



Draft Determination

Application for revocation of A91367 - A91375 and the substitution of authorisation AA1000433

lodged by

Australasian Performing Right Association Ltd

in respect of

arrangements for the acquisition and licensing of performing rights and communication rights in musical works

Authorisation number: AA1000433

Date 5 June 2019

Commissioners: Sims
Keogh
Rickard
Cifuentes
Court
Featherston

Summary

The ACCC proposes to grant conditional authorisation to enable the Australasian Performing Right Association (APRA) to continue its arrangements for the acquisition and licensing of performing rights in musical works. This conduct has been previously authorised since 1999.

The ACCC proposes to grant authorisation for 5 years.

The ACCC invites submissions in relation to this draft determination, and the proposed conditions of authorisation, before making its final decision.

APRA is a copyright collecting society that provides a centralised means for granting copyright licences to those wishing to broadcast or perform musical works in public (for example, cinemas, restaurants, radio stations, nightclubs and live music venues) and for distributing royalties back to its members. Composers, songwriters and music publishers who become members of APRA participate in these arrangements by assigning all of the performing rights in their current and future works to APRA.

On 24 December 2018, APRA lodged an application for re-authorisation of its arrangements that, in broad terms, cover its:

- ‘input arrangements’
 - the assignment of performing and communication rights by members to APRA and the terms on which membership of APRA is granted, and
 - APRA’s reciprocal arrangements with overseas collecting societies by which, for the most part, the collecting societies grant each other the exclusive right to license works they respectively control
- ‘output arrangements’ – the licensing arrangements between APRA and the users of musical works – APRA generally offers users a ‘blanket licence’ that covers its entire repertoire, and
- ‘distribution arrangements’ – by which APRA distributes to relevant members the fees it has collected from licensees/users.

These arrangements, in earlier forms, have been authorised by the ACCC on a number of occasions, most recently in 2014.

APRA is a near monopoly with exclusive rights to its members’ works and those of its equivalent overseas collecting societies, which cover close to the entire worldwide repertoire of musical works. As the exclusive licensor of rights to what is an essential input into many users’ businesses, APRA has significant market power in relation to its dealings with users

Many of the concerns raised by interested parties about APRA’s arrangements are about the licence fees APRA charges. These concerns are relevant context to the ACCC’s assessment about whether APRA’s collective licensing arrangements are likely to result in overall public benefits. Like other businesses, creators of music are entitled to set fees for use of the music they create. This application for re-authorisation, and the ACCC’s assessment of it, is focussed on the APRA arrangements through which those fees are set, rather than the level of any particular fee (which will vary according to the type of use and other factors).

Likely future with and without the authorisation

The ACCC has assessed the benefits of APRA's arrangements to the public and their likely impact on competition for the acquisition and supply of performing rights in relation to musical works in Australia, having regard to the likely future with and without authorisation.

The ACCC considers that whether or not authorisation is granted, APRA would remain the only major collecting society in Australia for performing rights. This reflects APRA's dominant position in the market and high barriers to entry due to sunk costs and economies of scale and scope and network effects which mean it is generally most efficient to have only one collecting society for these rights.

The ACCC considers that if the protection from competition law afforded by authorisation is not granted, APRA would likely hold rights in composers' or other rights-holders' works on a non-exclusive basis, instead of the exclusive basis on which APRA obtains them now.

For some APRA members, this would open up opportunities to negotiate directly with users seeking a licence for their works beyond the limited opportunity available under APRA's opt-out and licence back conditions.

However, for many users, direct dealing with rights holders is unlikely to be desirable or feasible.

Accordingly, whether APRA takes exclusive assignment of its members' rights, or holds these rights on a non-exclusive basis (which would not require ACCC authorisation), many users would continue to have no feasible alternative other than to acquire their performing rights licence from APRA. This also means that, whether or not authorisation is granted, APRA would likely still have substantial market power in acquiring and supplying performing rights in relation to musical works in Australia.

Public benefits

The ACCC considers that APRA taking exclusive assignment of its members' works is likely to result in some public benefits in the form of transaction cost savings. They primarily relate to avoiding the increased complexity of negotiating with users who may source licences for some works directly from APRA members if the opportunity to do so was available, but still require an APRA blanket licence for the remainder of the musical works they use.

The ACCC also considers that APRA's arrangements are likely to result in a public benefit in avoiding the additional administrative and legal costs that would be incurred in APRA moving from its current arrangements to a system where it obtain rights from its members on a non-exclusive basis.

The ACCC considers that APRA's arrangements are likely to result in significant public benefits from efficiencies in enforcement and compliance monitoring and preservation of the incentives for the future creation of musical works.

Public detriments

However, APRA's arrangements are also likely to result in significant public detriment. The ability and incentive for users to obtain direct or source licences under competitive conditions is limited, including because APRA takes exclusive assignment of its members' rights.

This can translate into higher fees for businesses that want to play music and inefficient under-utilisation of APRA's repertoire, a lack of transparency around licensing arrangements, and significant problems associated with commercial dealings with APRA.

APRA's near monopoly can also create inefficiencies for members. For example, individual members may have difficulty ensuring their rights are adequately recognised in distribution arrangements, or APRA may not be responsive to the needs of some of its diverse membership. In addition, APRA's costs may be inefficiently high due to a lack of competitive constraint. This would reduce the revenue pool available for distribution to members.

As noted above, the ACCC considers that APRA would have substantial market power, and as a consequence of this market power significant public detriments are likely to arise, whether or not it took exclusive assignment of its members' rights. However, the magnitude of these public detriments is likely to be greater with APRA taking exclusive assignment of its members' rights. Also, exclusivity removes the competitive constraint from the potential for direct dealing between APRA members and some classes of users.

Concerns about APRA's arrangements are clearly reflected in submissions to the ACCC. The ACCC has received a large number of submissions from interested parties on a wide range of issues associated with APRA's arrangements.

Licensees and relevant industry associations in particular have raised concerns about the level and structure of fees, the lack of transparency around licensing arrangements and the way in which APRA administers and enforces licences.

Concerns have also been raised, in particular by some smaller APRA members, that there is a lack of transparency around how licence fees are distributed and the system used to ensure that performers receive their rightful royalties.

Proposed conditions of authorisation

Since APRA's arrangements were first conditionally authorised in 1999, the approach of the Australian Competition Tribunal and the ACCC has been to impose conditions of authorisation to expose APRA to competition where possible and otherwise reduce the public detriment from its monopoly position, while still allowing for the clear efficiencies available from these arrangements to be realised, to the benefit of APRA's members and licence holders.

When APRA's arrangements were last authorised in 2014, the ACCC imposed conditions which focused on requiring APRA to provide more information to licensees and members about, and better publicise, its licence schemes and the situations in which APRA members could take reassignment of their rights to deal directly with users. The ACCC also required APRA to develop a new alternative dispute resolution scheme (ADR scheme) to provide an affordable and practical way for both members and licensees to resolve disputes with APRA.

The ACCC considers that these initiatives, particularly the ADR scheme, have been largely effective. The ACCC is proposing to impose conditions of authorisation requiring APRA to maintain and improve these arrangements.

The ACCC considers that an effective ADR scheme, such as that imposed by the ACCC's 2014 condition of authorisation, can reduce the public detriment generated by APRA's market power by helping redress imbalances in bargaining power between APRA and licensees. However, while feedback about APRA's ADR scheme from those who have used it has been generally positive, some interested parties have raised concerns that take up of the scheme by licensees has not been as high as anticipated due to a lack of awareness among licensees about the scheme. To address this issue, the ACCC is proposing to require APRA to take steps to better publicise the availability of the scheme.

The ACCC is also seeking feedback on proposed changes to the way in which disputes considered under the scheme are reported, and expansion of the scheme to include member-to-member disputes about royalty distributions.

The ACCC is also proposing to impose additional conditions on APRA's authorisation which focus on improving the transparency of APRA's licensing and distribution arrangements. The proposed conditions about APRA's licensing schemes require APRA to publish its methodology for calculating its licence fees for each licence category, including relevant data, economic analysis or examination, and matters taken into consideration in determining each licence fee. The proposed conditions also require APRA to publish an explanation of the matters it has taken into account any time it increases a licence fee, other than increases in line with CPI.

In relation to APRA's distribution of royalties to its members, the ACCC is proposing conditions of authorisation requiring APRA to publish details of accounting and distribution of licence revenue and, if requested by a licensee, provide detailed information about particular rights payments made pursuant to a licence.

Finally, the ACCC is proposing a condition of authorisation requiring APRA to publish an annual transparency report which includes information on rights revenue, APRA's operating costs, distributions to members and amounts received from and paid to overseas collecting societies.

The ACCC considers that transparency about APRA's licence fees and distribution arrangements can serve to mitigate, to some extent, APRA's market power. Transparency about licence fees can assist users in negotiations with APRA and allow users to make informed decisions about acquiring licences from APRA. Transparency about distribution arrangements assists in making APRA accountable to its members, making it more likely that APRA members are remunerated in proportion to the value of actual performance of their works.

The ACCC considers that these conditions will reduce the public detriments likely to result from the conduct for which APRA has sought authorisation.

The ACCC considers overall that, with the proposed conditions, the conduct for which APRA has sought authorisation is likely to result in public benefits that would outweigh the likely public detriments, including any public detriments in respect of any lessening of competition. Accordingly, the ACCC proposes to grant conditional authorisation for a further five years.

Contents

Draft Determination.....	0
Summary	1
1. The application for revocation and substitution.....	7
APRA	8
The Conduct	9
Previous authorisations	9
2. Background.....	10
Copyright.....	10
Performing rights and APRA	11
Other copyright collecting societies	12
The Copyright Tribunal.....	13
APRA's processes	14
OneMusic.....	18
CLEF.....	20
APRA's Alternative Dispute Resolution Scheme	20
Review of the Code of Conduct for Copyright Collecting Societies	23
3. Consultation	23
4. ACCC assessment.....	26
Relevant areas of competition	26
Future with and without the Conduct	26
Public benefits.....	28
Transaction cost savings in negotiation of licences	28
Efficiencies in enforcement and compliance monitoring.....	30
ACCC conclusion on public benefit.....	33
Public detriments.....	34
Inefficient under-utilisation of APRA's repertoire.....	37
Inefficiency in the production of musical works	38

Stifling innovation and adoption of new technologies and business models.....	40
Insulating APRA from the need to reduce cost inefficiencies	41
OneMusic	41
Factors that may mitigate against detriment	45
Copyright Tribunal	46
Alternative Dispute Resolution.....	47
APRA’s board and governance arrangements.....	55
Opt back and licence back	60
Transparency of APRA’s licensing and distribution arrangements	65
ACCC conclusion on public detriment	74
5. Balance of public benefit and detriment.....	75
6. Proposed condition of authorisation	76
7. Length of authorisation.....	77
8. Draft determination.....	79
Attachment A – Proposed conditions of authorisation	80

1. The application for revocation and substitution

- 1.1. On 24 December 2018, Australasian Performing Right Association Ltd (**APRA**) lodged an application to revoke authorisations A91367-A91375 and substitute authorisation AA1000433 for the ones revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). APRA is seeking re-authorisation to continue its arrangements for the acquisition and licensing of performing and communication rights in music for five years. This application for re-authorisation AA1000433 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).¹
- 1.2. The ACCC can grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but do not substantially lessen competition and/or are likely to result in overall public benefits.²
- 1.3. On 15 May 2019, APRA also requested interim authorisation to enable it to continue to engage in the arrangements the subject of the application for authorisation while the ACCC is considering the application for re-authorisation, as the existing authorisations expire on 28 June 2019. Specifically, APRA seeks interim authorisation to continue its existing arrangements, and for its relevant activities in operating its new OneMusic Australia joint licensing initiative.³ The details of OneMusic, which is due to launch on 1 July 2019, are discussed at paragraphs 2.48 to 2.56.
- 1.4. The ACCC is seeking submissions about APRA's request for interim authorisation. Submissions should be provided by 12 June 2019. The ACCC will make a decision about the request for interim authorisation before 28 June 2019.

Scope of the ACCC's assessment

- 1.5. The power of collecting societies to impose fees and charges on businesses that play music in a commercial setting is established under the *Copyright Act 1968* (Cth) (Copyright Act). Businesses that play music must have the permission of the creators of that music to do so, and the creators are entitled to charge for the use of their music.
- 1.6. In APRA's case, the creators of musical works (songwriters) assign their rights to APRA to issue licences for the use of their works, and collect royalties on their behalf. This enables royalties to be collected jointly, rather than requiring every songwriter to individually collect their own royalties.
- 1.7. The ACCC has a limited role in relation to collecting societies. Because APRA acts on behalf of songwriters who may be considered to be each other's competitors, their arrangements may risk breaching competition laws. The ACCC can grant 'authorisation', which gives legal protection that addresses this competition law risk.
- 1.8. Many of the concerns raised by interested parties regarding APRA's arrangements are about the licence fees APRA charges. These concerns are relevant context to the ACCC's assessment about whether APRA's collective licensing arrangements are likely to result in overall public benefits. Like other businesses, creators of music are entitled to set fees for use of the music they create. This application for re-

¹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 6, available: [ACCC public register](#).

² Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at <https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger>

³ Australasian Performing Right Association Limited clarification of conduct and request for interim authorisation, dated 15 May 2019, available: [ACCC public register](#).

authorisation, and the ACCC's assessment of it, focuses on APRA's arrangements through which those fees are set, rather than the level of any particular fee (which will vary according to the type of use and other factors).

APRA

1.9. APRA is a collecting society (or collection society) established in Australia in 1926. APRA's members – composers/songwriters and music publishers – hold certain copyrights in Australia, being the public performance and communication rights for musical works, which they assign to APRA.

1.10. APRA provides a centralised means of:

- granting licences to those wishing to perform in public or communicate musical works and associated literary works, and
- distributing royalties received pursuant to such licences to composers, songwriters and music publishers.

1.11. As at 31 December 2018, APRA had approximately 100,000 members and 147,416 licensees (businesses which pay APRA a licence fee to perform in public or communicate musical works).⁴

1.12. Under the Copyright Act, copyright licensing schemes are either 'statutory' – relating to, for example, the reproduction of printed material for educational institutions and institutions helping people with special needs – or 'voluntary'. Certain societies are declared by the Australian Attorney General to be the collecting societies for statutory schemes. Musical performing rights are not the subject of a statutory licence scheme. As such, for the purposes of the Copyright Act, APRA is a 'voluntary' collecting society.

1.13. APRA is the only collecting society in Australia that provides public performance licences covering the copyright in the musical works (e.g. lyrics, composition etc.). A public performance licence from APRA is a blanket licence that covers APRA's entire repertoire.

1.14. The 'repertoire' APRA administers includes works by Australian composers and, through agreements with largely similar institutions overseas, works from overseas composers. APRA states that it has more than 10 million works in its database and that its repertoire includes the majority of commercially available works in the world.⁵

1.15. APRA also administers the day-to-day business of the Australasian Mechanical Copyright Owners Society (**AMCOS**). In the 2017/18 financial year, APRA had:

- group revenue, inclusive of AMCOS, of \$420.2 million
- total royalties payable to songwriters, publishers and affiliated societies (net distributable revenue) of \$362.8 million, again, inclusive of AMCOS, including
 - digital revenue \$134.5 million
 - broadcast revenue \$132.6 million
 - audio streaming revenue \$81.9 million

⁴ APRA AMCOS, 2018 Year in Review, p. 2-3, available: http://apraamcos.com.au/media/YIR/2018/APRA_AMCOS_Year_in_Review_2018.pdf

⁵ APRA AMCOS, APRA Distribution Practices, March 2019, p. 4, available: <http://apraamcos.com.au/media/Distribution-Rules-and-Practices/APRADistributionPractices.pdf>

- royalties earned overseas \$43.7 million.⁶

1.16. Of APRA's approximately 100,000 members in 2017/18 financial year 47,648 earned royalties.⁷

The Conduct

1.17. APRA is seeking authorisation for five years to continue its arrangements for the acquisition and licensing of performing and communication rights in music. The arrangements cover:

(a) 'input arrangements'

- the assignment of performing and communication rights by members to APRA and the terms on which membership of APRA is granted, and
- APRA's reciprocal arrangements with overseas collecting societies by which, for the most part, the collecting societies grant each other the exclusive right to license works they respectively control

(b) 'output arrangements' – the licensing arrangements between APRA and the users of musical works, and

(c) 'distribution arrangements' – by which APRA distributes to relevant members the fees it has collected from licensees/users.⁸

Previous authorisations

1.18. APRA's arrangements were first authorised (conditionally) by the Australian Competition Tribunal (the Tribunal) in 1999, following the ACCC's determination denying authorisation to APRA's applications, other than for its overseas arrangements. The Tribunal granted authorisation to APRA for four years, subject to APRA amending its Articles of Association (including in respect of licence back arrangements) and APRA implementing an Alternative Dispute Resolution (ADR) scheme.

1.19. In 2006, the ACCC re-authorised APRA's arrangements for a further four years and in 2010, conditionally re-authorised APRA's arrangements for another three and a half years.

1.20. On 18 January 2010, APRA lodged a notification for exclusive dealing conduct with regard to APRA's assignment of rights (membership agreement) and Article 17 of APRA's Constitution. Specifically, the notification concerns conduct whereby APRA acquires rights in its members' existing and future musical works subject to a condition that the member does not 'opt out' of the APRA system or 'licence back' any of their works unless they comply with certain conditions (opt out and licence back are summarised at paragraphs 2.31 to 2.33). The ACCC did not object to this notification.

1.21. In 2014, the ACCC conditionally re-authorised APRA's arrangements, subject to conditions requiring APRA to revise its ADR scheme and publish plain English guides

⁶ APRA AMCOS, *Media Release* Wednesday, 17 October 2018, available: <http://apraamcos.com.au/news/2018/october/digital-revenue-eclipses-broadcast-in-apra-amcos-record-setting-financial-year-results/>.

⁷ APRA AMCOS, *2018 Year in Review*, p. 2-3, available: http://apraamcos.com.au/media/YIR/2018/APRA_AMCOS_Year_in_Review_2018.pdf

⁸ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 6, available: [ACCC public register](#).

relating to its licensing regime and members' ability to opt out and obtain licences back.

2. Background

Copyright

- 2.1. Copyright is a bundle of proprietary rights to do certain acts with an original work or other copyright subject matter. Copyright laws, such as the Copyright Act, are designed to prevent the unauthorised use by others of a work and to reward the creators of works, thereby encouraging creativity and innovation.
- 2.2. In Australia, copyright arises upon the creation of the copyright material, that is, it does not have to be registered (as patents and designs must be if the owner wants protection).
- 2.3. Copyright owners may exercise their rights themselves or may give permission to other people to do so by granting a licence. Copyright owners may grant a licence that is subject to certain conditions, such as the payment of a fee (or royalty), or limit the licence as to time, place or purpose. Licences may be 'exclusive' (granting specified rights with a guarantee that those rights will be granted to no other person) or 'non-exclusive', allowing the same work to be licensed by more than one user.
- 2.4. Copyright owners may also assign – effectively sell or otherwise transfer – their rights to third parties. Such assignment must be in writing and signed by or on behalf of the copyright owner. Under the assignment, the assignee (for example, APRA) becomes the owner of the rights and may license use of the work and commence infringement proceedings under the Copyright Act in their own right.
- 2.5. Under the Copyright Act, the rights, as they relate to musical works, include:
 - rights to reproduce the work in a material form
 - rights to publish the work
 - rights to perform the work in public
 - rights to communicate the work to the public
 - rights to make an adaptation of the work
 - mechanical rights – the right to record a musical work onto, for example, a record, cassette or compact disc, and
 - synchronisation rights – the right to use music on a soundtrack of a film or video.
- 2.6. In the case of a piece of music, it is not unusual for the copyright in different elements of the piece to be owned by different people or entities. For example, within the one piece of music there can be the following copyright owners:
 - the composer (being the artist who wrote the music) – composers generally have copyright in the 'tune' or musical work

- the lyricist (being the artist who wrote the lyrics, if any) – the lyricist generally has copyright in the ‘song’ or literary work
- the arranger (being the artist who arranged the music) – arrangers generally own the copyright in the arrangement, and
- the publisher (who arranges the sale or exploitation of musical works) – publishers usually obtain an 'assignment' (see below) of the mechanical rights, synchronisation rights and print-music rights in exchange for the assignor (that is, composers, lyricists and arrangers) getting an agreed percentage of the income received by the publisher.

2.7. Some works are 'unprotected'. For example, under the Copyright Act copyrights expire after a certain time. Once these rights have expired, the work is considered to be 'in the public domain'.

Performing rights and APRA

2.8. APRA deals in two distinct parts of the copyright bundle, being the right to perform a work in public and the right to communicate a work to the public. This determination refers to these two copyrights together as performing rights, consistent with APRA's approach.

2.9. The right to communicate a work to the public includes the right to make copyright material available by broadcasting or electronically transmitting a work, for example by radio or television, and by disseminating it online.

2.10. Public performance of a musical work (i.e. any mode of visual or aural presentation) includes, for example:

- playing a work via radio or television (either as the featured item or when the work is embedded in a program or advertisement)
- performance as part of showing a film or a live performance, and
- causing works to be heard in public, for example in pubs, clubs, cafes, gymnasiums and general workplaces. This can be either directly, for example by playing a musical recording containing the work; or indirectly, for example where works are embedded in television or radio broadcasts shown or heard in these establishments.

2.11. The overwhelming majority of music composers in Australia are members of APRA and assign their performing rights to APRA. Users wishing to perform or communicate music in public usually obtain the right to perform the music by taking a non-exclusive blanket licence for the performing rights from APRA. A blanket licence gives the user a performing-rights licence in respect of APRA's entire repertoire.

2.12. For particular types of use, some licensees may require a licence from APRA and another collecting society. For example, the Phonographic Performance Company of Australia Limited (the **PPCA**) represents the interests of recording artists and record labels and is the collecting society for the separate copyright that exists in the recording and/or music video of a musical work. When a user wants to broadcast or publicly perform a recording they will usually require two licences: one from APRA for the musical work and one from the PPCA for the sound recording.

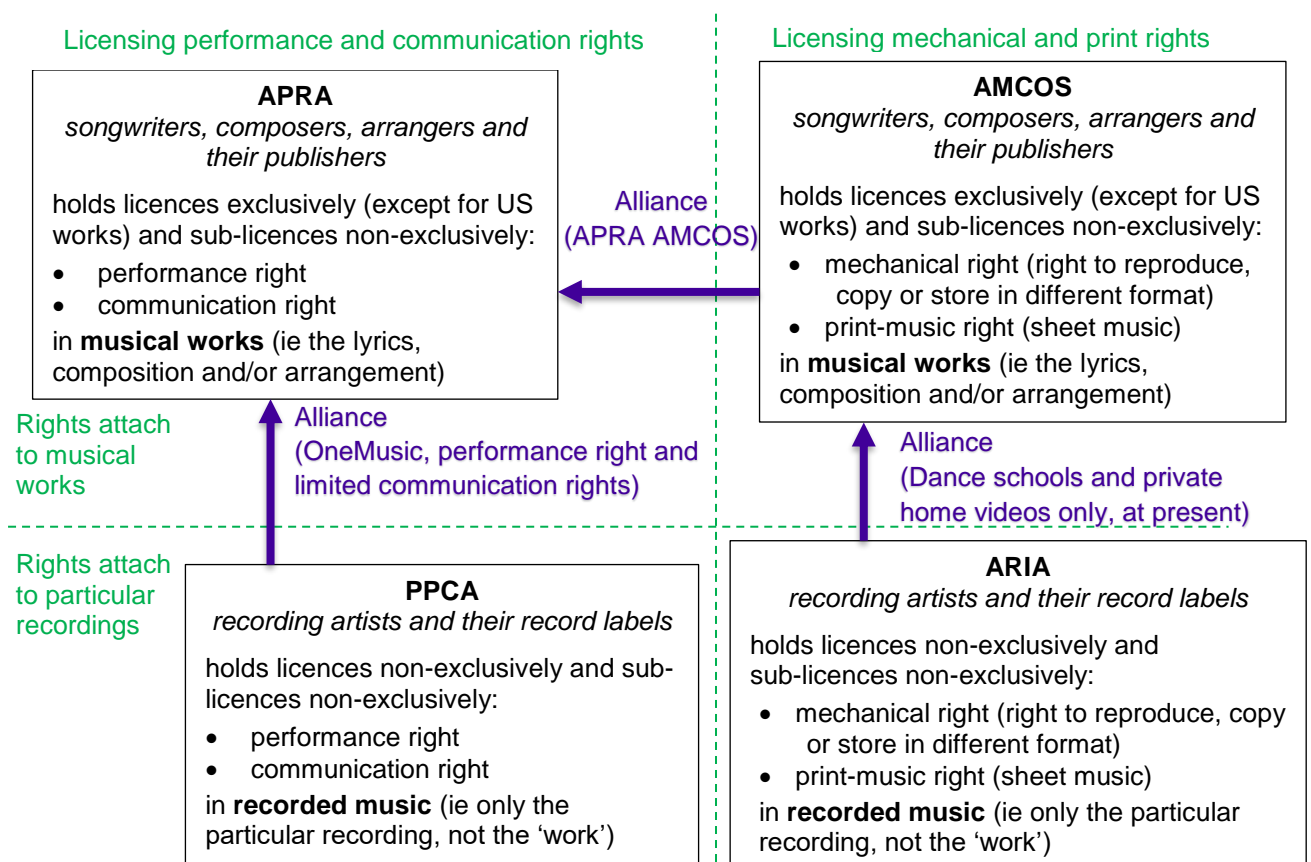
2.13. There are potentially a number of other ways in which users could obtain the right to perform music that is subject to copyright. For example, users could:

- take an assignment of the performing right or a licence from the copyright owner, for example before the copyright owner becomes a member of APRA
- after the owner has become an APRA member, that member could use APRA's opt out or licence back processes (as discussed at paragraphs 2.31 to 2.33) to take back certain rights in the works and enter into direct arrangements with users, either in respect of all of the works for particular uses or in respect of individual works for particular uses, or
- employ composers to produce music for them. Such employers would become owners of the copyright.

Other copyright collecting societies

2.14. APRA has negotiated alliances with other music licence fee collection entities. Its initial alliance was with AMCOS in 1997. More recently APRA is implementing a tripartite alliance between it, AMCOS and the PPCA. This will also incorporate AMCOS' very limited alliance with the Australian Recording Industry Association (ARIA). See the diagram below for an explanation of the role of each of the music licence fee collecting entities.

Diagram of Australian music collecting societies, their roles and alliances



2.15. Of most relevance in the current context is the PPCA. The PPCA manages sound recording rights in a similar manner to APRA's management of performing rights. As

noted, most commercial music users require both licences. Examples of businesses that do not require sound recording rights include venues that only perform live music and fitness centres that perform rerecorded APRA works (that is, they do not use sound recordings by the original recording artist, instead they use sound alike recordings not represented by PPCA). The PPCA also offers blanket licences covering its entire repertoire, acting as a one stop shop for sound recording rights.

