

Commonwealth of Australia

*Competition and Consumer Act 2010 — subsection 91C (1)*

**APPLICATION FOR REVOCATION OF A NON-MERGER AUTHORISATION AND  
SUBSTITUTION OF A NEW AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 91C(1) of the *Competition and Consumer Act 2010* for the revocation of an authorisation and the substitution of a new authorisation for the one revoked.

**Applicants**

**1. Provide details of the applicants for revocation and substitution, including:**

**1.1 Name, address (registered office), telephone number, and ACN**

Australasian Performing Right Association Limited

16 Mountain Street, Ultimo, New South Wales, 2007

02 9935 7900

ACN 000 016 099

**1.2 Contact person's name, position, telephone number, and email address**

Please see 13.

**1.3 Description of business activities**

The acquisition of the right to grant, and the granting of, licences to communicate and to perform in public musical and associated literary works.

**1.4 Email address for service of documents in Australia.**

haddock@bhf.com.au

**Authorisation to be revoked (the existing authorisation)**

**2. Provide details of the authorisation sought to be revoked including:**

**2.1 The registration number and date of the authorisation which is to be revoked**

A91367; A91368; A91369; A91370; A91371; A91372; A91373; A91374; and A91375, all of which are dated 6 June 2014.

**2.2 Other persons and/or classes of persons who are a party to the authorisation which is to be revoked**

Not applicable

**2.3 The basis for seeking revocation, for example because the conduct has changed or because the existing authorisation is due to expire.**

The existing authorisations expires on 28 June 2019.

### **Authorisation to be substituted (the new authorisation)**

**3. If applicable, provide details of any other persons and/or classes of persons who also propose to engage, or become engaged, in the proposed conduct and on whose behalf authorisation is sought. Where relevant provide:**

**3.1 Name, address (registered office), telephone number, and ACN**

Not applicable

**3.2 Contact person's name, telephone number, and email address**

Not applicable

**3.3 Description of business activities.**

Not applicable

### **The proposed conduct**

**4. Provide details of the proposed conduct, including:**

**4.1 Description of the proposed conduct and any documents that detail the terms of the proposed conduct**

[A91367] – The Applicant's output arrangements, that is, the applicant's licensing arrangements (in particular its blanket licensing schemes).

[A91368] – The Applicant's input arrangements arising from the Applicant's constitution (in particular articles 9 and 17).

[A91369] – The Applicant's input arrangements arising from the standard form of assignment for the Applicant's members.

[A91370] – The Applicant's output arrangements (that is, the Applicant's licensing arrangements, in particular its blanket licensing schemes).

[A91371] – The Applicant's input arrangements arising from the Applicant's constitution (in particular, Articles 9 and 17). Please see the Applicant's constitution.

[A91372] – The Applicant's input arrangements arising from the standard form of assignment for the Applicant's members.

[A91373] – The Applicant's overseas arrangements with affiliated international collecting societies. The contract between the Applicant and Society of Composers, Authors and Music Publishers of Canada (**SOCAN**), dated 30 November 1999, whereby under Article 1(1) SOCAN assigns to the Applicant the performing right in the works in SOCAN's repertoire for the territories controlled by the Applicant, a copy of which is annexed to this application.

[A91374] – The Applicant's overseas arrangements with affiliated international collecting societies. The contract between the Applicant and SOCAN as referred to above, whereby under Article 1(1) SOCAN assigns to the Applicant the performing right in the works in SOCAN's repertoire for the territories controlled by the Applicant, a copy of which is annexed to this application.

[A91375] – The Applicant's distribution arrangements arising from the Applicant's constitution (in particular, Article 93 and the Applicant's "Distribution

Rules”). Please see the Applicant’s constitution (in particular Article 93) and “Distribution Rules”.

**4.2 Outline of any changes to the conduct between the existing authorisation and the new authorisation**

See the Applicant’s accompanying submissions.

**4.3 Relevant provisions of the *Competition and Consumer Act 2010* (Cth) (the Act) to which the proposed conduct would or might apply, ie:**

Sections 45AA and 45.

**4.4 Rationale for the proposed conduct**

See the Applicant’s accompanying submissions.

**4.5 Term of authorisation sought and reasons for seeking this period.**

The Applicant seeks authorisation for a period of five years. The grounds for an authorisation for five years are set out in detail the Applicant’s submissions.

**5. Provide the name of persons, or classes of persons, who may be directly impacted by the proposed conduct (e.g. targets of a proposed collective bargaining arrangement; suppliers or acquirers of the relevant goods or services) and detail how or why they might be impacted.**

See the Applicant’s accompanying submissions.

**Market information and concentration**

**6. Describe the products and/or services, and the geographic areas, supplied by the applicants and identify all products and services in which two or more parties to the proposed conduct overlap (compete with each other) or have a vertical relationship (eg supplier-customer).**

See the Applicant’s accompanying submissions.

**7. Describe the relevant industry or industries. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process.**

See the Applicant’s accompanying submissions.

**8. In respect of the overlapping products and/or services identified, provide estimated market shares for each of the parties where readily available.**

See the Applicant’s accompanying submissions.

9. Describe the competitive constraints on the parties to the proposed conduct, including any likely change to those constraints should authorisation be granted. You should address:

9.1 existing or potential competitors

See the Applicant's accompanying submissions.

9.2 the likelihood of entry by new competitors

See the Applicant's accompanying submissions.

9.3 any countervailing power of customers and/or suppliers

See the Applicant's accompanying submissions.

9.4 any other relevant factors.

See the Applicant's accompanying submissions.

#### **Public benefit**

10. Describe the benefits to the public that are likely to result from the proposed conduct. Refer to the public benefit that resulted under the authorisation previously granted. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits.

See the Applicant's accompanying submissions.

#### **Public detriment including any competition effects**

11. Describe any detriments to the public likely to result from the proposed conduct, including those likely to result from any lessening of competition. Refer to the public detriment that may have resulted under the authorisation previously granted. Provide information, data, documents, or other evidence relevant to the ACCC assessment of the detriments.

See the Applicant's accompanying submissions.

#### **Contact details of relevant market participants**

12. Identify and/or provide contact details (phone number and email address) for likely interested parties such as actual or potential competitors, customers and suppliers, trade or industry associations and regulators.

The Applicant will provide this information separately.

#### **Additional information**

13. Provide any other information or documents you consider relevant to the ACCC's assessment of the proposed application.

Katherine Amy Haddock, solicitor for the Applicant, is the person authorised by the parties seeking revocation of authorisation and substitution of a replacement



authorisation to provide additional information in relation to this application.

Please contact Ms Haddock at:

Banki Haddock Fiora  
Level 10, 179 Elizabeth Street  
Sydney NSW 2000

t: 61 2 9266 3412

e: [haddock@bhf.com.au](mailto:haddock@bhf.com.au)

**Declaration by Applicant(s)**

Authorised persons of the applicant(s) must complete the following declaration. Where there are multiple applicants, a separate declaration should be completed by each applicant.

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).

*K Habdock*  
.....

Signature of authorised person

*Katherine Habdock*  
.....

Office held

*KATHERINE AULY HADDOCK*  
.....

(Print) Name of authorised person

This 21<sup>st</sup> day of December 2018

Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.

CONTRACT OF RECIPROCAL REPRESENTATION

Between the undersigned:

- SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA - SOCIETE CANADIENNE DES AUTEURS, COMPOSITEURS ET EDITEURS DE MUSIQUE, hereinafter designated "SOCAN", whose registered office is at 41 Valleybrook Drive, Don Mills, Ontario, M3B 2S6, Canada; represented by its Chief Executive Officer, Jan V. Matejcek

on the one part;

and

- AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED hereinafter designated APRA, whose registered office is at 1A, Eden Street, Crows Nest, New South Wales, 2065, Australia; represented by its Chief Executive, Brett Cottle

on the other part;

it is agreed as follows:

Art. 1.- (I) By virtue of the present contract, SOCAN assigns to APRA the performing right (as defined in paragraph III of this Article), in the territories in which this latter Society operates (as defined and delimited in Art. 6 (1) hereafter), and the right to authorize all public performances (as defined in paragraph III of this Article) of musical works, with or without lyrics, which are protected under the terms of national laws, bilateral treaties and multilateral international conventions relating to the author's right (copyright, intellectual property, etc.) now in existence or which may come into existence and enter into effect while the present contract is in force.

The assignment of the performing right referred to in the preceding paragraph is conferred in so far as the performing right in the works concerned has been, or shall be, during the period when the present contract is in force, assigned, transferred or granted by whatever means, for the purpose of its administration, to SOCAN by its members, in accordance with its By-Laws and Rules, the said works collectively constituting "the repertoire of SOCAN".

(II) Reciprocally, by virtue of the present contract, APRA assigns to SOCAN the performing right (as defined in paragraph III of this Article), in the territory in which this latter Society operates (as defined in Art. (I) hereafter) and the right to authorize all public performances (as defined in paragraph III of this Article) of musical works, with or without lyrics, ~~which are protected under the terms of national laws, bilateral treaties and multilateral international conventions relating to the author's right (copyright, intellectual property, etc.) now in existence or which may come into existence and enter into effect while the present contract is in force.~~

The assignment of the performing right referred to in the preceding paragraph is assigned insofar as the performing right in the works concerned has been, or shall be, during the period when the present contract is in force, assigned, transferred or granted by whatever means, for the purpose of its administration, to APRA by its members, in accordance with its Articles of Association and Rules, the said works collectively constituting "the repertoire of APRA".

(III) Under the terms of the present contract, the expression "performing right" includes any right that now exists or may exist in the future of performance of any musical work in public by any means whether now known or later invented and in any manner, or of communication of any musical work to the public by telecommunication or authorizing or prohibiting any public performance or any communication of any work to the public by telecommunication within the territories in which each of the contracting Societies operates. "Public performance" shall have a

corresponding meaning and without limiting the generality of the foregoing, includes performances whether instrumental or vocal or both and whether provided by live means, by mechanical means (including but not limited to analog or digital sound recordings whether phonographic recordings, discs, wires, tapes, sound tracks and similar devices capable of reproducing sound); by processes of projection (including but not limited to videogrammes, whether sound film, tape, and similar devices capable of reproducing sound); by means of telecommunication (including but not limited to wire, radio, visual, optical or other electromagnetic system) and whether by radiocommunication, broadcast, diffusion or other transmission; and by any process whatsoever whether wired or wireless, (including but not limited to radio, television, telephonic apparatus, cable, fibre optic, satellite and similar means and devices); and whether made directly, relayed, rebroadcast or retransmitted.

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With regard to direct broadcasting by satellite, the contracting Societies agree that the rights conferred by virtue of Art. 1 of this Contract are not limited to the territories of operation but are valid for all countries within the footprint of the satellite of which the transmissions are effected from the territories in which a contracting Society operates, subject to having consulted the other contracting Society beforehand as to the conditions under which the authorizations required for such transmissions may be delivered, insofar as the territories in which it operates are situated within the satellite's footprint.

(IV) Nothing in the present contract shall imply authorization, consent or grant of any licenses in respect of mechanical reproduction rights or synchronization rights.

Art. 2.- (I) The assignment of the performing right as referred to in Art. 1, entitles each of the contracting Societies, within the limits of the powers pertaining to it by virtue of the present contract, and of its own By-Laws, Articles of Association and Rules, and of the national legislation of the country or countries in which it operates;

- a) to permit or prohibit, whether in its own name or that of the copyright owner concerned, public performances of works in the repertoire of the other Society and to issue the necessary authorizations for such performances;
- b) to collect all royalties required in return for the authorizations issued by it (as provided in a) above);
- c) to receive all sums due as indemnification or damages for unauthorized performances of the works in question;
- d) to commence and pursue, either in its own name or that of the copyright owner concerned, any legal action against any person or corporate body and any administrative or other authority responsible for illegal performances of the works in question;
- e) to transact, compromise, submit to arbitration, refer to any Court of Law, ~~special or administrative tribunal;~~
- f) to take other action for the purpose of ensuring the protection of the public performance right in the works covered by the present contract.

(II) The present contract being personal to the contracting Societies, and concluded on that basis, it is formally agreed that, without the express written authorization of one of the contracting Societies, the other contracting Society may not in any circumstances assign or transfer to a third party all or part of the exercise of the prerogatives or faculties to which it is otherwise entitled under the said contract and in particular under Art. 2 (I). Any transfer effected contrary to this clause shall be null and void without the fulfillment of any formality, except as regards a transfer limited to the administration of rights for purposes of diffusion by means of a fixed service satellite or similar device and operated in favour of a Society having concluded a reciprocal representation contract with each of the contracting Societies.

Art. 3,- (I) By virtue of the powers conferred by Articles 1 and 2, each of the contracting parties undertakes to enforce within the territory in which it operates the rights of the members of the other party in the same way and to the same extent as it does for its own members, and to do this within the

limits of the legal protection afforded to a foreign work in the country where protection is claimed, unless, by virtue of the present contract, such protection not being specifically provided in law, it is possible to ensure an equivalent protection. Moreover, the contracting parties undertake to uphold to the greatest possible extent, by way of the appropriate measures and rules, applied in the field of royalty distribution, the principle of solidarity as between the members of both Societies, even where by the effect of local law foreign works are subject to discrimination.

In particular, each Society shall apply to works in the repertoire of the other Society the same tariffs, methods and means of collection and distribution of royalties as those which it applies to works in its own repertoire.

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(II) Each of the contracting Societies undertakes to send to the other Society any information for which it may be asked concerning the tariffs it applies to different kinds of public performance in its own territories.

(III) For the purpose of co-ordinating their efforts to raise the level of copyright protection in their respective countries and with a view to equating the economic content of the present contract, each society undertakes, at the request of the other Society, to seek the most effective means to this end.

Art. 4 - Each of the contracting parties shall place at the disposal of the other all documents enabling the latter to justify the repertoire it is responsible for licensing and the royalties it is responsible for collecting under the present contract and to take any legal or other action, as mentioned in Art. 2 (I) above.

Art. 5 - (I) Each contracting party shall place at the disposal of the other all documents, records and information enabling it to exercise effective and thorough control over its interests, in particular as regards notification

of works, collection and distribution of royalties, and obtaining and verifying performance programmes. In particular, each contracting party shall inform the other of any discrepancy which it notes between the documentation received from the other Society and its own documentation or that furnished by another Society.

(II) In addition, each of the Societies shall have the right to consult all the other Society's records and to obtain all information from it relating to the collection and distribution of royalties to enable it to verify the administration of its repertoire by the other Society.

