

## Recorded music

- 2.1 Australians love listening to recorded music. Despite its comparatively small population, Australia is the eighth largest market in the world for recorded music.<sup>1</sup> However, as with the global recorded music industry, the Australian recorded music industry has experienced significant disruption as a result of technological advances, forcing the industry to adapt and evolve.
- 2.2 This chapter will focus on the recorded music industry, considering copyright; the impact of streaming services; and licensing for broadcast and public performance.

### Recorded music industry

- 2.3 In April 2018, the Australian Recording Industry Association (ARIA) reported that recorded music revenue grew 10.5 per cent to a total of \$391 million, the largest annual growth since 1996 (Table 2.1). ARIA advised that revenues from recorded music are still approximately 30 per cent below those achieved prior to the digital disruption, but that 'the outlook for 2018 and beyond is positive'.<sup>2</sup>

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1 Australian Recording Industry Association, *Submission 96*, pp. 3-4.

2 Australian Recording Industry Association, *Submission 96*, pp. 3-4.

Table 2.1 2018 ARIA Yearly Statistics, January – June 2017 vs January – June 2018

	January-June 2018	January-June 2017	Percentage Change
<i>Configuration</i>	<i>Dollar Value</i>	<i>Dollar Value</i>	<i>Dollar Value</i>
Singles	68 745	253 570	<b>-72.89%</b>
Vinyl Albums	9 083 039	7 389 862	<b>22.91%</b>
CD Albums	22 979 827	32 888 197	<b>-30.13%</b>
Music Video/DVD	1 049 065	1 684 312	<b>-37.72%</b>
Other	11 792	6 395	<b>84.39%</b>
<b>Total Physical</b>	<b>33 192 468</b>	<b>42 222 336</b>	<b>-21.39%</b>
Digital Track	14 516 744	21 291 799	<b>-31.82%</b>
Digital Album	13 428 641	20 989 779	<b>-36.02%</b>
Ad Supported Streaming Models	12 686 941	9 621 665	<b>31.86%</b>
Video Streaming	14 615 972	10 357 509	<b>41.11%</b>
Subscription Services Income	104 997 595	77 720 247	<b>35.10%</b>
Digital Other	2 210 793	2 295 412	<b>-3.69%</b>
<b>Total Digital</b>	<b>162 456 686</b>	<b>142 276 411</b>	<b>14.18%</b>
<b>Grand Totals</b>	<b>195 649 154</b>	<b>184 498 747</b>	<b>6.04%</b>

Source Australian Recording Industry Association, *Submission 96*, p. 17.

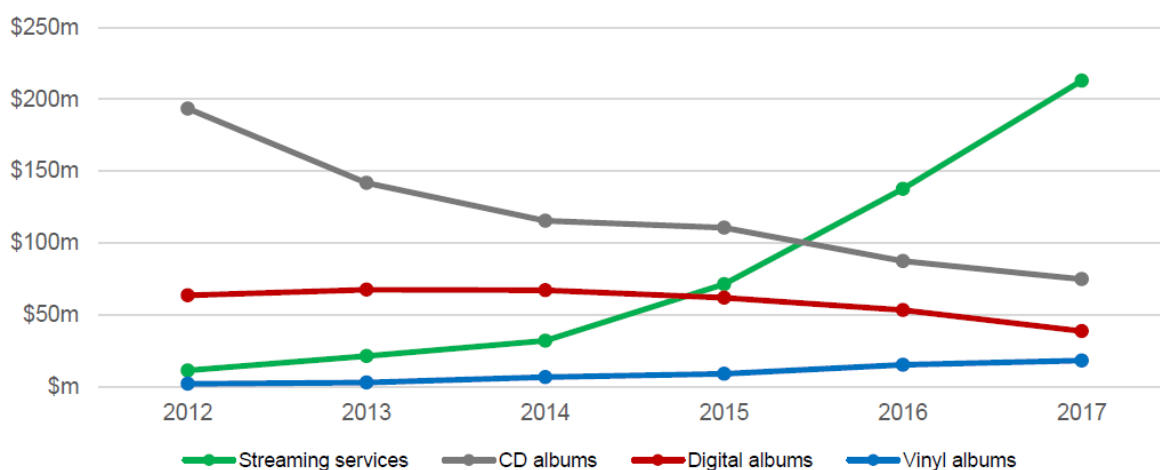
- 2.4 The music industry has always been subject to disruption as a result of changing technology; however, the digital disruption has accelerated the pace of change. This is illustrated by the rapid rise of streaming services, such as Apple Music and Spotify, which have grown from 38 per cent of the total Australian recorded music market value in 2016 to 67 per cent in 2018.<sup>3</sup>
- 2.5 The total market share for both digital and physical recorded music has decreased significantly in just the last few years (Figure 2.1). In 2016, physical formats (CD, vinyl, DVD, etc.) comprised 31 per cent of the total market share for recorded music in Australia, compared to 16 per cent in 2018. Digital downloads have also decreased, dropping from 31 per cent of the total market share in 2016 to 17 per cent in 2018.<sup>4</sup>
- 2.6 However, despite the rapid uptake of streaming services, the Australia Council for the Arts (Australia Council) 2017 National Arts Participation survey found that there has not been a decrease in other ways of listening to recorded music. It found that radio and television continues to be the most common way Australians listen to music (90 per cent), as well as

3 Australia Council for the Arts, *Submission 98*, pp. 11-12.

4 Australian Recording Industry Association, *Submission 96*, p. 16.

music that a person owns (e.g. CDs, music purchased online) (87 per cent).<sup>5</sup>

Figure 2.1 ARIA industry wholesale figures – market value by selected categories (\$m), 2012-2017



Source Australia Council for the Arts, *Submission 98*, p. 12.

