APRA SUBMISSIONS 9 AUGUST 2019

Introduction

1. APRA has reviewed all of the submissions made to the ACCC in connection with the draft determination. This submission is to respond to those written submissions, and to submissions made at the pre decision conference held in Sydney on 19 July 2019.

2. APRA takes the submissions of interested third parties seriously, and respects the fact that many people made the time to attend the pre decision conference. The purpose of this submission is not to refute each individual submission made, but rather to address the themes that have emerged or continued after the draft determination and to correct false information that has been submitted to the ACCC.

3. In the main, APRA considers that most of the matters raised in the recent submissions are appropriately the subject of review under the Code of Conduct, or referral to Resolution Pathways. Some of those matters, if true, might be evidence of APRA's market power. But APRA's market power is not in doubt.

4. As a result of the Code of Conduct, and as a result of the previous authorisation process which was the impetus for Resolution Pathways, as well as because APRA has responded to the changing business landscape in which it operates, APRA has over the last 20 years undergone a process of real cultural change. Members are no longer prevented from dealing directly with licensees, and they do, particularly through the licence back facility. The Resolution Pathways facility provides a real and very cost effective alternative to the previous form of ADR, and to the Copyright Tribunal. The Plain English Guides have proved to be useful in explaining the APRA licensing system to those who use music in their business.

5. APRA is not complacent about the changes it has made, and is well aware that as a collective licensor of music rights on behalf of millions of individual copyright owners, it is inevitable that there will be some complaints about the way APRA manages its business. Not all of those complaints are supported by evidence, but some of them are, and APRA is committed to improving the service it provides to its more than 107,000 songwriters, composer and publisher members, and its some 140,000 licensed premises. The majority of members and licensees are small businesses, and many do not have the time or inclination to obtain a detailed understanding of music copyright. The role of industry representative bodies, particularly for licensees, is therefore crucial.

6. There is no question that periodically reviewing APRA's compliance with the Code of Conduct, reporting under the conditions of authorisation, and the regular reauthorisation process, have ensured that APRA is much more transparent than it was twenty years ago.

Length of authorisation

7. APRA has operated under authorisations of various lengths, and advocates strongly for a five year authorisation.

8. The authorisation process is a valuable one, but is also extremely time consuming and expensive. The existing and proposed conditions require a very high level of ongoing reporting to the ACCC. The environment in which APRA operates is changing quickly in many ways, but APRA submits that in a volatile technological environment a longer period of relative stability as is allowed by the authorisation, is more conducive to efficiency. It would also enable APRA to make more effective use of beneficial technological change and to respond to real changes in the market.

9. It is a common misconception on the part of those who observe APRA's operations that "technology" will simply replace many of the functions that APRA currently undertakes. APRA does utilise technological solutions where possible. However, APRA believes it would be unwise to invest significant time and money in every potential technological solution that appears in the market. It takes time to assess the impact of technological developments. This is certainly the case with music recognition technology (discussed in more detail below) – the solution is (currently) extremely expensive and accordingly unwarranted for many licence schemes operated by APRA. As most businesses would appreciate, the mere availability of new technologies does not provide a sensible basis for their immediate adoption – other factors such as cost, accuracy, and reliability must be factored in to a proper decision making process.

10. At the time of APRA's previous authorisation, APRA was cautiously investing in a putative global repertoire database, which required significant worldwide cooperation to succeed and which did not eventuate. APRA submits that if a shorter period of authorisation had been granted on the assumption that the GRD would significantly change the nature of APRA's operations, the resulting expense would have been largely wasted.

11. APRA is investing significant resources in the development of its new copyright management system CLEF and the associated ecommerce portal, which enabled the launch of OneMusic Australia in July 2019. The full effects of this technology are yet to be experienced, however it is being developed on the basis that it will deliver significant benefits to APRA licensees and members.

12. APRA submits that the regular and rigorous process of reporting on licences back and opt outs, disputes, compliance with the Code of Conduct, and on operations via a Transparency Report will be a far more effective way to monitor APRA's conduct than having to apply for reauthorisation in 12 to 36 months' time.

OneMusic Australia consultation process

13. A number of interested parties have again made submissions about this process. APRA has made detailed submissions with respect to its

operation of OneMusic Australia and the consultation process that preceded its implementation and is continuing.

