- any executor, administrator or trustee of the estate of a deceased member, or a beneficiary in the estate of a deceased member, or widow, widower, child or next of kin of a deceased member.

3.3.3 Membership is granted in the form of associate or full member under Article 7. Persons admitted under category 6(a) are referred to as Writer Full Members (composers and authors) and Publisher Full Members (publishers) — unless the publisher is not a corporation, whereupon the person is an associate member. Persons admitted under categories 6(b) and (c) are associate members.

3.3.4 Under Article 38, only full members are entitled to vote at general meetings. This entitlement is subject to the proviso that the full member has within the last two consecutive financial years had allocated a share of moneys collected by APRA.

3.3.5 Pursuant to Articles 49 and 50, APRA has 12 directors made up of six Writer Full Members and six Publisher Full Members.

3.3.6 Ninety five per cent of applicants for writer membership join APRA without being approached by it. However, applicants for membership of APRA are frequently ill informed about copyright and the nature and function of APRA. Many have little experience as performers, have never participated in a contract negotiation and are misinformed about the structure and operation of the various sectors of the music industry. For this reason, APRA prepares information packs in a form which may be readily understood by new entrants into the music industry.

3.3.7 APRA's Articles of Association and the application form completed by members govern the terms of the members' relationships with APRA. Under the Articles, composers and authors are entitled to join APRA as writer members when there has been a public performance of a musical composition of which they are an author. Accordingly the majority of APRA's members join at a very early stage of their musical careers, before enjoying commercial success.

3.3.8 The rules for obtaining membership as a publisher member are more stringent. The Distribution Rules define 'publisher' to mean 'a music publisher to whom a writer has assigned copyright in a musical work, or an entitlement to receive a share of performing right royalties in respect of the work'. APRA states that the minimum criteria for the consideration of publisher membership is:

> (a) that the catalogue of works controlled by the publisher constitutes no fewer than twelve works which have been commercially recorded or published;
>
> (b) that the writers under contract to the publisher number no less than three, of which at least two are already members of a recognised accredited performing right society;
>
> (c) evidence of publisher activity is required, together with a copy of the publisher's standard contract of assignment of the performing right from writers. Documentation establishing that the publisher is an incorporated company is also required.

3.3.9 On joining APRA, members must assign to APRA all of the performing rights in their existing works and any future works they may create whilst a member of APRA. The Articles of Association of APRA set out membership entitlements and obligations. APRA proposes to amend its Articles of Association so that members may 'opt out' of the APRA system in certain circumstances. The proposed Article 17 provides that every member may require APRA to assign to them, or may reserve to themselves one or more

of particular categories of performing rights or foms of utilisation of performing rights. Therefore they could, for example choose to manage their own broadcasting rights and assign to APRA their public performance and diffusion rights, or require APRA to reassign those rights to them. The proposed Article 22 provides that members are not at liberty to alienate the performing right, must reserve the performing right when entering into any contract, and may not commence proceedings regarding the performing right without APRA's approval, subject to Article 17. The proposed Article 9 provides that members must give six months notice before being able to withdraw from membership of APRA, or such shorter notice period as accepted by the Board. The current Articles provide that members must give three years' notice before being able to withdraw from membership, although APRA apparently waives this notice period for members wishing to transfer to an overseas collecting society.

3.4 APRA's affiliates and CISAC

3.4.1 APRA also controls in its jurisdiction the performing rights in musical works of members of affiliated overseas societies operating in various parts of the world. As noted in 2.3.10, it is currently affiliated with 44 overseas performing right societies and is in the process of concluding agreements with several others. APRA remits to those societies fees payable for use of the works in those societies' repertoires. Given that Australia is a net importer of copyright works, a substantial portion of APRA's revenue is sent overseas. Conversely, in 1994 and 1995, more than $7.3 million (about 12 per cent of APRA's revenue) was remitted to Australia by its affiliated overseas societies.

3.4.2 Most of APRA's affiliates confer on APRA exclusive rights to the performing rights in the works in their repertoires. The exceptions are the US collecting societies which grant to APRA non-exclusive access to their repertoires. The Broadcast Music Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) do so in order to comply with the terms of Amended Consent Decrees entered into between them and the US Department of Justice.[5] Therefore, ASCAP and BMI members retain the right to issue licences throughout the world (including APRA territory) should they wish to do so.

3.4.3 Difficulties may arise in respect of the extent of rights conferred on APRA by its affiliates. The definitions of 'small rights' and 'grand rights' used by affiliated collecting societies and APRA often differ, the result being that it may not always be clear whether a licence from APRA will be sufficient in relation to certain works such as ballets or the performance of works in their entirety.

3.4.4 It is implicit in all contracts with affiliated societies that APRA will grant public performance, broadcast and diffusion licences to users only on non-exclusive terms, to facilitate the widest possible dissemination of each society's musical works.

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5 A Consent Decree is entered during a court action to resolve antitrust claims without a trial and without admission by the accused party of any wrongdoing. Further details are provided in Chapter 4.

3.4.5 APRA and its overseas affiliates see their purpose as:

- enabling copyright owners to licence the public performance of their work as widely as possible;
- minimising the costs of licensing users and distributing royalties through centralised operations;
- enabling users to become comprehensively, easily and economically licensed; and
- minimising the costs of licensing by reducing the number of transactions needed to obtain authorisation to perform vast numbers of musical works.

3.4.6 APRA and its affiliates are members of the Confederation of International Societies of Authors and Composers (CISAC). CISAC is a non-government, non-profit-making organisation. Its role is to lay down consistent principles for the collection of royalties and the security of works, to standardise the societies' methods of operations, to compare their operations, to strengthen the links between societies and to augment exchanges of information.

3.4.7 CISAC's principal aims are:

- to ensure the safeguarding, respect and protection of the moral and professional interests attaching to every kind of literary and artistic production;
- to watch over and contribute to the respecting of economic and legal interests attaching to productions both in the international sphere and in national legislation;
- to coordinate the technical activities of the authors' and composers' societies and ensure their collaboration, subject to the understanding that each society is master of its internal organisation;
- to constitute an international centre of research and information; and
- to conduct its activities in a strictly independent manner, in particular, independent of any political affiliation.[6]

3.4.8 Most of the agreements between APRA and its affiliates follow the CISAC model which entitles societies to terminate by giving six months' prior notice. The major exceptions are:

- ASCAP (US) — no period of termination is specified as the contracts require annual renewal under the terms of the Amended Consent Decree;
- PRS (UK) — 12 months' notice; and
- SACEM (France) — 3 months' notice.

3.4.9 Apparently, no overseas society has ever sought to terminate its relationship with APRA.

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6 Article 4 of the Statues of CISAC dated 21 September 1994.

3.5 Output arrangements: blanket licences

3.5.1 The vast majority of APRA licences are non-exclusive blanket licences. This means that users are entitled to use any or all of APRA's music repertoire for the term of the licence, usually 12 months. However, the Commission understands that from time to time APRA also grants licences relating to specific works for particular events or series of events (e.g. live performances). These licences are often referred to as individual licences.

3.5.2 There are approximately 55 APRA licence schemes in operation covering public performance rights in venues such as hotels, restaurants, shops, fitness centres, cinemas, dance schools, churches, skating rinks and other places where music is performed in public, whether by means of radio or television receivers, records, cassettes, CDs or live performances. In addition, there are a number of special licence agreements with groups of individual users, such as the airlines.

3.5.3 As at 15 August 1995, there were 36 032 individual public performance licences in place, with approximately 19 000 licensees, affecting more than 47 000 premises throughout Australia. Some venues have more than one licence and some licences relate to hundreds of premises (e.g. schools). As at 17 October 1995, the entire list of permanent and casual licensees contained 22 733 names.

3.5.4 Broadcast licence agreements negotiated with users fall into licence schemes such as the commercial radio licence scheme, commercial television licence scheme, narrowcast radio licence scheme, and narrowcast television licence scheme. Negotiations between APRA and user groups regarding licensing arrangements for pay television providers are apparently continuing.

