APPLICATION FOR REVOCATION OF A 91367 – A 91375 AND THE SUBSTITUTION OF AUTHORISATION AA 1000433

APRA RESPONSE TO DRAFT DETERMINATION

5 JULY 2019

1. APRA welcomes the opportunity to respond to the Draft Determination dated 5 June 2019. APRA respectfully agrees with the ACCC that, with the proposed conditions, the conduct for which APRA has sought authorisation is likely to result in public benefits that would outweigh any public detriments including in respect of any lessening of competition.

2. APRA broadly and respectfully accepts the proposed conditions of authorisation.

3. This submission sets out those areas of the Draft Determination that in APRA's respectful submission are factually incorrect or require a substantive response. References to paragraph numbers in this submission are references to paragraphs in the Draft Determination, and headings correspond to the headings in the Draft Determination. APRA does not in this submission address every point in the Draft Determination with which it does not agree.

4. Broadly, APRA has not addressed matters in the Draft Determination related to the operation of Resolution Pathways, noting that they have been the subject of submissions by the Facilitator and of an independent review, and that concerns about the independence of the process have been expressed.

5. APRA proposes some minor changes to the proposed conditions, but would welcome the opportunity to discuss these further with the ACCC prior to finalisation of the Determination. A summary of APRA's response to the proposed conditions is set out at the end of this submission.

Other copyright collecting societies

6. In the diagram contained in paragraph 2.14, the reference to AMCOS holding licences exclusively "(except in relation to US works)" is incorrect – AMCOS obtains exclusive rights in respect of US works, as well as works controlled by entities in other countries throughout the world.

CLEF

7. In relation to the implementation of CLEF as discussed in paragraph 2.58, APRA notes that on 1 July 2019 that part of CLEF that is responsible for licensing under the One Music Australia brand, was the subject of a successful go live. Other parts of CLEF will continue to be incrementally implemented with an anticipated ultimate completion of the staged go live over the course of calendar year 2020.

Future with and without the conduct

8. In response to paragraph 4.12 to 4.13, APRA does not agree that negotiations between individual APRA members and users under the model discussed would necessarily be "quicker and cheaper" than negotiations between APRA and users (indeed see paragraphs 4.19 to 4.22). Users would be required to locate individual copyright owners and negotiate individual terms with them, likely resulting in increased costs for the user and the affected members. APRA notes that there is

currently no obstacle to groups of members licensing back their works for the purpose of granting direct licences to a user. If the additional costs alluded to are the costs of the member "negotiating" with APRA for a licence back, APRA submits that the cost is minimal (there is no negotiation, the member simply fills out a form), and that the uncertainty that would result from a system that did not require the licence back process would be significantly more costly for all stakeholders.

Public benefits

9. In response to paragraphs 4.17 and 4.18, APRA respectfully notes that the broad approach adopted by the ACCC and referred to in paragraph 4.17 regarding public benefits does not appear to have been applied as reflected in paragraph 4.18. APRA agrees that the public benefits set out in paragraph 4.18 are indeed benefits of the APRA conduct, but submits that there are further public benefits resulting from the APRA conduct. Notable among these are ensuring that the laws of the Commonwealth are upheld, and the promotion of a vibrant and thriving Australian musical culture.

10. In response to paragraphs 4.29 to 4.35, APRA respectfully submits that the ACCC has underestimated the significance and on-going nature of the increased costs that would arise from non-exclusivity. First, based on APRA's recent experience, the costs of establishing "the systems" (paragraph 4.34) to deal with a complex licensing environment could be prohibitive rather than merely "significant". More importantly, the complexity of the negotiations regarding licence terms where a user requires some works from APRA and has obtained some rights directly is significant.

11. In response to paragraph 4.42, APRA says that if it were required to hold its rights on a non-exclusive basis, the additional costs of the monitoring and enforcement process would be considerable, and indeed may render the process so inefficient as to require comprehensive review. First, APRA notes the comments made by the ACCC in paragraph 4.14 –non-exclusivity would be unlikely to promote meaningful direct dealing with members of overseas societies, and accordingly, the licensing environment would be immediately more complex. Secondly, in relation to Australian and New Zealand works, every potential licensee would be able to make a credible claim to hold a direct licence. Under the current system, such claims can easily be verified against the records of licences back (if the response is that APRA could maintain a register of direct licences under a non-exclusive system, then the alleged benefits of non exclusivity fall away). Absent a register of direct licences, APRA would be required to verify each such claim with the members concerned in order to properly negotiate the licence. APRA members number more than 100,000 and are a diverse group whose occupation often requires frequent touring activity. Quick and cheap contact for the purpose of verifying direct licences is not a realistic prospect. Thirdly, if a licensee refused to enter into a licence agreement, APRA would be required to commence proceedings for infringement by joining the individual copyright owners whose works had been infringed. Unlike PPCA, and as noted at paragraph 4.69, the rights environment in which APRA members operate involves the performing rights residing with many individual songwriters rather than than publishers. Accordingly, APRA would be required to join individual songwriters in infringement matters in the Federal Circuit Court, with resulting advice, documentation and costs. This would be concerning for many APRA members, who would be understandably anxious about the cost and reputational implications of such litigation, even with appropriate indemnities. The costs of such litigation