(III) Each contracting Society may accredit a representative to ~~the other Society to carry out on its behalf the verification provided for~~ in paragraphs (I) and (II) above. The choice of this representative shall be subject to the approval of the Society to which he or she is to be accredited. Refusal of such approval must be motivated.

#### TERRITORY

Art. 6.- The territory in which SOCAN operates is Canada.  
The territory in which APRA operates is as listed in Annex I, attached.

#### DISTRIBUTION OF ROYALTIES

Art. 7. - (I) Each Society undertakes to do its utmost to obtain programmes of public performances which take place in its territories and to use these programmes as the effective basis for the distribution of the total net royalties collected.



(II) The allocation of sums collected in respect of works performed in the territories of each Society shall be made in accordance with Art. 3 and the distribution rules of the distributing Society, having regard, nevertheless, to the International Documentation and Distribution Procedures established by the Technical Committee of BIEM and CISAC, and any subsequent amendments to or new versions of those procedures.

Art. 8. - (I) Each Society shall be entitled to deduct from the sums it collects on behalf of the other Society the percentage necessary to cover its effective administration expenses. This necessary percentage shall not exceed that which is deducted for this purpose from sums collected for members of the distributing Society, and the latter Society shall always endeavour in this respect to keep within reasonable limits, having regard to ~~local conditions in the territories in which it operates.~~

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(II) When it does not make any supplementary collection for the purpose of supporting its members' pensions, benevolent or provident funds, or for the encouragement of the national arts, or in favour of any funds serving similar purposes, each of the Societies shall be entitled to deduct from the sums collected by it on behalf of the co-contracting Society 10% at the maximum, which shall be allocated to the said purposes.

(III) Any other deductions, apart from taxes, that either of the contracting Societies may make or be obliged to make from the net royalties accruing to the other Society would require special arrangements between the contracting parties so as to enable the Society not making such deductions to recoup itself as far as possible from the royalties collected by it for the account of the other Society.

(IV) No part of the royalties collected by either Society for the account of the other in consideration of the authorizations which it issues solely for the copyright works which it is authorized to administer may be regarded as not distributable to the other Society. With the exception, therefore, only of the deduction mentioned in paragraph (I) of this Article, and subject to the provisions of paragraphs (II) and (III) of the said

Article, the net total of the royalties collected by one of the contracting Societies for the account of the other shall be entirely and effectively distributed to the latter.

Art. 9. - (I) Each of the contracting Societies shall distribute to the other the sums due under the terms of the present contract at least once a year or as otherwise mutually agreed from time to time. Payment of these sums shall be made within 90 days following each distribution statement sent to the other Society, barring circumstances outside the Societies' control.

(II) Each payment shall be accompanied by a distribution statement in such form as to enable the other Society to allocate to each interested party, whatever his membership or category as member, the royalties accruing to him. These statements shall be uniform in style and content and conform as far as possible to the standards recommended from time to time by the Technical Committee of BIEM and CISAC and approved by the Administrative Council of CISAC.

(III) Settlements shall be made by each Society in a transferrable currency at international rates current on the date of payment.

(IV) Each Society shall remain responsible to the other for any error or omission which it may make in the distribution of the royalties accruing to works in the repertoire of the other Society.

(V) The fact that the date for settlement of accounts agreed upon between the contracting Societies has fallen due shall constitute without any formality, a formal demand on the Society which has failed to make the payment due to the other Society on the date in question. This provision shall be subject to force majeure.

(VI) If legislative or statutory measures impede the free exchange of international payments, or exchange control agreements have been or will be concluded in the future, between the countries of the two contracting Societies, each Society shall:

- a) without delay, immediately after drawing up the distribution accounting for the other Society, take all necessary steps and comply with all formalities as required by its national authorities in order to ensure that the said payments can be effected at the earliest possible moment;
- b) inform the other Society that the said steps have been taken and formalities complied with when sending to it the statements mentioned in paragraph (II) of the present Article.

Art. 10.- (I) Each Society undertakes to supply on a regular basis to the CAE Centre of CISAC (SUISA) complete and detailed information on the real names and the pseudonyms of its members, including dates of decease, deletions and alterations. Furthermore each Society undertakes to use the CAE List output as the basis for its identification of and distribution in respect of the membership of the other Society.

(II) Each Society shall also provide the other with a copy of its current Articles of Association, By-Laws and Rules, including its Distribution Plan, and shall inform it of any subsequent modifications made thereto while the present contract is in force.

Art. 11.- (I) The members of each contracting society shall be protected and represented by the other Society under the present contract without the said members being required by the Society representing them to comply with any formalities and without their being required to join the other society.

(II) While this contract is in force, neither of the contracting Societies may, without the consent of the other, accept as member any member of the other Society or any natural person, firm or company having the nationality of one of the countries in which the other Society operates. Any refusal to consent to such acceptance by the other Society must be duly motivated. In the absence of a reply within three months, following a request sent by recorded delivery letter, it shall be presumed that agreement has been given.

(III) Nevertheless, the preceding clause shall not be interpreted as prohibiting either of the contracting Societies from accepting as members natural persons who enjoy refugee status in its own territories of operation, or who have been authorized to settle there and have actually been resident there for at least one year, and to do so as long as they continue to reside there. Such membership shall not apply to the territory of the Society operating in the country of which the author is a national.

(IV) Each contracting Society undertakes not to communicate directly with members of the other society, but, if the occasion arises, to communicate with them through the intermediary of the other Society.

(V) Any disputes or difficulties which may arise between the two contracting Societies relating to the membership of an interested party or assignee shall be settled amicably between them in the widest spirit of conciliation.

Art. 12. - The contracting Societies shall have regard to the provisions of the Statutes and decisions of the International Confederation of Societies of Authors and Composers.

#### ENTRY INTO FORCE

Art. 13. - (I) The present contract replaces the contract effective from July 1, 1958 between Composers, Authors and Publishers Association of Canada, Ltd. (CAPAC) and APRA, and the contract effective from July 1, 1983 between Performing Rights Organization of Canada Ltd. - Société de Droits d'Exécution du Canada Ltée. (PROCAN/SDE) and APRA.

(II) The contractual rights and obligations of CAPAC and PROCAN having been assigned to SOCAN, SOCAN undertakes to respect and apply the terms and conditions of the contracts previously in force with regard to the period prior to the entry into force of the present contract.

Reciprocally APRA undertakes to respect and apply to SOCAN the terms and conditions of the contracts previously in force with CAPAC and PROCAN with regard to the period prior to the entry into force of the present contract.

(III) The present contract shall come into force for an initial period of five years as from the 1st day of January, 1991 and, subject to the terms of Art. 14, shall continue in force from year to year by automatic extension if it has not been determined by certified mail at least six months before the expiration of each period.

Art. 14.- Notwithstanding the terms of Art. 13 (III), the present contract may be determined by one of the contracting Societies:

- a) if an alteration is made in the Articles of Association, By-Laws or Distribution Plan of the other Society such as may modify in an appreciably unfavorable way the enjoyment or exercise of the patrimonial rights of the present owners of the copyrights administered by the Society represented. Any change of this nature shall be verified by the competent body of CISAC. After such verification the Administrative Council of CISAC may allow the representing Society a period of three months to remedy the situation thus created. When this period has expired without the necessary steps having been taken by the Society in question the present contract may be terminated by the unilaterally expressed wish of the Society represented, if it so decides;
- b) if such a legal or factual situation arises in the country of one of the contracting Societies that the members of the other Society are placed in a less favorable position than the members of the Society of the said country, or if one of the contracting Societies puts into practice measures resulting in a boycott of the works in the repertoire of the other contracting Society.

## LEGAL DISPUTES - JURISDICTION

Art. 15.- (I) Each of the contracting Societies may seek the advice of the Administrative Council of CISAC about any difficulty which may arise between the two Societies regarding the interpretation or performance of this contract.

(II) The two Societies may, if need be, and after attempting conciliation before the body mentioned in Article 10 b) 6th paragraph of the Statutes, agree to resort to arbitration by CISAC's appropriate authority in order to settle any dispute that may arise between them with regard to the present contract.

(III) If the two contracting Societies do not think it appropriate to resort to arbitration by CISAC, or to arrange between them for arbitration, even independently of CISAC, in order to settle their disagreement, the competent Court to decide the issue between them shall be that in which the defendant Society is domiciled.

Executed in good faith in the English language, in two copies.

Dated in Don Mills on November 15, 1990

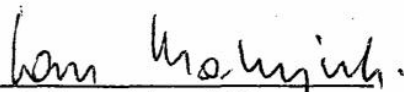
and in *Sydney* on *November 30, 1990*

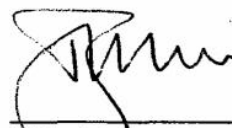
SOCIETY OF COMPOSERS, AUTHORS AND  
MUSIC PUBLISHERS OF CANADA -  
SOCIETE CANADIENNE DES AUTEURS,  
COMPOSITEURS ET EDITEURS  
DE MUSIQUE.

AUSTRALASIAN PERFORMING RIGHT  
ASSOCIATION LIMITED

Per: Jan V. Matejcek

Per: Brett Cottle

  
\_\_\_\_\_  
Chief Executive Officer

  
\_\_\_\_\_  
Chief Executive

ANNEX I

With regard to Article 6 (I), the territories in which  
APRA operates are as follows: -

Ashmore Island  
Australia  
Australian Antarctic  
Territory  
Cartier Island  
Christmas Island  
Cocos (Keeling) Islands  
Fiji Islands  
Heard Island  
Macquarie Island  
McDonald Island  
Nauru  
New Guinea  
New Zealand  
Niue (Savage) Island  
Norfolk Island  
Papua  
Ross Dependency  
Soloman Islands  
Tokelau (Union) Islands  
Western Samoa

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED  
APPLICATIONS FOR REVOCATION AND SUBSTITUTION: AUTHORISATIONS A91367 –  
A91375  
SUBMISSIONS

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## ATTACHMENTS

Document number	Details
1	Copyright Act, section 31
2	CONFIDENTIAL APRA's Operations
2a	APRA's Operations – public version
3	APRA Constitution current as at November 2108
4, 4a - 4e	Annual Reports 2013 – 2018
5, 5a – 5f	Membership Application Documents
6	List of Affiliated Societies
7, 7a	Public Performance Licence Schemes and Plain English Guides
8, 8a	CONFIDENTIAL Examples of Broadcast Licence Schemes
9	Examples of Online Licence Schemes
10	CONFIDENTIAL Examples of Negotiated Online Licences
11	Distribution Rules
12	Distribution Practices
13	Copyright Tribunal of Australia - overview
14	Copyright Tribunal of Australia - Draft Practice Note
15, 15a – 15d	Plain English Guides to Opt Out and licence back for members and licensees, and associated documents
16	CONFIDENTIAL Opt Outs and Licences Back
17, 17a	CONFIDENTIAL Guide to CLEF and CONFIDENTIAL CLEF in Plain English
18	ARIA Top 100 Singles of 2017
19	Current Code of Conduct for Australian Collecting Societies
20, 20a-20e	Code of Conduct Compliance Reports 2013 – 2018
21	Triennial Review Report of the Code 2014
21a	Supplementary Review Report 2014
21b	Triennial Review Report of the Code 2017
22	Department of Communications and Arts' Bureau of Communications and Arts Research Draft Report
23	CONFIDENTIAL CISAC special purpose vehicles document
24	CONFIDENTIAL Examples of discounting clauses

## Structure of this application

### Executive Summary

**Part A:** introductory information and identifies more precisely those aspects of the ACCC's conclusions in the 2014 Determination which continue to apply.

**Part B:** changes in the relevant market since APRA's existing authorisations were granted by the ACCC in June 2014, the effects of these changes that are relevant to the market in which APRA operates and whether those changes are likely to continue for at least five years into the future.

**Part C:** review of how the public benefits arising out of APRA's conduct and arrangements have been enhanced and potential detriments reduced by recent developments and why, therefore, the re-authorisation applications should be granted.

The **Attachments** contain documents and detailed information regarding some aspects of APRA's operations and other matters raised in these submissions.

**Confidential material** is highlighted in red and is not for disclosure to the public. A non confidential version of these submissions will be provided for publication.

## Executive summary

1. Australasian Performing Right Association Limited (**APRA**) applies for revocation of the ACCC's existing authorisations of APRA's arrangements and substitution of new authorisations for a period of five years. In effect, it is a re-authorisation application.
2. APRA's arrangements that are the subject of the present applications for revocation and substitution are:
  - (a) **input arrangements**
    - (i) APRA requires its members to assign to it the performing and communication rights in all of the works owned or controlled by the member, subject to the resignation, opt-out and licence back provisions of APRA's Constitution (see Attachments 1 -5, 5a-f) (**domestic arrangements**);
    - (ii) APRA's reciprocal arrangements with overseas collecting societies (see Attachment 6) by which, for the most part, the collecting societies grant each other the exclusive right to license works they respectively control (**overseas arrangements**);
  - (b) **output arrangements** – APRA grants licences in whatever form is most appropriate for users to perform or communicate any of the works in its repertoire (see Attachment 7, Confidential Attachment 8, Attachment 9, and Confidential Attachment 10) ; and
  - (c) **distribution arrangements** – APRA's rules require the distribution of at least 50% of royalties in relation to any work to be paid to the composer of the work (see Attachments 11 and 12)
3. The current Applications relate to substantively the same arrangements and conduct as were the subject of the ACCC's Determination to grant the existing authorisations (A 91367 - A91375) (**2014 Determination**). APRA submits that significant developments in the market notwithstanding, the conclusions reached by the ACCC in 2014 in relation to:
  - (a) the background;
  - (b) the market;
  - (c) the most likely counterfactual;
  - (d) the public benefits of APRA's arrangements;
  - (e) the extent to which the potential detriments are mitigated by APRA's licence back and opt out arrangements, and by the Conditions under the 2014 Determination; or
  - (f) the weighing of benefit and detriment,remain valid.
4. An analysis of developments since 2014 (discussed in Parts B and C below) shows that the ACCC's conclusion reached four years ago that public benefits outweigh the

public detriments remains valid, and that therefore it is appropriate to revoke the existing authorisations and substitute new ones on substantially the same grounds.