3.5.5 Different licence fee calculations apply under the licence schemes. For example, retail outlets usually pay a set fee plus an amount per additional speaker, whereas commercial radio licences involve a range of percentages because the variety of program formats in the medium and the sophisticated logging system used is able to ensure the accuracy of comparative music use figures. Cinema licence charges vary depending on the number of screenings per week and dancing school fees vary depending on the number of outlets.

3.5.6 APRA claims that, wherever possible, it seeks to value the use of its repertoire by applying the box office principle. This principle can only be applied if there is an identifiable 'box office' revenue (which may take the form of admission receipts, advertising revenue or sponsorship revenue) and if the use of copyright music is an important element in the entertainment or services for which the box office revenue is received.

3.5.7 APRA claims that the box office principle is applied under its agreements with broadcasters, exhibitors and promoters. The different percentages that apply under the licence schemes are intended to reflect the different circumstances of music use in each case. Commercial television broadcast licence fees are based on a percentage of advertising revenue. Fees for non-commercial television licences (e.g. the ABC) are based on percentages of parliamentary appropriation and gross revenue.

3.5.8 APRA states that as a matter of practice it only introduces new tariffs or changes to tariffs after first entering into consultation and negotiation with users and that if agreement cannot be reached APRA refers the proposed tariff to the Copyright Tribunal.

3.5.9 By charging a percentage of revenue earned across all programming, APRA receives income whether or not a program uses music, whether or not that music is APRA controlled and whether or not the revenue earned relates to the use of the music. FACTS gives the example of a television station broadcasting three hours of cricket coverage which contains only three minutes of music in the form of opening and closing themes. The station will pay a proportionately higher licence fee for that music than a one hour program with the same revenue but a higher music content.

3.5.10 APRA is now proposing to formulate a licence scheme which would enable those classes of licensees which are able to specify in advance the works which they wish to license to elect to do so rather than to obtain a blanket licence.

3.6 The licensing process

3.6.1 Public performance licences are granted on the basis that users make honest and accurate disclosure of their music usage according to the criteria specified in each licence scheme. Thus, where application forms are completed with obviously inaccurate information, APRA's policy is to not grant a licence until bona fide information has been delivered. Similarly, a licence may not be granted until a cheque in payment of the first year's licence fees has been received. APRA states that subject to these policies, it never refuses to grant a licence.

3.6.2 APRA has licensing representatives located in most States. Licensees rarely apply for licences of their own volition so APRA's licensing representatives are constantly forwarding information to users, explaining the nature of APRA's rights and requesting that appropriate licences be obtained. Once a licensing representative is satisfied that the information supplied by a user is accurate then, subject to the payment of the first year's licence fee, the licence will be granted by APRA.

3.6.3 Public performance licence fees are payable annually in advance based on an informed estimate of expected activity in the premises. If actual activity is greater or less than estimated, then an adjustment is made to the fees at the end of each annual period by a process of reassessment.

3.6.4 None of the difficulties inherent in the licensing of public performance rights are faced in relation to broadcast rights because broadcasting is a regulated activity in Australia conducted in accordance with the provisions of the *Broadcasting Services Act 1992*. APRA can readily establish when new services come on-stream and new broadcast licensees invariably join the appropriate representative body through which licensing arrangements are made.

3.7 Distribution

3.7.1 Twice a year APRA distributes licence fees and any accrued interest (less operating costs, etc) in the form of royalties to members and affiliates. Distribution is governed by the Articles of Association and APRA's Distribution Rules. APRA claims that royalties distributed reflect the demand for each members' works and are therefore performance specific.

3.7.2 To allocate the funds to be distributed APRA undertakes a range of analyses and applies a set methodology. For example, it uses a census analysis to calculate music use on fully networked television programs in Australia and in films publicly shown in cinemas.

3.7.3 Analysis of commercial radio broadcasts and non-network television programming is based on a scientific sampling system. APRA explains that by employing sampling techniques it is able to maximise distribution payments to members by not having to incur the enormous costs that would result from a 100 per cent analysis of the millions of broadcasts that take place each year. For commercial radio broadcasts the system requires radio stations to provide to APRA up to 12 weeks of logs per year. Each log contains basic information about musical works broadcast during the rostered week including title, featured performing artist or group, record label and writer(s). The number of logs required to be submitted depends upon the extent to which the station broadcasts music and the size of the licence fee paid. However, it is now possible for accurate 'play lists' of works broadcast to be stored on CD-ROM and reported to APRA by means of diskette, CD-ROM or electronic data interchange. Negotiations between APRA and the broadcasters are apparently continuing in relation to this exchange of information.

3.7.4 APRA also receives information from the ABC and SBS on a sample basis to enable it to assess usage of musical works on their radio and television networks. The sampling system involves providing APRA with logs in relation to various services offered, such as Radio National and Classic FM.

3.7.5 The distribution methodology allocates performance credits to music performed or broadcast according to the use made of the music (e.g. for television broadcasts, credits depend on matters such as whether the music is featured, opening/closing or background and the period in which it is broadcast). Funds are then distributed according, inter alia, to performance credits.

3.7.6 The Commission notes from FACTS' submission in relation to the original applications that there appear to be some anomalies in APRA's distribution arrangements such that members who acquired their rights to works by way of assignment are entitled only to associate membership with no voting rights, whereas publishers who acquired their rights by assignment are entitled to full publisher membership and the attendant benefits. Further, FACTS submits that Rule 4.02 of the Distribution Rules seems to indicate that no member other than an author/composer or publisher is able to receive royalty income. If correct, a copyright owner by way of assignment who is not a 'publisher' cannot receive the royalties that may be collected on its behalf by APRA.

3.7.7 The Commission understands that APRA has acknowledged the anomolies raised by FACTS and is taking or will take steps to ensure that the Articles of Association and Distribution Rules are amended to overcome the problems raised by FACTS.

3.8 Enforcement

3.8.1 The Simpson Report concluded that insofar as broadcasting rights are concerned, the level of compliance by licensees is extremely high. The report states that APRA requires no licensing department but has a full-time licensing officer to ensure compliance with existing licence schemes, and to notify new licensees of their legal obligations. However, in relation to public performance rights the report states that many licensees take advantage of the self-reporting system in order to minimise their fees. It is in this area, the report concludes, that enforcement and audit are essential.[7]

3.8.2 Insofar as public performance rights are concerned, APRA maintains a licensing department and employs two solicitors to correspond with users who continue to use APRA works without a licence. If a user fails to obtain a licence after due notice has been given by APRA, a licensing representative will attend the premises of the user to obtain evidence of infringement of copyright. If it is apparent that a user will continue to infringe copyright, proceedings for infringement will be commenced.

3.8.3 During the period 1990–1995 there were 909 infringement referrals from APRA's licensing department. The legal department conducted or supervised 71 legal actions, three appeals to the Full Federal Court and four references to the Copyright Tribunal. Gross infringement costs were $793 864.41 and costs recovered were $114 253.78. Gross Copyright Tribunal costs were $602 621.31 and no costs were recovered.

3.8.4 APRA states that it generally refrains from relying on US musical works in infringement proceedings because the non-exclusive assignment creates practical difficulties in obtaining proof of copyright control, substantially greater legal costs and unavoidable delays. However, it did just that in September 1994. In the Century 4 Cinemas case, proprietors of a cinema disputed APRA's right to licence the public performance of musical works contained in US films. In order to prove infringement of copyright it was decided that APRA would prove title to the musical works contained in the US film 'Aladdin'.

3.8.5 The agreements produced in relation to this single film were numerous because it was essential to prove every link in the chain of title. To do so, the following agreements had to be produced:

- Menken's (the principal composer) agreement with the production company (Wonderland Music Co Inc);
- the production company's agreement assigning copyright to Walt Disney Co Inc;
- Walt Disney Co Inc's reassignment to Wonderland Music Co Inc;
- Wonderland Music Co Inc's assignment to BMI;
- Walt Disney Co Inc's agreement with Warner Bros. Music (Australia) Pty Limited;
- Warner Bros. Music (Australia) Pty Limited's assignment to APRA; and
- BMI's agreement with APRA.

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7 The Simpson Report, p. 150.