## Copyright

- 2.7 Copyright protects the economic interests and moral rights of artists and other rightsholders (such as publishers) by prohibiting others from reproducing or copying their creative output.<sup>6</sup> Participants emphasised that strong and enforceable copyright protections were essential to the sustainability of the Australian music industry.
- 2.8 ARIA explained that copyright is ‘the foundation upon which long term investment in the industry and artists’ careers are possible’ and ‘the means by which artists and labels get paid for their creative work’.<sup>7</sup> The Australasian Performing Right Association and Australasian Mechanical Copyright Owners Society (APRA AMCOS) agreed, explaining that ‘copyright fuels new content’ and emphasised the need for copyright protections that ‘ensure music creators receive fair payment for their intellectual property and continue to innovate’.<sup>8</sup>
- 2.9 The Australian Copyright Council (ACC) advised that ‘the growth and sustainability of the Australian music industry is necessarily reliant on

5 Australia Council for the Arts, *Connecting Australians: Results of the National Arts Participation Survey*, June 2017, p. 71.

6 Andrew Stuart et al, *Intellectual Property in Australia*, 6<sup>th</sup> Edition, 2017, p. 135.

7 Australian Recording Industry Association, *Submission 96*, p. 6.

8 APRA AMCOS, *Submission 94*, p. 18.

strong copyright protections for creators and rights holders'.<sup>9</sup> The ACC told the committee that copyright is the 'currency in which creators trade'. It explained that without appropriately strong copyright protection, creators and those who invest in them are largely unable to gain the full economic benefit from their work product. The ACC asserted that a weak copyright regime 'ultimately acts as a disincentive to creativity'.<sup>10</sup>

2.10 The ACC advised the committee that it is satisfied with the protections currently afforded by the *Copyright Act 1968* (Cth):

We're quite happy with the way the Copyright Act works at the moment. The rights are good, and we have fair exceptions to copyright so that people have access to materials, and rights can be enforced. Obviously it's extremely expensive for individuals to exercise their rights through the court system, but there are big collective organisations that do a lot of that work for them. But certainly the rights basis for copyright in Australia is I think appropriate at the moment.<sup>11</sup>

## What is protected?

2.11 There are three distinct copyrights that commonly apply to music under the under the Copyright Act:

- musical work (composition);
- literary work (lyrics); and
- sound recording of performance.

2.12 In general, copyright in the musical work and lyrics lasts for the life of the artist plus another 70 years. Copyright in a sound recording lasts for 70 years from the end of the year in which the sound recording was first released.<sup>12</sup>

## Who owns the copyright?

2.13 In general, if no agreement exists stating otherwise, the first owner of copyright is the composer for composition and the lyricist for lyrics. If the composer or lyricist created the work as part of their employment, the employer will usually own the copyright. However, if the composer or lyricist created the work on a freelance basis, the person who paid for the

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9 Australian Copyright Council, *Submission 62*, p. 1.

10 Ms Kate Haddock, Chair of the Board, Australian Copyright Council, *Committee Hansard*, Sydney, 22 November 2018, p. 35.

11 Ms Kate Haddock, Chair of the Board, Australian Copyright Council, *Committee Hansard*, Sydney, 22 November 2018, p. 36.

12 Australian Copyright Council, 'Music & Copyright', G012v14, July 2014, p. 4.

work is usually entitled to use the work for the purpose for which it was commissioned, but does not usually own the copyright.<sup>13</sup>

- 2.14 In general, if no agreement exists stating otherwise, the first owners of copyright for a sound recording are the performer/s and the person who owns the recording medium (e.g. the master tape). However, performers' rights are often very limited in practice. In particular, performers will not own a share of the copyright in the sound recording if:
- the performance was given in the course of their employment; or
  - the recording was commissioned (e.g. a record company engaged a production studio to produce a master recording).<sup>14</sup>

## Copyright collecting societies

- 2.15 Copyright collecting societies are not-for-profit organisations that license or administer certain uses of copyright material on behalf of their members (copyright owners). The collected license fees are distributed to members. The main copyright collecting societies for music in Australia are:
- the Australasian Performing Right Association (APRA)<sup>15</sup>, which administers the rights for public performance and communication to the public of music composition and lyrics;
  - the Australasian Mechanical Copyright Owners Society Limited (AMCOS), which licenses certain recordings of music and lyrics (such as cover versions of songs which have already been released), and photocopying of sheet music and recording of music by schools; and
  - the Phonographic Performance Company of Australia (PPCA), which licenses the public performance of sound recordings, such as licenses for the public performance of sound recordings in pubs, clubs, restaurants, shops, radio, online radio and TV stations.<sup>16</sup>
- 2.16 There are also a number of collection societies for Christian music publishers, such as Christian Copyright Licensing International (CCLI), Mediacom/LicenSing, and One License LLC.<sup>17</sup>

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13 Australian Copyright Council, 'Music & Copyright', G012v14, July 2014, pp. 2-3.

