Australian Competition & Consumer Commission

Determination

Applications for Revocation and Substitution

& Applications for Authorisation

lodged by

Australasian Performing Right Association Limited

in respect of

the standard arrangements for the acquisition and licensing of the performing rights in its music repertoire

Date: 8 March 2006

Authorisation nos. A90918, A90919, A90921, A90922, A90924, A90925, A90944 & A90945

Public Register no.
C2004/764

Commissioners: Samuel, Sylvan, King, Martin, McNeill, Smith, Willett

Executive Summary

The ACCC grants authorisation to APRA's arrangements for four years.

On 2 June 2004, the Australasian Performing Right Association Limited (APRA) lodged applications for revocation and substitution A90918; A90919; A90921; A90922; A90924; and A90925 with the Australian Competition and Consumer Commission (ACCC). On 23 November 2004, APRA lodged two further applications for authorisation, A90944 and A90945. On 27 January 2006, APRA lodged amendments to its applications for revocation and substitution.

APRA is a non-profit, voluntary collection society which provides a centralised means for licensing performing rights of musical works in Australia and the distribution of licence fee revenue to copyright owners. The APRA repertoire exceeds 2.8 million musical works, of which approximately 800,000 works have been contributed by Australian and New Zealand composers.

In 1997 APRA sought authorisation of its input, output, distribution and overseas arrangements (as described in greater detail below). In January 1998 the ACCC denied authorisation to APRA's input, output and distribution arrangements. Authorisation was granted to APRA's overseas arrangements until 31 December 2002. In February 1998 APRA sought review by the Australian Competition Tribunal (the Competition Tribunal) of the ACCC's decision in relation to its input, output and distribution arrangements. On 20 July 2000, the Competition Tribunal granted conditional authorisation to these arrangements until 30 June 2004.

In lodging its 2004 applications APRA has sought to extend the immunity conferred by the Competition Tribunal and the ACCC so as to allow it to continue to give effect to its input, output, distribution and overseas arrangements. As the immunity conferred by the Competition Tribunal was due to expire on 30 June 2004, APRA sought to 'revoke' its existing authorisations and 'substitute' new authorisations on the same terms for a further period.[1] In broad terms APRA is seeking 're-authorisation' of its:

- input arrangements – being the assignment of performing rights by members to APRA and the terms upon which membership of APRA is granted;
- output arrangements – being the licensing arrangements between APRA and the users of musical works;
- distribution arrangements – being the arrangements pursuant to which APRA distributes to its members the fees that it has collected from licensees/users; and
- overseas arrangements – being the reciprocal arrangements between APRA and overseas collecting societies pursuant to which each grants the other the right to licence works in their repertoires.

In respect of its overseas arrangements, authorisation for these arrangements lapsed prior to APRA seeking re-authorisation. Consequently, APRA was not able to seek revocation and

[1] On 30 June 2004, the ACCC granted interim authorisation to APRA's applications for revocation and substitution of its input, output and distribution arrangements so as to protect the arrangements from action under the *Trade Practices Act* 1974 while the ACCC considered the merits of the substantive applications.

substitution of these arrangements. APRA has therefore lodged fresh applications for authorisation of these arrangements on the same terms as original authorised by the ACCC.

By virtue of the arrangements for which re-authorisation is sought, APRA licences public performing rights within Australia for virtually the entire world wide repertoire of musical works. Public performance of a musical work includes, for example, sound broadcast of the work via radio, television broadcast of the work, either directly or when the work is embedded in a program or advertisement, performance of works embedded in film exhibitions and live performance of the work. Similarly, causing works to be heard in public, for example in pubs, clubs, cafes, gymnasiums and workplaces, either directly, for example by playing a musical recording containing the work, or indirectly, for example where works are embedded in television or radio broadcasts shown or heard in these establishments, also constitutes public performance of the work for which a royalty to the copyright owner is payable.

Users wishing to perform music in public usually obtain the right to perform the music by obtaining a performing rights licence from APRA. Performing rights have generally been made available by APRA by means of non-exclusive blanket licences which give the user a performing rights licence in respect of its entire repertoire.

ACCC assessment

APRA administration within Australia of performing rights in respect of virtually the entire world wide repertoire of musical works generates significant public benefits.

It is far more efficient for APRA to administer performing rights than it would be for a number of competing societies to do so. Cost to composers in administering performing rights and monitoring use of works are reduced. Similarly, users' costs are reduced as they enjoy unfetted access to virtually any work in the world musical repertoire through a single performing rights licence. Although, such unfetted access is of far greater benefit to users who are not in a position to preselect all the music they wish to buy, or whose use of musical works is spontaneous and unpredictable, than to users whose use is predictable and planned and known well in advance.

APRA's arrangements also result in significant negotiation cost savings for both its members and the overwhelming majority of users as both members and music users only have to deal with one organisation.

APRA's arrangements, and in particular its grant of blanket licences, also generate significant public benefits through containing enforcement costs, as there would be greater incidents of copyright infringement, and associated costs of enforcing copyright, if different composers rights were administered by different collection societies.

