



Tiny Tutus Pty Ltd

51 Broadmeadow Road,
Broadmeadow NSW, 2292

Tess Macrae Director Competition Exemptions

23 Marcus Clarke Street Canberra ACT 2601 GPO Box 3131 Canberra ACT 2601

Dear Tess Macrae,

Please accept this letter from Tiny Tutus as an interested party in response to ACCC request for submissions on the application by APRA for interim authorisation and the substantive authorisation.

We welcome ACCC invitations to outline our experience of the arrangements in place from 13 July 2020 to 4 August 2024 under the previous conditional authorisation. Further, we wish to share our views on the public benefits and detriments that have actually resulted from the arrangements during the previous authorisation period and the effectiveness of the conditions of authorisation imposed by the ACCC.

We endeavour to undertake this by making comments and observations as per your Attachment A of your letter dated 19 February. (Your reference AA1000661)

We have copied your questions and provided our response in the following response section in **blue** for clarity.

Kind Regards,

Simone

Simone Cadell

Founder & Managing Director

Tiny Tutus Response Section

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;

Tiny Tutus is aware of the existence of the scheme and has utilised its services in the past. However, our experience has been underwhelming when compared to other Complaints Authorities or Ombudsman's services.

Despite the ACCC considering the alternative dispute resolution scheme largely effective in reducing public detriment arising in other sectors, it has not been as fruitful in the dance studio context. This is despite the ACCC imposing a condition requiring APRA to take steps to better publicise the scheme's availability.

Instead, APRA frequently uses strong-arm tactics towards dance studio owners, with many referred to debt collectors or small-claims court to force payment for music usage. There is no regulatory oversight nor reporting of such actions required to ACCC.

b. the factors you take into account when considering whether or not to try to resolve a dispute through the scheme; and

Time, effort, cost and likelihood of a successful outcome. As APRA had refused any and all efforts to mediate, I had engaged a legal team and were about to lodge our grievance with the Copy Right Tribunal. In response, APRA immediately CANCELLED our music license which would have effectively closed my business, leaving 70 teachers without income while the matter was lodged and heard.

APRA forced us to Resolution Pathways as the only way to play music while my matter was dealt with by the Copy Right Tribunal. Ultimately APRA and Tiny Tutus came to a mutually agreed outcome, however I believe this was only possible due to the legal action I was about to undertake.

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.

Tiny Tutus has utilised the ADR service in the past. Our experience was that the service simply regurgitated APRA's terms of service and pricing structure, which the ADR relies upon to make its own determinations.

Overall, Tiny Tutus can report anecdotally that dance studio licensees are having an increased number of problems in their commercial dealings with APRA.

The current onus is on dance studios to "prove" the appropriateness of APRA's imposed pricing tier determinations. At the moment, dance studio owners do not self-declare their

music usage but rather provide locations, classes, etc, but not the music used to APRA. However, it is APRA's own determination that is, in reality, applied to the business. Frequently, explanations that are devoid of methodology, formulas or calculations to support APRA determination of the fee to be imposed.

For example, APRA offered a 40% discount to studios using syllabus music, but if the studio used syllabus music for 70% of the class, APRA would only offer the 40% discount. Why?

Further, the disparate size of APRA (as an entity), compels dance studios to capitulate to threats of legal action. Many times, when the ADR scheme is utilised to seek relief from such usage calculations, the current complexity in pricing calculations is sufficient enough that independent review is unable to resolve the matter for both parties' mutual benefit.

Our own limited research conducted in the dance studio sector indicates that APRA is failing in its obligation to inform dance studio owners of the dispute process that is available to them. When Dance Studio owners make complaints, they are ignored and given little attention, which rarely results in any action taken. Dance Studio owners are not made aware of Resolution Pathways, and if they do reach Resolution Pathways, mediations or investigations of conduct rarely occur.

Therefore, APRA should be compelled by the ACCC to initiate its own complaint for non-payment using the ADA process to address issues they may have with particular dance studios to allow for independent review prior to any punitive actions undertaken.

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;

Condition C1 – Little to none as licencing fee calculations and methodology have not been provided to the industry in plain English.