- 2.16. However, unlike APRA, the PPCA only holds its members' rights on a non-exclusive basis. This means PPCA members (individually or, more commonly, a record company acting collectively on behalf of PPCA members signed to the record company) and music users are free to directly negotiate licences for use of the members works outside of the PPCA system.
- 2.17. As discussed below, APRA and the PPCA have recently formed a joint licensing initiative to deliver both performing rights and sound recording licences from a single point. This new operation, known as 'OneMusic', is due to commence on 1 July 2019. APRA will operate OneMusic. The OneMusic licences will also include the relevant licences from AMCOS and, in some cases, ARIA for a segment of users including eisteddfod competitions and dance or music schools and teachers.⁹

The Copyright Tribunal

- 2.18. The Copyright Tribunal of Australia (the **Copyright Tribunal**) is a specialist administrative body established primarily for the purpose of dealing with disputes regarding statutory licences and certain non-statutory or 'voluntary' licences. The Copyright Tribunal deals with cases where a monopoly, or quasi-monopoly, exists due to the role of a copyright collecting society or equivalent licensing body.¹⁰
- 2.19. The Copyright Act provides for proposed and existing licence schemes¹¹ to be referred to the Copyright Tribunal by a licensor, a licensee or their representatives.¹² In addition, the Copyright Tribunal has the function of determining remuneration payable under the statutory licence schemes established by the Copyright Act.
- 2.20. The Copyright Tribunal has jurisdiction to confirm or vary a licence scheme or proposed licence scheme. It may also substitute a new scheme for the one referred to it.¹³ The Copyright Tribunal has the power to make orders as to the charges and conditions that it considers applicable under a licence scheme, or, depending on the circumstances in which the application is made, the charges and conditions that the Tribunal Copyright considers 'reasonable in the circumstances', in relation to the granting of a particular licence.¹⁴
- 2.21. The Copyright Tribunal is required to have regard to relevant guidelines made by the ACCC in proceedings concerning certain copyright licences and licence schemes, if

⁹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 24, available: [ACCC public register](#).

¹⁰ Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited [2009] ACopyT 2, [30].

¹¹ Licence schemes are defined in s 136 of the *Copyright Act 1968* (Cth).

¹² See *Copyright Act 1968* (Cth) sections 154–156.

¹³ See *Copyright Act 1968* (Cth) sections 154–156.

¹⁴ Copyright Tribunal of Australia, *About the Tribunal*, viewed 4 April 2018, <<http://www.copyrighttribunal.gov.au/about>>

requested by a party.¹⁵ The ACCC may also seek to become a party to such proceedings.¹⁶

- 2.22. In April 2019, the ACCC published revised guidelines to assist the Copyright Tribunal in the determination of copyright remuneration.¹⁷ The guidelines are designed to assist in the determination of reasonable copyright remuneration in proceedings relating to voluntary licences and licence schemes before the Copyright Tribunal. The guidelines may also assist collecting societies and copyright users when negotiating reasonable copyright remuneration by providing insight into the economic framework that the ACCC considers could reasonably be adopted, and the approaches that can be used in applying that framework.
- 2.23. The guidelines detail matters the ACCC considers to be relevant to the Copyright Tribunal's determinations. In doing so, the range of principles in the guidelines may also assist licence negotiations and minimise resort to Copyright Tribunal proceedings.

APRA's processes

Input arrangements

- 2.24. Broadly, APRA's domestic input arrangements involve the exclusive assignment to APRA by members of the performing rights in any current and future musical and associated literary works in which they own copyright during the continuance of membership, subject to APRA's opt out and licence back provisions discussed below.
- 2.25. APRA's international input arrangements are reciprocal arrangements with equivalent overseas copyright collection societies. The International Confederation of Societies of Authors and Composers (CISAC), of which APRA is a member, has established an international licensing system under which each affiliate society will grant to each other affiliate society an exclusive right to license the works in its repertoire in the society's respective territory. An exception to this is in respect of the arrangements with the affiliated societies operating in the USA. In the 1930s, the US Government brought criminal charges in relation to the collecting societies under US competition law. However, these proceedings were ultimately resolved via a civil resolution worked out over many years. Under these consent decrees brokered by the US Department of Justice, US societies take and so confer non-exclusive rights only.
- 2.26. APRA takes exclusive rights to all the works in the repertoires of affiliated societies and administers these in Australia (with, as noted above, the exception that works from the US are administered on a non-exclusive basis). Similarly, it grants to the overseas societies exclusive rights to administer the musical works in APRA's repertoire in that overseas society's territory/country. Even if APRA were to move to non-exclusive overseas arrangements, the exclusive reciprocal arrangements between other overseas collecting societies would remain in place (APRA is a small part of the global licensing environment and is not able to substantially influence CISAC's arrangements).
- 2.27. By virtue of its input arrangements, APRA has a near monopoly (in Australia) over the worldwide repertoire of musical works.

¹⁵ *Copyright Act 1968* (Cth) s 157A

¹⁶ *Copyright Act 1968* (Cth) s 157B

¹⁷ Available at: <https://www.accc.gov.au/regulated-infrastructure/communications/intellectual-property/copyright-guidelines-2019>

Output arrangements

- 2.28. APRA's output arrangements deal with the process by which it licenses music users to use the musical works in its repertoire. As noted above, APRA's licences are generally granted on a 'blanket' basis – that is, they confer upon licensees an unlimited right to use all of the works within the APRA repertoire. Users are categorised into licensee groups, with each group being the subject of an individual licence scheme (with different terms and conditions and fees) based on the category of use.
- 2.29. Where APRA and a licensee cannot agree on the price or terms of a licence, a licensee may request that the dispute be dealt with through APRA's alternative dispute resolution process established under the terms of the ACCC's previous authorisation (Resolution Pathways, discussed further below). Parties dissatisfied with licence terms offered by APRA may also seek review by the Copyright Tribunal, as discussed above.
- 2.30. APRA's output arrangements also establish a process by which it responds to possible copyright infringements by users. This process may, in some circumstances, culminate in proceedings under the Copyright Act in the Federal Court. As part of this process, APRA has a program of monitoring to detect the unauthorised use of its members' works.

Opt out and licence back

- 2.31. APRA members, as a condition of joining APRA, agree to exclusively assign to APRA the performing rights in any current and future musical works in which they own copyright during the continuation of membership. However, this assignment is subject to two processes that can be used by members to manage their own rights (and thereby enter into licensing arrangements directly with users of their musical works):
- **Opt Out** allows a member to require APRA to reassign the performing rights in all, but only all, of the member's works in relation to a category of use (for example, live performance or broadcasting). APRA will not license any users of the works in the relevant category but will continue to exclusively manage the works in all other categories of use.
 - **Licence Back** allows a member to require APRA to grant to the member a non-exclusive licence in relation to any of the member's works, so that the member can enter into direct licensing arrangements with particular copyright users. APRA will continue to manage those rights for all other users in all categories of use.
- 2.32. Members seeking to opt out in respect of a category of use must give APRA at least three months' notice, to take effect either on 1 January or 1 July in any year, and may be required to pay a fee of up to \$200. For a licence back application, members must give APRA at least two weeks' notice of the specific use and user and may be required to pay a fee of up to \$200.¹⁸

¹⁸ Note: APRA requires written notice of only one week in the case of an artist licensing the live performance of their own music, performance in a cinema movie, or the communication (broadcast or online) of their own songs. Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p 823, available: [ACCC public register](http://apraamcos.com.au/media/5908/managing-your-rights_optout.pdf); APRA AMCOS, Managing your APRA rights, August 2014 available: http://apraamcos.com.au/media/5908/managing-your-rights_optout.pdf

- 2.33. In 2008, APRA introduced a “non-commercial licence back” option as part of its broader licence back arrangements. This permits members to license back particular work in relation to “the right to communicate to the public online” for non-commercial purposes.¹⁹ As with other licence back arrangements, consent of all interested parties in the work is required. APRA defines “non-commercial purposes” to mean:²⁰
- (i) *That there is no consideration or financial incentive whether directly or indirectly received by any party for the communication or any subsequent use of the work under any sub-licence; and*
 - (ii) *Any sub-licensee is a not for profit entity whose activities are not directed towards commercial advantage and that does not receive public or institutional funding.*

Distribution rules

APRA’s constitution

- 2.34. APRA’s constitution requires APRA, after payment of all expenses incidental to its operations, to allocate and distribute all moneys it receives through the licensing of rights and distributions from affiliate societies (together with any income earned through the investment of such funds) to members and affiliated societies.²¹ APRA’s Board of Directors has the legal power and responsibility for determining the distribution rules by which APRA’s revenue is allocated and distributed.²²
- 2.35. APRA submits that its expense to revenue ratio, as a standalone entity, is 14.45 per cent.²³ APRA submits that this is compared to an average expense to revenue ratio for overseas societies of 15.4 per cent.²⁴ APRA states this second figure is calculated in accordance with the CISAC-approved method, which requires foreign revenue to be excluded.²⁵
- 2.36. APRA’s distribution rules include the ‘50 per cent rule’, under which at least 50 per cent of any distribution must be paid to the relevant writer(s).²⁶ This rule is consistent with the rules of the CISAC.²⁷

¹⁹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 3, article 17(k)(i), available: [ACCC public register](#); APRA AMCOS 2019, *Request for licence back for non-commercial purposes online*, available: https://apraamcos.com.au/media/3526/17j_request-for-licence-back-for-non-commercial-purposes-online_distributed.pdf

²⁰ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 3, article 17(j), available: [ACCC public register](#)

²¹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 3, article 93, available: [ACCC public register](#).

²² Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 3, article 93, available: [ACCC public register](#).

²³ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 18, available: [ACCC public register](#).

²⁴ APRA AMCOS, *2018 Affiliate Society Expense Ratios*, available: http://apraamcos.com.au/media/financials/comparative_international_expense_to_revenue_ratios.pdf

²⁵ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 22, available: [ACCC public register](#).

²⁶ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 11, rules 9 & 10, available: [ACCC public register](#).

²⁷ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 23, available: [ACCC public register](#).

Distributions process

- 2.37. After the deductions for management costs noted above and its outreach work, APRA distributes the licence fees it collects to its members according to its distribution arrangements.
- 2.38. APRA distributes revenue arising out of the licensing of music in accordance with its distribution rules. Generally, APRA distributes money collected under specific licence schemes in accordance with information collected about music use under those schemes. For example, revenue from radio is distributed according to detailed logs provided by radio stations. Digital download revenue is distributed to the owners of tracks actually sold, and Spotify revenue is distributed to the owners of tracks.²⁸
- 2.39. Many of APRA's licence agreements require music users to report to APRA usage details of the musical works which they have publicly performed or transmitted.²⁹ For example, free-to-air television broadcasters provide APRA with monthly broadcast logs detailing what programs went to air, along with cue sheets listing the individual works used in a programme.³⁰
- 2.40. Similarly, commercial radio broadcasters provide APRA with a quarterly file listing the works they broadcast (identified by title, composer and performer) and the number of times each work was put to air. APRA also obtains information for non-playlist music, for example music used in advertisements and episodic material. For community radio broadcasters, APRA employs a simplified sample-based data collection process to take account of their relative size and funding. However, because many community radio stations do not use computerised music scheduling software, returns are often hand-written which significantly increases the manual administrative workload required for APRA to process them.³¹
- 2.41. APRA also conducts a full census analysis of music synchronised on film and publicly performed in cinemas and maintains a database of film cue sheets.³²
- 2.42. APRA also uses additional reporting methods such as data from background music suppliers, DJ Monitor units and other music recognition technology (**MRT**) to collect play data in venues such as nightclubs. MRT uses audio fingerprinting algorithms to automatically identify audio tracks.³³
- 2.43. APRA states that it uses the information provided by its licensees, together with information from members, affiliate societies and third parties where appropriate, to identify the copyright owner(s) of each work that has been performed or transmitted, and to calculate their royalty entitlements.³⁴

²⁸ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2, p. 22, available: [ACCC public register](#).

²⁹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2, page 3, available: [ACCC public register](#).

³⁰ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 11, rule 20, available: [ACCC public register](#).

³¹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2, page 23, available: [ACCC public register](#).

³² Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2, page 23, available: [ACCC public register](#).

³³ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, p. 32 & 35, available: [ACCC public register](#).

³⁴ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, page 3, available: [ACCC public register](#).

- 2.44. Separate distribution revenue “pools” are created from the licence fees received from individual licensees (for example: each commercial radio station) or from groups of similar licensees (for example: network TV stations, cinemas, or airlines).³⁵
- 2.45. APRA states that it endeavours to ensure that licence fees received from each music user are paid directly to the musical works performed or broadcasted by that user, providing it is economically feasible to do so. To ensure the costs of collecting and processing data from licensees is commensurate with the value of the licence fees received, APRA uses a combination of distribution techniques, in accordance with its distribution rules:
- Direct distributions, where licence fees from a client are distributed directly to usage data collected from that client (for example, commercial TV).
 - Sample distributions, where a sample set of data is processed from a representative source or group of sources, and licence fees are pooled together to be distributed against that data set (for example, community radio).
 - Analogous distributions, where data cannot be provided by a client and so licence fees are distributed against proxy data collected from a different source (for example, smaller online services).
- 2.46. APRA distributes royalties on a quarterly, six monthly or annual basis depending on the distribution category.³⁶ Where works are unidentifiable, relevant distribution credits are retained by APRA for three years, after which unidentified performances are deleted and unidentified account balances are returned to the distribution pool.³⁷
- 2.47. APRA’s distribution rules provide processes for complaints handling and dispute resolution processes, as well as processes for members and affiliate societies to seek an adjustment to an incorrect distribution.³⁸

OneMusic

- 2.48. OneMusic Australia is a joint licensing initiative between APRA, AMCOS and PPCA, the aim of which is to provide a single source of music licences for businesses.³⁹
- 2.49. As noted above, PPCA is the non-exclusive licensee of owners of copyright in certain sound recordings, which it licenses for public performance in a similar manner to the APRA blanket licensing system. Most users of recorded music (in the context of public performance) require licences from both the musical work and the sound recording.
- 2.50. APRA submits that this can cause a degree of confusion in the market, where a business that has obtained a licence from APRA is resistant to a claim from the PPCA (and vice versa) because it is difficult for the lay person to understand that there are two sets of rights involved in the public performance of recorded music.⁴⁰

³⁵ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, p. 4, available: [ACCC public register](#).

³⁶ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, p. 4, available: [ACCC public register](#).

³⁷ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, p. 5, available: [ACCC public register](#).

³⁸ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 11, rules 8, 12 & 13, available: [ACCC public register](#).

³⁹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 24, available: [ACCC public register](#).

⁴⁰ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 24, available: [ACCC public register](#).

- 2.51. APRA, trading as OneMusic Australia, will act as agent for PPCA in licensing PPCA's public performance rights. OneMusic Australia will manage licensing, customer service, invoicing, payment collection, enforcement, the OneMusic website and eCommerce.⁴¹
- 2.52. The PPCA and APRA will continue to distribute licence revenue (in the case of PPCA after the deduction of a fixed agreed commission by APRA) to their respective members, licensors and affiliates. There will be no change to the membership arrangements of either society.⁴²
- 2.53. APRA states that while the licences currently administered by APRA and the PPCA will in the future only be available through OneMusic, users who do not require both licences, for example because they do not require a sound recording licence or have sourced a sound recording licence directly, will be able to obtain a licence for only the APRA rights, or only the PPCA rights, through OneMusic.⁴³ In most cases, the licence fee will be 51.75 per cent of the fee charged if both sets of licences are required.⁴⁴
- 2.54. OneMusic has been operating in New Zealand since 2014 and APRA proposes to launch it in Australia in July 2019.⁴⁵
- 2.55. The House of Representatives Standing Committee released a report into the Australian music industry in March 2019. The Committee noted that:

*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.*⁴⁶

- 2.56. Accordingly, one of the Committee's recommendations was 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.*⁴⁷

⁴¹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 24, available: [ACCC public register](#).

⁴² Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 26, available: [ACCC public register](#).

⁴³ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 1, available: [ACCC public register](#).

⁴⁴ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 2, available: [ACCC public register](#).

⁴⁵ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 29, available: [ACCC public register](#).

⁴⁶ House of Representatives Standing Committee on Communications and the Arts *Report on the inquiry into the Australian music industry*, March 2019, p. 22, available: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Communications/Australianmusicindustry/Report

⁴⁷ House of Representatives Standing Committee on Communications and the Arts *Report on the inquiry into the Australian music industry*, March 2019, p. 22, available: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Communications/Australianmusicindustry/Report

CLEF

- 2.57. Since 2014, APRA has been developing a Copyright Licensing Enterprise Facility (**CLEF**) system. CLEF is designed as a whole of business platform to manage membership and licensing transactions.⁴⁸
- 2.58. APRA submits that CLEF will be implemented incrementally from the fourth quarter of 2019 to the second quarter of 2020.⁴⁹ The initial phase will be a subset of APRA's public performance licensing business aligned with the OneMusic Australia initiative (discussed at paragraphs 2.48 to 2.56). Subsequent phases will support licences aligned with different business sectors.
- 2.59. APRA submits that CLEF will provide a more automated and integrated technical solution to facilitate the withdrawal of rights from APRA's repertoire (discussed at paragraph 4.218). APRA also submits that the CLEF system will improve distribution processing by allocating and distributing to an increased number of multiple sharers in individual works, and by processing significantly more data much more quickly.⁵⁰
- 2.60. APRA submits that on current projections, the entire CLEF system is estimated to be fully implemented by the end of June 2020.⁵¹

APRA's Alternative Dispute Resolution Scheme

- 2.61. Under the conditions of the ACCC's 2014 authorisation, APRA was required to implement a revised ADR scheme managed by an independent facilitator approved by the ACCC. The ADR scheme was required to incorporate a consultative committee, comprising member and licensee representatives, to provide feedback and other advisory input to APRA and to the facilitator. The ACCC also imposed a number of reporting obligations, including requiring APRA to submit to the ACCC an annual report regarding the use of the scheme.⁵²
- 2.62. In April 2015, APRA launched 'Resolution Pathways', a new ADR facility administered by an independent provider, Resolve Advisors, and managed by resolution facilitator, Shirli Kirschner (the Resolution Facilitator).⁵³ As required by the conditions of authorisation, the scheme provides access to four resolution processes:
- 1) **Informal resolution:** informal resolution of the dispute in a manner facilitated by the Resolution Facilitator.
 - 2) **Mediation:** an informal process utilising a mediator trained in assisting participants to resolve disputes, without the mediator providing a view.
 - 3) **Expert view:** a non-binding evaluation given to those in a dispute jointly, by a person who is an expert in the area(s) in dispute.

⁴⁸ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 8 & 28, available: [ACCC public register](#).

⁴⁹ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 22, available: [ACCC public register](#).

⁵⁰ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 23, available: [ACCC public register](#).

⁵¹ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 23, available: [ACCC public register](#).

⁵² Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 82, available: [ACCC public register](#).

⁵³ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 20, p. 73, available: [ACCC public register](#).

- 4) **Expert decision:** a binding decision on the issues in a dispute provided by a person who is an expert in the area(s) in dispute. The expert decision is binding by virtue of a contract between the parties in dispute agreeing to be bound.⁵⁴

2.63. Participation in all of the four resolution processes is voluntary for all parties.

2.64. In addition, the Resolution Facilitator has initiated additional process which were not contemplated by the ACCC in 2014, both of which are in trial or pilot stages:

- i) **Mapping:** the same process as mediation but the “mapper” has expertise in the subject of the dispute to which they are appointed, and uses that expertise to pinpoint the key issues in dispute, to guide the disputants’ discussions of those key issues, and to suggest feasible areas of agreement. The process itself is not determinative, and the mapper’s role does not include making any decisions on behalf of the disputants.
- ii) **Peer assist:** the process is currently available to music creators (for example members disputing who will own copyright in the co-written work and in what proportion), and involves the appointment of an industry “peer” whose role includes considering information provided by the disputants, providing an assessment of the likely provenance of the disputed music item, and facilitating collaborative negotiations between the disputants. The process itself is not determinative, and the peer’s role does not include making any decisions on behalf of the disputants.⁵⁵

2.65. Resolution Pathways is governed by four committees (or subcommittees):

- i) **the consultative or steering committee**, established pursuant to the condition imposed by the ACCC in 2014. The Consultative Committee provides advice and support to the Resolution Facilitator in relation to the design, implementation and on-going management of the scheme. The Resolution Facilitator is required to consult the consultative committee on matters such as the monitoring of the operation of the scheme, including its cost, receipt of feedback on the scheme, and the making of a recommendation about the budget for the operation of the scheme. In compliance with the ACCC’s condition, committee members are a mixture of (large and small) member and licence representatives. Members were selected by an independent panel and are appointed on a volunteer basis
- ii) **the governance committee**, which was established by the Resolution Facilitator in 2016 to provide the scheme with greater independence from APRA. The ACCC’s 2014 condition did not require the establishment of the governance committee. However, the condition provides the Resolution Facilitator with the discretion to create further governing committees, in addition to the consultative committee. Membership of the governance committee is drawn from the consultative committee. The governance committee has an independent chair, who has experience in chairing and the music industry, but does not represent a stakeholder group
- iii) **the succession and nominations sub-committee**, which is responsible for replacing consultative committee members, and

⁵⁴ Resolution Pathways, *Pathways*, available: <http://www.resolutionpathways.com.au/Resolution-Pathways>

⁵⁵ Report of the Independent Review of Resolution Pathways, dated November 2018, p.16, available at: [ACCC public register](#).

- iv) **the peer review committee**, which was established to oversee the trial of the Peer Review Process.⁵⁶
- 2.66. As required by the ACCC's condition, APRA is the sole funder of the scheme's general management and operations, including the cost of the Resolution Facilitator.
- 2.67. Resolution Pathways is able to charge fees for use of the scheme. As per the conditions of authorisation, for an informal resolution of the dispute, an initial phone discussion with the facilitator is free of charge. Subsequent involvement of the facilitator attracts a fee of up to \$150 (including GST) depending on the amount in dispute. The fee is payable by each party to the dispute.
- 2.68. For the mediation, expert view, and expert decision processes, each applicant that is a party to the dispute must pay 50 per cent of the fees charged and 50 per cent of the disbursements or other costs reasonably incurred by the Independent Mediator or Independent Expert for the resolution of the dispute. These amounts are to be divided equally amongst all applicants who are parties to the dispute and who have agreed to that particular option for resolving the dispute. These fees and costs are not payable where:
- the amount disputed is less than \$10,000 or
 - the dispute does not involve a disputed amount but, in the case of a licensee the amount payable by the licensee for the licensing of copyright by APRA is less than \$10,000, and in the case of a member the amount paid by APRA for the licensing of copyright by the member to APRA in the previous twelve months is less than \$10,000.⁵⁷
- 2.69. Only the disputed part of an amount specified by APRA is taken into account in determining the fees and costs payable by the applicant.⁵⁸
- 2.70. The fees and costs payable under any of the four resolution processes may be waived or reduced by the Resolution Facilitator, the Independent Mediator or the Independent Expert (as relevant) or with the agreement of APRA, and in instances where the dispute consists of a complaint.⁵⁹
- 2.71. The ACCC's 2014 determination also included a requirement that the scheme be subjected to an independent review, the report of which was to be made available to the ACCC six months prior to the expiry of the authorisation.⁶⁰ In compliance with this condition, independent reviewer Alysoun Boyle conducted a review of Resolution Pathways in late 2018.⁶¹ The findings of this review are discussed further at paragraphs 4.144 – 4.146. Broadly the review found that feedback about the scheme from participants had been generally positive but that some improvements could be made to increase the usefulness of the scheme, including by improving awareness of the scheme.

⁵⁶ Report of the Independent Review of Resolution Pathways, dated November 2018, p. 24, available at: [ACCC public register](#).

⁵⁷ Resolution Pathways 2019, *Costs*, available: <http://www.resolutionpathways.com.au/Costs>

⁵⁸ Resolution Pathways 2019, *Costs*, available: <http://www.resolutionpathways.com.au/Costs>

⁵⁹ Resolution Pathways 2019, *Costs*, available: <http://www.resolutionpathways.com.au/Costs>

⁶⁰ Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 82, available: [ACCC public register](#).

⁶¹ Report of the Independent Review of Resolution Pathways, dated November 2018, Available at: [ACCC public register](#).

Review of the Code of Conduct for Copyright Collecting Societies

- 2.72. A voluntary Code of Conduct for Australian Copyright Collecting Societies (**the Code**) was introduced in July 2002. The Code sets out the standards of service that members and licensees can expect from collecting societies and aims to promote awareness and confidence in collecting societies.⁶² It addresses issues such as governance, transparency and dispute resolution. APRA is a signatory to the Code.
- 2.73. The Code also establishes a process of public reporting, by requiring each society to publish a statement of Code compliance in its annual report, and a process of independent review of Code compliance every three years.
- 2.74. The most recent report of the review of copyright collecting societies' compliance with the Code produced by the independent code reviewer was published in December 2018. The Code reviewer report found generally that APRA had complied with the requirements of the Code.⁶³
- 2.75. In 2017 the Department of Communications and Arts, in consultation with the ACCC, conducted a review of the efficacy of the Code – *The Review of Code of Conduct for Australian Copyright Collection Societies* (the **Code Review**). The review examined the extent to which the Code remains the best mechanism to promote efficient, effective and transparent administration of copyright licences, and supports overall confidence in Australia's collective copyright management system.
- 2.76. A final report released in April 2019 proposed a number of refinements to the Code.⁶⁴ The final report makes a number of recommendations that seek to increase transparency around how collecting societies operate, clarify the Code's role and objectives, and strengthen the Code's governance arrangements.⁶⁵ The review anticipates that collecting societies could finalise amendments to the Code by 30 June 2019, so that compliance with the updated Code could be measured from 1 July 2019.⁶⁶ APRA submits that it will be in a position to have implemented all of the recommendations set out in the report by 1 July 2019.⁶⁷
- 2.77. The ACCC considers that while the Code does not impose sanctions on signatories, it creates a culture in which member societies endeavour to maintain performance in line with their peers. Public code reviewer reports act as an incentive for member societies to perform well based on the criteria reported. However, the Code does not address issues around the terms on which licences are granted (i.e. licence fees).

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.

⁶² Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 19, section 1.3, available: [ACCC public register](#).

⁶³ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 20, available: [ACCC public register](#).

⁶⁴ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 22, available: [ACCC public register](#).

⁶⁵ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 22, p. 10 - 13, available: [ACCC public register](#).

⁶⁶ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 22, p. 17, available: [ACCC public register](#).

⁶⁷ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 2, available: [ACCC public register](#).