14 Australian Copyright Council, 'Music & Copyright', G012v14, July 2014, p. 3.

15 APRA AMCOS is an alliance of the Australasian Performing Right Association Limited (APRA) and Australasian Mechanical Copyright Owners Society Limited (AMCOS) following an agreement in 1997.

16 Australian Copyright Council, 'Copyright collecting societies', G036v14, December 2017, pp. 1-3.

17 Australian Copyright Council, 'Copyright collecting societies', G036v14, December 2017, pp. 1-3.

## Copyright infringement and piracy

- 2.17 Despite the increased availability of online access to music through a myriad of legal avenues and at a range of price points (including free access through add-supported services), copyright infringement and piracy continues to impact the music industry.
- 2.18 The International Federation of the Phonographic Industry (IFPI) currently estimates that 40 per cent of internet users access unlicensed music content.<sup>18</sup> The Australia Council advised the committee that ‘one in five musicians and almost one in three composers report experiencing copyright infringement’ and that ‘income for creative work has declined substantially’.<sup>19</sup>
- 2.19 Research in the United Kingdom, indicated that the number of consumers downloading music illegally is decreasing and is expected to decrease further. The research attributed this to the increased use of streaming services.<sup>20</sup> Spotify told the committee that it combats piracy by offering a more reliable, safer, and legal alternative, advising that:
- Since 2008, music piracy has been decimated in most of our established markets, and Spotify has been largely credited with helping restore the growth to the global music economy...<sup>21</sup>
- 2.20 However, as the music industry adapts to address copyright infringement, so too do the ways in which copyright infringement manifests. ARIA explained that the popularity of streaming services has led to an increase in ‘stream-ripping’,<sup>22</sup> the practice of using various programs and websites to convert the audio being played on a streaming platform to a downloadable file.

## Streaming services

- 2.21 Since entering the market six years ago, music streaming services have become the dominant revenue format for recorded music, accounting for more than two thirds (67 per cent) of the Australian total market value in

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18 International Federation of Phonographic Industry, <https://www.ifpi.org/music-piracy.php>, accessed 14 December 2018.

19 Australia Council for the Arts, *Submission 98*, p. 5.

20 YouGov, ‘Number of Britons illegally downloading music falls’, <https://yougov.co.uk/topics/arts/articles-reports/2018/08/02/number-britons-illegally-downloading-music-falls>, accessed 14 December 2018.

21 Ms Jane Huxley, Managing Director, Australia and New Zealand, Spotify, *Committee Hansard*, Sydney, 22 November 2019, p. 1.

22 Australian Recording Industry Association, *Submission 96*, p. 4.

2018.<sup>23</sup> As of 2016, three in four Australians were using online music streaming services, and in 2016-17 there were an estimated four million paid subscribers.<sup>24</sup>

2.22 ARIA explained that the recorded music industry's resurgence over the last three years has been largely fuelled by consumer uptake of paid streaming services, with revenue from streaming services rising from \$23 million in 2014 to \$213 million in 2018.<sup>25</sup>

2.23 Spotify advised the committee that it offers on-demand access to music, allowing consumers to listen to what they want when they want to listen to it. Consumers can access the service for free, with advertisements, or pay a subscription fee to access a 'premium' service without advertisements. Spotify currently has more than 191 million monthly active users, of which 87 million are paying subscribers.<sup>26</sup>

## Micropayment system

2.24 When music is played on streaming services, such as Spotify, the streaming service pays royalties to record labels and collecting societies, which then pass on those payments to artists.<sup>27</sup> Payments are linked to the number of times an artist's music is 'streamed'; however, the amount that record labels, and ultimately artists, receive per stream is unclear.

2.25 Spotify advised that the rates are 'set at various points, depending on the negotiation or the statutory agreements that we have, and so may vary'.<sup>28</sup> When asked to provide details regarding what fees musicians receive, Spotify responded:

We think that the best way to look at royalties is to consider how much we pay out overall – which is now over €10bn to the music industry since Spotify launched in 2008. Spotify pays out the majority of its revenues to music rights holders, who then pass those royalties onto the artists, musicians and songwriters they represent. We are not privy to the details of the agreements between those parties.<sup>29</sup>

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23 ARIA, *Submission 96*, p. 3.

24 Australia Council for the Arts, *Submission 98*, pp. 11-12.

25 ARIA, *Submission 96*, p. 16.

26 Ms Jane Huxley, Managing Director, Australia and New Zealand, Spotify, *Committee Hansard*, Sydney, 22 November 2018, p. 1.

27 Ms Jane Huxley, Managing Director, Australia and New Zealand, Spotify, *Committee Hansard*, Sydney, 22 November 2018, p. 3.

28 Ms Jane Huxley, Managing Director, Australia and New Zealand, Spotify, *Committee Hansard*, Sydney, 22 November 2018, p. 3.

