



# Draft Determination and interim authorisation

Application for authorisation AA1000637 lodged by  
Australian Entertainment Industry Association  
in respect of  
acquiring and negotiating copyright licences with Australasian  
Performing Right Association, Phonographic Performance Company of  
Australia and OneMusic Australia on behalf of its members  
Authorisation number: AA1000637

10 May 2023

Commissioners: Keogh  
Brakey  
Carver

## Summary

The ACCC proposes to grant authorisation to the Australian Entertainment Industry Association (trading as Live Performance Australia) to enable it to represent members, which include live music promoters, arts festival organisers and music festival organisers in:

- Negotiations with the Australasian Performing Right Association Limited, the Phonographic Performance Company of Australia Ltd and OneMusic Australia on the acquisition of copyright licences for music works, sound recordings and music videos in Australia, and
- the Copyright Tribunal and in alternative dispute resolution processes, in relation to the acquisition of these licences.

The ACCC proposes to grant authorisation for 10 years.

The ACCC considers that the proposed conduct will result in public benefits, including reduced transaction costs, improved input into contracts and streamlined dispute resolution. The ACCC considers the proposed conduct is unlikely to result in significant public detriment.

The ACCC has also decided to grant interim authorisation to enable Live Performance Australia to commence its representations on behalf of members while the ACCC is considering the substantive application for authorisation.

The ACCC invites submissions in relation to this draft determination before it makes its final decision.

### 1. The application for authorisation

- 1.1. On 7 March 2023, the Australian Entertainment Industry Association (trading as **Live Performance Australia**), lodged application for authorisation AA1000637 with the Australian Competition and Consumer Commission (the **ACCC**). Live Performance Australia is seeking authorisation with respect to the acquisition and negotiation of copyright licences on behalf of members with Australasian Performing Right Association Limited (**APRA**), Phonographic Performance Company of Australia Ltd (**PPCA**) and OneMusic Australia (**OneMusic**).
- 1.2. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides businesses with protection from legal action under the competition provisions in Part IV of the Act. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the conduct would result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).
- 1.3. Live Performance Australia also requests interim authorisation to enable it to commence representing members while the ACCC is considering the substantive application for authorisation. The request for interim authorisation is considered in Section 7 of the draft determination.

## The Applicant

- 1.4. Live Performance Australia is the industry association for Australia's live performance industry. Broadly, its role is to support and promote the interests of the live performance industry.
- 1.5. Live Performance Australia is seeking authorisation on behalf of itself and the live music promoters, arts festival organisers and music festival organisers as listed in Schedule 1 of the application (the **Members**). This encompasses 129 live music promoters and arts festival organisers, as well as 5 music festival organisers who are not Live Performance Australia members, 3 of whom are owned or part-owned by Live Performance Australia.

## 2. Background

### The industry – copyright management organisations

- 2.1. APRA is a music rights management organisation, which ensures that music creators receive royalties when their music is played or copied (both in Australia and overseas).<sup>1</sup>
- 2.2. PPCA is a copyright collecting society that provides blanket licences for the use of recorded music in Australia. PPCA submits that it is a non-profit organisation that represents the interest of record companies and Australian recording artists, aiming to ensure that recording artists and labels receive a fair return on their music.<sup>2</sup>
- 2.3. OneMusic is an APRA and PPCA joint licensing initiative (formed July 2019). OneMusic offers joint music licences from PPCA and APRA, which allows music users to meet their copyright obligations for the commercial use of music works, sound recordings and music videos.<sup>3</sup>
- 2.4. Live Performance Australia claims that an essential part of the live music events promoted by the Members involves obtaining a licence to use the relevant copyright works during ticketed live music events. These licences are granted by:
  - (a) APRA in respect of musical works and literary works associated with those musical works (lyrics) where the right to perform in public is owned or controlled by APRA in Australia (the **APRA Works**); and
  - (b) PPCA in respect of:
    - i. sound recordings owned and controlled by a PPCA licensor and which has been released on a label owned or controlled by a PPCA licensor; and
    - ii. music videos in which the copyright in the sound recording used in that video is owned and controlled by a PPCA licensor(the **PPCA Sound Recordings**).
- 2.5. In the context of ticketed live music events, the Members may require two separate copyright licences in order to publicly perform or play music. Members may require

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<sup>1</sup> APRA, [What is APRA AMCOS](#), APRA AMCOS website, accessed 5 April 2023.

<sup>2</sup> PPCA, [Home Page](#) and [About Us](#), PPCA website, accessed 5 April 2023.

<sup>3</sup> OneMusic, [About](#), OneMusic website, accessed 5 April 2023.

licences in APRA Works from APRA, and licences in PCCA Sound Recordings from PCCA. There are limited alternatives for Members to obtain licences in APRA Works or PCCA Sound Recordings.