5. In 2014, the ACCC expressed the view that technological developments were likely to render less necessary certain aspects of the APRA system. APRA is investing heavily in technology that is designed to make all aspects of the performing right markets more efficient. However, those and other technological developments are currently at a stage where various markets impacted by the APRA system are precarious and volatile. In those circumstances, APRA provides stability and the assurance for new markets to develop.
6. APRA's submission focuses on the ACCC's conclusions in 2014, the developments since the existing authorisations were granted and their impact on the conclusion that the public benefits outweigh the public detriments. In APRA's submission, developments over the last four years have only reduced any potential competitive detriment and increased scope for competition in the market for the acquisition and supply of performance and communication rights for music in Australia. The public benefits inherent in APRA's conduct and arrangements have also been enhanced in this period, including because APRA acts as a safety net to ensure that new business models can develop without infringing copyright. The developments since 2014 are compelling in favour of re-authorisation.
7. A number of major practical changes to APRA's systems are in the process of being implemented. This submission proceeds on the basis that they will have come into effect during the course of the authorisation process (that is, by or soon after 1 July 2019). However, it is possible that at some stage during the ACCC's consideration of this application that APRA will be required to seek interim authorisation for its existing practices, while its new practices are finalised. None of the changes has an impact on the legal basis for APRA's operations.
8. Part B sets out in detail the more significant developments which have occurred in the market since April 2014 or are to occur in the very near future, which can be summarised as follows:
  - (a) *Licence back and opt out awareness.* Since 2014, APRA has developed and promoted plain English guides for licensees and members to make the licence back and opt out processes more accessible. Where reasonable to do so, APRA waives the fees for members who utilise the licence back and opt out facilities. APRA's new technology platform, discussed below, is intended to streamline and simplify the licence back procedures further.
  - (b) *Effective expert determination of disputes with licensees and potential licensees.* During the period of the existing authorisations, APRA implemented Resolution Pathways, a purpose designed ADR system for disputes with licensees and disputes between members. Resolution Pathways has been awarded by the Australian Disputes Centre for excellence in the area of Alternative Dispute Resolution, and recently has been independently reviewed and the results of that review are discussed below in this submission.
  - (c) *Integration of APRA and PCCA public performance licensing will revolutionise the consumer experience of licensing.* APRA and PCCA have formed a joint licensing initiative to deliver music licensing from a single point, in a system successfully trialled in New Zealand and here known as OneMusic Australia. The new operation is due to commence on 1 July 2019, and is expected to remove much of the consumer confusion around music

licensing. As OneMusic Australia will be operated by APRA, conditions of APRA's authorisations (including plain English guides to licence schemes, and access to Resolution Pathways) will apply to its activities, which will benefit licensees.

- (d) *APRA is in the process of building a technological solution to improve both the customer experience and efficiency of APRA's licensing process that will also deliver additional flexibility for members.* APRA has invested significant sums in the development of its Copyright Licensing Enterprise Facility or CLEF system, which is expected to go live in 2019. The system has been designed to deliver unprecedented flexibility in licensing and membership options.
- (e) [CONFIDENTIAL]
- (f) *Changes to voting structure.* In 2018, the APRA membership voted to increase the number of dollars for which members receive an additional vote. By increasing the relative value of the votes of lower earning members, and diluting the voting power of the higher earning members, the changes will have a democratising effect.
- (g) *Technological changes and new digital businesses.* The changes that have occurred in digital media since 2014 are significant and ongoing. APRA has continued to license digital streaming services and the plethora of other digital businesses that deliver and use music. APRA has developed a number of new licence schemes since 2014, and has negotiated individual licences where necessary. In these ways, APRA has provided certainty and a relatively inexpensive means for new ways of accessing music to emerge and compete in the market without the concerns of a potential failure of supply of product. This has all been achieved in an environment where technological changes have also given rise to even more sophisticated means of using music in a way that infringes copyright.
- (h) *Developments in piracy.* Piracy continues to be a significant problem for copyright owners. This was recognised by the Commonwealth legislature in 2015 when it passed the *Copyright Amendment (Online Infringement) Act*. APRA has already participated in one successful action against a website whose purpose was to facilitate copyright infringement, and a second application was due to be filed on 21 December 2018.
- (i) *Music Recognition Technology (MRT).* APRA has also invested significantly in MRT for the purpose of increasing the accuracy of distribution and facilitating adjustments to blanket licence fees where works not controlled by APRA are performed.
- (j) *Discounted blanket licences.* APRA 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.
- (k) *Review of the Code of Conduct for Australian Collecting Societies.* In 2017, the Department of Communication and the Arts conducted a review of the extent to which the Code of Conduct promotes fair and efficient outcomes

for both members and licensees of copyright collecting societies. The review was conducted by the Bureau of Communications and Arts Research (BCAR) in consultation with the ACCC. The final results of the review have not yet been made publicly available, but it is anticipated that changes will be made to the Code by 30 June 2019.

- (l) *Changes to Copyright Tribunal procedures.* In around 2016 the Copyright Tribunal published a draft Practice Note that aims to significantly streamline the procedures of the Tribunal, particularly with respect to expert evidence. In November 2018 the ACCC issued draft guidelines under section 157A of the *Copyright Act 1968*.
- (m) *Continuing and significant international discussions between collecting societies with a view to facilitating multi territory online licences.* The GRD project that featured in APRA's 2013 submissions with respect to the existing authorisations did not eventuate. Instead, CISAC societies are exploring a more hub-based approach to multi territorial digital licensing, and APRA is poised to be central in the licensing of music services throughout the Asia Pacific region. This has required APRA to develop a more agile approach to licensing generally, particularly digital services, which has been of benefit to members and licensees.

9. The changes that have occurred since 2014 have made APRA more responsive to users and increased the ability of members to compete with it. There are also more sources of music that is not controlled by APRA. Now more than ever, it could not be said that APRA's arrangements are likely to entrench its position or heighten any barriers to entry by other collecting societies, should they seek to enter the market. Recent developments are only likely to have increased the public benefits offered by APRA's arrangements and lessened any detriments.
10. In the 2014 Determination, the ACCC made a number of findings with which APRA does not agree. In particular, APRA is concerned by the ACCC's apparent scepticism regarding APRA's submissions regarding the importance of the exclusive mandate and the legal and practical impact of a non-exclusive input of rights into APRA (for example, in paragraphs 200 and 201 of the 2014 Determination). The exclusivity of APRA's rights is essential for the effective and efficient enforcement of APRA's rights under Australian copyright law, as described more fully in Confidential Attachment 2 (public version 2a). [CONFIDENTIAL].
11. APRA is also concerned by the comments made by the ACCC regarding the representativeness of the APRA Board (see for example paragraph 416 of the 2014 Determination). These are dealt with below (see paragraphs 144 – 146).
12. APRA does not propose in these submissions to engage with every aspect of the 2014 Determination with which it takes issue; its failure to do so should not be taken as agreement to findings made by the ACCC. APRA here proceeds from the basis of the 2014 Determination that on balance APRA's systems are in the public benefit, and shows how changes since 2014 further decrease any anti competitive detriment arising from the APRA arrangements and conduct.
13. If the ACCC continues to have any of the concerns it expressed in the 2014 Determination, APRA will address those concerns when they are raised.
14. APRA submits that, in the circumstances as they have developed since 2014, the ACCC can continue to be satisfied that the contracts, arrangements, conduct and licences for which re-authorisation is sought would result or be likely to result in such



benefits to the public that they outweigh the detriment to the public constituted by any resultant lessening of competition and that they would result or be likely to result in such benefits to the public that the contracts, arrangements, conduct and licences should be allowed to continue.

15. The experience over the last four years, the enormous evolution in both the domestic and global digital music ecosystems, and the likely developments over the short to medium term indicate that there is no detriment in having a five year period of authorisation. APRA submits that in the next five years there are unlikely to be any substantial changes in the market or in technology that alter fundamentally the balance of benefit over detriment inherent in the granting of the present applications for authorisation. It is true that there are likely to be significant technological changes during that period, however as these submissions demonstrate, the impact of those changes is impossible to predict with any certainty, and the market has shown itself capable of adjusting to deal with such changes. It is likely that practical changes will be made to APRA's operations to accommodate technological developments as they occur. APRA respectfully submits that such market driven changes are the best way of dealing with rapid change, rather than attempting to predict the future in a volatile market. Given the cost of making these applications and the uncertainty they engender, it is submitted that the ACCC should determine that the authorisations of APRA's conduct and arrangements should again be for five years.
16. For the reasons set out more fully below, APRA submits that the ACCC should revoke the existing authorisations of APRA's arrangements and substitute new authorisations for a period of five years, and allow the notification to stand.

## PART A – 2014 FINDINGS THAT CONTINUE TO APPLY

### Introduction

17. APRA holds authorisations A91367, A91368, A91369, A91370, A91371, A91372, A91373, A91374 and A91375 (**existing authorisations**). APRA has previously given notification N30751 in respect of alleged exclusive dealings in APRA's method of acquiring members' performing rights (together **APRA's arrangements**), and to the extent necessary APRA provides a new notification to accompany its present applications.
18. In granting APRA its existing authorisations, the ACCC concluded that: *"In all the circumstances the proposed arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct. The ACCC is also satisfied that the proposed arrangements for which authorisation is sought are likely to result in such a benefit to the public that the conduct should be allowed to take place."* (2014 Determination paragraph 530)
19. In APRA's submission, there has been no development or change since 2014 that would justify the ACCC reaching a different conclusion in 2019.
20. APRA's current applications for revocation of the existing authorisations and substitution of further authorisations for five years accompany these submissions. The conduct and arrangements the subject of these re-authorisation applications are in many aspects the same as the arrangements and conduct that were authorised in 2014. An updated summary of APRA's operations is set out in Confidential Attachment 2 (public version 2a).

21. The existing authorisations expire on 28 June 2019, having been granted for a period of five years. The ACCC took the view that authorising APRA's arrangements for that period would allow *"time for the new ADR scheme to become fully operational...in particular the ACCC would like to be able to review the operation of the ADR scheme over a reasonable period of time when considering any application for re-authorisation."* – 2014 Determination paragraph 447. The ADR system is now fully operational, and is discussed in detail below.
22. APRA submits that granting the re-authorisation applications is appropriate in the current and likely future circumstances. While there have been changes in the relevant market since the existing authorisations were granted (dealt with in more detail below at Part B), and other changes are imminent, it is APRA's submission that none of the changes or imminent changes alters the conclusion previously reached by the ACCC that the benefits of APRA's arrangements and conduct relevantly outweigh any detriments inherent in APRA's operations.
23. APRA submits that the correct approach to these re-authorisation applications is: first, to accept that the ACCC's conclusion reached in 2014 was correct and that the analysis in the 2014 Determination is still valid and applicable in the respects identified below; and, secondly, to consider how any relevant changes or developments over the period 2014 to 2018 (and into the next five years) have affected or are likely to affect the balancing of benefit and detriment in favour of or against re-authorisation. If, as APRA submits, the changes and developments have reduced and will reduce any detriment and increased the benefits of APRA's arrangements and conduct, it follows that the re-authorisation applications should be granted.
24. Because the existing authorisations were granted only four years ago and APRA accepts many of the conclusions reached by the ACCC in the 2014 Determination, the following sections identify the ACCC's findings that remain valid, being those in relation to the background of the re-authorisation applications, the market, the counterfactual, public benefits, factors that mitigate detriment and the weighing of benefit and detriment.
25. APRA has not included detailed submissions on these topics as it does not anticipate that the ACCC will have altered its framework of analysis over the intervening four years. Should it become necessary to examine any of these matters more closely, APRA will provide detailed submissions to assist the ACCC.
26. The findings of the ACCC in the 2014 Determination concerning copyright (paragraphs 18 to 24), performing rights and APRA (paragraphs 25 to 30), the role of copyright collecting societies (paragraphs 31 to 38), international treaties and overseas collecting societies (paragraphs 39 to 40), the Copyright Tribunal (paragraphs 41 to 46), and the Code of Conduct for Copyright Collecting Societies (paragraphs 47 to 49) remain applicable as background to the present re-authorisation applications, even before consideration of the positive changes to some of those factors discussed below.
27. The ACCC's findings in 2014 concerning the nature of APRA and its operations (paragraphs 8 to 14) and APRA's arrangements also remain valid in general terms. There are also some significant changes that have occurred or are about to occur to APRA's operations, however the nature of APRA's operations has not changed in any fundamental sense, particularly with respect to public performance and broadcast in Australia.

28. APRA accepts that its re-authorisation applications should be considered in accordance with the tests found in sections 90(7) of the *Competition and Consumer Act*. Paragraphs 149 and 150 of the 2014 Determination referred to sections 90(5A), (5B), (6), (7) and (8) of the *Competition and Consumer Act*.

**Market**

29. The market for the purpose of consideration of the re-authorisation applications remains the market as found by the ACCC in the 2014 Determination at paragraph 152: "*the relevant area of competition [is] that for the acquisition and supply of performing rights (in relation to musical works).*"
30. The ACCC's references (in paragraph 153) to its earlier observations on the characteristics of music users, acquirers in the market, broadly speaking continue to be applicable. However, the market has developed further, as detailed below in Part B.

**The Most Likely Counterfactual**

31. While there are a number of counterfactuals that could be considered for the purposes of the present analysis, APRA accepts that the most likely counterfactual in the short to medium terms continues to be that found by the ACCC in the 2014 Determination at paragraph 158: "*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.*"

32. [CONFIDENTIAL]

33. It should be noted that APRA does not accept that in the most likely counterfactual situation any "*changed scope for competition and, for example, for 'source licensing'*" (as referred to in paragraph 160 of the 2014 Determination) will be substantial. APRA already has effective and well publicised facilities that enable members to enter into direct licensing arrangements, contained in Article 17 of its Constitution.

34. [CONFIDENTIAL]

35. The situation in the United States now involves a number of societies, only some of which are subject to consent decrees, and major music publishers, all operating in a social, technological and economic environment that is vastly different to that of Australia in terms of size, cultural dominance, and in many other respects. That

environment is regulated by a complex and highly specific legal, jurisdictional, and regulatory system. APRA would be very wary of seeking to draw comparisons between the way rights are managed in the US and the way they are managed in Australia and the rest of the world. If the ACCC were minded to look closely at the US example, APRA would want the opportunity to provide detailed evidence and expert opinions from those with direct experience of that market.