Condition C2 – None. No information about the distribution of fee income is provided to (in particular Dance Studio) music licensees.

Condition C3—None. Tiny Tutus can report that it is unaware of any resignation, opt-out, or licence-back provisions regarding OneMusic.

Condition C4 – The mandatory annual Transparency Report published by APRA is not fit for the Dance Studio industry. An example includes APRA claims it relies upon samples and direct reporting of similar industries without disclosing the sample metrics. Issues such as

sample size, composition, assumptions etc are not disclosed. Further, no information regarding direct reporting is evidenced by Tiny Tutus research of other members of the dance industry community. Nor is such direct metrics provided to the industry for validation or review.

Condition C5 – The latest independent report undertaken by C Alexander was to provide an independent report about APRA methodologies for determining licence fees. The independent reviewer came to the following conclusion:

The terms of my appointment state that I may include such recommendations of alternative methodologies for calculating licence fees as I may consider appropriate. I have been reluctant to venture into this area. Methodologies for establishing equitable rates can be the subject of considerable debate and have exercised the minds of the Copyright Tribunal on many occasions, where strongly competing views are advanced. In my view it is not appropriate to propose different methodologies without input from all concerned parties. A methodology which is acceptable to APRA may not be acceptable to licensees and vice versa. Such debates are best dealt with in the course of a mediation or arbitration where the parties have the opportunity to present their views.

The independent reviewer was “reluctant to venture into” the very area in which Condition 5 was implemented in the first place. Their claim that it was inappropriate for them to recommend an alternative methodology was a profoundly weak response and begs the question if the independent review undertaken actually meets the expectation of ACCC intent.

ii. improved your ability to negotiate with APRA; or

There is NO ability for independent Dance Studios to negotiate with APRA as an entity meaningfully. The revenue gained from our industry is insignificant when compared to other venues and industries such as pubs, retail and music venues.

This compounds the lack of transparency in licensing arrangements and fee structures. Licensees and relevant industry associations, in particular, have raised concerns about the level and structure of fees in the past. APRA now plan to introduce additional tiers of class numbers (from 4 tiers to 13 tiers) to scale the rates to reflect usage.

APRA applies this new system to each location rather than music or exposure. This is a direct admission that APRA targets business models (a form of monopoly-driven market manipulation) and significantly increases the complexity via an unexplained “tiered” pricing structure.

APRA is avoiding addressing the root cause of the pricing concerns of the Dance Studio community by not charging licensees for their usage of actual music exposed to the public relevant to their business circumstances. These dance studio businesses are in a unique position to identify precisely:

- a) What particular piece of music is used;
- b) When and how often each piece of music is used; and

c) The exact number of persons exposed to each piece of music.

Despite this, APRA refuses to consider nor negotiate a pricing regime based on this set of information and structure fees based on this disclosure of verifiable information. Instead, APRA relies upon its own estimates and refuses to negotiate alternative approaches, claiming it does not want to give a “special deal” to individual studios.

iii. improved APRA’s accountability?

Lack of clarity, information, data, analysis and methodology surrounding the proposed changes.

To date APRA has not been called on this failure to meet APRA conditions and it is our view that the ACCC has the necessary evidence already to hold APRA in breach of their compliance obligations.

If APRA itself cannot explain to an ACCC independent reviewer their licencing proposal backed by legitimate methodologies, data and analysis, what hope would dance studio owners have during a consultation period to critically examine what is best for their industry?

An independent review of licencing pricing is required as, by APRA's own admission, their licence rates in the dance studio context are insufficiently clear, hence the proposed changes. As APRA has failed to provide the details to enable licensees with a reasonable understanding of the methodologies involved, it is not fit for purpose.

The calculation of the impact of the proposed changes is unclear. The current APRA arrangement of 4 tiers (by their own admission) creates unfair pricing for a small dance and performance school that operates many separate locations and may be at a financial disadvantage compared to a large, single-location dance and performance school.

