

Submission in response to the application by the Australasian Performing Right Association (APRA) for revocation of authorisation AA1000433 and substitution of new authorisation AA1000661

Submission by the Australian Digital Alliance and the
Australian Libraries and Archives Copyright Coalition

Submitted Monday 11 March 2024



This submission is licensed for reuse under a Creative Commons Attribution 4.0 (CC BY 4.0) International licence.
For licence terms see <https://creativecommons.org/licenses/by/4.0>.

This submission is available to read or download (including in other file formats) on the ADA and ALACC websites at:
<https://digital.org.au/accc-apra-authorisation-aa1000661-submission>
<https://alacc.org.au/accc-apra-authorisation-aa1000661-submission>

Introduction

The [Australian Digital Alliance](#) (ADA) and the [Australian Libraries and Archives Copyright Coalition](#) (ALACC) thank the Australian Competition and Consumer Commission (ACCC) for the opportunity to make a submission in response to the Australasian Performing Right Association's (APRA) application to revoke authorisation AA1000433 and substitute it with a new authorisation (AA1000661) (application for 're-authorisation'). As the ACCC will be aware, the ADA and ALACC have made submissions in response to similar prior applications by APRA.¹

The ADA is a not-for-profit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy fora. The ALACC advocates for copyright law reform in the interests of Australian libraries, archives and information providers. Our interest in this matter stems from the importance of a well-functioning copyright system that supports copyright owners and copyright users – for music and more broadly. Further information about each organisation is included in the next sections.

As member-based organisations, our members are among those copyright user groups in Australia whose operations are impacted by collecting societies or collective management organisations (CMOs), including APRA. This is particularly acute for our members in primary, secondary and tertiary education. Members in the GLAM (galleries, libraries, archives and museums) sectors also participate in collective licensing as government bodies and as venues for live and recorded performance. As we will outline in this submission, oversight of Australian CMOs is insufficient which impacts the public benefits CMOs create. There remains an urgent need for reform of the governance arrangements for collecting societies in Australia, including APRA.

At the outset, the ADA and the ALACC wishes to make it clear that we continue to support appropriate collective rights management through CMOs, including music rights management organisations (MRMOs) such as APRA. We do not disagree that APRA's "centralised means for granting copyright licences to those wishing to communicate or publicly perform its members' musical works and for distributing royalties back to members"² provides numerous benefits to Australian music composers, songwriters and music publishers that are members of APRA and to Australian licensees using music in APRA's repertoire. By extension, we recognise the important role APRA plays in the Australian and international music industry, and the service the organisation provides to its members and musicians from other countries through its reciprocal arrangements with overseas music MRMOs.

¹ A list of the ADA's submissions in response to applications to the ACCC for re-authorisation by APRA, see <https://digital.org.au/resources/apra-licensing-arrangements>.

² APRA, 'Application for revocation of authorisation AA1000433 and substitution of a new authorisation: Outline of submissions in support of application', 2024, p 3, https://www.accc.gov.au/system/files/public-registers/documents/Application%20Received%20-%2006.02.24%20-%20PR%20VERSION%20-%20AA1000661%20APRA_0.pdf.

The ADA and the ALACC concur that such collective management of copyright material is an efficient and effective way of addressing the impracticalities of licensing the use of copyright material at scale. However, inflating the public benefits of these organisations while downplaying the detriments is dangerous.

We would also like to state that we recognise APRA's efforts to improve and simplify the licensing process for current and potential licensees. We also acknowledge the organisation's efforts to upgrade how it collects data on the use of its repertoire by licensees.³ These are welcome changes, especially when considered in tandem with improved information made available to members and the public via APRA's website related to the Opt Out, Licence Back and other options for managing music available to members.⁴

Even with these positive changes, the ADA remains concerned that:

- greater transparency and accountability of collecting societies in Australia is still needed, including at APRA; this is especially apparent in relation to how data related to the use of repertoire translates into royalty payments to members
- Opt Out, Licence Back and other mechanisms available to Australian musicians who are APRA members that allow them to direct licence their works in some limited situations do not allow them to utilise common open content licensing systems such as Creative Commons (CC) to share their music before or during their membership of APRA.

These are not new concerns for both our organisations. We raised largely the same concerns in response to APRA's last re-authorisation application,⁵ the determination for which was released on Monday 13 July 2020.⁶ Those comments are effectively the same as those outlined in the first submission the ADA and ALACC jointly made in relation to an application for authorisation, made by APRA back in 2009.⁷ We will restate and expand on those concerns in this submission.

³ We also recognise that these efforts have also positively impacted the Australasian Mechanical Copyright Owners Society (AMCOS) business as well.

⁴ See APRA AMCOS, 'APRA alternatives', n.d.-a, <https://www.apraamcos.com.au/music-creators/membership-explained/managing-your-rights/apra-alternatives>. See also APRA, 2024, p 10.

⁵ ADA, 'Submission to ACCC regarding APRA application for authorisation (A1000433)', 2019, <https://digital.org.au/resources/accc-apra-authorisation-a1000433-submission>.

⁶ ACCC, 'Application for revocation of A91367–A91375 and the substitution of authorisation AA1000433 lodged by Australasian Performing Right Association Ltd in respect of arrangements for the acquisition and licensing of performing rights and communication rights in musical works Authorisation number: AA1000433 Determination', 2020, <https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%202013.07.20%20-%20PR%20-%20AA1000433%20APRA.pdf>.

⁷ Australian Libraries Copyright Committee (ALCC) and ADA, 'Joint Submission of the Australian Digital Alliance and the Australian Libraries Copyright Committee, Australasian Performing Right Association Ltd Application for Revocation and Substitution Interested Parties Consultation', 2009, available on the ACCC website, <https://www.accc.gov.au/system/files/public-registers/documents/D09%2B185078.pdf>.