36. Certainly, it would be wrong to assume that the non-exclusive grant of rights into collective management organisations in the US could be replicated in Australia without serious detrimental consequences for the licensing and enforcement of rights in this territory.
37. A general observation is that the non-exclusive nature of the societies' rights does not in fact result in significant competition between the societies to grant licences. Rather, the societies compete, sometimes aggressively, for members. As far as pricing and supply of licences are concerned, users (apart from predictive users or those who can limit their music requirements to specific works) generally find it necessary in order to obtain access to a comprehensive repertoire of music, to have blanket licences from all societies and the major publishers. Because the societies and publishers are offering different repertoire, their blanket licences are not substitutable where access to all of the works in each of their repertoires is required or desirable.
38. The fact that digital music services in the United States (and increasingly, worldwide) have been required to negotiate with major publishers as well as with a number of societies, has increased costs considerably for music users and societies. This experience indicates that the ACCC's counterfactual in Australia would not necessarily produce either lower prices for licences or greater access and no or less withholding of supply. In fact, the opposite may be more likely. Furthermore, what actually occurs in the US by way of direct dealing can be achieved under APRA's input arrangements through the opt out, licence back or resignation mechanisms. Non-exclusive licensing of APRA by members is not necessary to achieve this.
39. The situation in Europe for online licensing is sometimes raised in relation to non-exclusive licensing. A comprehensive discussion of the European position may also be unhelpful, but if the ACCC were minded to look to Europe for guidance APRA would also seek to provide detailed and expert evidence.
40. In short, in 2005 the European Commission Internal Market Directorate issued a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services calling for the implementation of multi territory licensing within Europe and to establish competition between EEA collecting societies to attract members. Since that time, there have been a number of legal and practical developments related to online licensing within Europe. However, there were specific policy drivers behind the European Commission's intervention, namely the creation of a single internal online European market and ensuring cultural diversity within the internal market. As a result many of the justifications supporting the European Commission's intervention in the European market are not applicable to APRA's operations in the Australasian market and, in any event, they do not reflect the relevant considerations for authorisation under the Competition and Consumer Act. In addition, the European market is presently in a state of flux with various pan-European online licensing initiatives by the major publishers creating uncertainty amongst licensees. [CONFIDENTIAL]

41. It is also worth noting that until the recent developments discussed above, the collecting societies of Europe as a group held exclusive rights for Europe. That is, the policy behind non-exclusivity was to deliver a common online market within Europe, not to permit worldwide online licensing.
42. A digital music service still requires a pan-European licence from at least one of the bodies offering those rights, as well as licences from the rest of the world, if it wishes to operate a worldwide service. In fact, even within Europe, a digital music service requires licences from local societies. Major music publishers are also operating in Europe to license digital services, often on a repertoire specific basis, via relevant special purpose vehicles. [CONFIDENTIAL]
43. Thus, although the non-exclusive nature of the societies' rights in the United States and for online uses within Europe appear to hold out the tantalising prospect of societies and members competing with one another to grant licences, with the result that licence fees are lowered, the commercial and practical reality is that in a non-exclusive environment members act to extract higher prices than the (regulated) societies are able to achieve.
44. APRA also says that the ACCC's comments at paragraph 201 of the 2014 Determination, that *"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 the ambiguity created by non-exclusive licensing"* fails to take into account two matters:
  - (a) that while it may be true that high profile and easily monitored users tend to have little interest in avoiding appropriate licensing arrangements, and pay the highest fees as individual licensees, it remains the fact that APRA does receive significant amounts from small business licensees in Australia that are not high profile or easily monitored; and
  - (b) the "ambiguity created by non-exclusive licensing" is a real ambiguity, and sophisticated users are not "taking advantage" when they query the validity of licences. The confusion created for example by non-exclusive online licensing should not be characterised only or principally as a disingenuous manipulation of the system by users. The fact that individual works are controlled by a multiplicity or even a small number of copyright owners has resulted in situations where it may not be unreasonable for a potential licensee to query whether it has an obligation to pay licence fees to one owner or another in that situation.
45. In summary, APRA submits:
  - (a) for all non-online uses of music within Australia, the practical effects and benefits of APRA's licence back facility are the same as those that might potentially be available under a non-exclusive regime, but without the disadvantages or detriments inherent in such a regime, some of which are illustrated or referred to above. A very large part of the APRA business remains the licensing of public performance in Australia, and communications by local broadcasters. That licensing activity is a significant part of APRA's revenue, but also represents an important part of APRA's

activities in support of local writers and other copyright owners, and the Australian music culture generally. Utilising the licence back facility, members are free to deal directly with music users in competition with APRA;

- (b) for online uses, the opt out facility provides a most effective way for members to grant worldwide licences and is equivalent to and probably more beneficial than what occurs under the US non-exclusive schemes. As a practical matter, the members most likely to grant worldwide licences for online use are major publishers, because they are more likely to have the operational capacity to do so, and so the requirement to remove all works for the relevant use is not a barrier;
- (c) accordingly the ACCC's view expressed in the 2014 Determination and similar views expressed elsewhere as to the detriments inherent in APRA's present arrangement for which reauthorisation is sought: do not take into account of the statutory copyright scheme; do not consider the practical use of APRA's opt out, licence back and resignation facilities; are not supported by the experience in the United States or Europe; nor are they based on a comprehensive analysis of all relevant factors that would be necessary to sustain such views.

### Public Benefits

- 46. APRA accepts the meaning of public benefit adopted by the ACCC in paragraph 176 of the 2014 Determination.
- 47. In APRA's submission, many of the principal public benefits of APRA's arrangements and conduct for which authorisation is sought in the present applications are appropriately outlined by the ACCC in the 2014 Determination. These benefits continue to apply in 2018 and will continue to do so into the foreseeable future.
- 48. It remains the case that:
  - (a) *"APRA'S input and output arrangements can reduce the transaction costs in dealings with both its members and users. In turn a reduction in transaction costs should lead to more efficient licensing and improved incentives for production of musical works."* – 2014 Determination paragraph 181 and the analysis at paragraphs 182 to 190 continues to be applicable;
  - (b) *"aspects of APRA's arrangements generate public benefits by providing a degree of transaction cost savings for licensees through increased certainty regarding the completeness of APRA's repertoire"* – 2014 Determination paragraph 190;
  - (c) there is *"a public benefit in preserving the incentives for the future creation of musical works"* – 2014 Determination paragraph 204;
  - (d) *"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."* – 2014 Determination paragraph 204; and
  - (e) *"APRA'S arrangements are likely to result in public benefits from:*
    - (i) *transaction cost savings particularly resulting from the near comprehensive coverage of APRA's blanket licences (coupled with an exclusive assignment of all rights) which provide increased*

*certainty for users that they are licensed in respect of virtually the entire worldwide repertoire of musical works; and*

- (ii) enforcement and monitoring efficiencies as a result of the exclusivity of APRA's arrangement and a reduction in uncertainty. 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." – 2014 Determination paragraph 205.*

49. Even without the developments in blanket licensing referred to in Part B below, APRA's output arrangements continue to produce the substantial public benefits found by the ACCC in 2014:

- (a) "For users, APRA's blanket licence arrangements provide transaction cost savings as a licensee need only enter into a single transaction with APRA for all of his/her music use rather than negotiate individually with a large number of individual performing rights owners... This is particularly valuable for the many users who do not know in advance which musical works they will be performing and may not even have control over these (for example, where a radio station is played on premises or a broadcaster or live performer 'takes requests'. The key product feature which these types of users require is immediate access to a comprehensive repertoire of musical works." – 2014 Determination paragraphs 182 - 183; and*
- (b) "APRA's blanket licences also offer licensees certainty that they are licensed in respect of virtually the entire worldwide repertoire of musical works. This has benefits for users in that they do not have to check whether more than one licence is required, decide whether to obtain an additional licence or risk being unlicensed." - 2014 Determination paragraph 185.*

50. Public benefits that flow from APRA's acquisition by assignment of exclusive rights from members, leaving aside for the moment the additional benefits from the opt out and licence back facilities, continue to include that:

- (a) "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 having to establish whether licences have been obtained for the particular works being performed and from whom the licences were obtained." – 2014 Determination paragraph 197;*
- (b) "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 in a non-exclusive regime." –2014 Determination paragraph 203;*
- (c) "To the extent that the alternative of non-exclusive licensing and the option to license only some rights to APRA might affect the potential for copyright infringement action by APRA and might allow uncertainty over the exact ownership, however, temporary, ... some users may take advantage of such uncertainty to avoid paying licence fees if APRA was only granted licences on a non-exclusive basis" –2014 Determination paragraph 201. APRA does not accept the ACCC's supposition that high profile and easily monitored users would not take advantage of this uncertainty as explained below; and*
- (d) "The exclusive assignment of all non-US performing rights to APRA – opt out and licence back aside – and the mechanism of the blanket licence enables APRA to more effectively monitor and enforce copyright compared*

to a situation with non-exclusive arrangements” – 2014 Determination paragraph 197.

51. Should the ACCC's conclusions set out above be insufficient for the purposes of considering the re-authorisation applications, APRA would be pleased to provide further detailed explanation of the nature and extent of the public benefits of its arrangements and conduct.
52. The changes and developments that have occurred since 2014 and the impact these have had on the public benefits that result from APRA's conduct are considered below in Parts B and C.

### Factors That Effectively Mitigate Detriment

#### *Licence back and opt out*

53. APRA submits that the licence back and opt out facilities in Article 17 of its Constitution that permit competition between members and with APRA effectively mitigate detriment. It remains the case, as was recognised by the ACCC in paragraph 384 and 390 of the 2014 Determination that:
  - (a) *“in the near to medium term, at least, competition between composers will not be the norm and might never be. However, consistent with its view in 2010, the ACCC considers that there can and should be greater opportunity and conditions for more price and non-price competition between composers/other rights holders where it is **practical and efficient**”* (emphasis added); and
  - (b) *“where competition can be injected into the acquisition and supply of performing rights at **acceptable cost and in a way that does not jeopardise the other benefits or efficiencies produced by APRA's system** then this should be promoted. Such competition will decrease the public detriments of the APRA arrangements.”* (emphasis added).
54. This greater scope for competition is precisely what the licence back and opt out facilities continue to deliver in the market. Other changes and developments in this regard are set out in Part B below and their effect on the balancing of benefit and detriment are dealt with in Part C. The licence back facility permits members, in Australia, to compete with one another and with APRA where it is practical and efficient to do so.
55. Licence back and opt out applications are administered by APRA's member services team, which notifies APRA's licensing services teams of all works licensed back or opted out so that music users are not approached to enter into licence agreements where they already hold direct licences.
56. There has been no obstacle for those APRA members and music users who have wished to deal directly with each other in Australia and, as far as APRA is aware, the licence back facility in particular has continued to enable a number of licence arrangements to take place with which copyright owners and users are very satisfied. APRA welcomes this.
57. *Live Tours:* APRA's licence back arrangements are utilised by members in the context of live tours where the touring artist is a singer/songwriter. APRA estimates that approximately 35% of all licences back entered into fall within this category. It is APRA's experience that direct licensing is now more prevalent in the live performance market than other areas.



58. Live tours are typically licensed by APRA under its concert promoters' licence. Licence fees under the concert promoters' licence are calculated as a percentage of gross sums paid for admission to the concerts, multiplied by the "Music Use Percentage" (which is the duration of the works within APRA's repertoire performed at the concerts, divided by the duration of all musical works performed at the concerts, expressed as a percentage). Where APRA members license back their works for the purposes of a live tour, APRA treats these works as falling outside of APRA's repertoire for the purposes of calculating the Music Use Percentage, thereby effectively discounting the licence fees otherwise payable under the licence.

59. In order for APRA to take into account any licence back when licensing concert promoters for live tours, APRA requires that members submit their licence back application form one week prior to the tour, setting out the name of the tour and the performers, date and venue for each concert. Consistent with the licensee's reporting obligations under the concert promoters' licence, APRA requires that either the licensee or the member subsequently provide, within 30 days of the final concert of the tour, comprehensive reporting setting out all works performed at each concert and identifying the works the subject of the licence back. Without this information, APRA would be unable to calculate the Music Use Percentage under the licence and would therefore be unable to apply the correct discount to its licence fees.

60. [CONFIDENTIAL]

61. *Events:* APRA's licence back arrangements have also proved useful for members who wish to directly license the public performance of their works at individual events. APRA licenses events under its Special Purpose Featured Music licence, under which licence fees are calculated as a percentage of gross sums paid for admission to the event, multiplied by the duration of music controlled by APRA, expressed as a percentage of the total duration of the event. APRA works the subject of a member's licence back are treated as falling outside of APRA's repertoire for the purposes of calculating the licence fees, thereby effectively discounting the fees otherwise payable in respect of the event.

62. [CONFIDENTIAL]

63. *Background Music:* APRA's licence back facility continues to be used by members who wish to directly license retail premises for their use of background music. APRA's member services team notifies the licensing services team of the details of the licence back, the licensing services team confirms with the retail premises that it is only publicly performing works the subject of the direct licence and then terminates the retail premises' APRA background music licence. APRA estimates that around 11% of all licences back entered into relate to the background music category.
64. [CONFIDENTIAL]
65. *Music on Hold:* APRA's licence back arrangements are often used by members who wish to directly license businesses in relation to their use of music on hold. APRA estimates that approximately 21% of all licences back entered into fall within this category. Businesses are often happy to use a music on hold product that features a limited repertoire of works, rather than use (for example) radio broadcasts as on hold music, which would require an APRA blanket licence.
66. [CONFIDENTIAL]
67. 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. The licence back facility effectively provides the benefits of non-exclusivity, while retaining the benefits acknowledged by the ACCC to flow from APRA's existing input arrangements.
68. The opt out facility is more useful for multi-territory or worldwide licensing and for dealing with online rights. It permits competition between members and with APRA when it is practical and efficient. At paragraph 399 of the 2014 Determination the ACCC noted "*due to APRA's arrangements with overseas collecting societies APRA is unable to provide its members with worldwide licence back. Any reforms in this area would necessarily need to be centrally coordinated, involving discussions with CISAC, other collecting societies and major rights holders such as music publishers. The ACCC encourages APRA to continue to explore this issue...*". Significant developments have occurred in the period since 2014, and are detailed in Part B.
69. However, opt out can also be utilised by individual copyright owners.
70. [CONFIDENTIAL]

71. The opt out facility and the licence back facility do not jeopardise the acknowledged benefits and efficiencies produced by other aspects of APRA's system.
72. In compliance with Condition C2 of the 2014 Authorisations, since 2014 APRA has published a comprehensive plain English guide to opt out and licence back, and information about opt out and licence back is regularly included in licensee and member publications (further details are of course available if required).

