

## APRA Submissions in response to interested parties' submissions

### Introduction

1. APRA has carefully reviewed the interested parties' submissions received and published by the ACCC in response to APRA's applications for revocation and substitution.
2. APRA appreciates that the authorisation process exposes it to public scrutiny, and accepts that this is a cost of doing business. APRA takes its obligations to provide accurate factual information to the ACCC as part of this process very seriously but does have some concerns that baseless public allegations against APRA can sometimes be made by third parties as part of this process without any avenue for redress, and may even be considered by the ACCC in the course of making its determination.
3. APRA is disappointed that a number of interested parties appear to have made unsubstantiated claims about their alleged dealings with APRA. APRA has every confidence that the ACCC will recognise the difficulty that APRA has in responding to such submissions. APRA keeps records of all communications made with and by it, and particular complaints about conduct of APRA staff can be investigated if details are provided.
4. A large number of the interested parties that have made submissions are entities that are in existing commercial relationships with APRA (in some cases entities that are currently involved in ongoing negotiations or ADR processes with APRA regarding their licensing arrangements) and their submissions should be viewed in that context.
5. APRA also notes that a number of interested party submissions have also been made in the form of complaints to the Code Reviewer, or as matters referred to Resolution Pathways or the Copyright Tribunal of Australia. In those cases, APRA has already responded in detail to the matters raised in the relevant forum.
6. The ACCC has requested APRA provide certain further information as a result of matters raised in APRA's submissions and in the interested party submissions. APRA has provided a detailed response to that request. Accordingly, APRA does not propose to respond individually to each submission, but rather to respond to the broad themes that arise out of them. Of course, if the ACCC would like any more detailed response about any individual interested party submission, APRA will provide that response.
7. This submission in reply deals briefly with Code of Conduct and transparency generally; licensing issues, including OneMusic Australia generally and some of the specific licensee issues that have been raised; distribution issues; direct dealing; the period of authorisation; governance issues; and ADR. APRA has endeavoured not to repeat material from its primary submissions or from the additional material it has provided to the ACCC.

## Code of Conduct and transparency generally

8. On 1 April 2019 the Report of the Bureau of Communications and Arts Research into the Code of Conduct (**BACR Report**) was publicly released. The BACR Report makes a number of recommendations that will significantly increase transparency of the operations of collecting societies including APRA. APRA will be in a position to have implemented all of the recommendations set out in the Report by 1 July 2019. APRA believes this will satisfy the reasonable submissions regarding transparency.
9. Contrary to the views expressed by the Australian Lottery and Newsagents Association (**ALNA**), the APRA “regime” is not secret or private, nor is it only regulated by the ACCC. It is a highly regulated and transparent organisation.
10. APRA already provides a vast amount of information about its operations on its website. This includes information about APRA and its licence schemes, distribution policies, financial information, and information about the Board.
11. However, APRA rejects any suggestion that it should be required to disclose information regarding staff salaries or other benefits, or any financial information beyond what is already disclosed in its audited financial statements.
12. APRA is pleased that most parties making submissions have generally acknowledged APRA’s efforts to consult with industry as part of the OneMusic Australia project. As noted below, APRA accepts that aspects of the consultation process could have been more effective, and, for example, has indicated its willingness to provide more detailed information regarding the background to licence schemes ahead of the OneMusic Australia launch in July 2019.

## Licensing issues

### *OneMusic Australia*

13. This reauthorisation process coincides with the consultation period for many of the new licence schemes to be promulgated by APRA AMCOS and PPCA trading as OneMusic Australia. It was to be expected that the consultation process would result in an increased level of expression of dissatisfaction with APRA, particularly from those businesses that believe their licence fees will increase under OneMusic Australia. APRA welcomes constructive participation in the OneMusic Australia consultation process by all affected licensees and potential licensees.
14. As noted in APRA’s submission in support of its application and in further information provided to the ACCC, the OneMusic Australia project is expected to deliver significant efficiencies for APRA AMCOS, PPCA, and their affected licensees. Where many licensees must currently obtain licences from the two copyright owner collecting societies, involving two different sets of licence terms and fees, music licences will soon be delivered in a single transaction. OneMusic Australia licences will be available from 1 July 2019, although the

actual relicensing phase of the project will be staggered as existing licence renewals fall due over the 12 months to 30 June 2020.

