

APRA
Application for Authorisation
Reply by APRA to submissions by other interested parties

Part 1 – Introduction

A Introduction

1 This document is a reply by APRA to the submissions that have been provided to the Commission in opposition to the renewal of APRA’s authorisations.

2 The ACCC received a number of submissions in support of APRA’s activities.

3 Three opponents have emerged to APRA’s application: Commercial Radio Australia (**CRA**), the Cinema Operators, and Free TV. Of those three, Free TV does not oppose APRA’s authorisations, but submits that authorisation should be granted for a shorter period than is customary when authorisations are renewed.

4 In summary, APRA says that no submission provides any basis for:

- (a) refusing the renewal outright; or
- (b) making any renewal of authorisation subject to any additional condition.

5 In Part 1 of this Reply, APRA outlines the material aspects of the determination of the Australian Competition Tribunal in *Re Application by APRA Ltd [1999] AcompT 3 (Determination)*, which create a framework within which opposition to the authorisation can be usefully considered.

6 In Parts 2, 3, and 4, APRA addresses the submissions of CRA, the Cinema Operators, and FreeTV respectively.

B Summary of Tribunal’s findings

7 The Tribunal Determination comprised a thorough and rigorous analysis of the APRA system. Merely some of the critical findings are outlined below.

8 First, the Tribunal held that the market for the licensing and enforcement of the performing right is a natural monopoly [292].

9 Secondly, the Tribunal held that the operation of the APRA scheme is overwhelmingly a benefit to the public, and that components of conduct that are essential to APRA’s operation should be authorised [306]ff. More specifically, those benefits included:

- (a) reduction in the transaction costs of monitoring performance of APRA’s members’ works and enforcing payment;
- (b) reduction in transaction costs for users, arising from the ability to gain access easily to the right to perform music in the whole repertoire, through the blanket licence;

- (c) ensuring proper enjoyment by writers and publishers of their copyright interests;
 - (d) avoidance of “market failure” that would arise in the absence of a procedure for low cost enforcement of copyright: “If composers have difficulty in enforcing their property right, i.e., difficulty in identifying when their music is played and by whom, the value of their property right will be reduced and they will not invest as much time and effort in music composition as they otherwise would, and there will be under-production of music from society’s point of view -- a market failure” [294].
 - (e) certainty of licence provided by APRA's ability to give a comprehensive blanket licence in respect of virtually all musical works available world-wide; and
 - (f) creation of “countervailing power” for writers in negotiations with end users of music.
- 10 Third, that the two features which were generally essential to APRA’s operations comprised:
- (a) blanket licensing, in relation to output arrangements [332]; and
 - (b) the exclusivity rule, in relation to input arrangements (by which there is an exclusive assignment of the performing right to APRA) [350].
- 11 Fourth, that notwithstanding the important public benefit of the general APRA system, the Tribunal considered that it was appropriate to consider whether any modification to exclusivity and the blanket licence could be imposed (as conditions of authorisation), without unduly undermining the APRA system and benefits created by its operation [292], [293], and [128].
- 12 Fifth, it was implicit that it was appropriate to monitor the market for performing rights, to ensure that the authorisation of the APRA scheme remained a benefit to the public.

C Criteria for evaluating APRA’s application

- 13 APRA’s applications are made pursuant to section 91C of the *Trade Practices Act*, by which the application for the extension of APRA’s authorisations are processed as applications “for a revocation of the authorisation and the substitution of a new authorisation for the one revoked”.
- 14 By operation of section 91C(7) of the *Trade Practices Act*, the Commission’s discretion in relation to an application under section 91C, is substantially the same as the Commission’s discretion in relation to a fresh application under section 90.
- 15 However, APRA notes the following principles which have been established in the context of the Competition Tribunal’s application to review the Commission’s revocation of authorisation (under the old legislation):
- 16 Firstly, in relation to whether there has been a “material change” of circumstances, it has been held: “As the Tribunal must conduct a rehearing in the fullest sense, it is required to examine for itself those circumstances. However, where there has been an earlier hearing and determination by the

Tribunal, a later Tribunal, *as a matter of practical common sense*, will be fully justified in accepting the earlier Tribunal's findings of facts in the absence of cogent new evidence to show that some other finding should be made. That course was followed in *Re Media Council of Australia [1996] at 42,240*": *Re 7-Eleven Stores Pty Ltd & ors [1998] ACompT 3, at section 3, page 11 of 54.*

- 17 Secondly, it has been held that "it would be impermissible for the Tribunal...to go behind the reasoning expressed by the Tribunal in its [earlier] determination, and conclude that the authorisation should not then have been granted or would not have been granted on the same facts today": *Re Media Council of Australia & Ors (1996) ATPR 41-497, at 42,240*; *see also Re Media Council of Australia (No 2) (1987) ATPR 40-774, at 48,419*; *Re 7-Eleven Stores Pty Ltd (1994) ATPR 41-357, at 41-357*
- 18 Although these authorities are clearly not directly on point in relation to APRA's application, APRA respectfully submits that:
- (a) the principle is relevant by analogy;
 - (b) therefore, although its discretion is unfettered, the Commission would be fully justified in being guided by the factual findings and reasoning of the Competition Tribunal in the Determination.
- 19 The grounds for opposition to APRA's application put forward by the Cinema Operators, CRA and Free TV can be grouped into three general categories:
- (a) first, that the very foundation of the Tribunal's Determination should be reconsidered (**Foundational Challenge**);
 - (b) secondly, that there has been a material change in market conditions since the Tribunal's Determination, which undermines the continued basis for the authorisation (**Material Change**);
 - (c) thirdly, that authorisation should be conditional upon a modification to the APRA system (**System Modification**). The success of such an argument would necessitate establishing that:
 - (i) the modification will generate some pro-competitive benefits
 - (ii) benefits allegedly generated from the modification cannot already be generated under the present APRA system;
 - (iii) the implementation of the modification would not unduly undermine the beneficial operation of the APRA system.
- 20 The submissions of CRA, Cinema and FreeTV are consecutively considered by reference to these general grounds.

Part 2 – Submission of Cinema Operators

A Introduction

- 21 The Cinema Operators propose modifications to the APRA scheme in relation to the licensing of the performing right for music synchronised with cinema film.
- 22 By way of general reply, APRA says that the submissions of the Cinema Operators do not support any modification to the scheme for which it seeks authorisation.
- 23 Specifically, the Cinema Operators' submissions:
- (a) grossly exaggerate the alleged anti-competitive detriment generated by the APRA scheme, by unjustifiably dismissing the constraining influence of the Copyright Tribunal, and unjustifiably characterising the conduct of APRA as anti-competitive;
 - (b) fail to acknowledge the scope for direct dealing already facilitated by the existing opt-out and license back provisions under APRA's constitution;
 - (c) exaggerate the significance of the modifications proposed, by failing to acknowledge that they are likely to have no application to foreign compositions (which comprise the bulk of music synchronised with films exhibited in Australia); and
 - (d) fail to acknowledge the increase in transaction costs and copyright infringement likely to be associated with the implementation of the proposed modifications.
- 24 By way of general background to this analysis:
- (a) there are around 553 cinema theatres in Australia – containing 1,907 screens. APRA has 230 cinema licensees (indicating concentration of ownership, not unlicensed cinemas);
 - (b) APRA's total licence fee revenue from Australian cinemas for the financial year 2003/04 was \$2,666,175 which is approximately 2.8% of APRA's gross domestic revenue for the same period;
 - (c) in that financial year, APRA distributed \$2,364,148 from money collected from Australian cinemas;
 - (d) the two distributions made by APRA in that period in respect of cinema represents the performance of 4,878 musical works in 347 different films (an average of 14 works in each film), owned by 24,166 writers and publishers, being 8,791 unique sharers or copyright owners ("sharers" refers to the number of parties entitled to claim a share of performing right royalties);
 - (e) of the 347 films screened in Australia during that period, 32 were Australian films (which of course do not necessarily contain Australian music);

- (f) of the works performed, 1,237 were local works, owned by 395 unique local sharers;
- (g) in relation to the total number of works performed, there were 2,678 changes of ownership during the period. This would include changes of catalogue between publishers, and termination of publishing agreements. There were 190 ownership changes during the period in respect of the local works;
- (h) attachment A is a folder containing details of the films screening at a cinema controlled by each of the Cinema Operators in the week commencing 5, 12 or 17 August 2004. APRA has cue sheets for 29 of the 74 films, and those cue sheets are included in attachment A. The cue sheets show the number of musical works in each film, as well as the duration of each work. The 29 films for which APRA has cue sheets have an average of 24 works per film (APRA acknowledges that works may be repeated). Where APRA is able to make the calculation from the cue sheets, it can be seen that the percentage of the film during which music was performed ranges from 20% to 99.38%. This shows not only the vast amount of music contained in films, but also the complexity of identifying the number of musical works and their respective owners.

B Foundational Challenge

- 25 The Cinema Operators do not appear to oppose the authorisations generally. Rather, they appear to oppose the authorisations only in so far as the APRA scheme relates to cinema.
- 26 Consequently, by reference to the categories of challenge described in paragraph 19 above, their position is perhaps best characterised not as a “foundational challenge” to the entire APRA scheme, but as the advocacy of a “system modification”.
- 27 Nevertheless, the Cinema Operators seek to attack generally some of the foundations for the Competition Tribunal’s Determination. APRA’s response to these attacks is set out below.

B1 Anti-competitive detriment – alleged abuse of monopoly power

- 28 The Cinema Operators make various submissions to the effect that APRA abuses its position as an effective monopolist in ways not identified by the Competition Tribunal. It is to be presumed that the Cinema Operators intend to imply that such abuse materially tilts the public benefit balance against authorisation.
- 29 APRA submits that there is no basis whatsoever for the allegation that it abuses its monopoly position. APRA addresses the more specific submissions of the Cinema Operators below.

(1) Pricing Strategy

- 30 The Cinema Operators make repeated submissions to the effect that abuse of APRA’s monopoly power can be inferred from unreasonably high or otherwise inappropriate monopolist pricing.

- 31 As a general response, APRA submits that the Copyright Tribunal is the appropriate forum for the ventilation of any complaint by users in relation to pricing, and the general terms of licence offered by APRA. On the assumption that the Commission is satisfied with the efficacy of the Copyright Tribunal (as found by the Competition Tribunal) APRA submits that the price and terms of the APRA licence to Cinema Operators should be irrelevant to the exercise of the Commission’s authorisation discretion. As held by the Competition Tribunal, “the Copyright Tribunal is the body with primary responsibility to adjudicate an acceptable balance between the private and social interests” [292].
- 32 The Cinema Operators make more specific complaints about aspects of APRA’s pricing activity. APRA’s additional response to those matters is set out below.
- 33 First, they submit that APRA’s application to the Copyright Tribunal for an increase in the blanket licence fee for cinemas of 257% is an “unconstrained expression of market power”: para 8, 59. In reply, APRA says that:
- (a) this is not the context in which to address the merits of APRA’s submission as to the appropriate licence fee for cinema exhibition. That is a matter within the jurisdiction of the Copyright Tribunal. The Copyright Tribunal is well equipped to hear and test evidence filed by the Cinema Operators as to the reasonableness of APRA’s proposed licence scheme; and
 - (b) it is unable to comprehend how it can seriously be contended that the mere application to the Copyright Tribunal for a determination as to a reasonable licence fee could be characterised as an “unconstrained expression of market power”. APRA notes that it has not brought the proposed licence scheme into operation (which it is entitled to do under section 154 of the *Copyright Act 1968*).
- 34 Secondly, the Cinema Operators imply that the fee is not properly reduced to reflect the fact that the licence is for “a discreet incidental or dependent use of predetermined works”: para 11(h). In reply, APRA submits that:
- (a) on a quantitative level, music is an important component of films. Attachment A demonstrates the quantity of music synchronised in films recently screening;
 - (b) qualitatively, music plays a fundamental role in the success and audience experience of a film. APRA can produce evidence from numerous experts including musicologists and cinematographers who will testify to the critical role that music plays in films;
 - (c) the *Copyright Act 1968* grants certain exclusive rights to the owners of copyright in works, including musical works. Those exclusive rights include the right to perform the work in public and to communicate the work (section 31(1)(a)(iii) and (iv)). The rights are contained in the *Copyright Act* because Australia is a signatory to the Berne Convention for the Protection of Literary and Artistic Works – as set out in APRA’s primary submission. There is no basis to dismiss the rights owned by APRA as mere “incidental” rights of minimal significance; and

- (d) in any event, the value of music in film and the reflection of that value in the APRA fee is a matter within the jurisdiction of the Copyright Tribunal. APRA would expect that in its proceedings in that forum the Cinema Operators would raise arguments and tender evidence regarding the quantitative and qualitative significance of music in film. APRA agrees that these are relevant factors in the determination of a reasonable licence fee.
- 35 Third, they suggest that the fee is based on “a formula which reflects APRA’s perception of the Cinema Operators ability to pay rather than any assessment of the underlying value of the work”: para 11(k). In reply, APRA says that:
- (a) the basis for the fee is a matter for the Copyright Tribunal;
 - (b) APRA does not use capacity to pay as a criterion for determining its proposed fee, and there is no evidence otherwise; and
 - (c) APRA’s proposals are based on APRA’s belief as to the value of the music as used by the cinema operators.
- 36 Fourth, they suggest that the fee is not properly reduced to reflect that musical works derive a “free rider” effect from the exhibition of films: para 11(l), 59. In reply, APRA says that:
- (a) it does not accept that copyright owners derive a significant “free rider” effect by the exhibition of films. To the extent that there is any significant cross-promotional benefit, the producers of soundtrack albums are a more significant beneficiary than any writer. If the music is commissioned by the producer of the film it is that entity which benefits most;
 - (b) royalties on sales of soundtrack albums are fixed at 8.7% of the published price to dealer (essentially, the published wholesale price), divided between the number of tracks on the album. The writer has no control over the number of albums sold, nor over whether a soundtrack album is released at all; and
 - (c) the cross-promotional benefits flow both ways. It is not uncommon for a soundtrack album, or a track from it, to be released prior to the release of the film in order (presumably) to encourage attendance at the film. Further cross fertilisation occurs with performances in films by the artist featured on the soundtrack – such as Madonna in *Die Another Day*, the soundtrack to which was released prior to the film.

(2) “Imposition” of blanket licence

- 37 The Cinema Operators in effect submit that abuse of APRA’s monopolist power can be inferred from the imposition of the blanket licence system, which has the effect of “forcing” of APRA’s repertoire on Cinema Operators: eg, para 11(h), 20(d), 56, 59.
- 38 Despite the Cinema Operators’ protestations to the contrary (see para 70), their submission on this point does reflect a fundamental misunderstanding of the purpose and effect of the blanket licence. This was an issue raised and disposed of by the Competition Tribunal, which noted that “some users do not understand the blanket licence concept, and assume that, by offering a blanket

licence for use of a large repertoire, APRA is forcing them to pay needlessly high licence fees” [205].

- 39 The blanket licence does not “force” unwanted works on users. It is simply a cost-efficient method of ensuring that licensed users are authorised to use whichever music they perform. The user is not forced to use or pay for music it does not want. The “price” for the blanket licence is not calculated to reflect the scope of the repertoire of music covered by the licence. It is calculated to reflect the value of the music which is in fact used, and the value of the comprehensive nature of the licence offered, which ensures that copyright infringement does not occur regardless of what music is used.