### **Copyright Tribunal**

73. APRA submits that the constraint exercised by the Copyright Tribunal of Australia over APRA's pricing and licensing conduct is a significant mitigating factor. Nothing has changed in the jurisdiction or procedures of the Copyright Tribunal since 2014 so as to make it less of a constraint upon APRA's conduct. Indeed, during that time changes have occurred to the practices of the Tribunal that increase its mitigating impact. Those changes are discussed in Part B below. At paragraph 334 of the 2014 Determination the ACCC confirmed its earlier view that: *"a user's right to seek recourse to the Copyright Tribunal constrains APRA's ability to exercise its monopoly power in two ways. Firstly, 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 Copyright Tribunal is likely to constrain APRA in negotiating licences in the first instance."*
74. While the constraint on any market power of APRA by the Copyright Tribunal may not be complete, as the ACCC noted in the 2014 Determination at paragraph 335, the fact of that constraint continues to be one factor, among others, that the ACCC must take into account in considering the extent to which any detriments inherent in APRA's arrangements actually arise as opposed to being theoretical problems. For example, the constraint exercised by the Copyright Tribunal upon APRA's pricing and licensing conduct cannot be viewed in isolation from APRA's alternative dispute resolution processes. Although having recourse to the Copyright Tribunal might involve costs that a user does not wish to bear, the same is not true of the ADR procedures which, given their nature, are likely to take into account what the Tribunal would be likely to do.

### **Alternative Dispute Resolution**

75. APRA's market power has for many years been constrained by its ADR facilities. Significant changes have occurred to the ADR offered by APRA since 2014, and are discussed in Parts B and C below. Since the 2014 Determination in compliance with Condition C3 of the Authorisations, APRA has introduced its Resolution Pathways ADR facility, and has been reporting to the ACCC regarding the use of that facility.
76. A more detailed exposition of the nature and extent of the effective mitigating factors against detriment can be provided by APRA, if required.

### **The Weighing of Benefit and Detriment**

77. In 2014, the ACCC correctly concluded: *"The ACCC is satisfied, subject to the conditions of authorisation, that the likely benefit to the public would outweigh the*

*detriment to the public including the detriment caused by any lessening of competition.” (2014 Determination paragraph 427)*

78. APRA says that this continues to be the case. The changes that have occurred since 2014 can only increase the weight of the arguments in favour of re-authorisation. The conditions imposed in 2014 are conditions that APRA submits have proved to be effective and which should continue to be imposed in respect of the re-authorisation applications.
79. The changes in the market are considered in detail in Part B but the general position can be summarised as being that no developments in relation to online, digital or similar dissemination of music have had the effect of increasing any detriments that might be found to flow from APRA's arrangements. Indeed, the technological and digital developments have eroded any scope for APRA to behave unconstrained by competitors, suppliers and acquirers, and in many respects increased the efficiency of APRA's operations thus reducing detriment and enhancing the public benefits and made it possible for APRA to grant licences with pricing arrangements that properly reflect the extent of direct dealing and non-APRA controlled repertoire.
80. APRA has responded, and continues to respond, by developing licences in conjunction with users to meet their needs with flexibility both as to content and price, participating in ADR and striving to improve compliance with the Code of Conduct for Australian Collecting Societies.
81. In these circumstances and given APRA's continued willingness to comply with conditions such as those imposed in the 2014 Determination, the conduct and arrangements for which APRA has sought re-authorisation in the present applications will be likely to result in public benefit that will continue to outweigh any likely public detriment, in a similar manner to that which was found by the ACCC in the 2014 Determination (paragraphs 427 and 428).

## **PART B - CHANGES SINCE 2014**

### **Changes Implemented by APRA**

#### *Greater awareness of licence back and opt out*

82. The assignment to APRA by a member of the rights contained in section 31(1)(a)(iii) and (iv) of the Copyright Act remains subject to an ability on the part of the member to terminate the assignment altogether (Article 9 of APRA's Constitution), or, under Article 17:
- (a) to reserve – or to later require APRA to reassign – the performing and communication rights in respect of all of the member's works in relation to a number of categories of use (**opt out**); and
  - (b) 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 (**licence back**).
83. As discussed above, in practical terms, this means that a music user that wishes to acquire the right to perform and/or communicate a musical work, can negotiate with publishers and songwriters to be assigned or licensed the rights under the opt out or licence back facilities. Similarly, a songwriter or publisher wishing to administer their own rights in relation to a particular type of use (for example, live performance, television broadcast, internet communications, or performance in cinemas) can do so.

84. APRA contends that any negative impacts that may have arisen as a result of its “monopoly” have been significantly reduced by the existence of mechanisms that allow members to deal independently with their works. In this way, music users who wish to deal directly, have a viable alternative source of supply.
85. APRA’s licence back and opt out provisions are set out in Attachment 3.
86. In compliance with Condition C2 of the 2014 Authorisations, since 2014 APRA has published a comprehensive plain English guide to opt out and licence back. Copies of the plain English guides and forms for members and for licensees are included at Attachment 15, and 15a – 15d. Since that time APRA has continually notified members and licensees of the provisions, by way of correspondence and references in various publications, and providing on the home page of the APRA website a link titled “Alternatives to APRA” which links to plain English information for music users and members: <http://apraamcos.com.au/about-us/alternatives-to-apra-amcos/>. The information available through that link is Attachment 15.
87. An education campaign was launched in September 2014 which included a comprehensive news piece outlining the availability of opt out and licence back provisions. A series of information sessions run by APRA’s Member Services Representatives were also offered to members. A news piece is periodically featured in APRAP, APRA’s member publication, to serve as a reminder of the availability of opt out and licence back provisions.
88. APRA has prominently publicised the availability of opt out and licence back rights, and their availability is generally well known in the industry. APRA’s member services and legal staff are familiar with the procedures for opt out and licence back, and are available to assist members if required.
89. APRA members have utilised APRA’s opt out and licence back facilities on 73 occasions during the period January 2014 to December 2018. Confidential Attachment 16 provides details of each opt out and licence back since 2014 and a more detailed summary of each opt out and licence back during the term of these authorisations.

*ADR*

90. In 2014 APRA finalised its Resolution Pathways ADR facility, in accordance with Condition C3 of the 2014 Determination. Since 2014, the facility has been formally utilised by licensees on at least eight occasions, although the Facilitator has consulted with licensees and referred them back to APRA for direct resolution of their issue on many more occasions than that. APRA has published the ADR Reports in accordance with Condition C3 to the existing authorisations. The facility has been reviewed in accordance with Condition C3.
91. Resolution Pathways was awarded the best Corporate initiative in Alternative Dispute Resolution in 2016. Resolution Pathways was recently reviewed by an Independent Reviewer, Ms Alysoun Boyle, in accordance with Schedule D to Condition C3, and her report will be provided separately to the ACCC when it is released. APRA 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, including expressly in every licence agreement. APRA submits that the existence of Resolution Pathways is a powerful mitigating factor against detriment.
92. APRA experiences Resolution Pathways as a rigorous and independent constraint on its licensing activities.

93. [CONFIDENTIAL]

94. [CONFIDENTIAL]

95. [CONFIDENTIAL]

96. [CONFIDENTIAL]

97. [CONFIDENTIAL]

98. [CONFIDENTIAL] :

99. APRA considers that in addition to the obvious benefits of alternative dispute resolution procedures generally, the public interest is now better served in many cases by the fact that Resolution Pathways is a purpose built system that takes into account the particular needs of APRA licensees (and members), including by its use of industry experts and peers. APRA considers that the low cost of the facility provides no real barrier to its use, and ensures that users of the facility are invested in its outcomes. Alternative dispute resolution enables the relatively inexpensive resolution of disputes and enables conditions that are appropriate to exceptional or unusual circumstances, or to individual music users, to be crafted.
100. Considering that alternative dispute resolution is purpose built, low cost, and largely paid for by APRA, the limited uptake of alternative dispute resolution is consistent with a high general degree of satisfaction (or at least acceptance), amongst users, with APRA's licensing system, including with its services and its fees. Each of the disputes dealt with since 2014 has been resolved far less expensively, and with far greater efficiency, than would have been the case had APRA utilised its previous ADR system or commenced proceedings in the Federal Court or Copyright Tribunal.
101. APRA submits that the terms and availability of its ADR system, and the steps taken by APRA to promote its use and the developments in APRA's implementation of the regime in the years since 2014 have ensured that any detriments inherent in APRA's conduct and arrangements are effectively reduced. APRA intends to encourage use of Resolution Pathways by any disaffected licensee, including in the OneMusic Australia initiative described below.

#### *OneMusic Australia*

102. 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 in Australia. OneMusic New Zealand has been operating successfully since 2014.
103. 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 APRA and PPCA. 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 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.
104. 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, eCommerce and continuing compliance with the Code of Conduct for Copyright

Collecting Societies. PPCA and APRA will 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.

105. For those music users who do not require both licences, the licence fees will be appropriately and transparently adjusted. Examples of businesses that do not require both sets of rights are 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, rather sound alike recordings not represented by PPCA with appropriate disclosures).
106. OneMusic Australia 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.
107. APRA has sought to introduce, through consultation, schemes with less complicated structures. This has not always been met with positive responses; with industry bodies and licensees expressing a preference for schemes that are more subject to adjustment based on use and other factors and therefore necessarily more complicated.
108. It has been a fundamental term of the agreements between APRA and PPCA that APRA's Resolution Pathways facility will be offered and available to all One Music Australia licensees.
109. OneMusic Australia licence schemes are being formulated in a way that ensures that the Copyright Tribunal of the Australia will have jurisdiction over all of the schemes.
110. As a trading name of APRA, OneMusic Australia will be subject to the Collecting Societies' Code of Conduct (as are APRA and PPCA individually).
111. APRA has consulted widely regarding the formulation and implementation of its OneMusic Australia licence schemes. The consultation process has been documented on the OneMusic Australia website at: <http://www.onemusic.com.au/>.



112. The following table shows the status of the consultation process:

	Sector	Status of Consultation
1	Dedicated Karaoke Venues	Consultation in progress
2	Live Adult Entertainment Venues	Consultation concluded – final scheme published
3	Telephone Hold Music	Consultation concluded – final scheme published
4	Fitness, Exercise and Wellbeing Providers and Instructors	Consultation concluded – final scheme published
5	Workplace Music Use	Consultation concluded – final scheme published
6	LGAs	Consultation concluded – final scheme published
7	Dining	Consultation in progress
8	Recorded Music For Dance Use	Consultation in progress
9	Hotels (including Accommodation Providers), Dedicated Live Music Venues and Casinos	Consultation in progress
10	Clubs	Consultation in progress
11	Places of Interest and Amusement	Consultation in progress
12	Retail and Service Providers	Consultation in progress
13	Community Halls and Facilities	Consultation in progress
14	Venues and Facilities for Hire	Consultation in progress
15	Dance and Performance Instructors and Schools	Consultation concluded – final scheme published
16	Public Vehicles/Vehicles for Hire	Consultation upcoming
17	Cinemas / Film Festivals	Consultation concluded – final scheme published
18	Cruise Ships	Consultation concluded – final scheme published
19	Airlines	Consultation upcoming
20	Eisteddfodau	Consultation concluded – final scheme published
21	Events (Concerts, Festivals Dance Parties, Casual)	Consultation upcoming
22	Dramatic Context	Consultation upcoming
23	Sporting Codes	Consultation upcoming
24	Religious Organisations (Non-Worship Services)	Consultation upcoming
25	Casual Events	Consultation upcoming
tbc	Community Organisations/CMG	Consultation upcoming
tbc	Background Music Suppliers	Consultation in progress

114. APRA has regularly updated the Facilitator of Resolution Pathways on its progress with the OneMusic Australia consultation process, particularly at the point at which consultations conclude and a new joint licence scheme is finalised. As at the date of this application, no OneMusic Australia licence scheme has been referred to Resolution Pathways as far as APRA is aware.

115. [CONFIDENTIAL]

116. [CONFIDENTIAL]

117. [CONFIDENTIAL]

118. [CONFIDENTIAL]

119. APRA is firmly of the view that a single source of public performance licences can only be in the best interests of consumers, provided the licences are clear, the pricing transparent, and the terms of the licences have been the subject of consultation and as much as possible agreement. Businesses that perform music in public have no practical way of obtaining the licences that would be required from copyright owners, absent collective licensing. Attachment 18 is a list produced by ARIA of the Top 100 Singles for 2017. It can be seen that of the 100 works, only two have a single writer, and eight have a single publisher. Four works have more than 10 writers, and 30 works have three or more publishers. Some writers will be published in some

territories, but administer their own copyrights in other territories. The number of copyright owners would be multiplied when the sound recording copyrights are taken into account. The public benefits of OneMusic Australia are, in APRA's submission, obvious.

120. On balance, APRA believes that the OneMusic Australia consultation process will have the result that by the time of its launch in July 2019, OneMusic Australia licences will have a high degree of acceptance in the market.

*CLEF*

121. At the time of its previous authorisations in 2014, APRA was aware that its copyright management system was in need of upgrading. The changing nature and scope of digital transactions, ranging from the desire to transact with members and small business licensees online, to the need to process music use reports from download services that far exceeded the size of any reports previously handled by APRA, meant that a comprehensive new platform would need to be developed or acquired. During 2014 APRA considered many options for the acquisition or development of a new system, and resolved to contract with Accenture to build a whole of business platform to manage membership and licensing transactions.

122. [CONFIDENTIAL]

123. [CONFIDENTIAL]

[CONFIDENTIAL]

124. [CONFIDENTIAL]

125. [CONFIDENTIAL]

126. [CONFIDENTIAL]

127. [CONFIDENTIAL]

128. [CONFIDENTIAL]

129. [CONFIDENTIAL]

130. [CONFIDENTIAL]

131. [CONFIDENTIAL]

132. [CONFIDENTIAL]

133. [CONFIDENTIAL]

134. [CONFIDENTIAL]

135. [CONFIDENTIAL]

136. [CONFIDENTIAL]

137. [CONFIDENTIAL]

138. [CONFIDENTIAL]

*Changes to Weighted Voting*

139. In November 2018, the APRA membership voted to change the Constitution of the company with respect to the way that members' votes are weighted. Until that time, provided a member had received an allocation in the previous two years, each member received one vote. Each member (or group of members in the case of related bodies corporate) then received an additional vote for every \$500 of earnings in the previous financial year. APRA believes this is analogous to the voting entitlements of shareholders in most companies, and reflects the principle that those whose works are performed the most (and by the highest paying licensees) should

have a greater say in the running of the company. This principle is moderated by the fact that all writers' votes are equalised with all publishers' votes, and no individual member (or related group of members) can receive more than 15% of the available votes.