15. In the lead up to the introduction of OneMusic Australia, APRA has conducted what it considered to be a comprehensive consultation process, releasing consultation papers, meeting with representatives of licensees, and with individual licensees, in relation to each licence scheme or group of licence schemes. Overall, APRA remains of the view that the consultative process for OneMusic Australia has been successful, and has seen the release of around 40 consultation papers. The consultation process has resulted in amendments to the initial proposals as a result of feedback from licensees and industry bodies.
16. However, a number of interested parties have submitted that the OneMusic Australia process has not been as consultative as they would like, that APRA is not receptive to complaints and criticisms concerning OneMusic Australia and that the pricing of the licences is not transparent.
17. APRA has around 147,000 licensees. It is impractical and inefficient to consult individually with them all. Accordingly, APRA has focussed on consultations with industry representative groups, except in circumstances where the group is clearly not in fact representative of all interests. The consultation process has necessarily been conducted primarily in writing, although APRA has conducted numerous face to face meetings with licensees and their representatives during the process.
18. It is clear from the interested party submissions that some licensees are of the view that (at least) APRA's communication efforts in connection with the OneMusic Australia consultation process have been unsatisfactory, and APRA regrets this. The process has been a valuable experience for APRA, not least in understanding the importance of securing licensee buy-in to large-scale change. This experience will inform the balance of the OneMusic Australia roll out.
19. Many licensees are concerned that their licence fees under OneMusic Australia will increase. The harmonised tariffs under OneMusic Australia have been designed to be revenue neutral to APRA AMCOS and PPCA, across the project as a whole and across the vast majority of particular licence schemes. Where particular harmonised licence tariffs have involved a revaluation of either set of rights, such as the Retail and Services Providers scheme this has been clearly identified in the relevant consultation paper.
20. The process of harmonisation has involved examination of each licence scheme, and the formulation of a new licence fee calculation, on the basis that each licence scheme will not see an increase in revenue. The OneMusic Australia licence will also offer a discount (usually of 48.25% of the total licence fee) if either the APRA rights or the PPCA rights are not required. However, it is inevitable as a result of that process that some individual licensees will see a fee increase, and others a decrease, as a result of the different variables being used to calculate licence fees under the new licence schemes.

21. There are a small number of OneMusic Australia licence schemes where the APRA and PPCA tariffs will not be harmonised from launch. These licence schemes include:
- the Recorded Music for Dance Use licence scheme;
  - the Cinema licence scheme;
  - the Concert, Festival and Events schemes;
  - the Recorded Music for Dance Use, Live Music, Featured/Foreground Music and Karaoke rates in the Hotel and Clubs licence schemes.

The tariffs under these OneMusic Australia licence schemes will be the existing separate APRA and PPCA tariffs. APRA may eventually seek to harmonise these tariffs in the future, subject to a formal consultation process with relevant licensees and their representatives.

22. Many licensees have welcomed the OneMusic Australia initiative. Some Australian Local Government Association councils requested access to the single licence ahead of the launch of OneMusic Australia. APRA has facilitated this and now there are approximately 35 councils licensed under the new rates.
23. APRA believes that most licensees who experience a significant increase in licence fees in OneMusic Australia will do so because they are currently under-licensed. Once PPCA and APRA AMCOS are conducting licensing activities from a single point, it will be more difficult for a licensee to avoid obtaining both sets of rights if required.
24. The Australian Hotels Association (**AHA**) asks the ACCC to impose a number of conditions on any APRA authorisation. APRA believes that its response to the BACR Report should address the matters raised in relation to the Code of Conduct. APRA does not believe that the approval of one licensee representative body to a subset of APRA's licence schemes and associated documentation, is an appropriate condition of authorisation. APRA will continue to work closely with the AHA, as it has for many years, to formulate licence schemes and communications that are broadly acceptable to and useful for the AHA membership.
25. The AHA expresses concerns regarding the confidential information that APRA has requested be excluded from the public register. APRA has discussed its reasons for the request with the AHA, and believes its concerns have been allayed. However, for the record, APRA states that it has requested confidentiality only to protect the privacy of individual licensees involved in ADR, individual members in relation to their dealings with APRA, highly confidential commercial transactions, or matters relating to legal proceedings or potential legal proceedings.



26. As noted above, many of the issues raised regarding the transparency of licence fees are the subject of the BACR Report recommendations that will be implemented by 1 July 2019.

*Dance schools and eisteddfodau*

27. APRA respects and admires the role played by dance schools and eisteddfodau in teaching an appreciation of music and dance, and acknowledges that such schools and events are an important part of the community generally. Music is an integral part of the business of a dance school and dance competitions, and the composers and music publishers who own the copyright in that music are entitled to receive payment for its use. If a dance school is not using any music protected by copyright, it is not required to hold a licence for its use.
28. The OneMusic Australia consultation process has caused a relatively high level of dissatisfaction amongst the proprietors of dance schools and the operators of eisteddfodau. A number of the submissions made on behalf of this industry appear to reflect a general dissatisfaction with having to pay licence fees for the public performance of music controlled by APRA. Based on the submissions, it appears there is a significant level of misunderstanding about the nature of copyright rights.
29. APRA's licence scheme for dance schools, and information relating to it, is available on its website (<http://apraamcos.com.au/music-customers/licence-types/dance-schools/>). This page provides a link to a Plain English Guide. Both the webpage and the guide provide clear and transparent information about the relevant rate: \$73.17 per annum if the school operates one day a week, plus an additional \$36.60 per annum for each subsequent day of that week it operates. A dance school may require additional licences if for example the dance school has made reproductions of recordings, or uses music on hold. Rates for these other uses are also included in the material.
30. Licence fees collected from dance schools are distributed using proxy data including radio airplay and digital service streaming data. APRA takes this approach in seeking to achieve an acceptable balance between a desire for accuracy in distributions against the costs of obtaining the data (both for itself and licensees). Given the nature of many dance schools in Australia, APRA has taken the view that it would be burdensome to require ballet schools to report music usage, when appropriate proxies exist. APRA is always seeking to tie distributions to data, at an increasingly granular level. If APRA became aware of a better set of data against which to allocate dance school licence fees, and the collection and processing of that data could be justified taking into account the size of the licence fees and the costs of allocation, it would use that data. APRA's distribution practices are considered by and approved by the Board. A breakdown of APRA's distribution practices is publicly available at <http://apraamcos.com.au/about-us/governance-and-policy/distribution-rules-and-practices/>. Concerns such as those expressed by Academy Ballet are addressed on the APRA website at <http://apraamcos.com.au/music-customers/where-does-your-money-go/> and