- 3.2. The ACCC invited submissions from a range of potentially interested parties including industry associations, member organisations, government organisations, music users, members and licensees.⁶⁸
- 3.3. The ACCC received 47 (public and confidential) submissions from interested parties in relation to the application.
- 3.4. Public submissions by APRA and interested parties are on the Public Register for this matter: www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australasian-performing-right-association-limited-0
- 3.5. In summary, interested parties generally support a system of collective rights licensing and acknowledge that APRA's arrangements create efficiencies for members and licensees. However many interested parties consider that APRA has market power which is reflected in the terms and conditions of licences offered.
- 3.6. A number of licensees consider the lack of competitive constraint on APRA has resulted in it setting unfair licence fees and terms. Some licensees claim that APRA's licence fees are higher than comparable fees charged by overseas collecting societies, and argue that APRA is unable to justify these discrepancies.
- 3.7. Many interested parties have also raised concerns that the introduction of APRA-AMCOS's, the PPCA's and ARIA's joint initiative "OneMusic" will lead to significant increases in their licence fees. Some submissions also claim that APRA has not engaged in meaningful consultation with industry regarding their licensing arrangements under OneMusic. While many interested parties would like APRA's arrangements to continue, they would like to see some form of independent regulation of the fees set by APRA. Interested parties also consider there needs to be greater transparency around the methodology used by APRA in setting licence fees.
- 3.8. Interested parties, in particular some smaller APRA members, further submit that there is a lack of transparency around how licence fees are distributed and the system used to ensure that performers receive their rightful royalties. Some smaller members raise concerns that licence fee royalties are distributed disproportionate to larger APRA members, including the three major publishing companies (Sony, Universal and Warner). Some interested parties claim that the distribution of royalties is largely determined by commercial radio airplay, and as a consequence, artists whose airplay is beyond commercial radio do not receive their due royalties. Interested parties have called upon APRA to improve its data collection mechanisms in light of developments in technology, so that royalty payments better reflect music played.
- 3.9. Some interested parties have queried whether it is necessary for APRA to require rights to be assigned on an exclusive basis and consider a change to non-exclusivity to be the only effective way to introduce competition to APRA's arrangements. Many interested parties consider the current licence back and opt out mechanisms offered by APRA to be unsatisfactory and do not consider the provisions effectively facilitate direct dealings between APRA members and licensees.
- 3.10. Interested parties generally consider the introduction of APRA's dispute resolution scheme "Resolution Pathways" to be positive and consider the scheme has the potential to be an efficient and effective method of resolving disputes for members and licensees. However, interested parties have identified a number of factors that they submit undermine the usefulness of the scheme, including the scheme's cost, a lack of awareness about the resolution processes available under the scheme and the

⁶⁸ A list of the parties consulted and the public submissions received is available from the [ACCC public register](#).

scheme more generally, and a perception that the scheme is not sufficiently independent of APRA, particularly as it is primarily funded by APRA.

- 3.11. Some interested parties continue to raise concerns that APRA's voting system for appointing Board members disproportionately favours its large publisher members at the expense of smaller, independent, APRA members. This also feeds into concerns from some smaller members about the way licence fee royalties are distributed. Some have claimed the 2018 change to the way members' votes are weighted (as discussed at paragraphs 4.190 – 4.197) has disenfranchised low earning members and has further entrenched the dominant position of publishers on APRA's board. A number of interested parties would like to see APRA's voting system changed to "one member, one vote".
- 3.12. In addition to the general issues raised by a range of stakeholders across a range of industries, some interested parties have raised industry specific concerns, some general, and some specifically in relation to OneMusic.
- 3.13. Suppliers of background music have raised concerns that licence fees will increase substantially following the introduction of OneMusic. These suppliers contend that APRA/AMCOS has failed to conduct effective consultation with background music providers and other stakeholders as part of the development of the new licence fee structure under OneMusic, despite their claims that they have undertaken widespread industry consultation. A number of background music suppliers have also expressed concerns regarding the fact that APRA licenses businesses that use consumer streaming services, such as Spotify, in their commercial premises. These suppliers would like APRA to make it clear to licensees that it does not represent all artists that may be streamed through such services and that those licensees using personal streaming services in a commercial setting are in breach of the terms of use of these services.
- 3.14. The ACCC has also received multiple submissions from operators of dance schools and eisteddfods that claim that changes to the licence scheme arrangements for dance schools and eisteddfods under OneMusic will make licence fees unaffordable for many small businesses. Some dance schools have submitted that the increase in fees is so significant that it will affect the ongoing viability of their businesses. Parties have also argued that the consultation process for OneMusic was inadequate and that APRA did not consult with all appropriate industry associations about its introduction. Submissions further contend that APRA's licensing arrangements are too complex, and that licensees often pay duplicate fees covering the same subject matter or activities.
- 3.15. Nightclub licensees submit that APRA's licence fees for nightclubs are much higher than comparable licence fees charged by overseas collecting societies. Nightclub licensees also argue that OneMusic's change to a capacity based scheme for venues (where licence fees are based on a venue's maximum capacity, not actual attendance) is based on the erroneous assumption that nightclubs trade to, or close to, capacity on each night they operate. Nightclubs also question the distinction between the higher licence fees they are required to pay, and the lower fees that apply to other venues that also have dance floors, for example hotels and pubs/bars.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. APRA has sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.⁶⁹ Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

Relevant areas of competition

- 4.3. To assess the likely effect of the Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. APRA submits that the relevant area of competition is that adopted by the ACCC in 2014. That is, competition for the acquisition and supply of performing rights (in relation to musical works).⁷⁰
- 4.5. The ACCC considers that areas of competition which are likely to be affected by the arrangements for which APRA has sought re-authorisation are:
 - the acquisition of performing rights (in relation to Australian and overseas musical works) in Australia, and
 - the supply of performing rights in relation to musical works in Australia. This includes supply by APRA under its output arrangements and supply by 'direct licensing' between composers/other rights holders and music users.

Future with and without the Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.
- 4.7. APRA submits that the most likely situation without the Conduct in the short to medium term continues to be that found by the ACCC in the 2014 Determination: *"that there is one major collecting society that obtains rights from composers or other rights holders on a non-exclusive basis, instead of the exclusive basis on which APRA obtains them now."*⁷¹
- 4.8. The ACCC considers that the most likely future without the conduct is that APRA would hold its members' rights on a non-exclusive basis, instead of the exclusive basis on which APRA obtains them now. That is, the original rights holder would retain the capacity to deal with their works.
- 4.9. The ACCC also considers that without the conduct, APRA would take rights in the works of the repertoires of its affiliated overseas societies and administer these rights

⁶⁹ See subsection 91C(7).

⁷⁰ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 12, available: [ACCC public register](#).

⁷¹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 12, available: [ACCC public register](#).

in Australia on a non-exclusive basis, as it currently does with respect to works of its affiliated societies operating in the US.

- 4.10. The ACCC further considers that even if APRA was to take non-exclusive assignment of its members' works, entry of a second collecting society would be unlikely in the near future. The ACCC considers that APRA's dominant position is a significant deterrent to new entry. The ACCC also considers that barriers to entry for a second collection society are high due to:
- sunk costs in specialised knowledge and systems required to operate a collecting society
 - the economies of scale and scope of APRA's operations in simultaneously monitoring the use of and enforcing the rights to its entire repertoire of musical works, and
 - network economies or effects that mean users derive more value from (and therefore prefer) a collecting society as the range of musical works in its repertoire increases, and rights holders derive more value from (and therefore prefer) a collecting society as the number of users it attracts increases.
- 4.11. APRA holding exclusive rights to its members' works prevents direct dealing between rights holders and users, other than by utilising APRA's licence back and opt out systems. In the future without the proposed conduct - where rights would be held on a non-exclusive basis - members and users would be able to make alternative licensing arrangements rather than relying entirely, or in some cases, at all, on APRA's system.
- 4.12. If APRA obtained members' rights on a non-exclusive basis, rights holders could bundle their rights outside of the APRA system without each rights holder having to opt out or license back. The process would not be reliant on negotiations with APRA and thus likely to be quicker and cheaper. This would particularly be the case where a user requires access to a range of works from different APRA members. Under APRA's system, each member needs to separately opt out or license back from APRA to directly license the user.
- 4.13. Accordingly, the ACCC considers that without the conduct there would be greater opportunities for rights holders, be they composers, or other rights holders such as publishers aggregating rights, to make alternative licensing arrangements to APRA with users through direct dealing. Significantly more direct dealing than currently takes place utilising APRA's opt out and licence back provisions would be possible. The extent to which direct dealing would be likely to occur if this possibility was available is discussed at paragraphs 4.67 to 4.70.
- 4.14. However, with the exception of US works, the ACCC considers that APRA taking rights in the works of the repertoires of its affiliated overseas societies on a non-exclusive basis, would be unlikely to promote meaningful direct dealing in respect of overseas works. This is because generally members of these overseas collection societies assign their rights exclusively to the collection society in their jurisdiction. This means that users in Australia would not be able to deal directly with *members* of these societies irrespective of any changes made to arrangements between APRA and these societies.
- 4.15. If APRA took non-exclusive assignment of these rights, the only additional option this would provide for users in Australia would be to deal with the overseas society directly. However, as discussed at paragraph 2.26, under the international licensing system APRA and its affiliate overseas societies are a party to, each society grants each other

society an exclusive right to license its repertoire within its jurisdiction. These exclusive reciprocal arrangements would be likely to remain in place for the global licensing environment irrespective of any change to APRA's arrangements with affiliate societies. In this environment, APRA's affiliate overseas societies are unlikely to seek to compete with APRA to license works in their repertoire to Australian users even if their agreements with APRA allowed them to do so.

4.16. The ACCC also notes that there is currently a notification in place for conduct whereby APRA acquires rights in its members' existing and future musical works subject to a condition that the member does not opt out of the APRA system or license back any of their works unless they comply with certain conditions (see paragraph 1.20). For the purposes of assessing the application for re-authorisation, the ACCC has treated the notified conduct as forming part of the conduct that is the subject of the authorisation. In other words, it has proceeded on the basis that the notification would be in place in the future with, but not in the future without, and that the relevant exclusive dealing conduct would not be protected by the notification. The ACCC has taken this approach on the basis that the matters that are relevant in assessing the benefits and detriments of the notified conduct are largely the same as the matters that are relevant in assessing the authorisation application.

Public benefits

4.17. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁷²

4.18. The ACCC has considered the following public benefits :

- transaction cost savings in negotiation of rights
- avoiding the costs of having to make changes to APRA's systems, and
- efficiencies in enforcement and compliance monitoring

Transaction cost savings in negotiation of licences

4.19. As noted above, the ACCC considers that if authorisation is not granted APRA would hold its members' rights on a non-exclusive basis, instead of the exclusive basis on which APRA obtains them now. According, the ACCC must assess the transaction cost savings likely to be realised if APRA takes exclusive assignment of its members' rights, compared to if it did not.

4.20. In this respect, the ACCC considers that realisation of the transaction cost savings resulting from APRA's arrangements depends largely on APRA's ability to offer blanket licences covering virtually the entire worldwide repertoire of musical works.

4.21. For users, APRA's blanket licence arrangements provide transaction cost savings as licensees need only enter into a single transaction with APRA for all their music needs, rather than negotiate with a large number of individual rights owners. This

⁷² Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

reduces the number of negotiations between the parties and/or the burden of negotiations in terms of administrative, legal or IT costs and time.

- 4.22. Similarly for APRA's members, by assigning their rights to APRA upon membership, they are not required to deal directly with each individual user, which saves members both time and money.
- 4.23. However, the ACCC considers that APRA would continue to be able to offer blanket licences covering virtually the entire worldwide repertoire of musical works, and therefore, that these transaction costs savings would continue to be realised, if authorisation was not granted and APRA held its members' rights on a non-exclusive basis.
- 4.24. APRA submits that if it did not take an exclusive assignment of rights from its members and instead was only granted a non-exclusive licence by its members, it would be required to reassign all of its rights back to members and members would then have to grant a non-exclusive licence of the rights back to APRA. APRA argues that a number of rights would fall out of its repertoire during the process, inadvertently and/or because some members on having their rights reassigned to them would choose not to grant a non-exclusive licence back to APRA. This would create holes in APRA's repertoire which would in turn increase transaction costs because any user wanting to be licensed to cover all the works APRA is currently able to offer a licence for would, in the future, have to negotiate with a range of stakeholders rather than just with APRA.⁷³
- 4.25. However, the ACCC does not consider that APRA holding non-exclusive rights to its members' works, in and of itself, would create holes in APRA's repertoire. Rather, it would create opportunities for direct dealing in addition to, not instead of, licensing works through APRA. A member could enter into particular direct arrangements and still have APRA collect royalties from any other users of the member's entire repertoire.
- 4.26. While some members may value the opportunity to deal directly with some users, in almost all cases there is no reason that, in order to do so, they would give up the benefits of APRA licensing the use of their works by any and all other users. In this respect, the ACCC notes that if members wish to remove their musical works from APRA's repertoire in order to hold the rights exclusively themselves, they are already able to do so by utilising APRA's existing opt out provisions or by reassigning from APRA. In this respect, there would be little point in being a member of APRA if the member wished to hold their rights exclusively themselves.
- 4.27. The ACCC accepts that it is possible that some musical works could "fall out of APRA's repertoire" as a result of the divestment process outlined by APRA. That is some members, on having their rights reassigned to them, may not bother to go through the administrative process of granting a non-exclusive licence of the rights back to APRA. However, this is most likely to be the case in respect of members whose works are of such low value, because they are rarely used, that it is not worthwhile for the member to go through the administrative process that would be necessary to allow APRA to collect royalties for them in the future.
- 4.28. The ACCC considers that if APRA held its members' rights on a non-exclusive basis most, if not all, members whose works generate royalty revenue would likely continue

⁷³ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 9, available: [ACCC public register](#).

to have APRA manage their rights on their behalf, even if, in some cases, they also elected to seek to deal directly with some users in competition with APRA.

- 4.29. Therefore, APRA would be likely to continue to be able to offer blanket licences covering virtually the entire worldwide repertoire of musical works, and the transaction costs savings resulting from it doing so would likely continue to be realised. That is, the ACCC does not consider that it is necessary for APRA to take exclusive assignment of its members' rights in order for these transaction cost savings to be realised.
- 4.30. However, the ACCC does consider that APRA holding its members' rights on a non-exclusive basis would likely result in some, limited, increase in transaction costs.
- 4.31. First, if some APRA members did license directly with some users, and the user sought a blanket licence from APRA for the balance of the works they wished to use, to the extent that APRA and the user sought to negotiate discounts on the blanket licence to reflect the rights the user held through direct dealing, these negotiations would likely be more complex than would otherwise be the case.
- 4.32. Second, direct dealing between users and APRA members, in and of itself, may involve higher transaction costs than obtaining a blanket licence from APRA if the user required licences over a range of works that required it to negotiated licence agreements with a range of parties. However, users would only seek a licensing arrangement involving a degree of direct dealing if the net benefits of direct dealing exceeded the net benefit of obtaining only a blanket licence from APRA. Accordingly, the ACCC does not consider that there is a public benefit in the avoidance of these transaction costs.
- 4.33. The ACCC also considers there would be significant administrative, legal and IT costs involved for APRA, and for members, if APRA was required to reassign rights back to members, and members then granted a non-exclusive licence of the rights back to APRA, in order to establish a non-exclusive licensing system.
- 4.34. APRA would need to establish the systems to facilitate this and then engage in, largely pro-forma, transactions with each of its 100,000 members so it could license their works on a non-exclusive basis. These cost would be avoided if APRA maintained its near monopoly over acquiring and supplying performing rights in musical works.
- 4.35. The ACCC notes that while these costs would be significant, they would be largely initial, one off, costs necessary to change the system by which APRA acquires rights to license its members' works. This change would be unlikely to create significant additional ongoing costs in acquiring rights to licence members as new members joined or existing members create new works.

Efficiencies in enforcement and compliance monitoring

- 4.36. APRA submits that the exclusivity of APRA's rights is essential for the effective and efficient enforcement of copyright.⁷⁴ APRA submits that, in accordance with the statutory regime established under the Copyright Act only a copyright owner or

⁷⁴ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 9, available: [ACCC public register](#).

exclusive licensee can bring infringement proceedings for a breach of copyright.⁷⁵ In APRA's view, it is not possible for a non-exclusive licensee to bring infringement action without joining the copyright owner (i.e. the APRA member if rights were assigned to APRA only on a non-exclusive basis) and even in these circumstances, APRA submits it is not clear that this action would be permissible.⁷⁶

- 4.37. APRA submits that detection of unauthorised performances requires a substantial monitoring system for an enormous number of public performances, broadcasts and communications both in Australia and worldwide. It becomes financially viable to enforce performing rights rigorously only if the costs of monitoring and of bringing the proceedings can be spread over a large number of works in relation to which rights can be enforced.⁷⁷
- 4.38. APRA submits that the exclusive assignment of its members' rights to it facilitates this in the following ways:
- only one body incurs the costs of the monitoring necessary for detecting infringements (and this also serves the purpose of monitoring the use of licensed works for the purpose of determining the various members' shares of distributions) and as a result these costs are not needlessly duplicated
 - only one body incurs the costs of bringing the infringement proceedings and as a result, a consistent approach to enforcement is adopted and the enforcement costs are not needlessly duplicated
 - the costs can be spread over a very large number of works so that the maximum benefit of those infringement proceedings which are instituted can be extracted in the interests of all members of APRA, and
 - the costs of the enforcement proceedings are reduced because APRA, as the owner of the relevant rights, has title to sue and no other party needs to be joined.⁷⁸
- 4.39. APRA submits that if it held non-exclusive licences from copyright owners, the costs of monitoring for unauthorised performances would be substantially increased. This is because in addition to monitoring use, APRA would also have to establish whether any particular performance which was monitored had been licensed by the copyright owner or any other person with the right to grant non-exclusive licences in respect of the work in question.⁷⁹

⁷⁵ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 16, available: [ACCC public register](#).

⁷⁶ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 17, available: [ACCC public register](#).

⁷⁷ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 17, available: [ACCC public register](#).

⁷⁸ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 17, available: [ACCC public register](#).

⁷⁹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 17, available: [ACCC public register](#).

- 4.40. APRA submits that in the US, where collecting societies obtain the rights of their members on a non-exclusive basis, those societies are unable to enforce their respective rights as effectively as APRA.⁸⁰
- 4.41. The ACCC considers that APRA would still be able to take copyright infringement action if it was not the exclusive owner of the relevant copyrights. The rights administered by the PCCA are granted on a non-exclusive basis and the ACCC is aware that when the PCCA enforces its members' rights, those members (the affected record labels) are parties to the proceedings. More generally, section 115 of the Copyright Act provides that the "owner" of a copyright may bring an action for an infringement of the copyright. In this respect, APRA members could be joined to proceedings, as APRA contemplates above, and as the PCCA currently does.
- 4.42. The ACCC also notes the concerns expressed by APRA at paragraph 4.39 above, However, APRA has not explained how or why holding its members' rights on a non-exclusive basis would mean it could not continue to undertake the monitoring necessary to detect infringement, bring proceedings and spread the costs of doing so over a very large number of works. It is not apparent to the ACCC why this would be the case.
- 4.43. However, the ACCC does consider that APRA holding non-exclusive rights over its members' works would likely increase the costs of monitoring and enforcing copyright over those works, potentially significantly.
- 4.44. Monitoring costs would increase due to uncertainty about whether users performing or communicating musical works had obtained a licence to do so from an alternative source. Under the current system, APRA is directly aware of each instance of opt out and licence back. If members retained or obtained the right to deal directly, without having to opt out and license back, APRA would not be automatically aware of each instance of direct dealing that occurs.
- 4.45. Enforcement costs would also increase. If APRA held its members' rights on a non-exclusive basis, APRA would face greater practical complexities in taking copyright infringement action, as it would not be the exclusive owner of the relevant copyright. These complexities would arise, primarily, from the fact that any enforcement action by APRA would be based on an underlying copyright in which the owner of the copyright would still hold a separate interest. For example, proving the chain of title (chain of ownership) may be more difficult and APRA would need to establish that no other licence had been granted to the alleged infringer. There may therefore be circumstances in which the owner of the copyright, as well as APRA, would incur additional costs in relation to any such action, despite the fact that the copyright owner has granted a non-exclusive licence to APRA.
- 4.46. In this respect, APRA submits that of the top 100 singles for 2017, as recorded by ARIA, only two had a single writer, and eight had a single publisher. Four works had more than 10 writers, and 30 works had three or more publishers.⁸¹
- 4.47. Exclusive licensing of all rights lessens the costs of establishing a breach and allows APRA to focus on establishing whether the user has the correct licence rather than

⁸⁰ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 13, available: [ACCC public register](#).

⁸¹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 29, available: [ACCC public register](#).

having to establish whether licences have been obtained for the particular works being performed and from whom the licences were obtained.

- 4.48. In addition, non-exclusive licensing may, in the short term, create uncertainty about ownership and doubt about the ability of APRA to take copyright infringement action, which some users may take advantage of to avoid paying licence fees. In the ACCC's view, it is unlikely that the most high-profile and easily monitored users – who also pay the highest fees to APRA – would risk infringement by taking advantage of any ambiguity created by non-exclusive licensing. However, APRA submits that it also receives significant revenue from a large number of smaller businesses that are not high profile or easily monitored.⁸²
- 4.49. The ACCC also considers that monitoring and enforcement costs may be reduced by developing technology. The ACCC notes APRA's submission which states that it has the ability through technology to adjust fees for repertoire that has been directly licensed or that is not controlled by APRA. However, APRA notes that in order to make such adjustments, licensees must provide accurate and detailed play data, which many licensees are unable to provide at this point in time.⁸³ To the extent that this technology is available in the market and otherwise mitigates APRA's costs of monitoring and enforcement of performing rights, the ACCC considers that the magnitude of the public benefit arising from monitoring and enforcement efficiencies may be reduced.
- 4.50. However, the ACCC also notes that APRA has an increased incentive under its exclusive input arrangements to invest in and develop technology that reduces monitoring and enforcement costs that may not be present to the same extent in a non-exclusive regime.
- 4.51. In summary, the ACCC considers that APRA taking exclusive assignment of its members' rights is likely to result in a significant public benefit in the form of efficiencies in enforcement and compliance.
- 4.52. The ACCC also considers that there is a public benefit in preserving the incentives for the future creation of musical works and that the enforcement and compliance efficiencies generated by APRA's arrangements achieve this outcome. This is not to say that such incentives would be eliminated if APRA held its members' rights on a non-exclusive basis. However, to the extent that APRA's arrangements increase the effectiveness of monitoring and enforcement of performing rights, it helps reduce free-riding on musical works.

ACCC conclusion on public benefit

- 4.53. The ACCC considers that APRA's taking exclusive assignment of its members' works is likely to result in some public benefits from transaction cost savings. They primarily relate to avoiding the increased complexity of negotiating with users who may source licences for some works directly if APRA only held its members' rights on a non-exclusive basis, but still require an APRA blanket licence for the remainder of the musical works they use.
- 4.54. The ACCC also considers that APRA's arrangements are likely to result in a public benefit in avoiding the additional administrative and legal costs that would be incurred

⁸² Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 21, available: [ACCC public register](#).

⁸³ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 33, available: [ACCC public register](#).

in APRA moving from its current arrangements to a system where it obtain rights from its members on a non-exclusive basis.

4.55. The ACCC considers that APRA's arrangements are likely to result in significant public benefits from efficiencies in enforcement and compliance. This reduces free riding on the creativity of copyright owners and results in a public benefit in preserving the incentives for the future creation of musical works.

Public detriments

4.56. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁸⁴

4.57. In assessing detriments, the ACCC has had regard to how APRA taking exclusive assignment of its members' rights is likely to impact its degree of market power and the inefficiencies that this may cause.

4.58. In a future in which APRA holds its members' rights on a non-exclusive basis, the ACCC considers that APRA likely would have substantial market power in acquiring and supplying performing rights in relation to musical works in Australia as a result of:

- Its strong position of incumbency as the only major collecting society in Australia.
- No credible threat of entry by rival major collecting societies in the near to medium term due to high entry barriers in the form of sunk costs in specialised knowledge and systems; economies of scale and scope, and network effects.
- Direct dealing is unlikely to be desirable or feasible for many users due to unpredictable requirements, preference for access to a large repertoire of music, and significant transaction costs to obtain multiple licences.

4.59. The ACCC considers that exclusive assignment of members' rights increases APRA's market power in acquiring and supplying performing rights in relation to musical works in Australia. It provides APRA with a near monopoly in both acquiring and supplying these rights:

- Virtually all music owners in Australia are APRA members and as a condition of APRA membership, they are required to assign the rights in all their current and future works to APRA.
- APRA's opt out and licence back provisions offer only very limited opportunities for users to source performance rights to Australian works directly at source (from the APRA member)
- Even if APRA's input arrangements were less restrictive, by generally offering users blanket licences (albeit that users may be able to negotiate discounts off blanket licence fees), APRA reduces incentives for music owners and

⁸⁴ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

users to negotiate performing rights other than through it, as long as those users still have some residual requirements to access APRA's repertoire.

- APRA is able to profitably exercise its increased market power under the exclusive arrangement due to the absence of a credible threat of entry by another major collecting society as a result of APRA's dominant position and high barriers to entry discussed above.

4.60. However, direct dealing is likely to be desirable and feasible for a small subset of users that have predictable requirements (either in part or in total) for access to musical works, require access to a small repertoire of music, and value greater flexibility to negotiate terms and conditions that are not available under APRA's one-size-fits all blanket licensing. APRA's taking exclusive assignment of its members' rights currently prevent this direct dealing occurring, other than in a restricted way through APRA's opt out and licence back provisions.

4.61. The ACCC notes that APRA's opt out and licence back provisions are rarely used – only 73 times in total between January 2014 and December 2018.⁸⁵ APRA provided the ACCC with confidential details about these opt outs and licence backs. In summary, APRA's opt out and licence back provisions are only generally being used for APRA members to deal directly with a limited number of users, who require access to narrow repertoires, and only very irregularly.

4.62. The lack of direct dealing between APRA members and users through opt out and licence back provisions likely reflects, at least in part, that while there is a level of dissatisfaction with the licence fees that APRA charges, many users require access to large repertoires of musical works which, as noted above, only APRA, with blanket licences covering virtually the worldwide repertoire of musical works, is able to provide. Direct dealing will generally be most attractive where the users require a limited range of works, to which they can acquire rights from a single, or limited number of alternative sources to APRA.

4.63. It also may reflect the limited form of direct dealing permitted under opt out and licence back provisions and the fees APRA charges to use them.

4.64. For example, the existing opt out provisions require the user to take reassignment of all their works in a particular category of use (for example, live performance) meaning they would have to deal directly with every user wanting to use any of their works in that category of use. The member loses all the benefits of being an APRA member, with respect to that category of use. This means the opt out provisions are of very limited utility unless (a) there is only a very limited range of users of the member's works in the relevant category, and (b) those users are using the member's works extensively.

4.65. The licence back provisions are structured such that they generally apply only in respect of narrow, specific, usually one off instances of direct dealing.

4.66. The ACCC does not consider that APRA's current opt out and licence back provisions are likely to facilitate direct dealing at a level that would impose a material competitive constraint on APRA in respect of many categories of users.