14. It must first be reiterated that OneMusic Australia does not represent a change to the legal basis on which APRA does business, in terms of the conduct the subject of this authorisation application. APRA will act as PPCA's agent to administer PPCA's non-exclusive rights, and the APRA and PPCA rights will be licensed together under the business name OneMusic Australia. Other than the simplicity of dealing with a single entity, the major benefit of OneMusic Australia is that all public performance licences will have associated Information Guides (Plain English Guides), and will be subject to the Resolution Pathways ADR process.

15. Some submissions were made about APRA's increased market power as a result of the agency appointment. It is important to note that the rights managed by APRA and PPCA respectively are rights in different copyright material – APRA and PPCA are not in any sense competitors. Also, the PPCA rights remain non-exclusive, and so APRA is in no greater a position of power than PPCA with respect to rights in sound recordings. It is true that APRA will be a more effective licensor, because it will have access to the PPCA licensee database. However, to submit that this is a disadvantage to licensees is to submit that licensees should be entitled to avoid comprehensive public performance licensing, which is contrary to the public interest. Further, any increased power as a result of having access to the PPCA licensee database is only an incremental increase: once the databases are combined, APRA will not continue to become increasingly more powerful. In any event, the power is constrained by the complex regulatory regime canvassed throughout APRA's submissions, including compliance with the law generally, reporting under the authorisation, the Code of Conduct, Resolution Pathways, and the Copyright Tribunal of Australia.

16. The OneMusic solution is well overdue. The complexity involved in delivering a one-stop-shop for public performance music copyright licensing is reflected in the fact that so few territories internationally have embarked upon, let alone delivered a similar service. APRA notes that in the UK, Ireland and Canada the works and sound recording societies have merged administrative resources, however licensees are still required to report under separate licence terms for the respective rights. APRA submits that the single licence scheme model delivers far greater administrative simplicity for licensees.

17. Without doubt APRA could have consulted more comprehensively. That said, over a two year period APRA consulted with 27 industry associations, held many focus group meetings, and received and responded to very valuable feedback. APRA worked hard with industry associations and other business representative groups, and made a number of amendments to many schemes.

18. APRA generally enjoys very good relations with key industry associations. The Australian Hotels Association, Restaurant & Catering, Fitness Australia, Live Performance Australia, and Clubs NSW all worked closely with APRA to provide detailed feedback representing the perspectives of

their many thousands of constituents. A raft of changes were made to OneMusic's original rate proposals as a direct result.

19. At the pre determination conference, Mr Strong on behalf of the Council of Small Businesses Organisations Australia (COSBOA) made a number of concerning allegations against APRA, including that:

    (a) APRA is a "scam";

    (b) APRA has the highest performing right licence fees in the world (this is responded to below);

    (c) APRA's licensing arrangements are complex compared to other collecting societies' licences, for example the Canadian society has a one page document for "retail, service and dining licence category" (in fact, the one page document outlines the background music tariff and directs licensees to an additional four potential licence schemes);

    (d) APRA cannot accurately pay songwriters for the use of their music because APRA often does not know what music has been played (this is responded to below);

    (e) APRA's arrangements prevent people from being able to use disruptive technology.

20. APRA disputes COSBOA's allegations. APRA and COSBOA met on 8 August 2019 and had what APRA considered to be a constructive discussion. APRA has also invited COSBOA to participate in an alternative dispute resolution process facilitated by Resolution Pathways if it considers that would assist in addressing some of its concerns.

21. Ms Slingo on behalf of Electronic Music Conference claimed to have conducted multiple surveys of APRA stakeholders, a large percentage of which claimed to be unaware of OneMusic Australia. APRA cannot respond to this allegation without having details of the survey and the responses to it. APRA notes that Ms Slingo has never raised this concern with it previously, despite the fact:

    (a) that APRA provides funding in support of the Electronic Music Conference through which she presumably conducted these surveys; and

    (b) that Ms Slingo has a seat on APRA's Club Music Advisory Group which meets a number of times year to discuss issues relating to the sector. Indeed APRA's records show that at the CMAG meeting on 22 November 2018 Ms Slingo stated that artists and venues appreciated the OneMusic Australia consultation process.

22. APRA acknowledges that it did not commence its OneMusic Australia consultation process in relation to Events until May 2019 and that this consultation process remains ongoing. The existing APRA and PPCA rates for Events continue during the consultation period. APRA is engaging heavily with Live Performance Australia in relation to its Events consultation and understands that a number of the stakeholders operating

in the electronic music festival sector would be members of Live Performance Australia APRA has also written to all electronic music festival licensees directly.