the 'Distribution at a Glance' chart, which is downloadable as a PDF from that page and refers to proxy data.

31. Under OneMusic Australia it is proposed that there will be a change to the metric used to assess a dance school's public performance licence fee for classes. Currently both PPCA and APRA charge a licence fee tiered according to the number of days the school operates, regardless of whether the school hold one or many classes on a day. As part of the tariff harmonisation process, APRA and PPCA became concerned that this structure meant that a school that held five classes a day, six days a week (and therefore used music in 30 classes a week) would pay more than a school that operated 15 classes a day, 4 days a week (that is, 60 classes a week). Accordingly, OneMusic Australia proposed a fee linked to the average number of classes (with music) per week, per location. However, fees for additional locations will only apply where classes occur concurrently. For example if a dance school operated at one location on Wednesdays and Thursday and at another location on Fridays and Saturdays, this would be treated as a single location for the purpose of licence fee calculation.
32. APRA's dance school licence excludes separate performances by dance schools in front of audiences. It is APRA's experience that ballet schools throughout Australia differ in their approach to student performances. Some hold small concerts at the dance school for parents and friends, without an admission price being charged. Others hold an annual concert for larger audiences, and charge an admission price. Accordingly, APRA believes it is more reasonable for it to license concerts where there is an admission charge separately to the classes themselves. Licence fees under that licence are a percentage of box office (ticket price multiplied by ticket sales), which is an appropriate measure of the value of the music used in the performance.
33. The AMCOS/ARIA Dance School licence grants reproduction rights for multiple purposes including making audio recordings for the purpose of instruction, for performances at events and for supply to students, and making video recordings of events put on by the dance school. The licence fee is based on the number of students and is the same whether the dance school makes copies for one or multiple uses granted under the licence.
34. APRA acknowledges that its existing licence scheme arrangements for dance schools and eisteddfodau are relatively complex. For eisteddfodau, simplification of the licence scheme is a major goal of the OneMusic Australia initiative. APRA's experience of the sector is that there is a vast range of business models, which is one of the reasons for the historical piecemeal approach to licensing. However, a flat fee model is inequitable for the reasons discussed above, including because it would disadvantage smaller dance schools and competitions. APRA would be willing to calculate licence fees based on current year figures, however the majority of eisteddfodau and dance schools are unable to provide that information. These matters, along with payment timing matters, have been canvassed in the OneMusic Australia consultations.

35. The consultation process for OneMusic Australia, including as it relates to the dance school and eisteddfod licence schemes, has been thorough and genuine. APRA is aware that it has become embroiled in an internecine battle between competing eisteddfod representative organisations, one of which did not exist at the point in time at which APRA commenced its consultations with this industry in 2017. APRA has now attempted to consult with both groups, and has made substantive changes to the OneMusic Australia licence schemes that affect eisteddfodau and dance schools as a result. Further information in response to allegations made by individual dance schools is available on request.
36. A very long and detailed submission was made on behalf of an unidentified collective of dance industry participants calling themselves "The Group." As members of The Group have chosen not to identify themselves, APRA is unable to respond to the matters alleged with any degree of specificity. In particular, APRA cannot respond to allegations about the conduct of APRA staff, without a reasonable amount of information about the alleged incidents.
37. Many of the matters raised in The Group's submission reflect a fundamental misunderstanding of APRA's operations. APRA appreciates that considerable effort has gone into the submission, but, with respect, it is misconceived. The Group seeks answers to specific questions about APRA's operations. Much of the information requested is publicly available, and many of the Group's contentions are plainly speculative or false. Some of the information requested in the Group's submission is commercial-in-confidence or personal confidential information and APRA does not consider it appropriate to provide such information. If the ACCC would be assisted by a more detailed formal response from APRA to the Group's submission, APRA is willing to provide one upon request.

#### *Background music suppliers*

38. APRA welcomes the efforts of industry associations such as Background Providers of Music Ltd (**BPM Ltd**) to clarify and communicate the interests of their members, particularly in the context of the wide-ranging OneMusic Australia consultation process. Some of the Background Music Suppliers (**BMS**), including some members of BPM Ltd, have also made individual submissions.
39. The essence of the submissions made by the BMS is a complaint about disruption to their business model, particularly the impact of streaming services. This has been a theme of submissions made by the BMS to every avenue for complaint about APRA's operations in recent years.
40. Throughout its submission, BPM Ltd conflates the businesses of its members with the entire background music sector. The BMS provide many services; they are not simply a conduit for background music. They provide hardware and music curation services, and also provide access to music that is not controlled by APRA. Background music is available from many sources, including BMS but also including CDs, downloads, television, radio and of course digital music services.