29 Spotify, *Submission 146*, p. 1.

- 2.26 The revenue received by artists also differs between subscription streaming and free (advertising-supported) streaming. The Australia Council advised that, currently, subscription streaming services deliver 500 per cent more per stream to APRA AMCOS members than free (advertising supported) streaming services.<sup>30</sup>
- 2.27 The ACC told the committee that creators are receiving copyright royalties from streaming, but that digital technologies are ‘diffusing the amount of money that can be paid’. The ACC explained that:
- ...the more information you get about the number of streams a particular work might achieve, the more people are going to get paid, so they're each going to get paid less. So, the technology is enabling tight micropayments to be made, but they are micropayments. I don't think that's a problem of the copyright system. I think it's just a side effect of the digital technology.<sup>31</sup>

### Artist revenue from streaming services

- 2.28 A number of participants raised concerns that, despite the growing revenue generated by streaming services, streaming services have decreased the value of recorded music. The Media Entertainment and the Arts Alliance (MEAA) told the committee that the increasing market share of streaming services has ‘radically undermined the value of recorded music for musicians’.<sup>32</sup>
- 2.29 The Association of Australian Musicians (AAM) told the committee that ‘Spotify’s micro royalty payments (\$0.002 per play) have put many musicians out of business’.<sup>33</sup> The band Watling & Bates explained that the return from streaming is negligible for artists in the early stages of their careers, ‘with hundreds of thousands of streams required to generate income’.<sup>34</sup>
- 2.30 Shelley Karutz, who performs under the name Lacunae Glow, told the committee that artists such as herself receive, on average, one cent per stream from services such as Spotify, Amazon, iTunes and Apple Music. She acknowledged that ‘if you had millions of streams it might add up’,

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30 Australia Council for the Arts, *Submission 98*, p. 12.

31 Ms Kate Haddock, Chair of the Board, Australian Copyright Council, *Hansard Transcript*, Sydney, 22 November 2018, p. 36.

32 Media Entertainment and the Arts Alliance, *Submission 45*, pp. 5-6.

33 The Association of Australian Musicians, *Submission 48*, p. 2.

34 Watling & Bates, *Submission 56*, p. 3.



but noted that artists sometimes receive even less than one cent, providing examples of when her music had generated \$0.00 per stream.<sup>35</sup>

- 2.31 However, some artists told the committee that their income had increased as a result of the revenue generated by streaming services. Gav Parry, a professional artist and artist manager, explained that streaming can provide more opportunity and greater reach for independent artists:

...from my experience with my own project, we had a song that was out on Triple J a number of years ago, and we made like \$6,000 just through iTunes sales. With my biggest song now, we've made like \$20,000, and that's just through streaming. So I think that, with regard to your question about streaming, there's more money to be made as independent artists with playlisting and everything that gives artists who may not usually get those opportunities much wider reach, which is great.<sup>36</sup>

- 2.32 Kristy-Lee Peters, who performs under the name KLP, told the committee that she and her husband (also a professional artist) 'make way more money than we ever did, 100 per cent, so much more, through streaming'.<sup>37</sup> Ms Peters explained that, in order to be successful, artists need to understand how to navigate the industry and how to properly utilise platforms such as streaming services:

...if they don't understand how to use those platforms or they don't understand how to sign a record deal or to say no to a record deal, they're going to find themselves in situations where they can't earn a living like I do.<sup>38</sup>

## Conclusions

- 2.33 The digital disruption forced the recorded music industry to adapt its business models, distribution channels, and licensing options to compete with the ease, convenience, and extremely low cost of unauthorised digital file-sharing.
- 2.34 Streaming services offer an attractive alternative to unauthorised file-sharing. The services offer a more reliable, safer, and legal alternative which is tailored to individual consumers' music preferences. Furthermore, by offering this service for free (with advertisements) or for small subscription fees, streaming services have been able to successfully

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35 Ms Shelley Karutz, *Submission 15*, pp. 2-3.

36 Mr Gavin (Gav) Parry, *Committee Hansard*, Brisbane, 6 February 2019, p. 24.

37 Ms Kristy-Lee Peters, *Committee Hansard*, Brisbane, 6 February 2019, p. 21.

38 Ms Kristy-Lee Peters, *Committee Hansard*, Brisbane, 6 February 2019, p. 18.

compete with the 'free' music accessible through unauthorised file-sharing.

- 2.35 It is no small challenge to successfully provide a competitive and attractive alternative to 'free' music. The recorded music industry's recent return to growth and decrease in the number of consumers downloading music illegally is evidence of the industry's successful adaptation to the digital disruption. The committee commends streaming services for this achievement and for the positive impact that it has had on the global and the Australian recorded music industry.
- 2.36 Some artists have expressed disappointment that streaming services do not generate the same revenue that other formats may have provided in the past. However, music accessed via a streaming service generates more revenue than music accessed via an unauthorised source – even small amounts of revenue are preferable to no revenue. Furthermore, the committee is encouraged by artists that have benefitted as a result of streaming services, both from the revenue generated and the opportunities for greater audience engagement and reach afforded by the services.
- 2.37 Nonetheless, the committee is disappointed regarding the lack of clarity and transparency surrounding the micropayment system. The committee appreciates that the system of payments for royalties is complex; however, it is concerned that many artists and other industry stakeholders do not understand the method of calculating payments nor how much they will be paid when they license their music with streaming services.
- 2.38 The committee encourages streaming services to publish clear, consistent, and transparent information regarding how it calculates payments for artists. This will provide greater certainty and confidence for the Australian music industry and allow artists to better understand and utilise streaming revenues.

## **Broadcast licenses for radio**

- 2.39 The broadcast of music on radio requires commercial broadcasters to pay for licenses for the music's composition and lyrics (voluntary licensing administered by APRA AMCOS) and the sound recording (statutory licensing<sup>39</sup> administered by PPCA). These license fees are collected and distributed to the artists and record labels that own the music that is being played.