SUBMISSION IN RESPONSE TO THE APPLICATION BY THE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION (APRA) FOR REVOCATION OF AUTHORISATION AA1000433 AND SUBSTITUTION OF NEW AUTHORISATION AA1000661

The ADA is happy to make further comments on this matter should the ACCC require additional information in relation to this submission. Our principal contact with respect to this submission is our Executive Officer, Sarah Powell, who can be reached at sarah@digital.org.au or on 02 6262 1118.

About the Australian Digital Alliance

The Australian Digital Alliance (ADA) provides a voice for the public interest in access to knowledge, information and culture in copyright reform debates. We are a broad nonprofit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. The ADA was founded following a meeting of interested parties in Canberra in July 1998, with our first patron being retired Chief Justice Sir Anthony Mason AC KBE QC. More than 25 years later, the ADA continues to be a respected and active participant in the Australian copyright reform debates, regarded for its depth of copyright expertise and advocacy efforts on behalf of a diverse membership.

ADA [members](#) span various sectors, and include universities, schools, disability groups, libraries, archives, galleries, museums, research organisations, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

Committed to copyright reform that enables fair access to content and encourages innovation and growth, the ADA provides policy advice to government and its members, supports research and publications on new copyright law and policy, monitors international trade and IP developments and facilitates forums to discuss topical copyright issues and progressive reform.

The ADA's key positions can be viewed at <https://digital.org.au/key-positions>. More information about the organisation is available at digital.org.au/about.

About the Australian Libraries and Archives Copyright Coalition

The Australian Libraries and Archives Copyright Coalition (ALACC) (formerly the Australian Libraries Copyright Committee (ALCC)) is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. The ALACC has ten organisational members, each of whom nominates a representative to provide advice and reflect the concerns of their members. The organisational members are:

- [Australian Library and Information Association \(ALIA\)](#)
- [Australian Society of Archivists \(ASA\)](#)
- [National and State Libraries Australasia \(NSLA\)](#)
- [Council of Australasian Archives and Records Authorities \(CAARA\)](#)
- [Council of Australian University Librarians \(CAUL\)](#)
- [National Archives of Australia \(NAA\)](#)
- [Australian School Library Association \(ASLA\)](#)
- [NSW Public Library Association \(NSWPLA\)](#)
- [Australian Law Librarians Association \(ALLA\)](#).

The ALACC offers informed contributions to domestic and international copyright law and policy discussions and organises copyright education, including training and online information resources targeted at the library and archives sectors.

The ALACC and its members support a copyright framework that appropriately protects the interests of right holders while ensuring access to important cultural, educational and historic content for the public's benefit.

More information about the ALACC is available at alacc.org.au/about.

Improvements to APRA's operation

Before addressing the concerns outlined above, we wanted to make some preliminary comments in support of activities APRA has undertaken since their last re-authorisation application. The ADA and ALACC welcome improvements to APRA's operations in terms of the management of its repertoire and the collection of data on the use of that repertoire. We are also pleased to see APRA has invested in improving the information available to licensees and members. Likewise, it is encouraging to see that APRA continues to make the ways in which licensees and members interact with the organisation easier. While much of this effort was likely undertaken in response to the conditions the ACCC placed on APRA when its arrangements were last authorised, they have led to better outcomes on both sides of APRA's business.

While OneMusic Australia is far from criticism free, the initiative has simplified the licensing process for many businesses seeking to use APRA's repertoire. The music licensing 'one-stop-shop' for APRA, AMCOS and the Phonographic Performance Company of Australia (PPCA)⁸ does allow "businesses to obtain one licence for the public performance of recorded music that covers the composition, lyrics and sound recording instead of seeking multiple licences."⁹ In light of criticisms, we welcome APRA's stated commitment to improve OneMusic, including customer experience improvements and allowing licensees to pay monthly.¹⁰

It is also encouraging to see that APRA is implementing a number of administration and IT improvements on the member side of its business,¹¹ particularly those that will support a shift to monthly royalty payments to members, due to commence, in part, from April or May this year.¹² Over time the amount of

⁸ For more information on the arrangement between APRA AMCOS and PPCA and the administration of OneMusic, see APRA, 'APRA Response to Information Request 1-6', n.d.-b, pp 1 and 2, available on the ACCC website, <https://www.accc.gov.au/system/files/public-registers/documents/AA1000433%20-%20Revocation%20and%20Substitution%20of%20A91367%20-%20A91375%20-%20Australasian%20Performing%20Right%20Association%20Limited%20-%20Applicant%20to%20ACCC%20re%20Response%20to%20Information%20Request%20-%2016.04.19%20-%20PR%20VERSION.pdf>.

⁹ APRA, 2024, p 14.

¹⁰ APRA, 2024, pp 13 and 15.

¹¹ For example, in late 2020 APRA released an app called APRA AMCOS for Music Creators on Apple's App Store and Google's Play Store that allows members to register works and submit performance reports on smartphones, among other things. See APRA AMCOS, 'Introducing the new app: APRA AMCOS for Music Creators', 2020a, <https://www.apraamcos.com.au/about-us/news-and-events/introducing-the-new-app-apra-amcos-for-music-creators>. See also APRA AMCOS, 'APRA AMCOS for Music Creators app', n.d.-c, <https://www.apraamcos.com.au/music-creators/member-resources/guides/app>.

¹² APRA, 2024, p 11.

SUBMISSION IN RESPONSE TO THE APPLICATION BY THE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION (APRA) FOR REVOCATION OF AUTHORISATION AA1000433 AND SUBSTITUTION OF NEW AUTHORISATION AA1000661

royalty monies awaiting distribution reported in APRA's annual Transparency Reports¹³ should decrease as APRA members receive their royalty payments on a more regular basis.