41. Many of the BMS have expressed concerns regarding the fact that APRA licenses businesses that use services such as Spotify to perform music in public at their premises. APRA understands that services such as Spotify make it easier for (particularly small) businesses to use relatively sophisticated playlists of music. The BMS generally see the digital music services as providing a significant and unwelcome degree of competition for the BMS businesses.
42. The BMS' concern is expressed to be because Spotify and other digital music services include as a term of service that the music is provided for personal use only. If a Spotify customer uses the service to perform music in public, and if that use is contrary to the Spotify terms of service, APRA regards that as a contractual matter between Spotify and its customer.
43. Digital music consumer services such as Spotify and Apple Music have been a phenomenal disruptor of the music industry, and it is apparent that businesses that began in the era of physical product, such as many BMS, are also experiencing disruption. Adjusting to digital has proven to be a challenge for many in the music industry, and it is not surprising that this challenge extends to BMS. The proposal of a regulated preservation of the BMS business model goes far beyond any other protection afforded to music industry stakeholders, in a way that would protect them from having to compete with other providers of music services.
44. BPM Ltd states that “*21.3 million businesses use consumer services instead of a licensed background music provider*”. This is obviously a global figure. APRA does not accept that, in the absence of access to a digital music service, all businesses would use a BMS to provide their background music. It is APRA's experience that the overwhelming majority of businesses now using personal digital music services previously used radio or CDs for their background music. The number of premises licensed through APRA's agency agreements with the BMS (discussed below) as at the first quarter of 2018 is at 99.98% of the number of premises licensed as at the first quarter of 2014. That is, the customer base of BMS does not seem to be declining dramatically.
45. APRA believes that the competitive threat from digital music services perceived by BPM Ltd is overstated. For relatively small businesses that wish to use music to enhance the experience of their customers, the technological ease with which the personal digital music services can be used, and the availability of curated playlists on those services, means that many small businesses have opted to use such services.
46. On the APRA website ([apraamcos.com.au/music-customers/background-music-suppliers/](http://apraamcos.com.au/music-customers/background-music-suppliers/)) APRA says “To maximise the benefit of using music in your business we suggest you first consider contacting a Background Music Supplier ... These services offer the most sophisticated option for businesses because the music is programmed by a professional who will seek to match music with your customer base and business brand, sometimes even down to parts of the day where your customers change (or their mood does).” ... “While our licences covering songwriters and publishers (and those of PPCA's



- who represent artists and record labels) fix your use of the underlying music to ensure you are not infringing under Australian copyright law, your commercial use is likely to be still outside the streaming service’s particular terms and conditions. While we cannot legally compel you to do so, we suggest you contact your streaming service provider to discuss with them the use of the service in your business.”
47. In relation to businesses that are considering using a personal digital music service such as Spotify, APRA says: “The *right* music curated by a professional can help your bottom line but the *wrong* music may do the opposite. And of course, you need to be constantly updating the playlists to avoid repetition and staleness – time that’s better spent serving your customers. Using a Background Music Supplier saves all this time and effort.”
48. BPM Ltd states that “*it is estimated that APRA and PCCA collect approximately \$100m annually from the public performance sector, which is estimated as double the amount payable to the rights holders from broadcast radio*”. This figure has been quoted previously in submissions by BPM Ltd member Nightlife Music Pty Ltd and is misleading, as APRA has drawn to Nightlife’s attention. In the 2017/2018 financial year, APRA collected approximately \$69 million for the public performance of music it controls. However, approximately \$47 million of that amount was not collected in relation to the public performance of background recorded music such as that offered by BPM Ltd’s members. Rather, it was collected from a range of public performances including concerts involving live performances, airline in-flight entertainment, cinema use and nightclubs. Approximately \$22 million was collected from the public performance of background recorded music, and was distributed according to information provided by some BMS and proxy sources including data from streaming services.
49. In March 2019, the House of Representatives Standing Committee on Communications and the Arts released the report of its Inquiry into the Australian Music Industry. Nightlife Music (an APRA licensee, and one of the members of BPM Ltd) had made extensive submissions to the same end as those made by it, by other BMS, and by BPM Ltd, in relation to this authorisation application. The Committee concluded, at paragraphs 2.80 – 2.81, that “[t]he background music industry must rise to the competitive challenge presented by streaming services. It is the prerogative of copyright holders, and collecting societies operating on their behalf, to determine the conditions under which to 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.”
50. The BMS also complain about APRA’s pricing. A number of members of BPM have recently lodged with the ACCC a collective bargaining notification, of which APRA and AMCOS are the target. APRA has not objected to the notification.
51. For around 20 years, APRA has offered an agency arrangement to the BMS, which enables BMS to sublicense APRA rights to their customers. This has

numerous advantages for APRA, the BMS, and the BMS customers. Not all BMS opt to act as APRA's agent, and of those that do, not all offer the APRA rights to all of their customers.