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39 *Copyright Act 1968*, s. 109.

- 2.40 License fees for the music's composition and lyrics are paid by commercial radio stations monthly, based on a percentage of the station's gross advertising revenue in that month. The rate varies from 0.054 per cent to 3.76 per cent, dependant on the amount of registered works broadcast as a percentage of their on air time.<sup>40</sup> The annual license fee for sound recordings is approximately 0.4 per cent of the station's combined gross annual revenue.<sup>41</sup>
- 2.41 The rates are negotiated between the collecting societies and Commercial Radio Australia (CRA), the national industry body representing commercial radio broadcasters. Section 152 of the Copyright Act provides for broadcasters or copyright owners to apply to the Copyright Tribunal for determination of amounts payable for the broadcast of sound recordings if agreement cannot be reached.

### Pricing caps for sound recordings

- 2.42 Section 152(8) of the Copyright Act provides that radio broadcasters cannot be required to pay more than one per cent of their gross earnings in license fees for the broadcast of sound recordings. Section 152(11) provides that the Australian Broadcasting Corporation (ABC) cannot be required to pay more than 0.5 cents per head of the Australian population in licensing fees for the broadcast of sound recordings.
- 2.43 A number of participants called for the repeal of these pricing caps, asserting that they prevent fair negotiations and distort the market. The Australian Independent Record Labels Association (AIR) told the committee that the pricing caps set an artificially low rate that is 'unfair to both artists and labels and operates as an inhibiting factor to the ongoing development of Australian music'.<sup>42</sup>
- 2.44 ARIA agreed, describing the cap provided by section 152(8) as an 'international anomaly'. It asserted that the cap 'grossly undervalues the sound recording rights used by the Australian radio industry' and that 'Australian recording artists and record companies are effectively subsidising the highly profitable commercial radio sector'.<sup>43</sup> ARIA explained that:

It's the only part of the Copyright Act that we know of where the government is setting an artificial price between two major

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40 APRA AMCOS, <http://apraamcos.com.au/music-customers/licence-types/radio/commercial-radio-and-abc/sbs/>, accessed 12 February 2019.

41 Phonographic Performance Company of Australia, *Submission 97*, p. 3.

42 Australian Independent Record Labels Association, *Submission 104*, p. 7.

43 Australian Recording Industry Association, *Submission 96*, p. 7.

industries. Every committee that has looked at it over the last two decades – from the High Court to the ACCC and the Productivity Commission – has said it should be removed. So that definitely isn't working yet.<sup>44</sup>

- 2.45 PPCA argued that the pricing caps prevent normal free market negotiations and, as a result, licensing fees for the broadcast of sound recordings in Australia do not reflect their true value. It highlighted the significant difference between the license fees for the broadcast of the lyrics and composition of music (up to 3.76 per cent), which are not limited by a cap, and the license fees negotiated by PPCA under the cap (0.4 per cent) for the same music.<sup>45</sup>
- 2.46 PPCA told the committee that, by limiting the amount of income that can be earned from the broadcast of sound recordings, these provisions 'directly endanger the livelihoods and long-term sustainability of Australian recording artists and labels'. It asserted that repealing the pricing caps would give Australian artists the opportunity to 'finally earn fair market rates for the commercial use of their works' and result in higher incomes for recording artists.<sup>46</sup>
- 2.47 However, CRA disagreed, arguing that the pricing caps should remain. It told the committee that the caps are intended to protect the radio industry from multinational record labels. CRA argued that there is a link between the mandatory Australian content quotas and the pricing cap. It explained that, because radio broadcasters are required to broadcast quotas of Australian music, the pricing caps prevent record labels taking advantage of radio broadcasters:

...the record labels know that we're always going to have to pay them...the government mandates that we must play this protected [Australian] music and we have to pay the record labels for that protected [Australian] music...while we're required to play music for which we have to pay the record labels, we think it's fair that there's some break on what the record labels could ask us for...It can't be us trying to negotiate a deal with a record label for broadcast when they know that there's no way we cannot play the music that we're required to play under the code.<sup>47</sup>

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44 Mr Dan Rosen, Chief Executive Officer, Australian Recording Industry Association, *Committee Hansard*, Sydney, 2 November 2018, p. 14.

45 Phonographic Performance Company of Australia, *Submission 97*, p. 3.

46 Phonographic Performance Company of Australia, *Submission 97*, pp. 1-3.

47 Ms Joan Warner, Chief Executive Officer, Commercial Radio Australia, *Committee Hansard*, Sydney, 22 November 2018, pp. 20-21.