Seeing royalties flow back to creators sooner is a positive development from APRA. It contributes to transparency and accountability efforts by the organisation. It also increases Australian musicians' cash flow and their ability to forecast and financially plan for their creative businesses. The value of this cannot be overstated given the precarity of artists' incomes in Australia.

The seminal longitudinal research on artists' incomes by Professor David Throsby, Distinguished Professor of Economics at Macquarie University, shows a decline in creative incomes of almost 20 percent in real terms.¹⁴ To this point, Throsby, together with Katya Petetskaya, said:

“In the case of [artists'] incomes, little has changed in real terms; artists' creative incomes have increased sufficiently in nominal terms to keep pace more or less with inflation, but no more. Meanwhile, artists' relative position in comparison with other professionals has deteriorated, since those other groups have enjoyed a rising trend in their real incomes for most of the period covered.”¹⁵

Further, Throsby and Petetskaya noted that, consistent with earlier surveys in the series, “the distribution of artists' incomes is strongly skewed towards the lower end.”¹⁶ In the financial year 2014–15, Throsby and Petetskaya reported that mean gross creative income for musicians was \$15,600 with a median gross income of just \$4,700.¹⁷ The following additional points made by Throsby and Petetskaya specifically in relation to musicians are also worth noting:

- “The fact that the medians are substantially smaller than the means indicates the extent to which incomes are skewed towards the lower end, especially for creative and total arts income.”¹⁸
- “Comparing median and mean creative incomes for each [principal artistic occupation] PAO indicates the extent to which the distribution is skewed; it shows that writers and musicians are the

¹³ It is worth noting that the publication of annual Transparency Reports by APRA, and much of the detail disclosed in them, was a condition of the 2020 Determination: See ACCC, 2020, p 104. See for example APRA AMCOS, 2023, p 2.

¹⁴ Throsby, D and Petetskaya, K, ‘Making Art Work: An economic study of professional artists in Australia’, 2017, pp 10 and , available at the Creative Australia (formerly Australia Council for the Arts) website, <https://creative.gov.au/advocacy-and-research/making-art-work>.

¹⁵ Throsby and Petetskaya, 2017, p 15.

¹⁶ Throsby and Petetskaya, 2017, p 75.

¹⁷ Throsby and Petetskaya, 2017, p 74.

¹⁸ Throsby and Petetskaya, 2017, p 75.

occupational groups with the longest “tails”, i.e. with the largest numbers of practitioners with low creative incomes.”¹⁹

- “The prevalence of artists with relatively low creative incomes is apparent for musicians and composers.”²⁰

The harsh reality of creators’ incomes is even more concerning in light of the earnings gap for women artists,²¹ First Nations music artists,²² artists who live in regional cities or towns and in rural and remote areas²³ and artists with a disability.²⁴

We were particularly interested to hear about APRA’s improvements to their royalty calculation and distribution processes. In the 2020 Determination, the ACCC required APRA to report annually on the different distribution processing approaches used to determine how licence revenue would be distributed as royalties.²⁵ It is encouraging to see over 90 percent of revenue distributed as royalties is informed by a direct data source.²⁶

¹⁹ Throsby and Petetskaya, 2017, p 75.

²⁰ Throsby and Petetskaya, 2017, p 75.

²¹ “[F]or artists the pay gap appears to be significantly greater [than the full-time pay gap between men and women across all industries in Australia] ... on all measures except one women fare worse than men—the exception is earnings from arts-related work where, as noted ... women spend a greater proportion of their time than men. Of particular concern is the substantially lower incomes earned by women for their creative work in their PAO. This income gap appears to be especially evident for female writers, visual artists and musicians:” Throsby and Petetskaya, 2017, p 131. See also Throsby and Petetskaya, 2017, p 12 and Throsby, D, Petetskaya, K and Shin, S Y, ‘The Gender Pay Gap Among Australian Artists: Some preliminary findings’, 2020, <https://creative.gov.au/advocacy-and-research/the-gender-pay-gap-among-australian-artists>.

²² See generally Australia Council for the Arts, ‘Survey of First Nations music artists: results’, 2020, <https://creative.gov.au/advocacy-and-research/survey-of-first-nations-music-artists>.

²³ “Noting as always that differences that show up in simple correlations do not account for the influence of other factors, we can observe that on the whole artists living outside capital cities appear to earn significantly less than their urban counterparts”: Throsby and Petetskaya, 2017, p 141. See also p 12.

²⁴ “Artists with a disability earn significantly less than their colleagues with no disability ... the negative differential in mean incomes is greatest for creative incomes—artists with disability earn an income from their creative work that is less than half that for other artists.” See also p 13.

²⁵ ACCC, 2020, p 95.

²⁶ See APRA AMCOS, ‘Annual Transparency Report: APRA Consolidated for the year ended 30 June 2023’, 2023, p 7, https://assets.apraamcos.com.au/images/PDFs/About/Transparency-Report_FY2023.pdf; APRA AMCOS, ‘Annual Transparency Report: APRA Consolidated for the year ended 30 June 2022’, 2022, p 8, https://assets.apraamcos.com.au/images/PDFs/About/Transparency-Report_FY2022.pdf; and APRA AMCOS, ‘APRA Annual Transparency Report for the year ended 30 June 2021’, 2021, p 9, https://assets.apraamcos.com.au/images/PDFs/About/Transparency-Report_FY2021.pdf.

SUBMISSION IN RESPONSE TO THE APPLICATION BY THE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION (APRA) FOR REVOCATION OF AUTHORISATION AA1000433 AND SUBSTITUTION OF NEW AUTHORISATION AA1000661

What is evident in APRA's application is the role technology has played in making the tracking, accounting and reporting of music use for APRA's purposes much simpler. It is heartening to see that APRA is investing significantly in technology to modernise its business operations, including investment in music recognition technology (MRT).²⁷ The deployment of MRT across some licence types – for example, commercial television and radio broadcasting, in some nightclubs and venues where DJs perform and at some sporting contests – should be supplying APRA with a wealth of accurate music usage data it can use to more equitably distribute revenue as royalties.