52. A BMS that sublicenses APRA rights to its customers collects the APRA licence fees from its customers, and passes them to APRA less a discount (that is effectively consideration for the BMS' administration of the APRA licence). A BMS operating as APRA's agent can choose whether or not to pass the rebate on to its customers fully, to share the rebate with them, or to keep the rebate for itself. As far as APRA is aware, many BMS choose to keep the amount of the rebate.
53. Over time, the discount for sub-licensing APRA rights to BMS customers has reduced, including because it was originally introduced on the basis that the number of background music licensees would increase as a result of the BMS sub-licensing activities. That increase to the licensee base has now significantly slowed. At the same time APRA introduced a new discount payable as a one-off amount for each genuinely new APRA licensee added by the supplier.
54. The discount paid to BMS for sublicensing their customers, is a discount on the licence fees under the APRA licence. It is not properly characterised as revenue that APRA is taking away by reducing the discount.
55. It would be open to BPM Ltd or its members to enter into direct licensing arrangements with APRA members. Properly managed, APRA believes that licence back could be utilised to effect direct licensing by BPM Ltd members, and of course opt out would be available for certain types of background music.
56. APRA is not aware whether any of the BMS that have made submissions to the ACCC have attempted to enter into direct licences with APRA members. There is nothing preventing a BMS to enter into a direct licensing arrangement with an APRA member or members, as long as the licence back identifies the relevant BMS (and if the rights were to be sublicensed, its customers). APRA notes Mood Media's comment that it requires access to all of the works in APRA's repertoire, not only the works of an individual publisher.
57. To the extent that the BMS have submitted that the ACCC should have a role in APRA's pricing of licence fees, APRA says that it is ultimately the role of the Copyright Tribunal to determine reasonable prices, if all avenues of negotiation and ADR have failed. The ACCC has issued guidelines relating to such pricing, and is entitled to apply to be a party to any Copyright Tribunal proceeding regarding APRA licence schemes.
58. BPM Ltd makes certain assertions regarding APRA's conduct during the course of a review of the arrangements between the BMS and APRA. The existing arrangements between APRA and the BMS, where the arrangement includes an agency appointment, require BMS to provide details of their customers who are also licensed under the agency agreement. This ensures



that APRA does not contact those customers as part of its general compliance program.

59. In relation to BPM Ltd's submissions regarding OneMusic Australia, APRA says that OneMusic Australia is not offering a licence to the BMS. BPM Ltd's concerns appear to be related to APRA's consultations with other businesses that use background music. Here, the concern appears to be that OneMusic Australia will be offering simple licences for all background music use by businesses other than BMS, and that this will somehow unfairly impact the BMS businesses.
60. This concern is misplaced. Any business that performs background recorded music controlled by APRA and PPCA will require a licence to perform the music in public. That licence will be available from OneMusic Australia, from individual copyright owners, or from those BMS who are able to offer the licence as agent. OneMusic Australia does not offer the music itself – the licensee must obtain that music from the range of sources available to it. The BMS that accept an agency appointment will be able to compete with OneMusic Australia on price, by passing on the discount to their customers. The offering of a public performance licence by OneMusic Australia in no way detracts from the business of the BMS. Specifically, the BMS do not offer the public performance licence as a standalone product – it is a service offered to their clients. There is no reason why the licence offered by OneMusic Australia would cause licensees to not engage with BMS.

#### *Nightclub licensees*

61. Some nightclub licensees continue to dispute APRA's adoption of the rate determined by the Copyright Tribunal in the PPCA Nightclubs decision. APRA has addressed this on numerous occasions.
62. As a result of concerns expressed by industry, APRA has determined to continue consultations with respect to the implementation of a OneMusic Australia licence scheme. A harmonised OneMusic Australia scheme for nightclubs will not be introduced until 1 July 2020.
63. The West Australian Nightclubs Association (**WANA**) submission is essentially a complaint about price. In particular, WANA submits that APRA's licence fees for nightclubs are much higher than comparable licence fees charged by overseas collecting societies. APRA has provided further information to the ACCC on this issue, but reiterates that licence fees are determined for the markets in which they operate. International comparisons are fraught in circumstances where the legal and regulatory environments are quite different, licence schemes cover different activities, and the economic environment of each territory is different.
64. It is particularly disappointing that WANA has chosen to dismiss the operation of the Copyright Tribunal as a regulator on price, when it must be aware that in 2018 – 2019 Dr Jon Sainken, a nightclub owner from Western Australia, was the applicant in a Copyright Tribunal proceeding against APRA and PPCA.

