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Copyright Code Review
Director, Emerging Policy Issues
Bureau of Communications and Arts Research
Department of Communications and the Arts
GPO Box 2154
CANBERRA ACT 2601

Via email: codereview@communications.gov.au

Dear Copyright Code Review Secretariat

**Review into the efficacy of the Code of Conduct for Australian Copyright Collecting Societies:
Discussion Paper**

Live Performance Australia (LPA) welcomes the opportunity to comment on the discussion paper to the Review into the efficacy of the Code of Conduct for Australian Copyright Collecting Societies (the Review). We have provided our comments and views in our submission attached. LPA's submission is informed by feedback received from our Members.

ABOUT LPA

LPA is the peak body for Australia's \$2.5 billion live performance industry.¹ We represent licensees of both the Australasian Performing Right Association (APRA) and the Phonographic Performance Company of Australia (PPCA) for the public performance of musical works in Australia. 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.²

LPA has been actively involved in discussions with APRA on behalf of live performance licensees in recent years. In 2015 LPA concluded negotiations with APRA on licence fees and conditions for the public performance of live music at promoted events and festivals. APRA is currently consulting with LPA on other licensing matters that affect our Members.

LPA made several submissions to, and was actively involved, in the most recent ACCC reauthorisation process for APRA in 2013-14. LPA recognises that the conditions for APRA's reauthorisation determined by the ACCC has led to improved transactions and transparency in accordance with the conditions set. This has served to address some of the concerns LPA has raised in recent years.

¹ EY (2014), *Size and scope of the live performance industry 2012*, report for Live Performance Australia

² In 2015-16 public performance revenue contributed 21.25% (\$70.7m) of APRA AMCOS total revenue. Source: APRA AMCOS Year in Review 2015-16 (digital report), accessed at: <http://2016.yir.apraamcos.com.au/music-customers-revenue/>

LPA SUMMARY POSITION

- LPA Members depend upon the ability to licence the use of music works in a fair, efficient and timely manner to maintain their business operations, such as promoting live music concerts and producing live shows. LPA Members also support the rights of copyright owners and as such, will seek approvals from appropriate authorities and licence holders.
- LPA Members are appreciative of the role collecting societies play. They see the value in being able to contact one entity to obtain licensing approvals rather than having to seeking approvals from each individual copyright owner.
- Many Members report positive dealings with collecting societies (in particular APRA). However, LPA Members have also raised a number of concerns such as:
 - Lack of timely response to licensing requests or queries, causing uncertainty as to whether music can be used and placing undue stress on licensees and artists
 - Inconsistency in the interpretation of licence classification. Shows that have historically been licensed under one category being reclassified to a different (higher tariff) category, even though there have been no changes to the licensing framework
 - The broadening of the interpretation of how licence fees are calculated to include items that are inconsistent with licensees' understanding or interpretation
 - Pursuit of licence fees from venues even though event organisers are responsible for these fees
 - The need to raise greater awareness of APRA's alternative dispute resolution scheme
 - Greater transparency to ensure that royalty revenues paid by licensees are distributed to the rightful owner of the content.

Once again, we thank you for the opportunity to present our views for consideration as part of your Review. We wish to remain engaged throughout the review process and we look forward to working with you on this matter. Should you have any queries regarding our submission, please do not hesitate to contact us via email or telephone.

Yours sincerely,



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LPA SUBMISSION

Review into the efficacy of the Code of Conduct for Australian Copyright Collecting Societies

1. INTRODUCTION

Live Performance Australia (LPA) welcomes the opportunity to provide comment on the discussion paper to the Review into the efficacy of the Code of Conduct for Australian Copyright Collecting Societies (the Review).

LPA is the peak body for the live performance industry and we represent licensees of both the Australasian Performing Right Association (APRA) and the Phonographic Performance Company of Australia (PPCA) for the public performance of musical works in Australia. Our Members include producers, promoters, venues, performing arts companies and festivals that collectively contribute a significant portion of the royalty revenue collected for the public performance of music.³

LPA's submission is informed by feedback received from our Members, including performing arts companies, producers, venues (i.e. performing arts centres and theatres) and festivals.

2. KEY CONCERNS WITH THE CURRENT LICENCING ARRANGEMENTS

LPA Members depend upon the ability to licence the use of music works in a fair, efficient and timely manner to maintain their business operations, such as promoting live music concerts and producing live shows. While we acknowledge that there have been recent improvements in the licensing experience between APRA and our Members, at times there exists an imbalance between licensees and collecting societies.

LPA Members support the rights of copyright owners and will always seek approvals from appropriate authorities and licence holders. Indeed, some LPA Members commented that they are appreciative of the role collecting societies play. They see the value in being able to contact one entity to obtain licensing approvals rather than having to seek approvals from each individual copyright owner.