(3) Negotiation Process

- 40 The Cinema Operators complain about APRA exercising “market power in the negotiation process”: Para 11(j), 20(c), and suggest that “APRA enjoys significant market power over Cinema Operators as the exhibition of films would be entirely foreclosed unless a licence is negotiated with APRA”: para 20(c).

- 41 In reply, APRA submits that:

- (a) in light of the opportunity of any user to seek a determination by the Copyright Tribunal on the terms of a licence, APRA is devoid of any capacity unilaterally to impose terms upon users, or otherwise exert market power in the negotiation process. This is the case with any user, but particularly the Cinema Operators who are well resourced and well represented;
- (b) it is APRA’s invariable practice to negotiate with users and user groups rather than to impose terms on them on a “take it or leave it basis”. If agreement on a licence scheme cannot be reached after extensive negotiations, APRA elects to refer a scheme to the Copyright Tribunal. Often during the course of Tribunal proceedings, APRA reaches agreement with the affected users of its music (this happened, for example, in relation to the scheme for music to accompany dancing, and the scheme for music to accompany fitness classes (*Reference by Australasian Performing Right Association Limited under section 154 of the Copyright Act 1968*, 25 IPR 257; *APRA v Fitness Industry Confederation of Australia & Ors*, unreported, 15 March 1993));
- (c) APRA has never made a threat to prevent exhibition of a film, and has never obtained an injunction against a cinema operator, except where individual cinema operators have refused to take out an APRA licence at all. All such users have been offered the opportunity to engage in APRA’s ADR procedure as approved by the Competition Tribunal.

- 42 The negotiations in relation to the licence for cinema operators, in summary, proceeded as follows:

- (a) the licence scheme that is the current APRA scheme for cinema was introduced in 1991. In April 1995, the Entertainment Industry Employers Association on behalf of the cinema industry sought to negotiate terms of a new scheme with APRA. As a result of those negotiations, the parties agreed that the scheme would not be changed

for a period of five years, after which time the scheme would be open to review.

- (b) in September 2002, APRA sought to reopen negotiations with the Australian Entertainment Industry Association.
- (c) after extensive negotiations up until May 2003, APRA formed the view that agreement was unlikely to be reached as to terms of a licence scheme.
- (d) accordingly, APRA took the only course of action available to it – it filed a reference in the Copyright Tribunal. APRA did not bring the scheme into operation (see section 154(6)).
- (e) documents relating to this period of negotiation are available if they would be helpful to the Commission.

B2 Alleged inadequacy of Copyright Tribunal as a constraint on monopolist power

43 The Competition Tribunal found that the “Copyright Tribunal provides an effective constraint against APRA abusing monopoly power in dealing with the major users of music”: para 312- 14.

44 The Cinema Operators make repeated submissions to the effect that the Competition Tribunal overstated the role of the Copyright Tribunal in constraining APRA’s monopolist conduct (para 57), and that the Copyright Tribunal provides an inadequate constraint on the exercise by APRA of its monopoly power (para 9-10).

45 APRA supports the findings of the Competition Tribunal referred to in paragraph 43 above, and submits that the Cinema Operators provide no basis whatsoever for challenging them. APRA addresses the more specific submissions of the Cinema Operators below.

46 First, the Cinema Operators suggest that the Copyright Tribunal is somehow fettered in its determinations as to reasonable fees and licence terms, by the nature of any authorisations made in relation to APRA’s operations: para 9. They suggest that “an authorised anti-competitive framework necessarily integrated with an authorised blanket output arrangement will inevitably bring about a remuneration and terms outcome in the Copyright Tribunal which will not reflect an analogue of a competitive environment”(para 54). In reply, APRA submits that:

- (a) the Copyright Tribunal is in no way fettered or constrained in relation to the terms upon which licence schemes are determined. As was expressly held by the Competition Tribunal, “In Australia the powers of the Copyright Tribunal are extensive, and extend to the consideration of licence schemes generally, not just to schemes involving the traditional form of blanket licences. So much was recognised by FACTS in its 1993 application to the Copyright Tribunal for an order specifying a complex scheme incorporating multiple categories of blanket and per program licences, based on new fee structures. In the determination of conditions and charges under such a licence scheme by the Copyright Tribunal it is difficult to see how APRA (or FACTS, for that matter) could exert any monopoly power over the result”;

- (b) there is nothing in the *Copyright Act* to suggest that a blanket licence is the only appropriate form of licence, or that the fee should be calculated as a percentage of box office. Consequently, on application of the Cinema Operators, it is unequivocally open to the Copyright Tribunal to authorise a licence scheme (or a licence to an individual operator or group of operators) otherwise than on the basis of a blanket licence: see *Copyright Act*, section 157. (However, APRA notes that no cinema operator has either asked APRA, or applied to the Copyright Tribunal, to obtain such a licence); and
- (c) the Cinema Operators provide no basis whatsoever in support of the contention that (contrary to the findings of the Competition Tribunal) the Copyright Tribunal is constrained in determinations by the terms of any authorisation provided to APRA.

47 Secondly, the Cinema Operators suggest that the Copyright Tribunal is also constrained by the fact that its jurisdiction is only enlivened “by reference” under section 154 to 157 of the *Copyright Act* (para 36). In reply, APRA submits that the absence of powers to instigate investigations is completely irrelevant to the capacity of the Tribunal to constrain monopolist conduct by APRA. The Tribunal’s jurisdiction is enlivened by an application by any entity dissatisfied by the terms of licence provided by APRA. On the assumptions that:

- (a) there are no unreasonable barriers to making such an application to the Tribunal (which assumption is not disputed by the Cinema Operators); and
- (b) no entity has applied to the Tribunal to challenge the fairness of the terms of APRA’s licence,

there can be no reasonable cause for concern about monopolist conduct by APRA in relation to the terms of its licences. Making the Tribunal’s jurisdictional conditional upon user complaint or owner request is entirely appropriate, and consistent with the exercise of constraint over APRA’s monopolist power.

48 Thirdly, the Cinema Operators submit that “the Commission can not delegate its functions to the Copyright Tribunal and it would be improper for the Commission to so abdicated its functions to that body”. This suggests that for the Commission to assume that the Copyright Tribunal will properly exercise its powers, would constitute both an improper abdication of responsibility by the Commission, and also an irrelevant consideration in the exercise of its discretion to authorise conduct under the *Trade Practices Act*. With respect, this is an entirely untenable proposition. The fact that the Copyright Tribunal has powers to set the terms of APRA’s licence schemes is a matter of fundamental relevance to the assessment of what (if any) anti-competitive detriment would be caused by the authorisation of the APRA scheme. It must of course be considered by the Commission in the exercise of its authorisation discretion. Attributing relevance to that factor in no way involves an abdication of responsibility by the Commission.

C Material Change

49 The Cinema Operators do not suggest that there has been any material change in the relevant markets, which would of themselves warrant a decision not to renew the authorisation.

D Proposed System Modification

D1 Outline of proposed modification

(A) Features of modified arrangements

50 The Cinema Operators submit that “the exclusivity of assignment and the blanket licensing, so far as they relate to film, foreclose opportunities for direct negotiation and are not essential to the operation of APRA as a broader efficient collecting society”: para 73. They seek an arrangement that “clearly and easily enabled film producers to negotiate clearance for all forms of copyright with copyright holders including public performance licence fees”: para 69. They make reference to arrangements that have existed in the United States without attempting to demonstrate that market conditions in Australia bear any similarity to those in the United States.

51 There were no specific modifications to the APRA systems proposed in the first submission of the Cinema Operators. However, there appeared to be the suggestion that the Cinema Operators might be opposed to the authorisation of both:

- (a) The key aspect of the APRA “input” arrangements: ie, exclusivity of assignment;
- (b) The key aspect of the APRA “output” arrangements: ie, the blanket licence.

52 In their original submission, the Cinema Operators state that they would be prepared to formulate “a precise set of provisions which would make the position clear”: para 76.

53 The Cinema Operators subsequently provided a supplementary submission dated 5 October 2004 (**Cinema Supplementary Submission**).

54 In the Supplementary Submission, the Cinema Operators provide more specific details of the modifications to the APRA system that they propose. They appear substantially to resile from any possible suggestion that authorisation should be refused to the arrangements for exclusivity of assignment and the blanket licence. In paragraph 23, the Cinema Operators state that the “alternative licensing options” which were proposed “would not necessarily have to replace APRA’s blanket licence regime – they could operate in addition to the blanket licence regime”.

55 In the Cinema Supplementary Submission, the Cinema Operators submit that “the following options should be available”:

- (a) “cinema owners should be able to negotiate a transactional licence directly with rights owners – such a licence could be granted on a per film or a periodic basis”;

- (b) “cinema owners should be able to negotiate a transactional licence directly through APRA – such a licence could be granted on a per-film or a periodic basis”;
- (c) “film producers should be given the ability to negotiate a non-exclusive licence for public performance rights in Australia directly with the rights owner (that is, ‘at source’); this would occur at the same time that the film producer secures a synchronisation licence from the rights owner. Cinema owners would be licensed with all rights necessary to exhibit the film in consideration for the film hire paid to the film’s distributor. This would eliminate the need for cinema owners to obtain a licence for the “down stream” use of the rights.

56 APRA does not propose to address option (b). APRA refers to paragraph 31 above, and submits that the question of the provision and terms of the so-called “transactional licence” are irrelevant for the purpose of this application. They are questions that are properly addressed exclusively in the Copyright Tribunal.

57 In relation to options (a) and (c), the Cinema Operators state that the options “could be achieved through amending the APRA Articles of Association to provide for a simplified, more flexible and more user-friendly form of opt-out and licence back” (**Modifications**): *Supplementary Submission, para 21*. Unfortunately the specific details of the suggested Modifications are not elaborated. APRA will assume that the Cinema Operators propose that each of the present restrictions on opt-out and licence back that they criticise in the Supplementary Submission, should be removed. APRA notes that the modifications proposed by the Cinema Operators in the Supplementary Submissions do not explicitly include compulsory assignment back of copyright, or a prohibition on the authorisation of the “input” arrangements.

58 Further to options (a) and (c), APRA says that these options effectively exist already:

- (a) in relation to the US repertoire, rights owners in the US are free to negotiate world-wide licences for performing rights with film producers or any other entity (as to which see paragraph 64 below);
- (b) in relation to Australian works, APRA submits that the opt out and license back provisions provide a reasonable opportunity for cinema operators or film producers to obtain performing right licences from copyright owners (as to which see paragraph 78 below).

(B) Assumption as to dealings within framework of modified arrangements

59 There appear to be a number of questionable assumptions as to the operation of the Modifications, which are implicit in the submissions of the Cinema Operators (and which are fundamental to the assessment of the public benefits of the proposed Modifications and the continued necessity of the blanket licence).

“Pass through” licence of performance rights will be negotiated during production process

60 The Cinema Operators submit that there is “no good reason why all of the relevant rights through to exhibition could not be dealt with” at the same time

as the synchronisation rights are negotiated by the producer: para 64. This assumption is repeated in paragraph 20(c) of the Cinema Supplementary Submission. It is the clear assumption of the Cinema Operators that (if the Modifications are introduced) some form of “pass through” licence in relation to performance rights will be negotiated with the copyright holders (by which the producer can offer distributors and cinema operators a performing right licence), at the same time that the synchronisation rights are negotiated: para 11(c), (d), and 64; Supplementary Submission, para 20(c).

- 61 APRA submits that the assumption is flawed. The flaw has serious consequences for the utility and practicality of the Modifications.
- 62 In predicting the likelihood of “pass through” performing rights licences being negotiated during production, it is necessary to address three very different scenarios:
- (a) foreign produced film, using foreign musical composition;
 - (b) locally produced film, using foreign musical composition; and
 - (c) locally produced film, using locally composed music (in which copyright is held by a member of APRA);
- 63 For different reasons, in none of those scenarios is there any reasonable ground for asserting that “pass through” performing right licences will necessarily be negotiated at the time of production.
- 64 *Foreign produced films.* There is no general practice of producers of foreign films providing Australian distributors (and downstream cinema operators) with a pass-through performing right licence. This is a reflection of foreign copyright regulation, and commercial practice. It is critical to emphasise that APRA has only a non-exclusive licence in respect of American musical works. (This reflects the universal practice in the USA - as a result of the ASCAP Consent Decree - that members of the performing right societies grant only a non exclusive licence to the society). United States copyright owners and film producers therefore already have the unfettered capacity to negotiate “pass through” performing right licences in respect of music synchronised in films that are to be exhibited in Australia. There is absolutely nothing in APRA’s rules that frustrates such negotiations occurring. Notwithstanding that present capacity, such pass through licences are not in fact negotiated (for reasons of which APRA is unaware). The Modifications will therefore have not the slightest impact on the practice in relation to American films. This is extremely significant. As noted by the Cinema Operators, “films produced in the United States contribute approximately 85% of box office revenue in Australia”: *Supplementary Submission, para 11.*
- 65 *Local films, with foreign music.* There is no general practice of the copyright holders of foreign musical compositions granting “pass through” performing right licences in relation to the distribution and exhibition of films in Australia. Their legal capacity to do so is dependent upon what regimes for “opt out” exist in the regulations of the collecting societies to which they have assigned their performing rights. Again, there is no basis to infer that anything done by way of modification to the APRA scheme will have the slightest impact on practice of the copyright holders of foreign compositions in relation to the provision of “pass through” licences for the exhibition of films in

Australia. Consequently, whatever modification is made to the APRA scheme, it is again reasonable to assume that locally produced films with overseas musical compositions will be distributed in Australia without the existence of a “pass through” performance right licence that has been negotiated during production.