23. The AVA submitted that APRA did not fully consult with it as part of the OneMusic Australia process. It is true that APRA met with the AVA only once (noting that it claims to represent only around 130 members, compared to some much larger representative groups). However, the AVA did receive numerous consultation papers over a period of 18 months. The outcome from the AVA meeting was to maintain status quo and continue consultation, which is what the AVA requested. AVA undertook to provide specific feedback on the proposals but has not yet done so. APRA's current time frame is to circulate a further consultation paper and hold meetings with interested parties in September/October 2019.

OneMusic Australia licence fees

24. A number of organisations have made submissions to the ACCC regarding anticipated licence fee increases under OneMusic Australia. As noted above, a large part of the efficiency of OneMusic Australia for all parties will be the harmonised tariffs. Most of the PPCA and APRA licence schemes were quite different, and so harmonisation was complex. As APRA has stated on a number of occasions, the OneMusic Australia tariff harmonisation scheme is intended to be revenue neutral. However in harmonising metrics, it is inevitable that some licensees will pay more, and others will pay less, than they currently do. APRA believes that the majority of those who will pay more will be required to do so because they have not previously been appropriately licensed, in most cases because they did not hold either an APRA licence or a PPCA licence. (Submissions regarding the transparency of APRA's modelling in relation to OneMusic Australia are responded to below.)

25. In any event, if there are unreasonable increases in licence fees for particular licensees, these are matters for Resolution Pathways, or for the Code of Conduct. APRA welcomes the assistance of industry bodies in this regard. Individual licensees and industry bodies are also able to refer the licence schemes to the Copyright Tribunal for determination of questions of reasonableness.

26. In relation to specific concerns raised, APRA notes the submission of the AVA that for many of its members, the OneMusic Australia licence fees will be "higher than rent" and that for some AVA members the licence fees would be more than $100,000 annually. APRA does not have access to information regarding the rents paid by its licensees, or the membership of the AVA. However, APRA's records for licence fees from its GFN (nightclub) licence show that licence fees fall within the following bands:

    $0 - 4,999: 49.1% of licensed venues
    $5,000 - $49,999: 49.5% of licensed venues
    $50,000 - $99,999: 1.2% of licensed venues
    $100,000 +: 0.2% of licensed venues

27. The AVA and the AHA both alleged significant discrepancies in the way that APRA licenses similar premises. APRA disputes this allegation. In

almost all cases, APRA relies on information provided by the licensee to assess the applicable licence scheme and calculate licence fees. APRA has asked both organisations for specific examples, but none have been provided. If a representative organisation can demonstrate to APRA that it has the consent of its members to access their licensing information, APRA would be happy to discuss licence fee disparity with the body in respect of those licensees represented by that body.

28. Ms Benny, on behalf of the Strawberry Fields Music Festival, alleged that the Festival's licence fees have increased by 40 – 55% in the last 12 months. It is true that the Festival experienced a significant (approximately 49%) increase in licence fees from 2017 to 2018. However, most of this increase (approximately 80%) was due to increased box office receipts that APRA understands was achieved through higher ticket prices and larger attendance numbers. The remainder of the increase occurred as a result of the final year of a phased in increase negotiated with Live Performance Australia in around 2015.

29. Live Nation submitted that the OneMusic Australia licence fees would be so high that Live Nation will not be able to program a support act with major international touring artists. In response, APRA says that:

(a) OneMusic Australia is not proposing any change in respect of music concerts and festivals in respect of APRA's rights. There is a change to the PPCA licence fee structure, which is intended to reflect APRA's percentage of revenue approach, not to increase licence fees; and

(b) the OneMusic Australia Event consultation paper is just that, and APRA welcomes direct feedback on the proposals contained in it, including from Live Nation.

30. Live Nation referred to an increase in APRA licence fees of 50% over a five year period. This 'phased-in' increase relates to APRA's Live Concert licence scheme and was agreed in around 2015 following an extended negotiation involving APRA, Live Performance Australia and a number of national concert promoters including Live Nation. Notwithstanding the agreed increase, APRA'S Live Concert tariff remains one of the lowest in comparable territories across the world for this type of performance.