Undoubtedly, this is significantly bolstered by the use of digital music 'fingerprints' and Audoo audio metres to quickly and effectively identify music that has been played in other licensee's business premises. It is encouraging that APRA has been able to use MRT in "significantly more [licensees' business] premises."²⁸ (Although it is unclear what kinds of businesses this initiative is taking in.) It is great that APRA is already planning a staged roll out of this technology to other licensee groups, including community radio stations from July this year.²⁹ We look forward to APRA investing in more communications to current and potential licensees about the benefits of using such technology to encourage greater uptake.

In APRA's own words:

"APRA's licences ensure that those authors and composers whose works are performed and communicated are rewarded for that use. Creators therefore have an incentive to compete to ensure that their works become popular, while knowing that the evidence of that popularity will be collected by APRA and reflected in the distribution."³⁰

With a reliable and regular ingest of usage data the distribution of royalties by APRA should be more representative of actual music use while also reducing the labour burden on licensees needed to collate and report music usage to APRA. Every effort should be made to move to data reporting on actual repertoire use by licensees and away from less certain data options such as samples and analogous sources. Even with this influx of new, reliable music usage data it is unclear how it informs the allocation of royalties. This leads into the first of our concerns which we will take up in the next section.

²⁷ APRA, 2024, pp 11 and 12.

²⁸ APRA, 2024, p 12.

²⁹ APRA, 2024, p 25.

³⁰ APRA, 2024, pp 25–26.

Australian collecting societies need to be more transparent and accountable

Given the concentration of market power in CMOs there is a need for greater oversight of their operations. Too much of what they do is regulated by little more than an assumption that they are acting in good faith, they are not squandering royalties through inefficiencies and poor investment decisions and that they are not inappropriately wielding their market power. In particular, the ADA and ALACC are concerned that Australia's collective licensing system remains under-regulated. We also have concerns that, even with increased transparency, it is still difficult for individual APRA members to understand how their royalties are calculated and whether the amount they are paid is correct. This section looks at both of these issues in more detail.

Under-regulation of Australian collecting societies

As we and other interested parties have outlined in previous submissions to the ACCC and other government consultations³¹ there is an urgent need for reform of the governance arrangements for collecting societies in Australia, including APRA. The current collecting society governance regime in Australia:

- does not impose adequate transparency and accountability obligations on CMOs
- grants CMOs an inappropriate degree of discretion
- has insufficient measures for effective oversight, including sanctions for noncompliance and independent mechanisms for external review and amendment.

As noted in the World Intellectual Property Organisation (WIPO) CMO Toolkit, "Governments play an essential role in introducing the regulatory framework for the establishment, operation, governance and supervision of CMOs, including standards for good governance, financial management, transparency and accountability. This is essential to make sure that the CMOs operate in the best interest of their members and right holders they represent."³² While we recognised, as WIPO does, that "Governments should not

³¹ ADA, 'Review into the efficacy of the Code of Conduct for Australian copyright collecting societies', 2017, <https://digital.org.au/resources/review-of-the-code-of-conduct-for-copyright-collecting-societies-submission>. See also ADA, 'Australasian Performing Right Association Ltd application for revocation of authorisations A91367–A91375 and substitution of new authorisation A1000433', 2019, <https://digital.org.au/resources/accc-apra-authorisation-a1000433-submission>.

³² WIPO, 'WIPO Good Practice Toolkit for Collective Management Organizations (The Toolkit): A Bridge between Rightholders and Users', 2021, p 117, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_cmotoolkit_2021.pdf.

SUBMISSION IN RESPONSE TO THE APPLICATION BY THE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION (APRA) FOR REVOCATION OF AUTHORISATION AA1000433 AND SUBSTITUTION OF NEW AUTHORISATION AA1000661

unnecessarily become involved in the operation of CMOs ... but [they] should, as far as possible, ensure proper management by the CMOs, through impartial and transparent means,”³³ the amount of power CMOs wield in the market – especially APRA – warrants greater regulation and oversight as an important counterbalance.

Pointing to the UK Intellectual Property Office’s (IPO) 2012 report on codes of conduct for collecting societies, the IPO stated “... to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct [including that of Australia] struggle to meet these criteria ...”³⁴ Even as a voluntary code, Australia’s *Code of Conduct for Copyright Collecting Societies* fails to meet the ACCC’s own *Guidelines for developing effective voluntary industry codes of conduct* because, for example, the Code doesn’t meet the recommendation regarding commercially significant sanctions for noncompliance.³⁵ As far back as 2000 it was also criticised for not providing adequate powers for the government to direct and oversee the behaviour of individual societies.³⁶ That has not changed in the nearly 25 years since.

We call again for oversight that takes into account the public interest. The shortcomings of the current system cannot be addressed by mere amendments to the voluntary Code. Reforms to the regulatory system as a whole are required. This should take the form of legislative amendments and mandatory guidelines that together set clear standards and incorporate effective enforcement mechanisms, including an expanded role for the ACCC in overseeing Australian collecting societies. These measures will build greater consistency, accountability and transparency for the Australian collective licensing regime.

³³ WIPO, 2021, p 117.

³⁴ IPO, ‘Collecting Societies Codes of Conduct’, 2012, p 52,
<https://www.gov.uk/government/publications/collecting-societies-codes-of-conduct>.

³⁵ See ACCC, ‘Guidelines for developing effective voluntary industry codes of conduct’, 2011, p 11,
<https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>.

