

22 February 2019

Mr Gavin Jones
Director, Adjudication
Australian Competition & Consumer Commission (ACCC)
GPO Box 3131
CANBERRA ACT 2601

via email: adjudication@acc.gov.au

Dear Mr Jones,

Submission in response to Australasian Performing Rights Association Ltd (APRA) application for revocation of authorisations A91367 – A91375 and substitution of new authorisation A1000433

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

1. ABOUT LPA

LPA is the peak body for Australia's live performance industry. We represent licensees who use music in public performances, such as during live music concerts and festivals and in 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.¹

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

- Event Promoters
- Festival
- Music Performances with no admission fee
- Special Purpose Featured Music
- 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 re-authorisation. LPA was also a member of the External Reference Group, established in 2017 by the Bureau of Communications and Arts Research (BCAR) as part of its review of the efficacy of the Code of Conduct of Australian Copyright Collecting Societies. We are happy to share our submission into the BCAR review if the ACCC believes it would be useful.

¹ In 2017-18, public performance revenue contributed 20.4% (\$85.8m) of APRA AMCOS total revenue. Source: APRA AMCOS Year in Review 2017-18 (digital report), accessed at: http://apraamcos.com.au/media/YIR/2018/APRA_AMCOS_Year_in_Review_2018.pdf

2. KEY ISSUES

a. Alternative Dispute Resolution

During the last re-authorisation process, LPA supported the condition that APRA implement a revised ADR scheme. At the time, LPA did not believe there was a cost-effective and efficient means for resolving licencing disputes. LPA is satisfied that APRA has implemented a revised ADR scheme. However, it has not been tested in the context of live events and therefore, we are unable to comment on the appropriateness and efficacy of this scheme for the live performance industry. A key issue is to ensure that the ADR process is not unnecessarily long. LPA and APRA have discussed that there may be an opportunity to use the ADR scheme to resolve issues related to the interpretation of dramatic context.

LPA does not support APRA's contention in its re-authorisation application that "the limited uptake of alternative dispute resolution is consistent with a high degree of satisfaction (or at least acceptance), amongst users with APRA's licensing system, including its services and fees." (paragraph 100). In the early period of the scheme's establishment, there was little industry awareness that the ADR scheme existed. In preparing our submission for BCAR's review in 2017, our Members told us that APRA did not advise licensees that ADR was available, particularly where there was a potential for dispute. Since then, both APRA and LPA have taken steps to better educate the industry about the ADR scheme. We encourage APRA to continue advising licensees upfront and early that the ADR scheme exists to resolve disputes.

In addition, there may be practical reasons why licensees in the live performance industry are not resolving disputes through ADR. Producers, promoters and presenters of live shows need to ensure they have the necessary licence prior to the first performance. Licensees may only be advised of an outcome very close to the first performance date, sometimes a few days prior or the day before. In situations where the rights to use a piece of music is denied, there is simply not enough time to resolve licensing disputes through ADR, and therefore licensees must find an alternative solution.

b. Consultation regarding licensing changes

In September 2016, LPA became aware that APRA was undertaking an internal review of the Dramatic Context licence. LPA approached APRA directly to be consulted on the definitional changes, as our Members had raised serious concerns that the definition was unclear and inconsistently applied.

We subsequently became aware that APRA was seeking for its members to endorse, at its November 2016 annual general meeting, a new definition of 'dramatic context' which would then be updated in its Constitution. At that time, no consultation had occurred with licensees or LPA on the new definition and we raised concerns with APRA about the lack of consultation and the impact of the changes on the industry. While APRA advised in a letter to LPA in October 2016 that "it has always been our intention to consult with licensees about possible changes once consensus had been reached with our members on such changes", we were somewhat perplexed by the process, as it appeared to us that this was not the case.

Based on our request for consultation, APRA agreed to delay taking a new definition to members for endorsement and then engaged in consultation with LPA and licensees. LPA acknowledges that APRA changed its process to ensure licensee concerns were heard.

In future, LPA would like a formal undertaking that, when APRA is considering changes to licensing definitions or fees, licensees are consulted early in the process.

c. Responsiveness and timeliness

The most common complaint LPA receives regarding Members' experiences with APRA relate to lack of

responsiveness in responding to queries and the lack of timeliness in receiving licensing decisions. These experiences are most prevalent where a Dramatic Context licence is sought.

LPA acknowledges that the licensing of music within a dramatic context is not as simple as for blanket licences. Some works are not available for use in a dramatic context (Owner Restricted works). Some works must be referred by APRA to the copyright owner for consideration on a case by case basis (Owner Referred works). In cases where the works are not within APRA's remit, the applicant must submit a request directly with the copyright owner.