31. A number of other interested parties submitted that APRA (or OneMusic Australia) licence fees are higher than fees charged by similar societies overseas (including in New Zealand). APRA submits that this is not an appropriate forum for this discussion. However, the assertion is in any event not sustainable including because:

(a) it is extremely difficult to compare licence fees paid internationally, because the laws and the licences are all quite different;

(b) a nightclub in New Zealand is not operating in the same market as a nightclub in Australia, and different market conditions affect price;

(c) the argument amounts to a submission that the cheapest price anywhere in the world is the appropriate price to pay for any product in Australia; and

(d) there are many markets in the world where rates for comparable public performance music uses are higher than they are in Australia.

32. In relation to the submissions made by the Independent Cinemas, APRA says:

(a) the existing licence fees for cinemas were negotiated in or around 2006 with a predecessor of the National Association of Cinema Operators;

(b) the licence fees for cinemas have not increased under OneMusic Australia. However the invoicing cycle is no longer two six monthly payments (half in advance, half in arrears) but is now four quarterly payments (all in arrears) matching payments to the quarter to box office in that quarter; and

(c) far from being 'much higher" in Australia than in New Zealand as claimed, the APRA licence fees in New Zealand are 0.40% of box office, and in Australia are 0.42% of box office.

The Copyright Tribunal

33. APRA has been involved in many Copyright Tribunal proceedings over the years since the Tribunal was established. It is expensive, like all litigation. Disputes in the Tribunal are typically with industries that pay tens of millions of dollars a year in licence fees. It is appropriate that such disputes are determined by a Tribunal that is presided over by a Federal Court judge assisted by appointed lay members. It is also appropriate that parties engage expert legal representation in those disputes. APRA was most recently before the Tribunal in 2009, with opposing parties Apple, Telstra, Sony Music and Universal Music. The ACCC was also a party to the proceedings. It is APRA's view that the resources of the respective parties were reasonably balanced.

34. APRA has never commenced proceedings in the Tribunal against an individual licensee. It has, very rarely, been a respondent at the suit of individual licensees – most recently, in 2018 a self represented nightclub owner commenced proceedings against APRA and PPCA in the Tribunal. The proceedings were settled at mediation. APRA believes that Resolution Pathways is the better place for such disputes, and actively encourages its use.

35. APRA is surprised by the submissions made by Free TV with respect to the complexity and cost of Copyright Tribunal proceedings. In 1993, APRA commenced proceedings in the Copyright Tribunal seeking determination of a new licence scheme for the free to air commercial television stations. The response was for the free to air commercial television stations to commence proceedings against APRA in the Federal Court for breaches of the *Trade Practices Act 1974*, which in turn led to APRA's first applications for authorisation and the contested proceedings before the Australian Competition Tribunal. The free to air commercial television industry is a $4

billion a year industry, and demonstrates no obvious reluctance in participating enthusiastically in complex and expensive litigation.[1]

The BPM submissions

36. The BPM's extensive oral and written submissions raise a number of matters particular to background music providers. APRA's view is that the new BPM submissions add little to its submissions made earlier, and in fact reinforce the submissions made by APRA in relation to the background music providers generally.

37. APRA does not submit that the "competitive threat" to background music services represented by the "consumer digital music services" arises from an active targeting by Spotify *et al* of the small business market. APRA has no comments in that regard. Rather, it is apparent that some business consumers – particularly small business consumers – are using the curated playlists offered by large digital music services, to stream or otherwise play background music in their businesses.

38. BPM is transparent in its motives – BPM accepts that it was appropriate for a licence to be granted for business owners as "a way to legitimately copy CDs and thereafter digital song purchases" but "overall the impact to the BMS of the Copying License was minimal" however now because "technology has evolved" BPM wants the practice to cease. Plainly, BPM wants APRA to prevent businesses from using digital streaming services as a source of background music, to drive them to use background music suppliers instead. APRA cannot see the basis on which it could adopt that approach.

39. BPM seeks to dress this up as arguments about distribution and transparency, but the fact is that however advantageous the access to background music supplier data may be, it is not appropriate for APRA to refuse to grant a licence to any business even if that business uses a digital streaming service as a background music source.

