



**APRA
AMCOS**

9 November 2023

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

BY EMAIL - legcon.sen@aph.gov.au

Dear Secretary

COPYRIGHT LEGISLATION AMENDMENT (FAIR PAY FOR RADIO PLAY) BILL 2023

1. As Australia's largest music industry body representing the rights of songwriters, composers and music publishers across Australasia, APRA AMCOS welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023 (Inquiry)*.
2. The Australian Government is familiar with the Australasian Performing Right Association Limited (**APRA**) and Australasian Mechanical Copyright Owners Society Limited (**AMCOS**), trading as APRA AMCOS. APRA has been representing Australian songwriters, composers and music publishers since 1926. With over 115,000 members across Australasia, our membership includes the very best and brightest of established and emerging musical talent at home and around the globe.
3. AMCOS is a younger organisation, having been established in 1979, and together with APRA is at the forefront of music licensing on behalf of its copyright owner members.
4. We administer rights on behalf of our members, supporting songwriters, composers and music publishers in an industry that is a flagship of Australian culture and creativity, generating billions of dollars each year for the Australian economy across live, broadcast, digital, screen and digital games platforms. We are affiliated with similar collective management organisations around the world, so when Australian and New Zealand songs and compositions are played overseas, Australian and New Zealand writers and publishers get paid. We also help music customers in Australia and New Zealand access music from the rest of the world. APRA AMCOS works regularly in partnership with governments at all levels to support the development and career paths in music through the cornerstones of live music, digital platforms, local venues, education and global exports.

5. APRA AMCOS was one of the leading representative bodies of the Australian contemporary music industry that came together as part of the National Cultural Policy consultation to develop a united plan to revolutionise government policy and investment in the music industry at a critical time in its development. At the centre of this plan was a call for the Commonwealth Government to commit to establishing a new national music development agency – Music Australia – with significant recurrent annual investment and a whole-of-government approach for the industry to realise its local and global potential.
6. APRA AMCOS has participated fully and openly in all reviews of copyright legislation in Australia. We have expended considerable resources in gathering evidence, considering issues, preparing submissions and appearing before the reviewing bodies, on behalf of our members, as required. In respect of the most recent inquiries, copies of our previous submissions can be provided upon request.
7. APRA AMCOS would be pleased to assist the Inquiry in its review of the *Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023 (Bill)*.

APRA AMCOS and PPCA

8. In 2019, APRA AMCOS and the Phonographic Performance Company of Australia Limited (**PPCA**) launched a joint licensing initiative under the banner of OneMusic Australia, which licenses the public performance and reproduction rights in both musical works represented by APRA AMCOS and the sound recordings represented by PPCA.
9. Further, APRA AMCOS makes the following submissions.

Radio is a vital driver of revenue for Australian music

10. APRA AMCOS supports the intent of the Bill to provide a mechanism for market determination of royalties for sound recordings played on radio, or in the absence of agreement in the market, by the determination of the Copyright Tribunal (**Tribunal**).
11. APRA AMCOS submits that radio has long been and remains a critical and important part of the Australian music industry ecosystem.
12. The contribution that radio plays to developing and supporting audiences for Australian music is vital for the continuing health of the sector. Radio is still in many ways key to discoverability, surfacing, and market reach for Australian music.
13. For an Australian music artist to be picked up and profiled on radio – in particular on commercial radio – is hugely important to their profile whether they are at an emerging or established phase of their career. This is also the case for the Australian songwriters whose works are broadcast to radio audiences which in many cases are very large and span a variety of demographics and consumer profiles.
14. APRA AMCOS emphasises to the Inquiry the basic tenet that familiarity and frequency create music hits. The more radio features Australian music, the larger that music's audience grows, leading to a likelihood of more extensive and financially successful touring, which is often a central plank in the revenue platform for Australian music.