3.8.6 Another co-composer was a member of PRS. APRA was able to prove that person's interest in the works by relying on his assignment to PRS and the assignment between PRS and APRA. In addition, it was necessary to request the owner of the copyright to swear an affidavit averring to the fact that no licences for public performance of musical works embodied in the film had been granted for Australia.

3.8.7 The cinema proprietors accepted defeat as soon as they learned that APRA had in its possession all of the documents it needed to prove control of the copyright. The proceedings settled at a preliminary stage, resulting in substantial savings. Nonetheless the costs totalled $24 890.59. APRA notes, by way of comparison, that matters involving exclusive assignments of rights which settle at the same stage of proceedings cost between $800 and $4000. Defended matters which have gone to trial cost less, even when conducted by a firm of independent solicitors in commercial practice, than the conduct of the Century 4 matter.

3.8.8 APRA submits that if it held copyright on a non-exclusive basis for all artists, the Century 4 matter would be a fair gauge of the costs which would be incurred in legal proceedings and therefore it would have to be more selective in conducting enforcement proceedings. APRA says that this would result in more wide spread infringement of copyright.

3.8.9 FACTS contends that APRA's comments in relation to enforcement are limited to breaches of the public performance right. And further, as APRA's most significant component of repertoire currently is that derived from the USA, and is already non-exclusive to APRA, FACTS questions why non-exclusive arrangements would have the effect contended by APRA.

3.9 Documentation and other aspects of APRA's operations

3.9.1 In order to make distributions, APRA and its affiliates must maintain comprehensive records of musical works, details of the composers, authors, publishers and sub-publishers together with the shares each party has in each work and the society with which each is affiliated. Additionally, details of many millions of contracts are maintained to record changes in ownership of works or division of distributions. The process has become easier with the advance of information technology. As noted in the Simpson Report at page 14:

> Already, Information Technology has been widely implemented to undertake the complicated and detailed administration and calculation processes that are so central to the operation of every collecting society. What used to take hundreds of square metres of space for data storage now takes a few feet; what took weeks by hand now takes days by computer. The efficiencies permitted by IT are now evident in the societies — and they can be expected to increase.

3.9.2 APRA states that its methods of distribution and documentation are in accordance with the standards specified by CISAC.

3.9.3 Finally, APRA states that given its considerable infrastructure for the collation and analysis of large volumes of information regarding works and performances, it assists other collecting societies on a commercial basis in the collation of data, analysis of performance data and process of distribution.

3.10 Alternative dispute resolution mechanism for licensees

3.10.1 APRA proposes to establish an alternative dispute resolution mechanism to determine certain disputes between APRA and its licensees.

3.10.2 In APRA's view, the appropriate dispute resolution model is mediation and an appropriate mediator would be a retired senior judicial figure. APRA states it would undertake to pay the fees of the mediator.

3.10.3 APRA states that disputes between APRA and its current or potential licensees tend to fall within the following categories:

- disputes as to whether a particular activity is a public performance, that is, whether the person requires a licence at all;
- disputes as to which licence scheme should govern a particular type of performance. For example, whether the licence should be for a background music system or for music to accompany dancing;
- disputes as to other terms and conditions of licence schemes, such as the amount charged under a scheme; and
- disputes as to the calculation of licence fees in particular instances. For example, where APRA believes a licensee has under-reported music usage.

APRA states that the dispute resolution mechanism would be useful for the latter three types of diputes described above. APRA states that the first type of dispute is one over which the Federal Court of Australia has jurisdiction and the Federal Court Rules provide for a system of referral of such matters to mediation or arbitration.

4. Overseas collecting societies and international conventions

4.1 General

4.1.1 Much of the information for this section has been taken from the Monopolies and Mergers Commission (MMC) report on performing rights, dated February 1996.

4.1.2 The collective administration of performing rights by overseas societies differs widely across countries, reflecting a myriad of cultural influences and varying degrees of legal, governmental and competitive restraints.

4.1.3 A single society may only administer performing rights (e.g. APRA and the Performing Right Society (PRS) in the UK), or it may administer performing rights and *mechanical rights* (e.g. STIM in Sweden) or both of these rights in conjunction with synchronisation, lending and publication rights (e.g. the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC)).

4.1.4 The majority of overseas societies enjoy a de facto monopoly position in that only one society administers the performing rights. However, in the US there are three performing rights societies, namely, the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc (BMI) and the Society of European Stage Authors and Composers (SESAC). Other countries in which multiple performing rights collecting societies exist are Brazil (10), Argentina (two) and Columbia (two). Canada had two prior to 1990.

Input, output and membership arrangements

4.1.5 In general, overseas collecting societies are non-profit membership societies. However, there are two privately owned societies, BMI and SESAC. Both are United States societies and have *affiliates* rather than members. This means that writers and publishers (affiliates) have a contractual relationship with the society rather than a membership arrangement. Therefore, affiliates cannot vote in respect of the society's arrangements or practices, or join the board. In addition, SESAC is a profit making organisation.

4.1.6 The majority of performing rights societies offer membership on the basis that writers and publishers grant to them exclusive assignments of their performing rights. However, in the United States the terms of Amended Consent Decrees prohibit ASCAP and BMI from exclusivity. Although SESAC is not subject to the restraints imposed by the Decrees, it allows its affiliates to engage in non-exclusive licensing. In Ireland the Irish Music Rights Organisation (IMRO) obtains an exclusive assignment of performing rights, but grants its members non-exclusive licences to self administer their own works.

4.1.7 Many performing rights societies issue both blanket licences and individual licences, with the latter still encompassing the whole repertoire but relating to specific events such as concerts. Music users in the US can also avail themselves of per program licences and can enter into their own direct licensing arrangements, as can members of IMRO. In general, the structure of fees for licences depends on a variety of factors such

as the music medium, form of music used, and size and type of premises. For example, levies for commercial broadcasting are often set as a percentage of net advertising revenue whereas fees for public performance may relate to the number of speakers used in a retail premises.

4.1.8 Collecting societies have different termination arrangements. The termination period for members can vary from (say) five years for JASRAC, to one year for PRS and the French collecting society SACEM. Members of PRS and SACEM must give three months' notice of withdrawal. BMI affiliates may exit no sooner than six months and no later than three months prior to the end of the contract. SESAC affiliates must give 90 days notice for termination of their contract.

Cultural deduction

4.1.9 Collecting societies often make deductions from royalties remitted from foreign collecting societies to cover administrative costs. Moreover, collecting societies can make deductions from all royalties, including payments to their foreign counterparts, for the social and cultural purposes of national artists (e.g. promotion of music festivals, financial assistance to members that are pensioners or sick). The difference in the levels of cultural deductions that may be made reflect the differences in value accorded to the development of national artists.

Dispute resolution

4.1.10 For some collecting societies, disputes over a licence scheme and fees may be resolved through the society's membership board or by third parties, such as the courts or tribunals. In the UK, for example, the Copyright Tribunal can review and determine various licensing issues with respect to existing or proposed licence schemes. The appeal mechanisms for tariffs in the US and France are the courts, although in France there have not been many such court cases. The activities of Gesellschaft fur musikalische Auffuhrungs-und mechanische Vervielfaltgungsrechte (GEMA), the German collecting society for performing rights and mechanical rights, are monitored by the German Patent Office and the civil courts. Tariffs set by GEMA can be fully reviewed by the civil courts but, as a matter of principal, any court action must be preceded by proceedings before the arbitration board of the Patent Office. The arbitration board's role is limited to submitting a non-binding conciliatory proposal. If there is an objection the matter can then be referred to the civil courts.

4.1.11 In the US members of ASCAP do not necessarily have to take their disputes to court. ASCAP operates an internal procedure for the resolution of disputes through its Board of Review. The board comprises a number of members of the society who neither serve on the main board nor on any advisory committee and who are elected for a two year term by the membership. After the board has ruled either party to the dispute has the option of taking the matter to court if they are dissatisfied with the ruling.

Competition law enforcement

4.1.12 In the United States the Department of Justice enforces the Sherman Act of 1890 and administers Consent Decrees.[8] In Germany, the Federal Cartel Office is responsible for the supervision of GEMA in relation to any abuse of its dominant position in the market. Both the Federal Cartel Office and the German Patent Office can withdraw GEMA's authority to operate if it has not met its obligations. In the UK the antitrust authority is the MMC.