140. In 2017, a number of (on the whole) lower earning writers sought to have the voting system changed so that every member receives only one vote, regardless of allocations or earnings. APRA does not believe this is reasonable, including because there are no barriers to membership of APRA, the commercial success of copyright owners tends to fluctuate, and voting is not compulsory.
141. However, as a result of the approach from a sector of the membership, APRA reviewed its system of weighted voting. The conclusion was that at \$500, it could be argued the higher earning members were receiving a disproportionate number of votes compared to the mid earning members. Accordingly, it was determined to put to the membership that the amount of \$500 should be increased, to \$2,500. APRA believes this has a democratising effect.
142. A number of APRA members were not satisfied with this approach, and continue to push for one member one vote. Some of those members voted against the motion at the APRA AGM in November 2018. Ultimately the special resolution was passed at the AGM by a majority with 140,253 votes cast in favour and 1,119 votes cast against.
143. APRA promotes the AGM and encourages members to vote every year by way of email broadcasts, website news items, physical mail outs and articles in member publications.
144. APRA notes the comments made by the ACCC in the 2014 Determination with respect to the composition of the APRA Board, and respectfully disagrees with them. The APRA Board is required under the Constitution to be comprised of six writer directors elected by the writer members (including one New Zealand writer director elected by the New Zealand writer members) and six publisher directors elected by the publisher members. The current Board comprises writer directors Jenny Morris OAM (Chair), Malcolm Black, Amanda Brown, Brendan Gallagher, Chris Neal, Nigel Westlake; and publisher directors Bob Aird (Universal Music Publishing), Marianna Annas (ABC Music Publishing), Matthew Capper (Warner Chappell Music Publishing), Ian James (Mushroom Music Publishing), Damian Trotter (Sony/ATV Music Publishing), and Philip Walker (Origin Music Group).
145. The suggestion by the ACCC at paragraph 417, that APRA consider including a board member to represent the interests of "independent and niche writers/composers/producers" is fraught with complexity. Of the publisher directors, Ms Annas, Mr James, and Mr Walker are independent music publishers. Even the idea of what constitutes an "independent" writer is unclear. None of the writers currently on the APRA board is published by a major publisher. APRA notes that current elected board member Mr Gallagher considers himself to fall within the description of "independent and niche writers/composers/producers". Current board member Mr Westlake, in addition to his work in film, is a "classical" composer of note. Classical or art music composers would consider themselves to be among the most poorly remunerated composers in Australia, with far fewer performance opportunities than many "independent" songwriters. Ms Brown is a singer/songwriter who now works primarily in film and television. Mr Black was a singer/songwriter who became an artist manager and has worked in music licensing for Les Mills. If genres of music were to be guaranteed a place on the Board, the potential for controversy is enormous – for example, "Christian" or "religious" music is a category that is

separately recognised in some territories, but not currently in Australia. Each genre of music that is recognised by the APRA awards might be considered as a genre that would wish to be "represented" on the Board (for example, "blues and roots," "dance," "country," "urban," "jazz," and "rock").

146. APRA's experience is that the members elect directors who are representative of their interests, and that the directors exercise their obligations diligently and in accordance with the law. APRA regularly engages expert facilitators to conduct education sessions for Board members on their legal and other obligations.

*Distribution technology*

147. The efficient distribution of royalties received in respect of music used in online and mobile markets continues to be of paramount importance to APRA members. APRA continues to invest considerable resources in addressing the so called "long tail" issue of a vastly increased level of reporting by digital licensees of uses that have very low individual transaction values, including through the development of CLEF. APRA is working with its digital licensees to further improve its "auto-matching" capabilities whereby digital sales reported by licensees are matched automatically with payable works in APRA's database. [CONFIDENTIAL];

148. The overwhelming majority of licence fees collected by APRA are currently distributed on a quarterly basis. Some are still performed annually. The implementation of CLEF should result in vastly improved business intelligence capabilities for writer and publisher members, enabling them to compete in the global ecosystem without having to individually acquire, develop or replicate the complex infrastructure that is required to administer granular rights. Further information about distribution technology is available on request.

*Music recognition technology*

149. APRA has arrangements in place with a number of companies that offer music recognition technology, including DJ Monitor, Kuvo, Soundmouse, and Harvest Media.
150. APRA has now utilised MRT for almost seven years and was the first collecting society to do so worldwide. 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 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.
151. These arrangements are complex, involving negotiations over privacy, reproduction of sound recordings, and access to licensees' property.
152. On the whole, APRA's 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, 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.

153. 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. This increases the public benefits that flow from these aspects of APRA's arrangements and conduct.

*Discounted blanket licences*

154. APRA has always offered licence terms that acknowledge the possibility of the use of music outside APRA's control. The fact that APRA's repertoire might not be entirely comprehensive has been taken into account by APRA when setting its fees. The process of ascertaining the proportions of APRA controlled and non-APRA controlled music used by a licensee is more feasible and less costly, and APRA is now in a position to be more flexible with its blanket licences and their pricing, and more efficient in their administration. Adjusting licence fees to take account of the use of music that is not controlled by APRA requires accurate and full reporting of music use. To calculate the percentage of any reduction, it is necessary to have a means of ascertaining all APRA music used and all non-APRA music used. If the licence fee is to reflect the costs involved in providing the licence, the base licence fee also needs to be higher because the process of determining what the fee should be is more expensive. This is one of the reasons why APRA's blanket licence fees are set to take account of the fact that the repertoire may not be comprehensive.
155. For example, APRA's licence scheme for promoted concerts, since 1991, has provided for a reduction in licence fees to take account of any works performed that are not controlled by APRA. APRA is increasingly using MRT to ascertain what works have been performed and who controls them with greater ease and less cost. As noted above, APRA was an early adopter of MRT, and this initiative has enhanced APRA's distribution practices by ensuring the rightful right holders are paid when their music is played.
156. Many of APRA's licences contain provisions for an adjustment of licence fees in the event of a material reduction in repertoire. Most such agreements expressly contemplate the prospect of an opt out by a major music publisher. In practice, this has arisen most clearly in respect of digital music services. Confidential Attachment 24 gives examples of adjustment mechanisms contained in some APRA licence agreements. Further information and examples are available on request.
157. [CONFIDENTIAL]
158. In most of APRA's digital licences discussed above, APRA grants a licence to communicate all works controlled by APRA (that is, a blanket licence). However, no licence fees are payable on works that are not controlled by APRA. If the licence fee is calculated as a percentage of revenue, adjustments can be made depending on the level of use of the non-APRA works compared to APRA works.
159. Importantly, this structure is only possible because technology allow licensees to report use on a work-by-work basis cost effectively. Without this level of reporting, APRA would be unable to offer adjustments and rebates with this level of precision. Examples of this type of reporting can be provided.



160. Further examples of adjustment mechanisms can be seen in Attachments 7, CONFIDENTIAL Attachment 8, Attachment 9, CONFIDENTIAL Attachment 10, and CONFIDENTIAL Attachment 24.
161. Some licences contain provisions to deal with the situation that will occur if any publisher member of APRA withdraws all of its rights in respect of the relevant use. Broadly, the licensee has a right to terminate or renegotiate the agreement, depending on the size of the catalogue withdrawal relative to the number of works used by the licensee. In the case of a renegotiation, the agreements provide that the new licence fees will take account of the fact that the licensed repertoire has been materially reduced.
162. The above examples demonstrate APRA's ability largely because of its capacity to use technology to provide blanket licences (which are required by users) with licence fees discounted to take into account the extent to which a user may have licensed performing rights for some of the works in APRA's repertoire directly or may otherwise have used non-APRA controlled music. This, once again, enhances the public benefits that are attendant upon blanket licences for the many music users who require them. In addition, the ability through technology to adjust fees for repertoire that has been directly licensed or that is not controlled by APRA means that any anti-competitive detriment, which might arise as a consequence of blanket licensing, is substantially reduced.

## **Other Changes In The Market In Australia**

### *Introduction*

163. There have been a number of other developments in the market in which APRA operates since the ACCC's determination in 2014. The changes either enhance the efficiency of the APRA system, or promote competition.

### *Development of digital markets*

164. In 2014, digital downloads were the main format in which recorded music was sold. At that time, APRA's licensing of digital music services was very much focused on facilitating the entry to market of an increasing number of services many of which were experimenting with models of delivery and payment. Many of the services that were highly successful in 2014, have exited the market. There is no longer a significant market for mobile telephone ringtones, as the popularity of this product was significantly waned. In 2014, Spotify had only just launched in Australia. In its submissions in support of authorisation, APRA said: *In APRA's opinion, the online market for music services is now at a critical point, with many unanswered questions about the directions in which it will develop.* That cannot be said in 2018, and APRA did not foresee the way the market has developed.
165. Today, on demand streaming services are the dominant means by which music and video are delivered to consumers. Indeed, in 2018 APRA's income from streaming services was higher than from any other source for the first time.
166. APRA now has licence schemes for streaming services that are well established in the market.
167. In addition to numerous individual websites, APRA has licensed around 60 digital music services for Australia, including traditional download, video on demand, subscription-based and advertising supported music streaming services and user uploaded content platforms. Of those, around a third are Australian.

168. APRA continues to be approached by new music and video services, in a market in which more people than ever seek new ways of monetising content. In many cases, without the availability of an APRA licence, these users would not have the resources to negotiate licences on an individual basis with the plethora of composers and publishers both local and overseas whose music they want to use. Examples of this include: a live stream music service that seeks to connect local South Australian bands to their fans; a number of semi-interactive subscription music service providing customised playlists for runners; a video on demand service providing documentaries and drama targeted at Australian aficionados of the British Royal Family; and an international virtual reality start-up, looking to expand its music concert offering into Australia.
169. In these areas, APRA's experience is that:
- (a) the blanket licences enable many entrants to enter the market, including entrants that would otherwise lack the resources to obtain licences from a variety of sources, with confidence that they can utilise APRA's repertoire; and
  - (b) the consistent, low cost of the licence, relative to licence fees paid by competitors and other costs of the service provider respectively, also facilitate the entry of new providers into the market, thereby increasing competition and benefiting consumers.
170. Most such businesses and putative businesses are relying on a model that utilises digital platforms to deliver music. Without an APRA licence, such users would be required to obtain permission from individual songwriters and publishers, and from foreign collecting societies, or risk legal action for infringement. The APRA licence enables the development of such new businesses to proceed without concerns about the cost or availability of musical product. APRA's operations have continued to provide certainty and relatively inexpensive means for new markets for the supply of music to emerge and to compete without the concerns of a potential failure of supply of product.
171. In the year ended 30 June 2012, APRA's income from digital licensees was \$9.6 million, then an increase of approximately 17% on the previous year. In the year ended 30 June 2018, APRA's income from digital licences, including digital music services and online platforms, was \$65.6 million, an increase of 28.5% on the previous year. APRA can provide the ACCC with further confidential market information and statistics in this regard if requested.
172. The digital market is currently dominated by a small number of music streaming and video on demand services. APRA expects that a continued push in the market for connected speakers (Apple's Homepod, Google's Alexa and Amazon's Echo) or devices in vehicles, will result in further growth in digital music consumption by enabling even wider access to music through the use of APRA's rights. User upload content platforms continue to increase their presence in the music space, coming up with new ways to use music in order to engage more users and drive their revenue. APRA is also starting to see the arrival of virtual reality based services in Australia. At the moment this is mostly focussed on music-based events but APRA envisages it will expand into both television/filmed entertainment and virtual shopping experiences (in order to mirror a store's brand online). APRA is also witnessing a rapid increase in online fitness services providing on demand access to fitness classes with music heavy playlists. More than ever, music consumption is being transferred from traditional retail spaces such as fitness centres, and into people's homes.

173. The digital download market has rapidly declined since 2012, and now represents less than 4% of APRA's digital revenue. APRA can provide the ACCC with further confidential market information and statistics in this regard if requested.
174. APRA has good relationships with the major providers of digital services, including Apple, Spotify, Google, Netflix, Amazon and Facebook. It is APRA's experience that these licensees prefer to enter into licences that reflect precisely their own business models, rather than to develop industry schemes.
175. It remains APRA's policy to enter into licence agreements with users in accordance with published licence schemes wherever possible to ensure that there is no discrimination between members of a class of licensee, particularly in classes of licences which are widely disseminated, such as the background music, live music, nightclub and fitness centre schemes. However, if a music user is not satisfied with such an approach, it can make its own application to the Copyright Tribunal seeking an order that APRA grant a licence on the music user's proposed terms.
176. [CONFIDENTIAL]
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177. However, as noted above, APRA's experience is that most of the large digital licensees prefer to either use their own standard terms as the basis for a licence agreement, or to negotiate specific language approved by their own advisors. For this reason, APRA has found it difficult to adopt a truly standard set of agreements for the various digital offerings.
178. To support the continued growth of Australia's digital economy, APRA has been flexible in its blanket licensing of new entrants to the market. However, during the term of the existing authorisations there have been fewer short term agreements with new entrants to the market, largely because APRA has implemented standard licence schemes as preferred models have emerged in the market. However, APRA has developed a number of low cost licences for digital businesses that do not have the same levels of revenue and use as the large scale providers. APRA has sought to develop licences that allow smaller businesses to enter the market, often providing access to niche genres of music or film. Such licensees do not have the capacity to report music use in the same level of detail as a Netflix or a Spotify, and APRA provides a relatively straightforward licensing solution for such businesses. This is in the interests of APRA and its members as increased access to and use of music leads to a corresponding increase in returns to members. APRA does, however, attempt to apply consistent licence rates in particular industries, but is flexible where there is evidence of differentiation or some other factor that justifies departure from rates generally applicable to the industry.
179. It has been APRA's experience that usage reports from digital music services such as Spotify, indicate that subscribers have been encouraged to listen to a wider selection of music than might otherwise be the case. Nonetheless, this does not produce a windfall or excessively high returns for APRA members. As has been widely reported overseas, although such services can generate significant advertising revenue, the combination of huge streaming volumes and a licence fee comprised of a modest percentage of the service's revenue produces a very low royalty per musical work streamed.

180. [CONFIDENTIAL]

[CONFIDENTIAL]

181. [CONFIDENTIAL]

182. [CONFIDENTIAL]

183. [CONFIDENTIAL]

184. [CONFIDENTIAL]

185. These changes since 2014 in relation to digital music and video have emphasised and increased the public benefit of the certainty that music users obtain from being able to deal with APRA as the owner of the rights in a comprehensive repertoire should not be underestimated in considering the extent to which these markets have been able to develop over the last four years.

#### *Piracy*

186. To the extent that APRA's product is the licence to use music, then, in a sense, its competitors include those whose product is unlicensed music use. APRA's product is therefore in constant competition with piracy and music copyright infringement on mass scales. In effect, APRA has had to compete against parties, increasingly more sophisticated and unfettered by regulation or respect for copyright law and the rights of creators. That is, APRA has had to compete with suppliers who supply free of charge but with the risk of being held liable for infringing copyright. IFPI's Global Music Report 2017 states that the most common form of illegally downloading music is in the form of 'stream ripping'. This is where a user will create a downloadable file from a music video and then use that file on another device.<sup>2</sup> Data from IPSOS from 2016 showed that 30% of all internet users (with a high number of younger users in the 16 to 24 age bracket) had engaged in the practice in the prior six months.<sup>3</sup> Common stream ripping sites, such as the now-defunct YouTube-MP3.org facilitate the process.<sup>4</sup> Services of all models which operate legally without infringing copyright, including APRA's, incur costs and regulatory expenses that their competitors do not.