66 *Local films, with exclusively local music.* Even in this very narrow category, there is no reasonable basis to infer that a “pass through” performance right licence would be negotiated during the production process (even if modifications to the APRA system somehow facilitated that process). As to this:

- (a) presumably, the negotiations for the pass-through licence would have to be initiated either by the producer of the film, film distributors, or the Cinema Operators. APRA notes that currently, the Cinema Operators are not parties to the negotiations for the arrangements for the making of films;
- (b) presumably, the consideration for the licence would be either a fixed up-front fee (**fixed fee**) or a percentage of box office revenue (**sliding fee**);
- (c) for the following reasons, a producer may be unwilling or unable to negotiate a “pass through” performing right licence:
 - (i) whereas the producer of a film needs to acquire the synchronisation (reproduction) right to make a film, the producer does not also need to license the performing right (because the producer does not perform the work in public);
 - (ii) because procuring a “pass through” licence for the performing right for cinema music is not essential for the production of film, the producer will presumably only be interested in securing such a licence if it is commercially beneficial to the producer to do so. However, there is no reason to think it necessarily will be, for reasons set out below;
 - (iii) the producer may be unwilling or unable to negotiate a *fixed fee* for any number of reasons:
 - there are typically strict budgets for local movie production, for which a fixed sum is allocated to procuring music rights. The budget may be too limited to pay an up-front fee for the performance right, in addition to the fee for the synchronisation right. This will particularly be so if no distribution agreement has been agreed, and the producer has no guarantee that the film will be exhibited, and any licensing fees recouped;
 - any negotiation in relation to the performing right licence is potentially difficult. The present value of the performing right is linked to the success of the film. It can reasonably be assumed that the (anticipated) success of the film would remain a relevant criterion for determining the licence fee for the performing right. However, the prediction of film

success is notoriously difficult, and the producer and copyright holder may have dramatically different views about the appropriate fee. Neither party has a compelling commercial interest to reach agreement on the performing right licence during production: the producer does not need to secure agreement in relation to the licence for performing rights in order to produce the film; and the copyright holder may be very happy to defer striking an agreement for the performing right if agreement has been reached on the synchronisation right (because his bargaining power with distributors and cinema operators is likely to dramatically increase as the date for film release approaches). In such circumstances, agreement is perhaps unlikely;

- even if some agreement in relation to price might otherwise be reached, the producer might form the view that the cost of acquiring the performing right can not be passed on to the distributors (in which case there would be no point in acquiring the right from the copyright holder).
- (d) For the following reasons, cinema operators may be unable to secure a performing right licence during the film production process:
- (i) there is not presently a single body which represents (and is able to negotiate on behalf of all of) the cinema operators (including local independent operators) (**Peak Body**);
 - (ii) it is perhaps unlikely that any such a Peak Body would ever emerge, because there may be a significant divergence of commercial interests, between the large national distributors, and the smaller independents. Further, different cinema operators have relationships with different film distributors. This would likely give rise to conflicting commercial interests in relation to the negotiation of film performing rights, because operators will have differing exhibition rights in relation to films;
 - (iii) APRA suggests that if access to the performing right were able to be negotiated by cinema operators on other than a blanket basis where the same licence is available to all operators, the performing right could become a barrier to entry or participation in the Cinema Operators' market;
 - (iv) even if there were a Peak Body, there may well be competition law issues raised by any attempt by it to negotiate collectively with copyright holders;
 - (v) even if there were a Peak Body able to negotiate with copyright holders, there is no reason to think that they would necessarily be "invited to the table" to negotiate the licensing of performing rights, when the producer was negotiating the licensing of the synchronisation right with copyright holders. As stated above, Cinema Operators are not usually involved in the production of films;

- (vi) even if the Peak Body were “invited to the table”, there is no reason to think that it would want to come. Cinema Operators are presumably only interested in securing the performing rights of films that are in fact to be exhibited. There are a significant number of films that commence, but do not finish, production. Of the films that complete production, a large number are never publicly exhibited. The cinema operators would presumably have no interest in negotiating (let alone paying for) performing rights for films that are not guaranteed exhibition (unless the rights can be secured for only nominal consideration);
 - (vii) even if the Peak Body were invited and willing to “come to the table”, there is no reason to think that agreement could inevitably be reached with the copyright holder *at that stage* in relation to licensing of the performing right. Such an agreement is not essential for the film production process. Indeed, if the copyright holder has secured an agreement with the producer in relation to licence of the synchronisation right, the copyright holder may have a vested interest in deferring agreement in relation to the performing right. (Once costs have subsequently been sunk in the marketing and organisation of a film for exhibition, the copyright holder is in a far stronger negotiating position in relation to the licensing of his performing rights). The copyright holders might no doubt be “encouraged” to license their performing rights to the Cinema Operators during the production process, if the producer says that a deal in relation to the synchronisation right is contingent upon a deal being struck in relation to the performing right. However, there may be problems with exclusive dealing under section 47 of the *Trade Practices Act*, if there is any collaboration between producers and the Peak Body in relation to such arrangements. If there is not, then it would be clear that copyright owners would be in an extremely poor position to protect their interests in relation to the licensing of the performing rights. Individual songwriters are unlikely to be in a position to monitor performances of films at cinemas to determine whether their works are being performed, and are similarly unlikely to be able easily to enforce their copyright if no licence is able to be negotiated.
- (e) There can equally be no guarantee that a distributor can secure a pass through licence.

Performing rights licence will be in place before the exhibition of the film

- 67 A further apparent assumption of the Cinema Operators as to the effect of the Modifications, is that performing rights licences will be in place, at least by the time of release (in the absence of any “blanket licence”).
- 68 However, for the following reasons, there are serious grounds for doubting whether this assumption is likely (let alone inevitably) to be sound.
- 69 For the reasons outlined above, it is unlikely that there will develop a universal practice of “pass through” licences for performing rights being negotiated

during the production process. Such licences can be granted now, and they are not.

- 70 For the reasons set out below, there might be very significant problems in otherwise securing the necessary licences before film release.
- 71 First, although it is true that the body of musical work in a film is fixed and finite once production has been completed, it is by no means clear that the distributors (let alone the cinema operators) will have sufficient notice of the repertoire of musical composition on the films, to be able to negotiate a licence for the performing rights before the film release. It is APRA's experience and understanding that cinema operators are not provided with cue sheets in relation to the music synchronised in the film significantly (if at all) in advance of the film opening. Indeed, they are often provided after the film has been released. Consequently, as a matter of theory the body of musical work in a film is "knowable" before the film's release; however, as a matter of practice, that body of work may not in fact be "known" by cinema operators significantly in advance of the film's release.
- 72 Secondly, even if there were a sufficient time before exhibition to conduct negotiations in relation to the licensing of performing rights, there is no basis for confidence that licences could be secured:
- (a) in relation to non-Australian music, there is no basis whatsoever for assuming that it would be legally or practicably possible to negotiate individual performing right licences in relation to Australian exhibition of films, without the assistance of APRA. In the "modified" world, APRA would remain essential for this reason. This very dramatically limits the relevance of the Modifications, in light of the prevalence of foreign musical works in films exhibited in Australia (as to which see 24 above). If there were no "blanket licence" arrangement, there would necessarily have to be negotiations with APRA before the release of each film, in relation to the licence of the particular embedded works. If that were not negotiated before the release of the film, there would inevitably be an infringement of copyright;
 - (b) in relation to Australian music, there are real doubts as to the feasibility and practicality of securing performing right licences:
 - (i) *Who negotiates for cinema?* There is real doubt as to which entities would be willing and able to negotiate on behalf of the cinema operators:
 - the film distributor would be a logical candidate, but there is no evidence or submissions to support the inference that distributors would be willing and able to negotiate the rights for all cinema operators;
 - for the reasons set out in paragraph 78(d)(i) above, there is real doubt as to whether a Peak Body would be able to negotiate on behalf of all cinema operators;
 - if neither the film distributor nor a Peak Body negotiated the rights, the only alternative would be individual cinema

operators, or groups of them. This would involve a complex multiplicity of overlapping negotiations;

(ii) *Who negotiates for the copyright holders?*

- it would be essential that APRA is available to negotiate on behalf of copyright holders of foreign musical composition. The alternative would be for foreign copyright holders to establish local collecting societies – leading to an inevitable duplication of transactions and costs, and consequent inefficiencies;
- if the modification proposed by Cinema Operators only involved an “opt out” and not a compulsory re-assignment of the performing right, APRA would have to negotiate on behalf of copyright holders who had not taken a re-assignment of the performing right;
- if APRA has assigned back the performing right to a copyright holder (without a licence back), APRA would not be available to negotiate on behalf of those copyright holders. There would have to be a separate negotiation with each and every holder of copyright in relation to the film music;

(c) *Striking a deal.* The likelihood of striking a deal must be considered against the following backdrop: Significant costs have presumably been sunk in acquiring the distribution rights in the film. Significant costs have presumably been sunk in marketing the film. Scheduling of exhibitions of all films in a particular cinema has presumably been based on precise assumptions as to the release of a particular film. It is essential to obtain a performing right licence, for the lawful exhibition of the film. In all those circumstances, the bargaining power of the copyright holder is substantial, if the performing right license is negotiated on the eve of release. Reflecting that inflated bargaining power, it is quite conceivable that the terms demanded by the copyright holder would be extravagant. If APRA is not available to provide a licence, there were appear to be four possibilities:

- the film is not exhibited (which is extremely unlikely, in light of sunk distribution and marketing costs);
- the film is reworked to excise the music for which no licence can be agreed (which is unlikely, in view of cost and time pressures, and impact of the excision on the film itself);
- agreement is reached to meet the inflated demands of the copyright holder; or
- the film is exhibited in an infringement of copyright.

73 The serious doubt as to whether ‘at source’ licenses could be obtained in relation to musical works performed in film underlines the critical need for the retention of the blanket licence. In the absence of the blanket licence, breach of copyright (or the frustration of film exhibition) would be inevitable,

D2 Nature and efficacy of present procedures for “opt out” and “licence back”

- 74 The Cinema Operators propose the Modification to the APRA system to facilitate direct dealing with copyright holders in relation to the performing right. This is presumably advocated to facilitate price competition between writers in relation to the licence of the performing right, or place some competitive pressure on APRA or its members.
- 75 There are two procedures that are relevantly available, to facilitate direct dealing by copyright holders in relation to performing right associated with the screening of films.
- 76 First, under Article 17(b)(v) a writer or publisher can require APRA to re-assign the category of performing right in relation to “the performance in public by the exhibition of cinematograph film”, subject to the following conditions:
- (a) not less than 3 months notice in writing, expiring on either a 30 June or 31 December: Article 17(c);
 - (b) procuring the written consent and release “from all persons interested in the works in the relevant categories of the Performing Right consenting to the proposed assignment to the member of the categories of the Performing Right and releasing the Association from any obligation to collect royalty or other sums in respect of works arising as a result of the assignment...”: Article 17(d)(ii); and
 - (c) providing the Association with a “written indemnity..indemnifying the Association against any actions arising from the use by any licensee of the Association or the member’s works in the relevant category of the Performing Right”: Article 17(d)(iii).
- 77 Secondly, under Article 17(g), a member can require APRA to grant a “non-exclusive licence in relation to specific works”, subject to conditions which include the following:
- (a) provision of notice “not less than 2 months prior to the date of the first performance under the proposed sub-licence”: Article 17(h)(ii)(a);
 - (b) the notice must specify:
 - (i) Title of the work or works;
 - (ii) Identity of persons to whom the member intends to grant a sub-licence;
 - (iii) Date or dates on which the performance under the proposed sub-licence is to take place;
 - (iv) Geographic location of the performance, and the venue of the performance;
 - (c) the notice must contain a signed consent, and release, and indemnity, from all Interested Persons (being a person with an interest in the performing right); and
 - (d) undertaking to pay reasonable costs connected with the sub-licence.

- 78 APRA submits that these procedures create considerable scope for direct dealing (by producers or cinema operators) with copyright holders in relation to the licensing of performing rights. For example:
- (a) any APRA member with a significant body of work in film may well elect to “opt out” under Article 17(b)(v) in relation to film performance, leaving him or her (or their publisher) to negotiate terms with individual cinema operators. Such a copyright owner may be able to negotiate exclusivity with a cinema operator, so that films containing works by that writer could not be screened in competing cinemas (something APRA cannot do);
 - (b) alternatively, a writer or publisher who had relevantly opted out of APRA could negotiate with the maker of a film at the time of negotiating the synchronisation rights, so that the public performance rights were “bundled” with the film. The maker of the film could then enter into negotiations with cinema operators for the public performance rights in films;
 - (c) a writer or publisher could take a non exclusive license back in order to grant a non exclusive licence to a particular cinema operator or operators in respect of all of that writer’s or publisher’s works in a film or films.
- 79 APRA repeats its submission that there is completely unfettered scope for direct negotiations with owners of copyright in American musical works: see paragraph 58(a) above.
- D3 Critique of the present procedures for “opt out” and “licence back”**
- 80 The Cinema Operators submit that the opt-out and licence-back provisions do not provide a workable mechanism that enables an exhibitor of a film to negotiate a right to publicly perform musical works embedded in a film: para 11(a).
- 81 They complain that the “opt out and licence back arrangements are restrictive and largely ineffective in facilitating efficient negotiation between those wishing to screen a film and authors of musical works”: para 11(n), and that they are “limited and inflexible in their operation and effect and do not provide any realistic opportunity for cinema owners to source rights directly from the rights owners”: Supplementary Submissions, para 13.
- 82 They submit that the changes made to APRA’s Articles of Association has not “been effective in reducing APRA’s real exclusivity”: para 11(n); see also para 39-51.
- 83 They contend that impracticality arises from the “terms and conditions attached to the exercise of the rights”: para 49, and that the “licence back arrangements...are drafted in overly restrictive terms and consequently are ineffective”: para 51.
- 84 Set out below is:
- (a) an outline and response to the specific criticisms in relation to the “opt-out”;

- (b) an outline and response to the specific criticisms in relation to the “licence-back”; and
- (c) a general reply to the criticism of the present systems of “opt out” and “licence back”.

(1) Criticisms of the “Opt-out”

85 In the Supplementary Submissions, the Cinema Operators make the following specific criticisms of the “Opt-Out” procedures.

86 First, the Cinema Operators criticise the procedures, on the grounds that the “opt out” only applies in relation to “all” of the members works in relation to a particular category of use (eg, performance in films). “This does not allow a member to withdraw his or her rights for a particular work and particular type of use at any time. It is clear that this is an “all or nothing” opt-out provision which would have limited appeal to, or use for, any APRA member”. In reply, APRA submits that:

- (a) the limitation of the “opt out” to “categories” of work rather than “particular” works, has significant importance to the efficient operation of the APRA system. This is because of the importance of the integrity of the APRA repertoire to the enforcement of APRA’s rights both generally and in particular categories of use. The exercise of the opt out by a member of APRA creates a “hole” in the APRA repertoire in a way that the exercise of the mere license back does not. When a member takes a non exclusive license back, he or she is able to grant licences, but APRA remains the owner of the right, and remains entitled to grant non exclusive licences to others. On the other hand, when a member opts out, APRA reassigns the rights to the owner, and has no further rights in relation to the member’s works for that purpose. APRA effectively represents that its licences cover the world’s repertoire of works. If the repertoire is diminished by a member removing works, APRA would effectively be required promptly to notify all relevant licensees of the fact that certain works were no longer covered by the licence. (This obligation would arise from implied contractual term, or to avoid exposure for liability for misleading and deceptive conduct). It is to be expected that this would result in further negotiations between APRA and licensees – who may demand a reduction in the licence fee, or different licence terms. This process gives rise to a massive and costly administrative exercise for APRA, which also causes significant inconvenience and administrative burden for the licensees. . The limitation of the opt-out to categories of works means that not more than one “opt out” notification is required per member per category. If the opt out were available in respect of single works, and utilised in a piecemeal fashion, there would inevitably be a multiplication of the necessary opt out notifications to licensees. The potential number of necessary notifications would be virtually limitless. This would inevitably significantly increase the transaction costs both of APRA (in relation to notification to licensees), and also the licensees (in relation to the management of “opt out” and other licensing records);

- (b) the scale of the transaction costs associated with the opt-out notification can be inferred from the number of APRA licensees in the various categories of opt out available to members (noting that APRA's licences do not correlate strictly with the opt out categories, which pre-date the changes to the *Copyright Act* following the *Copyright Amendment (Digital Agenda) Act 2000*:
- (i) *the right of performance in public*: APRA has approximately 50,555 public performance licensees (this does not include licensees holding a licensee under a head agreement, for example with a background music supplier);
 - (ii) *the broadcasting right*: APRA has 738 broadcast licensees;
 - (iii) *the right of communication or transmission to the public other than by way of public performance or broadcasting but including transmission to subscribers to a diffusion service*: APRA has 4,939 communication other than broadcast licensees;
 - (iv) *the right of live performance in public*: APRA has 5,022 live public performance licensees;
 - (v) *the right of performance in public by the exhibition of cinematograph films*: APRA has 230 cinema licensees;
 - (vi) *the right of performance in public by other means*: APRA has 45,303 other public performance licensees;
 - (vii) *the sound broadcasting right*: APRA has 687 radio licensees;
 - (viii) *the television broadcasting right*: APRA has 51 television licensees;
 - (ix) *the right of communication or transmission to the public by cable television*: APRA has 6 subscription television licensees;
 - (x) *the right of communication or transmission to the public by other wired means*: APRA has 4,939 such communication licensees;
- (c) it should also be noted that APRA's representation of writers takes place in an international context. Australian films containing Australian music find markets overseas, and APRA's systems must be able to mesh with the systems of affiliated societies. Consequently, APRA would be required to notify the overseas collecting societies, if there were an opt-out;
- (d) it is erroneous to characterise the opt out provisions as "all or nothing". Under the opt-out provisions, a writer is able to limit his or her opt-out by reference to 10 separate categories of use, of which only one is performance of the work by the exhibition of film. To opt out in relation only to film does not necessitate the writer electing to abandon the support of APRA generally. It should be noted that licence fees collected from the exhibition of film is a relatively minor source of APRA revenue (and writer income). By way of example, in 2003/04, the total APRA revenue was \$99,499,000 of which \$2,666,175 was generated from cinema;

- (e) for a writer with a significant body of work in film, who is experienced in relation to negotiation with film producers, APRA does not consider it likely that an “opt-out” in relation to the whole category of film would be at all intimidating. APRA’s records show there are 931 Australian writers active in the film and television area – of those, 196 have received distributions totalling more than \$10,000 in the last two years;
- (f) the submission that the “opt out” be on a work-by-work basis was considered and firmly rejected by the Competition Tribunal: [353]

87 Secondly, the Cinema Operators criticise the “opt out” provisions, on the basis that there are “strict time constraints”. In reply, APRA submits that the imposition of notice requirements in relation to “opt out” is of fundamental importance to the efficient operation of the APRA system. This is because a reasonable period of time is required for affected parties to put in place procedures to identify and address problems created by the “hole in the repertoire” caused by the opt out. APRA must have time to notify licensees. In case licensees were proposing to perform the music, licensees must have time either to negotiate a licence with the new rights-holder, or adjust their scheduled program of musical performance (to omit works which had been “opted out”). If a member could remove works from the APRA repertoire on short notice, licensees relying on the APRA licence might be significantly prejudiced. For example, if an independent cinema had scheduled future screenings of a film containing works subsequently removed from APRA, the cinema might be unable to negotiate a licence with the new owner. This would leave the cinema with a film it could not legally screen, leading either to the screening of the film in breach of copyright, or the late cancellation of screening.