would be increased at least as a result of the additional layer of evidence that would be required, but it is also likely that additional costs would be incurred in members obtaining their own legal advice including in relation to the relevant indemnities.

Public detriments

12. In response to paragraphs 4.63 to 4.65, APRA respectfully submits that the ACCC has understated the competitive constraints on APRA arising out of the opt out and licence back provisions. APRA submits that the relatively limited use of these provisions indicates acceptance on the part of members and licensees of the efficiencies and other benefits of the APRA system, and in particular the considerable benefits of the blanket licence that provides access to the world's repertoire of works. APRA submits that in the context of the long history of APRA's highly exclusive arrangements, the level of utilisation of opt out and licence back is in fact positive.

13. APRA notes the references in the Draft Determination to the fees published by APRA as being applicable at the Board's discretion for the use of the opt out and licence back facilities. As APRA has made clear in its primary submissions, the Board rarely exercises its discretion to charge these fees, and to the extent that those fees are seen as a disincentive to the use of the facilities, APRA would be prepared to remove them. APRA notes that this will necessarily involve the subsidisation of those members choosing to opt out of take a licence back, by those members who choose not to.

14. In response to paragraphs 4.73 to 4.80, for the reasons articulated previously APRA respectfully does not agree that its blanket licences result in allocative inefficiency, but does not propose to make submissions in relation to this aspect of the Draft Determination.

15. In response to paragraphs 4.81 to 4.90, for the reasons articulated previously APRA respectfully disagrees that its conduct encourages the over production of works, but does not propose to make further submissions in relation to this aspect of the Draft Determination.

16. APRA respectfully rejects the ACCC's conclusion at paragraph 4.91. There is no evidence whatsoever to suggest that APRA's conduct is or is likely to be stifling technology or business models in any way. In fact, as APRA has previously demonstrated, APRA develops and offers licences to all kinds of new businesses, including businesses that are engaged in technological development. Australia is an early adopter of technology, and the availability of the APRA licence has been a significant factor in the early entry into Australia of many streaming services and other delivery platforms. APRA has offered licensing arrangements to the background music supplier industry that facilitate exactly the type of business model described at paragraph 4.92.

17.

18. APRA notes the matters set out at paragraph 4.108. As at the date of this submission, the One Music Australia licence terms, website and plain English guides are available. A package of these materials is included with this submission.

19. With respect to the matters raised at paragraphs 4.123 and 4.124, it is true that the PPCA repertoire of licensed sound recordings is not as extensive as the APRA repertoire of works. The quantification of the discrepancy is extremely complex. However, and with respect, the public submissions in relation to this reveal a misunderstanding of the issue. The submission from the Australian Small Business and Family Enterprise Ombudsman suggests that the issue is that "APRA does not represent all artists [*sic*] that may be, say, streamed through services such as Spotify...and this will become an even more significant issue upon commencement of OneMusic Australia since [PPCA] covers a narrower range of artists that are likely to be streamed" (10 May 2019 submission, paragraph 4). That is, the Ombudsman is concerned with inadvertent infringement. To the extent that this is an issue, it is not affected by OneMusic Australia – the works and sound recordings licensed by APRA and PPCA respectively remain unchanged. To the extent that the ACCC is concerned about inadvertent infringement, APRA is confident that it and PPCA provide a near comprehensive licence for all musical works and sound recordings likely to be performed by Australian businesses. There is certainly nothing to suggest that the repertoire available on streaming services is notably greater than the repertoire licensed by APRA and PPCA. To date, APRA has not encountered a claim that a work has been streamed on such a service and was not appropriately licensed.