⁸⁵ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 22, available: [ACCC public register](#)

- 4.67. The ACCC considers that there is likely to be unmet demand for direct dealing that would likely be accommodated if APRA held its members' rights on a non-exclusive basis.
- 4.68. For those types of use where APRA's licence back provisions are currently used on occasion – such as live tours where the touring artist is a singer/songwriter performing their own works, individual events where the APRA member wishes to directly license the public performance of their works, background music and music on hold – direct dealing could occur without the administrative burden, or financial cost of using APRA's opt out or licence back provisions.
- 4.69. Performing rights for films, television programs and advertisements (for television, radio and cinema) are well suited to direct negotiation at source (along with synchronisation rights) and often at the same time as commissioning the works. Other possibilities for direct or source licensing include pre-packaged music in, for example, cinema foyers, restaurants, retail outlets or fitness classes. In many cases, these types of users will use curated (pre-packaged) playlists, developed by them or supplied by background music suppliers and do not require the blanket licence that APRA offers.

Direct dealing in relation to sound recording licences

As discussed at paragraphs 2.16, the PPCA is the non-exclusive licensee of owners of copyright in sound recordings, which it licenses for public performance in a similar manner to the APRA blanket licensing system. Because the PPCA holds these rights on a non-exclusive basis, PPCA members and users can choose to negotiate licences directly rather than the user obtaining a blanket licence through the PPCA.

The ACCC understands that for users who have predictable requirements and do not require access to the entire repertoire offered through the PPCA and APRA's blanket licences, such as some of the examples outlined above, material direct dealing does occur.

The ACCC has been provided with confidential examples of music users who negotiate sound recording rights at source, instead of or as well as a PPCA blanket licence, and who, they submit, would value the opportunity to do the same in respect of the performing rights held by APRA.

The ACCC does note, however, that direct analogy cannot necessarily be drawn between the level of direct dealing in relation to sound recording rights, where the PPCA is a non-exclusive licensee, and likely demand for direct dealing in relation to performing rights if APRA operated in the same manner. This is because the performing rights held by APRA members are more fragmented than the sound recording rights held by PPCA members. Reasons for this include that a song may have several writers and, for any given work, there is generally likely to be more parties with an interest in the performing right than the sound recording.

As noted at paragraph 4.46, APRA submits that of the top 100 singles for 2017, as recorded by ARIA, only two had a single writer, and eight had a single publisher. Four works had more than 10 writers, and 30 works had three or more publishers. In contrast, the ACCC understands that sound recording rights are more concentrated with a greater proportion held by the three large record companies and that rights being held by a single rights holder (such as a single record company) is far more common.

Therefore, the transaction costs involved in obtaining a suite of performing rights licences directly from APRA members will, in many cases, be greater than those in obtaining the sound recording rights licences to a similar repertoire directly from PPCA members.

4.70. Accordingly, while APRA holding performing rights on a non-exclusive basis would provide members and users with the opportunity to make alternative licensing arrangements rather than relying entirely, or in some cases, at all, on APRA's system, the extent to which this would result in greater direct dealing is unclear. However, the ACCC considers that under a non-exclusive arrangement there is a real chance that meaningful direct dealing, that is, significantly more direct dealings than currently takes place utilising APRA's opt out and licence back provisions, would occur.

4.71. The public detriment resulting from the foreclosure of opportunity for greater direct dealing manifests in a number of ways:

- inefficient under-utilisation of APRA's repertoire
- inefficiency in the production of musical works
- stifling innovation and adoption of new technologies and business models, and
- insulating APRA from the need to reduce cost inefficiencies.

4.72. These public detriments are discussed below. This is followed by a discussion of the factors that may help mitigate the public detriment of APRA's exclusive licensing arrangements.

Inefficient under-utilisation of APRA's repertoire

4.73. A number of APRA's licensees submit that the lack of competitive constraint on APRA results in it setting unfair licence fees and terms.⁸⁶

4.74. The ACCC notes that many licensees have limited, if any, alternatives to APRA's blanket licence. For APRA, each licensee is one of many, but for many licensees APRA's blanket licence is a necessary input into their businesses. Television and radio stations, cinema operators and nightclubs, for example, would not be able to operate without some sort of performing rights licence. Consequently, because of the importance of music performance to their business, they have little alternative other than to enter into agreements with APRA.

4.75. APRA's membership rules are generally not structured to encourage direct dealing – individual licensors and licensees negotiating directly over price and other terms where this is feasible and efficient. This concentration of members' rights exclusively with APRA means that APRA would, absent any alternative such as that provided by an opt out or licence back, be able to set prices for access to its repertoire free from competitive constraints, thus earning monopoly rents. As discussed at paragraph 4.222, the ACCC does not consider that APRA's opt out and licence back provisions

⁸⁶ For example: Academy Ballet submission, dated 5 February 2019; Ascendance Academy submission dated 22 February 2019; The Association of Australian Musicians submission, dated 15 February 2019, p. 6; Australian Small Business Family Enterprise Ombudsman, dated 15 February 2019; Australian Venues Association, dated 1 March 2019, p. 2; Background Providers of Music submission, dated 22 February 2019, p. 8; Carlo Colosimo submission, dated 20 February 2019, p. 1-2; Council of Small Business Organisations Australia, dated, p. 2; Eisteddfod Organisers Australia, dated 8 February 2019, p. 2-3; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 13; Marketing Melodies submission, dated 20 February 2019, p. 1; Mood Media submission, dated 8 March 2019, p. 2; Nightlife submission, dated 6 March 2019, p. 11; WA Nightclubs Association submission, dated 26 February 2019, s 1.4, 2.5-2.13. Submissions available at: [ACCC public register](#).

facilitate direct dealing at a level that would impose a significant competitive constraint on APRA in respect of many categories of users.

- 4.76. As a near monopolist supplier and acquirer of rights to musical works in Australia, APRA is able to maximise its profit by engaging in price discrimination across user groups. Different groups are offered different licensing terms and conditions according to their willingness to pay. APRA is also able to price discriminate within user groups through the use of pricing structures that capture differences in individual group members' willingness and ability to pay, such as those based on percentage of box office sales.
- 4.77. The ACCC notes that market power is necessary for profitable price discrimination. In the absence of some degree of market power, users who are charged a high price will be able to switch to a lower-priced competitor so that price differences that are unrelated to costs will be competed away. The ACCC recognises APRA's ability to price discriminate is affected by a user's willingness to pay which relates in part to the use to which the licensed repertoire will be put and whether it is incidental to or part of the income generating activity of that user.
- 4.78. The ACCC recognises that perfect price discrimination can result in an efficient allocation of resources and utilisation of APRA's repertoire in the short run. Blanket licensing can also encourage users to maximise their usage of the repertoire. However, APRA is unlikely to be able to perfectly price discriminate.
- 4.79. Furthermore, while APRA does not restrict output in the sense that it does not refuse access to its works as a bundled product, the conduct of only supplying an 'all or nothing' bundle is itself a restriction on the form of supply and therefore output. This is particularly the case for those users who are not willing to pay for access to APRA's entire repertoire but would be willing to pay at least the marginal cost of access to part of the repertoire. Such users would be deterred from obtaining an APRA licence, which is allocatively inefficient.
- 4.80. It is also the case for users who would be willing to pay at least the marginal cost of an APRA blanket licence but are not prepared to pay a price reflecting the monopoly rent that APRA is able to charge. To the extent that this arises there will be some allocative inefficiency in the form of under-utilisation (that is, under consumption) of APRA's repertoire.

Inefficiency in the production of musical works

- 4.81. In the long run, the ACCC considers that APRA's distribution rules may result in a misallocation of resources in relation to the production of new works. Efficiency requires that new works are produced until the additional value (the marginal value) created by a new work equals the marginal cost of producing the work. APRA distributes its licence fees (including monopoly rents) to composers and publishers broadly in proportion to the use of their works and has an open entry policy for new works and new composers. If individual composers are price takers, they will create new works until their royalty payment (or average revenue, which includes monopoly rent) equals the marginal cost of producing an additional work. This will tend to lead to more production overall and over time than would be the case if creators had better price signals.
- 4.82. This situation of general over-production may also co-exist with pockets of under-production owing to mismatches between the level of use of particular musical works and the distribution of payments under APRA's distribution rules. APRA attempts, where possible and, in its view, is cost effective to do so, to distribute royalties directly

based on usage data collected. That is, based exactly, or almost exactly, on the songs played. However, in many cases this is not possible and in these cases APRA distributes fees in a pool based upon sampling of usage or by analogy (proxy data collected from other sources). Where this is the case it is likely that some APRA members will receive a level of royalty payment which is significantly lower than what they would be entitled to if all fees were distributed based on to actual usage, while others would receive higher royalty payments than if fees were distributed based on usage of their works.

- 4.83. The ACCC considers that to the extent possible, APRA's members should be remunerated in proportion to the value of actual performances of their works. This helps to reduce any dynamic inefficiencies (inefficient over or under production of works) arising from the APRA system. Comprehensive reporting of performances of music would be ideal. However, there are costs for measuring and reporting usage that need to be taken into account.
- 4.84. Improving the correspondence between music usage and royalty payments depends upon gaining access to higher quality data which in turn increases APRA's costs. APRA must assess the benefits to its members of investing in improved data quality to increase the correspondence between usage and royalty payouts, be it by investing in new technologies or engaging in more extensive monitoring using existing technologies, compared to the costs of doing so. Some licence fee pools are not large enough to support any significant investment in data gathering. For some others, while such investment could be supported, the cost relative to the licence fees collected for those pools would significantly erode the royalty payments to members.
- 4.85. In its 2014 determination the ACCC noted that MRT is rapidly evolving and will become increasingly affordable. The ACCC stated that it was concerned to ensure that, during the period of the 2014 authorisation, APRA adopts new technology as appropriate to monitor and record performances as this would lead to improvements in the way royalties are distributed to members.⁸⁷
- 4.86. APRA submits that it has now utilised MRT for almost seven years and was the first collecting society to do so worldwide. APRA states that MRT utilises audio fingerprinting algorithms (similar to consumer products Shazam, SoundHound and Music ID) to automatically identify audio tracks. APRA estimates that it has spent \$1.3 million to date on MRT and related matters, including an annual expenditure of around \$250,000 on technology to enable more accurate distribution of royalties to members whose works are used in advertising jingles. APRA states that it has plans to expand its MRT related work in nightclubs and dance/electronic music festivals and has recently employed a dedicated MRT coordinator to facilitate this.⁸⁸
- 4.87. APRA submits that on the whole, its experience with MRT has been mixed. Each platform has its own advantages and disadvantages, and there has not yet emerged a single platform that provides an effective identification solution across a wide variety of music uses. However, APRA states that as an organisation at the nexus of music, technology and data, exploring opportunities and relationships that assist in obtaining empirical data relevant to licensed public performances is a key strategic imperative.⁸⁹

⁸⁷ Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. iii, available: [ACCC public register](#).

⁸⁸ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 32, available: [ACCC public register](#).

⁸⁹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 32, available: [ACCC public register](#).

- 4.88. APRA submits that improvements in reporting and distribution technology over recent years have allowed and will continue to allow APRA to be more efficient and effective in collection and distribution of royalties.⁹⁰
- 4.89. The ACCC welcomes the increased adoption of MRT by APRA aimed at improving the accuracy of music usage data available to APRA for the purpose of distributing licence fees. Any improvements in the matching of licence fees distributed to the value of actual performances of members' works reduces any dynamic inefficiencies, through inefficient over or under production of works, arising from the APRA system.
- 4.90. As it did in 2014, the ACCC considers that APRA should continue improving its collection mechanisms in light of the possibilities opened up by these developments and growth in music recognition and other technology, so that royalty payments better reflect what music is actually being played.

Stifling innovation and adoption of new technologies and business models

- 4.91. APRA taking exclusive rights to its members' works is likely to be stifling the development and adoption of new technologies and business models.
- 4.92. Over time, the emergence of new technologies and business models has the potential to challenge the necessity of APRA's role as a clearing house between music users and music creators and undermine its dominant market position. For example, increasingly technology is allowing businesses to offer online services which bundle a large repertoire of works with the licence fees required to utilise them, as well as a variety of value-added services. An example of such businesses are background music suppliers, which may bundle the supply of curated playlists with the supply of sound equipment and the administration of their customers' licensing fees.
- 4.93. Technological solutions are also developing which would facilitate the tracking of the ownership of rights in musical works and monitoring of usage of works. The extent to which such technological developments may make widespread direct dealing between APRA members and music users, particularly those requiring a large repertoire of works, feasible is uncertain, as is how quickly such technology may evolve.
- 4.94. However, APRA's exclusive acquisition of rights from members and blanket licences for music users are likely to act as a significant impediment to the development and adoption of innovative technologies and business models in Australia, by foreclosing in most cases the possibility of direct dealing, eliminating any significant demand from parties other than APRA for such services.
- 4.95. Some types of innovation, for example, in relation to monitoring usage of works, would likely improve the efficiency of APRA's operations. Accordingly, there will be some demand for these services even if APRA exclusively holds the rights to its members' works. In this respect, APRA has provided evidence which suggests that it has invested heavily in music monitoring recognition technology in recent years.
- 4.96. However, unconstrained by competition from alternative licensing sources, APRA does not face the same commercial incentives to promote and encourage such technological developments as would other potential licensors. And furthermore, it has no incentive to invest in technology that would promote competition to its position as a virtual monopolist in the supply of performing rights in Australia.

⁹⁰ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 33, available: [ACCC public register](#).

4.97. Further, unlike the other public detriments identified by the ACCC, where APRA taking exclusive assignment of its members' rights is likely to exacerbate an existing public detriment that would be realised whether or not APRA took exclusive assignment of its members' rights, the public detriment likely to result from inhibiting of the development and adoption of new technologies and business models is almost entirely as a consequence of APRA taking exclusive assignment of its members' rights.

Insulating APRA from the need to reduce cost inefficiencies

4.98. A number of interested parties question the level of APRA's management expenses.⁹¹ For example, the Association of Australian Musicians questioned APRA's staffing costs. In this context, the Association of Australian Musicians expressed concern that APRA does not release a detailed breakdown of its expenses in any of its reporting and that 'APRA spends too much on awards, ambassadors, grants, seminars and sponsorship of other organisations; and that it prioritises funding social engineering projects that benefit publishers.'⁹²

4.99. APRA's submission in support of its application indicates that, since 2014, it has invested in infrastructure and technology in order to reduce the cost of its operations with the aim of increasing the distribution of royalties to its members. These investments largely consist of heavy technology-based investment in many areas of its business including: music monitoring, data processing and matching, its online licensing system, and upgrades to its internal database systems required to support this increased technology.⁹³ OneMusic, which is discussed further below, is one such example.

4.100. The ACCC considers that in the absence of any significant competitive constraint, APRA may not have an incentive to minimise its expenses, control its costs or implement changes to improve its cost efficiency, which in turn results in a reduction in the royalties available for distribution to its members, or may redirect funds away from programs valued by its members.

4.101. However, the ACCC notes that APRA's operations are managed by its Board, which includes members representing the interests of different member groups. These members have an incentive to ensure that APRA is as effective as possible as this maximises the revenue that is available for distribution. If APRA was operating inefficiently, and its members were aware of this fact, the ACCC would expect there to be dissatisfaction from APRA's members and that this would lead to changes led by the board.

4.102. In this respect, the ACCC has not received submissions which indicate widespread concern from APRA members about APRA's cost efficiency.

OneMusic

4.103. In addition to the public detriments discussed above, some interested parties argue that the introduction of OneMusic will result in further, significant, public detriments.

⁹¹ For example: Association of Australian Musicians, dated 15 February 2019, p. 12-13; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 3-5; Trudy Newell submission, dated 6 February 2019. Submissions available on the [ACCC public register](#).

⁹² Association of Australian Musicians submission, dated 15 February 2019, p. 13, available: [ACCC public register](#).

⁹³ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 25 & 32-33, available: [ACCC public register](#).

- 4.104. As discussed at paragraphs 2.48-2.56, OneMusic is a joint licensing initiative between APRA, AMCOS and PPCA, the aim of which is to provide a single source of music licences for businesses.
- 4.105. APRA submits that OneMusic has arisen in response to consumer feedback and efficiency imperatives, and is in the interests of providing a licensing solution that is administratively and conceptually simpler for consumers. The solution is administratively simpler because licensees will have to deal only with one licensor, will have to sign only one agreement, will have to provide information only once, and will only have to pay a single invoice. APRA believes that this will be of particular benefit to small businesses. It is also in the public interest that licensees are comprehensively licensed, rather than inadvertently infringing by obtaining only one set of rights.⁹⁴
- 4.106. APRA submits that it has consulted widely regarding the formulation and implementation of its OneMusic Australia licence schemes.⁹⁵ APRA also submits that OneMusic New Zealand has been operating successfully since 2014.
- 4.107. The introduction of OneMusic has raised significant concern amongst interested parties, in particular that their licence fees for music use will increase.⁹⁶ For example:
- in relation to dance schools, charging by venue when many dance schools work out of multiple venues because of the inability and expense of being able to have their own studio space,⁹⁷ and
 - in relation to music venues, charging based on capacity, not actual attendance.⁹⁸
- 4.108. Other music users expressed concern that the lack of transparency and complications caused by the process of introducing OneMusic. For example, the AHA submits that '[a]s a result of the pending implementation of OneMusic Australia, there are various complexities relating to this reauthorisation. Unfortunately, the licence agreements, terms, conditions, definitions and plain English guides for OneMusic are still to be finalised.⁹⁹
- 4.109. The Australian Local Government Association submits that they are generally supportive of OneMusic. However, they also submit that some councils have expressed concern regarding the fee development process, which they believe has been characterised by minimal sector consultation, a lack of transparency regarding payments to artists, and untenable timelines. This is particularly so as the fee

⁹⁴ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 26, available: [ACCC public register](#).

⁹⁵ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 26, available: [ACCC public register](#).

⁹⁶ For example: Academy Ballet submission, dated 5 February 2019; Association of Australian Musicians, dated 15 February 2019, p. 6; Australian Local Government Association submission, dated 21 January 2019, p. 1; Australian Music Industry Network submission, dated 15 February 2019, p. 3; Australian Venues Association, dated 1 March 2019, p. 2; Cechetti Ballet submission, dated 13 February 2019, p. 1-2; Clubs Australia submission, dated 22 February 2019, p. 1-2; Helen Skuse submission, dated 8 February 2019; Independent Cinemas Australia submission, dated 7 February 2019, p. 1; Nadia's Performance Studio & Sydney Stars on Show Eisteddfod submission, dated 19 March 2019; Nightlife submission, dated 6 March 2019, p. 9; NSW Small Business Commissioner submission, dated 15 February 2019, p. 2; Odette's School of Dance submission, dated 28 February 2019; Shopping Centre Council of Australia submission, dated 8 February 2019, p. 1-2; WA Nightclubs Association submission, dated 26 February 2019, s 3.2. Submissions available: [ACCC public register](#).

⁹⁷ Helen Skuse submission, dated 8 February 2019, p. 1, available: [ACCC public register](#).

⁹⁸ Australian Music Industry Network submission, dated 15 February 2019, p. 3, available: [ACCC public register](#).

⁹⁹ Australian Hotels Association submission, dated 22 February 2019, p. 3, available: [ACCC public register](#).

increases were presented largely as a 'fait accompli' by APRA AMCOS and there are no alternative avenues open to councils to pay artists for the use of their music.¹⁰⁰

- 4.110. However, notwithstanding concerns about licence fees and consultation about OneMusic, interested parties were generally supportive of the concept of OneMusic. That is, a single source of licensing for both the rights administered by APRA and the PPCA.¹⁰¹
- 4.111. In response to interested party concerns, APRA submits that in the lead up to the introduction of OneMusic Australia, APRA has conducted what it considered to be a comprehensive consultation process, releasing around 40 consultation papers, meeting with representatives of licensees, and with individual licensees, in relation to each licence scheme or group of licence schemes.¹⁰²
- 4.112. APRA submits that as it 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.¹⁰³
- 4.113. With respect to licence fees, APRA submits that 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. 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.¹⁰⁴
- 4.114. The ACCC notes that the concerns raised by interested parties primarily relate to the imposition of a licensing fee and/or the quantum of such fees. In this respect, the right to collect royalty fees from businesses who use music is established under the Copyright Act. Accordingly, the rights for APRA and the PPCA to collect royalties on behalf of their members exists under copyright law.
- 4.115. The ACCC considers, as most interested parties who commented on OneMusic accept notwithstanding their concerns, that OneMusic will simplify the administration of these rights and likely lead to transaction cost savings for APRA and music users. OneMusic is also likely to reduce the incidence of inadvertent, and deliberate, infringement of copyright by users who require both sets of licences but only currently acquire one or the other.
- 4.116. The ACCC considers that it is likely that following the introduction of OneMusic, licence fees will increase for some music users. As part of the process of introducing OneMusic, APRA has reviewed the methodologies used to calculate some of its licence fees, resulting in changes to some of these fees. Some music users will be

¹⁰⁰ Australian Local Government Association submission, dated 15 February 2019, p. 3, available: [ACCC public register](#).

¹⁰¹ For example: Australian Hotels Association submission, dated 22 February 2019, p. 4; NSW Small Business Commissioner submission, dated 15 February 2019, p. 1; Clubs Australia submission, dated 22 February 2019, p. 1. Submissions available: [ACCC public register](#).

¹⁰² Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 3, available: [ACCC public register](#).

¹⁰³ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 3, available: [ACCC public register](#).

¹⁰⁴ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 3, available: [ACCC public register](#).

disadvantaged by the changes in the collecting societies' fee calculation methods (while others may be advantaged).

- 4.117. To the extent that changes in methodologies used by APRA to determine licence fees result in higher licence fees overall for some categories of users, the ACCC considers that having decided to adopt these methodologies for setting licence fees, APRA will do so whether or not OneMusic is introduced.
- 4.118. APRA's ability to exercise market power to maximise monopoly rents, and the associated public detriment, will not materially change with the introduction of OneMusic.
- 4.119. One way in which OneMusic may facilitate APRA charging higher licence fees than it would otherwise is that APRA will gain access to the other collecting societies' licensing data. This is likely to increase its knowledge of the market and increase its ability to price discriminate and thus raise the fees for some users. However, the extent to which this will be the case is not clear and given APRA's extensive existing knowledge of its users' commercial requirements, based on the information currently available it appears that its ability to adopt these pricing strategies is unlikely to be significantly enhanced.
- 4.120. A further source of increased licence fees under OneMusic will be that some music users who require both sets of licences but have historically not paid for both now will. However, the ACCC considers that this is one of the benefits of OneMusic, these users will in the future be more likely to pay the royalties that the owners of the works they are using are entitled to.
- 4.121. Accordingly, the ACCC does not consider that the extent of APRA's market power, and the public detriment resulting from APRA exercising this market power, will be materially enhanced by APRA adopting the OneMusic licensing system.
- 4.122. The ACCC also notes that APRA's choice of the means by which it collects its licence fees is not likely to be affected by the ACCC's decision to authorise or not authorise its conduct. Accordingly, OneMusic is likely to be introduced whether or not the ACCC authorises APRA's conduct. In this respect, APRA has not sought authorisation for any agreement between it and the PPCA relating to OneMusic.¹⁰⁵
- 4.123. A further concern that has been raised in a confidential submission and in a submission by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO)¹⁰⁶ relates to differences in the repertoire for which the PPCA is a non-exclusive licensee for the public performance of sound recordings and the repertoire for which APRA is the licensee for the broadcasting or performing of musical works.¹⁰⁷
- 4.124. In particular, the ACCC understands that the PPCA repertoire is not as extensive as APRA's. This means that in relation to recorded music where the user requires licences for both the broadcasting or performing of the musical work and the public performance of sound recordings, in some cases the musical work will be covered by

¹⁰⁵ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 3, available: [ACCC public register](#).

¹⁰⁶ Australian Small Business and Family Enterprise Ombudsman, dated 10 May 2019, p. 2, available: [ACCC public register](#).

¹⁰⁷ Australian Small Business and Family Enterprise Ombudsman, dated 10 May 2019, p. 2, available: [ACCC public register](#).

the APRA blanket licence, but the sound recording will not be covered by the PPCA blanket licence.¹⁰⁸

- 4.125. This has led to concerns that APRA, through OneMusic, offering a single licence covering both sound recordings and musical works may lead licensees to assume that the repertoire of sound recordings covered is the same as the repertoire of musical works covered, when this is not the case.¹⁰⁹
- 4.126. This potentially has two related consequences. Users may inadvertently use recorded music when they do not hold a licence for the public performance of the sound recording because they believe that they are licensed by OneMusic, and the right holder is denied the royalties to which they are entitled for the public performance of the sound recording.
- 4.127. The ASBFEO submits that this is particularly likely to be an issue for users using digital streaming services as not all artists on these platforms have granted rights to license use of their works to APRA and/or the PPCA.¹¹⁰
- 4.128. The ACCC considers that there is a risk that by bundling blanket licences over APRA and the PPCA's repertoires into a single licence through OneMusic, some licensees will assume that they are being granted a licence over equivalent repertoires in respect of the rights APRA holds and the rights the PPCA licenses on a non-exclusive basis. APRA's description of OneMusic as a 'single source of music licences'¹¹¹ while correct in respect of APRA's and the PPCA's repertoires could, due to differences in their respective repertoires, reinforce this perception.
- 4.129. The ACCC has not formed a concluded view about this issue at this stage. The ACCC invites APRA to provide further information about the concern raised and, to the extent APRA consider that there is a risk of inadvertent unlicensed use of recorded music, what measures it proposes to take to address this issue.

Factors that may mitigate against detriment

- 4.130. The ACCC considers that the anti-competitive detriment resulting from a collecting society's licensing arrangements will be more limited where the arrangements:
- do not prevent direct negotiation between copyright owners and users
 - are as unrestrictive as possible and strike an appropriate balance between facilitating the administration of copyright and allowing flexibility in licensing as appropriate
 - allow adjustments to blanket licences in appropriate circumstances, including an appropriate adjustment to the fee
 - are clear, transparent and readily available to users, and

¹⁰⁸ Australian Small Business and Family Enterprise Ombudsman, dated 10 May 2019, p. 2, available: [ACCC public register](#).

¹⁰⁹ Australian Small Business and Family Enterprise Ombudsman, dated 10 May 2019, p. 2, available: [ACCC public register](#).

¹¹⁰ Australian Small Business and Family Enterprise Ombudsman, dated 10 May 2019, p. 2, available: [ACCC public register](#).

¹¹¹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 24, available: [ACCC public register](#).

- provide for effective alternative dispute resolution processes where appropriate.
- 4.131. The ACCC notes that there are certain mechanisms which may help to mitigate against the public detriment of APRA's exclusive licensing arrangements. In part these were introduced as conditions of authorisation by the Tribunal in 1999, and subsequent authorisation by the ACCC. These are:
- availability of recourse to the Copyright Tribunal
 - APRA's alternative dispute resolution scheme
 - APRA's board and governance arrangements
 - opt out and licence back arrangements, and
 - transparency in licensing and distribution arrangements.