Feedback received from LPA Members about their experiences with APRA is mixed. Some reported positive dealings with APRA, and find the licences and accompanying materials easy to understand. One member was particularly grateful for recently receiving licensing approvals quickly from APRA (as in the past, gaining approvals has been slow). In these cases, APRA already represented the copyright owners and publishers.

³ In 2015-16 public performance revenue contributed 21.25% (\$70.7m) of APRA AMCOS total revenue. Source: APRA AMCOS Year in Review 2015-16 (digital report), accessed at: <http://2016.yir.apraamcos.com.au/music-customers-revenue/>

Where LPA Members have experienced issues, they relate to the following areas:

- i. Licensing process, approvals and communications
- ii. Licence classification and interpretation
- iii. Calculation of licence fees
- iv. Pursuit of venues for event licence fees
- v. Dispute resolution
- vi. Transparency of payments to copyright owners

2.1. Licensing process, approvals and communications

Several LPA Members expressed frustration with APRA's licensing processes and the lack of timeliness in receiving licensing decisions. This frustration is most prevalent with respect to using music within a dramatic context.

APRA requests that dramatic context licence applications be submitted approximately 6-8 weeks (with 3 weeks as a minimum) prior to a show being presented. There have been instances where an application for a dramatic context licence has been submitted two months before the show is scheduled and the licensee does not receive approval of music until the day before. Sometimes licensees do not receive notice of an outcome at all. Because licensees receive notification that the use of music has been denied until very late or do not receive notification of an outcome, licensees are then forced to change the show with extremely limited notice.

For many licensees, it is extremely difficult to submit applications 6-8 weeks prior to the scheduled performance. Rehearsals for productions typically occur 2-4 weeks prior to previews/opening night, and often music has not yet been scripted into the production. During rehearsals, the director, sound designer and cast will try different things and then decide what music best suits the production. Due to commercial realities, it is not feasible for rehearsals to occur months before previews/opening night and therefore, it is difficult to determine all the music that will be used and where within a particular production.

These problems are exacerbated when licensees request to use restricted works, as APRA needs to identify the relevant copyright owners and seek approvals. 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 intended mood of the production, and hence the experience for the audience.

A major concern for licensees (particularly those producing provocative new work) is that the moral compass of a production seems to be arbitrated by individual copyright holders as to whether they are comfortable to licence the use of their work. It is also unclear how APRA is communicating these requests to copyright holders and in some cases it may be worthwhile involving licensees and artists to communicate the intent for the works to copyright holders.

When music is scripted into a production, LPA Members generally find that they are able to gain the appropriate licences because they are able to apply for approval well in advance.

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.

2.2. Licence classification and interpretation

LPA Members have raised concerns about APRA reclassifying the licence category of an event (to a category that attracts a higher tariff rate) when previously the event has been licenced under a different (lower tariff) category. Typically, this affects shows that ordinarily require an Event Promoters licence but are reclassified to a Dramatic Context licence.

Licensees are particularly frustrated because the licensing framework for Dramatic Context licences has not changed (although it is currently under review), yet greater scrutiny is being applied to shows (even if it is clear that they do not meet the criteria). LPA Members are frustrated by the additional and unnecessary administrative burden placed on them to complete the forms related to dramatic context even though APRA “didn’t anticipate that all these productions will satisfy enough criteria to be deemed as Dramatic Context” and so that the forms can be kept on file for “auditing and reporting” purposes.

There are a number of implications when APRA decides to reclassify shows from a lower to higher tariff licence:

- The significantly higher licence fees are not factored into the event budget
- There is a greater administrative burden associated with certain licence categories (ie Dramatic Context licence) which may provide a disincentive for some venues (particularly smaller venues) from booking these shows and for producers to produce these shows
- A longer application process associated with Dramatic Context licences which may result in the inability to obtain a licence in time
- The classification of certain shows (particularly shows with low budget and low ticket prices or performed in small venues) into a different licence category would render these shows commercially unviable.

To put the impact of licence reclassification into context: if a producer believes an event requires an Event Promoters licence but APRA then deems it to require a Dramatic Context Licence the tariff rate could be up to three times higher. In an extreme example, one of our Members received an invoice of almost \$150,000, when in the previous years they had paid approximately \$5,000, after APRA reclassified the event into a different category.

The classification of a work as dramatic context also assumes that the work remains unchanged. The reality for some types of work (e.g. cabaret) is that music choices will change when one performer is replaced for another performer. Each time this occurs, a new dramatic context licence is required which requires greater administration and lead times.

Event organisers need certainty about the licence category and associated fees, as planning for events occur years in advance and ticketing for some events can occur 12 months in advance. Reclassifying events with limited notice is unfair for licensees.

In addition, LPA Members believe that APRA does not provide adequate justification for the licence reclassification.