4.1.13 Over the years the European Court of Justice and the European Commission have applied Articles 85 and 86 of the EEC Treaty, to collection societies. In general, Article 85 prohibits agreements which may prevent, restrict or distort competition between member States and within the common market, and Article 86 prohibits abuses of a dominant position. The most notable case was a decision by the European Commission in 1971 concerning GEMA. The decision had the effect of entitling members of European collecting societies (including the PRS) to withdraw from the collecting society one or more of the categories of rights identified in the decision, including general performing rights and broadcasting and transmission rights, whilst remaining a member of the society in respect of rights not withdrawn.

International arrangements and CISAC

4.1.14 Like many of its overseas counterparts, APRA and all of its affiliates are members of the Confederation of International Societies of Authors and Composers (CISAC). CISAC, founded in 1926, is an international non profit-making organisation. It provides a forum for canvassing music copyright issues and prescribes the accounting principles and standards for the operation of collecting societies. For instance, the maximum limit prescribed by the CISAC model contract for cultural deductions is 10 per cent. The Commission understands that, in general, APRA's arrangements with overseas collecting societies comply with the requirements in the CISAC model contract.

4.1.15 Australia is a signatory to a number of international treaties. Since the commencement of the Act, Australia has acceded to the Brussels revision of the Berne Convention (1948) and the Universal Copyright Convention (1969) and their subsequent revisions. The Berne Convention sets out minimum rights in relation to literary and artistic works and is based on the principle of national treatment, which requires member countries to accord citizens of other member countries the same rights it accords its nationals.

4.2 Brief summary of the United States market

4.2.1 The United States television, radio, music and other markets in which music is used and the US copyright environment are all quite different to those in Australia. The United States is a net exporter of copyright material, particularly in respect of musical works, and is one of the largest, if not the largest producer of such works in the world.

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8 The Sherman Act of 1890 makes illegal 'every contract ... in restraint of trade or commerce among the several states or with foreign nations ...' and prohibits persons from monopolizing or attempting to monopolize ... any part of trade or commerce among the several states, or with foreign nations...'

The US television and film industries are more vertically integrated and are many times larger than the Australian television and film industries. In addition, copyright registration exists in the United States and this has a number of benefits including proof of validity of copyright and chain of title.

The United States collecting societies

4.2.2 There are three music performing rights organisations in the United States: ASCAP, BMI and the smaller society, SESAC. Each organisation serves as a licensing agent and administers the collection and distribution of royalties for licensed performances. They vary in structure, size, scope and method of operation, and they also differ significantly from other overseas collecting societies in that they operate in a different judicial, legislative and competitive environment.

4.2.3 ASCAP was founded in 1914 and is an unincorporated membership society. It is the first and largest performing rights licensing organisation in the United States. SESAC (until a few years ago a private family-owned corporation) administers European and American musical works and was incorporated in 1931. BMI was created in 1939 by radio broadcasters following a dispute between them and ASCAP over the excessive level of licensing fees proposed by ASCAP. ASCAP and BMI are non-profit organisations whereas SESAC is a profit making organisation. Writers and owners of copyright can join ASCAP and BMI upon meeting entry requirements. Joinder of SESAC is by invitation. Each organisation has affiliations with overseas societies and is a member of international associations of collecting societies.

4.2.4 ASCAP and BMI hold the performing rights to virtually all of the available music in the United States. The total 1994 revenue for ASCAP and BMI was $US442.7 million and $US314.0 million, respectively, with broadcasting accounting for the largest share of revenue for each organisation. SESAC's repertoire and annual revenue are significantly smaller than those of ASCAP and BMI.

4.2.5 United States music users may need to hold licences from more than one licensing organisation to ensure they do not engage in copyright infringement.

4.2.6 To acquire full membership with ASCAP, writers need to have at least one musical work published or commercially recorded or performed on a regular basis; and for music publishers, musical works regularly performed by an ASCAP licensee. As explained in 4.1.5, BMI and SESAC have affiliates rather than members. For SESAC, writers are asked to submit a sample recording of their music and may be offered affiliate status on the basis of the commercial viability of their work. For publishers, ownership of the performing right of a SESAC affiliate is required.

4.2.7 It is not possible for individuals and companies to have the same work or works in the repertoires of both ASCAP and BMI simultaneously. Owners of copyright usually have at least two corporate entities; one for membership of ASCAP and one for membership of BMI.

4.2.8 Each organisation has different termination arrangements. ASCAP members may terminate their membership at the end of a year by providing three months' notice. BMI offers writers two year contracts and publishers five year contracts and BMI affiliates may exit no sooner than six months and no later than three months prior to the end of the

contract. SESAC offers writers three year contracts and publishers five year contracts and SESAC affiliates must give 90 days' notice for termination of their contracts.

The Consent Decrees and Amended Consent Decrees

4.2.9 As noted above, the United States Department of Justice enforces the Sherman Act and administers Consent Decrees. In 1941, the Department of Justice sued ASCAP and BMI for antitrust violations alleging that the issue of an annual blanket licence (the only licence then offered) was an unreasonable restraint of trade. Consent Decrees were entered in 1941 and have been amended since that date. Some differences exist in the extent of the Amended Consent Decrees that presently apply to ASCAP and BMI. In summary, the decrees require (inter alia):

- non-exclusivity in relation to the right to licence performance rights, enabling members or affiliates to engage in their own direct licensing;
- the offer to broadcasters of blanket and per program licences. A blanket licence from ASCAP or BMI permits the music user to use as much music contained in the repertoire of the society as it wishes, for payment of either a flat fee or a fixed percentage of the music user's total advertising revenues. Per program licences also grant use of the whole of the organisation's repertoire but the fee is directly related to the user's programs that contain the organisation's music. A per program licence requires the licensee to regularly report music use to its collecting society to enable the society to ascertain whether the programs trigger a fee which is a fixed percentage of advertising revenues from those programs in which the music is used;
- the offer to non-broadcasters of a per program licence and a per piece licence (sometimes referred to as 'per use licences' or 'per composition licences'). A per piece licence permits the use of a specific music composition;
- the establishment and operation of mechanisms to determine fees and conditions when ASCAP and BMI cannot agree with licensees (Rate Courts);
- the grant to television networks of a 'through to the viewer' broadcast licence which permits the networks and their affiliate television stations to broadcast network programming across their networks without requiring separate licences for each individual station; and
- provide for a restriction on ASCAP from enforcing motion picture performance rights against any motion picture exhibitor and bringing any action for copyright infringement against any exhibitor relating to such picture performing rights or against any user relating to compositions not contained in ASCAP's official public repertoire.

4.2.10 The last requirement listed above was incorporated into ASCAP's Consent Decree following the Alden-Rochelle case, in which the Federal District Court in New York restrained ASCAP from issuing performance licences to movie theatres, and the Court restrained ASCAP's members from refusing to grant performance licenses to movie producers at the same time as synchronisation rights are granted.

4.2.11 Members and affiliates of BMI and ASCAP therefore retain the right to engage in direct licensing to users in competition with each other and the collecting societies. The Commission understands that cinema exhibition rights have been negotiated directly with composers by film producers along with synchronisation rights. This indicates that it is possible for users to successfully deal directly with composers. SESAC has not been encumbered with a Consent Decree but nonetheless gives its affiliates the right to engage in direct licensing with users.

4.2.12 The terms of the Amended Consent Decrees do not require ASCAP or BMI to issue licences for less than the entire repertoire. The provisions for limited licences are permissive, not mandatory.

4.2.13 While the government is prevented from proceeding with antitrust action while the accused party complies with the terms of the Consent Decrees, private parties still have the right to pursue an action for unreasonable restraint of trade or unlawful monopoly. Over the years there have been many antitrust actions in the US against ASCAP and BMI.

4.3 Summary of the United Kingdom market

4.3.1 As noted above, the MMC recently published a report on performing rights. The MMC made 44 recommendations and the Commission understands that many of the recommendations are in the process of being or have been implemented.