Copyright Tribunal

- 4.132. APRA submits that the constraint exercised by the Copyright Tribunal of Australia over APRA's pricing and licensing conduct is a significant factor mitigating any public detriment generated by its arrangements.¹¹² This view is supported by the Australasian Music Publishers' Association Limited (**AMPAL**). AMPAL considers APRA is subject to independent scrutiny by the Copyright Tribunal which prevents APRA from imposing unreasonable licence terms.¹¹³
- 4.133. In response, the WA Nightclubs Association (**WANA**) submits the Copyright Tribunal does not moderate APRA's market power because of the cost of presenting a dispute to the Copyright Tribunal and the information asymmetry that exists between APRA and licensees. WANA submits that parties giving evidence need to have access to expert legal representation and be able to generate sophisticated economic analysis to respond to APRA, and licensees often do not have access to key information needed for such analysis.¹¹⁴
- 4.134. APRA submits that the constraint exercised by the Copyright Tribunal upon APRA's pricing and licensing conduct must be viewed in combination with its alternative dispute resolution processes (as discussed below). APRA argues that while having recourse to the Copyright Tribunal might involve costs that a user does not wish to bear, its ADR processes are a lower cost option available to licensees and members who want to challenge APRA's decisions.¹¹⁵
- 4.135. The ACCC considers a user's right to seek recourse to the Copyright Tribunal constrains, to some extent, APRA's ability to exercise its market power in two ways. Where agreement cannot be reached between APRA and a user, the user has the right to have the Copyright Tribunal determine the reasonable terms on which APRA must grant it access to its repertoire. In addition, the availability of recourse to the

¹¹² Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 20, available: [ACCC public register](#).

¹¹³ Australasian Music Publishers' Association Limited submission, dated 7 February 2019, p.1-2, available: [ACCC public register](#).

¹¹⁴ W.A. Nightclubs Association submission, dated 26 February 2019, p. 4, available: [ACCC public register](#).

¹¹⁵ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 20, available: [ACCC public register](#).

Copyright Tribunal is likely to constrain APRA in negotiating licences in the first instance.

- 4.136. However the ACCC considers that while the Copyright Tribunal constrains APRA to some extent, it is far from completely constrained by the Copyright Tribunal in its ability to set prices to extract monopoly rents from users and offer licences on terms which foreclose copyright owners and users exploring ways of dealing with each other, other than through APRA.
- 4.137. The ACCC considers that some businesses are likely to be deterred from using the Copyright Tribunal to resolve a dispute with APRA because of the cost and time involved. In particular, the ACCC considers the Copyright Tribunal constrains APRA's ability to exercise its market power only beyond the point where the cost to the user of seeking recourse to the Copyright Tribunal would be less than the difference between the price which the user could negotiate with APRA directly and that which it considers that the Copyright Tribunal would be likely to impose. For many users, this means that the Copyright Tribunal is unlikely to impose any constraint at all on the exercise of market power by APRA.
- 4.138. As discussed below, information asymmetry between APRA and music users due to lack of transparency about APRA's licensing arrangements also impacts the extent to which users are able to advocate their cases in the Copyright Tribunal as a constraint on APRA's exercise of market power.
- 4.139. The ACCC considers that reducing this information asymmetry, through the conditions of authorisation the ACCC proposes to impose, also discussed below, will go some way to addressing this issue and may result, for some classes of users, in the Copyright Tribunal being a more effective constraint on the exercise of market power by APRA.
- 4.140. The ACCC also notes that under section 157A of the Copyright Act, in making a decision on a reference or application concerning a voluntary licence or licence scheme, the Copyright Tribunal is required to have regard to (among other relevant matters) any relevant guidelines made by the ACCC. In April 2019, the ACCC released guidelines to assist the Tribunal in making such determinations.¹¹⁶ These guidelines detail matters the ACCC considers relevant to the Copyright Tribunal's determination, specifically in relation to prices (licence fees). The guidelines may also assist collecting societies and copyright users when negotiating reasonable copyright remuneration outside of Copyright Tribunal proceedings, by providing insight into the economic framework that the ACCC considers could reasonably be adopted, and the approaches that can be used, in applying that framework. This may in turn assist to minimise resort to the Copyright Tribunal.
- 4.141. Notwithstanding these developments, the ACCC considers that the Copyright Tribunal imposes only a limited constraint on the exercise of market power by APRA, and only in respect of those customers whose licence fees are large enough to justify the expense of seeking recourse to the Copyright Tribunal.

Alternative Dispute Resolution

- 4.142. As noted above, APRA launched Resolution Pathways in 2015, in compliance with the ACCC's 2014 conditions of authorisation which required APRA to implement a

¹¹⁶ Available: <https://www.accc.gov.au/regulated-infrastructure/communications/intellectual-property/copyright-guidelines-2019/final-copyright-guidelines>

revised ADR scheme managed by an independent facilitator. In imposing this condition, the ACCC considered that the ADR scheme would provide an affordable and practical way for both members and licensees to resolve disputes with APRA. The ACCC considered that recourse to an effective ADR process may reduce the public detriment generated by APRA's market power by helping redress imbalances in bargaining power between APRA and licensees.

- 4.143. Resolution Pathways is managed by resolution facilitator, Shirli Kirschner (the **Resolution Facilitator**). APRA submits its market power is constrained by Resolution Pathways, which, it submits, is a low cost, independent mechanism available to members and licensees to resolve disputes with APRA.¹¹⁷
- 4.144. In accordance with the conditions of authorisation imposed by the ACCC, in 2018, an independent scheme reviewer conducted a review of Resolution Pathways (the **Independent Review**). The independent reviewer concluded that, in summary, "the scheme resolved disputes in a timely, efficient and effective manner" and commented that "people expressed satisfaction with the scheme's existence, and commended the commitment, the skills and the hard work of the facilitator."¹¹⁸ The Independent Review also identified some issues with the operation of the scheme and made a number of recommendations for further improvements. These issues are explored in more detail below.
- 4.145. The ACCC notes that the number of referrals to Resolution Pathways has increased every year since its inception,¹¹⁹ which the ACCC considers to be an indication that stakeholder awareness of and confidence in the scheme is increasing. In its first two years of operation, the scheme did not enjoy a high uptake of use. A total of 28 matters were handled by the scheme between 1 January 2016 and 31 December 2017, and only six of these matters concerned licences.¹²⁰ However, there has been a marked increase in the number of disputes handled by the scheme, including disputes involving licences, for the period of 1 January 2018 to 31 December 2018. A total of 24 matters were handled by the scheme for this period, and 9 matters concerned licences.¹²¹ The Independent Review found that Resolution Pathway's data for the period of 1 January 2016 to 31 December 2017 showed that the majority of disputes were resolved through the scheme, and that the Resolution Facilitator obtained the majority of resolutions promptly through early intervention.¹²²
- 4.146. Overall, the ACCC's views about the effectiveness of the Resolution Pathways scheme are broadly consistent with those expressed by the Independent Review. The ACCC generally considers Resolution Pathways provides licensees and members with an accessible and practical option for resolving disputes with APRA. Resolution Pathways is also a more affordable option for many, but not all, classes of users.

¹¹⁷ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 20, available [ACCC public register](#).

¹¹⁸ Report of the Independent Review of Resolution Pathways, dated November 2018, p.10, available at: [ACCC public register](#).

¹¹⁹ Report of the Independent Review of Resolution Pathways, dated November 2018, p.10, available at: [ACCC public register](#).

¹²⁰ Report of the Independent Review of Resolution Pathways, dated November 2018, p.16, available at: [ACCC public register](#).

¹²¹ Resolution Pathways submission, dated 14 May 2019, p. 9, available: [ACCC public register](#).

¹²² Report of the Independent Review of Resolution Pathways, dated November 2018, p.20, available at: [ACCC public register](#).

- 4.147. The ACCC also considers an additional benefit of the scheme has been the ability of the Resolution Facilitator to recommend changes to APRA's policies in order to facilitate the effective resolution of certain types of common disputes. For example, the Resolution Facilitator submits that on her recommendation, APRA has agreed to a one year pilot program in which it will provide incentives for writer members to actively use Resolution Pathways to resolve member-to-member disputes about royalty splits.¹²³
- 4.148. The ACCC is consequently proposing to impose a condition requiring APRA to maintain the Resolution Pathways scheme for the duration of the authorisation period, on substantially the same terms as its 2014 condition (**condition C5**).

Increasing awareness of the ADR scheme

- 4.149. The ACCC notes that while there is generally a high degree of satisfaction among many stakeholders who have participated in the scheme, some interested parties have identified issues which they consider undermine the scheme's usefulness:
- a lack of awareness among licensees about the existence of the scheme¹²⁴
 - a lack of transparency around how the scheme operates, particularly around the fees involved with the scheme,¹²⁵ and
 - the perception that APRA is able to exert influence over the scheme.¹²⁶
- 4.150. Accordingly, the ACCC is considering requiring changes to the scheme to improve the effectiveness of the scheme in mitigating APRA's market power.
- 4.151. The ACCC considers that the area where the ADR scheme is likely to be of most utility, but where it is currently being underutilised, is in respect of disputes small licensees have with APRA. The ACCC considers that one of the most likely reasons for this is a lack of awareness of the scheme.
- 4.152. The conditions imposed by the ACCC in 2014 required APRA to publish a plain English guide to the ADR scheme, and make that guide available in a prominent position on its website, and create a public website for the scheme separate from its own website. APRA has complied with these conditions.
- 4.153. However, some interested parties submit that APRA does not publicise the availability of Resolution Pathways as an independent method of dispute resolution or include information about available dispute resolution processes in its correspondence with licensees.¹²⁷
- 4.154. APRA submits that it offers ADR to all licensees with whom it is in dispute, and publishes information about the system on its website and in numerous other ways,

¹²³ Resolution Pathways submission, dated 14 May 2019, p. 8, available: [ACCC public register](#).

¹²⁴ Association of Australian Musicians submission, dated 15 February 2019, p. 17-18, available: [ACCC public register](#).

¹²⁵ For example: Ascendance Academy submission, dated 8 March 2019, p. 1–2; Association of Australian Musicians submission, dated 15 February 2019, p. 18. Both available: [ACCC public register](#).

¹²⁶ For example: Association of Australian Musicians submission, dated 15 February 2019, p. 14; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 29; Eisteddfod Organisers Australia submission, dated 8 February 2019, p. 2. Submissions available: [ACCC public register](#). Report of the Independent Review of Resolution Pathways, dated November 2018, p.28, available at: [ACCC public register](#).

¹²⁷ For example: Association of Australian Musicians submission, dated 15 February 2019 p. 17-18; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 28; Eisteddfod Organisations Australia submission, dated 8 February 2019, p. 1. Submissions available: [ACCC public register](#).

including expressly in every licence agreement.¹²⁸ APRA further submits that letters of demand sent to licensees using APRA's music without a licence refer to the ability of licensees to have disputes determined under Resolution Pathways or the Copyright Tribunal.¹²⁹

- 4.155. Notwithstanding this, the ACCC considers that more could, and should, be done to make licensees aware of the scheme. In this respect, the ACCC notes that the reference to dispute resolution in APRA licences is in fine print towards the bottom of the licence terms and conditions. Further, the information provided by APRA in its licences is a general reference to the availability of an alternative dispute resolution mechanism, along with an invitation to contact APRA if the licensee requires more information. There is no reference to Resolution Pathways or details about how to contact them included.
- 4.156. The ACCC considers that, at a minimum, the information provided by APRA should directly reference, and direct licensees to, Resolution Pathways, rather than to APRA itself in a similar manner to APRA's plain English guides to its licences. The ACCC also considers that this information should be more prominently displayed. The ACCC is therefore proposing to amend the condition imposed in 2014 to require APRA to display contact details for, and information about, available dispute resolution processes, including the ADR scheme, prominently on licence forms and on member statements, licence invoices and licence agreements, as well as on any initial legal correspondence with licensees, prospective licensees and members.¹³⁰
- 4.157. The ACCC also considers that information about ADR scheme, including the link to access the ADR scheme website, should be displayed more prominently on APRA's website. Currently, details on Resolution Pathways can only be accessed in the "Feedback Centre" section on APRA's website. The ACCC is proposing to require APRA to display a link to information about the ADR scheme on its homepage.

Cost of the ADR scheme for licences and APRA members

- 4.158. The ACCC also considers that the potential cost of a dispute, as summarised at paragraphs 2.61-2.71, and uncertainty about costs that will be incurred, is likely to be a reason why the scheme is being underutilised by licensees. Broadly, initial advice from the Resolution Facilitator is free, subsequent involvement of the Resolution Facilitator in an informal resolution process can cost up to \$150, and for mediation, expert view and an expert decision the applicant must pay 50 per cent of fees and costs incurred by the Independent Mediator or Independent Expert. The fees are not payable if the amount in dispute is less than \$10,000 or, if the dispute is not about a licence fee, and the applicant's licence fee is less than \$10,000.¹³¹
- 4.159. The Resolution Facilitator submits that fees for matters covered by the ACCC authorisation are outlined on the Resolution Pathways website, and they form a part of the checklist for the Resolution Facilitator triage process provided to all participants in a dispute at no charge. The Resolution Facilitator further states she is also available to ensure that any party considering lodging a dispute understands the

¹²⁸ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 22, available: [ACCC public register](#).

¹²⁹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Attachment 2, available: [ACCC public register](#).

¹³⁰ This requirement would not extend to legal correspondence where the matter in dispute is being considered by the Copyright Tribunal or has already been referred to the ADR process.

¹³¹ Resolution Pathways 2019, Costs, available: <http://www.resolutionpathways.com.au/Resolution-Pathways>

potential fees.¹³² The Independent Review stated that it was not aware of any instance in which the disputants were concerned about the fees and charges associated with their matter, nor that any matter has been withdrawn due to concerns about fees and charges.¹³³ However, some submissions made to the ACCC submit that a lack of certainty around which fees would apply if a dispute progressed is a deterrent to pursuing the dispute.¹³⁴

4.160. The ACCC considers there needs to be more transparency for licensees and members around which dispute resolution processes are available at no cost (for example, informal conversations with the independent facilitator), and at which point fees may apply. Some interested parties who have provided submissions also appear to be unaware that fees will only apply if the amount in dispute is above a certain threshold (or for non-monetary disputes, where the applicant pays licence fees to APRA or receives payments from APRA above a certain threshold).

Information available about the ADR scheme

4.161. The ACCC also considers the Resolution Pathway website could be updated to include further information about how the scheme operates and better explanations of the processes available within the scheme. For example, it is likely that many licensees would not be aware that, under the ADR scheme, they are able, if both parties agree, to apply for a binding, independent expert determination about whether their APRA blanket licence adequately takes account of direct dealing or potential future direct dealing and reflects genuine and workable commercial terms to accommodate this.

4.162. The ACCC notes that the Resolution Pathways website has some out of date information and technical glitches. In response, Resolution Pathways submits it has requested quotes for updating the website that will include a review of the existing pages of the website and the addition of further details about the services available under the scheme.

4.163. When identifying potential updates to the website, Resolution Pathways should consider implementing the improvements identified by the Independent Review. In particular, the Independent Review suggested that the resolution processes available to stakeholders under the scheme could be presented on the website as cascading logically from least interventionist (e.g. the facilitator attempting early and informal intervention and resolution), through to consensual processes (such as mediation, mapping, and peer assist), and ultimately leading to the scheme's determinative processes.¹³⁵ The ACCC considers Resolution Pathways should implement this suggestion in a way that incorporates information about the fees that may attach to each resolution process.

4.164. The ACCC will have regard to the foreshadowed improvements in the Resolution Pathways website to address these issues in its final determination.

¹³² Resolution Pathways submission, dated 14 May 2019, p. 13, available: [ACCC public register](#).

¹³³ Report of the Independent Review of Resolution Pathways, dated November 2018, p.20, available: [ACCC public register](#).

¹³⁴ For example: Ascendance Academy submission, dated 21 February 2019, p. 2; Association of Australian Musicians submission, dated 15 February 2019, p. 18; Eisteddfod Organisers of Australia submission, dated 8 March 2019, p. 1–2. Submissions available on the [ACCC public register](#).

¹³⁵ Report of the Independent Review of Resolution Pathways, dated November 2018, p.12, available at: [ACCC public register](#).

Independence of the ADR scheme from APRA

- 4.165. Some interested parties have raised concerns about the way Resolution Pathways is funded. Other than in respect of escalated disputes as noted above, Resolution Pathways is fully funded by APRA, as required by the condition imposed by the ACCC in 2014.
- 4.166. Some interested parties have raised concerns that because APRA funds Resolution Pathways' operations (including the cost of the Resolution Facilitator) Resolution Pathways is not sufficiently independent of APRA.¹³⁶
- 4.167. The Resolution Facilitator acknowledges that the perception of independence and autonomy is particularly important for Resolution Pathways in circumstances where APRA is a party to a dispute and that Resolution Pathways' funding arrangement presents a challenge to true independence.¹³⁷ The Resolution Facilitator also notes the mechanisms for ensuring independence suggested by the Independent Review, which include alternative funding options such as opening the scheme up for use by the broader music industry and industry funding. In response, the Resolution Facilitator submits that a major barrier to implementing this option is the increased expense and difficulty of integrating with other wider stakeholder groups, in the absence of any legislative or administrative power to compel such participation or seed funding to organise such an alliance.¹³⁸
- 4.168. The Resolution Facilitator submits the scheme has addressed the challenge of independence by working towards implementing practical safeguards to protect the system.¹³⁹ The Resolution Facilitator submits she has implemented a number of measures, beyond those required by the ACCC's condition, to assist with protections centred around robust reporting and governance, including:
- A governance committee made up of members and licensees, with an independent chair who does not represent a stakeholder group. The Resolution Facilitator considers the benefit of an independent chair is that the governance committee has the capacity to meet in the absence of the Resolution Facilitator or APRA and discuss/make decisions on issues where the presence of either may challenge its effectiveness.¹⁴⁰
 - A pathway for parties to make complaints about the Resolution Facilitator, APRA or the Resolution Pathways scheme generally. A participant can lodge complaints or concerns to the governance committee through the independent chair or directly to the committee.
 - A pilot program for a system which allows confidential reporting to the Resolution Facilitator or the governance committee about issues with APRA, where a reporter does not want to be identified for fear of retribution.¹⁴¹

¹³⁶ For example: Association of Australian Musicians submission, dated 15 February 2019, p. 14; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 29; Eisteddfod Organisers Australia submission, dated 8 February 2019, p. 2. Submissions available: [ACCC public register](#). Report of the Independent Review of Resolution Pathways, dated November 2018, p.28, available at: [ACCC public register](#).

¹³⁷ Resolution Pathways submission, dated 14 May 2019, p. 3, available: [ACCC public register](#).

¹³⁸ Resolution Pathways submission, dated 14 May 2019, p. 3, available: [ACCC public register](#).

¹³⁹ Resolution Pathways submission, dated 14 May 2019, p. 3, available: [ACCC public register](#).

¹⁴⁰ Resolution Pathways submission, dated 14 May 2019, p. 2-3, available: [ACCC public register](#).

¹⁴¹ Resolution Pathways submission, dated 14 May 2019, p. 4-5, available: [ACCC public register](#).

- 4.169. In addition, the Resolution Facilitator is investigating introducing an automated electronic process for the registration, management, and tracking of matters. The Resolution Facilitator submits this will ensure that all matters lodged with the system are reported, and that the time it takes for matters to be resolved are properly tracked in a way that is independent of the Resolution Facilitator and APRA.¹⁴²
- 4.170. The Resolution Facilitator also recommends that the ACCC impose a condition which changes the way Resolution Pathways is funded. The Resolution Facilitator recommends that APRA be required to provide “block funding”. In accordance with the ACCC’s 2014 conditions of authorisation, APRA is currently only required to fund disputes in which it is a party. The current funding model also provides a retainer to cover five days a quarter for establishment costs and administration. Additional funding for other types of disputes or projects (e.g. member-to-member disputes) depends on APRA agreeing to a request from the Resolution Pathways Facilitator after a discussion with the Governance Committee.¹⁴³ While the Resolution Facilitator submits that APRA has funded all requests so far, the ACCC notes that the current arrangement means that APRA does play a role in determining which services and disputes not explicitly covered by the current funding arrangements receive funding.
- 4.171. The Resolution Facilitator submits that under a block funding arrangement, APRA would be required to commit to a fixed annual amount each year with the amount to be determined by APRA in consultation with the Governance Committee of Resolution Pathways and a stipulation that a portion of the funds be set aside to allow capital works and discretionary matters.¹⁴⁴
- 4.172. The ACCC accepts that APRA funding Resolution Pathways is likely to create a perception, at least amongst some licensees and members, that Resolution Pathways is not sufficiently independent. This in turn is likely to compromise the accessibility of the scheme to these members and licensees. Conversely, other than charging members and licensees directly, APRA is the only practical source of funding for the scheme. Accordingly, APRA not funding the scheme is also likely to compromise the accessibility of the scheme for many members and licensees.
- 4.173. The ACCC considers that the steps taken by Resolution Pathways broadly address concerns around the independence of the scheme. As long as APRA continues to fund the scheme, some perceptions of APRA exerting influence over the operation of the scheme are likely to remain. In this respect, while APRA funding the scheme is not ideal, the only way to remove any concerns about independence would be for APRA to have no role whatsoever in financing the scheme, which is not practical without undermining the usefulness of the scheme as a low cost way to resolve disputes with APRA.
- 4.174. The ACCC notes the suggestion of the Resolution Facilitator about the way in which the scheme is funded. The ACCC seeks submissions about the proposed change to the funding arrangements.

ADR scheme reporting

- 4.175. Under the condition imposed by the 2014 authorisation, APRA must provide the ACCC with an annual public report, which must include certain information about the

¹⁴² Resolution Pathways submission, dated 14 May 2019, p. 5, available: [ACCC public register](#).

¹⁴³ Resolutions Pathways submission, dated 24 May 2019, p. 1, available: [ACCC public register](#).

¹⁴⁴ Resolution Pathways further submission, dated 16 May 2019, p.1, available: [ACCC public register](#).

disputes handled by the scheme, including (broken down into licensee disputes and member disputes):

- the number of disputes considered by the scheme and the number of disputes resolved, under each dispute resolution process
- the time taken to refer and resolve disputes, and
- a summary of the subject matter of the disputes and the fees and charges incurred by APRA and/or the applicants.

4.176. The Resolution Facilitator has requested the ACCC allow for flexibility in any reporting requirements imposed on Resolution Pathways by a condition of the current authorisation. Specifically, the Resolution Facilitator requests that ACCC impose a condition permitting the format of reporting be decided by the governance committee, with the ACCC having the right to request that additional information or additions on an annual basis.¹⁴⁵ The Resolution Facilitator considers it appropriate for the ACCC to provide a base of matters to be included (for example, the type of matters, the number of matters and details of any evaluations received) and reserve a right to request changes to any reporting format if required.¹⁴⁶

4.177. The ACCC recognises that the current reporting condition, which is prescriptive and requires Resolution Pathways to report by classes of process, may make reporting difficult in instances where a dispute involves multiple processes. The ACCC also considers that allowing for flexibility will facilitate more accurate reporting, as Resolution Pathways will be able to adapt reports to account for future changes to the scheme.

4.178. The ACCC is proposing to amend the condition of authorisation imposed in 2014 to provide greater flexibility about the reporting requirements (**condition C5.16**). The information requirements remain as per the condition imposed in 2014, but the format in which the required information is provided will be decided by the governance committee. Given this change, the ACCC is also proposing to amend this condition to provide that the ACCC is able to request additional information from Resolution Pathways and/or request Resolution Pathways to make changes to the report format (**condition C5.18**).

Scope of the ADR scheme

4.179. The ACCC notes that in its 2014 determination, it was envisaged the ADR facility would assist in the resolution of disputes between APRA and its licensees or potential licensees, as well as disputes between APRA and its members. The ACCC considered the ADR scheme would be of most utility to small licensees who may have been deterred from using the Copyright Tribunal to challenge APRA's licensing decisions. However, in practice, as illustrated by the data at paragraph 4.145, Resolution Pathways has primarily been used to resolve member-to-member disputes, usually about royalty distributions. As outlined in paragraph 2.64, the Resolution Facilitator has also introduced a "peer assist" pilot program to assist in resolving member-to-member disputes.

4.180. While the ACCC considers the ability of Resolution Pathways to effectively resolve member-to-member disputes to be an unforeseen benefit of the scheme, it notes that

¹⁴⁵ Resolution Pathways further submission, dated 16 May 2019, p.1, available: [ACCC public register](#).

¹⁴⁶ Resolution Pathways further submission, dated 16 May 2019, p.3, available: [ACCC public register](#).

inter-member disputes fall outside the scope of the scheme mandated by the ACCC's 2014 authorisation. In practice, this means that currently services provided to resolve member-to-member disputes are funded at the discretion of APRA.

- 4.181. The Resolution Facilitator recommends that the scope of Resolution Pathways be extended to cover all disputes arising under the eco-system created by the structure of authorising APRA, including member-to-member disputes. The Resolution Facilitator states this would also encourage the keeping of data on disputes for all issues within the APRA-AMCOS eco-system allowing for a better allocation of resources overall.¹⁴⁷ The Resolution Facilitator submits that in the event the scope of the scheme is broadened, the funding approach in the current authorisation could continue to be primarily allocated to resolve disputes with APRA itself, at the subsidised rates. However, overheads should also be allowed for additional services such as member-to-member disputes.¹⁴⁸
- 4.182. The ACCC seeks submissions from APRA and interested parties about whether the proposed condition of authorisation about the ADR scheme should be amended to formally recognise member-to-member disputes as being required to be considered under the ADR scheme.

ACCC conclusions about the ADR scheme

- 4.183. The ACCC considers that APRA's ADR scheme does provide some, limited, constraint on APRA's market power in respect of some users. The ACCC considers that changes to the scheme, such as proposed in the ACCC's proposed condition of authorisation, are likely to increase the scheme's effectiveness in this regard.
- 4.184. However, like the Copyright Tribunal, the ADR scheme constrains APRA's ability to exercise its market power only beyond the point where the cost to the user of seeking recourse to the ADR scheme would be less than the difference between the price which the user could negotiate with APRA directly and that which it considers would likely be determined under the ADR scheme. Further, binding determinations can only be made under the ADR scheme if both parties agree to participate.
- 4.185. Accordingly, the ACCC considers that the ADR scheme provides only a limited constraint on APRA's market power.

APRA's board and governance arrangements

Composition of the APRA Board and member voting rights

- 4.186. The APRA board is comprised of twelve directors. Of these, six directors are representatives of writer members, elected by writer members, and six directors are representatives of publisher members, elected by publisher members. One of the six writer directors must be a New Zealand writer member. APRA submits that this direct system of election by the membership ensures the board is representative and accountable to members.¹⁴⁹
- 4.187. The ACCC notes that having board representation from all APRA member groups (including small and independent composers) would ensure that the interests of all

¹⁴⁷ Resolution Pathways further submission, dated 16 May 2019, p.2, available: [ACCC public register](#).

¹⁴⁸ Resolution Pathways further submission, dated 16 May 2019, p.2, available: [ACCC public register](#).

