Australian Competition and Consumer Commission
23 Marcus Clarke St
Braddon ACT 23600

ACCC ref: AA1000661

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Via web form

Dear ACCC

I am an owner of a business that uses recorded music as a component of its business. Previously, I have held positions with the Australian Venues Association, which represented businesses across Australia that used music in some way. Both of these experiences have required in-depth communication with APRA AMCOS PPCA (together OneMusic, as OneMusic is APRA's authorised representative) and to learn as much as possible about how copyright, licensing, and the copyright collection societies functioned.

This submission focuses on the proposed conditions of re-authorisation contained within the submission in Section F and APRA's Proposed Conditions in Attachment 1.

The submission before draft decision, is for the benefit of providing a perspective to the ACCC on the conditions of re-authorisation. To be clear, I am not opposed to APRA AMCOS reauthorisation. There is certainly utility in having a single point to contract with for licensing music. The monopoly position must be tempered to ensure that Australians are not taken advantage of where an organisation and its management has carte blanche to do as it likes.

Conditions of re-authorisation

Referring to paragraph 173 the comments by APRA should be disregarded. The entire purpose of the conditions are so that they are not dispensed with after some 'period of time'. With respect, it is fanciful to think that if parameters are not set for organisations, the management of those organisations will continue 'business as usual', never seeking to change.

The fact is that monopolies enjoy super profits, because of the lack of competition. Conditions are therefore not set on monopolies to be efficient, they are set to curtail the absolute power imbalance that exists. Further, if APRA were sincere about being efficient, it would not levy among the highest fees in the world on Australian businesses.

Referring to paragraph 176, APRA's drafted 'proposed alternate formulations' with its best interests in mind and probably not the market's. APRA's lived experience comes at the cost of untold numbers of licensees and licensors of music. It would have been appropriate for those stakeholder groups to have had a meaningful input of their lived experiences and not just APRA posturing that its current management's experience is representative.

With respect, APRA's application is a 920-page document that would have required a team of people to spend many weeks, if not months, preparing it to submit. Had I had more time and resources, a more fulsome response would have been possible outlining my lived experience and others as well.

Condition C1 – Transparency of Licence Fees

Referring to paragraph 181(a), it is agreed that licence categories can be unclear by what is meant by licence categories. In practice what does occur is that APRA (or OneMusic) try to define it for its own interest.

Regardless of the categories, more clarity is needed as to why music input into a business should be priced differently. For example, why does a music streaming business pay less per use of a song than a restaurant, bar, nightclub, pub, or festival? Why does a restaurant pay a different amount than a nightclub or festival?

Referring to paragraph 181(c), the form of the guide is important, and so is the substance. The requirement for the Guide serves several benefits, including a fixed source of information to compare licence types for each category, transparency, historical reference, global reference and material for a business's information and records.

Referring to paragraph 181(d), perhaps the Guide is longer than the licence itself because it explains the licence. A guide could conceivably be longer than the licence in the same way a recipe will be longer than the ingredients list.

A summary or top-level explanation could also be welcome, if a shorter document is required. Noting that an in depth explanation should not be dispensed with.

Referring to paragraph 181(e), those considering entering into a licence are usually the only parties that receive licence documents. Further, it is unlikely that one consider entering into a licence, it is more the case that one is required to enter into a licence. Guides play the role of reference material for relevant parties, the general public and the public record.

Referring to paragraph 181(g), with respect, the difficulty and questionable value that APRA finds in attempting to describe the process of fee setting to a general audience is immaterial. APRA should have to describe the process. Utility companies can do it, and APRA should also be able to do it.

Referring to paragraph 181(i), APRA's preference for people and businesses to deal with it through a portal should not change the condition, or if it does, it should include portals.

Referring to paragraph 181(j), PDF documents are one of, if not the, most accessible file type across all devices (and time periods) and geographies. Additionally, PDF documents can be made with accessibility features for those with different accessibility from the conventional user. PDF documents also have the advantage that the file type retains the design across devices. Taking APRA's comment at its highest value though, I do agree that multiple file types should be available.

Referring to paragraph 181(l), if a portal is going to be used to formulate a licence, a wholly relevant guide should be generated.

Referring to C.1.(d) The status quo is that the creation and implementation of a licencing scheme are at the discretion of its creator, in this case, APRA.

Once a rate has been deemed reasonable, it applies to the general licence scheme. The current rate appears to continue to be set by reference to the decision in the Nightclub Case (*Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968 (Cth)* [2007] ACopyT 1 88.).

