radio broadcasters make to Australia, through the provision of radio and audio services. Commercial radio broadcasters deliver trusted, local content to Australians all over the country.

The royalties that commercial radio broadcasters pay to APRA for their use of musical works are a significant cost incurred by those broadcasters and therefore CRA has a keen interest in ensuring that the Proposed Authorisation is balanced, with appropriate mitigations to address the public detriments which arise from APRA's monopoly position in the licensing of musical works for broadcasting purposes.

B. CRA's support for the Proposed Authorisation is qualified

CRA supports APRA's Application, given that APRA's role as a collecting society, and its blanket licensing arrangements, provide a convenient means for the collection of music royalties from commercial radio broadcasters (and others) and the distribution of those royalties to rights holders when done on an efficient, transparent and accountable manner.

¹ CRA data available here: <https://www.commercialradio.com.au/Industry-Resources/Media-Releases/2023/Commercial-radio-listening-ends-2023-at-an-all-tim>

² Available here: <https://www.commercialradio.com.au/RA/media/General/Documents/CRA-Deloitte-Connecting-Communities-2023-Report.pdf?ext=.pdf>

However, we have a number of concerns with the Application, and the terms and conditions that APRA has requested for the Proposed Authorisation.

In short, we do not agree with APRA's statement that industry concerns about anticompetitive conduct and effects flowing from APRA's operations are misconceived and/or overstated.³ CRA has very real concerns in these areas that should be addressed by the ACCC through the Proposed Authorisation.

CRA believes it is very important that the issues the media sector (and the ACCC) have previously raised in relation to APRA's privileged position as a monopoly in Australia are addressed in a real and meaningful manner so that there is not a loss of efficiency due to the absence of competition.

Given the cost pressures that the commercial radio sector faces, including from the need for broadcasters to invest in technological change, the ACCC should review the Application with a view to ensuring that APRA operates in a manner that is efficient, transparent and accountable. Unless the ACCC is satisfied in relation to these matters, it should not authorise the proposed conduct by APRA.

Our concerns with the Application, and the Proposed Authorisation, broadly relate to:

- **Addressing monopoly power:** There is the potential for APRA to misuse its market power, including by APRA potentially charging music royalties fees that are in excess of what would be achieved in a competitive market and/or engaging in protracted dispute processes in setting those fees. The ACCC, in considering the Application, should critically consider how best to address the market power that will arise through the Proposed Authorisation, having regard to the ACCC's focus on modernised and effective regulation of entities that enjoy monopoly positions in the contemporary digital environment. As the ACCC has stated, efficiencies in the context of monopolies are essential to ensuring Australia's productivity growth.⁴
- **Promoting efficiency, transparency and accountability:** Ensuring efficiency, transparency and accountability regarding the collection and distribution of music royalties is key. All stakeholders, and the broader Australian community, are entitled to receive assurance that music royalties are set by APRA at an appropriate level and are collected and distributed by APRA to the relevant rights holders in an efficient, transparent and accountable manner.

In return for the privileged position that APRA would enjoy through the proposed authorisation, the ACCC should ensure that the conditions it imposes require transparency and accountability and assist in facilitating efficiency and cost reductions (thereby increasing the amounts paid to rights holders rather than royalties being applied to the administration costs of APRA). We would hope to see royalty rates reduce in the near future, including as a result of the implementation of technology

³ Paragraph 7 of the Application.

⁴ See the ACCC's submission to the Treasury's Competition Review, available from here: <https://www.accc.gov.au/inquiries-and-consultations/accc-submissions-to-external-consultations>. While the comment was made in the context of monopoly infrastructure, it applies equally to all monopolies throughout the economy.

enhancements, rather than continually increase, as appears to have been the case at the current time.

- **The bigger picture:** The ACCC should take into consideration structural changes in the media sector in Australia in determining the terms and conditions on which the Proposed Authorisation may be granted. APRA should not be protected, through the monopoly proposed to be enshrined in the Proposed Authorisation, from the cost pressures facing the media sector. This again points to the need for conditions to be imposed on APRA that drive efficiencies.

Each of these issues is addressed in this submission.

C. The need for increased public safeguards to prevent misuse of monopoly position and driving transparency, efficiency and accountability

As the ACCC is fully aware, APRA is a copyright collecting society. It is necessary for Australia's commercial radio broadcasters to pay royalties to APRA in order to broadcast musical works.

In the Existing Authorisation, which APRA is seeking to replace with the Proposed Authorisation, the ACCC highlighted the very real competition issues and concerns that are raised by the monopoly position held by APRA. As noted by the ACCC, the exclusivity granted to APRA under the Existing Authorisation, which is proposed to be continued by the Proposed Authorisation, removes the constraints that otherwise would arise in a competitive environment, where direct arrangements could be entered into. Those concerns remain as valid today as was the case in 2020, when the Existing Authorisation was granted.

There are two key points that we wish to raise:

- **High royalties:** As the ACCC is also aware, it remains the case that many stakeholders are very troubled by the music royalty fees that APRA charges – those fees are too high. The ACCC should address this as part of the current Application process and assess what steps could be taken to mitigate this concern. CRA's view is that the steps outlined below could assist in this regard:
 - There would be significant merit in the ACCC imposing a mandatory requirement in the Proposed Authorisation for APRA to take into consideration the ACCC's Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration (**ACCC Guidelines**)⁵ in negotiations with licensees such as commercial radio broadcasters. The approach in the Existing Authorisation of simply recommending that this is done may be insufficient to promote appropriate negotiation practices by APRA.
 - Additional transparency obligations should be imposed on APRA as to how music royalties are determined, and how royalties received by APRA are distributed. This will assist in limiting inappropriate royalty fee increases. Further transparency will allow a greater level of scrutiny of the efficiencies implemented by APRA in its administrative processes, leading to *greater* efficiencies in those

⁵ Available on the ACCC's website, here: <https://www.accc.gov.au/by-industry/telecommunications-and-internet/copyright-regulation/copyright-guidelines-2019b>

processes. Consequential lower costs arising from the implementation of efficiencies should ensure that there is less pressure for APRA to seek to impose higher payments on users of musical works such as commercial radio broadcasters. We have commented further on transparency in a separate section of this submission.