³⁶ Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, 2000, pp 122, 124 and 125, available at the Trove website,
https://webarchive.nla.gov.au/awa/20071118222325/http://pandora.nla.gov.au/pan/33012/20071102-1423/www.nationalsecurity.gov.au/www/agd/rwpattach.nsf/VAP/%28765F1D0B5FA9A829C7FDA9B7F9E8611A%29_Review%20of%20Intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement%2C%2B%28September%2B2000%29.pdf/%24file/Review%20of%20Intellectual%20property%20legislation%20under%20the%20Competition%20Principles%20Agreement%2C%2B%28September%2B2000%29.pdf.

Need for greater transparency in how APRA calculates and distributes royalties

Measures undertaken by APRA to comply with the conditions the ACCC put in place in the 2020 Determination have added some much needed transparency about how the organisation sets its licence fees and how royalties are distributed to members. APRA's annual Transparency Report, for example, publishes high level information that discloses a breakdown of revenue by type of use, operating costs, amounts paid to different types of rights holders, the amounts received from and paid out to other MRMOs, details of distribution arrangements and other financial information. While this is useful information, it does not address the complexity in how collecting societies calculate royalties and distribute them. A lack of transparency in this regard raises questions about whether artists are being compensated fairly for the use of work – and how underpayment could even be identified if it was occurring.

More needs to be done to address the 'black box' around the formulas and methodologies used to allocate royalties. While transparent reporting of the types of distribution processing used by APRA is important, the ADA wants to see a commitment by APRA to strive to use methods that 'count' each musical work used over less accurate data methods (although we do recognise the use of such methods will not be possible in every situation). This should be achievable given the improvements outlined above. Importantly, more disclosure to members should be made to help members have confidence in the royalty payments they receive.

Direct licensing of APRA works by members

APRA, like many MRMOs, requires members to assign to it their 'performing right'³⁷ – which for APRA's purposes includes the right to perform the work in public and the right to communicate the work to the public (including by broadcasting it)³⁸ – in current or future works or parts of works of which they are the composer, author and/or publisher or in works 'vested' in them. APRA argues that this approach creates greater certainty in its ability to licence its repertoire on behalf of members, and that underpins the efficient administration, monitoring and enforcement of rights in musical works. This results in greater public benefits than the detriments with this arrangement.

Concerns with the assignment arrangements of APRA are not new. Many interested parties and the ACCC itself³⁹ have flagged it as a concern on numerous occasions. In fact, the introduction of APRA's first Licence Back mechanism resulted from the Competition Tribunal compelling the creation of such a mechanism in 1999 to introduce more flexibility in terms of how members could direct licence works in certain situations.⁴⁰ The ACCC *guidelines to assist the Copyright Tribunal in the determination of copyright remuneration* also places a strong emphasis on the importance of direct licensing as a competitive constraint on collecting societies.⁴¹

³⁷ See APRA AMCOS, 'APRA Constitution', 2018, Article 17(a), <https://assets.apraamcos.com.au/images/PDFs/About/APRA-Constitution.pdf>. See also APRA, 2024, pp 7 and 8.

³⁸ See APRA AMCOS, 2018, Article 3.

³⁹ The ACCC's Determinations in 2010 and 2014 place an increasing emphasis on the importance of direct licensing. For example in 2010 the ACCC stated: 'There is little incentive for users to deal directly with members if APRA does not offer a genuine discount on blanket licensing to reflect direct licensing': ACCC, 'Application for revocation and substitution of authorisations A490918, A490919, A490921, A490922, A90924, A490925, A90944 & 490945 Determination', 2010, p iii, <https://www.accc.gov.au/system/files/public-registers/documents/D10%2B3541839.pdf>.

In 2014 the ACCC made it a condition of authorisation that APRA take '... steps to increase awareness of the licence back and opt out provisions: ACCC, 'Application for revocation and substitution of authorisations A91187-A91194 and A91211 Determination', 2014, p iii, <https://www.accc.gov.au/system/files/public-registers/documents/D14%2B72965.pdf>. See also pp 81 and 89.

⁴⁰ In the decision the Tribunal stated: 'The Tribunal considers a scheme which permits a non-exclusive licence back to a member of APRA of the performing rights in Australia for a specific work or works to allow the member to grant a sub-licence would not threaten the integrity of the APRA system, and should be required.' See Australian Competition Tribunal, *Re Applications by Australasian Performing Right Association Ltd* [1999] ACompT 3, https://www.competitiontribunal.gov.au/decisions/year/1999/acomp-1999?sq_content_src=%2BdXJsPWh0dHBzJT-NBJTJGJTJGd3d3Lmp1ZGdtZW50cy5mZWRjb3VydC5nb3YuYXUIMkZqdWRnbWVudHMLMkZKdWRnbWVudHMLMkZ0cmliW5hbHMLMkZy29tcHQIMkYxOTk5JTJGMTk5OWFjb21wdDAzJmFsbD0x.

⁴¹ ACCC, 'ACCC guidelines to assist the Copyright Tribunal in the determination of copyright', 2019, p 2 and 9–11, <https://www.accc.gov.au/system/files/ACCC%20Copyright%20Guidelines.pdf>.