20. The more complex issue related to the PPCA repertoire appears not to be the concern of the Ombudsman, although it may be the subject of the confidential submission referred to in paragraph 4.123 that APRA has not seen. The issue is this: sound recordings are "protected" by copyright when the country in which they are "made" is a signatory to the Rome Convention. The United States is not a signatory to the Convention. However, because of the way that ownership of copyright in sound recordings (and as a result issues relating to the "making" of sound recordings) is determined in various legislative instruments throughout the world, many sound recordings that would appear to have been made in the United States are in fact protected. For example, any performance by a non United States session musician on a recording will render the recording protected. Further, many United States based record labels actually make recordings in studios located outside the United States, for example in Jamaica. These recordings will also be protected. The fact that some sound recordings are not protected is a matter that has been extensively examined by the Copyright Tribunal in determinations relating to PPCA licence schemes. The issue should be of no concern to licensees, because there is no risk of infringement – the performance of the non protected recordings does not require a licence. APRA submits that it would require considerable determination and research on the part of a licensee to play only non protected sound recordings, and accordingly a sound recording licence is required for the majority of recordings likely to be performed in public in Australia. APRA and PPCA are developing a statement regarding the PPCA repertoire, to be displayed on the One Music Australia website. APRA will provide a copy to the ACCC shortly.

Factors that may mitigate against detriment

21. In response to the matters set out in paragraphs 4.132 to 4.141, APRA agrees that the Copyright Tribunal is an expensive jurisdiction, and is acutely aware of access

to justice issues generally. However, APRA respectfully submits that the Copyright Tribunal is a relatively accessible jurisdiction that acts as a significant constraint on APRA's conduct. In particular, it has no filing fees and the rules of evidence do not apply (section 164 of the *Copyright Act 1968*). The Act requires proceedings to be conducted with as little formality as is possible in the circumstances. APRA notes that in 2018 an individual West Australian nightclub owner did in fact commence proceedings in the Tribunal against APRA and PPCA, without legal representation. The matter settled at a Tribunal ordered mediation in 2019.

22. APRA believes that there is considerable scope for small business licensees, particularly those supported by industry representative bodies, to access the jurisdiction of the Tribunal. APRA submits that this belief alone is enough to act as a constraint on APRA's conduct, particularly with respect to the development of licence schemes. APRA has no active wish to have licence schemes referred to the Tribunal: the benefit of the Tribunal's imprimatur is almost always offset by the legal and internal costs of litigation. Therefore, APRA behaves in a way that anticipates the Tribunal's obligation to determine reasonable licence conditions, because if APRA's licences are reasonable, licensees have less rational incentive to refer them to the Tribunal. Once a matter is referred to the Tribunal, a licensee is entitled to all of the processes of the jurisdiction, including compelling APRA to produce material relevant to the proceedings.

23. It is self evident that the Tribunal's jurisdiction is most frequently invoked in matters involving sophisticated licensees. The last major Tribunal proceeding in which APRA was involved was the litigation between APRA AMCOS on the one hand, and Apple Australia, Telstra, Sony Music, Universal Music, and the ACCC on the other, regarding the licence scheme for digital downloads. There is no way in which it could be represented that any of those parties was at a disadvantage because of access to data. The expense and other resources required for proceedings such as these act as a real constraint on APRA's behaviour.

24. APRA respectfully submits that the ACCC has also underestimated the impact that the very existence of Resolution Pathways has on APRA's conduct. Even if it is true, as stated in paragraph 4.184, that a user will only submit a dispute for resolution if the cost to the user of doing so is less than the difference between the APRA price and the likely ADR price (which APRA does not accept, including because it has not been APRA's practical experience), the potential cost (including reputational damage) to APRA of participating in (particularly a large number of) dispute resolution processes means that APRA has an incentive to behave reasonably.

25. APRA rejects the allegation made by some third parties that APRA does not draw attention to the availability of Resolution Pathways in its communications with licensees. However, APRA accepts the criticism that details of Resolution Pathways can be difficult to locate on its website. In response to paragraph 4.156, APRA respectfully submits that to include contact details for Resolution Pathways in all of its standard licence agreements is unnecessarily cumbersome, including because APRA is trying to reduce the "fine print" in the contracts, but also because if the contact details were to change APRA would be required to amend every contract. It is APRA's experience that small business licensees typically do not turn to their licensing documentation in the event of a dispute with APRA, but rather look to online resources. Accordingly, APRA has taken steps to ensure that information about Resolution Pathways is far more prominent on the OneMusic Australia website than has been the case on the APRA website. A copy of the

information is attached. APRA proposes to adopt the same approach on the APRA website. The APRA website itself was redesigned several years ago, with great care taken to make it accessible and helpful for both members and licensees. However, APRA recognises that improvements could be made, and has committed to a redesign of the APRA website in 2020. To be clear, APRA will immediately make the Resolution Pathways information, including contact information, prominently available on the APRA website as well as on the OneMusic Australia website.