The nature of the copyright environment

4.3.2 The UK Copyright Designs and Patents Act 1988 provides that a writer of a musical work is entitled to copyright in that work. For administrative reasons, collective licensing bodies have been established and include:

- the Performing Right Society (PRS) which deals with performing rights (excluding grand rights);
- the Mechanical Copyright Protection Society (MCPS) which deals with 'mechanical' rights chiefly on behalf of publishers or in respect of unpublished works, writers; and
- Phonographic Performance Ltd (PPL) and Video Performance Ltd (VPL) which deal with the right to play records or videos in public.

4.3.3 PRS has been in existence since 1914, has approximately 28 500 members (as at November 1995) and collects licence fees from a range of licensees, covering some 258 000 premises in all. Its three main sources of revenue, broadcasting, public performance and overseas use, contribute in roughly equal proportions to its annual revenue of £stg167 million (1994).

4.3.4 PRS operates by issuing licences to the many different categories of users of music in the UK. Some licences are 'blanket licences' covering all of PRS's repertoire for an entire year. Others are 'event licences' covering the whole repertoire for one occasion. PRS has 41 tariff categories and over 500 different licence rates in all, reflecting the different ways in which music is used. Licences to broadcasters are negotiated individually or with representative bodies such as the Independent Television Association.

4.3.5 If a licensee cannot reach agreement with PRS on the level of tariff to be applied, the Copyright Tribunal provides an avenue for appeal. The MMC Report found that many users see an imbalance in the strength of negotiating position between PRS and themselves in the Tribunal. Cases tended to be protracted and expensive, enhancing the relative position of PRS. Users also expressed concern about the Tribunal's practice of awarding costs to reflect the outcome of the case. This was said to act as a deterrent to recourse to the Tribunal, particularly to small users.

4.3.6 Article 7 of the Articles of Association of PRS requires that writers and publishers assign to PRS all the performing rights for the whole world. PRS submitted to the MMC that ownership of rights is necessary to effectively enforce the rights of the individual members in the event of any infringement of those rights but that it nevertheless has always been willing to reassign rights to members if they fall within the categories set out in the GEMA decision.

Conclusions of the Monopolies and Mergers Commission

Exclusivity

4.3.7 The MMC found that a monopoly situation existed in favour of PRS and that PRS could, if it was willing, allow a degree of 'non-exclusivity' to its members within the framework of Article 7.

4.3.8 The MMC was not persuaded that PRS's present practice of exclusivity was so essential that no further exceptions could be allowed and concluded that if members consider that they can administer live performances themselves, then they should be free to choose, but should bear any reasonable costs caused to PRS. The MMC pointed out that there is no reason to suppose that writers or publishers cannot achieve a better deal for themselves than PRS. The MMC went on to say that if expectations of such writers and publishers were found to be unfounded in this regard, they may choose to leave administration of such rights with PRS.

4.3.9 The MMC found that the deficiencies in the corporate structure and management of PRS and its refusal to allow self-administration were attributable to its monopoly position and operated against the public interest. It also indicated that it did not believe enforcement would be hampered if there was a clear statement of the rights being reassigned to members. It noted that ASCAP and MCPS both operate without exclusivity without appearing to have difficulties in this regard.

4.3.10 The MMC concluded that Article 7 of PRS's Articles of Association should be amended to allow for self administration of live performance rights and to make it clear that members have the right to self administer the categories of performing rights specified in the GEMA decision. This confirmed that members may self administer their rights but must do so in respect of entire categories of rights for all their works.

Other matters

4.3.11 The MMC also recommended, inter alia, that:

- an appeal mechanism be established for the purpose of hearing complaints by members; and

- termination arrangements for members be altered. The Commission understands that it is proposed that members should provide PRS with one or three years' notice of intention to 'opt out' (depending on the nature of the rights involved), until the year 2000, whereupon three months' notice will be required. In addition, the period of notice for termination of membership is proposed to be three months.

Other competition decisions affecting PRS

4.3.12 In 1991 PRS and IMRO (which was a subsidiary of PRS until 1995) jointly notified the Irish Competition Authority in relation to three standard form assignment agreements. The Authority indicated to PRS that the arrangements would be acceptable if the Articles of Association were amended so as to require PRS, in response to a request, to allow members to license the use of a work to individual users on a non-exclusive basis. PRS declined to do so.

4.3.13 The Authority concluded in 1994 that the arrangements precluded a member from self administering the performing right and had the effect of restricting the freedom of users to purchase from other sources and of restricting competition in supply. The Authority considered they therefore offended the Irish Competition Act, as also did the period of notice required for termination of membership (at that time, three years). The Authority concluded that while a mechanism for creators and publishers to assign their rights to PRS was clearly indispensable, preventing members from granting non-exclusive licences to individual users for particular purposes was not.

4.3.14 After becoming an independent company, IMRO notified the Irish Competition Authority in January 1995 in relation to three new standard form assignment agreements. The agreements included a provision whereby IMRO could grant non-exclusive licences to members provided certain pre-conditions were met. The conditions were amended by IMRO in October 1995 so that a member could require IMRO to grant him or her a non-exclusive licence to exercise all the performing rights in relation to particular works upon provision by the member, within two months of the proposed use, of information about the use to be made of the works. The Competition Authority determined that in the light of the amendments made by IMRO, it would grant licences in respect of the standard agreements for a period of 15 years.

5. Submissions of APRA

5.1 APRA's original submissions in support of its applications

5.1.1 A substantial and comprehensive submission document accompanied the original applications for authorisation and notification lodged by APRA in this matter. Two additional submissions relating to the original applications were also received from APRA. APRA relies on these submissions for the new applications to the extent that they remain relevant. As far as practicable, APRA's submissions have been summarised using the same formats as were used in the original documents.

General

5.1.2 APRA submits that authorisation is sought to confirm APRA's ability to acquire the rights that enable it to grant blanket licences to users, and to grant blanket licences.

5.1.3 APRA submits that an analysis of the competitive impact of its operations in the market can only be undertaken in the following context:

- if there had been no collecting society such as APRA, it is highly unlikely that there would ever have been any significant market in performing rights in Australia; and
- the Australian music performing right market is a regulated market and one of the fundamental purposes of this regulation is to ensure that owners of copyright and, in particular, collective bodies such as APRA do not use market power to increase prices to unreasonable levels or to restrict supply.

5.1.4 APRA submits that its services are necessary because of the practical difficulties for copyright owners such as:

- locating each user wherever they might be in Australia and overseas;
- licensing each user in Australia and elsewhere; and
- ensuring compliance with the terms of each individual licensing agreement.

5.1.5 In APRA's view, the concept of public benefits to be taken into account is not limited to benefits to consumers but also includes benefits to the community generally. These benefits are not limited to economic benefits but include those benefits which flow from the cultural and creative activities in the community, whether or not they produce any economic benefit to individuals or to the community generally, and those benefits which flow from a proper regard for and enforcement of the rights created under the Act.

The Copyright Tribunal

5.1.6 APRA submits that section 154 of the Act permits a licensor to refer a scheme to the Tribunal and section 157 permits a licensee or a person desiring a licence to apply to the Tribunal. Section 155 and 156 permit licensors and licensees to refer disputes to the Tribunal. Accordingly, APRA says that all of its licences are subject to the jurisdiction of

the Tribunal and it cannot unreasonably refuse a licence or unreasonably impose terms on a licensee.

5.1.7 APRA states that its practice is to refer to the Tribunal all schemes which it is unable to negotiate satisfactorily with users or their representative organisations.

5.1.8 APRA asserts that while the Tribunal encourages settlement of matters, it does not consider itself bound by agreements between the parties. The Tribunal considers APRA's terms for itself before ruling on the reasonableness of a scheme and leaves the door open for all licensees to bring APRA's schemes back before it.

5.1.9 APRA contends that the existence and jurisdiction of the Copyright Tribunal requires it to continue to behave reasonably, and is a powerful practical tool for licensees in their negotiations with APRA.

5.1.10 APRA submits that the powers and functions of the Copyright Tribunal prevent it from exercising market power by either restricting supply or by charging an excessive price for performing rights. It acknowledges that the Tribunal cannot regulate APRA's constitution or input agreements, but says that such regulation is a matter for the TPA. APRA claims the Copyright Tribunal's jurisdiction prevents or ameliorates those detriments that could or do arise from the above arrangements.