Over time APRA has introduced a number of ways in which members can regain their rights to facilitate direct licensing. Despite these mechanisms being in place, APRA members are still unable to engage with common open content licensing schemes such as [Creative Commons](#) (CC). We discuss APRA's direct licensing mechanisms next, followed by an analysis why those mechanisms are not compatible with the CC licensing system.⁴²

Direct licensing mechanisms available to APRA members

The suite of direct licensing mechanisms that can be activated by an APRA member consists of five different options. Each allows APRA members to directly manage the licensing of their music in different ways. These mechanisms are:

- **Resignation of membership** – An APRA is reassigned all their rights by resigning their membership. From the point of resignation they forego any royalties from APRA.
- **Opt Out** – By opting out of APRA's management of their music in certain categories of use, an APRA member regains the ability to self-manage the licensing of their work for those uses.⁴³ Through this mechanism, APRA reassigns to a member the right to perform in public and communicate to the public (including broadcasting) all of their music worldwide in one or more of the following categories of use:
 - the right to perform their music in public
 - the right to communicate their music to the public by broadcasting
 - the right to communicate their music to the public other than broadcasting
 - the right to perform their music live in public
 - the right to perform their music in public by showing films
 - the right to perform their music in public by means other than live performance and showing films
 - the right to communicate their music to the public by radio
 - the right to communicate their music to the public by free to air television
 - the right to communicate their music to the public by subscription television.

⁴² In the interest of disclosure the ADA is an Institutional Member of the Creative Commons Global Network (CCGN) and works closely with the Creative Commons Australia Chapter.

⁴³ APRA AMCOS, n.d.-a. See also APRA, 2024, p 10.

SUBMISSION IN RESPONSE TO THE APPLICATION BY THE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION (APRA) FOR REVOCATION OF AUTHORISATION AA1000433 AND SUBSTITUTION OF NEW AUTHORISATION AA1000661

- **Licence Back (Commercial Use)** – Through a Licence back for commercial use, an APRA member is able to manage certain works for a particular purpose licensed to a particular sub-licensee.⁴⁴ APRA grants the member a non-exclusive licence to the performing rights in identified songs to enable the member to sub-licence to an identified party or parties the performance or communication of that song or those songs within Australia.
- **Licence Back (Non-commercial website)** – Unlike the commercial Licence Back option, this mechanism licences back rights to communicate certain works to the public online to the APRA member.⁴⁵ APRA grants the member a non-exclusive licence to communicate identified songs to the public online worldwide for non-commercial purposes.
- **Free Personal Website Licence** – This option allows APRA members to make available certain musical works for free downloading or streaming from a personal website.⁴⁶ Upon application, APRA will grant a member a non-exclusive licence to publish their music on their website allowing the public to download or stream their music without charge.

To their credit, APRA have made the information about each option easier to understand on their public facing website.⁴⁷

There are other administrative factors for each mechanism that should be noted. These are detailed in the table below:

⁴⁴ APRA AMCOS, n.d.-a. See also APRA, 2024, p 11.

⁴⁵ APRA AMCOS, n.d.-a. See also APRA, 2024, p 11.

⁴⁶ APRA AMCOS, n.d.-a. See also APRA, 2024, p 11.

⁴⁷ APRA AMCOS, n.d.-a

Direct licensing mechanism	How to apply	Notification period	Fee payable	Other requirements
Resignation of membership	Using the online contact form	Six months (unless a shorter period is appropriate in the circumstances)	Not stated	None
Opt Out	Using a PDF form available on the APRA website	Three months	For “complex” applications an administration fee (capped at \$200) may be payable	Each other party with an interest in the member’s music (if any) must consent using a PDF form available on the APRA website
Licence Back (Commercial Use)	Using a PDF form available on the APRA website	One week before the sub-licensed use occurs if it is a live performance of the member’s own music, a performance in a cinema movie or a communication (broadcast or online) of the member’s songs Two weeks before the use occurs for other uses (live performances of your music by others or performances of recordings of your songs)	For “complex” applications an administration fee (capped at \$200) may be payable	Each other party with an interest in the member’s music (if any) must consent using a PDF form available on the APRA website
Licence Back (Non-commercial website)	Using a PDF form available on the APRA website	One week before the sub-licensed use occurs if it is a live performance of the member’s own music, a performance in a cinema movie or a communication (broadcast or online) of the member’s songs	For “complex” applications an administration fee (capped at \$200) may be payable	The music must only be available on a website for a noncommercial purpose

SUBMISSION IN RESPONSE TO THE APPLICATION BY THE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION (APRA) FOR REVOCATION OF AUTHORISATION AA1000433 AND SUBSTITUTION OF NEW AUTHORISATION AA1000661

Direct licensing mechanism	How to apply	Notification period	Fee payable	Other requirements
		Two weeks before the use occurs for other uses (live performances of your music by others or performances of recordings of your songs)		Each other party with an interest in the member’s music (if any) must consent using a PDF form available on the APRA website
Free Personal Website Licence	Using a PDF form available on the APRA website	No notification period	No fee	The works are provided free

As noted in the table, in most cases a member can initiate an application related to one of the direct licensing mechanisms using a PDF form available on the APRA website.⁴⁸ In the case where an application is “complex” (such as where it involves multiple works and co-writers⁴⁹) an administration fee capped at \$200 may be applicable. Where any other party holds an interest in the music that is the subject of an Opt Out or Licence Back request, each interested party must consent to the application.

⁴⁸ See *Opt out request form*, <https://assets.apraamcos.com.au/images/PDFs/Music-Creators/17b-opt-out-request.pdf>; *Request for licence back (Commercial use) form*, <https://assets.apraamcos.com.au/images/PDFs/Music-Creators/17g-request-for-licence-back.pdf>; *Request for licence back (Non-commercial website) form*, <https://assets.apraamcos.com.au/images/PDFs/Music-Creators/17i-request-for-licence-backnon-commercial-website.pdf>; and *Free personal website licence form*, <https://assets.apraamcos.com.au/images/PDFs/Music-Creators/free-personal-website-licence.pdf>.

⁴⁹ APRA AMCOS, ‘Licensing your music yourself – the Licence Back and Opt Out processes’, 2020b, <https://www.apraamcos.com.au/about-us/news-and-events/licensing-your-music-yourself-the-licence-back-and-opt-out-processes>.