15. Larger tours build bigger audiences who want to tune in to radio to hear Australian music featured. However, the potential royalty revenue of this positive feedback loop is currently hampered by a statutory cap which reflects the business conditions of radio many decades ago.
16. With the 55-year-old statutory caps removed, a commercially negotiated royalty for radio play of Australian music would provide a crucial boost in income for creatives who often face challenging and sometimes precarious economic situations.
17. APRA AMCOS draws the Inquiry's attention to the fact that radio's ability to bolster the livelihood of Australia's world-class music is also hampered by the low local content quotas for Australian music on radio.
18. In APRA AMCOS's view, local content quota issues dovetail with statutory royalty cap concerns because the playing of Australian music on radio must be preserved and supported alongside the removal of any unnecessary legislative caps on royalties payable for playing Australian music.
19. At present, in compliance with the local content quotas for radio, a commercial radio broadcaster can feature international music for 75% of its programming.
20. Furthermore, due to the obligations of the 2004 Australia-United States Free Trade Agreement (**AUSFTA**) the 25% cap on music quotas faces a ratchet mechanism should it ever be lowered. If the Australian local music quota measure were to be liberalised (that is, lowered) by the government, it cannot then be raised at a later date – the liberalised measure becomes bound as part of the AUSFTA commitments.
21. If the local content quota was to be lowered to 15%, for example, a commercial radio broadcaster could feature international music for 85% of its programming into the future, so long as Australia and the US remained in the AUSFTA. This would have significant negative impacts on the economic benefits that radio can provide to the Australian music sector.
22. In general, APRA AMCOS supports legislative reform which will increase the amount of local music played on radio and remove barriers to a commercial royalty rate being paid for Australian music.

The proposed amendment

23. APRA AMCOS supports the intent of the Bill to amend the *Copyright Act 1968* (**Act**) to repeal subsections 152(8) to 152(11), which would have the effect of:
 - a) removing provisions that prevent radio broadcasters from paying more than one per cent of their gross earnings in licence fees for the broadcast of sound recordings (the **Commercial Radio Cap**); and
 - b) removing provisions that cap the licensing fees for the broadcast of sound recordings that the Australian Broadcasting Corporation (**ABC**) be required to pay by the formula of one-half of one cent multiplied by the estimated population of Australia as set by the Commonwealth Statistician (the **ABC Cap**).
24. APRA AMCOS supports the removal of these provisions from the Act on the basis that the jurisdiction of the Tribunal should not be fettered in this way.

Origin of the restriction on the Tribunal's jurisdiction

25. The origins of the provision for the Commercial Radio Cap and the ABC Cap in the Act as a restriction on the Tribunal's jurisdiction are curious, as is the absence of a mechanism for review of these caps.
26. It was recognised at the enactment of the Act in 1968 that the Tribunal would serve a vital role in the arbitration of remuneration to be paid to copyright owners.
27. APRA AMCOS submits that the clear intention in 1968 was to empower the Tribunal with the jurisdiction to arbitrate where a copyright owner and a broadcasting organisation cannot agree on a royalty to be paid by the broadcaster to the owner of the copyright in a sound recording. This includes determination by the Tribunal – in its discretion – of the amount of or formula for such a royalty.
28. APRA AMCOS notes that the second reading speech of The Hon. Nigel Bowen QC MP in respect of the *Copyright Bill 1968 (1968 Bill)* suggests that the Commercial Radio Cap and the ABC Cap were intended to be a temporary limit on the jurisdiction of the Tribunal.
29. Clause 153 of the 1968 Bill provided for a procedure for the revision of these maximum royalty limits whereby if a prima facie case could be made to the Attorney-General after five years of operation of the Act (i.e., after 1973) that a change in circumstances meant that the maximum royalty should be varied, the Attorney-General could request the Tribunal hold an enquiry and upon its report the maximum royalty might be varied by regulation.
30. For reasons unknown to APRA AMCOS, this provision was not included in the Act as enacted in 1968. In APRA AMCOS's submission this mechanism would have been an efficient and proportionate way to revisit the Commercial Radio Cap and the ABC Cap in the light of evolving economic circumstances and would have provided for a more flexible restriction on the jurisdiction of the Tribunal, subject to periodic review.
31. APRA AMCOS submits that the Commercial Radio Cap and the ABC Cap were instated due to circumstances specific to the period of enactment in 1968. As stated in the second reading speech, these limits were fixed "*in the light of the special circumstances now existing in Australia in relation to the broadcasting of records*", and these "special circumstances" were expressly distinguished from the circumstances related to the broadcasting of copyright musical works.
32. These circumstances were specifically focused – related to concerns around payments to the record industry as it operated at the time – and clearly recognised as being an issue *of the time*, as seen by the reference to the circumstances "now existing". In APRA AMCOS's view it is unusual that these limitations remain unchanged and in place in a vastly different broadcast landscape in 2023.
33. In APRA AMCOS's view, the fixing of these limits due to the perceived economic circumstances of the late 1960s, coupled with the decision to not provide for the proposed review mechanism, instituted an artificial restraint on the Tribunal's exercise of its jurisdiction that remains in place five decades later and has no clear rationale in the broadcast industry today.