88 Thirdly, the Cinema Operators criticise the “costs and indemnity provisions” upon which the opt-out is conditional. (This criticism is made specifically in relation to the licence-back, but presumably the same criticism is meant to be directed to the opt-out provisions). In reply, APRA submits that:

- (a) the likely costs associated with an opt-out are potentially very significant, and would include the following: the cost of changing the APRA records to record the opt-out; the costs of notifying licensees of the removal of the works from the repertoire; possibly, legal costs associated with complaints or actions by licensees following that notice. It should be noted that without the indemnity, APRA would also have to incur the costs of verifying the consent by all interested parties, or risk incurring further costs in actions by interested parties who did not in fact consent to the opt out or license back;
- (b) APRA considers that it is entirely reasonable that such costs should be borne by the member who elects to opt-out. The only alternative would be that the costs are borne by the remaining members. Presumably, the costs could be taken into account by the copyright when directly negotiating with producers; and

- (c) the Tribunal gave detailed consideration to the issue of the indemnity, and firmly concluded that the added expenses caused by the opt-out should be borne by the member seeking to opt-out: [358]

89 The Cinema Operators do not take issue with the requirement of written consent and release “from all persons interested in the works in the relevant categories of the Performing Right consenting to the proposed assignment to the member of the categories of the Performing Right and releasing the Association from any obligation to collect royalty or other sums in respect of works arising as a result of the assignment...”: Article 17(d)(ii). Nor could reasonably objection be taken to this requirement. It has significant importance to the efficient operation of the APRA system, because works are very often created by more than one writer, and the administration of the copyright in the work often involves more than one publisher. If a writer were to remove a work from the APRA repertoire, APRA would cease to license and distribute in relation to that work. If there were copyright owners interested in the work who had not agreed to the opt out, those owners may well have an action against APRA for failing to discharge its mandate. It is imperative that APRA ensures that all interested parties are aware of the fact that a work has been removed from the repertoire and the serious consequences of that fact. If the consent of interested parties was not a precondition of opt out and license back, APRA would be left to enforce partial shares of works, which APRA suggests would create enormous confusion in the market.

(2) Criticisms of the “license back” arrangements

90 First, the Cinema Operators criticise the requirement to nominate:

- (a) identity of persons to whom the member intends to grant a sub-licence;
- (b) date or dates on which the performance under the proposed sub-licence is to take place; and
- (c) geographic location of the performance, and the venue of the performance.

91 The Cinema Operators submit that “the requirement to notify “specifics’ in advance (by way of dates, geographic location and venue) are entirely unsuitable and inappropriate in the context of exhibiting films”: Supplementary Submissions, para 17. They submit that the relevant details are not known in advance by the Cinema owners: para 18.

92 In reply, APRA submits that:

- (a) the notification requirements are of considerable importance to the efficient operation of the APRA system, because APRA needs to know those parties to whom it is not required to offer a licence and in respect of whom APRA is not required to enforce its rights. If APRA continued to enforce its rights in respect of all performances of works in its repertoire, when in fact some of those performances were the subject of a direct licence, APRA would expose itself to actions from unlawful threats, as well as using resources that would be better directed elsewhere. As far as APRA is aware, the geographical location

of all cinemas in Australia is known in advance, as are the details of films that are to be screened;

- (b) the requirement of two months' notice is for the purpose of facilitating interested parties to re-ordering their contractual relationships following the licence-back. If it were demonstrated that this period of notice were of itself frustrating the utilisation of the licence-back procedure, APRA acknowledges that modification might reasonably be required; and
- (c) APRA submits in passing that the fact that Cinema Operators are not aware of the films they will be exhibiting two months in advance of the date of first screening, is a powerful argument in favour of the blanket licence. The less time there is between the Cinema Operator knowing what film is to be screened, and the date of the screening, the higher the likelihood of infringement of copyright in the absence of a licence from APRA.

93 Secondly, the Cinema Operators complain about “cost and indemnity conditions”, as to which see paragraph 88 above.

(3) General Reply

94 By way of general reply to the criticisms by the Cinema Operators of the opt-out and licence-back provisions, APRA makes the following further submissions.

95 First, APRA submits that the mere fact that the procedures are not being utilised in relation to cinema does not necessarily indicate that the procedures are “overly restrictive” and “ineffective in facilitating efficient negotiation” directly with copyright owners. The obvious alternative explanation is that the opportunity is not attractive to APRA’s members. This is entirely understandable. Quite apart from the transaction costs inevitably associated with undertaking direct negotiations, there will inevitably be very significant difficulties in estimating a fair value for the performing right, if it were to be sold for a fixed fee during the film production process or otherwise prior to screening. The value of the right is presently dependent upon the box office success of the film, but success of a film is notoriously difficult to predict (particularly early in the production phase). APRA acknowledges that it may be necessary for there to be adjustments to the blanket licence fee, in the event that “opt out” and direct dealing occurs. However, this is simply a matter for negotiation or (failing agreement) the Copyright Tribunal.

96 Secondly, for the reasons set out in paragraph 78 above, the existing procedures still provide significant scope for the utilisation of both opt-out and licence-back;

97 Thirdly, the mere fact that the “opt out procedure” has not been utilised does not of itself render it ineffective as a constraint on APRA’s conduct. By reason of the opt out procedures, APRA is vulnerable to opt out by writers and publishers (possibly encouraged by film producers and cinema operators). The vulnerability imposes competitive constraint on APRA’s conduct.

98 Fourthly, as far as APRA is aware, no cinema operator has asked a writer or publisher to deal directly in respect of the performing right. If a writer or

publisher had made enquiries of APRA as to whether opt out or license back was available in such circumstances, APRA would have detailed records of the communications. No APRA member has been denied the right to opt out or license back under APRA's constitution since the provisions were introduced.

- 99 Fifthly, the potential efficacy of the procedures is demonstrated by the extensive utilisation of the opt-out procedures in relation to “music on hold”, which is an area where total revenue is substantial - \$1.6 million in 2003/4;
- 100 Sixthly, to the extent that the conditions on the exercise of “opt-out” and “licence-back” do create constraints on the utilisation of those procedures, it must be remembered that the promotion of competition against APRA is not the exclusive and pre-eminent policy goal. “It is important to note (as the Tribunal pointed out in *Media Council (No 2)* at 48,418-9) that conduct which answers the statutory description of anti-competitive lessening of competition does not necessarily constitute anti-competitive detriment for the purpose of section 90. It is erroneous to equate anti-competitiveness with detriment. Anti-competitive behaviour may in certain circumstances be a benefit”: *Re 7-Eleven Stores Pty Ltd (1994) ATPR 41-357, at 42,654*”. Further, the Tribunal found that there was no evidence of inefficiency [306], or misallocation of resources [305]. The Tribunal further recognised that the APRA system provided very significant public benefit, and it was therefore critical that any promotion of competition does not cause undue detriment to the efficient operation of the APRA system. This issue is explored in D4 below.

D4 Impact of modification on beneficial operation of APRA system

- 101 The Cinema Operators submit that:
- (a) “virtually none” of the alleged benefits of the APRA system “apply to Cinema Operators”: para 61; and
 - (b) the introduction of procedures which better facilitate “direct dealing” in relation to the performance right for works embedded in films, will not “affect the broader administrative functioning of APRA in its wider role as a collecting society”: para 67, 69.
- 102 By way of general reply, APRA submits that:
- (a) the impact of the Modifications should be considered not just by reference to the “Cinema Operators”, but by reference to the efficient operation of the market generally, and the interests of persons affected by it;
 - (b) the Modifications have the potential to cause additional public detriment, in terms of increasing costs, decreasing efficiency, decreasing compliance with copyright, and prejudicing a fair return for writers.
- 103 Set out below is a consideration of the impact of modifications, by reference to the recognised heads of public benefit generated by the APRA system.
- 104 The analysis proceeds on the following assumptions:
- (a) (unless otherwise stated) “**Modifications**” refer to the removal of substantially all the conditions for “opt out” and “licence back”; and

- (b) the Modifications will lead to a widespread utilisation of those procedures.
- 105 As noted earlier, in their first submission, the Cinema Operators appeared possibly to advocate compulsory re-assignment of copyright. In case it might still faintly be pressed, APRA also addresses additional problems caused by assignment-back.
- (1) Minimise transaction costs.
- 106 The Cinema Operators note that APRA and the Competition Tribunal referred to the “enormity of the administrative tasks which confront APRA” in the event of departure from the input and output arrangements to allow “opt-out”: para 63. They submit that this argument does not apply to “dependent or derivative works embedded in the film”: para 63. APRA repeats its objection to this categorisation of music in film.
- 107 The Cinema Operators submit that all of the “administrative and efficiency arguments relating to the structural management of a large portfolio of works and a large portfolio of licensees have no application to the administrative imperatives confronting APRA in dealing with Cinema Operators as licensees”: para 68.
- 108 APRA sets out below the potential impact of the Modifications on the following transaction costs associated with the administration and enforcement of performing rights:
- (a) licence negotiation;
 - (b) re-assignment of copyright;
 - (c) monitoring status of copyright ownership;
 - (d) monitoring use of music;
 - (e) enforcement:
- Licence negotiation
- 109 Subject to the infrequent re-negotiation of the general terms of the blanket licence, there are no negotiations presently involved in relation to the licensing of the performing right for film music (between APRA and either members or users).
- 110 If the Modifications were introduced, there would likely to be the need for extensive, and possibly overlapping licensing negotiations (which would unquestionably lead to the incurring of very significant costs).
- 111 In relation to foreign compositions, there would need to be licence negotiations between APRA, and some entity on behalf of cinemas (being a producer, distributor, cinema industry body, or individual cinemas). There can be no real prospect that the Modifications will trigger or facilitate direct negotiations with copyright holders. This is because the scope for such negotiations (with respect to US works) already exists, and is not utilised to negotiate “flow through” licences in respect of exhibition in Australian cinemas.
- 112 In relation to Australian compositions, there would have to be negotiations between:

- (a) *Copyright holders*: These would include APRA (in relation to works for which there had been no re-assignment of copyright or no direct licence), and individual copyright holders (possibly represented by publishers) in relation to works for which there had been an re-assignment of the performing right. As earlier stated, single musical works will often have multiple copyright holders: for example, see Attachment B which shows the PPCA top 100 recordings broadcast on commercial radio, which demonstrates the splintered nature of copyright ownership. The multiplicity of owners for each work would cause a corresponding multiplicity of necessary licence negotiations; and
- (b) *Cinema*: There may be representative negotiating undertaken for cinema operators, by film producers, distributors, or cinema industry bodies. However, for reasons set out in paragraph 60-66 above, there would appear to be a significant prospect that individual cinema operators (or groups of them) would be forced to undertake negotiations with each copyright holder (if they wished to procure the requisite licence). APRA submits that there is no basis for the submission by the Cinema Operators that “the transaction costs involved in negotiating downstream or “pass through” public performance rights for works in films at a point in time during the film production process, are likely to be quite low”: para 61.

113 Attachment A identifies the number of works which were performed in some of the films screened in Australian cinemas over a very short period, and the number of persons holding at least a part ownership interest in those works. APRA’s distribution records show that in the financial year 2003/04, APRA distributed royalties in relation to 347 different films, in respect of the 4,878 musical works contained in those films, and that there were 8,791 ownership interests in the films. There are 553 cinemas in Australia. These figures highlight the enormity of the administrative tasks associated with negotiating copyright licences otherwise than through a single entity by means of a blanket licence.

Reassignment of copyright

- 114 If the Modifications consisted of a mandatory non exclusive licence to APRA (enabling copyright owners to deal direct if they so choose, as is the case in the US), APRA would first have to reassign the rights to each of its 38,000 members. This assignment would be required to be in writing (section 196(3) of the *Copyright Act 1968*). If there were such a compulsory re-assignment of copyright, there would be at least the following costs incurred:
- (a) the costs of drafting the reassignment (and related explanatory materials) and identifying all relevant copyright owners and their respective works;
 - (b) the costs of numerous mailouts relating to the reassignment. Merely writing to the active APRA writer membership (as is required, for example, to notify the membership of a recent writer election at the AGM costs around \$15,000 (including more than \$9,000 in postage, and \$6,000 in printing costs).

- (c) legal costs of advice in relation to the assignment; and
- (d) extensive legal costs related to of analysis and further negotiation in relation to the question of ownership following reassignment. As to this matter, a number of APRA members are parties to publishing agreements under which copyright is assigned or exclusively licensed “subject only to the prior rights of APRA”. It may be contended that if APRA were to assign its rights to writers, the rights might ultimately vest in the publishers not writers. Legal advice would likely be required in relation to each publishing contract, to determine the legal effect of an attempted reassignment by APRA. Further, many catalogues may also have changed hands during the years since the original signing, and so writers may find their APRA rights being owned – or arguably owned – by publishers they never intended to hold such rights, on terms not agreed.