¹⁴⁹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 32, available: [ACCC public register](#).

stakeholders are taken into account in decision making, rather than only a subset of members. This would also assist in reducing the dynamic inefficiencies generated by APRA's system (inefficient over or under production of works) as the more representative of members the APRA board is, the more likely that APRA's distribution arrangements will fully reflect the interests of all members.

- 4.188. The ACCC's 2014 determination noted concerns raised about the composition of APRA's board and the system used to determine members' voting entitlements. In 2014, submissions argued that APRA's voting system, in which votes are weighted by royalties earned, had resulted in major international publishing companies and writers affiliated with large labels dominating APRA's Board.¹⁵⁰
- 4.189. The ACCC suggested that APRA consider including a board member to represent the interests of independent and niche writers/composers/producers. The ACCC recommended APRA review the structure of its board and voting rights (including the weighting of votes) to ensure that it has appropriate incentives to represent its members. The ACCC also flagged it would take account of any improvements in this area in considering any future application for re-authorisation.¹⁵¹
- 4.190. The APRA AMCOS membership voted to change members' voting entitlements in board elections and Annual General Meetings (**AGM**) in 2018. Prior to this change, every APRA or AMCOS member who had received any earnings at all over the previous two financial years was entitled to cast one vote in the relevant company's board elections and AGM. Members were then allocated one additional vote for every \$500 block of earnings they had received over the last financial year. In 2018, the APRA AMCOS membership voted to increase the number of dollars for which members receive an additional vote. Members now receive an additional vote for every \$2,500 block of earnings. It remains the case that no individual member (or related group of members) can receive more than 15 per cent of the available votes.
- 4.191. Some interested parties continue to raise concerns that APRA's voting system disproportionately favours its three large publisher members, Sony, Universal and Warner, at the expense of smaller, independent, APRA members.¹⁵² A number of interested parties also submit that the change to the way members' votes are weighted has disenfranchised low earning members.¹⁵³ The Association of Australian Musicians, Phil Bromley and Dr Julie Storer all argue the ACCC should require APRA to change its voting system to "one member, one vote".¹⁵⁴
- 4.192. The ACCC notes that while some smaller APRA members have fewer voting rights under the new system, on the balance, the change has resulted in most smaller APRA members having proportionally more votes compared to larger members than they did under the previous system. For example, a member with \$100,000 in earnings has gone from having 201 votes to having 41 votes, whereas a member with \$500 in earnings has gone from having two votes to one vote, and a member with \$1,000 in earnings from three votes to one vote. However, some smaller

¹⁵⁰ Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 65, available: [ACCC public register](#).

¹⁵¹ Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 65-66, available: [ACCC public register](#).

¹⁵² For example: Jamison Young submission, dated 29 January 2019, p. 3-4; An Interested Party submission, dated 9 February 2019, p. 1. Both submissions are available on the [ACCC public register](#).

¹⁵³ Association of Australian Musicians submission, dated 15 February 2019, p. 8, available: [ACCC public register](#).

¹⁵⁴ Association of Australian Musicians submission, dated 15 February 2019 p. 8-9; Dr. Julie Storer submission, dated 8 February 2019, p. 6; Phil Bromley submission, dated 9 February 2019, p. 3;.All of the above submissions are available on the [ACCC public register](#).

members have had a reduction in voting rights comparable to large members, for example, a member earning \$2,000 has gone from five votes to one vote.

- 4.193. The ACCC notes that APRA's membership consists of a relatively small group of members whose works generate much of APRA's licensing revenue, a large group of members whose works each generate relatively less of APRA's licensing revenue and a larger group again who generate almost no licensing revenue at all. For example, of APRA's roughly 100,000 members, only approximately 47,000 members received royalty distributions from APRA in 2018.¹⁵⁵
- 4.194. The ACCC considers it appropriate that those members whose works are performed the most, and therefore generate the bulk of APRA's licensing revenue, have a greater say in the running of the company, and accepts that a weighted voting system is an effective way to achieve this outcome. While the ACCC is of the view that APRA's voting arrangements should ensure that the interests of various stakeholders are taken into account in decision making, the ACCC considers that a system of voting where every member receives one vote regardless of earnings would go too far. It would shift voting power to low and no royalty-earning members which may undermine the effectiveness of APRA's arrangements. Collectively, APRA members who received no royalty distributions at all in 2018 would have more voting power than all those members who did.
- 4.195. The ACCC is not in a position to form a view at this time about the extent to which the voting reforms APRA did institute in 2018 address the concerns raised in the 2014 determination as it is too soon to assess the impact of these changes. In this respect, the ACCC is disappointed that it took APRA until late 2018, just before its application for reauthorisation was lodged, to adopt the reforms the ACCC flagged in 2014 that it expected to see. However, the ACCC's preliminary view is that APRA's changes to its voting rights are likely to make its board and AGM elections more representative.
- 4.196. In response to the ACCC's suggestion in its 2014 determination that APRA consider including a board member to represent the interests of independent and niche writers/composers/producers, APRA submits that none of the writers currently on the APRA board are published by a major publisher, and that three of the publisher directors are independent music publishers.¹⁵⁶ APRA also notes that current elected board member Brandan Gallagher considers himself to be an independent musician.¹⁵⁷ The ACCC considers that this adequately addresses the issue of representing the interests of independent and niche writers/composers/producers on APRA's Board.
- 4.197. However the ACCC will review the composition of APRA's board when assessing any future applications for re-authorisation, particularly once there is a greater opportunity to assess the impact of the changes to APRA's system of weighted voting.

Governance and transparency of decision-making

- 4.198. The ACCC considers it is important that as a member organisation, APRA's arrangements include strong governance mechanisms to ensure that it is acting in the interests of its members, and to enable members to participate in APRA's

¹⁵⁵ APRA AMCOS, *2018 Year in Review*, p.4, available: http://apraamcos.com.au/media/YIR/2018/APRA_AMCOS_Year_in_Review_2018.pdf

¹⁵⁶ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 31, available: [ACCC public register](#).

¹⁵⁷ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 31, available: [ACCC public register](#).

decision making processes. Transparency is a necessary component of good governance arrangements.

- 4.199. Submissions have argued that APRA is not adequately transparent about how it operates and in particular, how it manages member funds.¹⁵⁸ Australian Libraries Copyright Committee is of the view that collecting societies are given an inappropriate degree of discretion and that there are insufficient measures for effective oversight or sanctions if that discretion is abused.¹⁵⁹ However AMPAL submits APRA AMCOS operates transparently, efficiently and at best practice. AMPAL also notes that APRA's practices are determined by its board of directors and that APRA's directors generally have a legal duty to act in the best interests of their respective members.¹⁶⁰
- 4.200. On 1 April 2019, the final report of the Department of Communications Collecting Societies Code Review (the **Code Review**) was publicly released. This review related to all copyright collection societies, not just APRA.
- 4.201. The Code Review examined the level of transparency around collecting societies' governance arrangements, and included an examination of how the reporting practices of Australia's collecting societies, including APRA, compare to collecting societies in the European Union. The Code Review states that collecting societies in the European Union are required to publish on their websites an 'annual transparency report,' which should include information on the activities and governance of the collecting society, comprehensive financial information and information on the use of amounts deducted for social, cultural and educational services.¹⁶¹
- 4.202. The Code Review found that much of what is published in response to these requirements is information that collecting societies in Australia, including APRA, already publish. The Code Review concluded that while this suggests that Australian collecting societies perform well in terms of making some information available, the accessibility of this information could be improved. The Code Review considered stakeholders would benefit from the availability of the range of information about collecting societies' governance, operations and performance in an accessible, easy-to-navigate form.¹⁶² However, the Code Review did not go as far as to recommend amendments to the code that would require copyright collecting societies to produce an annual transparency report in any form.
- 4.203. In response to interested parties' submissions, APRA submits that it already provides a vast amount of information about its operations on its website, including its distribution policies, financial information, and information about the board. APRA does not agree with any suggestion that it should be required to disclose information

¹⁵⁸ For example: Association of Australian Musicians submission, dated 15 February 2019, p. 12; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 4; Copyright Advisory Group submission, dated 8 February 2019, p. 2; Marketing Melodies submission, dated 20 February 2019, p. 1. Submissions available: [ACCC public register](#).

¹⁵⁹ Australian Libraries Copyright Committee submission, dated 8 February 2019, p. 2, available: [ACCC public register](#).

¹⁶⁰ The Australasian Music Publishers' Association Limited submission, dated 7 February 2019, p. 1-2, available: [ACCC public register](#).

¹⁶¹ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 75-77, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

¹⁶² Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 36-37, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

regarding staff salaries or other benefits, or any financial information beyond what is already disclosed in its audited financial statements.¹⁶³

- 4.204. To support governance mechanisms, the ACCC considers APRA should make enough information about its operations public to ensure that members can make fully informed decisions when exercising their voting rights.
- 4.205. The ACCC accepts that APRA currently makes the vast majority of information pertaining to its operations available in its various publications, including APRA AMCOS' 'Year in Review'. The ACCC also notes that it is likely that APRA's members have access to more detailed information about APRA's operations, necessitated by APRA's legal disclosure obligations.
- 4.206. However the ACCC is of the view that providing this information in a single, easy to read document will improve stakeholder confidence in APRA's system for both members and licensees. The ACCC also notes that while APRA and AMCOS do produce separate annual reports, much of the information available on APRA AMCOS' website and its 'Year in Review' publications regarding the group's operations is an aggregation of APRA *and* AMCOS' information. For example, the APRA AMCOS group's cost to revenue ratio for the financial year ending June 2018, available on APRA AMCOS' website, is 13.6 per cent.¹⁶⁴ APRA submits its cost to revenue ratio, as a standalone entity, is 14.45 per cent.¹⁶⁵ However, this information was only made available in response to a request by the ACCC.
- 4.207. The ACCC is proposing to impose a condition (**condition C.4**) requiring APRA, separately from AMCOS, to publish an annual Transparency Report which includes:
1. A description of APRA's legal and governance structure
 2. Information on rights revenue, including
 - Total rights revenue generated per type of use¹⁶⁶
 - Total distributable revenue, per type of use
 - Income on investment of rights revenue, and use of such income
 3. Information on APRA's operating costs, including
 - Total operating costs
 - Total remuneration paid to APRA's board directors
 - APRA's cost to revenue ratio
 4. Amounts due to members, including
 - Total revenue attributed to members
 - Total amount distributed to members
 - Total amount attributed but not yet distributed to members
 5. Information about expired undistributed funds, including:

¹⁶³ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 2, available: [ACCC public register](#).

¹⁶⁴ APRA AMCOS 2019, *Cost To Revenue Ratio*, available: <http://apraamcos.com.au/about-us/cost-to-revenue-ratio/>

¹⁶⁵ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 18, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

¹⁶⁶ For example: digital, public performance, radio etc

- Reasons why funds remain undistributed
 - Steps taken to locate and distribute funds to members
 - The uses for which funds are to be applied
6. Information about international collecting societies, including
- Total amount received from other collecting societies
 - Total amount paid to other collecting societies
7. Details of any social, cultural or educational services provided by APRA which are funded through deductions from rights revenue, including the total amount deducted from rights revenue.
- 4.208. The ACCC seeks further information from APRA about the best way to facilitate the reporting of this information, including possibly, through existing reporting structures.

Opt back and licence back

Existing arrangements

- 4.209. APRA submits that the licence back facility provides members and licensees with freedom to enter into direct licences for all uses within Australia, such that there is no reason to require the arrangements between APRA and its members to be on a non-exclusive basis.¹⁶⁷
- 4.210. The ACCC considers that direct licensing between copyright owners and licensees may operate as a competitive alternative and constraint on collective licensing in certain circumstances, in particular, where a user has predictable usage requirements and can identify and negotiate with the copyright owners before the copyright material is required for use.
- 4.211. In its 2014 determination, the ACCC noted that the take up of APRA's licence back and opt out facilities by members was relatively low and raised the possibility that there was a lack of awareness among licensees about the processes. The ACCC was concerned to ensure that the licence back and opt out arrangements were as effective as possible so that direct dealing and source licensing could be entered into where it is feasible and efficient to do so.¹⁶⁸
- 4.212. The ACCC also noted in its 2014 determination that the efficient use of the opt out or licence back provisions needs to be promoted through a reduction in the blanket price charged by APRA to users of these provisions.¹⁶⁹ This is because APRA's licences for users are generally granted on a blanket basis – that is, they confer upon the licensees an unlimited right to use all of the works in APRA's repertoire (including the works of the affiliated overseas collecting societies). This means that even if direct dealing between APRA members and users was simple and straightforward there would be little incentive to deal directly because, unless the user only required a licence over a limited repertoire of works, they would still have to deal with APRA in order to obtain a licence for the balance of the repertoire they wished to use. Unless

¹⁶⁷ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 19, available: [ACCC public register](#).

¹⁶⁸ Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 53, available: [ACCC public register](#).

¹⁶⁹ Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 54, available: [ACCC public register](#).

APRA offered discounts on its blanket licences to reflect direct dealing, the user would, in effect, be paying twice for the rights to works where they have entered into direct licensing arrangements.

4.213. It was a condition of the 2014 Authorisation that APRA take certain steps to increase awareness of the licence back and opt out provisions, including publishing a plain English guide and launching an education campaign.¹⁷⁰ APRA submits that since 2014, it has developed a plain English guide to the licence back and opt out processes and it submits that information about opt out and licence back is regularly included in licensee and member publications. APRA also submits that since 2014, it launched an education campaign on its opt out and licence back provisions which included a news piece outlining the availability of the provisions and a series of information sessions.¹⁷¹ APRA further submits that it now includes provisions in a large number of agreements that reflect the fact that licence fees may need to be adjusted to take account of direct licences between copyright owners and APRA licensees.¹⁷²

4.214. A number of interested parties have submitted that the current licence back and opt out provisions offered by APRA are unsatisfactory and inefficient.¹⁷³ Interested parties have also submitted that the provisions do not effectively facilitate direct licensing between APRA members and licensees.¹⁷⁴ Interested parties are also concerned that the fees for requesting a licence back or opt out, as well as the notice period required, act as a disincentive for members to pursue these options.¹⁷⁵

Take up of opt out and licence back opportunities

4.215. As noted at paragraphs 4.61 to 4.68, despite APRA's attempts to simplify the licence back and opt out processes and to improve awareness of these arrangements, there has still been relatively low take up of these provisions in the past four years. During the period January 2014 to December 2018, these facilities were only used on 73 occasions (APRA has over 100,000 members, and approximately 147,000 licensees.)¹⁷⁶ It does not appear that the conditions of the 2014 authorisation relating to increasing awareness and understanding of APRA's opt out and licence back provisions have increased the utilisation of these provisions in any material way.

4.216. The main situations in which the licence back provisions have been used are:

- Live tours (35 per cent of all licence backs) – the touring artist licenses back their works on a non-exclusive basis for the purpose of performing the works themselves while on tour.

¹⁷⁰ Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 62, available: [ACCC public register](#).

¹⁷¹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 22, available: [ACCC public register](#).

¹⁷² Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 8, available: [ACCC public register](#).

¹⁷³ For example: Marketing Melodies submission, dated 20 February 2019, p. 2; Mood Media submission, dated 8 March 2019, p. 2; Nightlife submission, dated 6 March 2019, p. 8; WA Nightclubs Association submission, dated 26 February 2019, s 2.21. Submissions available: [ACCC public register](#).

¹⁷⁴ Australian Digital Alliance submission, 8 February 2019, p. 5; Australian Libraries Copyright Committee, dated 8 February 2019, p. 2; Creative Commons Australia submission, dated 8 February 2019, p. 3. Submissions available: [ACCC public register](#).

¹⁷⁵ Australian Small Business Family Enterprise Ombudsman, dated 15 February 2019; Copyright Advisory Group submission, 8 February 2019, p. 4. Both submissions available: [ACCC public register](#).

¹⁷⁶ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 22, available: [ACCC public register](#).

- Events – for members who wish to directly license the public performance of their works at individual events.
- Background music (11 per cent of all licence backs).
- Music on hold (21 per cent of all licence backs) – again this is viable because the user, for example a call centre, only requires a very limited repertoire which can generally be supplied by a single artist.¹⁷⁷

4.217. As can be seen from these examples, APRA's licence back provisions are only generally being used for APRA members to deal directly with a narrow range of users, requiring access to narrow repertoires, and even within this narrow range of users and repertoires, only very irregularly.

4.218. APRA submits that its technology platform CLEF (discussed at 2.57-2.59), is intended to streamline and simplify the licence back provisions further.¹⁷⁸ APRA submits CLEF will provide a more automated and integrated technical solution to facilitate the withdrawal of rights from APRA's repertoire. For example, works which are subject to opt out for a particular type of usage will be automatically excluded from receiving allocations from the relevant distribution pool, rather than the manual adjustment which must currently be performed. In addition, APRA intends to improve the user experience of requesting an opt out or licence back through the new membership portals to the new APRA website.¹⁷⁹

4.219. The ACCC understands that APRA anticipates CLEF will reduce the administrative work involved with processing applications for licence back. The ACCC therefore expects that following the introduction of CLEF, the notice period required and fees associated with members utilising the licence back will also decrease. The ACCC considers that such changes to the processes could encourage greater use. However, the ACCC understands that CLEF may not reduce the amount of administrative work required to process an opt out request, because in this instance APRA is required to notify all affected licensees of the opt out.¹⁸⁰

4.220. In summary, APRA's opt out and licence back provisions are rarely used and, on current information, it does not appear that their availability imposes a meaningful competitive constraint on the exercise of market power by APRA other than in respect of, in some cases, a very narrow class of users such as those discussed at paragraph 4.216 above.

4.221. The ACCC considers that this in large part reflects the exclusive assignment APRA takes of its members' rights in the first instance rather than any fundamental problem with the opt out and licence back provisions *per se*. That is, other than in respect of users who only require a very limited repertoire of works, direct dealing is only likely to be feasible if there is a system that facilitates not only opportunities for APRA members to license use of the works directly, but also opportunities for them to easily aggregate their rights into bundles that would be attractive to users, such as for

¹⁷⁷ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 17-19, available: [ACCC public register](#).

¹⁷⁸ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 7, available: [ACCC public register](#).

¹⁷⁹ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 23, available: [ACCC public register](#).

¹⁸⁰ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 14-15, available: [ACCC public register](#).

example if APRA held its members' rights on a non-exclusive basis as discussed at paragraphs 4.66 to 4.69.

4.222. Accordingly, the ACCC does not consider that APRA's current opt out and licence back provisions are likely to facilitate direct dealing at a level that would impose a significant competitive constraint on APRA in respect of most categories of users. The ACCC also considers that the changes proposed by APRA under CLEF, while welcome because they will make the process easier and less costly as foreshadowed by APRA above, are unlikely to facilitate more direct dealing in a material way that would impose a more significant competitive constraint on APRA other than in respect of the narrow classes of users discussed above.

Non-commercial licence back

4.223. As outlined in paragraph 2.33, in 2018 APRA introduced a "non-commercial licence back" option as part of its broader licence back provisions. This permits members to license back particular work in relation to "the right to communicate to the public online" for non-commercial purposes. APRA defines "non-commercial purposes" to mean that there is no consideration or financial incentive received by any party for use of the work under any sub-licence. APRA also requires that any sub-licensee is a not-for-profit entity whose activities are not directed towards commercial advantage and that does not receive public or institutional funding. The non-commercial licence back provisions differ from APRA's ordinary licence back provisions in that ordinary licence back provisions can be used by members who wish to enter into direct licences with any entity for public performance, broadcast or communication within Australia, while a non-commercial licence enables members to grant a not-for-profit entity a global licence for online use only.

4.224. Interested parties have also raised concerns about the usefulness of APRA's licence back for non-commercial use provisions. Submissions claim that APRA's definition of "non-commercial purposes" is too narrow and highly restrictive. Issues raised by parties include:

- The requirement that the entity be "not-for-profit" appears to exclude licensing to individuals.¹⁸¹
- Many not-for-profit entities receive some form of "public or institutional funding", (for example schools, universities and libraries) and as such these organisations are excluded from APRA's definition despite normally being considered non-commercial.¹⁸²
- APRA's definition prohibits any consideration being received for the work in order to be considered a "non-commercial purpose". As such, artists are prevented from licensing works in exchange for a non-monetary benefit, such as a promise to include the work in an online compilation of new music.¹⁸³
- The narrowness of the definition of "non-commercial purposes" excludes artists from licensing works under common licences such as the non-commercial Creative Commons licence.¹⁸⁴

¹⁸¹ Australian Digital Alliance submission, dated 8 February 2019, p. 5; Creative Commons submission, dated 8 February, p. 3. Both submissions available: [ACCC public register](#).

¹⁸² Australian Digital Alliance submission, dated 8 February 2019, p. 5; Copyright Advisory Group submission, dated 8 February 2019, p. 3; Creative Commons submission, 8 February, p. 3. Submissions available: [ACCC public register](#).

¹⁸³ Copyright Advisory Group submission, dated 8 February 2019, p. 3, available: [ACCC public register](#).

¹⁸⁴ Copyright Advisory Group submission, dated 8 February 2019, p. 4 and Australian Digital Alliance submission, dated 8 February 2019, p. 5. Both available: [ACCC public register](#).

- The current provision is limited to “purposes online”, which does not permit licensing for broadcast or performance.¹⁸⁵
- 4.225. In response, APRA submits that the non-commercial licence back provisions were introduced to allow licensing of online non-commercial use. APRA states that its reciprocal arrangements with overseas collecting societies mean that ordinary licence back can only be used for online purposes if the online use is confined to Australia. This is because a licence back for global use might conflict with the terms of a licence already granted in an overseas territory.¹⁸⁶
- 4.226. APRA considers that the risk of conflict between a non-commercial licence back for global use and a licence granted by an overseas society to be low. However APRA submits the definition of non-commercial licence is critical to minimising this risk of conflict, and to ensure that members did not grant non-commercial licences to multinational social media platforms on the misunderstanding that they are non-commercial.¹⁸⁷
- 4.227. APRA also notes that an APRA member can enter into a direct licence with any party in Australia (including a school, library or other not-for profit entity) under the ordinary licence back provisions, with no need to satisfy the additional conditions of the non-commercial licence back.¹⁸⁸ Similarly, APRA states that an APRA member can also use the ordinary licence back provisions to enter into an arrangement for the broadcast or public performance of the member's works free of charge for any purpose in Australia.¹⁸⁹
- 4.228. Specifically in relation to education institutions, APRA submits that schools already benefit from significant licensing advantages under the Copyright Act including a free licence for public performance in the classroom, and a comprehensive statutory licence for the reproduction and communication of works.¹⁹⁰
- 4.229. In response to criticisms about the costs of using the non-commercial licence back provisions, APRA submits that its fee on members of \$200 per licence-back transaction is rarely applied except in circumstances where it would be unreasonable for other APRA members to bear the administrative costs. APRA also submits has never been applied to an individual writer member seeking to enter into direct licence with a school or library.¹⁹¹
- 4.230. The ACCC considers that APRA's ordinary licence back provisions provide members with the ability to enter into direct licensing arrangements with any party, including educational institutions, libraries and other not-for-profit organisations operating in Australia, without having to satisfy APRA that the use is non-commercial. The ACCC sees no advantage to members, in terms of cost and process, in using non-

¹⁸⁵ Creative Commons submission, dated 8 February, p. 3, available: [ACCC public register](#).

¹⁸⁶ Australasian Performing Right Association Limited further submission, dated 18 April 2019, p. 19; Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 16. Both available: [ACCC public register](#).

¹⁸⁷ Australasian Performing Right Association Limited further submission, dated 18 April 2019, p. 20, available: [ACCC public register](#).

¹⁸⁸ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 16, available: [ACCC public register](#).

¹⁸⁹ Australasian Performing Right Association Limited further submission, dated 18 April 2019, p. 20; Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 16. Both available: [ACCC public register](#).

¹⁹⁰ Australasian Performing Right Association Limited further submission, dated 18 April 2019, p. 19; Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 16. Both available: [ACCC public register](#).

¹⁹¹ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 16, available: [ACCC public register](#).

commercial licence back over standard licence back, provided the use in question occurs in Australia.

- 4.231. However, the ACCC understands that some APRA members would like the ability to use APRA's non-commercial licence back provisions to enter into direct licensing arrangements with not-for-profit entities or educational institutions operating *outside* of Australia.¹⁹² For this group of members, APRA's definition of non-commercial, which the ACCC acknowledges is narrow, may restrict their ability to do so. However, the ACCC accepts APRA's submission that a narrow definition of "non-commercial use" is necessary to minimise the risk of conflict between a non-commercial licence back for global use and a licence granted by an overseas society.

Transparency of APRA's licensing and distribution arrangements

- 4.232. Transparency about APRA's licence fees and distribution arrangements could serve to mitigate, to some extent, APRA's market power. Transparency about licence fees can assist users in negotiations with APRA and allow users to make informed decisions about acquiring licences from APRA. Transparency about distribution arrangements assist in making APRA accountable to its members, making it more likely that APRA members are remunerated in proportion to the value of actual performance of their works.
- 4.233. Conversely, lack of transparency about these issues could serve to entrench or enhance APRA's market power.

APRA's licence fees

- 4.234. In accordance with a condition imposed by the ACCC in its 2014 authorisation, APRA publishes plain English guides to its licence categories. As required by the condition of authorisation these guides include information about the basis on which fees are determined, and the range of fees payable for each licence and licence category. The ACCC considers these plain English guides have improved clarity and certainty for licensees around how much they will need to pay for an APRA licence.
- 4.235. However, the ACCC notes that while the guides provide transparency about how much licensees will have to pay, the guides do not set out how the tariffs that determine the licence fees are formulated. The condition of authorisation imposed by the ACCC in 2014 did not require APRA to provide this.
- 4.236. A number of interested parties have criticised APRA's licensing fee arrangements for not being sufficiently transparent, and argue that it is difficult for businesses to understand how and on what basis licence fees and tariffs are calculated.¹⁹³ For example, the Council of Small Business Organisations Australia submitted it has received complaints that licence agreements are confusing to small business owners

¹⁹² See Australian Digital Alliance submission, dated 8 February 2019, p. 4; Australian Libraries Copyright Committee, dated 8 February 2019, p. 2; Creative Commons submission, dated 8 February 2019, p. 2. Submissions available: [ACCC public register](#).