40. If APRA were to refuse to license the businesses that use streaming services as a source for background music, two obvious consequences would flow. First, APRA would be required to commence proceedings for

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[1] *In the matter of TEN Network Holdings Limited (Administrators Appointed) (Receivers and Managers Appointed) and Others* [2017] NSWSC 1219; *In the matter of TEN Network Holdings Limited (Admins Apptd) (Recs and Mgrs Apptd) and Others* [2017] NSWSC 1359; *In the matter of Ten Network Holdings Limited (subject to a deed of company arrangement) (receivers and managers appointed)* [2017] NSWSC 1480; *In the matter of Ten Network Holdings Limited (subject to a deed of company arrangement) (receivers and managers appointed)* [2017] NSWSC 1529; *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 914; *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] FCA 1144; *Network Ten Pty Limited v Seven Network (Operations) Limited* [2014] NSWSC 274; *Network Ten Pty Ltd v Seven Network (Operations) Ltd* [2014] NSWSC 752; *Network Ten Pty Ltd v Seven Network (Operations) Ltd* [2014] NSWSC 692; *Network Ten Pty Ltd v TX Australia Pty Ltd (No 2)* [2019] NSWCA 51; *Network Ten Pty Ltd v TX Australia Pty Ltd* [2018] NSWCA 312; *Nine Network Australia Pty Ltd -v- Birketu Pty Ltd [2016]* NSWSC 694; *Nine Network Australia Pty Ltd & Ors v Sheppard* [2018] QCA 301; *Nine Network Australia Pty Ltd v Tabbaa* [2018] NSWCA 243; *Seven Network (Operations) Limited and Anor v Amber Harrison* [2017] NSWSC 405; *Seven Network (Operations) Limited and Anor v Amber Harrison* [2017] NSWSC 952; *Seven Network (Operations) Limited and Cockman* [2018 FCWA 108; *Seven Network (Operations) Limited and Screen Australia (Taxation)* [2019] AATA 798; *Seven Network (Operations) Limited v Amber Harrison* [2017] NSWSC 129; *Seven Network (Operations) Limited v Amber Harrison* [2018] NSWSC 633; *Seven Network (Operations) Limited v Endemol Australia Pty Limited* [2015] FCA 800; *Seven Network (Operations) Limited v Fitzgerald* [2016] NSWSC 420; *Seven Network (Operations) Limited v Shane Dowling* [2018] NSWSC 1890; *Seven Network Limited v Commissioner of Taxation (No 2)* [2015] FCA 201; *Seven Network Limited v Commissioner of Taxation* [2014] FCA 1411; *Seven Network Limited v South Eastern Sydney Local Health District* [2017] NSWCATAD 210; *Seven Network v Commissioner of Police, NSW Police Force* [2017] NSWCATAD 31; *Seven Network v Dowling* [2017] NSWSC 1803; *TCN Channel Nine Pty Ltd v Pahuja* [2019] NSWCA 166; *TX Australia Pty Ltd v Network Ten Pty Ltd; Network Ten Pty Ltd v TX Australia Pty Ltd* [2018] NSWSC 559; *WIN Corporation Pty Limited -v- Nine Network Australia Pty Limited* [2016] NSWSC 205; *WIN Corporation Pty Ltd -v- Nine Network Australia Pty Limited* [2016] NSWSC 523; *WIN Corporation Pty Ltd v Nine Network Australia Pty Limited* [2016] NSWSC 153; *WIN Corporation Pty Ltd v Nine Network Australia Pty Ltd* [2016] NSWCA 297; *WIN Television Qld Pty Ltd v Tripplea Pty Ltd* [2018] QDC 58

copyright infringement against numerous small businesses in the Federal Circuit Court. Secondly, those businesses would approach the Copyright Tribunal on the basis that APRA was refusing to grant a licence on the terms of an existing scheme. APRA has no way of predicting whether the Tribunal would consider such refusal to be reasonable in the circumstances.

41. APRA notes that the option of using a digital streaming service as a background music source is likely to be most attractive to small businesses that will not typically be users of background music services including because digital streaming services are generally less expensive than background music services. APRA is accordingly surprised that COSBOA supports this aspect of the BPM submission.

42. The BPM submission dated 28 June 2019 suggests a number of reasons why APRA's market power is increased by the OneMusic Australia initiative. For the reasons set out above, APRA does not agree that this is the case, and says that even if there were increased market power, the conditions of the authorisation would act to constrain it.

43. In relation to the submissions made by BPM with respect to transparency, APRA has responded separately to the Draft Determination in this regard. However, APRA rejects the underlying assumption of the BPM submission that APRA is somehow generally responsible for reporting on the "performance of different sectors within the Australian music industry." APRA is dedicated to supporting the Australian music industry, and does so within its mandate, but its core functions are to license the rights it holds and to distribute the revenue to its members and affiliated societies. Its role is not to spend members' money in a vast and expensive reporting exercise for the commercial benefit of private companies that use music.