Monitoring status of copyright ownership

- 115 There is presently no doubt that the performing right vests in APRA. Users can confidently deal with APRA, in the knowledge that it is able to negotiate in relation to the performing right for effectively all music.
- 116 There is no central register of copyright. If the exclusivity of assignment of performing rights to APRA were seriously undermined, there would inevitably develop significant uncertainty in relation to the ownership of the performing rights.
- 117 A prudent user would of necessity be required to undertake due diligence in connection with the ownership of the performing right. The investigations would inevitably be both costly, and imperfect. Needless to say, a dispute in relation to the ownership of synchronised film music has the potential to cause significant disruption in the distribution of a film.
- 118 From APRA’s perspective, even if the rights were returned to APRA on a non exclusive basis, APRA would incur significant additional costs in relation to monitoring direct licences granted by or on behalf of the writer (and not involving APRA). Such monitoring would be essential, to facilitate APRA determining the balance of the musical repertoire for which it would continue to provide a licence. The materiality of this issue was expressly recognised by the Tribunal at [296]

Monitoring use

- 119 The monitoring costs of APRA would remain identical. On any view of the “modified environment”, APRA (or another collecting society in APRA’s absence) would necessarily remain involved in relation to the licensing of foreign compositions. It would therefore be required to maintain monitoring of all films. Those monitoring costs are in fact likely to increase. The monitoring costs are presently kept down by requirements of self-reporting by the cinema operators, as a condition of the blanket licence. However, if the blanket licences were abolished, it may be difficult to secure equivalent cooperation from the cinema operators in relation to the provision of detailed self-reporting.

120 In addition to APRA, there will be a range of other entities that own and control performing rights, who will effectively be obliged to undertake monitoring of the use of their works.

Enforcement

121 The Cinema Operators submit that “the public benefit of exclusivity of assignment facilitating the efficient management of copyright infringement litigation is also an illusion in the context of the activities of the Cinema Operators. Whilst assignment of the public performance right enables APRA to commence proceedings as owner against infringers in the management of a broad field of works within a repertoire exposed to broad use in a diverse number of ways, that is not the circumstance which confronts APRA in its dealings with the Cinema Operators. They do not infringe public performance copyright. Films are exhibited lawfully”: para 11(j). They conclude, “as to copyright protection and enforcement efficiencies, APRA would spend virtually not time in dealing with Cinema Operators on these issues. They do not arise”: para 61.

122 While the statement quoted may be true of the current environment, it is precisely because of the use of blanket licences that it is true. For the reasons set out in paragraph 127 below, APRA submits that the Modifications will likely lead to a significant increase in copyright infringement by cinema operators.

123 To the extent that these infringements will be prosecuted, there will logically be a significant increase in enforcement costs. To the extent that infringements will go undetected and accordingly not be prosecuted, there is a public detriment.

124 Not only will the number of enforcement proceedings increase, but (depending upon the precise nature of the Modifications) APRA’s costs of enforcement in respect of each discrete proceedings is likely to increase. If the Modifications left APRA with non exclusive rights, it would be necessary to prove not only the validity of APRA’s non exclusive rights, but also the absence of a licence from any other source. As a non exclusive licence does not have to be in writing, there is a potential for a verbal non exclusive licence to be granted by any person holding an interest in the copyright material. The possibility that a user might have procured a licence from another source will frustrate (and significantly exacerbate the transaction costs associated with) copyright enforcement, in two respects. First, there is the risk that any demand by APRA of a licensee for the payment of royalties will be met by the assertion that a licence has been procured from some unspecified source. APRA would then be forced to undertake investigations in relation to the possible existence of the alleged alternative licence, in order to determine the existence (if any) of APRA’s entitlement to recover royalties. Secondly, as a non exclusive licensee APRA would have no right to prosecute for alleged breach. It would incur additional litigation costs, by reason of the need to prove the absence of alternative licences, and the need to have the copyright owner be the applicant party to the proceedings as a condition of the conduct of proceedings: see section 119 - 120 of the *Copyright Act*. The costs and difficulties associated with joining the copyright owner would arise from the need to contact (and liaise with) the copyright owner about the commencement of proceedings, the

possible demand that the copyright owner might make in relation to the provision of indemnities concerning liabilities arising from the conduct of proceedings, the prospect that the copyright owner might insist upon management of (or reporting in relation to) the conduct of the litigation, and the costs exposure arising from the possibility that the defendant might prove the existence of the alleged alternative licence. The Competition Tribunal made express findings in relation to the problems arising from the absence of exclusivity: [350].

(2) Provide comprehensive authorisation to users

- 125 The present APRA system provides complete security for cinema operators who take out the blanket licence, which effectively eliminates the scope for infringement of copyright.
- 126 The Cinema Operators submit that the “body of musical works and associated literary work incorporated within a film is finite and entirely identified....There is thus no need for nor any utility in imposing upon Cinema Operators a blanket licence of a total repertoire of nearly 3 million titles in order to confer a public performance right for the works in the film”: para 11(f), 11(g). They conclude that “securing the rights [during the film production process] would involve absolute certainty of the works involved with no need to secure certainty through access to an entire APRA repertoire”: para 61, 70, 71.
- 127 In reply, APRA submits that:
- (a) an unarticulated critical assumption in the submission of the Cinema Operator’s argument is that a “pass through” performing right licence could be obtained during the production process. For the reasons set out in paragraph 60-66 above, there is no reason to believe that a “pass through” performing rights licence would ordinarily be obtained during the production process; and
 - (b) If there were no “pass through” licence negotiated in the production process, and APRA were unable to provide a blanket licence by reason of the assignment back of copyright, it is almost inconceivable that licences would be duly agreed in relation to the musical works performed in films (in view of the enormity of the number of licensing transactions that would be necessary, as to which see paragraph 113 above).

(3) Create “countervailing power” for writers in dealings with users

- 128 In its Determination, the Competition Tribunal noted with apparent approval the decision of the Commission of the European Communities, to the effect that “Collecting society membership is above all necessary in relation to communication to the public and broadcasting rights, where copyright holders are up against powerful users of music and the demand side, ie, the listener, can exert only very limited influence on these users. Only through the collecting societies therefore can the copyright holders obtain the fair compensation due for their intellectual labour” [228]; see also [306]ff.
- 129 The Cinema Operators submit that “As to countervailing bargaining power, the issue really is the bargaining power of a Cinema Operators in their

dealings with rights owners at source within the framework of film production...There is no reason to believe that a balanced commercial bargain reflecting the interests of rights owners and Cinema Operators could not be struck.”

- 130 It should be noted that the impact of the Modifications would be limited to the licensing of Australian compositions (for the reasons explained in paragraph 64 to 65 above). In light of the relative paucity of Australian compositions in the films exhibited in Australia, the impact of the Modifications is therefore relatively limited.
- 131 In relation to the negotiation of the performing rights for Australian works, the impact of the Modifications on the bargaining power of the writers depends very much upon the degree of collaboration between the producers and distributors/cinema operators in negotiations with the writers.
- 132 If there is close collaboration between them, then:
- (a) it is possible that producers might inform the writers that it is a condition of the producer acquiring the synchronisation rights, that the writer also provide a “pass through” performing rights license (which authorises the performance of the music in any subsequent exhibition of the film);
 - (b) in view of the intense competition between writers in relation to the supply of composition for film, there is a significant possibility that the performing right would be cheaply bargained away (by all but the most prominent writers).
- 133 If there is no close collaboration, then:
- (a) it is possible that the producer would negotiate the synchronisation right, without also securing a “pass through” performing rights licence;
 - (b) if this were the case, then the bargaining power of the writer would be dramatically strengthened in its negotiations with the distributors/cinema operators in connection with the licensing of the performing right. Once the music is synchronised in the film, the owner of the performing right has the capacity to prevent the legal exhibition of the film with out a performing right licence.
- 134 In either scenario, there is a very significant imbalance in bargaining power. This issue was of course considered by the Tribunal: eg, [228], [350]
- (4) Ensure proper enjoyment by writers and publishers of their copyright interests
- 135 The Modifications are likely to prejudice a writer’s proper enjoyment of their copyright interests in three respects.
- 136 First, if the scenario referred to in paragraph 132(a) eventuates, it is very likely that the performing right will be negotiated away by the writer for an amount that is significantly below the value of the right as enforced by APRA.
- 137 Second, a writer’s proper enjoyment is likely to be prejudiced by the increased likelihood of infringement, if the Modifications are introduced. In view of:

- (a) the unlikelihood that individual writers (or even their publishers) would be in a position to rigorously monitor all film exhibition throughout Australia;
 - (b) the relatively modest damages suffered from each discrete infringement of copyright;
 - (c) the very significant costs of infringement litigation,
- there is a significant likelihood that much infringement would go unremedied.

138 Thirdly, by reason of the current structure of publishing contracts, it is possible that any attempt to re-assign copyright to writers, will end up vesting that copyright in the writers' publishing (and thereby possibly prejudicing the writer's entitlement to earn royalties in relation to the performance of the writer's works: see paragraph 114(d) above.

139 Fourthly, for reasons noted in paragraph 106 124 above, the implementation of the Modifications would likely significantly increase APRA's costs. At the same time, the "opt out" of writers would inevitably decrease revenue. The inevitable consequence of increased costs on a reducing revenue base is that the amounts available for distribution to writers would be diminished.

(5) Encouragement of creative activity, and avoidance of "market failure" in relation to that process

140 To the extent that the Modifications are likely to prejudice a writer's proper enjoyment of their copyright interests, there is a corresponding risk that the level of creative activity would be prejudiced.

141 However, APRA does not suggest that this is a major factor in this case.

(6) Additional detriment

142 There is a risk that independent cinema operators would be prejudiced by the Modifications (and the decreased role of APRA), for two reasons.

143 First, in the "modified" environment, it is possible that distributors might assume responsibility for seeking to negotiate "pass through" performing rights licences. The major distributors have links with the major cinema operators, and it is possible that the selective availability of the performing right licence may be used in a manner that prejudices the independents.

144 Secondly, in the "modified" environment, it is also possible that cinema operators might be required directly to take responsibility for the negotiation of performing right licences. Cinema Operators who belong to the major groupings will be relatively well placed to undertake collective bargaining. The smaller independents will not be. Under the present APRA system, there is no discrimination between the large and small cinema operators. Any such discrimination is unlikely to reflect efficiencies and is therefore likely to be anti-competitive.

Part 3 – Submission of Commercial Radio

A Introduction

- 145 By way of background, excluding the radio networks operated by the ABC and SBS, there are approximately 830 radio licences that have been issued by the Australian Broadcasting Authority. Of these, around 260 are commercial radio stations which are members of CRA. Quantifying the amount of music broadcast on those radio stations is a task of mammoth proportions. Music is of critical importance to the majority of those radio stations – it is their principle product. Radio station playlists are developed with great skill to attract very specific demographics. APRA is confident in its assertions as to the importance of music to commercial radio.
- 146 APRA has examined its records for the financial year 2003/04, in relation to the stations 2MMM (in NSW) and 3MEL (“NOVA”) (in Victoria). Both stations are heavy users of music.
- (a) 2MMM broadcast 2,229 different works during the period. Those works were represented by 3,348 unique sharers of whom 738 were local APRA members. (“Sharer” means a person entitled to share in the copyright distribution, which include the songwriters, their publishers, and their successors in title). Of the works performed, 448 were first broadcast during that period. The works that were broadcast during the period had 464 ownership changes during the period.
 - (b) 3MEL broadcast 2,351 different works during the period. Those works were represented by 5,524 unique sharers of whom 735 were local APRA members. Of the works performed, 1,145 were first broadcast during that period. The works that were broadcast during the period had 958 ownership changes during the period.

B Foundational Challenge

- 147 Like the Cinema Operators, CRA does not appear to oppose the authorisations generally. It states that “as a general statement, we accept that the collective administration of copyright can deliver public benefits. From our members’ perspective, the fact that they can acquire rights to musical works through one collecting agency has administrative advantages”: para 2.4.
- 148 Rather, it appears to oppose the authorisations only in some respects in so far as the APRA scheme relates to commercial radio.
- 149 Consequently, by reference to the categories of challenge described in paragraph 19 above, its position is perhaps best characterised not as a “foundational challenge” to the entire APRA scheme, but as the advocacy of a “system modification”.
- 150 Nevertheless, like the Cinema Operators, CRA does seek to challenge generally some of the foundations for the Tribunal’s Determination. APRA’s response to these challenges is set out below.

B1 Market Definition

- 151 CRA contends that “there are distinct markets in the acquisition of rights for each of the various public performance (eg, bar and nightclubs, jukeboxes,

retail outlets) broadcasting and communication uses and that the effect of APRA's input, output, distribution and affiliation agreements must be considered in each of those markets separately": para 3.1.

152 In reply, APRA submits *first* that this submission was squarely addressed and rejected by the Competition Tribunal in its decision. The Tribunal noted that: "FACTS argued that a sub-market of television broadcast rights was relevant to its complaint that APRA's conduct prevented competition between writers for television: see para 116 above. However, we do not believe that it is helpful to our considerations to distinguish markets on this basis as the same argument could be made for competition between writers in any other area such as radio or cinema." [291].

153 Secondly, in any event, the Tribunal further held that: "We agree with ACCC (see para 89 above) and Dr Walker that little turns on market definition in this matter. As Dr Walker stated: "...as all such rights derive from the same underlying work and they are all administered by APRA, it would seem useful to include them in a single market." [291]

B2 APRA exercises monopolist power

154 CRA submits that APRA "continues to act as an unconstrained monopolist" in a number of alleged respects: para 2.4, page 2.9

(1) Approach to negotiations

155 First, CRA alleges that "because no practical licensing alternatives to APRA have developed...APRA continues to approach negotiations with our industry from a position of absolute power....This means that negotiations with APRA still resemble an all-or-nothing proposition": para 2.4(a). In response, APRA submits that:

- (a) the mere fact that there are no "licensing alternatives" does not mean that APRA is "unconstrained". It is substantially constrained in its dealings with both users and writers by the fact that:
 - (i) APRA is required under the terms of the Tribunal's Determination to offer ADR (in the form of expert determination) to its licensees or potential licensees, and it does so;
 - (ii) dissatisfied end users can apply to the Copyright Tribunal; and
 - (iii) dissatisfied writers can seek to opt out;
- (b) to the extent that the complaint about a "take it or leave it" approach comprises a criticism that APRA offers standard licensing agreements rather than licences adapted to difference circumstances, the complaint is without foundation:
 - (i) it ignores the findings by the Competition Tribunal: "There is nothing unusual or intrinsically anti-competitive in APRA simplifying its administrative processes by applying standardised practices to aggregates of members, users and works. Equivalent procedures, directed to efficient and reliable administration that is capable of audit, are routinely applied in any large administrative structure or to any complex

administrative task, in both the public and private sectors. The Tribunal accepts in principle that the imperatives of efficient administration and the generality of APRA's obligations to members require standardised procedures and rules that apply to all its members and to all the works it administers". [126]

- (ii) it ignores the fact that it is open to CRA (or any user) to apply to the Copyright Tribunal to obtain a licence on terms different from those proposed by APRA, or to seek expert determination in relation to the matters of which it complains;
 - (iii) it ignores the fact that it is open to the CRA (or any other user) to complain to APRA or to the Code Reviewer under the Collecting Societies' Code of Conduct; and
 - (iv) it ignores the fact that APRA is responsive in negotiations to consider any alternative proposals for licensing arrangements;
- (c) to the extent that the criticism about APRA's negotiating style is made in confidence, APRA does not have access to the critical submission and accordingly cannot directly answer it. However, APRA rejects any suggestion that it has acted in a high-handed or unreasonable manner. All APRA can do is give details of the negotiations with CRA, which it will do, as to which:
- (i) in 1999 the Copyright Tribunal approved a licence scheme for the broadcast of musical works in APRA's repertoire on commercial radio. That scheme brought music reporting and financial accounting closer than had previously been the case. Commercial radio had previously paid APRA a percentage of revenue from the financial year ending eighteen months prior to the period in respect of which music use details were given;
 - (ii) following the implementation of the Copyright Tribunal's decision, and for the first time in the course of the proceedings and subsequent negotiations, CRA approached APRA seeking an amendment to the scheme, so that a radio station would pay a percentage of revenue earned in the same financial period in respect of which music use details are provided;
 - (iii) APRA repeatedly has said that it is willing to consider such an amendment, provided CRA members can demonstrate an ability to report current music use;
 - (iv) attachment C is a folder of the correspondence between APRA and CRA relating to this issue;
 - (v) APRA has also been in negotiations with CRA regarding an on line licence. This is a licence to reproduce works (AMCOS is the licensor) and to communicate them (the APRA right) as part of a web based radio service. The industry is a new one, and the industry wide licence fees to APRA/AMCOS from the service are estimated to be less than \$10,000. APRA/AMCOS has been willing to grant such a licence since it was approached in confidence by a CRA member. However, APRA/AMCOS

thought it prudent to conduct negotiations through CRA, as the industry is likely to become increasingly involved in this new business. CRA has denied the need for such a scheme. Attachment D is a folder containing the correspondence between APRA and CRA in relation to this issue.