¹⁹³ For example: Academy Ballet submission, dated 5 February 2019; Ascendance Academy submission, dated 22 February 2019; Australian Lottery and Newsagents Association submission, dated 26 February 2019; Australian Small Business Family Enterprise Ombudsman submission, dated 15 February 2019; Carlo Colosimo submission, dated 20 February 2019, p. 1; Council of Small Business Organisations Australia submission, dated 22 February 2019, p. 1; Creative Commons Australia submission, dated 8 February 2019, p. 3; Eisteddfod Organisers Australia, dated , p. 7, dated 8 February 2019; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 7; Nadia's Performance Studio & Sydney Stars on Show Eisteddfod submission, dated 19 March 2019; Nightlife submission, dated 6 March 2019, p. 11-12; WA Nightclubs Association submission, dated 26 February 2019, s 2.20. Submissions available: [ACCC public register](#).

and that that many small businesses believe APRA AMCOS to be a scam and therefore refuse to pay fees when confronted by them.¹⁹⁴

- 4.237. The Office of NSW Small Business Commissioner (OSBC) submits that a lack of transparency exacerbates the issues caused by APRA's monopoly power. Since licensees have no practical choice but to contract with APRA, it is possible that inefficiencies in APRA's operations are passed on to licensees. Without transparency, the OSBC submits that it is not possible to determine whether a fee might not be lower but for inefficiencies in the operations of the relevant collecting societies, or whether it represents price gouging relative to the proportion of that fee returned to the relevant artist.¹⁹⁵ The OSBC submits that increased transparency would allow licensees to dispute the merit and equity of a fee, and thereby engage more constructively in consultations on licence reforms.¹⁹⁶
- 4.238. WANA has questioned APRA's change to a capacity-based scheme for nightclubs (where licence fees are based on a venue's maximum capacity, not actual attendance) and the distinction between the (higher cost) licence scheme that they are categorised under and the licence scheme APRA offers to other licensed venues that also have dance floors.¹⁹⁷
- 4.239. The final report of the Collecting Societies Code Review found that some licensee participants in the review process raised concerns about licence fee negotiations and indicated that increased transparency around how their fees are calculated would help them better determine whether fees are fair and reasonable and their ability to make informed decisions.¹⁹⁸
- 4.240. In this respect, the Code Review found that the information required by licensees and other stakeholders is in two parts: first, the methodology that shows how the licence fee is calculated, and second, the underlying basis or rationale applied in that methodology.¹⁹⁹
- 4.241. The Code Review found that the Code should require sufficient transparency around licences and fee calculations to support negotiations between collecting societies and licensees. The Code Review made the following recommendation:

Recommendation 4: Amend clause 2.3 (of the Code) to require collecting societies in response to a reasonable request, to make available to licensees and potential licensees:

- a. the methodology for calculating the licence fee applicable to that licensee or potential licensee, and*

¹⁹⁴ Council of Small Business Organisations Australia submission, dated 22 February 2019, p. 1, available: [ACCC public register](#)

¹⁹⁵ Australian Small Business Family Enterprise Ombudsman submission, dated 15 February 2019, p. 2, available: [ACCC public register](#)

¹⁹⁶ Australian Small Business Family Enterprise Ombudsman submission, dated 15 February 2019 p. 3, available: [ACCC public register](#)

¹⁹⁷ WA Nightclubs Association submission, dated 26 February 2019, p. 4, available: [ACCC public register](#).

¹⁹⁸ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 20, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

¹⁹⁹ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 24, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

b. matters taken into consideration in determining the licence fee to the extent that such information is not commercial-in-confidence and does not otherwise directly affect a commercial negotiation between the collecting society and the licensee or potential licensee.

*The Code Reviewer is able to consider whether a request or a collecting society's response to it has been reasonable.*²⁰⁰

4.242. In response to interested party submissions about the application for re-authorisation, and an information request from the ACCC, APRA submits that:

- Industry negotiation takes place prior to the introduction of a new scheme with industry bodies and individual licensees.²⁰¹
- The data and economic analysis it uses to set fees is confidential, including because it is confidential information belonging to APRA, its members and licensees. Such information would give a commercial advantage to licensees in circumstances where they could not be compelled outside litigation to share the same information that they had created. Depending on the circumstances of its creation, it is also often the subject of legal professional privilege.²⁰²
- In response to the ACCC advising that it was considering adopting a condition requiring APRA to provide information similar to that contained in the Code Review recommendation in its plain English guides, APRA would have no objection to disclosing the basis or rationale for each licence scheme, for example, the schemes that APRA believes to be relevant comparators, the extent of its consultation with industry bodies, alternative bases reasonably considered, etc.²⁰³

In response to the ACCC advising that it was considering requiring APRA to make available an explanation of all matters taken into account when it increases licence fees other than in accordance with CPI, APRA submitted that it does not increase licence fees other than in accordance with CPI without industry consultation or Copyright Tribunal proceedings. Accordingly, APRA would have no objection to disclosing this type of information in connection with any licence fee increase.²⁰⁴

4.243. With respect to the Code Review, APRA submits that it will be in a position to have implemented all of the recommendations set out by 1 July 2019. APRA believes this will satisfy the reasonable submissions regarding transparency received during the ACCC's consideration of the application for re-authorisation.²⁰⁵

4.244. The ACCC considers that there is a lack of transparency about the underlying basis and methodology by which APRA's licence fees are determined. While most

²⁰⁰ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 26, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

²⁰¹ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 17, available: [ACCC public register](#).

²⁰² Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 15, available: [ACCC public register](#).

²⁰³ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 15, available: [ACCC public register](#).

²⁰⁴ Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 15, available: [ACCC public register](#).

²⁰⁵ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 2, available: [ACCC public register](#).

businesses are easily able to determine, by reference to APRA's plain English guides, how much they will have to pay in licence fees, they receive little, if any information about why the fees are set at the levels that they are.

4.245. Further, in any attempt to question, or test the rationale for the fees charged by APRA, there is a significant information asymmetry between APRA and the business. APRA has a large store of data about the basis on which licence fees are set on which to draw, including from previous negotiating processes. This is information that is generally not available to the business seeking a licence. Not having this information available is likely to impact the business' ability to make informed, rational decisions about acquiring licences from APRA.

4.246. This information asymmetry also has implications for the business' bargaining position in negotiating with APRA. In this respect, the ACCC notes cases in the past where businesses have questioned the level of fees proposed to be charged and APRA has dismissed these concerns on the basis of a lack of supporting evidence. For example, in its consultation paper in relation to licence fees to apply to nightclubs under OneMusic, APRA stated that:

We acknowledge that some submissions asserted that the existing APRA AMCOS, existing PPCA and/or proposed OneMusic rates are too high. However, these submissions did not include any underlying critical analysis – including relevant data, economic analysis or examination – necessary to give proper consideration or weight to these submissions.²⁰⁶

4.247. However, APRA itself had also not provided such information in support of its proposed licence fees. In this respect, the ACCC considers that, in the context where APRA is the near monopoly supplier of an essential input for many businesses, any onus to explain the basis on which fees are arrived at should rest with it.

4.248. The ACCC considers that a lack of transparency around how licence fees are formulated also impacts the extent to which recourse to the Copyright Tribunal and APRA's ADR process may act as constraints on APRA's exercise of market power.

4.249. The ACCC considers this information asymmetry could impact the ability of licensees to seek recourse to the Copyright Tribunal. Without sufficient information about the basis on which the structure and quantum of the licence fee has been determined, a licensee has significant difficulty determining the 'reasonableness in the circumstances' of the licence scheme on which it would be seeking a ruling from the Copyright Tribunal. This is likely to mean businesses are less likely to challenge APRA licence schemes in the Copyright Tribunal than if more information about the basis for the licence scheme they are concerned about was available.

4.250. Second, if a licensee, or a group of licensees, does decide to challenge a licensing scheme to the Copyright Tribunal, it will likely not have access to the same level of licensing information and data that is available to APRA, making it more difficult for a licensee to put on evidence to support its claims or to challenge claims made by APRA. In its submission, WANA referred to a determination made in respect of APRA's licensing scheme where the Copyright Tribunal noted that no one had placed

²⁰⁶ OneMusic, *Our Consultation Process With You*, p. 1, available: <http://www.onemusic.com.au/wp-content/uploads/2017/03/RMFD-181031-1.pdf>.

any evidence before the Copyright Tribunal in opposition to APRA's application and to counter the evidence adduced by APRA.²⁰⁷

- 4.251. The same is true of businesses who may wish to seek recourse to APRA's ADR process. The more information about the rationale for APRA's licence schemes that is available, the better position licensees will be in to assess whether recourse to the ADR process to address any concerns they may have is likely to be a viable option.
- 4.252. The ACCC also notes submissions from licensees which claim that difficulties in understanding how APRA's licensing schemes work have adversely affected their perceptions of fairness about APRA's licence fees and conditions.²⁰⁸ The ACCC considers that requiring APRA to produce further information about its licence schemes will have the dual effect of promoting understanding of how APRA's licensing policies are applied to a particular licensee's circumstances and will enable licensees to make more informed decisions about their licensing arrangements. In turn, this could reduce the number of disputes and inquiries related to licence fees handled by or directed to APRA.
- 4.253. Accordingly, the ACCC is proposing to impose a condition of authorisation requiring APRA to make available, in its plain English guides:
- the methodology for calculating the licence fee for each licence category, including relevant data, economic analysis or examination, and
 - matters taken into consideration in determining each licence fee to the extent that such information is not commercial-in-confidence (**condition C1.2**).
- 4.254. This condition is similar to the requirement recommended by the Code Review. It goes further than recommended by the Code Review in that APRA would be required to make this information available in its plain English guides, rather than only make it available on request. The ACCC considers that this is appropriate having regard to the ACCC's conclusion about the concerns regarding lack of transparency raised and APRA's indicated preparedness to provide the requested information on these terms.
- 4.255. The ACCC does not consider that APRA should be required to provide commercial-in-confidence information. However, the ACCC is considering further whether to adopt the other limitation on the information APRA would be required to provide recommended by the Code Review. That is, not requiring the provision of information that directly affects a commercial negotiation between the collecting society and the licensee or potential licensee.
- 4.256. The ACCC is concerned that such a limitation on the information required to be provided could severely limit the utility of the information that is provided. If such a limitation was interpreted broadly, it could mean that very little information would be made available. In this respect, any information about the methodology for calculating a licence fee, including relevant data, economic analysis or examination is likely to affect commercial negotiations between APRA and businesses. One of the reasons for making this information available is to allow businesses to negotiate from a more informed position. Further, the context in which the ACCC is proposing that APRA

²⁰⁷ WA Nightclubs Association submission, dated 26 February 2019, s 2.23, available: [ACCC public register](#).

²⁰⁸ For example: A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 7; Ascendance Academy submission, dated 21 February 2019, p. 2; Council of Small Business Organisations Australia submission, dated 22 February 2019, p. 1-2; Mood Media submission, dated 8 March 2019, p. 2-3; Office of the NSW Small Business Commissioner submission, dated 15 February 2019, p. 3. Submissions available: [ACCC public register](#).

provide this information, that is, in its published guides, means that it would be provided in a general context rather than specifically in the course of an ongoing negotiation process. The ACCC invites submissions from interested parties about this issue.

- 4.257. The ACCC is also proposing to impose a condition of authorisation requiring APRA to make available, each time there is an increase in a licence fee, other than increases in line with CPI, an explanation of the matters taken into consideration in determining the increase in the licence fee (to the extent that such information is not commercial-in-confidence) (**condition C1.6**).
- 4.258. These conditions are in addition to the condition imposed by the ACCC in 2014 requiring APRA to publish comprehensive plain English guides to each of its licence categories. The ACCC proposes to impose a condition of authorisation that APRA maintain these guides (**condition C1.1**).

Distribution of royalties to APRA members

- 4.259. APRA currently publishes publications explaining both its distribution rules and its distribution practices. These documents explain both the manner in which distributions are determined, and the frequency of distributions, by category.
- 4.260. A number of interested parties raised concerns about APRA's distribution of royalties. In particular, a number of interested parties submit that there is a lack of transparency around how licence fees are calculated and distributed and the system used to ensure that performers receive their rightful royalties.²⁰⁹
- 4.261. The final report of the Code Review concluded that rights holders should have sufficient information to understand the remuneration they receive for use of their materials and the processes associated with its determination. The Code Review also concluded that licensees should also receive adequate information about how the licence fees they pay are divided up and distributed so they have a better understanding of the extent to which their fees are determined on a reasonable and fair basis.²¹⁰
- 4.262. The Code requires collecting societies to make information on their distribution policy available to members, including how entitlements are calculated, how often they are distributed, and how they adhere to the processes described in their policies. However the Code does not provide any guidance as to how comprehensive or granular this distribution information must be. In this respect, the Code Review found that where collecting societies do provide information on the distribution of funds, this information is often written in dense or legalistic language.²¹¹

²⁰⁹ For example: Association of Australian Musicians, dated 15 February 2019, p. 4 & 6; Australian Small Business Family Enterprise Ombudsman, dated 15 February 2019; Australian Venues Association submission, dated 1 March 2019, p. 1; Carlo Colosimo submission, dated 20 February 2019, p. 2; Creative Commons Australia submission, dated 8 February 2019, p. 3; Live Performance Australia submission, dated 22 February 2019, p. 4-5; Nadia's Performance Studio & Sydney Stars on Show Eisteddfod submission, dated 19 March 2019; NSW Small Business Commissioner submission, dated 15 February 2019, p. 3; Odette's School of Dance submission, dated 28 February 2019; Phil Bromley submission, dated 9 February 2019, p. 2-3; Trudy Newell submission, dated 6 February 2019. Submissions available: [ACCC public register](#).

²¹⁰ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 26, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

²¹¹ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 31, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

- 4.263. The Code Review found that despite recent improvements in transparency around the distribution of funds, there is still a perception that there is a lack of an effective mechanism to ensure such information continues to be available. For instance, there is a concern that there is no specific obligation to ensure more detailed rights holder payments information be made available.²¹²
- 4.264. The Code Review also noted that improving information around the distribution of funds by collecting societies may assist licensees to negotiate directly with rights holders.²¹³
- 4.265. However, the Code Review expressed the view that any changes in this area also need to balance the needs of licensees and the potential for a compliance burden on collecting societies.²¹⁴
- 4.266. Overall, the Code Review concluded that the persistence of stakeholder concerns in this area, and the importance of fair negotiating processes, suggests that confidence in the system would be improved by strengthening transparency arrangements in the Code around funds distribution.²¹⁵
- 4.267. The Code Review made the following recommendations.

Recommendation 5: Amend clause 2.6 (of the Code) to require collecting societies to detail in annual publications, at an anonymised or aggregate level where appropriate, the accounting and distribution of licence revenue. This information is to be reported in a consistent format year on year. Categories for reporting should include, but are not limited to:

- a. classes of licensees from whom licence revenue is received,*
- b. classes of members to whom licence revenue is paid,*
- c. categories of copyright material copied / licensed in respect of which licence revenue is received, and*
- d. domestic vs international payments of licence revenue.*

Recommendation 6: Amend clause 2.4 (of the Code) to require collecting societies in response to a reasonable request by a licensee or their representative, to provide detailed information about particular rights payments made pursuant to a licence. Such information should only be provided to the extent that it is not commercial-in-confidence and does not otherwise directly affect a commercial negotiation between the collecting society and the licensee or potential licensee. Such information is to be provided:

- a. on an anonymised basis, and*

²¹² Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 27, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

²¹³ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 28, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

²¹⁴ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 28, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

²¹⁵ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 29, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

b. where the collecting society can do so at a reasonable cost.

The Code Reviewer is able to consider whether a request or the collecting society's response to it has been reasonable.

Recommendation 7: Amend clause 2.4 (of the Code) to require that collecting societies:

a. consult with members prior to making any substantive changes to its distribution policies, and

b. publish 'plain English' guidelines on its distribution policy and make them available to members and licensees.²¹⁶

- 4.268. In response to interested party submissions, and the findings of the Code Review, APRA submits that it already provides considerable information regarding distribution, including in each plain English guide. Furthermore, in response to the Code Review 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 2019.²¹⁷
- 4.269. More broadly, as noted, APRA submits that it will be in a position to have implemented all of the recommendations set out in the Code Review by 1 July 2019.²¹⁸
- 4.270. In relation to its distribution arrangements, APRA submits that it 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.²¹⁹
- 4.271. APRA notes that a number of interested parties have raised the issue of reporting by community radio stations. APRA states that 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 states that it 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.²²⁰
- 4.272. As noted, the ACCC considers that to the extent possible, APRA's members should be remunerated in proportion to the value of actual performances of their works. This helps to reduce any dynamic inefficiencies (inefficient over or under production of works) arising from the APRA system.

²¹⁶ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 13, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

²¹⁷ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 17, available: [ACCC public register](#).

²¹⁸ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 17, available: [ACCC public register](#).

²¹⁹ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 17, available: [ACCC public register](#).

²²⁰ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 17, available: [ACCC public register](#).

- 4.273. In this respect, a lack of transparency around distribution arrangements reduces the accountability of collecting societies for royalties paid to their members and would make it less likely that APRA members are remunerated in proportion to the value of actual performance of their works.
- 4.274. Lack of transparency about distribution arrangements is also likely to make a collecting society less accountable for management expenses potentially leading to cost inefficiencies.
- 4.275. Further, as identified by the Code Review, lack of transparency around distribution arrangements makes it more difficult for collecting society members to make informed choices about negotiating directly with music users.²²¹
- 4.276. The ACCC notes that APRA currently provides considerable information about its distribution practices to its members. Given the broad range of businesses licensed by APRA and the numerous categories of users, these practices are necessarily detailed and complexed. This complexity is likely a contributing factor to the concerns that some interested parties have expressed about a lack of transparency in APRA's distribution arrangements.
- 4.277. In this respect, the ACCC considers that APRA's existing publications do adequately explain the methodologies it adopts. The ACCC considers that concerns about transparency of APRA's distribution arrangements likely reflect the difficulties in any individual member being able to discern from an examination of these methodologies how much of the around \$362 million APRA collects each year (inclusive of AMCOS) from around 147,000 licences, they, as one of APRA's 100,000 members, are individually entitled to. APRA's radio and television licensees alone broadcast over 5 million hours of content per year.²²²
- 4.278. Even where direct distribution is used (distribution to members based on actual usage of works) this is a complex process. For example, in relation to commercial television, revenue is allocated based on ratings and music content. The value of the music content is further weighted according to type of use (featured, background, theme or promotional) and time of day. The value of the music used in advertisements on commercial television stations is calculated using a different methodology again.
- 4.279. Further, in many cases APRA relies on sample sets of data (sample distribution methodology) or proxy data (analogous distribution methodology) to estimate usage of works by licensees. Accordingly, much of the concern around the transparency of APRA's distribution arrangements relates to the accuracy of the data and information used by APRA to estimate usage where it does not have information from licensees recording actual usage. In this respect, APRA submits that 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.²²³

²²¹ Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 20, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

²²² Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, pages 7 & 8, available: [ACCC public register](#).

²²³ Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 17, available: [ACCC public register](#).

- 4.280. Finally, while APRA has methodologies for determining the proportion of licensing revenue assigned to each member, actual royalties to which each member is entitled depend not just on the licensees' use of their works, but the licence fee they pay.
- 4.281. Accordingly, while it is often difficult for members to determine the value assigned by APRA to a particular musical work, used by a licensee in a particular context, this often reflects the complexities of calculating member distributions rather than the absence of information about the methodologies for calculating distributions.
- 4.282. Notwithstanding this, the ACCC considers that more can be done to improve the transparency of APRA's distribution arrangements and thereby reduce the dynamic inefficiencies resulting from APRA's arrangements.
- 4.283. In this respect, the ACCC considers that adopting recommendations 5, 6 and 7 of the Code Review would go some way to improving the transparency of APRA's distribution arrangements. The ACCC notes that APRA has stated that it intends to adopt these recommendations. However, for the avoidance of doubt, the ACCC proposes to impose a condition of authorisation requiring APRA to adopt these recommendations (**condition C2**).
- 4.284. The condition the ACCC is proposing varies slightly from the Code Review recommendation 6. Recommendation 6 is that collecting societies provide details about particular rights payments made pursuant to a licence in response to any reasonable request. To avoid ambiguity about what constitutes a reasonable request, and provide certainty, the ACCC is proposing that APRA be required to provide this information in response to any request.

ACCC conclusion on public detriment

- 4.285. As noted above, the ACCC considers that APRA would have significant market power, and as a consequence of this market power, significant public detriments are likely to arise, whether or not it took exclusive assignment of its members' rights. However, the magnitude of these public detriments will depend on the extent of competitive pressure placed on APRA.
- 4.286. The ACCC considers that APRA holding its members' rights on a non-exclusive basis would be likely to impose a degree of competitive constraint on APRA, reducing the very substantial market power it currently holds in acquiring and supplying performing rights in relation to musical works in Australia. This is likely to result in some reduction in the detriments identified by the ACCC above, namely lack of price competition resulting in inefficient under-utilisation of APRA's repertoire and inefficiency in the production of musical works and stifling innovation and adoption of new technologies and business models.
- 4.287. The ACCC also recognises the factors that mitigate APRA's market power, particularly, to the extent that they are used, effective dispute resolution via ADR or the Copyright Tribunal and, in respect of some classes of users, APRA's opt out and licence back arrangements. The ACCC considers that these measures go some way in reducing the detriments resulting from APRA's arrangements.
- 4.288. In summary, the ACCC considers that APRA's arrangements continue to generate a significant level of public detriment compared to the likely alternative of APRA holding its members' rights on a non-exclusive basis.

5. Balance of public benefit and detriment

- 5.1. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Proposed Conduct is likely to result in a public benefit, and that the public benefit will outweigh any likely public detriment, including any lessening of competition.
- 5.2. The ACCC considers that APRA taking exclusive assignment of its members' rights is likely to result in the following public benefits:
 - Significant efficiencies in enforcement and compliance monitoring and preservation of the incentives for the future creation of musical works.
 - Some transaction cost savings. These primarily relate to avoiding the increased complexity of negotiating with users who may source licences for some works directly from APRA members if the opportunity to do so was available, but still require an APRA blanket licence for the remainder of the musical works they use.
 - Avoiding the additional administrative and legal costs that would be incurred in APRA moving from its current arrangements to a system where it obtains rights from its members on a non-exclusive basis.
- 5.3. However, the ACCC considers that APRA's arrangements are also likely to result in significant public detriment. The ability and incentive for users to obtain direct or source licences under competitive conditions is limited, including because APRA takes exclusive assignment of its members' rights.
- 5.4. The public detriment resulting from the foreclosure of opportunities for greater direct dealing can manifest itself in a number of ways including higher prices for businesses that want to play music, inefficient under-utilisation of APRA's repertoire, a lack of transparency around licensing arrangements, and significant problems associated with commercial dealing with APRA.
- 5.5. The ACCC also considers that APRA's near monopoly is likely to create inefficiencies for members. Individual members may have difficulty ensuring their rights are adequately recognised in distribution arrangements, or APRA may not be responsive to the needs of some of its diverse membership. In addition, APRA's costs may be inefficiently high due to a lack of competitive constraint, reducing the revenue pool available for distribution to members.
- 5.6. Most of the public detriments identified relate to APRA's ability to exercise market power. In this respect, the ACCC considers that APRA's arrangements are likely to generate a significant and greater level of public detriment compared to the likely alternative of APRA holding its members' rights on a non-exclusive basis.
- 5.7. The ACCC therefore proposes to specify conditions in the proposed authorisation, with the objective of reducing this likely public detriment, as discussed below.
- 5.8. For the reasons outlined in this draft determination, the ACCC is satisfied, subject to the conditions of authorisation, that the conduct the subject of APRA's application for authorisation is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the conduct. Accordingly, the ACCC proposes, subject to the conditions, to grant authorisation.

6. Proposed condition of authorisation

- 6.1. The power conferred upon the ACCC to authorise conduct is discretionary.²²⁴ In exercising that discretion, the ACCC may have regard to considerations relevant to the objectives of the Act.²²⁵
- 6.2. The ACCC may specify conditions in an authorisation.²²⁶ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.²²⁷
- 6.3. In its 2014 determination, the ACCC imposed three conditions. In summary, these conditions required APRA to:
- publish comprehensive plain English guides that outline all of the APRA's licence categories individually and include other specified information
 - take certain steps to increase awareness of the licence back and opt out provisions provided by APRA, including publishing a plain English guide and launching an education campaign, and
 - implement a revised ADR scheme to be managed by an independent facilitator. The scheme must offer informal resolution, mediation, expert opinion and binding determination to licensees and members. The ADR scheme must incorporate a consultative committee to provide feedback and other advisory input to APRA and to the facilitator.
- 6.4. The ACCC is proposing to impose conditions of authorisation requiring APRA to maintain these arrangements.
- 6.5. The ACCC considers that an effective ADR scheme, such as that imposed by the ACCC's 2014 condition of authorisation, can reduce the public detriment generated by APRA's market power by helping redress imbalances in bargaining power between APRA and licensees. However, while feedback about APRA's ADR scheme from those who have used it has been generally positive, some interested parties have raised concerns that take up of the scheme by licensees has not been as high as anticipated due to a lack of awareness among licensees about the scheme. To address this issue, the ACCC is proposing to require APRA to take steps to better publicise the availability of the scheme.
- 6.6. The ACCC is also proposing to impose additional conditions on APRA's authorisation which focus on improving the transparency of APRA's licensing and distribution arrangements. The proposed conditions about APRA's licensing schemes require APRA to publish its methodology for calculating its licence fees for each licence category, including relevant data, economic analysis or examination, and matters taken into consideration in determining each licence fee. The proposed conditions also require APRA to publish an explanation of the matters it has taken into account any time it increases a licence fee, other than increases in line with CPI.

²²⁴ *Application by Medicines Australia Inc* (2007) ATPR 42-164 at [106].

²²⁵ *Application by Medicines Australia Inc* (2007) ATPR 42-164 at [126].

²²⁶ Section 88(3).

²²⁷ Section 88(3).

- 6.7. In relation to APRA's distribution of royalties to its members, the ACCC is proposing a condition of authorisation requiring APRA to publish details of accounting and distribution of licence revenue and, if requested by a licensee, provide detailed information about particular rights payments made pursuant to a licence.
- 6.8. Finally, the ACCC is proposing a condition of authorisation requiring APRA to publish an annual transparency report which includes information on rights revenue, APRA's operating costs, distributions to members and amounts received from and paid to overseas collecting societies.
- 6.9. The ACCC considers that transparency about APRA's licence fees and distribution arrangements can serve to mitigate, to some extent, the effect of APRA's market power. Transparency about licence fees can assist users in negotiations with APRA and allow users to make informed decisions about acquiring licences from APRA. Transparency about distribution arrangements assists in making APRA accountable to its members, making it more likely that APRA members are remunerated in proportion to the value of actual performance of their works.
- 6.10. These conditions are outlined in full at **Attachment A**.

7. Length of authorisation

- 7.1. The Act allows the ACCC to grant authorisation for a limited period of time.²²⁸ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 7.2. In this instance, APRA seeks re-authorisation for five years. APRA submits that five years is appropriate because:
- applications for authorisation involve considerable costs which are ultimately borne by licensees and consumers and by members of APRA. More frequent applications because of short term authorisations increase those costs, and
 - short term authorisations and authorisation applications that are pending engenders uncertainty both in relation to APRA's ability to participate fully in international developments and its ability to detect and enforce copyright for the benefit of its members and ultimately consumers who seek the availability of music for performance and communication.²²⁹
- 7.3. Some interested parties submit that the authorisation should only be granted for a shorter time. The NSW Small Business Commissioner recommends that authorisation be granted for three years to allow licensees ample time to properly identify recurring issues arising from the introduction of OneMusic.²³⁰ The AVA similarly submits that an authorisation period of longer than one year is inappropriate

²²⁸ Subsection 91(1)

²²⁹ Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 49, available: [ACCC public register](#).