65. [CONFIDENTIAL]

*Cinema*

66. APRA welcomes the positive comments from ICA regarding APRA's current arrangements, and the likely efficiencies of OneMusic Australia.
67. The concerns raised by ICA relate to the pricing of the proposed OneMusic Australia licence for cinemas. APRA respectfully submits that it would not be appropriate for the ACCC to make price conditions on APRA's authorisation, including because all of APRA's licence schemes are subject to the jurisdiction of the Copyright Tribunal, which should not be fettered.
68. OneMusic Australia's proposed licence scheme for cinema operators is to continue with the current APRA and PPCA rates, and for the APRA component to move to quarterly payment in arrears rather than a bi-annual payment in the middle of the accounting period. APRA believes that this will ease any cash flow issues for cinemas and provide a direct match between box office takings and the APRA distribution cycle.
69. Cinema licensees have been advised that the cinema licence scheme will be reviewed in the near future, but not in the 12 months following the launch of OneMusic Australia. That review will be conducted in consultation with industry, and with the benefit of APRA's experiences during the OneMusic Australia consultation process.

*Free TV*

70. [CONFIDENTIAL]

71. [CONFIDENTIAL]

72. [CONFIDENTIAL]

[CONFIDENTIAL]

73. [CONFIDENTIAL]

*Live Performance Australia (LPA)*

74. APRA has had a longstanding and productive relationship with LPA.
75. The licensing of dramatic context productions is undertaken by APRA as agent, mostly for certain of its publisher members. APRA says that issues with dramatic context licensing demonstrate the difficulties of licensing outside the exclusive APRA blanket arrangements. APRA continues to work with its members to make the dramatic context licensing process as smooth as possible for producers, however as APRA does not control the relevant rights it is unable to grant licences where the rights are denied or where there is no response from the copyright owner.
76. APRA engaged in a long consultation process with members, and then with licensees, regarding changes to the dramatic context licensing process that were intended to make the process easier. APRA is happy to provide more details of the consultation process if it would assist. APRA is again reviewing dramatic context licensing given the issues raised by LPA.
77. APRA is not aware of incidents where licensees have been charged for out of copyright material, or material not controlled by APRA. Under all licence schemes relevant to LPA members, where a licensee provides music use information, APRA does adjust licence fees for works that it does not control. If specific information in support of the allegations is provided, APRA can respond in detail.

*Small business licensing issues*

78. Many APRA members are themselves small businesses. APRA has had a long relationship with COSBOA, and for a number of years a senior APRA representative served on its Board of Directors. APRA also appreciates the interest of the New South Wales Small Business Commissioner and the Australian Small Business and Family Enterprise Ombudsman.
79. To the extent the concerns expressed relate to transparency of licensing arrangements, APRA notes its plain English guides to all licence schemes that APRA believes are effective in communicating information to small business music users.
80. In relation to the calculation of licence fees, APRA has formulated its licence schemes over many years having regard to numerous factors. APRA has

consulted widely in the development of OneMusic Australia, and has sought to make its thinking around licence fees as transparent as possible. The OneMusic Australia licence schemes cover a very wide range of activities, and the methods for determining an appropriate basis for licence fee calculation are complex and encompass negotiation with industry to determine willingness to pay, consideration of how closely music is linked to revenue generation for the licensee, comparable licences, and other contextual factors.

81. If small businesses are concerned about the basis for a particular licence fee (for example, one based on floor space), APRA would be happy to discuss the rationale behind the particular licence scheme. In addition, the OneMusic Australia consultation process affords a further opportunity to discuss with APRA the basis for any particular proposed licence scheme that is causing concern.
82. APRA elsewhere has expressed a willingness to provide plain English information regarding the formulation of its licence schemes in future.
83. COSBOA makes recommendations that encompass a broad range of issues. Recommendation 2, for example, seeks transparency and affordability – the first can be achieved through communication, but the second is subjective and relative. Recommendation 3 requires law reform that is beyond the control of either APRA or the ACCC. Recommendations 4 and 5 are essentially the same, and do not acknowledge the operation of APRA's licence back and opt out facilities. APRA notes that licence back is particularly useful for small business copyright owners who enter into direct licensing arrangements for services such as music on hold.

#### **Direct licensing and non-commercial licence back**

84. APRA has provided further information, including confidential information, to the ACCC regarding this issue.
85. A number of submissions refer to the fee that APRA is able to charge a member for opt out or licence back. The fact is that APRA rarely requires a member to pay this fee, but reserves its right to do so depending on the complexity of the particular transaction. In APRA's view, it is unreasonable to expect the APRA membership as a whole to subsidise the costs caused by a member wishing to limit its participation in the system.
86. There are a number of submissions relating to APRA's direct licensing arrangements generally. There is an abundance of information on the APRA website regarding direct dealing opportunities. APRA is not aware of any member wishing to enter into a direct licence with a music user, who has not been able to do so as a result of APRA's conduct.
87. The Australian Small Business and Family Ombudsman's concerns regarding opt out reflect a misunderstanding of the process – the opt out is by the APRA member, not by the licensee, and the time periods reflect the administrative difficulties of effecting such a transaction, which requires notification to all affected licensees. Indeed, if an APRA member were to opt out for all public

performance categories, APRA would be required to notify nearly all of its 147,000 licensees, many of which are small businesses, that they would need to obtain a licence from that member if they were to continue to perform the member's works in public.