- 2.6. APRA Works and PCCA Sound Recordings can be licensed together under OneMusic licensing schemes.
- 2.7. Industry-based licensing schemes offered by OneMusic are developed by APRA on its own behalf and on behalf of PCCA. The objective and intent of such schemes is to ensure that all licensees are licenced on the same terms for the same licence and proposed use.

### The industry – live music event industry-wide licence scheme

- 2.8. OneMusic operates on behalf of both APRA and PCCA, and is able to offer industry-wide licence schemes. OneMusic has the power to provide a licensing scheme which applies to both the use of APRA Works and PCCA Sound Recordings.
- 2.9. OneMusic may offer licences under an industry-based licensing scheme, where all licensees are licensed on the same terms, for the same licence and proposed use.
- 2.10. Since the termination of the Promoted Music Event Blanket Licence Agreement, an industry-related licensing scheme is yet to be determined.
- 2.11. Live Performance Australia has estimated that the Members represent approximately 85% of ticketed live music performances in Australia by revenue.

## 3. The Proposed Conduct

- 3.1. Live Performance Australia is seeking authorisation with respect to the acquisition of copyright licences, in particular:
  - (a) negotiation with:
    - i. OneMusic; and
    - ii. APRA and PCCA, including in the event that they participate in the negotiations in their own capacity or OneMusic is restructured or ceases to operate as it is currently constituted;on behalf of the Members, on the terms and conditions, including licence fees, of copyright licences;
  - (b) representing the Members before the Copyright Tribunal, in respect of matters which are about the acquisition of the licences described at paragraph 3.1(a); and
  - (c) representing the Members, through any alternative dispute resolution process including Resolution Pathways, in respect of matters which are about the acquisition of the licences described at paragraph 3.1(a),(the **Proposed Conduct**).
- 3.2. Members have the right to choose whether to participate in the Proposed Conduct, and each Member will be able to negotiate and deal with APRA and PCCA, in their own capacity or as OneMusic, on an individual basis. The Proposed Conduct does not include a collective boycott.

## Rationale

3.3. Live Performance Australia submits the following:

- Licences from OneMusic are a necessary input for the Members, and they have little alternative than to enter into agreements with APRA (in its own name or as OneMusic).<sup>4</sup>
- There is an information asymmetry between APRA and licensees, due to APRA's market power and lack of transparency about APRA's licensing arrangements.
- In late September 2022, the Promoted Music Event Blanket Licence Agreement was terminated, and ticketed music events are subject to a new OneMusic licensing scheme which has not yet been determined.

3.4. Live Performance Australia submits that the Proposed Conduct would:

- to some extent, redress any power imbalance that exists between OneMusic and those seeking to acquire a licence which is an essential input for their business, in the circumstances where OneMusic is seeking to establish a licensing scheme
- provide some degree of counterweight to APRA, and therefore OneMusic's, substantial market power, by allowing Live Performance Australia to negotiate the licensing schemes with OneMusic on behalf of the Members
- assist Members in obtaining more balanced licensing terms
- reduce transaction costs by streamlining the negotiation processes between OneMusic and each Member
- increase efficiencies with the resolution of disputes
- reduce information asymmetries between the negotiating parties by facilitating input into terms and conditions from each Member
- improve transparency as to how licence fees are calculated by OneMusic.

## 4. Consultation

- 4.1. The ACCC invited submissions from a range of potentially interested parties including major industry associations, member organisations, government organisations, music users, and the Members.<sup>5</sup>
- 4.2. The ACCC received 2 submissions, from APRA and the PPCA, in relation to the application. Public submissions are on the [Public Register](#) for this matter.
- 4.3. In summary, APRA supports the application and the PPCA supports APRA's submission. APRA submits that the ability to negotiate with an industry body, such as Live Performance Australia, would create efficiencies that benefit APRA members, Live Performance Australia members and members of the public generally.

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<sup>4</sup> ACCC, Final Determination on APRA re-authorisation (13 July 2020).

<sup>5</sup> A list of the parties consulted is available from the ACCC's [public register](#).

4.4. APRA provided the following additional comments:

- The authorisation is unlikely to have as significant a benefit as Live Performance Australia suggests, namely that it is unlikely to significantly streamline or replace OneMusic's consultation process. This is because OneMusic states it uses this process to obtain comments from as wide a range of stakeholders as possible. APRA further notes that to its knowledge, Live Performance Australia does not represent all licensees or potential licensees under any OneMusic licence scheme.
- OneMusic's objective is to license all similar licensees on equivalent terms. Consequently, terms offered to the Members would also be offered to other relevant music users, regardless of their membership with Live Performance Australia.
- OneMusic's consultation, which initiated Live Performance Australia's application for authorisation, was completed in December 2022. Many Live Performance Australia members and non-members have already entered into a licensing scheme with OneMusic. Should an aspect of the scheme be disputed and result in any alteration to the terms, OneMusic will reopen its consultation in respect of that licensing scheme and will offer any amended licence scheme to all music users of a similar class, whether a Live Performance Australia member or not.