44. BPM makes submissions relating to the "legitimacy" of the licences offered by APRA. APRA finds these submissions confusing, and suspects this is because they have been devised as a justification for BPM's primary submission, which is that APRA should refuse to license businesses that are playing streaming services as background music (and therefore, BPM asserts, depriving background music providers of customers). To the extent that this submission is related to the discrepancy between the respective repertoires of APRA and PPCA, APRA reiterates paragraphs 19 and 20 of its response to the Draft Determination and says further:

    (a) there is no gap in respect of APRA's repertoire if a business uses Spotify for background music. The blanket licence APRA grants to subscription streaming services is for the same APRA repertoire covered by the OneMusic Australia licences;

    (b) to the extent there is any gap in terms of the repertoire of sound recordings licensed to subscription streaming services in Australia and the repertoire of sound recordings covered by a OneMusic Australia licence, APRA will be very clear about that on the OneMusic Australia website and in the Information Guides. The statement currently on the OneMusic Australia website is found under FAQ / General / What sound recordings are covered by PPCA?: https://onemusic.com.au/faqs/;

(c) there is a great deal of publicly available information about the complex issue of "protected" sound recordings, but the issue has been taken into account when PPCA licence schemes are formulated, and has been publicly examined by the Copyright Tribunal; and

(d) if the Commission or any other stakeholders have concerns regarding the scope of PPCA's repertoire, then APRA is able to provide further information.

45. BPM appears to be advocating for the compulsory appointment of background music suppliers as agent for all of APRA's public performance licences. APRA objects to this on a number of grounds. First, APRA is expert in administering its own licence agreements. Secondly, APRA has established relationships with many users of music, and it would be confusing and inefficient for those relationships to be handed to a third party to manage. APRA does appoint background music suppliers as agent for certain licence schemes (primarily those where the licensee is unlikely to require a licence for music use other than that directly supplied to it by the background music supplier, such as live music, background television, fitness classes and DJ performances). APRA believes this proposal is a thinly veiled attempt on the part of BPM to ensure relevance for its members and to protect them from the threat posed by digital streaming services. APRA notes that background music suppliers typically provide services that go well beyond the mere selection of music.

46. BPM is advocating for increased accuracy of APRA distributions. While a laudable goal, APRA submits that this is another transparent attempt to require APRA to acquire data from background music providers. APRA notes that at least one member of BPM has refused on several occasions to permit APRA to use the supplier's music returns to make general distributions.

47. Where APRA has received data from background music suppliers, its analysis has revealed that Australian music is not played more regularly on background music provider systems than on the major international streaming platforms such as Spotify or Apple Music.

Transparency

48. APRA has proposed minor changes to the format of the Transparency Report proposed by the ACCC. APRA reiterates the matters set out in paragraphs 40 – 44 of its response to the Draft Determination.

49. In particular, APRA does not agree that it should be required to disclose commercial in confidence information. The requirement to do so would put it at a commercial disadvantage in negotiations, including with major licensees such as the content platforms and the broadcast industries, where those powerful licensees would be under no similar obligation.

50. Ms Benny, on behalf of the Strawberry Fields Music Festival, raised a number of issues about the way that APRA licenses some types of events. APRA is not sure how this relates to the subject matter of the authorisation, and so is dealing with it under the most general heading of "transparency". APRA understands the issue to be that as far as Ms Benny

is aware, performers at the Strawberry Fields Music Festival either do not receive APRA distributions, or receive distributions which are far lower than the amount of APRA licence fees paid for the performance.

51. Ms Benny made a number of claims in relation to the performer and songwriter Tash Sultana. She alleges that she booked Tash Sultana to perform at one of Tash's first gigs, before Tash was an APRA member. It is alleged that Tash did not receive any of the licence fee paid to APRA for that performance. APRA believes that the first time that Tash Sultana performed at Strawberry Fields was at the 2016 event that took place in November 2016. Tash was an APRA member at the time, having joined in June 2016. Tash was paid in May 2017 for this performance. APRA makes discrete distributions to each promoted festival it licenses, that is the licence fees from the event are distributed directly to the works performed at the event with each work at the event receiving the same payment. Tash performed 10 works that were paid approximately [redacted] each and then distributed in accordance with the ownerships details registered at that time.