2.48 The Department of Communications and the Arts (the Department) advised the committee that the one per cent cap represents a longstanding policy dispute between the commercial radio sector and the record industries.<sup>48</sup> During this time, the caps have been considered by a number of government reviews. Notably, in 1995, the Review of Australian Copyright Collecting Societies (Simpson Review) concluded that:

Broadcasters are in no need of the protection offered by the present cap. They are sufficiently well represented to be able to negotiate market rates without the protective arm of government interfering in that process. Experience has shown that the best way of setting rates is by inter-parties negotiation with access to the Copyright Tribunal to determine matters that cannot be resolved in that way. **It is recommended that the ceiling on the broadcast fee payable pursuant to section 152 be removed forthwith.**<sup>49</sup>

2.49 A similar conclusion was reached in 2000 by the Review of intellectual property legislation under the Competition Principles Agreement (Ergas review). However, it recommended that the provisions for the ABC under s. 152(11) remain:

...since the time of [the caps] introduction, the economic circumstances of the commercial radio industry have evolved, and the Committee does not believe capping remains warranted. No public policy is served by this preference, which may distort competition...resources use, and income distribution...to achieve competitive neutrality and remove unnecessary impediments to the functioning of markets on a commercial basis, the Committee recommends that s. 152(8) of the Copyright Act be amended to remove the broadcast fee price cap. We recommend that no change be made in relation to the ABC under s. 152(11) of the Copyright Act.<sup>50</sup>

2.50 In 2013, the Australian Law Reform Commission (ALRC) considered the pricing caps in its broader consideration of the statutory licensing scheme for sound recordings under s. 109 of the Copyright Act. It recommended that the statutory licensing scheme for sound recordings be repealed in favour of a voluntary licensing scheme, such as that used for the licensing

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48 Ms Kirsti Haipola, Director, Digital Media and Copyright Branch, Department of Communications and the Arts, *Committee Hansard*, Canberra, 13 February 2019, p. 4.

49 Shane Simpson, *Review of Australian Copyright Collecting Societies: A Report to the Minister for Communications and the Arts and the Minister for Justice*, Department of Communications and the Arts, July 1995, p. 112, emphasis in original.

50 Henry Ergas, *Review of intellectual property legislation under the Competition Principles Agreement: Final report to the Minister for Industry, Science and Resources and Attorney-General*, IP Australia, September 2000, p. 116.

of composition and lyrics. However, it noted that, 'if the s. 109 license is retained, there appears to be a strong case for repeal of the one per cent cap'.<sup>51</sup>

## Conclusions

- 2.51 The committee is not convinced that the cap imposed by s. 152(8) of the Copyright Act on license fees for sound recordings on commercial broadcasters is justified. The committee sees no public policy which is served by the cap and is concerned that it distorts the market in a way that disadvantages Australian artists. This is particularly concerning at a time when Australian music, and sound recordings in particular, are reportedly providing less return for Australian artists than at any other time in the history of the industry.
- 2.52 The findings of the Simpson Review, Ergas Review, and Australian Law Reform Commission are compelling. The committee sees no reason why copyright owners of sound recordings should be limited in their ability to negotiate license fees when the copyright owners for the composition and lyrics of the same music are not.
- 2.53 The committee is of the view 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.

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### Recommendation 1

- 2.54 **The committee recommends that the Australian Government amend s. 152(8) of the *Copyright Act 1968* to remove the one per cent cap on license fees for sound recordings.**

## Licenses for the public performance of music

- 2.55 The public performance of recorded and live music requires businesses to acquire licenses for the music's composition and lyrics (administered by APRA AMCOS) and the sound recording (PPCA). These licenses vary based on the type of business, the purpose of the music being performed,

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51 Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report*, November 2013, p. 425.

and a range of other factors.<sup>52</sup> The license fees are collected and distributed to the artists and record labels who own the music that is being played.

## OneMusic Australia

- 2.56 APRA AMCOS and PCCA are currently conducting stakeholder consultation regarding a joint initiative, OneMusic Australia, which is intended to simplify the licensing process. The new initiative will enable businesses to obtain one license for the public performance of recorded music that will cover the composition, lyrics, and sound recording instead of seeking multiple licenses.<sup>53</sup>
- 2.57 The Australian Hotels Association (AHA) acknowledged that the current system of seeking multiple licenses 'is cumbersome' and told the committee that it agrees in principle with any moves to simplify the process.<sup>54</sup> However, it raised concerns regarding the application of the new initiative, its calculation of license fees, and the oversight of collecting societies. AHA explained that:
- Most of the current APRA and PCCA metrics have been discarded by the joint venture and replaced by capacity-only tariffs totally unrelated to music use or value. The capacity-based tariffs simply measure the number of persons that a regulator such as the police or fire department say can be admitted to a venue and takes no account of factors such as the actual number of people attending, the value paid for the musical performance, the day or night of the week and other seasonable or variable factors.<sup>55</sup>
- 2.58 Furthermore, AHA noted that licenses based on venue capacity are likely to have a greater impact on venues in regional and remote areas, which usually have high-capacity but low population density when compared to those venues in urban and city areas.<sup>56</sup> It told the committee that, according to its estimates, 40 per cent of hotels will be financially worse off

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52 For more information regarding types and cost of licenses see: <http://apraamcos.com.au/music-customers/licence-types/> and <http://www.pcca.com.au/music-users-/tariffs/>, accessed 9 January 2019.

53 Ms Lynne Small, General Manager, Phonographic Performance Company of Australia, *Committee Hansard*, Sydney, 22 November 2018, p. 49.

54 Australian Hotels Association, *Submission 114*, p. 3; Mr Stephen Ferguson, Chief Executive Officer, Australian Hotels Association, *Committee Hansard*, Canberra, 28 November 2018, p. 3.

55 Mr Stephen Ferguson, Chief Executive Officer, Australian Hotels Association, *Committee Hansard*, Canberra, 28 November 2018, p. 1.