26. APRA understands that the Resolution Pathways website is in the process of being comprehensively redesigned, including to address the issues raised in the Draft Determination.

27. APRA also will ensure that the Australian Copyright Council and the Arts Law Centre of Australia, being the two legal centres most likely to receive enquiries regarding APRA (and OneMusic) licences, receive appropriate information regarding the availability of Resolution Pathways.

28. APRA submits that it is not necessary for the conditions of authorisation to be amended to formally recognise disputes between members. This is a service offered by APRA to its members, and disputes between members are not a consequence of the APRA conduct. However, APRA is willing to commit separately to provide that service over the term of this authorisation.

APRA's Board and governance arrangements

29. With respect to transparency, APRA notes that it has implemented the recommendations of the BACR Committee, effective 1 July 2019.

30. In response to paragraph 4.207, APRA has no objection to publishing a transparency report of the kind described.

31. However, APRA would not be able easily to publish costs incurred "per type of use", and even if it could, does not believe that the publication of that information would be of any utility. In fact it may be misleading.

32. Article 93 of APRA's Constitution requires it to first pay its costs of operations, then (subject to allowable contributions under Article 95) all amounts must be allocated to members. APRA does not allocate costs "per type of use", even internally, and should not be required to do so for a number of reasons. First, different types of costs are often incurred across a long life of a licence scheme or even a licence, and would often appear to be disproportionally allocated in the context of relevant revenue. For example, APRA's first agreement with a streaming service would have seen a high level of legal costs, disproportionate to the level of licence fees generated. However, that licence agreement formed the basis for many licences that now generate a high percentage of APRA's revenue. That is, the costs are recovered (and more costs are incurred), but over a long period of time. It is also likely that APRA has incurred significant costs in the development of licence schemes for technologies that have never generated any revenue. It is appropriate for those costs to be allocated across the whole of APRA's operations.

33. The position is similar with respect to enforcement costs. APRA's enforcement actions are often taken with respect to small business music users with relatively low licence fees. However, the costs of such enforcement actions are appropriately

borne by the whole company, including because they increase compliance among a broader range of licensees. Many of the test cases that have cemented APRA's rights under the *Copyright Act*, were routine enforcement actions. A period in which a large dispute was managed would, if the costs of that dispute were allocated to the particular "type of use" make that licence scheme seem particularly poorly performing in terms of amounts distributed – and APRA would not in fact require the owners of the copyright in those particular works to bear the burden of the costs of the dispute. Enforcement costs with respect to broadcast or video on demand licensees are lower, because the licensees are more sophisticated and tend to be more compliant. However the costs of entering into the licence agreements are high, because of the costs of negotiating with sophisticated licensees.

34. The technology and data costs of administering licences with large streaming and UGC services are high, but the results of the expenditure go beyond those particular licence schemes. Staff members are engaged on many different activities, some of which (such as member services) cannot be allocated to any "type of use". The costs of APRA's involvement in copyright law and policy reform also go beyond the immediate beneficiaries of the efforts expended.

35. APRA has taken great care to ensure that extraordinary expenditure (and extraordinary revenue) is allocated across years of operations, so as not to deliver an unfair burden (or windfall) on any particular group of members.

36. It is for these reasons that the expenses to revenue ratio is the best overall measure of APRA's efficiency. APRA is able to publish the expenses to revenue ratio for APRA as a standalone entity, but believes the figure is artificial and unhelpful when in fact, many APRA staff and other resources are engaged in generating AMCOS revenue. With the implementation of OneMusic Australia those staff will also be engaged in generating PPCA revenue.

37. APRA respectfully submits that point 5 in paragraph 4.207 perhaps reflects issues that some third parties have expressed with respect to collective administration more generally, rather than a specific problem with APRA. APRA does not hold large amounts of undistributed funds. If a work cannot be identified, APRA attempts to identify the work rather than the copyright owner. Unidentified copyright owners are not a problem with which APRA has to contend in any significant sense. The Transparency Report will likely reflect this fact.

38. In relation to point 7 of paragraph 4.207, APRA is happy to provide information about the total amounts allocated to the services described, but would strongly resist the making public of amounts granted to particular individuals, for reasons of privacy and confidentiality.

39. APRA submits that the most efficient time for it to publish its Transparency Report would be for it to be made available on the APRA website at the same time as the annual report and Year in Review documents.

40. APRA understands that a number of licensees have expressed concerns with a perceived lack of transparency about the way that APRA has arrived at particular licence fee formulations (that is, for the most part licensees understand how their own licence fees are *calculated*, but do not always understand how APRA came to *formulate* the basis on which licence fees are charged). APRA accepts that there are advantages in making this information more transparent. This is also reflected in the recommendations of the BACR Report, which APRA has implemented.