187. As noted in paragraph 8(h), APRA has been involved as a joint applicant in a case under s 115A of the *Copyright Act*, which allows for injunctions to be granted to require a carriage service provider (and as of recent amendments, search engines) to disable access to an online location. In *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435 the Federal Court ordered TPG Internet Pty Limited and thirty three other ISPs to 'take reasonable steps to disable access' to KickAssTorrents and its associated domains. KickAssTorrents was a website which allowed for the free download of musical works, sound recordings and other works without licence or approval of the copyright owners.

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<sup>2</sup> IFPI Global Music Report, p 37.

<sup>3</sup> Ibid.

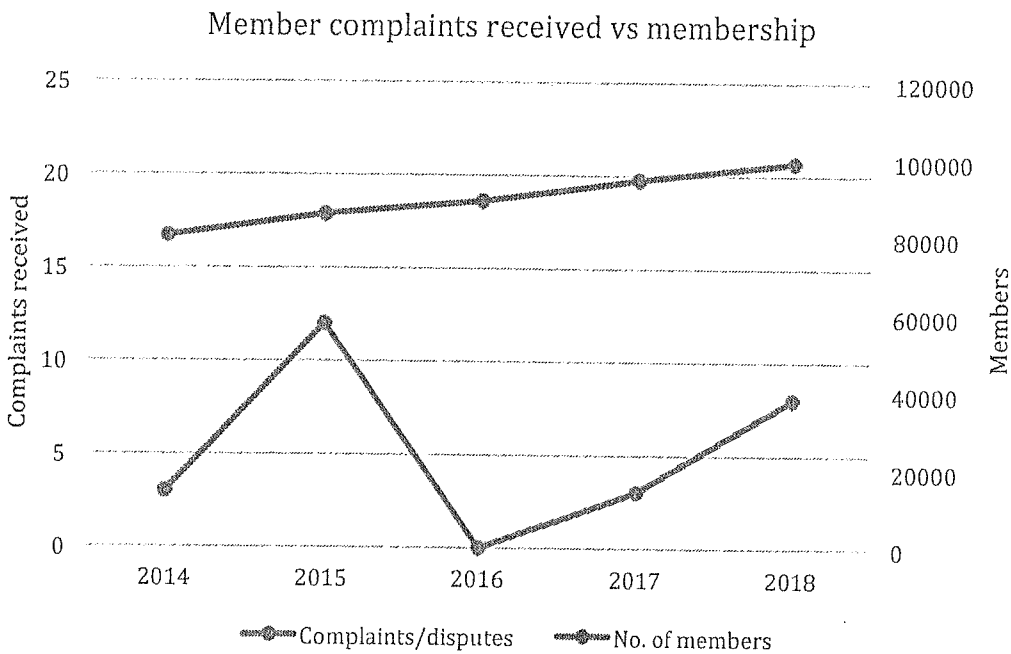
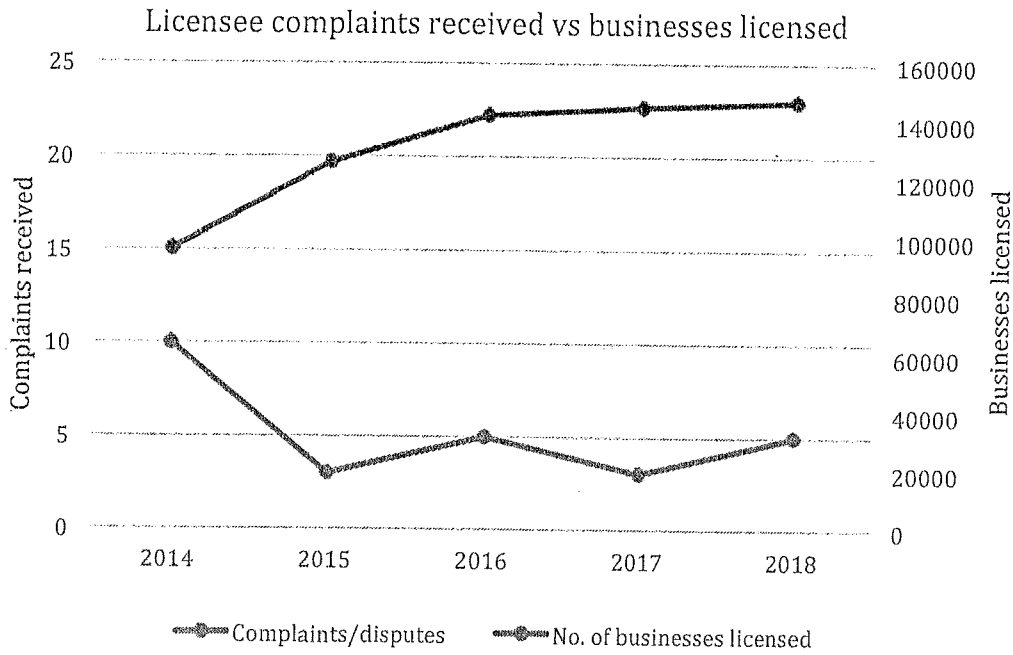
<sup>4</sup> Ibid.

188. The public benefits inherent in APRA's arrangements of enhanced production of music and increased compliance with copyright law are therefore of greater significance now and into the future than they were when APRA obtained its initial authorisation over a decade ago and even when its arrangements were re-authorised three years ago. APRA is a thought leader in the copyright industries in Australia and worldwide, playing a significant role in the process of copyright law reform and rights administration practice. The work that APRA does in promoting investment in local music and businesses that utilise music, in enabling copyright owners to be fairly compensated for the commercial use of their product, and in promoting the cultural and economic potential of the Australian music industry, has been recognised by government and business, and is world class.

*Code of Conduct for Australian Collecting Societies*

189. The Code of Conduct for Australian Collecting Societies was adopted in 2002 as a means of achieving greater transparency in the copyright collecting society industry. The Code was drafted in conjunction with the Commonwealth Attorney General's Department and the Commonwealth Department of Communications Information Technology and the Arts. The Code itself is reviewed regularly and was amended in February 2017. A copy of the current Code is Attachment 19.
190. APRA has advertised prominently the existence of the Code and its existence is generally known in the music and entertainment industries.
191. At its broadest, the Code requires societies to maintain proper standards of transparency in dealings with members and licensees.
192. To that end, the Code requires APRA to maintain detailed records in relation to complaints. APRA's member services and general performance licensing departments have established a call tracking process that means that every complaint is referred to the director of the department. APRA has systems to ensure that complaints can easily be referred within or between departments and reviewed centrally through a lotus notes database. In the client-focussed departments, specific individuals have been identified as having carriage of the complaints-collating process to ensure that complaints are actioned and reported. Supporting the system and process review has been an increased level of staff training, which is discussed in more detail below.
193. In July of each year, APRA submits its Report to the Code Reviewer for the twelve month period ending 30 June. After reviewing the Report and conducting an independent public consultation process, the Code Reviewer visits APRA in or around September each year and interviews senior APRA management. Before the end of each calendar year, the Reviewer publishes a Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the relevant period. The reports are online and accessible to all members of the public. Copies of this report for the years ending 30 June 2013, 2014, 2015, 2016, 2017 and 2018 are included in Attachments 20 and 20a - e.
194. Copies of the materials prepared for the Code review process that are not attached to this application are readily available on request. In particular, copies of APRA's publications, including publications for members, are available.
195. APRA has found the experience of the continued development of the Code, and the annual Code Review, particularly useful. In particular, APRA has developed processes that ensure that complaints are brought to the attention of senior management and dealt with appropriately.

196. APRA'S commitment to providing information on education to its members, publisher members and licensees was noted that in the most recent Code Review, with the reviewer setting out a selection of APRA's events, functions, and seminars, and the growth of APRA's website and social media channels. In addition, APRA's submission for the Code Review detailing its handling of complaints was described as 'commendably detailed and, apparently, frank'.
197. APRA believes that the level and type of complaints received by APRA, when compared with APRA's size and the nature of its business, indicates a broad level of success in the communicating of APRA's operations.
198. The Code is an effective mechanism that assists to ensure that APRA does not abuse any market power it may have or otherwise behave contrary to the public interest. The Code continues to result in an ever increasing focus on staff training and customer awareness at APRA. APRA staff members at management level and above are comprehensively trained regarding the Code. The Licensing Services department and the Member Services department each hold staff training conferences at least once (usually twice) in each year. Both departments also conduct monthly teleconferences with APRA's state based branches and APRA New Zealand. The teleconferences provide important opportunities to discuss Code relevant topics, including client service, conflict management and time management and in particular the procedures for identifying and dealing with complaints. APRA also has a whole of staff training program that includes timetabled sessions throughout the calendar year. The program focuses on the respective needs and expectations of general staff, middle and senior management and also the expectations of the organisation. The strategy for the training was developed jointly by the Communications department and an external HR consultant and included a review of the current APRA work environment and culture. The focus of the training sessions has been communication, within and between departments and with APRA's external stakeholders. The training covered the importance of forms of communication, role-playing, conflict resolution, time management, the importance of attitude and accountability.
199. The collation of materials for and submission of the annual Report to the Code Reviewer is taken very seriously at all levels of the company. The responsibility involved in working for an organisation in APRA's position is made clear to all staff who understand they are publicly accountable for their conduct.
200. In the Triennial Review of the Code, which took place most recently in 2017, the Code Reviewer stated that "one cannot fail to be impressed with the detailed annual compliance reports that the collecting societies provide".
201. The following graphs illustrate the numbers of complaints received since 2014 relative to the number of licensees and members respectively.



- 202. The Honourable Kevin Lindgren QC AM has been the Code Reviewer since September 2012.
- 203. During 2017 and 2018 the Code was reviewed by BCAR, with input from the ACCC. The Draft Report following that Review was published in February 2018 and proposed a number of amendments to the Code to further improve its efficacy. A copy of the Draft Report is included at Attachment 22.



204. APRA understands that the Bureau of Communications and Arts Research will release its Final Report by end of 2018 with the recommended amendments to the Code required to be brought into effect by July 2019. APRA envisages that the Code will provide for an even more robust governance framework for copyright collecting societies than existed for the duration of APRA's previous authorisation.

#### *Changes to Copyright Tribunal Procedures*

205. In around 2016 the Tribunal published a draft practice direction, aiming to simplify the procedures of the Tribunal, particularly with respect to expert evidence. A copy of the Draft Practice Direction is at Attachment 14.
206. In November 2018 the ACCC released draft guidelines in accordance with section 157A of the Copyright Act. APRA believes the Guidelines essentially serve as submissions to the Tribunal in the event that the ACCC did not seek to be made a party to proceedings, and in that sense also serve as a useful aid for under resourced litigants. APRA believes the Guidelines will be a useful part of future Tribunal proceedings.
207. APRA notes that the Tribunal currently has before it a significant number of proceedings. In December 2018, APRA was served with an application by a self-represented litigant in Western Australia.

#### **Internationally**

##### *Existing international online licensing arrangements*

208. APRA's licence back system cannot presently be utilised for worldwide licences. Accordingly, an APRA member cannot deal with his or her works for online use by means of a licence back. [CONFIDENTIAL]
209. A member wishing to enter into a direct, worldwide (or multi-territorial) licence with a DSP is able to utilise APRA's opt out facility. This involves a re-assignment of the copyright in all of the member's works for the purpose of online communications described in Article 17 as "the right to communicate to the public other than by means of broadcasting". A member opting out for this category of use would have to remove all works from APRA for that purpose, but would retain the benefit of APRA's licensing and distribution services for all other uses.
210. APRA continues to believe that piecemeal opting out and administration of online rights would have little if any commercial attraction and is most unlikely. An individual writer member would also not be inclined or in a position to administer their own online rights, especially for only selected works.
211. [CONFIDENTIAL]

212. [CONFIDENTIAL]

213. In any event, APRA notes that the laws relating to the communication of material online are not consistent throughout the world, and accordingly a worldwide licence is not always appropriate. In some territories, a licence to communicate digital downloads may not be required. In some territories, certain communications may be the subject of free exceptions. These differences make the negotiation of worldwide licences from a single territory less efficient than might at first seem the case.

214. Most digital service providers do not enter every territory, and accept the reality of negotiating with local copyright owners for those countries in which they wish to operate. There are reasons other than the territorial nature of copyright why an online service provider might wish to have a local presence and relationship in the territories in which it operates.

215. There are also a number of practical reasons why local repertoire should be administered by local societies. APRA and its sister societies have a deep knowledge of their respective members and their music. Distribution is far more efficiently undertaken by expert local societies. For example, APRA employs staff members who are expert in music generally, but in the Australian repertoire in particular. They are able to identify works that have over \$15 in earnings allocated to them but have been inadequately identified by digital service providers, including by recognition of local titles, but also by matching software that compares reporting information against APRA's local databases. APRA currently has records of approximately 5000 unidentified works that have been communicated by digital music providers, which are the subject of ongoing research by APRA staff. There is a legitimate and well-founded concern that if global licences were to be entered into for online music services, Australian works would be at a considerable disadvantage and export income would be lost as a result.

#### *Global Repertoire Database*

216. In 2013, APRA made detailed submissions regarding its participation in the Global Repertoire Database project, which was intended to establish a means of licensing online communications on a worldwide basis. The societies (including APRA) and other stakeholders invested significant amounts of money in the development of a GRD.

217. The GRD project failed in late 2014, due to technological incapacity and irresolvable disputes regarding funding, data ownership and territorial control.

#### *Potential solutions*

218. There continues to be significant debate regarding the most efficient ways to accommodate the borderless nature of online communication. While physical

performances and local communications are most efficiently licensed on a territorial basis, it is arguable that online licensing requires ability on the part of the licensor to license on a multi-territory (or even worldwide) basis.

219. The CISAC Societies are well aware that online licences need to have the capacity to be granted on a multi-territory or worldwide basis, while maintaining the integrity and benefits of the local societies' respective operations. To that end, they are engaged in active discussions as to the best means of achieving that goal.
220. Since the date of APRA's last authorisation, the focus of the music industry appears to have turned from searching for a single global solution to the development of a number of multi-territorial music copyright licensing hubs around the globe. The music licensing world is often broken down into the following regions: North America; Europe; Asia Pacific; and Rest of World. The notion of a "multi-territorial music copyright licensing hub" has a number of dimensions, including front-end licensing; back-end processing; and provision of IT platform services. One of the reasons for APRA's significant investment in the CLEF system is its strategy of positioning itself as a key player in the Asia Pacific hub, across one or more of those dimensions.