56 Mr Stephen Ferguson, Chief Executive Officer, Australian Hotels Association, *Committee Hansard*, Canberra, 28 November 2018, p. 1.

under the new initiative and called for assurances that no venue be worse off under the new initiative.<sup>57</sup>

- 2.59 Jon Perring, a live music venue operator, raised concerns that the OneMusic Australia initiative will also disproportionately affect small to medium live music venues. He explained that large stadium venues will ‘pay nothing’ because the show promoter pays the copyright license fees directly (APRA AMCOS’s Promoted Music Event blanket license). Whereas smaller venues will be ‘lumbered with an unsustainable, disproportionate and inflexible fee increase under the OneMusic proposal in the order of 2 to 3 times existing licensing fees’. Mr Perring cautioned that small and medium venues would ‘have to consider shedding hundreds of gigs if the current OneMusic proposal proceeded’.<sup>58</sup>
- 2.60 PPCA explained that, under the current system, APRA AMCOS and PPCA approach the calculation of license fees from ‘completely different positions’. PPCA emphasised that the consultation and development process is ongoing and OneMusic Australia is endeavouring to ‘achieve neutrality’ in terms of the rates for licenses:
- There were some tariffs where [PPCA] might be doing it based on the room capacity and APRA may have been doing it based on the number of speakers or other devices. So, we have had to come up with what we think is the best approach – either of those or even a new one – for each business sector.<sup>59</sup>
- 2.61 PPCA explained that, while there is no intent that rates should increase, OneMusic Australia would not be able to guarantee that every business will pay the exact same amount under the new initiative as they were paying under the current system:
- It is very hard, in doing all of these calculations, to make sure that every business will pay exactly the same amount...it is mathematically impossible, we’ve found, to make them all come out to exactly the same number, but there is certainly no intent that the rate should increase, and that is part of the feedback process.<sup>60</sup>
- 2.62 AHA acknowledged that OneMusic Australia has ‘embarked on a mammoth consultation process with a huge range of affected licensees’. However, it raised concerns that stakeholders do not have access to

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57 Australian Hotels Association, *Submission 114*, p. 4.

58 Mr Jon Perring, *Submission 92*, p. 6.

59 Ms Lynne Small, General Manager, Phonographic Performance Company of Australia, *Committee Hansard*, Sydney, 22 November 2018, p. 50.

60 Ms Lynne Small, General Manager, Phonographic Performance Company of Australia, *Committee Hansard*, Sydney, 22 November 2018, p. 50.



sufficient information to properly analyse the proposed initiative. AHA called for greater access to the data and analysis undertaken by OneMusic Australia.<sup>61</sup>

2.63 PPCA advised the committee that the OneMusic Australia website provides calculators against each tariff. It explained that people can enter their information into the calculators and immediately receive feedback on what the new rates might be. This allows stakeholders to raise concerns or provide feedback on issues with OneMusic Australia before the initiative is launched and new tariffs are applied.<sup>62</sup>

2.64 AHA noted that APRA's authorisation from the Australian Competition and Consumer Commission (ACCC) expires in June 2019 and called for the OneMusic Australia scheme to be considered as part of the re-authorisation process.<sup>63</sup> It told the committee that the ACCC's oversight authorisation process for the collecting societies has been 'very effective'. AHA explained that:

In their last authorisation they identified a lot of issues that had caused angst and they came up with solutions for them – and that was great. Everyone sort of came to the conclusion that it was all fair and we sort of moved on from poor behaviours.<sup>64</sup>

2.65 In December 2018, APRA lodged its application seeking re-authorisation from the ACCC. The application advises ACCC regarding changes implemented by APRA since the previous authorisation and outlines the OneMusic Australia joint licensing scheme.<sup>65</sup>

## Conclusions

2.66 The current system for licensing the public performance of music is complex and challenging for many businesses, especially those not directly operating within the music industry. The committee notes OneMusic Australia initiative's intention to simplify this process and its active and ongoing consultation with stakeholders during its development.

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61 Australian Hotels Association, *Submission 114*, pp. 3-5.

62 Ms Lynne Small, General Manager, Phonographic Performance Company of Australia, *Committee Hansard*, Sydney, 22 November 2018, p. 50.

63 Australian Hotels Association, *Submission 114*, p. 3.

64 Mr Stephen Ferguson, Chief Executive Officer, Australian Hotels Association, *Committee Hansard*, Canberra, 28 November 2018, p. 4.

65 Australian Competition and Consumer Commission, APRA, *Application and supporting submission*, <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australasian-performing-right-association-limited-0>, accessed 15 February 2019, pp. [43-44].

- 2.67 The committee is aware of the challenges inherent in developing the methods for calculating license fees considering the different approaches currently used by APRA AMCOS and PPCA. The committee acknowledges that it may not be practical to guarantee that no business will pay more for license fees under the new system. However, it is important that all care is taken during the development process to ensure that changes to license fees are not unduly onerous for Australian venues and businesses.
- 2.68 OneMusic Australia is a significant change in the licensing of the public performance of music and the way in which licenses are administered and license fees are calculated. As such, it is essential that the ACCC has access to the finalised OneMusic Australia scheme in order to properly assess and consider the conditions under which to grant re-authorisation of APRA.