There is no obligation to refer a licence scheme to the Copyright Tribunal for scrutiny and no requirements for a fee to be independently assessed regularly. There absolutely should be and this should be a condition of authorisation. The Nightclubs case, decided in 2007, has set the precedent for the last 17 years when the value of music has changed dramatically.

Those affected by a proposed or new scheme do not have the right to have it preemptively reviewed, and review in itself is prohibitively expensive. Licensing schemes will likely be scrutinised as a matter of law or fact after implementation (if ever).

Licence fees should only be able to be increased at all with approval from the ACCC and not simply because CPI increased. Rather than encouraging more efficient operations, the current regime allows costs to be passed on without meaningful attempts to improve operations.

There should be more than a report; licence fees and schemes should be scrutinised and approved by the ACCC with advice provided by the Productivity Commission, Foreign Investment Commission, and/or the Copyright Tribunal.

Condition C2 – Transparency of distribution arrangements

In addition to C2.5, APRA should detail in its annual publications the specific amounts distributed to each MRMO in foreign jurisdictions that enjoy reciprocal neighbourhood rights.

The transparency report should be emailed to all licence holders within four weeks of publication.

Condition C4 – Annual Transparency Report

Regarding paragraph 191, the utility, at least for this submission's author, is. The transparency of the distribution arrangements should be contained in its condition and should also form an individual component contained within the reauthorisation to ensure that the importance is not under valued at all.

Referring to C4.1(b), there should be additional transparency about the executive management's remuneration.

Referring to C4.1(e), there should be much information provided, including:

1. The amount received from each foreign copyright collection society (similar to C4.1(a)).;
2. The amount paid to each foreign copyright collection society;
3. An outline of the licence schemes (or equivalent) each collecting society uses and how that resulted in the amount paid to OneMusic .

By way of a comment, it is curious that Australia, a country with a relatively small population globally, receives less in total from countries with neighbouring rights agreements than it pays out.

The Transparency Report should include additional information, such as a general transcript that can be agreed on the general nature of the outcomes concerning ADR (the reason will be included below)

Condition C5 – Independent Report on methodologies adopted by APRA in determining licence fees for each licence category

The ADR process should only be required where OneMusic still needs to negotiate in good faith.

The status quo is that the creation and implementation of a licence scheme is at the creator's discretion, in this case, APRA.

There is no obligation to refer a licence scheme to the Copyright Tribunal for security.

There should be more than a report; licence fees and schemes should be scrutinised and approved by the ACCC, Productivity Commission, Foreign Investment Commission, and the Copyright Tribunal.

Once a scheme has been deemed reasonable, it applies as the general licence scheme.

Those affected by the proposed scheme do not have the right to have it preemptively reviewed, and review in itself is prohibitively expensive. New or updated licencing schemes may go unfettered and unchecked until after implementation.

Condition C6 – Alternative Dispute Resolution

I have participated in the ADR process and know of others who have been in the same position. I negotiated an outcome with OneMusic, the terms of which are subject to an NDA.

I know of several others who had the same experience.

There are three main issues with ADR and OneMusic:

1. The ADR in itself is expensive for small businesses. As such the first ADR session should be a less formal conference than a mediation. It could still have a facilitator, which should be at no cost to the licensee or licensor, as the case may be.
2. OneMusic, by the very nature it is a national copyright collection agency, will arrive with two of the most highly skilled lawyers within the copyright practice area and a seasoned veteran of music licensing that works for APRA AMCOS PPCA or OneMusic. Most small businesses cannot justify or afford the expense of briefing a solicitor to attend a mediation with them (or on their behalf), which would conservatively cost at least $3,000 plus GST. They may not even realise that they should or could.
3. OneMusic has been in and is knowledgeable about every ADR and its outcome. This provides them with an asymmetric information advantage that cannot be reached, even by the most well-resourced business.
4. The use of the NDA means that outcomes that are in the public's best interest are not able to be disclosed.

Conclusion

The ACCC plays an important role, and this submission encourages that there should be further oversight of monopoly players in the market

It is important that APRA (and by extension OneMusic) in receiving reauthorisation have conditions placed on its operations to ensure that Australian businesses, consumers, and creative producers are not exploited.

Everyone should have a clear understanding on how money flows to and from Australia with respect to copyright and how the fees are both set and compare with global counterparts.

Kind Regards,

Jeremy Koadlow