41. APRA notes that the "information asymmetry" referred to in paragraphs 4.245 to 4.249, is only an issue with respect to certain licensees. Large streaming services and similar content platforms are in possession of far more information regarding their own activities than APRA, and APRA would resist strongly any suggestion that it should be required to disclose information to those services other than in the usual course of commercial dealings.

42. On that basis, APRA understands the reasoning behind the proposed recommendation set out at paragraph 2.253, if that recommendation applies only to public performance licences.

43. However, in APRA's respectful opinion it would not be in the interests of public performance licensees to have detailed information of the type referred to in paragraph 2.253 contained in the plain English guide for each licence scheme. The PEGs are designed to be a guide to the licence, and APRA's experience is that most licensees are interested in how the licence scheme will affect their own business. Most licensees do not require information about the basis for the licence scheme, and would in APRA's view find the information unnecessary and inefficient to have to consume. Rather, APRA believes that a single PEG that describes the basis for all licence schemes would be a more useful document. Interested licensees would find it useful, and uninterested licensees would be aware of its existence but would not need to ingest the unwanted information. In APRA's view a single document would also be more useful because those licensees who are interested in the genesis of licence schemes are usually very interested in a comparative analysis of the basis for licence schemes (for example, a fitness centre will want to know why it pays more than a retail outlet that performs background music). A single document will be of far more use in this regard. A summary of APRA's suggestions is set out at the end of this submission.

44. In response to paragraph 4.255, APRA believes that the limitation set out in the BACR recommendation is appropriate. APRA's commercial negotiations should not be compromised by the compulsory provision of information that does not have to be provided by the other negotiating party. APRA does not entirely understand the type of information that the ACCC is considering requiring APRA to produce, but it appears that the requirement would amount to a discovery obligation in the absence of litigation, but without any of the constraints of the litigation process. APRA would regard this as grossly unfair.

45. APRA has been working on implementing the BACR recommendation in good faith. APRA submits that the appropriate course is for APRA to discuss with the ACCC the form that the licence overview PEG would take, before finalisation of the determination.

46. In response to paragraph 4.284, APRA says that it should only have to provide information in response to reasonable requests. As at the date of this submission, APRA has published most of its distribution PEGs in accordance with the BACR recommendations. The remainder will be published within 3 months.

DETAILED RESPONSE TO PROPOSED CONDITIONS

Condition C1 – Transparency of licence fees

C1.1 – APRA agrees in principle. However, the nature of the "table" referred to is unclear, and some of the information may be of little utility. For example, the range of licence fees paid under the background music licence scheme will be from the fee paid by a small shop

with a radio, to a large department store, and this range is too large to be useful. APRA requests the opportunity to discuss the "table" before the condition is finalised.

C1.2 – APRA submits that this condition should be revised to require each individual PEG to contain that information at a high level only, with more detailed information to perhaps be contained in the "table" referred to in C1.1. The condition should also be revised so that the exclusion of information that is commercial in confidence applies to both (i) and (ii).

C1.3 – APRA has no objection to this condition. APRA notes that most licensees will enter the website other than via the homepage, and respectfully suggests that the relevant links should rather be "prominently displayed" at that entry point (as well as being reasonably obvious on APRA's home page).

C1.4 – APRA has no objection to this condition.

C1.5 – APRA has no objection to this condition.

C1.6 – APRA has no objection to this condition, except that APRA should only be required to make the information available to any party on reasonable request. APRA should not be required to respond to vexatious requests.

Condition C2 – Transparency of distribution arrangements

C2.1 – APRA has no objection to this condition.

C2.2 – APRA has no objection to this condition, except that consistent with the BACR recommendation, APRA should only be required to make the information available on reasonable request. APRA should not be required to provide information in response to vexatious requests.

C2.3 – APRA has no objection to this condition.

C2.4 – APRA has no objection to this condition.

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

C3.1 – APRA has no objection to this condition.

C3.2 - APRA has no objection to this condition.

Condition C4 – Annual Transparency Report

C4.1 – APRA has no objection to this condition, except that APRA does not allocate costs in the manner suggested by (i)(b), and should not be required to disclose amounts allocated to grant recipients ((c)) due to confidentiality and privacy concerns. Otherwise, APRA would publish the report at the same time and in the same manner as its Year in Review.

Condition C5 – Alternative Dispute Resolution

In the interests of maintaining the independence of Resolution Pathways, APRA does not propose to make any submissions in relation the proposed condition. APRA understands that the Resolution Pathways facilitator will be making a submission in this regard.