²³⁰ NSW Small Business Commissioner submission, dated 15 February 2019, p. 2, available from: [ACCC public register](#).

while issues relating to OneMusic remain unresolved.²³¹ Nightlife contends that authorisation should be limited to a maximum of three years.²³²

- 7.4. As noted above, while the ACCC considers that APRA's arrangements are likely to generate significant public detriment, the ACCC considers that, overall the arrangements are likely to result in a net public benefit.
- 7.5. The ACCC is also proposing to impose significant conditions of authorisation, particularly in relation to increasing the transparency of APRA's licensing and distribution arrangements. The ACCC considers that it will take some time for these changes to be implemented and for any impact of these changes on the public benefits and detriment resulting from APRA's arrangements to be observed.
- 7.6. Having regard to these factors, the ACCC proposes to grant conditional authorisation for five years.

²³¹ Australian Venues Association submission, dated 1 March 2019, available from: [ACCC public register](#).

²³² Nightlife submission, dated 6 March 2019, p. 4, available from: [ACCC public register](#).

8. Draft determination

The application

- 8.1. On 24 December 2018, APRA lodged an application to revoke authorisations A91367-A91375 and substitute authorisation AA1000433 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000433 was made under subsection 91C(1) of the Act.
- 8.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 8.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 8.4. For the reasons outlined in this draft determination and subject to the conditions in Attachment A, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 8.5. Accordingly, subject to the proposed conditions, the ACCC proposes to grant re-authorisation.

Conduct which the ACCC proposes to authorise

- 8.6. The ACCC proposes to revoke authorisations A91367-A91375 and grant conditional authorisation AA1000433 in substitution to enable APRA to continue its arrangements for the acquisition and licensing of performing rights in musical works as described in paragraph 1.17. The proposed authorisation is subject to the conditions in Attachment A.
- 8.7. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 8.8. The ACCC proposes to grant authorisation AA1000433 for five years.
- 8.9. This draft determination is made on 5 June 2019.

Next steps

- 8.10. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, APRA or an interested party may request that the ACCC hold a conference to discuss the draft determination.

Attachment A – Proposed conditions of authorisation

Condition C1 – Transparency of licence fees

C1.1 APRA must continue to maintain and publish comprehensive plain English guides that outline each of the licence categories individually. The guides, which must also be published as a single document, must also include:

- (i) a table summarising each type of licence and licence category, the basis on which fees are determined, and the range of fees payable for each licence and licence category listed
- (ii) an introduction that includes an overview of the licence categories and their use
- (iii) definitions of each of the licence categories (e.g. Recorded music for dancing use, Dance party, Featured music event and TV/large screen)
- (iv) examples of common types of licensees and the fees payable by them (e.g. nightclubs, hotels, gyms, cafes), the licence categories commonly utilised by each of those types of licensees, and the range of fees payable by each of those types of licensees
- (v) guidance on whether fees are negotiable and if so in what circumstances
- (vi) information that encourages licensees to contact APRA if they have any concerns, including the types of assistance available and the numbers to call
- (vii) the options available to licensees for resolving a dispute about licence fees, or about other licence terms and conditions
- (viii) links to the application forms for the licences and licence categories.

C1.2 Within 3 months of the ACCC's final determination being made, APRA must revise its plain English guides to each licence category to include:

- (i) the methodology for calculating the licence fee for each licence category, including relevant data, economic analysis or examination, and
- (ii) matters taken into consideration in determining each licence fee to the extent that such information is not commercial-in-confidence.

C1.3 Once updated, the revised plain English guides to each license category must be provided to all new or renewing licensees and must be prominently displayed on APRA's website (www.apra.com.au). The homepage must have a prominently displayed link to the guide as well as available links on the relevant section of APRA's website. APRA must also provide the revised comprehensive plain English guides, and information about how to obtain additional copies of the guides, to relevant industry associations (that is, industry associations that have musical work copyright holders, or licensees or potential licensees, as members) on publication.

C1.4 APRA must provide a copy of the revised plain English guides to the ACCC, prior to publishing.

C1.5 APRA must publish a revised, and up to date, version of the guides by 30 June each year (if any aspect of the content of the guide, including the content required to be published under clause C1.1 or C1.2, will no longer be current as at that date).

C1.6 APRA must publish on its website, and make available to any party upon request, each time there is an increase in a licence fee in any licence category other than increases in line with CPI, an explanation of the matters taken into consideration in determining the increase in the licence fee. The provision of such information is only required to the extent that the information is not commercial-in-confidence.

Condition C2 – Transparency of distribution arrangements

C2.1 APRA must detail in annual publications, at an anonymised or aggregate level where appropriate, the accounting and distribution of licence revenue. Categories for reporting must include, but are not limited to:

- (i) classes of licensees from whom licence revenue is received
- (ii) classes of members to whom licence revenue is paid
- (iii) categories of copyright material copied / licensed in respect of which licence revenue is received, and
- (iv) domestic vs international payments of licence revenue.

C2.2 APRA must, in response to a request by a licensee or their representative, provide detailed information about particular rights payments made pursuant to a licence. The provision of such information is only required to the extent that the information is not commercial-in-confidence and does not otherwise directly affect a commercial negotiation between APRA and the licensee or potential licensee. Such information is to be provided:

- (i) on an anonymised basis, and
- (ii) where APRA can do so at a reasonable cost.

C2.3 APRA must consult with members prior to making any substantive changes to its distribution policies.

C2.4 APRA must publish 'plain English' guidelines on its distribution policy and make them available to members and licensees.

Condition C3 – Comprehensive plain English guide for the opt out and licence back provisions

C3.1 APRA must maintain on the APRA website a plain English guide to the opt out and licence back provisions, which includes:

- (i) the purpose, scope and content of the opt out and licence back provisions
- (ii) the situations where using those provisions might be of benefit to members and licensees

- (iii) the steps involved in applying to make use of the opt out and licence back provisions (including guidance about the minimum information that an applicant must provide to APRA)
- (iv) examples of how the opt out and licence back provisions have been used to date

and attaches the APRA application forms for the licence back and opt out provisions

C3.2 At least once each calendar year, APRA must include a standard plain English paragraph in correspondence sent to licensees and members, outlining the availability and scope of the opt out and licence back provisions, and providing the web address for the guide referred to in condition C3.1 above, as well as information about how to apply.

Condition C4 – Annual Transparency Report

C4.1 APRA must publish an annual Transparency Report which includes:

- (i) information on rights revenue, including
 - (a) total rights revenue generated per type of use
 - (b) total distributable revenue per type of use
 - (c) income on investment of rights revenue, and use of such income
- (ii) information on APRA's operating costs, including
 - (a) total operating costs
 - (b) total remuneration paid to APRA's board directors
 - (c) APRA's cost to revenue ratio
- (iii) amounts due to members, including
 - (a) total revenue attributed to members
 - (b) total amount paid to members
 - (c) total amount attributed but not yet distributed to members
- (iv) information about expired undistributed funds, including:
 - (a) reasons why funds remain undistributed
 - (b) steps taken to locate and distribute funds to rightsholders
 - (c) the uses for which funds are to be applied
- (v) information about international collecting societies, including
 - (a) total amount received from other collecting societies
 - (b) total amount paid to other collecting societies

- (c) details of any social, cultural or educational services provided by APRA which are funded through deductions from rights revenue, including the total amount deducted from rights revenue.

Condition C5 – Alternative Dispute Resolution

Scheme Requirements

- C5.1 APRA must maintain an alternative dispute resolution ('**ADR**') scheme (the '**Scheme**') that is managed by an independent dispute resolution facilitator (the '**Facilitator**') for the resolution of any disputes between APRA and a licensee, or potential licensee of copyright held by APRA ('**Licensee**') or a member or potential member of APRA ('**Member**'), including complaints made to APRA by or on behalf of a Member or Licensee. The objective of the Scheme is to resolve disputes in a timely, efficient and effective manner.
- C5.2 The Scheme must include four options for resolving a dispute or complaint, or an aspect of a dispute or complaint ('**Dispute**') notified by a Member or Licensee, or by an authorised representative of one or more Members or Licensees ('**Applicant**'), as follows:
- (i) Option 1 - informal resolution: informal resolution of the Dispute in a manner facilitated by the Facilitator, with an indicative timeframe of 20 business days for resolution of the Dispute or referral of the Dispute to Options 2, 3 or 4
 - (ii) Option 2 - mediation: external mediation by an independent mediator ('**Independent Mediator**'), with an indicative timeframe of 20 business days for the resolution of the Dispute (from the date on which the Dispute is referred to Option 2)
 - (iii) Option 3 - expert opinion: a non-binding written expert opinion (including reasons) delivered by an appropriately qualified or experienced independent expert ('**Independent Expert**'), with an indicative timeframe of 20 business days for the resolution of the Dispute, and 30-60 days for preparation of the written opinion from the date on which the Dispute is referred to Option 3
 - (iv) Option 4 - binding determination: a binding written determination (including reasons) delivered by an Independent Expert, with an indicative timeframe (from the date on which the Dispute is referred to Option 4) of 30-60 days for resolution of the Dispute, or of 90 days for a Dispute involving more than one Applicant).
- C5.3 The Scheme must provide that:
- (i) a Dispute, or an aspect of a Dispute, may be referred to Options 2, 3 or 4 at any time by agreement between APRA and the Applicant, including agreement about the identity of the Independent Mediator or Independent Expert (as relevant). The resolution of each Dispute must commence with Option 1, but APRA may not withhold agreement to progress to another Option merely because the Applicant has not agreed to continue or complete the processes available under Option 1 first. If agreement cannot be reached about the identity of the Independent Mediator or Independent Expert or about progressing a Dispute to another Option, the Facilitator must refer these preliminary matters for determination (at APRA's cost) by an

Independent Expert (who must not then be otherwise appointed to hear the Dispute under the Scheme).

- (ii) the resolution of Disputes under Options 2, 3 and 4 must be carried out on terms, and in accordance with processes and procedures, established by the Independent Mediator or Independent Expert (as relevant) in accordance with practices commonly adopted in other ADR schemes for ADR options of that kind
- (iii) the Applicant (or APRA, if a non-binding written opinion has been delivered under Option 3) may also seek resolution of the Dispute by the Copyright Tribunal or by a court, rather than under the Scheme
- (iv) the Facilitator must, if requested by an Applicant, refer a function of the Facilitator set out in Schedule C (in respect of the Applicant's Dispute) to an Independent Expert (at APRA's cost)
- (v) subject to condition C5.3(vii) and conditions C5.15–C5.19, the resolution of Disputes under the Scheme is to be carried out confidentially unless all parties to a particular Dispute agree otherwise in respect of that Dispute.
- (vi) each Independent Expert may obtain such advice (including, but not limited to, economic or financial advice) as the Independent Expert considers reasonably appropriate for the purposes of resolving a Dispute, provided that the estimated costs of obtaining that advice have been approved by APRA and the Applicant, or by the Facilitator, or by another Independent Expert (at APRA's cost) if APRA or the Applicant is dissatisfied with the Facilitator's decision to approve (or not approve) those estimated costs. The actual costs of any such advice are to be included in the costs of the Independent Expert in relation to the Dispute.
- (vii) each Independent Expert who issues a binding written determination under Option 4 is to prepare and issue, to the Facilitator, a public version of that determination (excluding any confidential information of APRA, the Applicant, a Licensee or a Member) within 7 days of the date of the determination.

C5.4 APRA must procure that the Facilitator ensures that each Independent Mediator or Independent Expert:

- (i) is suitably qualified, by reason of their training and / or experience, for resolving the kinds of disputes, and for carrying out the kinds of dispute resolution processes, for which they are engaged under the Scheme
- (ii) has an understanding of copyright or the ability to properly acquire such understanding
- (iii) takes into account the matters referred to in Schedule E, if requested to do so by the Applicant.

Fees and Charges

C5.5 The Scheme must also provide that:

- (i) the fees and charges payable by Applicants under the Scheme, including provision for the reduction or waiver of those fees and charges, will be set in accordance with Schedule A (**'Fees and Charges'**)
- (ii) the relevant Fees and Charges for Option 1 are payable for all Disputes that are then referred to Options 2, 3 or 4, even if the Applicant does not complete the processes that are available under Option 1
- (iii) the Fees and Charges are payable to the Facilitator (who will then distribute them as appropriate)
- (iv) other than the Fees and Charges, each party must bear their own costs of resolving the Dispute
- (v) an Applicant may withdraw a dispute from the Scheme, except after a hearing when awaiting a written expert opinion or a binding determination under Option 3 or 4 above (in which case the Applicant may only withdraw if the withdrawal is the result of APRA and the Applicant having reached an agreed settlement of the Dispute). Unless otherwise agreed as part of the settlement of the Dispute, the Applicant must pay all Fees and Charges incurred up until the date of withdrawal.

Establishment and role of consultative committee

C5.6 APRA must maintain a consultative committee (the **'Committee'**). APRA must also permit the Facilitator to establish and maintain sub-committees of the Committee where the Facilitator considers it appropriate to do so. APRA must ensure that the members of the Committee (as appointed or reappointed from time to time by the Facilitator) consist of an equal number of representatives of:

- (i) Licensees whose annual licence fees payable to APRA are \$3,000 or less
- (ii) Licensees whose annual licence fees payable to APRA are over \$3,000
- (iii) Members whose annual royalty receipts from APRA are \$3,000 or less, other than members who have not received any royalties from APRA in the previous 24 months
- (iv) Members whose annual royalty receipts from APRA are over \$3,000

Where a representative of a Licensee or a Member is appointed to the Committee, that appointment must be as a representative of one Licensee or Member (as relevant), but a representative of a Licensee may also represent the interests of one or more other Licensees, and a representative of a Member may also represent the interests of one or more other Members.

If an insufficient number of Members or Licensees in a particular category are willing to be members of the Committee, APRA must ensure that the Facilitator appoints another Member or Licensee (as relevant) to fill that position on the Committee.

C5.7 APRA must also ensure that:

- (i) the Committee operates with the objective set out in Schedule B and performs the functions set out in Schedule B
- (ii) the Facilitator periodically invites all Members and Licensees to nominate for the Committee, and takes all nominations and other input from Members and Licensees into account in determining the members of the Committee
- (iii) the annual funding provided by APRA for the operation of the Scheme (including the costs of the Facilitator but otherwise excluding costs incurred by APRA in connection with individual Disputes) are adequate for the operation of the Scheme (taking into account the level of funding recommended by the Committee)
- (iv) it provides to the Committee all information requested by the Committee that the Committee considers necessary or appropriate for performing its functions under Schedule B (including information about the actual costs of operating the Scheme).

Appointment and role of the Facilitator

C5.8 APRA must ensure that there is an appointed Facilitator in place to operate and manage the Scheme at all times throughout the term of the authorisation. The Facilitator (including any replacement Facilitator) must:

- (i) have specialist training in ADR and have a detailed understanding and experience of dispute resolution practice and procedures which do not involve litigation
- (ii) have the capacity to determine the most appropriate alternative dispute resolution procedures in particular circumstances
- (iii) have an understanding of copyright or the capacity to quickly acquire such an understanding.

C5.9 Any replacement Facilitator must be approved by the ACCC, within 20 business days, in accordance with condition C5.13 and for a specified period of time, prior to the appointment taking effect for the purposes of these Conditions:

C5.10 APRA must ensure that each Facilitator:

- (i) operates with the objective set out in Schedule C, and performs the functions set out in Schedule C
- (ii) complies with conditions C4.3(i) and (iv)
- (iii) does not perform any work for APRA other than work relating to the Scheme or to any extensions of the Scheme
- (iv) can be, and is, removed by APRA from the position of Facilitator if the ACCC considers, having regard to the performance of the Facilitator in that role, that the Facilitator is likely to fail to adequately perform the functions set out in Schedule C.

Appointment and role of the Independent Reviewer

C5.11 No later than 18 months before the date on which this authorisation expires, APRA must appoint an independent reviewer (**'Independent Reviewer'**), to review and report on the operation and management of the Scheme. The Independent Reviewer must:

- (i) be approved by the ACCC, within 20 business days and in accordance with condition C5.13, prior to the appointment taking effect for the purposes of these conditions
- (ii) have substantial experience in reviewing the operation and performance of alternative dispute resolution schemes.

C5.12 APRA must ensure that the Independent Reviewer operates with the objective set out in Schedule D, and performs the functions set out in Schedule D.

ACCC approval of the Facilitator and Independent Reviewer

C5.13 In considering whether to approve a proposed Facilitator or a proposed Independent Reviewer, the ACCC may take into account any matter it considers relevant, including:

- (i) any previous or existing relationships between APRA (or a Member or Licensee) and the proposed Facilitator or proposed Independent Reviewer (as relevant)
- (ii) the proposed remuneration arrangements for the proposed Facilitator or proposed Independent Reviewer (as relevant).

C5.14 Prior to the ACCC making a decision about whether to approve a proposed Facilitator, APRA must provide to the ACCC:

- (i) the agreement, or proposed agreement, setting out the terms and conditions on which the proposed Facilitator or proposed Independent Reviewer (as relevant) will be engaged in connection with the Scheme
- (ii) any other information requested by the ACCC that the ACCC considers relevant.

Annual Reporting

C5.15 APRA must provide the ACCC with an annual public report, for publication on the public register of authorisations maintained in accordance with Section 89 of the *Competition and Consumer Act*, about Disputes notified to APRA under the Scheme for the previous calendar year (the **'ADR Report'**), in accordance with condition C5.16 and C5.17.

C5.16 The format of the ADR Report must be decided by the Governance Committee.

C5.17 Each ADR Report must be submitted to the ACCC prior to 1 March of each year and must concern disputes which commenced in a 12 month period ending 31 December of each year.

C5.18 Upon receipt of each ADR Report, the ACCC has the right to request additional information from Resolution Pathways and/or request Resolution Pathways to make changes to the ADR Report format.

C5.19 Each ADR Report must include:

- (i) the number of Disputes considered, and the number of Disputes resolved
- (ii) a summary of each Dispute resolved, including:
 - i. the type of dispute
 - ii. the subject matter of the dispute
 - iii. time taken to resolve the dispute
 - iv. fees incurred by Applicants and the fees borne by APRA
 - v. any outcomes, including details of any evaluations received
- (iii) for Disputes considered but not resolved, a summary of the:
 - i. reasons why those Disputes were not resolved
 - ii. the fees incurred by Applicants and the fees borne by APRA
- (iv) a summary of feedback received by APRA, and by the Facilitator, in relation to the operation of the Scheme, including the feedback and recommendations provided by the Committee (see Schedule B).

Other matters

C5.20 APRA must establish and maintain a link to information about available dispute resolution processes, including the Scheme, in a prominent location on the homepage of its own website.

C5.21 APRA must display contact details for, and information about, available dispute resolution processes, including the Scheme, prominently on the following APRA documents:

- (i) licence forms
- (ii) member statements
- (iii) licence invoices
- (iv) licence agreements, and
- (v) all initial legal correspondence with licensees, prospective licensees and members. This requirement does not extend to legal correspondence where: APRA has advised the licensee, prospective licensee or member about the Scheme in previous legal correspondence about the matter in dispute, the matter in dispute is being considered by the Copyright Tribunal or has already been referred to the ADR process.

SCHEDULE A – Fees and Charges (Condition C5.5)

Option 1

Action	Maximum fee to Licensee / Member
Initial phone discussion with the Facilitator (up to 45 minutes)	No charge
Subsequent involvement of the Facilitator (Option 1) where the amount in dispute is less than \$1,500.00 or there is a Dispute on matters that are not monetary.	\$50.00 incl. GST
Subsequent involvement of the Facilitator (Option 1) where the amount in dispute is \$1,500.00 to \$3,000.00	\$75.00 incl. GST
Subsequent involvement of the Facilitator (Option 1) where the amount in dispute is over \$3,000.00	\$150.00 incl. GST

1. Each Member or Licensee who wishes to become a party to a Dispute must pay this fee (if any) separately.
2. Where the Dispute relates to only a part of an amount specified by APRA, the undisputed parts of that amount are not to be taken into account in determining the fee payable by the Applicant.
3. The fee payable by an Applicant may be waived or reduced by the Facilitator, or with the agreement of APRA. The Facilitator must waive the fee where the Facilitator determines that the Dispute consists of a complaint.

Options 2, 3 and 4

1. Subject to paragraphs 2 and 3 below, each Applicant who is a party to a Dispute must pay 50 per cent of the fees charged, and 50 per cent of the disbursements or other costs reasonably incurred, by the Independent Mediator or Independent Expert for the resolution of the Dispute, each divided equally amongst all Applicants who are parties to the Dispute and who have agreed to that particular Option for resolution of the Dispute.
2. Subject to paragraph 3 below, fees and costs are only payable by an Applicant where the Dispute is about:
 - (i) the terms and conditions of a grant, or potential grant, of a licence of copyright by a Member to APRA, or by APRA to a Licensee
 - (ii) the implementation of the terms and conditions of a grant, or potential grant, of a licence of copyright by a Member to APRA, or by APRA to a Licensee

or where the Facilitator determines that fees and costs are to be payable in respect of the Dispute.

3. Fees and costs are not payable in respect of a Dispute where:
 - (i) the amount disputed by a Member or Licensee is less than \$10,000
 - (ii) the Dispute does not involve a disputed amount, but:
 - (a) in the case of a Licensee, the annual amount payable by the Licensee for the licensing (or potential licensing) of copyright by APRA to the Licensee is less than \$10,000
 - (b) in the case of a Member, the amount paid by APRA for the licensing of copyright by the Member to APRA in the previous twelve months is less than \$10,000; or
 - (iii) the Facilitator determines that the Dispute consists of a complaint.
4. Where the Dispute relates to only a part of an amount specified by APRA, the undisputed parts of that amount are not to be taken into account in determining the fees and costs payable by the Applicant.
5. The fees and costs payable by an Applicant may be waived or reduced by the Facilitator, the Independent Mediator or the Independent Expert (as relevant) or with the agreement of APRA.

SCHEDULE B – objective and functions of the Committee (Condition C5.7)

The objective of the Committee is to provide feedback and other advisory input to APRA and to the Facilitator in relation to the operation of the Scheme.

The functions of the Committee must include:

- (i) monitoring the operation of the Scheme, including the actual costs of the Scheme
- (ii) receiving feedback on the Scheme and communicating that feedback to the Facilitator and APRA (where appropriate)
- (iii) in consultation with the Facilitator and for each calendar year, making an annual recommendation to APRA about the budget for the operation of the Scheme
- (iv) making other recommendations to the Facilitator and to APRA about the operation of the Scheme

but not intervening in individual Disputes.

SCHEDULE C – objective and functions of the Facilitator (Condition C5.10)

The objective of the Facilitator is to manage the operation of the Scheme, and to participate in the resolution of Disputes, in a way that facilitates the resolution of Disputes in a timely, efficient and effective manner.

The functions of the Facilitator must include:

- (i) ensuring the effective operation of the Scheme
- (ii) appointing, reappointing, replacing and terminating the appointment of members of the Committee from time to time
- (iii) informing Members and Licensees about the Scheme (including informing individual Members or Licensees (as relevant) about the costs that those Members or Licensees are likely to incur under the Scheme in relation to a particular dispute) and being available to answer enquiries and questions about the Scheme
- (iv) resolving Disputes under Option 1, including by discussing issues with Applicants on a confidential basis, assisting with communications between APRA and Applicants, and narrowing down issues between APRA and Applicants
- (v) establishing a pool of suitably qualified or experienced Independent Mediators and Independent Experts (the '**DR Pool**'), including barristers and / or former judges, and persons with relevant industry and / or commercial experience, across a range of areas of expertise and geographic locations, and reviewing the composition of the pool annually
- (vi) making recommendations to APRA and to Applicants about the suitability of Options 2, 3 or 4 for resolving a particular Dispute, including recommendations about appropriate Independent Mediators or Independent Experts for resolving that Dispute (whether drawn from the DR Pool or otherwise), with the objective of resolving the Dispute quickly and efficiently
- (vii) collecting and distributing the Fees and Charges
- (viii) assisting the Independent Mediator or Independent Expert in the making of timetabling and other administrative arrangements for resolving each Dispute under Options 2, 3 and 4, including:
 - (a) arranging meetings or conferences
 - (b) receiving submissions from the parties
- (ix) distributing submissions and other relevant materials to the parties and to the Independent Mediator or Independent Expert (as relevant) with the objective of ensuring that the resolution of each Dispute progresses in a timely and efficient manner (including the objective of ensuring that all preliminary steps in relation to a dispute be completed without the need for travel)
- (x) preparing the annual ADR Report (see condition C5.15 to C5.19)
- (xi) establishing and maintaining a public website for the Scheme that is separate from APRA's own website, and publishing on that website information and documents relating to the Scheme, including:

- (a) each public ADR Report, which the Facilitator must publish no later than 1 business day after receiving it from the relevant Independent Expert, and the public version of the report of the Independent Reviewer (see Schedule D)
- (b) the curriculum vitae of each Independent Mediator and Independent Expert in the DR Pool
- (c) the public version of each binding written determination under Option 4 (see condition C5.3(vii)).

SCHEDULE D – Independent Reviewer (Condition C5.12)

The objective of the Independent Reviewer is to monitor and report on the operation of the Scheme (including whether the Scheme is resolving Disputes in a timely, efficient and effective manner).

The functions of the Independent Reviewer must include:

- (i) reviewing:
 - (a) the operation and performance of the Scheme (including without limitation the processes and procedures established under the Scheme, and the extent to which any concerns expressed by Members and or Licensees have been addressed by APRA and / or the Facilitator), and
 - (b) the performance of the Facilitator,

in accordance with the requirements of condition C3 and the Scheme's objective of resolving Disputes in a timely, efficient and effective manner.
- (ii) as part of item (i) above, obtaining feedback from APRA, the Committee, Members, Licensees and Independent Mediators/Independent Experts about the operation and performance of the Scheme, and the performance of the Facilitator
- (iii) no later than six months before this authorisation expires, preparing a report, and providing the report to the ACCC and publishing a public version of the report, on the matters reviewed under items (i) and (ii) above in respect of the period between the commencement of the Scheme and that date that is twelve months before this authorisation expires.

SCHEDULE E – Relevant Matters (condition C5.4)

1. Consider whether APRA offered the user (being a Licensee) a licence that takes into account any direct dealing or potential future direct dealing between the user and a copyright owner.
2. If so, whether in the Independent Expert's opinion, APRA offered the user (being a Licensee) a licence that reflects a genuine and workable commercial alternative to the user's blanket licence to take into account past, or potential future direct dealing between the user and a copyright owner. In expressing this opinion, the Independent Expert must have regard to whether any increase in administrative costs, charges and expenses contained in the modified blanket licence are reasonable, having regard to the administrative costs to APRA of offering and providing to the user a modified blanket licence.
3. Whether any amendments could be made to the user's licence (or if the user is not a licensee, to the blanket licence offered) so that the licence provides a genuine and workable alternative to the user relying on a blanket licence.