Incompatibility of APRA's direct licensing mechanisms and Creative Commons

When it comes to APRA members being able to use CC licences, a core inconsistency lies in the assignment of rights. APRA, like most MRMOs, requires a full assignment of performance and communication rights. APRA's arrangements see it become the copyright owner of its members' public performance and communication rights. They are able to exclusively exploit their members' rights. They operationalise this arrangement by acting as an intermediary between music creators and those who wish to use their music. This largely plays out on an 'all or nothing' basis – members assign their performance and communication rights in exchange for a share of the revenue distributed as royalties.

In order to release copyright material under a CC licence, the licensor needs to be able to exercise the full bundle of rights in their material – including public performance and communication, both of which are assigned to APRA (when taking out APRA membership). The CC licences give creators direct control over how their music is used, allowing them to determine the specific permissions they want to grant through their licence selection. CC allows creators to retain some rights while licensing others broadly to the public. This gives musicians nuanced control over their work. Importantly, a common licensing option in the CC licensing suite is to licensing the use of copyright material for noncommercial uses only. Such a choice should not preclude receiving income in other ways for commercial use of the licensed material. In our opinion, that should include the ability to collect royalty payments through APRA for commercial uses of a member's music.

Unlike APRA's membership arrangements, CC licences are intentionally not exclusive in nature. They do not inhibit a licensor's ability to choose to licence their music through multiple channels at the same time. It is also important to note that CC licences do not identify specific licensees. Rather, CC licences offer use of the licensed copyright material within the restrictions applied by the licensor to anyone who wants to use the material. Literally, CC licensed material is offered in a nondiscriminatory way to anyone in the world who wants to make use of the licensed material. Additionally, where a licensee redistributes the licensed material any subsequent users are able to rely on the CC licence in relation to uses they make of the material.

Because of APRA's arrangements, an Australian musician who is already an APRA member cannot release their work under a CC licence. This was flagged with the ACCC by Creative Commons International back in 2005.⁵⁰ Nearly 20 years later and this issue remains unresolved. As we will demonstrate in this section, this is the case even where a member has regained rights through one of the direct licensing mechanisms APRA supports.

⁵⁰ Creative Commons International, 'RE: re-authorisation of collective administration of music performing rights by APRA', 2005, p 6, available on the ACCC website, <https://www.accc.gov.au/system/files/public-registers/documents/D05%2B61451.pdf>.

SUBMISSION IN RESPONSE TO THE APPLICATION BY THE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION (APRA) FOR REVOCATION OF AUTHORISATION AA1000433 AND SUBSTITUTION OF NEW AUTHORISATION AA1000661

CC licensing is not a option for APRA members seeking to utilise one of the direct licensing mechanisms APRA supports for the following reasons:

- **Resignation of membership** – Resignation of membership puts Australian musicians in a troubling ‘either/or’ position. In order to utilise CC licences, an Australian musician has to give up all royalty income they could receive through APRA.
- **Opt Out** – Because CC licences grant a broad public permission to use licensed material – including any form of public performance or communication – and APRA members can only Opt Out for specific categories of use it is difficult to reconcile both approaches. To make use of CC a member would need to opt out of every category, the result of which is effectively the same as resigning their membership. Also, because members Opt Out all of their works, this is not an attractive option for an APRA member who wishes to CC licence a specific work or group of works while still making use of APRA’s services for other works.
- **Licence Back (Commercial Use)** – Because the commercial Licence Back is territorially bound to Australia and CC licences apply worldwide this mechanism could not be used to allow an APRA member to CC licence musical works.
- **Licence Back (Non-commercial website)** – While *prima facie* the noncommercial Licence Back mechanism could allow APRA members to utilise one of the noncommercial CC licences, this is not actually the case. The very narrow definition of ‘non-commercial’⁵¹ in APRA’s Licence Back undermines the utility of the mechanism even for common noncommercial uses. The practical effect of this definition is so limited as to not only exclude actions ordinarily considered to be noncommercial, but also to arguably exclude almost all uses of the material. By being limited to ‘not for profit entities’ the definition would appear to exclude licensing to individuals, and the requirement that the entity not receive ‘public or institutional funding’ would appear to exclude a large proportion of not for profit entities such schools, universities, libraries, museums, disability groups or arts organisations that receive federal or state government arts grants. By comparison, the definition of noncommercial in the Creative Commons Attribution-NonCommercial 4.0 International licence is: ‘... not primarily intended for or directed towards commercial advantage or monetary compensation.’⁵²

⁵¹ For the purposes of the Licence Back (Non-commercial website):

‘Non-commercial Purposes means:

- (i) that there is no consideration or financial incentive whether directly or indirectly received by any party for the communication or any subsequent use of the Work under any sub-licence; and
- (ii) any sub- licensee is a not for profit entity whose activities are not directed towards commercial advantage and that does not receive public or institutional funding.’: APRA AMCOS, 2018, Article 17(j).

⁵² See <https://creativecommons.org/licenses/by-nc/4.0/legalcode>.

- **Free Personal Website Licence** – An APRA member would not be able to release music on their personal website under a CC licence using this mechanism because CC licences grant a broad public permission to use licensed material. The scope of any CC licence allows broad reuse of the licenced material – well beyond just downloading or streaming the music. Even where the APRA member restricted their choice of CC licence to a noncommercial licence, they still could not utilise CC using the Personal Website Licence because the scope of the licence back to the member APRA provides is limited only to downloads or streaming by the public.

It is also important to note that, where an Australian musician has licensed even a single musical work to which they are a copyright owner under a CC licence, they are technically unable to become an APRA member in the future.

Other matters

In addition to the matters listed above, we also wish to flag that the nature of this application differs from previous re-authorisation requests. While APRA is correct in its assertion that the proposed conduct in this application “is identical, or practically identical, to the conduct that was authorised in the 2020 Determination”,⁵³ the nature of the request in this application is different to prior re-authorisation applications. This section will detail the specific matters in APRA's application we are concerned about.