2.3. Calculation of licence fees

LPA Members have raised concerns about APRA's interpretation of how licence fees are calculated. For example:

- The licence fee for music performances with no admission fee is currently calculated based on gross expenditure on live artist performers. While previously, APRA's interpretation related only to the fees paid to the artists to perform at the event, the interpretation has now broadened to include other costs such as all transport, freight, infrastructure and support personnel. Interpretation of this licence in this way means that free events that are presented in regional and remote areas are financially penalised simply due to their location. The consequence of 'moving the goal posts' means that event organisers cannot afford to put on the show – which in the end disadvantages both copyright owners and audiences, particularly in rural and remote areas (e.g. Torres Strait Island).
- The licence fee for festivals and event promoters are both based on gross admission fees (less credit card charges and ticket booking fees). LPA Members interpret this to mean amount paid for admission to the event, with optional extras (such as food, beverages, accommodation, merchandise and VIP add-ons) excluded from the licence fees calculation. One LPA Member offers a VIP add-on as part of its event and has been asked to include this optional extra in calculating the licence fee. We are not aware of publicly available information that explicitly informs licensees that VIP add-ons should be included, although APRA has advised that its position is consistent with internal policy.

2.4. Pursuit of venues for event licence fees

Venues often allow event organisers to hire their facilities for use. In these situations, event organisers are responsible for obtaining the necessary licences from APRA and/or PPCA for the public performance of music. Venues must check that event organisers have obtained the necessary licences prior to the event.

Some LPA Members have raised concerns about PPCA's pursuit of licence fees from venues for events presented by hirers. Generally this occurs when the event organiser has not paid licence fees or PPCA believes fees are due even though the event did not involve recorded music.

Venues are keen to have productive working relationships with collecting societies and recognise they are part of the licensing ecosystem. Some venues have developed deeds of agreement with PPCA to establish the protocols for dealing with licensing by hirers (for example, the venue will provide the event organiser's contact details for PPCA to follow up). However, PPCA has failed to acknowledge this deed of agreement and some months later, is now pursuing venues for unpaid licence fees by hirers. Members are frustrated that they have tried to put in place a practical working arrangement with PPCA but PPCA does not seem open to consulting on these issues.

Some venues have also experienced pressure from APRA to collect licence fees from hirers on their behalf, even though they are not obliged to do so.

2.5. Dispute resolution

In LPA's March 2017 submission to the Code Reviewer, The Hon Kevin Edmund Lindgren AM QC, LPA raised concerns that:

- there is no accessible avenue for licensees to seek an independent and enforceable determination on licence fees and conditions. The Copyright Tribunal is the only independent

body that can determine the fees and conditions for licences in accordance with the market value of content and how it is used. However, in cases where licensees disagree with the conditions or fees of a licence scheme it is significantly costly and onerous to pursue proceedings through the Copyright Tribunal. The lack of accessible means to pursue an independent determination creates scope for copyright collecting societies to set unchallenged arbitrary licence fees and conditions that do not accurately reflect the value of content within the context in which it is being used.

- there is a lack of effective recourse for licensees to pursue efficient, fair and independent resolution of licensing disputes with collecting societies. LPA acknowledges the efforts by APRA to implement an independent Alternative Dispute Resolution (ADR) scheme as a condition of their recent reauthorisation with the ACCC. We are not aware of any LPA Member that has sought to resolve disputes via this process. Therefore, we are unable to comment on whether this ADR scheme meets its intended objectives. Member feedback indicates that APRA is not advising licence applicants that ADR is available, particularly where there is a potential dispute. LPA intends to do more to educate its Members of the ADR scheme but believes APRA needs to be much more upfront in advising potential licensees of this avenue.

2.6. Transparency of payments to copyright owners

LPA believes there needs to be greater enforceable transparency requirements for collecting societies in relation to payments to copyright owners. There is a lack of clear and detailed disclosure on how the distribution of funds to right holders correlates to the royalty payments received. As such, there is currently insufficient information available to discern how royalty revenue collected is then distributed to the rights holders that own the content used. Licensees should be able to confirm that fees paid for the use of particular content is fairly distributed to the owner of that content.

3. SUMMARY

In summary, many LPA Members report positive dealings with APRA. However, when Members have raised concerns, they relate to:

- Lack of timely response to licensing requests or queries, causing uncertainty as to whether music can be used and placing undue stress on licensees and artists
- Inconsistency in the interpretation of licence classification. Shows that have historically been licensed under one category being reclassified to a different (higher tariff) category, even though there have been no changes to the licensing framework
- The interpretation of how licence fees are calculated is broadened to include items that are inconsistent with licensees' understanding or interpretation
- Pursuit of licence fees from venues even though event organisers are responsible for these fees
- The need to raise greater awareness of APRA's alternative dispute resolution scheme
- Greater transparency to ensure that royalty revenues paid by licensees are distributed to the rightful owner of the content.