52. Ms Benny alleged that a large proportion of works performed at the Strawberry Fields Music Festival are not controlled by APRA, either because they are obscure independent overseas repertoire or by emerging Australian songwriters who have not yet joined APRA. In response, APRA says that it has a process that when a set list is required for a non-member, research is conducted to locate them. If the writer is not a member of another society and is located in Australia, APRA invites them to join so that royalties can be distributed. If the writer is not located in Australia, APRA directs them to their local society. The relevant scheme under which Strawberry Fields was licensed includes a provision that if the licensee has a reasonable belief that certain performed works are not represented by APRA and provides relevant information (for example the song titles and composer details) and these are verified by APRA, a reduction will apply to the total licence fee. No such request has been made.

Distribution

53. A number of interested parties have made submissions about how APRA distributes money, particularly whether the money is going to the people whose music is being performed. Accurate distributions are at the core of APRA's operations, and are a key factor used by members to judge APRA's performance. However, it is wrong to assume that a distribution that is not based on census data is not "accurate". APRA is highly experienced in distribution methodologies. Effective performing rights management requires a balancing of the interests of licensees as well as the interests of members. Many APRA licensees are incapable of providing census data about the music they perform, and years of experience show that reporting at that level is not required to achieve a distribution that fairly balances accuracy and burden.

54. APRA periodically conducts comprehensive surveys of its members and member stakeholder groups. The most recently completed members survey achieved a higher than average response rate, and an 88% overall satisfaction rate, which is also higher than average. More than 5,000 writers responded to the survey, and more than 80% of them reported a

high level of satisfaction with APRA's distributions and distribution processes. APRA will provide a copy of the results of the survey to the ACCC.

55. Many interested parties appear to believe that APRA's distribution of public performance income is predominantly based on commercial radio broadcast logs. That is simply not true:

(a) for all Major Events APRA distributes on actual set lists provided by promoters;

(b) for smaller live performances APRA has a self-reporting system where members upload their individual set-lists through the writer portal APRA developed for them;

(c) for Nightclubs APRA uses a combination of 45% MRT data, 45% Club Chart data, and 10% commercial radio data;

(d) for background music in small businesses APRA uses a combination of music streaming service data, commercial radio data, and commercial television data;

(e) for premises that use a commercial background music supplier APRA uses that supplier's actual data, with the agreement of the supplier;

(f) for films exhibited at cinemas APRA uses music information on cue sheets for the films;

(g) for airlines APRA uses music, film and program logs provided by the airlines; and

(h) for fitness classes, APRA in part uses data from Les Mills, the largest supplier of music for fitness classes in Australia.

56. Distribution is a highly complex process. APRA processes many millions of lines of data each quarter. APRA is always looking to make the distribution more accurate, but is always aware that it can be difficult and expensive for licensees to report their music use fully and accurately.

57. Many third parties have an expectation that there will be a technological solution, particularly music recognition technology. APRA does use music recognition technology in premises where a lot of recorded music is used and significant licence fees are paid, such as nightclubs. Indeed, APRA is a world leader in its implementation of MRT in nightclubs, as has recently been recognised by APRA being the first performing right organisation in the world (along with the French society SACEM) to be accepted into the global Association For Electronic Music, where APRA sits on the PRO Relations Working Group, which continues to engage and advocate for deployment of MRT and other setlist collection technology at DJ events globally.

58. That said, there is no justification for putting MRT in all nightclubs or in other types of licensed premises (noting that MRT is only able to be utilised for identifying recorded music in any event). A DJ Monitor box and

the associated bandwidth costs between $350 and $450 a month from the service provider APRA uses, depending on the number of devices rented. Further, not all licensees, including some nightclubs, agree that APRA can use MRT at their premises. In any event, the expense and time taken in placing an MRT device in a premises is not justified if the licensee is paying licence fees in the hundreds of dollars a year. With 140,000 premises licensed the annual cost of placing a device in each location would likely be more than $500 million.

59. Even where a licensee reports on a census basis, the distribution cannot rely on all of the data, at least in the medium term. The problems of the "long tail" in relation to digital streaming services are well documented, including that relevant metadata to assist in matching reported tracks to works are often missing from the licensee's reports and that each stream effectively attracts a micro payment. Many works will not have received sufficient streams to generate more than a fraction of a cent in royalties and will not be distributed.

60. APRA has acknowledged that it needs to review its Community Radio distribution practices and has undertaken to the sector that it will consult and amend the practices prior to 30 June 2020. This has been a long term project for APRA and it has been in discussions for a number of years with the CBAA and AMRAP to that end.