(2) “Monopoly fees” & the Copyright Tribunal

- 156 CRA submits that “because of its monopoly power, APRA is able to extract monopoly fees from [CRA’s members]”: para 2.4(b). In reply, APRA submits that CRA’s contention completely ignores the role of the Copyright Tribunal, which the Competition Tribunal found “provides an effective constraint against APRA abusing monopoly power in dealing with major users of music.” para 312.
- 157 CRA submits that “it would be untenable to refer matters to the Copyright Tribunal whenever the industry agreement is renegotiated”: para 2.4(c). In reply, APRA:
- (a) notes that the Competition Tribunal acknowledged that “expense and complexity are intrinsic to the resolution of large disputes”: para 311;
 - (b) submits that, given the collective size of the commercial interests and resources of CRA’s members, there could be no basis for the contention that the expense of Copyright Tribunal litigation creates an effective barrier to any serious challenge by CRA to the reasonableness of APRA’s terms; and
 - (c) notes that in any event, there is a new dispute resolution procedure for small disputes.
- 158 CRA submits that the new royalty rates fixed by the Copyright Tribunal in relation to CRA’s members were “unjustified”: para 2.4(c). APRA disputes the allegation that the determination of the Tribunal to which CRA refers was unreasonable. That is not a matter on which the Commission can properly adjudicate. But more fundamentally, APRA submits that the ACCC should not attempt to review or second guess the Copyright Tribunal in relation to the exercise by that Tribunal of its jurisdiction in relation to the determination of reasonable terms of licence. In any event, it is open to the CRA and its members to approach the Copyright Tribunal for a new determination in light of any evidence or circumstances that the CRA believed to be relevant. Further, APRA notes that the CRA contested the Copyright Tribunal vigorously and were well represented by expert counsel and solicitors. There can be no suggestion that CRA was not in a position to argue all relevant points before the Copyright Tribunal, nor that the Tribunal did not have before it all relevant and appropriate evidence.
- 159 CRA apparently submits that the goal of regulation should be to “force [APRA] to set prices equal to the marginal costs of supplying the relevant right”: para 2.4(b). With respect, this submission reflects a lack of understanding of the market. As noted by the Competition Tribunal, “...many of the aspects of copyright enforcement contain a high proportion of fixed costs...[including] establishment of the systems for monitoring users and registering works. By contrast, once these systems are in place, the incremental cost of accepting another writer or new work into the system is

insignificant.” Similarly, the marginal cost of supplying (or licensing) the rights is extremely low. If price were set at the marginal cost, there would inevitably be market failure.

C Material Change to the market

160 CRA does suggest that the “development of DRM has the capacity to dramatically alter the market so that the detriments from APRA’s monopoly will outweigh the public benefits”: section 4.2.

161 By way of summary, in reply APRA submits that the introduction DRM has no impact on the market which materially affects the application of the public benefit test in relation to APRA’s applications.

162 CRA does not clearly articulate what it contends to the definition, nature and significance of “DRM”, but seeks to draw attention to the services offered by MusicPoint.

163 The acronym “DRM” stands for “Digital Rights Management”. APRA understands DRM, in current usage, to describe technology which encodes “content usage rules” in digital format music, and which thereby restricts the use and dissemination of music recorded in digital form (which includes music on DVDs, CDs, and downloaded from the internet). By way of example, DRM technology is embodied as ‘file security settings’ in certain digital music downloads from the internet, and has the effect of physically limiting what a recipient of a download can do with the file (e.g. whether they can copy the file onto a CD and if so how many times). The Telstra owned *BigPond Music*, Australia’s largest download service provides the following information on DRM, at <http://bigpondmusic.com/whypay.asp?cache=484141>:

“WHAT IS DRM?”

All music in BigPond Music is digitally protected media. This protection uses a secure e-commerce system called Digital Rights Management (DRM), which protects digital content from illegal use. In other words, DRM encrypts each digital media file so that only people who have legally acquired a proper licence can play the file.

DRM RULES

Your purchase of a Music File, authorises you, for your own personal use, to: (a) download the Music File once, to one stand-alone personal computer; (b) copy the Music File an unlimited number of times to up to two portable devices registered to you which operate with Microsoft Windows Media Player version 9; (c) burn the Music File up to 3 times onto CD-R or CD-RW; and (d) download up to two replacement Music Files at no additional charge if you have had problems installing the licence or if the original file on your stand-alone personal computer is lost or destroyed.

164 DRM does not of itself constitute or provide a platform for the delivery of music, or the licensing of copyright therein. Rather, it is technology which

encodes and implements rules in relation to the dissemination and use of digital format music recording.

- 165 MusicPoint provides a service for record labels and radio stations by delivering the label's new music releases to stations connected to the service. MusicPoint charges the labels to use the service, which is free for radio stations. MusicPoint says:

"OUR SERVICE

Musicpoint is a web-based service for radio stations providing immediate, secure and automated online distribution of new releases with supporting promotional material. The Musicpoint service enables Program and Music Directors within radio stations to:

Listen to new songs anywhere, anytime and with complete security as soon as they are released;

Point and click to compile the week's hot songs for weekly program meetings;

Search and browse;

Check out dynamically the three most popular tracks being added to playlists around the country.

- 166 MusicPoint is another service for the supply of music in digital format over the internet, which utilises DRM technology. The MusicPoint Conditions of use which relate to DRM are set out below. (They can be found at <https://www.musicpoint.com.au/legal.aspx>):

"DIGITAL RIGHTS MANAGEMENT

The Software includes a digital rights management system ("DRM") designed to manage and enforce intellectual property rights in the Content. Owners of the Content are using DRM to protect the integrity of their Content and to ensure that their intellectual property, including copyright, is not misappropriated, and to ensure that their content is used in accordance with content usage rules which the Content Owner may properly apply. These content usage rules are attached as metadata to each data file which comprises each audio track, and are published when the authorised user opens that data file. You may not take any action to circumvent the security or content usage rules provided or enforced by the DRM or the Software. To do so breaches the Copyright Act 1968 of the Commonwealth of Australia and attracts criminal sanctions, including substantial fines and prison sentences of up to five years."

- 167 Again, the DRM technology incorporated in MusicPoint does not facilitate the direct licensing of the musical works disseminated through MusicPoint. Further, the 'content user rules' are set by the owner of the copyright in the master recording, not the owner of the copyright in the underlying works.
- 168 APRA assumes that it is possible that CRA intended to submit that it is the general systems for the internet delivery of sound recordings in digital format (such as MusicPoint), rather than DRM technology specifically, which constitutes the material change in the market which justifies a reevaluation of the APRA authorisations.

- 169 APRA therefore addresses below whether MusicPoint service generally “has the capacity [to] allow copyright owners (or intermediaries acting on their behalf) to directly licence [sic] musical works to users and at the same time monitor or record the use of that music”.
- 170 APRA has had discussions with MusicPoint’s representatives over the course of the last year regarding licensing of the service. From those discussions, APRA has the following understanding about the operation of MusicPoint:
- (a) MusicPoint provides certain supporting information with the files it delivers to radio stations including artist based details for DJs to refer to when introducing the song (e.g. biographical details, release and tour schedules etc) and song based metadata to assist with scheduling (e.g. beats-per-minute, artist name, Australia/overseas artist, solo-group recording, release date, mood);
 - (b) The information provided with the file is sourced from the record label and does not include publishing details or writer information;
 - (c) Recordings are often available through MusicPoint prior to their formal public release;
 - (d) MusicPoint can monitor which files are downloaded to which radio station, but it presently does not incorporate technology which facilitates the monitoring of the number of broadcasts each song receives (following download).
- 171 APRA submits that there is no basis for contending that platforms for the delivery of internet music (like MusicPoint) has either the present capacity (or even potential) to provide a system, which eliminates the public benefit of the APRA system for the licensing and enforcement of performance rights. In order to provide a system which creates a satisfactory alternative to the APRA system, it would be essential that the system was able to facilitate:
- (a) the identification of the owners of copyright in the underlying musical works;
 - (b) the negotiation of licensing in relation to those works;
 - (c) the monitoring of the performance of those works, and the calculation of royalty entitlements;
 - (d) the enforcement of breaches of copyright, in relation to the unauthorised use of musical works.
- 172 Systems such as MusicPoint do not have the present capacity (or foreseeable potential) to facilitate all of these processes.
- Identification of the owners of copyright.*
- 173 MusicPoint has neither the present capacity (or obvious potential) to facilitate the accurate identification of copyright owners, for the following reasons:
- (a) MusicPoint does not presently even endeavour to include information as to the ownership of copyright in the underlying works;

- (b) MusicPoint has no commercial incentive to seek accurately to record copyright ownership, because its market comprises record companies and radio stations. The commercial interests of copyright owners are immaterial;
- (c) even if there were a present commercial interest in compiling and providing copyright information, it would not likely be possible for MusicPoint to do so when recordings are first released on the system (if MusicPoint were to maintain the present practise of allowing the release recordings through its service prior to or just after the public release of the recording). This is because the procedure by which copyright in the underlying musical work of new recordings is established and asserted presently takes a period of around two weeks after the release of a sound recording. As to this matter:
 - (i) by operation of Part III Division 6 of the *Copyright Act*, a recording artist can make a sound recording of a pre-existing musical work, without seeking the prior consent of the owner of the copyright in that work. The authority to record a version of the work is provided by compulsory statutory licence. The statutory licence provides for the payment of a royalty to the copyright owner, at a rate set by the Copyright Tribunal. The royalty (as set out in the *Copyright Act*) is presently 6.25% of the retail price of the sound recording;
 - (ii) under the Part III Division 6 statutory licence the sound recording artist (or the record company through which the recording is being released) is required to notify the copyright owner of the fact that a sound recording of a pre-existing musical work has been made, 28 days before manufacture. An industry agreement modifies the procedures (and the price) required by the *Copyright Act*;
 - (iii) this notification facilitates the clarification of the ownership of copyright in the underlying work, in the following way. AMCOS maintains a computer database of all works and recordings. Copyright owners, including publishers and AMCOS (as the exclusive licensee of many copyright owners) daily review the databases, to identify whether any recordings of works over which they claim copyright, are to be released. Upon the identification of such works, the copyright owner notifies the record company for the purpose of asserting its entitlement to the statutory licence fee in relation to the recording of the underlying work. This process of notification is known as the making of an “ownership claim”; and
 - (iv) it follows that accurate information as to the ownership of copyright will not be known by the record company, until the “ownership claims” have been made and processed. As has been previously noted, there will be frequently be multiple owners of copyright in relation to musical works, and possibly some dispute as to copyright entitlement. These disputes can arise as a result of catalogue changes – most publishing

contracts contain a period after the expiry of the term of the contract during which the publisher is entitled to collect income from works covered by the contract. There is often a dispute as to which publisher controls a particular work on a particular date;

- (d) even if originally accurate information were obtained in relation to new recordings, there is no obvious and commercially feasible mechanism by which MusicPoint (or equivalent delivery systems) could ensure that any information in relation to the identity of copyright owners remained updated in its system, to reflect frequent ownership changes (that are typical in relation to copyright in musical works).

Licensing.

174 Even if there were no difficulty in identifying copyright owners in relation to recordings released or distributed through MusicPoint (or equivalent delivery systems), there is no obvious way that MusicPoint could be used a universal system for the licensing of works, for the following reasons:

- (a) the MusicPoint system provides no feasible mechanism for the negotiation and agreement of licence terms between copyright owners and radio stations, prior to the broadcast of works distributed through MusicPoint. There can be no basis for the assumption that the licence can be provided by the record companies, simply because record companies are presently providing the recordings which are distributed through MusicPoint. As has been previously stated, there is no basis whatsoever for the assumption that the record companies control the copyright in the underlying work. Again, the feasibility of direct negotiations with copyright owners is effectively undermined by the multiplicity of owners of many works; the sheer number of musical works broadcast; the number of independent commercial radio stations who would need to negotiate a licence; the difficulties arising from songs with unknown authors; the difficulties arising from songs whose ownership is in dispute; the difficulties arising from identifying and verifying transfers in ownership; and the difficulties inherent in seeking to negotiate with overseas copyright holders;
- (b) more importantly, there is no basis for the assumption that MusicPoint (or equivalent delivery systems) is (or has the foreseeable potential to become) the universal platform for the distribution of all music for broadcast on commercial radio. There are a number of other sources of recordings. For example, there are the older works of which radio stations have non-digital format recordings (or digital recordings without DRM). Further, there are the “independent” releases, which will not be recorded and distributed through the major record companies. Needless to say, any recording which is not distributed through MusicPoint can not be licensed, and monitored through MusicPoint.

Monitoring.

175 As noted above, MusicPoint does not presently have the capacity to monitor the broadcast of works downloaded from the MusicPoint system. Therefore, monitoring of the broadcast of works distributed through the MusicPoint system can not presently be undertaken (by any person). APRA is aware that there are presently extreme difficulties in implementing systems for the electronic monitoring of broadcasts. However, APRA acknowledges that technology could foreseeably develop which facilitates monitoring the frequency of the broadcast of recordings distributed through MusicPoint (or equivalent delivery platforms). This has the capacity to substantially reduce the costs of monitoring. This may theoretically create a situation in which the existence of APRA is not strictly necessary for the cost-efficient monitoring of works distributed through MusicPoint (or equivalent delivery platforms). (It would also, of course, be material to determining a reasonable rate for the APRA licence fees). However, the potential reduction in monitoring costs does not undermine either the basis for concluding that there is a natural monopoly for the licensing and enforcement of performing rights, or the net public benefit of APRA system, for the following reasons:

- (a) monitoring is only one critical aspect of the present APRA system. The facilitation of licensing and enforcement of copyright comprise other fundamental (and entirely independent) justifications for the APRA system. Therefore, even if the costs of monitoring were eliminated entirely, the justification for the APRA system would remain; and
- (b) further, in any event, it is not presently conceivable that all recordings broadcast on commercial radio, will be distributed through MusicPoint (or other equivalent digital platforms). This is because there are (and will remain for the foreseeable future) other sources of recording which will likely be broadcast on commercial radio: eg, old works in non-digital (or non DRM) format, and independent releases: see paragraph 174(b) above.