4.5. PPCA commented that sound recording rights are non-exclusive, including when those rights are sub-licensed to APRA.

## 5. ACCC assessment

5.1. Live Performance Australia has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and/or may have the purpose, effect or likely effect of substantially lessening competition within the meaning of section 45(1)(a) and (b) of the Act. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result.

### Relevant areas of Competition

5.2. To assist with the assessment of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.

5.3. The ACCC considers the relevant area of competition likely to be the acquisition of music copyright licences in Australia.

### Future with and without the Proposed Conduct

5.4. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.

5.5. The ACCC considers that the likely future without the Proposed Conduct is that the Members will continue to deal with APRA and PPCA (either in their own capacity, or as OneMusic) individually and acquire licences on a take-it or leave-it basis.

## Public benefits

- 5.6. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>6</sup>*

- 5.7. The ACCC has considered the following public benefits, as claimed by Live Performance Australia:

- reduced transaction costs
- improved input into contracts for Members
- streamlined dispute resolution and/or Tribunal processes.

### Reduced transaction costs

- 5.8. Live Performance Australia claims that the attempts by OneMusic to impose an industry-wide licence scheme by engaging in a consultation process over more than 3 years has been unsuccessful. Therefore, a single negotiation process involving OneMusic and Live Performance Australia would avoid further time and costs associated with the negotiation of this licence scheme by allowing Live Performance Australia to put forward a position on behalf of Members. Live Performance Australia submits that it would be able to coordinate with the Members to identify and deal with common contractual issues in a more effective and streamlined manner, as well as collectively develop proposals and responses in negotiating with OneMusic.
- 5.9. Members are also able to share the costs of the negotiations, rather than incur such costs on an individual basis.
- 5.10. Generally, the ACCC considers that transaction costs can be lower where a single negotiating process is employed, such as via a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. As OneMusic would make any amendments to the licensing scheme as a whole, the ACCC accepts that it would be beneficial for Members to be collectively represented by Live Performance Australia rather than individual consultations and negotiations and this may give rise to transaction cost savings because Members can share the costs of the negotiations relative to dealing with OneMusic individually.

### Improved input into contracts

- 5.11. Live Performance Australia submits that the Proposed Conduct provides a means to coordinate with Members to identify and deal with common contractual issues in a more effective and streamlined manner. The Proposed Conduct would allow Live Performance Australia to collectively develop proposals and responses to any counter proposals to provide to OneMusic on behalf of the Members.

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<sup>6</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- 5.12. Live Performance Australia submits that this would redress imbalances in bargaining power between the Members and OneMusic, which it submits the ACCC has previously identified as a near monopolistic entity.<sup>7</sup> As noted by APRA, some of Live Performance Australia's members are large entities such as Live Nation Australasia, TEG entities, AEG entities, and Frontier Touring Company. However, the bargaining imbalance is particularly evident with smaller promoters and festival organisers who may otherwise not be in a position to have any meaningful input in the negotiations with OneMusic. Live Performance Australia also submits that collective negotiation may improve transparency with respect to how licence fees are calculated by OneMusic.
- 5.13. Live Performance Australia claims that the Proposed Conduct would allow Members to become better informed of relevant market information which is likely to improve their input into contractual negotiations and achieve a more efficient and balanced licence agreement which includes terms that better reflect the Members' circumstances, resulting in more efficient outcomes.
- 5.14. The ACCC accepts that the information shared through the negotiations is likely to keep Members informed, improve their inputs into contract terms, and redress a potential imbalance in bargaining power.
- 5.15. The ACCC has taken into consideration the fact Live Performance Australia does not represent all licensees or potential licensees under any OneMusic licence scheme. The ACCC recognises that any improved licensing terms would impact music users of the similar class, whether Live Performance Australia members or not.
- 5.16. The ACCC recognises that as a result of the December 2022 consultations, OneMusic established the current licensing scheme, which commenced operation on 1 January 2023. However, the ACCC accepts that as per Live Performance Australia's submission, the terms of the events licensing scheme are still in dispute and that negotiations are ongoing. Many Members have not yet entered into OneMusic licences on the terms of the published licensing scheme.

### **Streamlined dispute resolution**

- 5.17. Live Performance Australia submits that in the event that agreement cannot be reached with OneMusic on price or non-price licence terms, under the Proposed Conduct there will be increased efficiencies in the dispute resolution and/or Tribunal processes as a result of Live Performance Australia being able to represent the Members.
- 5.18. As OneMusic's licence scheme aims to provide equivalent licence terms to all licensees of the particular class, the ACCC considers it is efficient for one industry body to engage in dispute resolution on behalf of the collective class.