As stated previously, instead of addressing the root cause of pricing per location to actual exposure rates to students, they have proposed to price based on the number of classes with 13 tiers instead of 4 to determine exposure. This complex formula and the reasoning behind its calculation have not been shared nor juxtaposed with historical calculations to see how this proposed change would impact each dance studio. This makes meaningful “consultation” impossible beyond wholesale rejection of their proposal.

ACCC requires APRA to publish its methodology for calculating licence rates for each category, including descriptions of the data used and any analyses or evaluations undertaken. Their recent consultation paper lacks the majority of the aforementioned required information, analysis or evaluations, further making critical consideration impossible (potentially by design) considering the relative unsophistication of the dance studio industry members.

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?

Therefore, instead of allowing APRA to rush forward with an unexplained, untested, new licencing arrangement with a lack of methodology shared for critical review, *it should be quashed by ACCC.*

Further, *market manipulation* has not been addressed by ACCC and consideration should be made in particular to the dance industry over the unintended consequences of allowing APRA to wield monopolistic power over our sector.

Instead, a robust and independent review should be undertaken on these proposed changes before consultation to ensure the public interest is always protected.

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;

Unclear what impact this had on the Dance Studio sector

b. whether the current composition of APRA's board (as of the date of this letter) is representative of all APRA members; and

Unclear what impact this had on the Dance Studio sector

c. any suggested further changes to voting entitlements which would improve the representation of smaller, independent members to APRA's board.

It's unclear what impact this would have on the Dance Sector. A voting entitlement would provide the industry with an opportunity to have a voice.

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?

Currently, APRA charges high prices to Dance Studio owners and has no practical way for any of the proceeds out of fees to be passed along to the artists who deserve the recognition, as APRA refused to collect music usage data.

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?

The digital age has made this possible, however APRA suggestions of using music sampling devices in private studios and business raises immense privacy and national security concerns that I understand are currently in front of the Senate Committee.

b. Do you consider that the sunk costs to establish specialised knowledge and systems have been lowered, given new technologies available?

Yes

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.

APRA is showing signs of monopolistic bloating.

APRA's internal costs are inefficiently high. Economic inefficiency is evidenced by the following.

a. Personnel costs have increased from 2022 to 2023 from \$45,329,000 to \$53,709,000 a year-on-year increase of over 18% and well outside CPI increases. Net income before tax increased from 2022 to 2023 from \$421,344,000 to \$476,490,000, a year-on-year increase of only 13%. This wage increase comes at the expense of music licence users and music creators. This is despite APRA providing the exact same "service", which has not changed significantly during the 2022-23 financial year or in previous years.

b. Royalties owing to copyright owners paid in 2022 to 2023 only increased from \$207,168,000 to 223,045,000, which is only a %7 increase. Reminder: APRA employee costs increased by 18% over this same period with no changes in business activities.

c. As of 30 June 2023, APRA had 381 employees (including casual compliance staff) in Australia and an additional 38 employees in the APRA AMCOS New Zealand office. Based on these figures, average remuneration equates to an average income of \$125,782 for every employee of APRA AMCOS. For context, the average income in Australia is approximately \$79,000. This is a 58% premium over the broader economy and indicative of monopolistic practices.

Combined with this is evidence of a regulatory-created cash cow, monopolistic and abusive market behaviour at worst and clearly not in the broader public interests. Further, it results in less of the revenue pool available for distribution to APRA members, as evidenced in less of a "cut" being passed along to them.

6. Please comment on any other issues you consider relevant to the ACCC's assessment of this matter.

Evidence of APRA Market Manipulation in the Dance Studio Industry.

APRA's licensing of dance studios is currently overly complex, and their newly proposed changes exponentially increase this complexity for our industry.

It is understood that APRA differential pricing model is aimed at controlling the market and income stream for music licences rather than accurately pricing for music exposure to consumers.

APRA members:

As we are not APRA members, our ability to comment on such matters is limited. However, as a licence, there is a lack of transparency around how our licence fees are distributed.