## Recommendation 2

- 2.69 **The committee recommends that the Australian Competition and Consumer Commission incorporate an assessment of the finalised OneMusic Australia licensing scheme when considering the re-authorisation of the Australian Performing Rights Association.**

## Background music industry

- 2.70 The background music industry comprises companies that facilitate the use of recorded music for businesses such as shops, gyms, bars, restaurants, etc. to play in the background. Background music companies offer services such as arranging for the appropriate public performance licenses for a business and curating playlists that suits that business' needs.
- 2.71 Nightlife Music told the committee that background music companies 'invest heavily in bespoke technology that links venues/brands to consumers through music'.<sup>66</sup> It emphasised that the background music industry is innovative and adaptable, explaining that 'whenever there's a gap in the market, we fill it...we use technology, combine it with music and give people their music in public spaces'.<sup>67</sup>

66 Nightlife Music, *Submission 113*, p. 3.

67 Mr Mark Brownlee, Co-Founder and Managing Director, Nightlife Music, *Committee Hansard*, Sydney, 22 November 2018, p. 64.

- 2.72 However, Nightlife Music raised concerns that background music companies cannot compete with the prices offered by streaming services. It advised that background music companies price their services at between \$50 and \$200 per month, compared to the significantly lower subscription fees for streaming services. Nightlife Music warned that ‘if the background music companies are pushed to a price point of \$10.99 per month it won’t be possible to compete or survive’.<sup>68</sup>
- 2.73 Nightlife Music argued that collecting societies should not provide public performance licenses that allow businesses to use streaming services for background music. It acknowledged that collecting societies are acting in the best interests of their members and are within their rights to provide such licenses. However, it asserted that this ‘does nothing to support Background Music Companies nor, in our opinion, the longer-term interests of the Australian Music Industry’.<sup>69</sup>
- 2.74 Nightlife Music explained that collecting societies are ‘openly licensing Personal Services [streaming services] into business environments’ and that as a result ‘no one is policing what we believe is an inappropriate use of music in a massive segment of the Australian Music Industry’.<sup>70</sup> Nightlife Music asserted that:
- In licensing businesses to undertake the use of personal streaming services on a non-personal basis, contrary to the terms of use of these services, these organisations may in fact be authorising the unlicensed public performance of music and significantly increasing the potential for copyright infringement.<sup>71</sup>
- 2.75 APRA AMCOS acknowledged the competitive pressure placed on Nightlife Music by digital streaming services. However, it disagreed with Nightlife’s claims that streaming services were significantly impacting the background music industry, noting that the total number of businesses using background music services has remained relatively static over the last five years. Furthermore, APRA AMCOS explained that background music services offer a service that is more sophisticated and broader than the services offered by personal streaming services.<sup>72</sup>
- 2.76 APRA AMCOS refuted Nightlife Music’s claims regarding copyright infringement, noting that it highlights a ‘fundamental misunderstanding of the legal position’. It explained that ‘a license from APRA AMCOS

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68 Nightlife Music, *Submission 113*, pp. 5-6.

69 Nightlife Music, *Submission 113*, p. 5.

70 Nightlife Music, *Submission 113*, p. 5.

71 Nightlife Music, *Supplementary Submission 113.1*, p. 3.

72 APRA AMCOS, *Supplementary Submission 94.1*, p. 3.

prevents copyright infringement, it does not increase the potential for it to occur'. If a business has obtained a license for the public performance of music from the relevant collecting societies, it can play music from streaming services without infringing copyright.<sup>73</sup>

- 2.77 Furthermore, APRA AMCOS explained that the use of personal digital music subscriptions in a business context is similar to commercial use of personal CDs and vinyl records in the past.<sup>74</sup>
- 2.78 APRA AMCOS told the committee that it is 'very concerned' regarding Nightlife's calls for APRA AMCOS to police the terms of use of third party contracts:

[Nightlife] seeks to invoke the old paradigm of infringement and even criminality in relation to the use of music, which we regard as particularly unhelpful at a time when consumers of music are best served by comprehensive and amicable licensing solutions. Continued references to APRA AMCOS "policing" the terms of third party contracts do not accurately reflect the nature of the way APRA AMCOS does business.<sup>75</sup>

- 2.79 APRA AMCOS raised concerns that Nightlife Music's proposals are 'in effect a regulated preservation of its own business model that goes far beyond any other protection offered to music industry stakeholders, and in a way that would protect it from having to compete with other providers of music services'.<sup>76</sup> It concluded that, 'if Nightlife cannot compete on price it will be required to compete on product'.<sup>77</sup>

## Conclusions

- 2.80 Digital disruption has required all businesses across the Australian music industry to adapt their business models to compete with the ease, low-cost, and convenience offered by digital alternatives such as streaming services – background music companies are no different. It is clear that background music companies offer businesses a broad and sophisticated service that is tailored to the company's brand, audience, and business needs. The background music industry must rise to the competitive challenge presented by streaming services.
- 2.81 It is the prerogative of copyright holders, and collecting societies operating on their behalf, to determine the conditions under which to

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73 APRA AMCOS, *Supplementary Submission 94.1*, p. 3.

74 APRA AMCOS, *Supplementary Submission 94.1*, p. 3.

75 APRA AMCOS, *Supplementary Submission 94.1*, p. 1.

76 APRA AMCOS, *Supplementary Submission 94.1*, p. 1.

77 APRA AMCOS, *Supplementary Submission 94.1*, p. 3.

license the public performance of their music. The committee does not share the background music industry's concerns regarding the provision of licenses that allow businesses to use streaming services for background music.