- **Copyright Tribunal should not be seen as providing protections for licensees:** The ACCC has stated that the Copyright Tribunal is intended to act as a constraint on the level of fees charged by collecting societies such as APRA. The Copyright Tribunal does not effectively perform this function. Its processes are legalistic, it is expensive to take a dispute to the Copyright Tribunal and its processes take an excessively long time. The Copyright Tribunal effectively operates as a court, meaning that taking a dispute to the Tribunal creates significant uncertainties for commercial radio broadcasters, who can have no confidence that the Tribunal will in fact make determinations that are reasonable in all of the circumstances. The inability of the Copyright Tribunal to act as a constraint adds further support for the need for other action to be taken by the ACCC to ensure that the rates of music royalties imposed by APRA are reasonable.

D. Requirements for transparency and accountability

The Existing Authorisation recognises that there are public detriments arising from an absence of transparency in APRA's arrangements, particularly as to how licence fees are determined by APRA and then distributed by APRA, including the system used to ensure that performers receive their rightful royalties.

APRA has done little to reduce its administrative costs over time, given the absence of effective scrutiny. The higher the administrative costs of APRA, the less money that is paid to rights holders and the greater the incentive for APRA to increase royalties to address concerns from rights holders in relation to the payments they receive.

The Application states that APRA's expenses to revenue ratio was 15.7% or 18.38% if foreign revenue is excluded for the financial year ending 30 June 2023.⁶ In other words, if foreign revenue is excluded, APRA spent *almost 20% of its revenues* on expenses. This level is unsustainable for the users of musical works and unfair to rights holders.

While CRA applauds APRA's intention to reduce its expenses to 11% of its revenue, even that percentage is too high in the current digital age where technological changes should allow for significant automation of APRA's work. With such high expenses, there is no justification for reducing levels of transparency – ongoing scrutiny is important. Stakeholders (including both rights holders and musical works users) are entitled to examine APRA's financial and administrative practices and increased transparency is the only means by which APRA may be held accountable and incentivised to improve its practices.

For this reason, CRA is very concerned by the suggestions of APRA that transparency requirements should be removed from the Proposed Authorisation. CRA urges the ACCC to, at a minimum, retain the transparency requirements contained in the Existing Authorisation. In the view of CRA:

⁶ Paragraph 42 of the Application.

- APRA should be required to publish not only its methodology for calculating its licence rates but also publish explanations where it increases *any* fees by more than CPI;
- APRA should continue to publish an annual transparency report, which contains information on rights revenue, APRA’s operating costs, distributions to members and amounts received from and paid to overseas collecting societies. In fact, there would be benefits in obligations being imposed on APRA requiring such reports to include more detailed information, particularly on expenses and why those expenses were incurred; and
- APRA should continue to publish details of its practices related to accounting and distribution of licence revenue; how it monitors music and how it uses that music data; as well as reporting on the distribution of royalties.

In summary, given the ongoing concerns regarding the level of fees imposed by APRA through its monopoly position, and the ongoing high level of administration costs that are incurred by APRA, we also recommend that the ACCC considers strengthening the transparency requirements of the Existing Authorisation.

E. Requirements for efficiencies against a background of significant structural changes in the media sector

The structural changes in the media sector in Australia cannot be ignored in the context of the ACCC’s consideration of the Application.

As the ACCC recognised as long ago as 2017-2019, when it completed its groundbreaking Digital Platforms Inquiry, traditional media businesses, including commercial radio have suffered in the context of the rise in popularity of digital platforms. The popularity of those platforms has led to a marked and continuing fall in advertising revenues for media businesses, including commercial radio.

Commercial radio plays an essential role in ensuring that Australian communities have access to local news, Australian music, emergency information, community information and entertainment. Many commercial radio broadcasters, particularly in regional and rural areas, have struggled and there is no doubt that local media in those areas is already diminished. The ACCC should consider this bigger picture in determining the terms and conditions on which the Proposed Authorisation is granted.

At the current time, in aggregate, the commercial radio industry pays just under \$40 million in copyright fees. This equates to approximately 5% of industry revenue and of course a much greater proportion of profit. Higher copyright fees, which would be facilitated by the ACCC approving the Proposed Authorisation without the additional guardrails recommended in this submission, would be unsustainable for the sector.

It is submitted that the Application cannot be considered in isolation of the broader media sector changes and that the ACCC should closely examine the nature and adequacy of the conditions that are imposed as part of the Proposed Authorisation. CRA is of the view that industry have raised real and legitimate concerns as to the entitlement of APRA under the Existing Authorisation and rather than remove the conditions the ACCC previously imposed, as APRA has sought, CRA encourages the ACCC to look more closely at what are appropriate

conditions to drive transparency, efficiency and accountability in a modern digital media environment, before the ACCC should be satisfied as to granting the Proposed Authorisation.

CRA would be very happy to discuss this submission further with the ACCC.

Commercial Radio & Audio

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