88. A number of submissions have been received relating to APRA's non-commercial licence back for online use. The submissions are made on behalf of organisations, some of which are funded or otherwise supported by major online content distribution platforms and search engines that often seek to portray their own businesses as involving non commercial sharing of user generated content, and which are major licensees of APRA. APRA submits the submissions made by Creative Commons Australia, the National Copyright Unit to the Copyright Advisory Group, the Australian Digital Alliance, and the Australian Libraries Copyright Committee should be treated as a single submission. By way of example, the National Copyright Director of the National Copyright Unit to the Copyright Advisory Group is also a Board member of and the education lead for Creative Commons Australia and Director of Australian Digital Alliance. The Chair of the Australian Libraries Copyright Committee is a Director of the Australian Digital Alliance. The Copyright Law and Policy Adviser of the Australian Libraries Copyright Committee is also Executive Officer of the Australian Digital Alliance and was previously Global Network Manager of Creative Commons and Project Manager of Creative Commons Australia. The Copyright Officer of the Australian Libraries Copyright Committee is also the copyright officer of the Australian Digital Alliance, and previously worked at Creative Commons Australia. The Australian Libraries Copyright Committee and the National Copyright Unit are both members of and thus fund Creative Commons Australia.
89. The submissions regarding non-commercial licence back are misconceived. Most of the activities described in the submissions are in fact capable of being licensed directly by APRA members under a licence back. The primary running on the topic has been left to the Copyright Advisory Group (CAG), and so APRA will turn its attention to that version of the submission.
90. APRA has a number of licence agreements with members of CAG, and other educational institutions, intended to extend the rights that educational institutions receive under the Copyright Act.
91. First, in relation to public performance, section 28 of the Copyright Act contains a free exception to copyright infringement for performances of music in class by a teacher or student. This exception extends to communications for the purposes of facilitating such a performance. Accordingly, for classroom performances, there is no need for a CAG member to obtain a direct licence from an APRA member – it already has guaranteed free access to the rights.
92. Secondly, there is a comprehensive statutory licence that permits the copying and communication of copyright works, including music, in return for the payment of equitable remuneration. This licence was simplified at the end of 2017 in consultation with educational institutions and copyright owners.



93. Thirdly, educational institutions enjoy the benefit of comprehensive industry licences that “fill the gaps” for uses of music not covered by free exceptions or statutory licences.
94. Fourthly, APRA members do not need to rely on the non-commercial licence back provisions to deal directly with schools. An APRA member can enter into a direct licence with a school (or a library, or any other party in Australia) under the ordinary licence back provisions, with no need to satisfy the additional conditions of the non-commercial licence back. APRA is at a loss to understand how the experienced copyright practitioners that manage CAG can have misunderstood the plain English information that is readily available on the APRA website.
95. Finally, it is simply not the case that members who use the licence back facilities are required to pay \$200 for each licence back transaction. APRA rarely requires members to pay a fee for any type of licence back, unless the administrative costs of the process mean that it would be unreasonable for other APRA members to bear the cost of the work undertaken. For an individual writer member seeking to enter into a direct licence with a school or a library, APRA has never imposed the fee.
96. The Creative Commons Australia (CCA) submission repeats issues with APRA that CCA has been agitating since its establishment in Australia as a branch of the international Commons movement. The Commons movement, which is funded by public donations and by the support of, among others, educational institutions and large digital platforms, advocates for the free sharing of copyright material globally. It promulgates licence terms that can be adopted as part of the sharing culture it promotes. It offers no ongoing support to creators who use its licences - uses under CC licence are not reported and breaches of licence terms, if detected, must be enforced by individual creators.
97. APRA and its affiliated societies were established to ensure that copyright owners are paid for the public performance and communication of their copyright material. As such, the aims of APRA and CCA are inherently incompatible. APRA licenses its members' works and enforces their rights.
98. CCA now says that the non-commercial licence back is insufficient for the needs of unidentified copyright owners, and advocates for its extension to “broadcast and public performance.” The non-commercial licence back is intended for a specific low risk category of online use, and operates in spite of APRA’s exclusive arrangements with foreign collecting societies. If an APRA member wishes to enter into an arrangement for the broadcast or public performance of the member’s works free of charge for any purpose in Australia, it may do so under the ordinary licence back provisions.
99. At some point an APRA member may be required to choose whether it wishes to operate inside the APRA system or inside the free public sharing system operated by CCA. The costs of administering a system that permitted use of CCA licences by APRA members, including the increased costs of enforcement in an environment where unmonitored non-exclusive licences



would be raised as an obstacle to the enforcement of APRA's rights, would be prohibitive.