### **Public detriments**

- 5.19. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*<sup>8</sup>

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<sup>7</sup> ACCC, Final Determination on APRA re-authorisation (13 July 2020).

<sup>8</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.



- 5.20. Live Performance Australia submits that the Proposed Conduct is unlikely to result in any public detriment, including from any lessening of competition. Live Performance Australia considers there are no public detriments in the circumstances where participation by Live Performance Australia's members is voluntary and upon negotiations or Tribunal determinations, OneMusic will establish an industry-wide licence.
- 5.21. As OneMusic provides a licensing scheme in equivalent terms to the whole industry and the licence is non-exclusive, Members do not compete with one another to acquire copyright licences. The ACCC also considers that the Proposed Conduct does not reduce competition between Members to promote or organise live music events and festivals.
- 5.22. The ACCC also notes:
- Participation in the Proposed Conduct is voluntary for the Members.
  - APRA, and therefore One Music, are near monopolies with exclusive rights to their members' works. Consequently, there are little, if any, effective competitors to APRA, and therefore OneMusic. Although the ACCC recognises that some Members may be in a position to seek these rights directly from the copyright owners, such as record labels, the ACCC understands that it is more efficient to have a OneMusic licence for the copyright for both APRA Works and PPCA Sound Recordings.
  - Licences are a crucial input for the Members, who must acquire such licences from OneMusic in order to operate their businesses. It is only in very limited circumstances that APRA, and therefore OneMusic, does not hold the exclusive rights to the copyright works. Consequently, Members have very little negotiating power.
  - APRA supports the Proposed Conduct because it would create efficiencies that benefit APRA members, Live Performance Australia Members and members of the public in general.

## Balance of public benefit and detriment

- 5.23. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:
- reduced transaction costs
  - improved input into contracts for Members
  - streamlined dispute resolution and/or Tribunal processes.
- 5.24. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriment.
- 5.25. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

## Length of authorisation

- 5.26. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>9</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 5.27. In this instance, Live Performance Australia seeks authorisation for 10 years.
- 5.28. The ACCC considers that 10 years is an appropriate period for authorisation.

## 6. Draft determination

### The application

- 6.1. On 7 March 2023, Live Performance Australia lodged application AA1000637 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 6.2. Live Performance Australia seeks authorisation for the Proposed Conduct defined at paragraph 3.1.
- 6.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 6.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 6.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 6.6. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 6.7. The ACCC proposes to grant authorisation AA1000637 to Live Performance Australia for the Proposed Conduct, as described in paragraphs 3.1 to 3.2.
- 6.8. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose, effect or likely effect of substantially lessening competition within the meaning of section 45 of the Act.
- 6.9. The ACCC proposes to grant authorisation AA1000637 for 10 years.
- 6.10. This draft determination is made on 10 May 2023.

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<sup>9</sup>Subsection 91(1).

## 7. Interim authorisation

7.1. The ACCC has decided to grant interim authorisation.

7.2. Live Performance Australia requested interim authorisation on the following basis:

- (a) OneMusic and industry participants acting on an individual basis have failed to produce an acceptable industry-wide licence scheme in relation to ticketed music events and eligible temporary music events. This failure has created a lack of certainty across the industry. Industry participants are currently operating under interim arrangements whilst the terms of an industry-wide OneMusic licensing scheme remains unsolved.
- (b) APRA has recently indicated it will offer some Members a new licence (replacing the licence that was terminated in September 2022). However, this licence would apply to APRA Works only.
- (c) The lack of certainty in relation to licensing schemes is detrimental to the ticketed music events promoters' ability to compete to create music events and festivals.
- (d) Interim authorisation will allow Live Performance Australia to commence negotiations on behalf of Members so as to enable this lack of certainty to be resolved in a more timely manner.

7.3. The ACCC considers it is appropriate to grant interim authorisation, because:

- (a) OneMusic has advised it will ultimately grant an industry-wide licensing scheme and so interim authorisation may speed up the process of negotiating the industry-wide licensing scheme
- (b) in the absence of interim authorisation, the Members are likely to continue to negotiate with OneMusic on an individual basis, therefore missing out on the public benefits from a collecting bargaining process
- (c) as all Members acquire the copyright licences on the same terms and conditions, interim authorisation would not reduce competition between Members
- (d) APRA is in support of the authorisation.

7.4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or when the application for authorisation is withdrawn.

## 8. Next steps

8.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, Live Performance Australia or an interested party may request that the ACCC hold a conference to discuss the draft determination.