The market

5.1.11 In APRA's submission, the relevant market is the market in Australia (it may be a world wide market) for the acquisition by assignment, licence or otherwise, of the performing right in relation to musical and associated literary works in which copyright subsists. They describe this market as the music performing right market.

5.1.12 APRA's view is that the legislative and factual differences between the US and Australia suggests that there is little to be gained from US experience in determining the relevant market for the purposes of the present applications.

No push for change from the members

5.1.13 APRA is unaware of any pressure from writer or publisher members to change the basis of their legal relationship with APRA. It therefore assumes that its members are satisfied and that they are content to allow APRA to continue administering their rights on the same basis. If they wished to effect a change in their arrangements with APRA so as to permit selective sale of performing rights to producers, then APRA says the necessary steps can be taken to amend the Articles of Association in accordance with membership wishes as determined by them in general meeting. The Commission notes that APRA now proposes to amend its Articles of Association to allow members to reserve or re-acquire any of the rights or forms of utilisation of the rights in relation to all of the member's works.

5.1.14 APRA points out that writers and publishers are not compelled to join APRA. If they believe their rights may be more effectively administered or dealt with by alternative means, then they may do so. For example, unaffiliated writers could offer to assign their copyright to producers for a once and for all fee rather than to submit their works to collective administration.

APRA's input arrangements — competitive impact and public benefits

5.1.15 APRA acknowledges that via its input arrangements it presently acquires virtually all rights in the music performing right market in Australia. It contends, however, that it does not have monopoly market power because of the operation of the Copyright Tribunal. APRA says it cannot restrict supply nor increase prices beyond what is determined by the Tribunal to be reasonable. Consequently APRA submits that there is no significant lessening of competition nor any lessening of competition that is not outweighed by public benefits.

5.1.16 APRA claims the exclusive assignment of members' performing rights confers on it the ability to protect, monitor and enforce each member's rights in the most efficient manner. Further, as all members have the ability to terminate their membership under the Articles of Association, APRA submits that members' assignments are not absolute and irrevocable. Consequently, APRA claims that the exclusive assignments do not substantially inhibit music creators and music owners from licensing performing rights to a particular work or body or works directly to users or through another society.

5.1.17 APRA argues that non-exclusive assignments from members would be unsatisfactory for many reasons including:

- it would be contrary to the wishes of the members;
- individual writers have little bargaining power vis-a-vis powerful users;
- users would lose the freedom of knowing that they can use almost any work and be certain that is in APRA's repertoire so that on obtaining an APRA licence their chances of infringing copyright are almost nil;
- the differentiation which APRA would have to make between musical works which it could licence and those which it could not, would lead to soaring monitoring and enforcement costs resulting in lower returns to composers and/or higher licence fees to users; and
- APRA's enforcement costs would soar because Australia does not have a system of copyright registration.

Price competition

5.1.18 APRA asserts that the 'public goods' nature of performing rights does not lend itself to price competition. Price competition would tend to drive down the price to zero and would result in market failure. Additionally, the price of a licence as a proportion of total cost is negligible for most if not all music users compared to their other costs and revenue. APRA says in these circumstances it is not the price of music that determines its demand and use but rather the popularity, appropriateness and quality of particular pieces of music. As a result, reducing price or otherwise engaging in price competition would not be likely to have an appreciable effect on demand. The experience of overseas societies is used by APRA to illustrate this point. They say that in Canada, before the amalgamation of the two performing rights collecting societies, there was no, or no substantial, price competition and that in the US, ASCAP and BMI do not engage in any significant degree of price competition. In fact, BMI's licence fees are usually calculated as a percentage of ASCAP's.

power comparable to the producers or the real option of retaining performing rights. Producers in that situation are likely to respond to their monopoly in a particular right by restricting supply and increasing prices.

Efficiencies in the protection and enforcement of performing rights

5.1.46 It is APRA's contention that the costs of protecting and enforcing performing rights by infringement proceedings are substantially increased under a system of non-exclusive licensing. At the same time they say the effectiveness of such proceedings is diminished. This is because:

- the chain of title of the owner must be proved (which is more difficult than adducing evidence of a simple assignment); and
- it must also be proved by the plaintiff that no other licence has been granted to the person against whom the infringement proceedings are being brought.

5.1.47 Although not impossible to achieve in an environment of non-exclusive licensing, APRA says it is difficult to persuade the courts, to the requisite standard of proof, of the fact that a licence has not been granted. This is especially so as non-exclusive licences do not need to be in writing under the Act.

5.1.48 APRA points to the Century 4 Cinemas case, referred to in 3.8.4, as illustrating the costs and difficulties implicit in infringement proceedings of this nature.

5.1.49 APRA states that these costs would act as practical and financial constraints on its ability to enforce rights via infringement proceedings. They submit that without the real threat of infringement proceedings users would have an incentive to ignore copyright, which would tend to undermine musical composition in Australia. Composers and writers would receive little or no financial reward for their efforts, Australia would lose export earnings as composers move offshore to countries where their rights could be enforced, and the Australian public and Australian culture would suffer.

5.1.50 APRA asserts that under the current arrangements enforcement costs are kept low and only one body, APRA, incurs the costs of monitoring for the detection of infringements. Transaction costs of monitoring for infringements and usage, upon which licence fees are based and royalties distributed to members, are all borne by APRA. These costs are spread over a large group for the mutual benefit of both owners and users. APRA submits that it is far from certain that all additional costs associated with administering and monitoring a licence system that allows composers to exempt from their assignment to APRA any commercial television right in relation to a particular work or works could be isolated so as to be borne only by commercial television broadcasters.

5.1.51 APRA contends that if there were a number of societies competing to administer and licence the same musical performing rights, costs would be greatly increased because each society would duplicate costs at least to some extent. Further, APRA believes that apart from the theoretical benefit of a competitor's presence, no other benefit not currently offered or capable of being offered by APRA would be made available. It states that a multiplicity of societies would only be likely to lead to increased administrative costs, reduced returns to members and higher costs to users.

Ensuring that Australia receives export earnings which would otherwise be irrecoverable

5.1.52 Under a non-exclusive licence regime, persons who take assignments of performing rights from an Australian composer and who do not wish to allow the composer to obtain at least 50 per cent of the licence fees generated from the licensing of performing rights, would not be accepted as members of APRA or any other collecting society operating under CISAC rules. APRA submits that if the assignee cannot monitor performances, grant licences and recover licence fees, it is most unlikely that any performing right licence fees would be collected. Therefore earnings generated overseas would not be returned to Australia.

Other points

5.1.53 APRA submits that it is not accurate to say that all APRA needs to achieve the benefits flowing from its activities is a non-exclusive licence from members which allows APRA to on-licence members' work, and that this would be more competitive. APRA says such an argument fails to take into account the true nature and effect of members' assignments, the purposes for which assignment is required, and the public benefits which flow from the assignments.

5.1.54 APRA refers to comments made in the Simpson Report to the effect that demanding an assignment of rights rather than a licence is not anti-competitive per se.[9] What is important is how easy it is for the owner of the right to recover ownership or control.

5.1.55 APRA submits that provided there is no undue restriction on a member's ability to withdraw from APRA, there is no alternative to the assignment of members' rights to APRA which is less competitively restrictive and offers the same benefits as the APRA scheme.

5.1.56 In respect of the current Article 9, APRA says that as a matter of practice, the board has not insisted on the three year notice requirement and invariably accepts a shorter period if sought. Consequently, the assignment does not inhibit creators and other music owners from licensing any performing right directly or through another society, whether to a particular work or to the whole body of their works. Further, the power of users to acquire the performing rights of works they wish to use is not substantially hindered by the members' assignments. The proposed amendments to Article 9 provide for a reduction in the notice period to six months.

5.1.57 If members were to grant APRA a non-exclusive licence in place of the current assignment, APRA suggests that members would deal direct with users willing to offer a better deal than APRA. If a better deal was not forthcoming, APRA thinks it unlikely that members would licence except through APRA. APRA submits that there is no substantive competitive difference in effect between a non-absolute and revocable assignment and a non-exclusive licence in this context.