### **Changes In The Market – Likely Duration**

221. There is no reason to expect that APRA's licence back procedures, participation in ADR and compliance with the Code of Conduct will not continue indefinitely. Competitive pressure on APRA is only likely to increase as a consequence of foreseeable changes in technology and developments in the market for access to performing rights and digital music markets.
222. Similarly, there are no foreseeable commercial or technological developments which would provide APRA with any incentive to cease offering flexible licence agreements including, in particular, blanket licences with provisions that accommodate reduced licence fees to take account of direct dealing or other removal of repertoire. Indeed, technological advances are only likely to make this more efficient.
223. The volatile situation regarding online licensing is likely to continue for some time as publishers that control large repertoires test how they might maximise their revenues and returns.

## **PART C – EFFECT OF CHANGES ON WEIGHING OF BENEFIT AND DETRIMENT**

### **Introduction**

224. The developments in the performance and communication of music and its licensing since the ACCC's Determination in 2014, identified in detail Part B above, either enhance the efficiency and flexibility of the APRA system thus increasing the benefits flowing from that system or promote competition thereby reducing any detriment.
225. The changes do not, in any instance, provide a reasonable basis for the ACCC to conclude otherwise than that the conduct and arrangements for which APRA now seeks re-authorisation will be likely to result in public benefit that will outweigh any likely public detriment, for the purposes of section 90 of the *Competition and Consumer Act*.

### **The Changes**

226. The changes (and imminent changes) identified in Part B can be summarised as follows:

- (a) the increased promotion of APRA's licence back procedures;
  - (b) comprehensively improved alternative dispute resolution procedures for APRA licensees;
  - (c) Onemusic Australia ;
  - (d) CLEF;
  - (e) [CONFIDENTIAL].
- 
- (f) changes to APRA's weighted voting;
  - (g) the massive growth of digital music markets in Australia;
  - (h) more sophisticated technology enabling piracy;
  - (i) distribution efficiency improved through technology, including music recognition technology;
  - (j) more flexible blanket licences through technological developments;
  - (k) proposed amendments to the Code of Conduct for Australian collecting societies due to come into effect 1 July 2019;
  - (l) changes to the Copyright Tribunal procedures, including the ACCC Guidelines; and
  - (m) trialling of new and innovative international arrangements for digital licences.

#### **Effect of Changes on Analysis of Benefits and Detriments**

227. The ACCC has acknowledged in past determinations that APRA's conduct and arrangements have substantial public benefits. APRA submits that these benefits continue to apply. It is not necessary to restate them here as they have been set out above.
228. The principal cause of detriment said to arise out of APRA's arrangements and conduct has in the past been consistently identified as the lack of competitive pressure on APRA because of APRA's taking an assignment of all its members' performing rights and the comprehensive coverage of those rights that APRA has achieved in Australia. Users were thus seen as having no readily available alternative source of supply of performing rights for the vast majority of musical works in Australia. Although APRA does not accept the ACCC's previous analysis of the detriments that are said to flow from these factors, the effect of the changes can be considered in the light of the ACCC's previous reasoning.
229. The ACCC has previously concluded that the benefits inherent in APRA's arrangements and conduct did indeed lead to public benefits that outweighed any public detriment to such an extent that APRA's arrangements and conduct should be authorised under the Trade Practices Act (as it then was).
230. Against this background, the effect of the changes in relation to in the performance and communication of music and its licensing must be assessed for the purposes of these re-authorisation applications.

*The promotion of APRA's licence back procedures*

231. As licence back has become an entrenched part of the APRA system, and following the increased publicity about its availability as a condition of the current authorisations, its uses and benefits are better understood by APRA members and licensees. This increased understanding has allowed and will continue to allow APRA members and music users to deal directly with one another without any substantial impediments. As a result, users (especially those who can determine or predict the music they use) now have a viable alternative source of supply of performing rights. APRA is consequently exposed to greater competitive pressure as far as those predictive users are concerned. Thus, anti-competitive detriment that might have flown from APRA's exclusive input arrangements is reduced compared to the situation prior to these changes. The active promotion of the availability of this streamlined licence back facility has brought it to the attention of more members and more users. Thus, the potential for anti-competitive detriment has been further reduced. Finally, it must be acknowledged that this has been achieved, without requiring APRA to accept only non-exclusive rights which would substantially reduce the benefits which undoubtedly flow from APRA's input arrangements based on assignment of the rights to APRA. This change tips the balance of benefit and detriment further in favour of authorisation.

*Comprehensively improved alternative dispute resolution procedures for APRA licensees*

232. This change has given music users greater practical ability to negotiate licence fees and terms with APRA because not only is the process independent, it has the imprimatur of industry and is purpose designed to suit APRA disputes. In effect, it is a real restraint upon such market power as APRA may possess. The changes have been proved, by experience, to work. The effect of the changes then is, once again, to reduce any anti-competitive detriment that might otherwise result from APRA's arrangements and conduct.

*OneMusic Australia*

233. These developments can only enhance the public benefits provided by APRA's arrangements for which re-authorisation is sought. The changes will lead to increased compliance with Copyright law and decreased transaction costs for licensees.

*CLEF*

234. [CONFIDENTIAL]

[CONFIDENTIAL]

235. [CONFIDENTIAL]

*Changes to weighted voting*

236. These developments give lower earning members a greater say in the governance of APRA, particularly the election of the Board, which can only enhance the public benefits of APRA's arrangements.

*The growth of digital music markets in Australia*

237. This development in the market has increased the benefit which flows from APRA's blanket licences because not only existing, but also especially new, entrants into the digital music markets value the extent of the licensing cover provided by blanket licences and the certainty of ownership provided by APRA's taking an assignment of all members' rights. The availability of these licences facilitates the entry of new providers into these markets and provides wide and efficient copyright coverage for all participants, thereby increasing competition in those markets ultimately to the benefit of consumers of digital music and video.
238. In other words, the public benefits inherent in APRA's input and output arrangements previously accepted by the ACCC, including greater access to music, lower cost and more efficient licensing and lower transaction costs, continue to be applicable and, if anything, have become more significant with the greater use and intensity of digital streaming and downloading over the past four years. Every indication is that this increased benefit from APRA's input and output arrangements will continue into the foreseeable future. It should also be concluded that none of the changes identified above have increased the level of detriment that might be said to be likely to flow from APRA's input or output arrangements. If anything, it has been reduced. Once again, the balance is further tipped in favour of authorisation.

*More sophisticated technology enabling piracy*

239. The unwelcome concomitant of technological development and the growth of the availability of digital music to consumers is that music providers which choose not to comply with copyright laws are able now to do so on a mass scale, to the point where the legislature has seen fit to enact provisions to facilitate enforcement by rights holders. In these circumstances, APRA's arrangements which facilitate the efficient detection of copyright infringement and the cost effective prosecution of infringement actions against copyright pirates become even more significant and the extent of the public benefit should be seen as correspondingly greater than it was when the technology permitting mass piracy was not as developed. In addition, even though illegal, the technological possibility of mass piracy also operates as a competitive constraint upon APRA. APRA cannot afford to charge such high fees that music users are effectively encouraged to perform or communicate music in infringement of copyright. In this way, the development of more sophisticated technology enabling mass piracy has the effect of reducing any anti-competitive detriment inherent in APRA's arrangements and conduct. This change also rebalances benefit and detriment in favour of authorisation.

*Distribution efficiency improved through technology*

240. These developments can only enhance the public benefits provided by APRA's arrangements for which re-authorisation is sought.

*More flexible blanket licences through technological developments*

241. With the greater use of digital music and with technological developments, the process of ascertaining the proportions of APRA controlled and non-APRA controlled music used by a licensee has become more feasible and less costly. Technology continues to improve to make these processes are less costly and less inefficient. Thus, the acknowledged benefits to be derived from blanket licences that now can be priced more flexibly and efficiently will be enhanced compared to the level of those benefits in the past.
242. In addition, APRA's demonstrated flexibility over the years, facilitated by technological developments, is likely to continue in the foreseeable future, particularly when APRA new CLEF system is deployed. It reflects APRA responding to competitive pressure to accommodate the existence of non-APRA controlled music and direct licensing by users. Given the nature of the changes, it can be concluded that conditions will not deteriorate in relevant regards over the life of any re-authorisation so as to render these increased benefits and decreased detriments from APRA's output arrangements unlikely to be realised. Thus, the benefit and detriment balance moves to provide increased support for authorisation.

*Ongoing compliance with the Code of Conduct for Australian collecting societies and proposed further strengthening of the Code*

243. The comments of the Code Reviewer in the latest Triennial Review of the Code (see Attachment 21b) indicate that it has operated as a constraint upon any market power that APRA may have and has influenced APRA's conduct in beneficial ways. It can therefore be concluded that more effective compliance by APRA with the Code has enhanced the benefits that flow from APRA's arrangement and conduct and reduced any anti-competitive detriment compared to the past.
244. The changes that will be made to the Code in 2019 following its review by BACR will ensure that APRA's ongoing compliance with the Code will have an increased impact on any market power APRA may have and continue to encourage conduct that is in line with the expected behaviours of a collecting society.

*Changes to Copyright Tribunal Procedures*

245. These developments can only enhance the public benefits provided by APRA's arrangements for which re-authorisation is sought.
246. The Tribunal will be more accessible, cheaper and litigants will have the benefit of the ACCC guidelines.

[CONFIDENTIAL];

247. [CONFIDENTIAL];

*Existing limitations on international licensing and potential solutions*

248. Changes in the international situation have not yet resulted in a situation where APRA's licence back facility can be used in respect of international rights. As a practical matter this is unlikely to be a problem. If a member wishes to withdraw works for the purpose of online communication, this can be achieved by APRA's opt out mechanism. [CONFIDENTIAL];

### Conclusion on the Effect of the Changes on Benefit and Detriment

249. Over the life of the existing authorisations, there have been significant changes in ADR and dramatic developments in digital services. In this context, APRA has shown itself to be responsive to the needs of the market by promoting and engaging in ADR, and by developing licence schemes and licences that permit the large scale use of APRA music on digital music services while acknowledging the possibility of direct licensing. APRA has also acted so as to permit and encourage direct dealing between users and members. This demonstrates that APRA's systems are sufficiently flexible as to enable copyright owners to deal directly with their own works, without the need for any modification of the nature of APRA's exclusive input arrangements and its output arrangements. APRA is expending significant resources to ensure that its systems are fit for purpose over the coming years.
250. The OneMusic Australia project is an imminent change the impact of which will not be known for some time. However, it is a development that is expressly intended to benefit music users, and should significantly reduce confusion in the market, and introduce efficiencies over time.
251. In summary, the changes which have occurred in the last four years and which have had an impact upon APRA and the market for performing rights in Australia all tend to support the re-authorisation of APRA's arrangements and conduct, as sought in the present applications. These changes and their consequences are not temporary. They are likely to continue into the foreseeable future.

### Duration of Authorisation

252. Applications for revocation and substitution of authorisations such as the present involve considerable cost by way of both legal and consultants' fees and management time and attention. Those costs are ultimately borne by licensees and consumers and by members of APRA. More frequent applications because of short-term authorisations increase those costs.
253. In addition, the fact that authorisation applications 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.
254. In all the circumstances, APRA submits that there are no factors which require a short term authorisation. Nor is there anything in APRA's structures or arrangements that is likely to have the consequence that APRA's incentives to be flexible and responsive to users' needs will change dramatically within less than five years. APRA is recognised as a global participant in a highly changeable licensing and rights management environment, and is known to be at the forefront of technological developments and to operate at a standard that represents world's best practice.
255. The situation with regard to international online licensing is likely to develop quickly and in a way that favours competition. The changes in digital technology over the last four years show the futility of trying to predict how markets will develop in the short to medium term. Accordingly, it would not be appropriate to grant a short term authorisation on that account. If authorisations were to be granted for a term of five years, APRA would consent to a condition requiring it to report annually to the ACCC on the progress of OneMusic Australia, and on the international developments described in this submission. This would permit the ACCC to monitor those



developments, and if necessary, to seek to make appropriate changes to the authorisations.

256. Authorisations of five years, as sought by APRA, are appropriate.

### Conclusion

257. In all the circumstances, the ACCC should be satisfied that:

- (a) APRA's input, output and distribution arrangements and conduct produce substantial, well attested public benefits;
- (b) APRA's constitution and other structures allow members to obtain control of their rights so as to permit direct dealing between members and users in circumstances where that is likely to be practical and beneficial;
- (c) APRA's licensing conduct is not only regulated but is also responsive to competitive pressure and APRA has shown itself to be willing to enter into flexible licensing arrangements including blanket licences which provide for adjustments to licence fees to take account of performing rights licensed by the user directly or rights not controlled by APRA;
- (d) the market structures which are likely to exist over the next five years, including regulatory constraints upon APRA, mean that APRA will have no incentive, and substantially limited ability, to restrict supply or increase prices above competitive levels.

258. To the extent that there is any lessening of competition as a result of APRA input, output and distribution arrangements and conduct, APRA submits that the benefit to the public flowing from APRA's structure and operation outweighs the detriment constituted by that competitive detriment. To ensure that this continues to be the case, APRA is prepared to submit to conditions requiring the continued operation of Resolution Pathways, continued publication of Plain English Guides (including with respect to licence back and opt out), continued reporting requirements, and a further condition concerning reporting on OneMusic Australia and international developments.

259. Further and in any event, the benefit to the public resulting from APRA's structure and activities is such that the contracts, arrangements, and assignments which constitute that structure by means of which APRA operates, should be allowed to be made, or given effect to, as the case may be.

260. APRA submits that the ACCC should be satisfied that the contracts, arrangements, conduct and licences for which authorisation is sought would result or be likely to result in such benefits to the public that they outweigh the detriment to the public constituted by any resulting lessening of competition and that they would result or be likely to result in such benefits to the public that the conduct should be authorised to take place.

261. Finally, if, as APRA submits, the ACCC's conclusions in relation to previous applications for authorisations of APRA's arrangements and conduct were correct and:

- (a) The changes to the market that have occurred since the existing authorisations were granted are such that the benefits offered by APRA's operations and arrangements are increased and any detriments are lessened;

(b) those changes are not temporary and their effects will continue to operate in the market for the foreseeable future; and

(c) the existing conditions are continued,

the present applications for authorisations should be granted for a period of five years.