The system is used to ensure that performers relevant to the dance studio industry receive their rightful royalties are not disclosed. (Other than the 50% rule) There is compelling evidence that the fees paid by the dance studio industry do not reach those APRA members who create the genres of music that are critically needed in their sector. This is known because:

- a. At no time does APRA ask for a list of music played in dance studios. This directly contradicts APRA's assertion to the ACCC that it collects music lists from the industry. This makes any reconciliation of paying OneMusic artists impossible.
- b. The above makes any industry analysis by the public or artists as to what music is played or popular, preventing incentives to artists to produce more music in dance industry preferred genres. This inefficiency continues to impair the production of targeted dance musical works, and the consultation process has been silent on this particular concern.

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;

APRA's internal calculations, methodology and how it is applied to each dance studio is not shared during this process. However, it is clear that internal business numbers such as turnover, enrolment numbers, actual class sizes, etc, are not part of their calculation/process. Instead, APRA utilises analysts and investigators to troll websites and other online reviews to form "guesstimates" to support their invoicing decisions. This process of course, was not revealed during negotiations with ACCC to obtain their monopoly authorisation.

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

APRA's current "consultation" process is devoid of the very methodology they are compelled to provide for a considered analysis to be undertaken.

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).

No comment. The bundles do not relate to music played rather fees imposed on business structures.

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

There is no transparency around pricing. There is no explanation of how the fees paid reach the creative owner or how APRA determined its charging structures. APRA will not produce the data behind its pricing structures even when compelled to by the ACCC to keep its monopoly status.

APRA's current and proposed tiered pricing model stifles innovation and adoption of new technologies and business models in the dance industry. Their pricing structures are a form of market manipulation of the dance industry and negatively affect the expansion or creation of new dance studios.

Arbitrary higher fees based upon business structure, locations, and random music usage rather than actual music exposure to end users. (For example, a dance studio that operates 10 classes of 5 students in different locations charges significantly more than 1 class of 50 students in one location.) APRA should not be in a position to wield such power over dance studio licensees that are fundamentally designed to be market manipulative.

Music usage should be a fixed business expense that scales or even reduces based on bulk usage or, at a minimum, be equal per unit of usage for all music licensees in the Dance Studio industry.

Instead, APRA is proposing that as dance studios scale in size, they face an increasing variable cost under the guise of making a scaled pricing structure. In APRA's words, it is so that 'smaller' businesses are not unfairly disadvantaged compared to 'larger' businesses. It is not APRA's place to determine which businesses should receive special treatment. Their only reason for being to collect royalties for the creatives they represent.

APRA has chosen to utilise its pricing monopoly to reward certain business models at the expense of others in a fundamentally arbitrary fashion, without justification and seemingly determined by APRA executives. Who are these APRA executives to exploit their ACCC-granted monopoly to pick winners and losers in the marketplace when their business is simply to license the music they hold the rights to?

The Dance Industry, in particular, should not be exposed to differential pricing, given the size of our unique business landscape. The only effect of APRA's market manipulation (via differential pricing models) is to ensure increased profits for APRA at the expense of innovation and competitive behaviours in the dance studio marketplace.

This power disparity results in APRA:

- a) Frequently ignoring or dismissing objections to tier determinations relying instead on exploiting the unsophisticated nature of dance studio owners to comply with invoices;
- b) APRA's usage of debt collectors, small claims and local court bullying studio owners for non-payment when studio owners have genuine complaints that are not being addressed;
- c) APRA frequently fails to inform the dance school licence owners of the existing Resolution Pathways for complaints despite being compelled to do so;

A fully transparent system in the public interest should include provisions requiring APRA to refer any “punitive actions” to the ADR process first.

With regard to the ‘Industry Consultation Process’:

This is the basic guide OneMusic publishes about the consultation process:
<https://onemusic.com.au/consultation/> Noting the ACCC does have a much more comprehensive statement.

In OneMusic’s own basic statement it says:

Our consultations are designed so that there is adequate time for any impacted party to respond to the new or revised licensing products being proposed. Generally, this is between 4 and 6 weeks taking into account any relevant seasonal factors. We also provide notice of when we intend to finalise the consultation and implement any new or revised licensing products.

The Dance Studio Industry were not offered the most basic consideration, according to OneMusic’s own guide.