Enforcement.

176 Even if it were assumed that MusicPoint created a system which facilitated the licensing and monitoring of performing rights in relation to musical works, it does not facilitate cost-effective enforcement by copyright holders (in a manner which would eliminate the utility of APRA in relation to enforcement).

Universality of MusicPoint.

177 APRA understands that MusicPoint is not universally utilised by commercial radio stations. It is not clear that all radio stations (including regional stations) would want to utilise such a system (or an equivalent system). Needless to say, even if MusicPoint created a means by which users of broadcast rights could be licensed, monitored and enforced, the APRA system would remain essential in relation to users who did not use MusicPoint.

D System Modifications: Overview

178 There is some uncertainty about exactly what is proposed by CRA.

179 It is at least clear that CRA advocates that:

- (a) APRA should “be prepared to offer alternative licences” to the blanket licenses: section 3.3(b); and
- (b) (at least going forward) that the “transfer of rights by its members” should take place “by way of a non-exclusive licence”. Section 3.3(a)

180 However, there is also the possible suggestion that APRA should be required to assign back the existing copyright.

181 Each of these is addressed below.

E First “System Modification”: Alteration to “blanket licence”

182 CRA does not suggest that authorisation for the blanket licence be withheld.

183 Rather, it submits that APRA should be prepared to offer alternative licences, such as “per program” licences. APRA has not been asked by CRA or any of its members to offer a per program licence, nor has such a licence been referred to the Copyright Tribunal by CRA or any of its members. APRA recognises the validity of the concept of per program licensing, and is prepared to argue such a licence scheme on its merits in the Copyright Tribunal.

184 The issue of “per program licensing”, was addressed by the Competition Tribunal in its Determination, in which the Tribunal noted at para 334 that:

- (a) the per program licence still constitutes a “blanket licence”, subject to only to adjustments in respect of the music content;
- (b) “It is plainly within the power of the Copyright Tribunal to approve or devise a similar (or different) scheme that allows for fee adjustment to blanket licences in Australia”; and
- (c) “the real and substantial difficulty that besets the introduction of a blanket licence that allows for fee adjustment ...is not the monopoly power of APRA, but the complexity of working out how to provide for the calculation of the adjustment – and for the reporting of music use that underlies such a calculation – in a way that does not so increase transaction costs as to defeat the exercise”.

185 In reply to CRA’s submissions in relation to the alternatives to the blanket licence, APRA submits that:

- (a) CRA mistakenly assumes that the issue of adjustments to (or provisions of substitutes for) the blanket licence fees is a matter for the ACCC. As was made clear by the Competition Tribunal, the issue is properly within the jurisdiction of the Copyright Tribunal; and
- (b) in any event, CRA’s submissions fail to address what the Competition Tribunal identifies as the critical issue: namely, the manner in which adjustments should be made.

186 A “per program” licence negotiated directly with copyright owners is one form of licence used in the USA (along with blanket licences issued by the collecting societies, which only hold a non-exclusive licence). APRA understands that it is typically sought and used for radio programs which:

- (a) are “high revenue”: ie, high advertising income, by reason of popularity of the program; and

- (b) are “syndicated” in relation to program and advertising content: ie, the identical program (including advertisements) is broadcast from a large group of stations across the country.
- 187 The appeal for radio stations of “per program” licences in relation to high revenue programs, obviously lies in the expectation that lower licence fees can be obtained through that form of licence, than would apply by application of the standard licence fee. This expectation is based on the fact that blanket licence fees are typically based on a percentage of revenue generated by the program. The blanket licence fee is therefore likely to be proportionately higher in a “high revenue” program.
- 188 The prime difficulty associated with the implementation of “per program licences” relate to the transaction costs associated with:
- (a) first, the inherent complexities and difficulties of negotiating an appropriate fee for a “program”. This need take into account the role of music in the program; but it also must logically take account of the advertising revenue generated by the program; and
 - (b) secondly, the sheer number of separate negotiations that would be necessary, in relation to the massive number of programs that are broadcast on radio.
- 189 There are at least two aspects of the radio broadcasting environment in USA, which increase the appeal and utility in that country (relative to Australia), of “per program licences”:
- (a) first, the transaction costs associated with the negotiation of the “per program” licences are relatively small, both because of the extent of syndication of the program, and the fact that there is consistent advertising content. These factors facilitate a single transaction in relation to the licensing of the syndicated program across all syndicated outlets; and
 - (b) secondly, unlike APRA in Australia, the American collecting societies do not offer “tiered” licences, which adjust the level of licence fee to the relative amount of music performed on the program. There is therefore a very large incentive for high-revenue low-music programs to explore alternatives to the blanket licence offered by the collection societies.
- 190 It should be noted that per program licences need not necessarily lead to lower licence fees. By reason of the increased transaction costs associated with the negotiation of the licence (and the absence of any impact on the level of costs associated with monitoring and enforcement), the overall costs of administering per program licences is likely to be higher than in relation to blanket licences. The costs of administration will logically be relevant to the fair level of licence fee.

F Second “System Modification”: “Assignment back”

F1 Outline of proposal

- 191 CRA appears clearly to contemplate a scenario in which the “major music publishing houses” or “several specialised collecting agencies (by record label

- or music genre for instance)” would administer the performing right: para 7.9-8.3.
- 192 CRA is not explicit in articulating the method by which it was proposed that such a scenario would be achieved. In particular, whether it would be brought about by the operation of “opt-out procedures”, or alternatively by compulsory re-assignment.
- 193 APRA addresses the proposal on the basis that CRA is proposing a compulsory re-assignment. APRA assumes that the “alternative” collecting societies will be the five major publishing houses, or the four major record companies being: (**Majors**):
- (a) EMI Music Publishing
 - (b) EMI Music
 - (c) Sony/ATV Music Publishing
 - (d) Sony/BMG Music
 - (e) BMG Music Publishing
 - (f) Warner/Chappell Music Publishing
 - (g) Warner Music
 - (h) Universal Music Publishing
 - (i) Universal Music
- 194 Assuming that APRA were required to assign back to its members the rights in relation to communication of works by commercial radio, the process of reassignment would involve the following steps:
- (a) first, the assignment back by APRA of the performing rights in relation to commercial radio;
 - (b) second, at the election of the copyright owner, the provision of a non-exclusive licence to:
 - (i) the Major Publishers; and/or
 - (ii) APRA.
 - (c) thirdly, licence agreements between the Major Publishers and the broadcasters;
 - (d) fourth, a licence from APRA to the broadcasters in respect of the balance of the copyright repertoire (which is not subject to a licence between the broadcaster and a Major Publisher); and
 - (e) fifth, some method by which the licence fee from APRA is adjusted to reflect the quantity of copyright in respect of which the broadcaster has entered into independent licence agreements with the major publishers.
- 195 In addition to being available to “mop up” the works which are not licensed to a Major Publisher, it would be necessary for APRA to remain in the market for the purpose of licensing foreign works which are not licensed to a Major Publisher.

F2 Assumptions underpinning proposed modification

196 There are a number of assumptions underpinning the proposal that procedures be put in place to facilitate the emergence of the Major Publishers as alternative collection societies, including:

- (a) the assumption that there is high concentration of popular music controlled by the Major Publishers (rendering the Major Publishers natural contenders for the administration of performing rights);
- (b) the Major Publishers would be willing and able to undertake the role of the administration of performing rights;
- (c) that writers would wish their rights to be administered by the Major Publishers in this manner.

197 Each of these is addressed below.

(1) Synchronicity between record companies and publishers

198 CRA seems possibly to assume that the licensing of the performance right could be satisfactorily procured by the record companies. The premise underpinning that assumption appears to be that record companies have both a vested interest in having works played on commercial radio, and also a capacity to secure licences for the broadcast of musical works from their related publishing companies (if those publishing companies held the performing rights presently vested in APRA). This suggestion is flawed, for the following reasons:

- (a) first, publishing companies and record companies are separate entities, with separate commercial interests. Publishers and record labels are often in dispute, including currently in the Copyright Tribunal in respect of the royalty payable under the Part III Division 6 statutory licence referred to above;
- (b) secondly, as demonstrated by the PPCA list which is Attachment B, even if a recording is released by a major label and the underlying work is published by a major publisher, the Major publisher which holds an interest in the underlying musical work is very often not related to the Major record company which is producing and distributing the sound recording of the work. In other words, there is no necessary synchronicity between the ownership of copyright in the underlying musical work, and the production and distribution of the sound recording. This absence of synchronicity is accentuated by the frequency of multiple ownership of the copyright in the underlying musical works. In that list, relied on by CRA, there are:
 - (i) 82 works with more than one writer;
 - (ii) 16 works with more than one publisher controlling the work in Australia;
 - (iii) 21 works with an interest owned by a non Major Publisher;
 - (iv) 2 works the ownership of which is controlled by APRA but appears to be in dispute between the original copyright owners; and

- (v) only 17 of the recordings are published absolutely by an entity related to the record company – not all are majors.

(2) High concentration of works in Major Publishers

- 199 There are a total of 850,768 local works in the APRA repertoire. Of those works, 667,717 works have no local publisher; 168,113 have a local publisher; and 14,938 are “inactive” (ie, never recorded a performance in any media). Of the published works, only 45,378 works are owned or controlled by major publishers (or subsidiaries).
- 200 A number of APRA’s successful writer members are “self published”, so their works are represented by a publishing company associated with the writer. Some but by no means all, of these publishing companies are administered by larger publishing companies, not all majors. Works by the self published writers are included in the 168,113 figure above, and if they are administered by a major publishing company, in the 45,378 figure.
- 201 Of the musical works broadcast by the two commercial radio stations referred to in paragraph 146 above:
- (a) for 2MMM, 611 works (27%) are published by majors only (and 26 – 4% of those also have an unpublished share); and
- (b) for Nova, 482 works (20%) are published by majors only (and 50 – 10% - of those also have an unpublished share). See Attachment E.
- 202 There are a number of independent Australian music publishers who represent significant catalogues of works. For example, Mushroom Music, ABC Music Publishing, Orient Pacific Music Publishing and Shock Music Publishing all control works by significant Australian writers, as well as important foreign catalogues.
- 203 The fact that not all works are within the control of the “Majors” significantly undermines the viability of any alternative to the APRA system of blanket licensing. It is simply not feasible that organisations other than the Majors could operate an efficient and efficacious system for the licensing and enforcing performing rights.

(3) Major Publishers willing and able to administer rights

- 204 APRA acknowledges that Major music publishers have copyright administration systems, by reason of which are best placed (aside from APRA) to implement effective and efficient licensing of performing rights.
- 205 However, there is no cogent evidence to the effect that the Majors would be willing to assume the role of collecting society. On the contrary, the evidence contradicts that proposition. If the Majors had a commercial interest in administering the performing rights of the works they control, it would be open to them to seek to procure the “opt-out” of their controlled works, and deal directly with the radio stations (and other users). This has not been done, and APRA has received no inquiry in relation thereto.
- 206 Further, even if the Major publishers had the commercial interest to do so, they would be unable effectively to administer the world-wide licensing of the performing rights, for 2 reasons:

- (a) first, those overseas societies with which APRA is affiliated can, by reason of their CISAC membership, only pay to societies where it is a rule that the writer directly receives at least 50% of the performing right royalty – see APRA’s primary submissions. It would represent a seismic shift in the international collective administration of copyright if CISAC societies were to pay Australian publishers 100% of the performing right royalty in relation to musical works;
- (b) secondly, the international enforcement of performing rights is based on the principle of reciprocity – see APRA’s primary submission. It is extremely doubtful whether the Major publishers would be willing to undertake enforcement and collection in relation to foreign repertoires. If they did not do so, then the foreign societies would not collect on behalf of the Majors.

207 It must also be noted that a number of successful writers do not have publishing contracts – for example, John Butler who has this year won major APRA and ARIA awards has neither a publishing nor a record contract.

F3 Nature and efficacy of present procedures for “opt-out” and “licence back”

208 The purpose of the “assignment back” proposal is presumably to facilitate competition against APRA for the provision of the services of a collection society.

209 It is a clear assumption of that proposal that:

- (a) there is a public benefit in exposing APRA to competition;
- (b) there is inadequate competitive pressure in the present APRA system.

210 This raises equivalent issues to those addressed in section D2 and D3 of Part 2 above. APRA repeats the submissions it made there.

F4 Impact of modification on beneficial operation of APRA system

211 In accordance with the Determination of the Competition Tribunal, it is necessary to consider what impact (if any) the assignment back would have on the overall efficacy of the APRA system. This is properly considered by reference to whether it would compromise the benefits that the Competition Tribunal identified as flowing from the APRA system.

(1) Minimise transaction costs.

212 The reassignment of copyright by APRA would substantially increase the transaction costs associated with the licensing and enforcement of performing rights, for reasons substantially equivalent to those explored in relation to APRA’s response to the submissions of the Cinema Operators, at section D4 above at paragraph 124 above.

213 By way of minor elaboration, APRA submits as follows.

214 If the “new world” were to involve the “Major” publishers assuming responsibility for the licensing and enforcement of performance rights, it is inconceivable that licensing could feasibly operate otherwise than by the provision of “blanket licences” by each of those 5 Majors, and the implementation of systems by each for monitoring and enforcement of the copyright which they respectively control. The implementation of 5 parallel

systems for blanket licensing, monitoring and enforcement would inevitably very significantly increase the transaction costs (relative to the present APRA system);

- 215 Even if the Majors were to assume responsibility for the licensing and enforcement of copyright, there would remain a substantial number of works which fell outside the control of the Majors, comprising “independent” releases from Australia and overseas. APRA would need to retain a role in the “new world”, effectively to “mop up” the licensing and enforcement of the copyright of those writers. Notwithstanding that the repertoire over which APRA had control would be significantly diminished, its costs would be higher than they presently are. This is because APRA would still be required to negotiate with every commercial radio broadcaster (unless the broadcaster elected not to play any music otherwise than music published by the Majors), and would still be required to undertake identical monitoring. However, its likely costs would increase because:
- (a) in relation to monitoring, it would be unlikely to receive equivalent cooperation to that presently provided by the commercial radio broadcasters, because APRA would be less significant to their respective operations; and
 - (b) in relation to enforcement, there would be the additional costs associated with the enforcement of rights associated with a non-exclusive licence (as distinct from outright ownership).
- 216 Quite apart from the increased transaction costs likely to be incurred by broadcasters (by reason of the need to negotiate licences with each of the Major publishers, and also APRA), it is likely that radio broadcasters would incur very significant transaction costs in relation to the monitoring of the ownership of copyright. As to this:
- (a) as is explained in paragraph 218 below, if there were an assignment back by APRA of its copyright, there are very likely to be “holes” in the collective licensed repertoire of APRA and the Majors: ie, even if a broadcaster were to obtain licences from each of the majors and APRA, there would be some musical works which were not covered by the collective licences;
 - (b) by reason of the possibility of such “holes” in the collective licensed repertoire, the broadcasters would need to investigate whether each song they proposed to broadcast was covered by a licence. This is to be contrasted with the present situation, where a broadcaster is able to broadcast any work, confident in the knowledge that it is covered by the APRA licence; and
 - (c) the necessity of careful auditing of proposed playlists is accentuated by the heavy “churn” of copyright ownership in musical works (as to which see para 146 above). By reason of that churn, the mere fact that a work is identified as being covered by a particular licence :at on point in time, provides no basis for assurance that it will thereafter remain within the scope of that licence.