We are concerned APRA is requesting authorisation without conditions.⁵⁴ They state:

“Almost all of these conditions are now firmly and permanently embedded, entrenched, and ingrained into APRA's business functions. That is, almost every condition previously imposed by the ACCC has effectively been incorporated into APRA's Constitution and/or day-to-day operations. Specifically, since each of the conditions imposed by the 2020 Determination are now in-built into APRA's daily operations, and having regard to the significant public benefits generated by APRA's arrangements (that far outweigh any purported public detriments), this Application can be granted (and APRA's arrangements re-authorised) without any of the above conditions being imposed.”⁵⁵

Further, they declare that, should conditions be deemed necessary by the ACCC, “the content of those conditions should be reconsidered.”⁵⁶ Pursuant to that notion, APRA has put forward what it believes those conditions should be.⁵⁷

We are concerned that taking such an approach diminishes the importance of conditions in the authorisation framework. Applications for authorisation by the ACCC arise where an organisation is seeking an exemption

⁵³ APRA, 2024, p 8.

⁵⁴ In their application, APRA states:

“The ACCC may impose conditions when re-authorising APRA's arrangements. Various conditions have been imposed on APRA's operations since 1999, including pursuant to the 2020 Determination.

Almost all of these conditions are now firmly and permanently embedded, entrenched, and ingrained into APRA's business functions. That is, almost every condition previously imposed by the ACCC has effectively been incorporated into APRA's Constitution and/or day-to-day operations. Specifically, since each of the conditions imposed by the 2020 Determination are now in-built into APRA's daily operations, and having regard to the significant public benefits generated by APRA's arrangements (that far outweigh any purported public detriments), this Application can be granted (and APRA's arrangements re-authorised) without any of the above conditions being imposed”: APRA, 2024, pp 5 and 6.

⁵⁵ APRA, 2024, pp 5 and 6.

⁵⁶ APRA, 2024, p 6.

⁵⁷ See APRA, 2024, Attachment 1.

to engage in conduct that may otherwise breach Australian competition law. Such requests should not be and are not taken lightly. The ACCC may grant authorisation where the proposed conduct in the application is not likely to harm competition or is likely to result in a net public benefit that outweighs the public detriment.⁵⁸ The *Competition and Consumer Act 2010* (Cth) permits the ACCC to specify conditions in an authorisation,⁵⁹ with the ACCC determining “the nature, form and scope of any conditions imposed” within “the subject matter, scope and purposes of the Act.”⁶⁰

In the 2020 Determination the ACCC noted that since APRA was first conditionally authorised in 1999, “the approach of the Australian Competition Tribunal and the ACCC has been to impose conditions of authorisation ...”⁶¹ Conditions imposed in the past have been continuing conditions.⁶² Such an approach should be maintained if an authorisation is granted in this case. The reason is that conditional requirements for engaging in conduct that may contravene the competition law should not be left to the whims of the organisation seeking that exemption. Business processes within organisations can change as market conditions change. Certainly the global music industry has seen rapid change during the term of APRA’s current authorisation and undoubtedly this trend will continue through the proposed five-year term of the next one (should APRA be re-authorised, and if so, the authorisation covers the period requested in their application). While “almost all” conditions tied to previous authorisations may be “firmly and permanently embedded, entrenched, and ingrained into APRA’s business functions”⁶³ there is a risk that the implementation of one or more of these legacy conditions may be lessened or abandoned in the future without the same or similar conditions forming part of the ACCC’s determination in this case.

We also note that APRA is seeking authorisation for five years. The last authorisation was granted for four years. Given how rapidly the music industry is changing, we are concerned that a longer authorisation period will keep APRA’s arrangements static while the market is in flux.

As a final point, the ADA and ALACC are concerned about the short consultation period to respond to APRA’s application. Interested parties were notified by email on Monday 19 February 2024 and given three weeks to respond. The nature of the application is complicated, evidenced by the fact that the full

⁵⁸ ACCC, ‘Guidelines for Authorisation of Conduct (non-merger)’, 2022, p 4, https://www.accc.gov.au/system/files/Authorisation%20of%20Conduct%20%28non-merger%29%20guidelines%20-%20December%202022_0.pdf.

⁵⁹ *Competition and Consumer Act 2010*, s 88(3). See also ACCC, 2022, p 40.

⁶⁰ ACCC, 2022, p 40.

⁶¹ ACCC, 2020, p 3.

⁶² See ACCC, 2022, p 40.

⁶³ APRA, 2024, pp 5 and 6. APRA goes on to say, “... almost every condition previously imposed by the ACCC has effectively been incorporated into APRA’s Constitution and/or day-to-day operations” and “APRA is not just complying with the current conditions – it has integrated them into APRA’s daily operations, such that it is no longer necessary for those matters to be imposed as “conditions” on the ACCC’s re-authorisation of APRA’s arrangements.”

SUBMISSION IN RESPONSE TO THE APPLICATION BY THE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION (APRA) FOR REVOCATION OF AUTHORISATION AA1000433 AND SUBSTITUTION OF NEW AUTHORISATION AA1000661

application is more than 900 pages in total.⁶⁴ While there are other opportunities to contribute during the authorisation process, we feel more time to review the application would support greater engagement with the process by interested parties.

⁶⁴ The PDF document of the application is 920 pages including all of the attachments.



AUSTRALIAN DIGITAL ALLIANCE

(02) 6262 1118

info@digital.org.au

digital.org.au



**AUSTRALIAN LIBRARIES AND
ARCHIVES COPYRIGHT COALITION**

(02) 6262 1118

info@alacc.org.au

alacc.org.au