5.1.58 APRA points to the US experience where non exclusive licensing is mandatory but, APRA says, the option of direct licensing has not generally been taken up.

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9 Simpson Report, pp 57 and 60–1 para 7.1 and 7.1.2.

5.1.59 In relation to its affiliation agreements with overseas collecting societies, APRA claims they effectively increase APRA's repertoire. The Simpson Report details other benefits of APRA's affiliations in Chapter 19.[10] In the absence of an effective and cost efficient collective administration of copyright, and performing rights in particular, APRA contends that not only would users ignore the rights of individual music owners, but those in control of overseas music would not be willing to participate in the Australian market, reducing the range of available musical works.

5.1.60 APRA says the input arrangements allow it to offer a series of comprehensive blanket licences and other licence schemes where circumstances demand, at a low cost. Composers are guaranteed a reasonable return and the listening and viewing public of Australia has access to the widest possible range of copyright music.

5.1.61 APRA submits that it follows from the above that the members' assignments are not unduly restrictive and do not lessen competition, where competition is feasible. In addition, they confer the stated public benefits.

APRA's output arrangements — competitive impact and public benefits

5.1.62 APRA does not believe that its output arrangements require authorisation because it interprets section 51(3) of the TPA as making it clear that the Commonwealth Parliament intends terms and conditions of copyright licensing not to be regulated under the TPA provided the terms and conditions relate to the work or works in which copyright subsists. However, as FACTS has alleged in the Federal Court that APRA's output arrangements breach the Trade Practices Act, APRA seeks authorisation.

5.1.63 APRA submits that its output arrangements do not have the effect of lessening competition because of the Copyright Tribunal's jurisdiction to deal with all disputes concerning such arrangements. APRA contends that as any dissatisfied licensee may apply to the Tribunal for a determination of whether its proposed licence terms, including price, are reasonable, or whether existing licence terms are unreasonable, the terms of licences are determined or approved by the Tribunal. APRA says that in this regard Parliament has decided that competition should not be the ultimate regulator of the appropriate fees and conditions for copyright licences.

5.1.64 APRA points out that it generally negotiates new licence schemes with bodies representing licensees, for example, FACTS. If agreement cannot be reached, either APRA, a licensee or the representative organisation may apply to the Copyright Tribunal.

5.1.65 APRA and its affiliates grant non-exclusive blanket licences to users. According to APRA this enables the widest possible dissemination of each society's musical works and is necessary because it is impossible to predict which works will be used and the timing of such usage. APRA makes the following points:

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10 Simpson Report, pp 170–1 para 19.2.2, pp 172–3 para 19.3.2, pp 175 para 19.4.2 and 19.6.2, pp 176 para 19.2.6, pp 179 para 19.8.2, p 179 para 19.9.2 and pp 180 para 19.10.2.

It should be noted that the Simpson Report also recognised the problems inherent in the principle of '*national treatment*', and recommended further review of the rules of collecting societies as they relate to relationships with foreign societies and foreign collecting societies as they relate to relationships with Australian societies.

- APRA cannot prevent usage of its works;
- APRA's only redress against infringing users is to seek an injunction as it does not have the power of seizure over goods embodying its musical works;
- the works that are used throughout the life of the licence will in all likelihood not be in existence on the date the licence is granted;
- many of the mediums by which musical works are performed are mediums of mass communication (television, radio) in which vast numbers of musical works are performed. The labour and costs incurred in licensing this usage on an individual works basis would not be practical;
- many users, such as hoteliers using televisions and radios, do not and will never know precisely which works they are using and so require instant access to the worldwide repertoire of musical works; and
- mass methods of communication such as television and radio mean that the number of users is potentially the entire population of each country and region. By their nature non-exclusive performing rights are a product of infinite supply as consumption by one user does not diminish the amount available for other users and the usage can occur simultaneously, not only in Australia but around the world.

5.1.66 In arguing that its output arrangements do not involve any significant lessening of competition not outweighed by attendant public benefits the following reasons are given by APRA:

- the arrangements provide guaranteed, easy, efficient and cheap access by the music user to virtually all music publicly performed in Australia;
- the Copyright Tribunal's supervision and APRA's Distribution Rules ensure reasonable and fair compensation to the composer and reasonable and fair charges to the music users;
- music is compensated on the basis of frequency of use and is paid for by the performer of the music;
- they eliminate the users' costs of negotiating with various individual music owners, they provide a user with flexibility of choice and they eliminate the threat of infringement;
- they provide protection to composers from exploitation by major music users who have monopsony power in negotiation;
- by granting access to virtually all copyright works in the world and allowing a return on creativity based on type and amount of performance, they tend to increase program diversity and encourage the writing of new music;
- the arrangements do not eliminate price competition between individual compositions because the blanket licence is a different product which is more than

a right to individual compositions. There is no substantial price competition anyway, as the choice of which work is used is usually not determined by price;

- they lead to reduced transaction costs (including identification costs, information costs and transaction time costs) and reduced copyright enforcement costs;
- as the user's licence fee is measured by a percentage of gross revenue, and is based roughly on the size of the audience actually listening to or viewing the performance, performing rights are actually valued on the basis of the benefits conferred;
- APRA's output arrangements offer instant access to new and currently popular compositions in addition to all other works whether or not their performance was anticipated;
- they allow copyright owners to spread identical transaction and enforcement costs over a large group for the mutual benefit of owners and users, under the Copyright Tribunal's supervision;
- they enable music owners to protect and enforce rights which might otherwise be difficult or impossible;
- the Copyright Tribunal has approved some of APRA's licence schemes and they reflect a system which has arisen as the most useful means of ensuring widespread access to music at the same time as ensuring that copyright royalties are not avoided. If the Tribunal could be persuaded that alternatives to blanket licences were reasonable, APRA would be obliged to provide those other licences;
- as a matter of economic principle, APRA submits that its output arrangements are consistent with Part IV of the TPA; and
- the blanket licence is not 'a naked restraint of trade ... but rather accompanies the integration of sales, monitoring and enforcement against unauthorised copyright use'.[11]

5.1.67 APRA quotes a decision of the European Court of Justice involving the rules of SACEM, the French collecting society, in support of blanket licences. The Court determined that it was not an illegal restraint of trade for SACEM to refuse to grant a licence for a portion only of its repertoire if such a form of licensing would increase the costs of managing and monitoring the use of copyright works.[12]

5.1.68 The Court said that the refusal by a copyright collecting society to grant such a licence does not restrict competition unless such a licence could entirely safeguard the interests of members without increasing the costs of managing contracts and monitoring the use of protected musical works. Further, the Court said that a licence fee based on a percentage of revenue could only be attacked if other methods of calculating fees could also provide the protection of members' interests without increasing administrative costs.

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11 BMI V CBS 441 US 1 at 20.

12 Ministere Public v Tournier Case 395/87 FSR [1991] at 474—5.

APRA's distribution arrangements — competitive impact and public benefits

5.1.69 APRA believes the following points to be significant in relation to competition and public benefit.

- APRA deducts 1.25 per cent of the distributable revenue payable to members for the purposes of promoting the use and recognition of music written or controlled by APRA's members. This is a substantial public benefit.

- Generally shares in the musical works are allocated so that the publisher receives 50 per cent and the composer and lyricist (and any other person involved in the process of creation, for example an arranger of the music) share the other 50 per cent. There is an overriding rule that notwithstanding any contractual variation, the shares of the composer, lyricist etc. cannot total less than 50 per cent.

- The distributable revenue is divided into the following separate distribution pools depending on the source of the revenue:

  — each Australian and New Zealand commercial TV network;
  — commercial TV stations unaffiliated with a network;
  — ABC;
  — SBS TV;
  — Australian commercial radio:
  — New Zealand private commercial radio;
  — Radio New Zealand;
  — New Zealand Maori radio;
  — ABC radio;
  — SBS radio;
  — Australian public radio;
  — promoted concerts;
  — ABC concerts;
  — New Zealand symphonic concerts;
  — live performances other than concerts under xi, xii, xiii;
  — dance clubs and discotheques;
  — cinema exhibitors;
  — airlines; and
  — such other sources of distributable revenue which in the board's view are of sufficient importance and value to justify the creation of a separate pool.