Our Members find it frustrating that, despite submitting an application within the timeframes requested by APRA, they are notified in the week or days leading up to the first performance that the use of a music is denied or must be referred directly to the copyright owner. Sometimes licensees do not receive notice of an outcome at all. Because licensees receive notification that the use of music has been denied very late or do not receive notification of an outcome, licensees are then forced to change the show with extremely limited notice.

If requests to use a certain piece of music are denied or if approvals are not received in time, then last minute adjustments need to be made to the show. It is stressful for licensees (as well as the cast and crew) to wait until the last moment to learn whether a piece of music has been approved for use or not. In addition, the inability to use a particular piece of work can compromise the artistic integrity of the production and can dramatically alter the intention of the production, and hence the experience for the audience.

Another concern for LPA Members is the lack of responsiveness from APRA staff. LPA Members report that they do not always receive the clearest or promptest reply. Indeed, several Members reported that a large number of phone calls were not returned or they did not receive responses to emails. Again, this lack of responsiveness and lack of certainty place undue stress on licensees and artists.

LPA would like APRA to complete an initial assessment of Dramatic Context licence applications within one week of being received so that licensees know which works are restricted, need to be referred by APRA or the licensee must deal directly with the copyright owner.

LPA has also received feedback that the slow response times to licensing decisions is not isolated to the Dramatic Context licence. Some Members have experienced receiving part of the Event Promoters licence the day before the first performance (despite lodging the application many weeks before the event). Other Members (presenters) have experienced difficulties in getting sign off for the event, because the venue in which the show is being staged requires evidence of the appropriate licence. These delays cause unnecessary stress for licensees.

Some Members have also raised administration issues – such as receiving invoices without purchase order details (so licensees are unable to assign costs to the right production) or not receiving invoices until several months after the event.

Despite the frustrating experiences outlined above, LPA would also like to acknowledge that some of our Members reported very positive and helpful relationships with their APRA contacts. These Members appreciated the time taken by APRA staff to explain and discuss licensing requirements with clarity and transparency.

d. Transparency

In the past, LPA has raised concerns regarding transparency in relation to the distribution of royalty payments

as well as processes and decision-making. LPA notes that these areas were considered as part of BCAR's review and the final report is expected to make recommendations to encourage greater transparency.

e. Calculation of licence fees

Some Members have raised concerns about being overcharged for the use of music, particularly when the works performed are out of copyright (or not within APRA's remit) and when they had made a request for the set list to be reviewed to confirm the music was out of copyright.

LPA would like the analysis of whether music used in public performances is in/out of copyright or in/out of APRA's remit performed more regularly, rather than on request, to ensure that licensees are not being overcharged.

f. OneMusic Australia

Consultation on the OneMusic licensing arrangements for 'Events' (i.e. concerts, festivals, dance parties, casual events) and 'Dramatic Context' has not yet commenced and LPA looks forward to consulting with APRA, AMCOS and PPCA on this initiative.

Thank you for the opportunity to provide input into the re-authorisation process. Please let us know if you have any queries or require clarification on any matters raised in our submission.

Yours sincerely,



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ABOUT LPA

LPA is the peak body for Australia's live performance industry. Established 100 years ago in 1917 and registered as an employers' organisation under the *Fair Work (Registered Organisations) Act 2009*, LPA has over 400 Members nationally. We represent commercial producers, music promoters, major performing arts companies, small to medium companies, independent producers, major performing arts centres, metropolitan and regional venues, commercial theatres, stadiums and arenas, arts festivals, music festivals, and service providers such as ticketing companies and technical suppliers. Our membership spans from small-medium and not-for-profit organisations to large commercial entities.

LPA has a clear mandate to advocate for and support policy decisions that benefit the sustainability and growth of the live performance industry in Australia.

LPA EXECUTIVE COUNCIL

Richard Evans (President)
Australian Chamber Orchestra

John Kotzas (Vice-President)
Queensland Performing Arts
Centre

**Maria O'Connor (Vice-
President)**
Ticketmaster Australia & New
Zealand

Torben Brookman
GWB Entertainment

Alex Budd
Opera Australia

Lisa Campbell
Luckiest Productions

Michael Coppel AM
Live Nation Australasia

Sue Donnelly
Belvoir St Theatre

Douglas Gautier AM
Adelaide Festival Centre

Shirley McGrath
Gordon Frost Organisation

Patrick McIntyre
Sydney Theatre Company
Liza McLean
Tinderbox Productions

Rod Pilbeam
AEG Ogden

Melanie Smith
Arts Centre Melbourne

Louise Withers
Louise Withers & Associates

Observers
Cameron Hoy Ticketek
Tim McGregor TEG Live
Judy Vince Crown Perth