Calls for review of the fettering of the Tribunal's jurisdiction

34. The fettering of the Tribunal's jurisdiction as a means of protection for a burgeoning radio industry in the 1960s has been questioned multiple times over the decades.
35. As the Committee is aware, the 1995 the Review of Australian Copyright Collecting Societies concluded that broadcasters were in no need of the protection offered by the Commercial Radio Cap and the ABC Cap and were sufficiently well represented at the time to be able to negotiate market rates without legislative protection.
36. The Ergas Report (2000) recommended that competitive neutrality be achieved by removing unnecessary impediments to the functioning of markets on a commercial basis (while retaining the ABC Cap).
37. In its 2019 Report on the inquiry into the Australian music industry (**2019 Report**), the House of Representatives Standing Committee on Communications and the Arts was not convinced that the cap imposed by section 152(8) of the Act was justified, finding no public policy reason underlying the restriction and stating that *"were the cap to be removed, the ability to apply to the Copyright Tribunal for determination of amounts payable for the broadcast of sound recordings would provide adequate safeguards against record labels taking advantage of commercial broadcasters"*.
38. Further, APRA AMCOS emphasises to the Inquiry that an unfettered Tribunal would not necessarily determine a rate higher than the Commercial Radio Cap and the ABC Cap – it might in fact determine a rate that is below the cap at one point in time and in excess of the cap at another. This would simply be a reasonable and judicious exercise of its jurisdiction without the unnecessary restraint of a statutory cap on a specific use of sound recordings.

The current landscape

39. APRA AMCOS submits that the findings of the 2019 Report still stand in the current landscape.
40. The Tribunal's jurisdiction was artificially fettered due to "special circumstances" which were said to be facing the radio industry in the late 1960s. The legislature in its wisdom was seeking to protect broadcasters from what is referred to in the Ergas report as "an unbudgeted expense".
41. In APRA AMCOS's view the concerns about the budgets of radio broadcasters in 1968 have no rational basis for restricting the jurisdiction of the Tribunal some 55 years later.
42. Commercial radio revenues are underpinned by the playing of music, and music forms the backbone of much of ABC Radio (for example, Triple J, Double J, ABC Classic, ABC Jazz, ABC Country). Radio broadcasters are well-equipped to negotiate royalty rates for the broadcast of sound recordings with the backstop of the unrestricted jurisdiction of the Tribunal where negotiation has not led to an agreement.
43. Comparable radio markets such as the UK, New Zealand, Canada, and France do not have equivalent to the Commercial Radio Cap and the ABC Cap. Instead, in these markets commercial rates are able to be determined, where necessary, by an independent specialist copyright body. Australia's institution of the caps makes it an outlier and the lack of a public policy foundation to the caps points toward a rational conclusion – the caps should be removed.

Conclusion

44. Equitable remuneration for the broadcasting of musical works and sound recordings is at the core of Australian copyright law. APRA AMCOS submits that there is no policy reason to have a cap on the remuneration that financially successful radio broadcasting networks pay for the use of music.
45. Further, the Commercial Radio Cap and the ABC Cap unreasonably limit the powers of the Tribunal. From the original provision of its jurisdiction in the 1968 Act, the Tribunal has been intended to operate as an arbitrator of rates of remuneration between relevant parties. In APRA AMCOS's view, the Tribunal must be allowed to exercise its jurisdiction without restraint.

Thank you for the opportunity to submit to the Inquiry.

If we can provide further information, or be of assistance in any other way, please do not hesitate to contact Jonathan Carter, Chief Operations Officer at APRA AMCOS.