5.1.70 Revenue received in respect of public performances for which no program returns are available is apportioned to those pools which, in the board's view, most accurately reflect the music performed. Music played in shops and fitness centres, for example, fall into this category.

5.1.71 APRA contends that under the Distribution Rules music performance is compensated on the basis of frequency, type and length of use. In addition, the system values the performing rights on the basis of the benefits derived by the person performing the works. This benefit is usually directly proportional to the number of persons viewing or listening to the works in the circumstances. For these reasons the rules provide that distributions received by members reflect the demand for each member's works by users

in relation to each distribution pool, which in turn reflects the popularity of, or demand for, the work among members of the listening and viewing public.

5.1.72 APRA argues that this is a satisfactory result as it encourages all the benefits of a competitive environment without the disadvantages inherent in abolishing collective administration of performing rights which are manifest in this case.

5.1.73 In conclusion, APRA claims its Distribution Rules do not have a negative impact on competition in the music performing right market. Further, they say their impact is beneficial as they reflect a competitive outcome as far as composers, songwriters and publishers are concerned.

APRA's structure and activities — competitive impact and public benefits

5.1.74 APRA asserts that when it comes to considering the consumer aspects of the public benefits of APRA's structure and operations, the relevant effects are those on composers and publishers on the one hand, and persons who listen to or watch music on the other.

5.1.75 APRA submits that the benefits that flow from its structure and activities fall into the following categories:

- efficiencies and benefits in the licensing of performing rights and monitoring of performances;
- efficiencies in the enforcement of performing rights;
- the establishment of a system which ensures adequate protection of performing rights and reasonable remuneration to music creators and owners;
- enhanced availability of, and access to, copyright works for all Australians;
- the encouragement of creative and musical composition in Australia;
- the Australian music industry is able to make a significant contribution to export earnings and achieves a significant substitution of domestic music for imported music;
- the encouragement of an environment where the laws of the Commonwealth Parliament and, in particular, the Act, are respected and upheld; and
- the benefits of competition are achieved in any event.

Efficiencies and benefits in the licensing of performing rights and monitoring of performances

5.1.76 APRA says that the benefits and efficiencies inherent in the APRA system depend on the peculiar nature of the product and are achieved because:

- music users only have to deal with one organisation;
- music owners only have to deal with one organisation and not each music user or groups of music users;

- the Copyright Tribunal only has to make one determination in relation to each type of proposed licence scheme;

- there is one body establishing and recording entitlements, recording and verifying music usage, dealing with overseas collecting societies and music users, so that duplication of records and efforts are eliminated;

- difficulties for music users in establishing who is entitled to the performing rights and the difficulties for music users in contacting and obtaining a licence from the relevant performing rights holders are all eliminated; and

- the possibility of duplicate licences in respect of the same works being obtained by music users are eliminated.

5.1.77 APRA submits that the Simpson Report provides a useful statement of the efficiencies which are derived from collecting societies.[13]

Efficiencies in the enforcement of performing rights

5.1.78 APRA submits that its input arrangements involve substantial efficiencies and benefits in that:

- only one body incurs the costs of the monitoring necessary for detecting infringements (which also enables use of licensed works to be assessed for distributions) and, as a result, these costs are not needlessly duplicated;

- only one body incurs the costs of bringing infringement proceedings and as a result a consistent approach to enforcement is adopted and the enforcement costs are not needlessly duplicated;

- the costs can be spread over a very large number of works so that the maximum benefit of those infringement proceedings which are instituted can be extracted in the interests of all members;

- the costs of enforcement proceedings are reduced because APRA has title to sue and no other party needs to be joined. If a non-exclusive licence only were given to APRA, the costs of enforcement would be substantially increased.

Establishment of a system which ensures adequate protection of performing rights and reasonable remuneration to music creators and owners

5.1.79 APRA says that without a system of collective administration, composers and songwriters would be exposed to dramatic exploitation by the major publishers, commercial television and radio stations, film and television producers and other corporations seeking to maximise their profits from using composers' and songwriters' works. They submit that if direct licensing was an alternative, those seeking to maximise their profits by exploiting composers' and songwriters' works would require composers and songwriters to assign all of their performing rights in return for a flat fee. This would

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13 Simpson Report, pp7–15 and pp 258–9.

be acceptable if composers and songwriters had the practical option of retaining the performing rights, if the parties had a comparable degree of bargaining power and if they had a comparable degree of knowledge to be able to assess the likelihood of the popular success of the work. This is unlikely to ever be the case.

Enhanced availability of and access to copyright works for all Australians and the encouragement of creative musical composition in Australia

5.1.80 APRA suggests that blanket licences result in the greatest possible range of works being made available. If there was more than one repertoire owner, it would be unlikely that the repertoire owners would go to the trouble of making available a complete range of works when by offering a more limited range they could maximise their returns.

5.1.81 Further, a system which encourages musical creativity in Australia by providing an environment which includes a reasonable return for creativity and effort and which protects performing rights means that Australians are likely to have the benefit of new Australian works. Moreover, APRA submits that overseas music creators and their publishers and recording companies will be more likely to have their works broadcast or performed in Australia.

The Australian music industry is able to make a significant contribution to export earnings and achieves a significant substitution of domestic music for imported music

5.1.82 APRA says that in the absence of an adequate system of protecting, licensing and rewarding performing rights, it is likely that composers and songwriters would be encouraged to leave Australia and operate from a country that has such a system. In addition, incentive to create works would be reduced.

The laws of the Commonwealth Parliament, and in particular the Copyright Act, are respected and upheld

5.1.83 APRA says that unless there is a system which makes it financially and practically possible to bring infringement proceedings against persons who perform, broadcast or use copyright works, music users will flout the law. This is not in the public interest. The output arrangements help to avoid this because of the comprehensive coverage of the blanket licences and the resulting limited scope for licensees to infringe.

The benefits of competition are achieved

5.1.84 APRA says that benefits such as encouragement of innovation, proper allocation of resources to meet demand, and the encouragement of investment, result from the operation of its system because the price and revenue rewards that usually flow in a competitive market from greater demand are reproduced by the system.

5.2 APRA's submissions dated 17 May 1996 in relation to the original applications

5.2.1 APRA rejects the suggestion that the FACTS proposal (that authorisation should only be granted on certain conditions) would give rise to a more competitive environment, because they submit that FACTS and its members have monopsony power. They say that there is nothing to suggest, in such an environment, there would be any more works available and APRA doubts whether composers and songwriters would receive appropriate reward for their creativity. They say the FACTS alternative would continue monopsonistic power on the buying side which could impose outcomes on a fragmented selling side.

Market

5.2.2 APRA says that it has a monopoly in relation to supply of performing rights in Australia and the Copyright Tribunal was established to ensure that APRA cannot charge unreasonably high licence fees, impose unreasonable licence conditions or withhold supply on unreasonable terms. This is true, whether the market is defined widely as the market for acquisition and supply of the performing right in relation to musical and associated literary works, or as a set of markets broken up according to the different rights identified in subsection 31(1)(a)(iii), (iv) and (v) of the Act or some more minute division of those rights.

5.2.3 APRA submits that in the circumstances not a great deal will turn on determining which of the market definitions propounded is accepted. Some characteristics of the market do not depend on which market definition is adopted. APRA is prepared to adopt the market for supply and/or acquisition of the right to broadcast musical works on commercial television as the relevant market.

Overseas comparisons

5.2.4 APRA says that in order to determine whether the FACTS proposal that the US model for performing rights administration is to be preferred, it is important to:

- note the structure and limitations affecting the US television industry;
- note the differences between the US television industry and the industry in Australia;
- examine the differential treatment of the various US performing right organisations and the resulting market for purchasers/users which has developed;
- consider whether the US method of administration and regulation of administration of performing rights is effective;
- note the differences between the US performing right system and that in Australia;
- consider whether the US method of administration and regulation of copyright societies is superior to that operating in Australia;