100. [CONFIDENTIAL]

### **Distribution rules and practices**

101. A number of submissions make reference to APRA's distribution rules and practices, and allege that APRA's approach lacks transparency.
102. APRA's distribution rules and practices are complex, and are based on APRA's nearly 100 years of experience in allocating licence fees according to imperfect data. Licensees' ability to provide data for distribution purposes vary widely, and in many cases licence fees do not justify the keeping of records of music use, and proxy data are the better basis for allocating payments.
103. There is a large amount of information on its website regarding the distribution process. APRA does not have a licence scheme for "small businesses". If a small business uses a BMS to supply its background music, and that BMS provides usage data to APRA, that usage data is used to make distributions from the relevant licence pool. For other small businesses using background music, distributions are made using BMS data, commercial radio broadcast data and streaming service data.
104. APRA already provides considerable information regarding distribution, including in each plain English guide. Furthermore, in response to the BACR Report and in preparation for the commencement of the new Code of Conduct for Collecting Societies on 1 July 2019, APRA is in the process of preparing Plain English Guides relating specifically to its Distribution Rules and Practices which it will make available upon its website prior to 1 July 2019.
105. Where appropriate and reasonable, APRA distributes in accordance with detailed reporting provided by licensees. Where such data is not available, APRA uses the best proxy data to enhance the distribution of smaller pools.
106. A number of members raise the issue of reporting by community radio stations. This issue is addressed in APRA's submissions. Most community radio broadcasters do not have the resources to provide detailed reporting of music use to APRA. If they were to do so, the costs of processing the data would outweigh the amount of the licence fees received from the sector. APRA is working hard to support those of its members whose works are broadcast on community radio, and is acutely aware of the issue faced by songwriters in this category. APRA has been a vocal supporter of the quotas for Australian music, noting the regulatory environment in which such quotas are managed. APRA again notes the findings of the House of Representatives Standing Committee on Communications and the Arts released the report of its Inquiry into the Australian Music Industry.

107. The Australian Venue Association expresses concerns regarding the accuracy of APRA's distributions. APRA understands that licensees are interested to know that the licence fees that they pay are distributed to the owners of the copyright in the works that have been performed under the APRA licence. Depending on the type of licence, distributions are either made from a licence fee pool related to a particular event (for example, licence fees for a touring concert are distributed in accordance with the music use information provided by the licensee), or using sample or proxy data. APRA has also invested significantly in music recognition technology to improve the accuracy of its distributions. APRA notes that not all AVA members have consented to the use of music recognition technology at their venues.
108. Accordingly, APRA does not agree that the data it uses to make distributions to members bears "minimal (if any) relationship" to the rights actually used by venues. APRA members require APRA to distribute licence fees in accordance with the highest standards, and accuracy of distribution data is a high priority for APRA. In particular, if a venue is using works written by "local, niche and/or inexperienced artists" APRA would encourage the licensee and its members to ensure that the music use was reported. APRA regularly makes distributions to members who report that they have performed at venues that have not reported music use.
109. LPA also expresses concerns about the transparency of APRA's distributions. As LPA is aware, the majority of licence fees collected from its members are distributed directly in accordance with the music information provided by the licensee. This is certainly the case with all major events, such as live concerts.
110. Members receive distributions according to the use of their works. Members, including members who do not receive distributions from APRA because their works have not been performed, receive support from APRA in the form of services such as member events and initiatives such as SoundHub residencies.

### **Period of authorisation**

111. Some interested parties have submitted that a shorter period than the five years sought by APRA is appropriate.
112. APRA asks for five years on the basis that the authorisation process is time consuming for management and expensive, and that conditions previously imposed ensure that APRA's activities are strictly monitored. The rights management environment is changing so rapidly that a reasonable period of time is needed to enable all stakeholders to observe any patterns in the market and adapt their systems to accommodate anything more than fleeting change.
113. APRA submits that the power of the ACCC to revoke authorisations under s91C(3) if there has been a material change of circumstances since the authorisation was granted protects against any adverse consequence that a longer period of authorisation might otherwise cause.

## Governance

114. Some submissions refer to the election of members to the APRA Board and allege that the process is unfairly skewed in favour of members with higher earnings. APRA's submissions deal with this issue in detail.
115. APRA rejects the suggestion that major publishers control APRA elections and voting rights. The totality of the writer and of the publisher votes are balanced against each other. The publisher members of the Board are elected by the publisher members, and no single group of companies can exercise more than 15% of the votes at a meeting. The writer members of the Board are elected by the writer members. None of the current writer members of the Board are published by a major publisher.
116. APRA believes that it has fully dealt with issues relating to the voting entitlements of members in its primary submissions, but is happy to provide more detailed information if requested.

## Alternative dispute resolution

117. A submission was made by Dr Julie Storer, primarily in relation to the *Report of the Independent Review of Resolution Pathways (Resolution Pathways Report)* and the Resolution Pathways website. Other submissions referred to the cost of the ADR process, and the promotion of the service by APRA.
118. APRA believes that it widely publicises the availability of ADR, and that the costs of the service are reasonable and appropriate. It is aware of the issues concerning the website that are addressed in the Resolution Pathways Report, and these and the recommendations made by Ms Boyle are currently being reviewed by APRA.
119. APRA notes that its ADR facilitator has been in direct communication with the ACCC regarding the facility, and believes it is appropriate that questions relating to ADR be dealt with in that manner. However, if further information is required, APRA would be happy to provide it.