61. It is important to remember that the onus is typically on music users to report their music usage to APRA. The commercial radio industry pays about $30 million in licence fees to APRA each year, and it has the resources to report comprehensively. By contrast the Community radio sector pays about $1.6 million in licence fees each year and is largely staffed by volunteers. APRA is very supportive of community radio – for many APRA members it is often their first source of airplay. Most community radio stations do not have the resources to provide detailed reporting of music they broadcast. Accordingly, APRA tries to ease the burden by using a sampling methodology.

62. It has been suggested that APRA should (at its members' cost) use MRT to identify the music broadcast on community radio. APRA's best estimate is that using its current MRT service provider this would cost about $1.4 million a year. Obviously, that would leave $200,000 to be distributed to APRA members whose music is played by the stations, which APRA considers to be an unacceptable trade off. In any event APRA does not believe this is not the most efficient way to report radio music use – for example commercial radio stations do not use MRT to report their music use to APRA, but rather extract "APRA reports" from their music scheduling software.

63. As previously submitted, APRA does a lot of other work to support developing songwriters – including the provision of music grants, member education, the Sounds Australia music export program, the SongHubs song writing sessions, and continued lobbying for local music on commercial radio and streaming services.

64. Ms Slingo, in her capacity as manager of certain APRA members, made the allegation at the pre decision conference that APRA distribution statements lack sufficient data for APRA members or their managers to

review or verify and that APRA distribution statements only disclose the total royalty payments such that members or their managers are unable to pick up any discrepancies in their payments. APRA disputes this allegation. Confidential annexure 1 is a copy of the most recent distribution statements for two of the APRA members referred to in Ms Slingo's written submission. APRA is not aware of Ms Slingo ever raising with it directly a concern regarding the distribution statements sent to APRA members that she represents.

65. APRA acknowledges that of course the detail and granularity of its distribution statements could be improved and will be improved with the implementation of the new CLEF platform. However, most limitations in detail in APRA's distribution statements arise from the limited detail in reporting received from its overseas affiliate societies.

66. Following each distribution made to members, APRA's member services department logs the number of calls received from members querying their distribution statements for one week. In the year ended 30 June 2019, APRA's member services department handled 582 such calls. In the last Code of Conduct compliance report, there were no complaints from members regarding the transparency of distributions.

67. APRA's distribution rules provide a three year window for any member to seek an adjustment for an incorrect payment or to make an unlogged claim for a missing performance and such adjustments are made regularly. These processes are considered to be a standard aspect of APRA's service to members.

Negotiating framework and pricing principles – the Free TV submission

68. APRA repeats its submissions above regarding the resources available to the commercial television industry. APRA also repeats its submissions in response to the Draft Determination and says that it would be grossly unfair to require APRA to disclose more information than another party during a commercial bargaining process, particularly where that party is a sophisticated licensee.

69. APRA disputes Free TV's characterisation of APRA's conduct during negotiations.

70. Free TV submits that APRA should be required as a condition of authorisation, to take into account the matters set out in the ACCC guidelines for the Copyright Tribunal, when negotiating with licensees. The ACCC guidelines set out many matters that APRA would ordinarily consider when negotiating licence schemes. However, by definition, during commercial negotiations parties are not litigating disputes before the Copyright Tribunal. Commercial negotiations take place in a variety of circumstances, with parties taking into account all kinds of considerations. APRA should not be required artificially to take into account certain matters – which would not be required to be taken into account by the licensee party – in circumstances where the parties are willingly negotiating without having recourse to the Copyright Tribunal.

71. In any event, it is unclear how compliance with the condition would be monitored. Is "taking into account" a higher standard than, say "consider"?

Would APRA simply be required to formally state at some point during the negotiation that it had taken the guidelines into account, or would it be required to demonstrate to the satisfaction of the ACCC that it had taken the matters into account? APRA feels that the involvement of the ACCC in every commercial negotiation it conducts would be unduly burdensome on all parties.

72. Free TV also submits that a condition should be imposed on APRA that would require APRA to take into account industry circumstances, and that licence fees may increase or decrease over time. APRA does not understand how compliance with such a condition would be verified. Compliance would either be satisfied by a "tick the box" approach, which would be relatively meaningless, or would necessarily involve the ACCC in every licence renegotiation.

73. APRA submits that if it is required to conduct every negotiation within the framework required for Tribunal proceedings, it will be encouraged to have all licence schemes reviewed by the Tribunal, increasing costs for licensees.