1. We were only offered 3 weeks
2. There was no seasonal consideration

Generally, this is between 4 and 6 weeks, taking into account any relevant seasonal factors. Tiny Tutu can report that APRAs chosen timeframes for consultation were completely inappropriate and discriminatory to the industry.

APRA’s consultation process is claimed to be designed so that there is adequate time for any impacted party to respond to the proposed new or revised licensing products. OneMusic commenced the consultation process for dance studio owners at the single busiest and most stressful time of the year. December is the end-of-year concert time, which is followed by a shutdown over Christmas / early January. From mid-January – end of February is securing enrolments (a Dance Studio Owner’s livelihood) for the new year. Time to have a serious conversation about the impact of OneMusic’s suggested changes is in short supply.

After engaging with OneMusic directly about this issue without result, I brought this issue to Resolutions Pathways. Resolutions Pathways was able to secure an extension to the consultation process, but not a time change to allow the industry to engage.

Honest industry consultation would be able to take place March / April. I would note here that the timetable put forward by OneMusic to have the new more complicated charge criteria approved by 1st May, was a schedule that could have been changed by OneMusic if they genuinely wanted considered consultation.

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.

APRA is a detriment to the public good and, in particular, towards women and girls who dominate the Dance Studio industry.

Since 1999, APRA was conditionally authorised with provisions to expose APRA to competition where possible and otherwise reduce the public detriment arising from its substantial market power. Instead, there is evidence of APRA suffering from organisational monopoly-driven bloat, lack of substantive competition and increasing complexity and legal/financial abuse by APRA towards the dance industry. In particular, the typical dance studios are micro business owners who are:

- a) Predominately women;
- b) Less sophisticated;
- c) Often run their businesses with incomes substantially below the average wage or at a loss; or
- d) Undertake their dance business as a hobby or a passion akin to other artistic pursuits.

Accordingly, the following should be considered as conditions for APRA to retain their monopoly.

- a) Pricing for music usage will be based on the actual number of protected songs played and exposed to customers.
- b) Dance Studio Owners are only charged for the music they play. Studio Owners are in a unique position to tell APRA not only what music is played but also 'how many ears' listen to it.
- c) Fix music licensing prices for all events. Currently, APRA charges additional fees for end-of-year studio events when ticket prices are in excess of \$40. Was it ACCC's intent to place an artificial restraint on artistic performances open to the public through additional costs?
- d) APRA's "video recording package" charge for events applies to the Studio Owner as well as the subcontracted business that undertakes the video recording. This effective double charge is unexplained and illogical, and either needs to be eliminated or reduced to one fee per event type. Additionally, this fee is charged regardless of how many people obtain the video. A studio could have 50 students, and only 25 buy the video, but APRA charges for the 50. Why?
- e) APRA's sole purpose, as they repeatedly state, is to *"pay royalties to music creators when their music is played or copied, both locally and overseas."* APRA needs to cease all

market manipulation practices and get back to its purpose – which is to ensure music creators receive royalties. All artificial pricing tiers, classes, and categories should be dissolved so studio owners can list the music they use and pay for it accordingly. This would be a much more economical and return to APRA’s purpose and what Dance Studio Owners pay their licensee fees for.

- f) APRA must publicly and clearly explain how it determines its pricing for music. This must include disclosure of charging algorithms, research on which the charges are based, and definitive explanations of how the royalties are distributed.

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?

Not applicable

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?

The music predominantly used by the Dance Studio industry is under the APRA AMCO / OneMusic regime, which prevents direct dealing from being realised. Music creators are prohibited from dealing with individual Dance Studios.

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?

No technological advancements can penetrate the monopoly OneMusic has over music owners being compelled to sign their rights to the scheme. There is a deeply unhealthy monopoly in place.

Tiny Tutus would love an opportunity to deal with artists for usage rights of their music directly.

This would allow us to have better control over our actual musical expenses and get assurance that the fees charged actually is reimbursed to the artist.

Perhaps ACCC would like to explore an option to force OneMusic to nominate fixed pieces of music for a reasonable yearly fee to use limited tracks rather than blanket licences for the Dance Studio industry.