(2) Provide comprehensive authorisation to users

- 217 The present APRA system provides complete security of authorisation for radio stations who take out the blanket licence, which effectively eliminates the scope for infringement of copyright.
- 218 Any compulsory re-assignment of performing right (or increase in the prevalence of opt-out) would inevitably significantly increase the risk that users will perform music without licence, for the following reasons:
- (a) it would almost certainly lead to the creation of a “hole” in APRA’s repertoire. It is very unlikely that writers or other entities to whom or which copyright was re-assigned, would provide a non-exclusive licence back to APRA. The same would apply in relation to a voluntary “opt-out” procedure; and
 - (b) there would be a very large risk that users would not fill the corresponding “hole” in their APRA licence, by procuring a licence from the new copyright holder, for a number of reasons. Firstly, in view of the transaction costs associated with the negotiation of licences, it is inconceivable that every relevant user of music would seek a licence from every rights holder. Perhaps the most that can be hoped for is the procuring of a licence from the Major publishers. Secondly, it is inconceivable that the Majors will hold all relevant copyright. This is because the Majors may not wish to take a transfer of some rights, writers may intentionally elect not to assign or licence rights to the Majors, and by neglect or misadventure many writers may simply neglect to assign or licence the work to a Major (or any other publisher). Thirdly, even if the copyright is at first licensed or assigned to a publisher, it is possible that the publishing contract will expire without renewal (thereby causing the reversion of the rights in the writer and divesting the publisher of rights). Fourthly, it is quite inconceivable that all users would precisely monitor the content of their licensed repertoires, and thereby ensure that unlicensed works were not performed.

(3) Create “countervailing power” for writers in dealings with users

- 219 The compulsory reassignment of copyright, and the emergence of the Major publishers as the substitute licensors, would likely substantially reduce the bargaining power of writers in relation to the terms upon which their works were licensed. Although the Major publishers would be interposed between the writers and the ultimate end users, it is very likely that writers would have difficulty adequately protecting their interests in negotiations with the Major publishers, by reason of the following factors:
- (a) the market for the provision of publishing services by “Majors” is concentrated;
 - (b) it is likely that a writer would negotiate a publishing contract relatively early in the writer’s career (at a time when the writer had not achieved a level of commercial success which would likely enhance his or her bargaining power); and

- (c) if a broadcasting environment were to develop in which commercial broadcasters were only to broadcast works which could be licensed from the Majors (to avoid the need for a further licence from APRA for the balance of the world-wide musical repertoire), young and inexperienced writers desirous of commercial airplay may well feel a desperate desire to be contracted with a Major.

(4) Ensure proper enjoyment by writers and publishers of their copyright interests

- 220 The interests of songwriters may be prejudiced in a number of ways
- 221 Firstly, by reason of existing contractual relationships between a songwriter and publisher, any attempted re-assignment by APRA to the songwriter may lead to the automatic vesting of the performing right in the songwriter's publisher: see paragraph 114(d) above. Under the terms of the publishing contract, the songwriter may be worse off than under the songwriter's direct arrangements with APRA. .
- 222 Secondly, if the broadcasting environment described in paragraph 219(c) were to develop, then either songwriters are likely cheaply to bargain away their performing right to the Majors (for the reasons stated in paragraph 219 above); or the (if the songwriter did not contract with a Major) the songwriter would likely be denied the chance of airplay.
- 223 Thirdly, even if the unpublished songwriter somehow did secure airplay, the writer would be unlikely to be in a position to monitor use and enforce copyright.

(5) Encouragement of creative activity, and avoidance of "market failure" in relation to that process

- 224 To the extent that the likely remuneration of songwriters would be prejudiced by the matters set out in paragraphs 221 ff above, creative activity is likely to be discouraged.

(6) Additional detriment

- 225 As noted above, the development of a broadcasting environment in which the Majors became a source for the licensing of the performing right, would likely lead to a situation in which the commercial radio stations sought licences exclusively from the Majors (to avoid the additional costs of procuring a "mop up" licence from APRA).
- 226 If that were to occur, there would inevitably be a very significant reduction in the diversity of work played on radio. Young, unpublished songwriters would likely be denied the opportunity of airplay. This would significantly frustrate the development of their profile and success.

G Third Modification: "Non-exclusive licence" going forward

- 227 It is implicit in the "assignment back" modification considered in section F above, that APRA would receive (at most) a non-exclusive licence in relation to all future compositions.
- 228 This "third modification" addresses a scenario in which APRA is not obliged to reassign copyright presently vested in it, but is precluded in the future from taking an assignment, and is limited to taking a "non-exclusive licence".

229 This was of course a proposal which was thoroughly considered by the Competition Tribunal, which emphatically rejected the proposal. It concluded that:

“the exclusivity rule is central to the operation of a collecting society. Unless the collecting society is able to obtain and retain the ability to licence a comprehensive repertoire of works, the many benefits which have maintained the viability of collecting societies will be lessened. Licensees will not simply obtain comprehensive protection against infringement, transaction costs for licensees will increase, administration costs of the society in respect of recording input information, monitoring use, and effecting distribution will increase significantly, and monitoring and enforcement of copyright by the society will become difficult. Those who attempt self-administration are likely to face an imbalance of bargaining power when dealing with producers and large users of music, and to encounter considerable difficulty in policing their copyright, particularly in respect of overseas performances, and will be at risk of losing royalties. It is understandable that suggested modifications to the requirement of exclusive assignments have been approached with great caution, and we think this Tribunal should proceed in the same way” [350]

230 Needless to say, there has been no basis alleged by CRA (or anyone else) for challenging the factual basis upon which the Tribunal’s decision was based, or asserting that there has been a material change of circumstances.

231 Further, APRA further submits that:

- (a) there would be considerable legal difficulty in implementing a legal regime whereby APRA took only a “non exclusive licence” in relation to future work of presently contracted writers. This is because APRA’s standard form contract provides for the assignment of all future works. APRA could only be divested of its entitlement to the copyright in future works, by fresh agreement with the writer;
- (b) the bulk of the matters set out above in relation to the “assignment back” option, are equally applicable to the more limited modification associated with the “exclusive licence going forward”;
- (c) if APRA were to be deprived of the right to take an assignment of the performing right in the future, but were not required to reassign the performing rights presently vested in APRA, there would be created a scenario in which APRA’s repertoire is partly wholly owned, and partly the subject of a non exclusive licence. This could lead to considerable complexities. Before enforcement of any suspected breach, it would be necessary for APRA to determine the date of authorship, in order to assess whether APRA is the outright owner or merely a non-exclusive licensee. If the latter, APRA would be required to verify that no licence had been granted, prior to taking enforcement action. However, it may be no easy task to determine the date of authorship. For a start, the concept of the creation of a musical work is a rather open-textured concept in the Copyright Act. Further, musical works are often reworked and rewritten, in a manner which may

arguably give rise to the creation of a new work for copyright purposes. If a work has been rewritten, there may be significant doubt and controversy about the date on which the work in question should be deemed to have been created.

Part 4 – Free TV

A Introduction

- 232 In its submission dated 2 August 2004, Free TV does not appear to oppose the granting of the authorisations sought by APRA, but submits that authorisation should only be granted for 2 years.
- 233 The basis for the proposed short duration of the authorisation is that a number of developments in the market have caused the public benefits of the APRA system to decrease, and the anti-competitive effects to increase
- 234 By way of summary, APRA submits in reply that none of the matters identified by Free TV have materially changed the relevant public benefit balance, and are not likely to do so in the foreseeable future. In the circumstances, the authorisations should be granted for the same duration as previously.
- 235 APRA addresses below the nature and significance of the alleged material changes.

B Material change in the market

- 236 Free TV submit that the material changes to the market relate to:
- (a) technological advances;
 - (b) the state of flux of the mass media communications industry; and
 - (c) overseas developments.
- 237 Each is addressed below.

B1 Technological Advances

- 238 Free TV submits that “Technological advances in digital rights management (DRM)...[have] the potential to allow for efficient, competitive direct licensing of music and will have a significant impact on collective licensing practices of organisations like APRA”: para 1.1. Free TV submit that “DRM has the potential to significantly impact upon the need for and use of collecting societies as they will find themselves disintermediated by the DRM Systems which link creators and users directly”: para 5.9.
- 239 The definition of DRM used by Free TV is broader than that employed by APRA in 163 above. Whereas the definition used by APRA focused on technology related to use and dissemination of digital format music, Free TV submit that DRM is properly understood as encompassing technology in relation to “identification, trading, protecting, monitoring and tracking” of digital music: para 5.3.
- 240 APRA freely acknowledges that DRM has the (long-term) potential to very significantly reduce monitoring costs, in relation to digitally delivered music.
- 241 However, for the following reasons, APRA submits that there is simply no basis for contending that DRM (even on the broader definition of that technology) has the present (or foreseeable) potential to “disintermediate” APRA, or otherwise undermine compelling public benefit of the APRA system.

- 242 Firstly, APRA is aware of no basis for contending that there is any reasonably foreseeable prospect of DRM facilitating the accurate recording of ownership in the underlying work of all “on-line” digitally delivered music. As to this matter, APRA refers to the matters set out in paragraph 173 above (relating to the general difficulties of timely inclusion of information in relation to the copyright in the underlying work), and paragraph 146 (which relates to the frequency with which there are ownership changes relating to rights in the underlying work).
- 243 Secondly, APRA is aware of no basis for contending that there is any reasonably foreseeable prospect (in any media) of music being delivered exclusively by “on-line” delivery platforms. (DRM would appear to have no role in licensing, and monitoring, except in relation to on-line delivery).
- 244 Thirdly, even if it were assumed that DRM could somehow provide an accurate “on-line” identification of the copyright holders in the underlying work, APRA is aware of no basis for the assumption that DRM technology could somehow facilitate the “at source” negotiations for the licence of the performing right, between the proposed user and each and every copyright owner, as to which see paragraph 174(a) above.
- 245 The capacity of the APRA efficiently to facilitate the licensing of the performing right is at the very foundation of the public benefit of the APRA system.
- 246 APRA strongly rejects the submission that it is “unlikely” that APRA will “foster the deployment of innovative technologies such as DRM”, by reason of its effective monopoly position. APRA incurs significant costs in monitoring the use of works. Because DRM has the potential to significantly reduce those costs, APRA has a very strong commercial incentive to develop the DRA technology. Indeed, APRA has been actively pushing the development and implementation of new technology which facilitates efficient monitoring (whether or not it is classified as “DRM”). That technology comprises an electronic system by which television stations collate and report musical works incorporated in their broadcasts (called “EDI”). EDI eliminates the need for manual reporting by means of “cue sheets”, and expedites calculation of entitlements. The current licence agreement between APRA and Free TV includes an undertaking that the TV industry seek to implement EDI by agreed dates. The provision of that undertaking was extremely material to the position taken by APRA in relation to the negotiation of the licence fee. However, despite active and continual encouragement by APRA, the television stations have proved unable to reach to contractual targets. APRA can provide copies of related correspondence, if the Commission so desires.

B2 Mass media communication industry in a state of flux

- 247 Free TV identifies two key aspects of the present state of the industry, which they contend constitute a material change to the market (for the purpose of APRA’s application):
- (a) Firstly, “the increase in the number of distribution platforms” which “raises the issue of how music should be licensed for distribution on these platforms”: para 6.3. Free TV submit that the “effects of this

platform proliferation are likely to be much better understood in the next two years”

- (b) Secondly, “Personal Video Recorders”, which allow the capacity to skip advertisements, and which “may impact how MMC participants use and licence music”.

Increase in delivery platforms

248 APRA submits that the proliferation of delivery platforms (and the speed of their emergence) is a factor which weighs strongly in favour of the APRA application.

249 There is no basis (of which APRA is aware) for the contention that any of the new platforms will provide a mechanism which somehow universally eliminate the massive transaction costs (and insurmountable practical difficulties) associated with direct negotiations between users and copyright holders, and thereby undermine the most critical basis for the APRA system.

250 On the contrary, there are two respects in which the platform proliferation increases the importance of the APRA blanket licence system:

- (a) first, the proliferation of delivery platforms necessarily causes the proliferation of transactions necessary to license the performance of music in the marketplace. In other words, it increases the overall level of transaction costs necessarily incurred in relation to the proper licensing of music. That increase would be dramatically increased, if APRA were not available to provide a blanket licence to the users which utilise the new platforms; and
- (b) secondly, the availability of the blanket licence significantly lowers the barriers to entry, relating to the development and exploitation of new music delivery platforms. Parties wishing to develop or exploit new delivery platforms need only to acquire a single blanket licence from APRA. If those parties were required to procure individual licences (at source) for the works proposed to be broadcast and performed on the platform, it would significantly increase transactional costs associated with licensing, delay entry into and participation in the relevant sub-market, and constrain the musical content that could be delivered on the new platform.

Personal Video Recorders (PVR)

251 APRA assumes that Free TV refer to PVR as an example of technology which has the capacity to affect the value to broadcasters of music performed in television transmissions.

252 APRA admits being unable precisely to understand how it is contended that PVRs have the capacity to have such an effect.

253 Nevertheless, even if such an effect could be established, it is irrelevant to the justification for APRA’s application. Any matters affecting the value of music are relevant only to the reasonable terms of the TV Operators’ APRA licences, which is relevant only to the Copyright Tribunal jurisdiction in relation to appropriate licence fees.

B3 Overseas Developments

- 254 APRA understands that the Free TV submits that the prevalence of “cross-border” activity and interest overseas in relation to the licensing of performance rights, calls into question the justification for the exclusivity of the rights that APRA presently takes from foreign collecting societies.
- 255 In reply, APRA submits *firstly* that is erroneous to characterise APRA’s rights from the foreign collection societies as always exclusive. The rights that APRA receives from the American collection societies are non-exclusive.
- 256 Secondly, there is a significant public interest in the retention by APRA of exclusive licence rights in relation to the foreign works. This relates to the very significant increase in transaction costs associated with the monitoring and enforcement of non-exclusive rights (as to which see paragraph 124 above).
- 257 Thirdly, Free TV’s argument implies that (but for APRA’s contractual exclusivity in relation to foreign works), there would be a reasonable prospect of competition in relation to the licensing of foreign works. APRA submits that there is no basis for that assumption. If there were an interest by any entity in competing with APRA in relation to the licensing of foreign works, the scope for that competition already exists, through at least two means, neither of which has been utilised to APRA’s knowledge:
- (a) first (because APRA only has a non-exclusive licence from the American collection societies), it would be open for another collection society to set up in Australia, and seek a licence from the same American societies. APRA is not aware of any such application by any entity; and
 - (b) secondly, it would be open to a publishers in Australia to seek to cause the “opt out” of the copyright in the works which they control, and seek directly to licence that work.
- 258 Unlike the situation in Europe, it is not surprising that no existing foreign collection society has sought to set up in competition with APRA in Australia in relation to the licensing of foreign works. Transaction costs associated with the establishment of a competitive business in a foreign country are minimised by the physical proximity of countries in Europe, and greatly exacerbated in Australian by its physical isolation from other jurisdictions.
- 259 APRA submits that it is not is not surprising that “cross-border” issues are of significant interest in Europe, while at the same time being of limited significance in Australia. As to this:
- (a) the existence of the European Market creates pressures to take active steps to minimise the practical and legal effect of national boundaries within Europe;
 - (b) there is unquestionably greater competitive pressure between national collecting societies, in relation to the licensing of works in a particular territory. This arises from the close physical proximity of the European territories, which facilitates physical entry by the collecting societies into the markets of other territories.



22 11 04