By reducing incidents of infringement of copyright, APRA's arrangements also protect incentives for the creation of new works more effectively than would otherwise be the case.

In addition, significant costs would be incurred in the transition to an alternative system or systems of performing rights administration if APRA was to discontinue its present arrangements.

However, these benefits of APRA's arrangements, while significant, also come at considerable cost.

APRA has a virtual monopoly in respect of performance rights licences in Australia. Its input and overseas arrangements significantly limit any realistic prospect of music composers and users dealing directly in respect of performing rights in most instances. By virtue of its input arrangements, APRA is essentially a monopoly supplier of performing rights licences whose membership rules prevent 'cheating' in the form of direct dealing between music composers and users. Similarly, APRA's output arrangements, and in particular its propensity to generally only offer users blanket licences, eliminates incentives for music composers and users to negotiate performing rights licences other than through it.

This concentration of members' rights exclusively with APRA means that APRA would be able to set prices for access to its repertoire without consideration as to what the economically efficient price of those rights would be. Indeed, unconstrained, music users would be forced to deal with APRA on whatever terms it saw fit, including in respect of licence fees and types of licences offered.

APRA is constrained, to some extent, in its exercise of its monopoly power by the Australian Copyright Tribunal (Copyright Tribunal) which is empowered to determine the 'reasonableness' of licence terms and conditions. However, while the Copyright Tribunal may have regard to what the efficient price for performing rights licences would be, it is not bound by these principles in determining reasonableness. In addition, seeking recourse to the Copyright Tribunal is generally a costly and time consuming process, limiting its utility to users and consequently, the extent to which it constrains APRA's exercise of its market power.

Similarly, while APRA's expert determination process provides a relatively quick and inexpensive means by which disputes between APRA, and particularly smaller users can be resolved, its utility, and consequently, the constraint in places on APRA, is also limited.

While APRA has amended its applications since the release of the ACCC's draft determination to introduce greater flexibility to its license back provisions, the utility of these provisions, as amended, in facilitating direct dealing between music users and rights holders, is still very limited.

In addition, APRA has stated in response to issues raised in the draft determination that it intends to actively explore alternatives to blanket licenses with interested user groups. However, the extent to which, if such alternatives are developed, this is likely to result in greater direct dealing between music users and composers, thereby imposing greater competitive constraints on APRA, is also limited.

Therefore, while the Copyright Tribunal and expert determination process, together with the potential development of alternatives to traditional blanket licenses, constrain APRA's ability to exploit its monopoly to some extent, they do not provide such a constraint that APRA is forced to offer performance rights licences on terms which accord, or are close to, the efficient price for public performance of its repertoire. Nor is APRA constrained, in respect of users who wish to negotiate some performing rights directly at source, to the extent that it is forced to offer licences that accommodate direct dealing between music composers and users.

However, it is not clear that, absent APRA's arrangements – that is, where a number of collection societies each managed part of APRA's existing repertoire – that the outcome would be prices and/or other licence terms and conditions which more closely accorded with the efficient price for performing rights for each category of user. For users where different bundles of works are not close substitutes (i.e. where a user requires access to a large part of APRA's

existing repertoire such that different works are complimentary goods) there would, at best, be limited price competition between collection societies. In contrast, for users where different bundles of works are close substitutes, there may be significant price competition between societies.

However, in respect of most users, it is not clear, based on the uncertainty as to how the market would react if a number of collecting societies each licensed performing rights in respect of limited repertoires of works, that the outcome would be prices and/or other licence terms and conditions which more closely accorded with the efficient price for performing rights than is the case under APRA's arrangements.

Consequently, while the ACCC considers that APRA's arrangements generate significant public detriment, the level of public detriment generated by APRA's arrangements relative to the situation which would prevail absent its arrangements is less clear.

This is not to suggest that modifications could not be made to APRA's existing arrangements which would act as a competitive constraint on APRA in its dealing with some users. For example, APRA's blanket licensing arrangements could be modified to accommodate direct dealing between music composers and users. In particular, the ability for users to obtain adjustments to blanket licence fees roughly proportional to the value of works used for which the user had negotiated performing rights directly, would provide incentives for direct dealing between music owners and users. Even if rarely used, this would provide a significant competitive constraint on APRA in setting the terms and conditions of its licence fees for those users where direct dealing would be an otherwise practical alternative.

In this respect, the ACCC is encouraged by APRA's stated preparedness, in response to the draft determination, to actively explore alternatives to blanket licences with interested music users. However, it is too early to assess how effective any such alternatives, if developed, will be. Further, instances where direct dealing is likely to be a cost effective alternative to APRA's blanket licenses are limited. In addition, even in these instances, the utility of modified blanket licenses is likely to be restricted to those limited classes of users whose use of musical works is, by and large, predictable and planned.

Some interested parties have submitted that any authorisation granted by the ACCC should be subject to conditions requiring that APRA offer alternatives to its blanket licensing arrangements to accommodate direct dealing between music users and rights holders.

However, it is not for the ACCC to determine appropriate licence fees, or other licence terms and conditions, for public performance of APRA's repertoire in respect of each user. This is a matter for negotiation between the parties, or, failing that, determination by the Copyright Tribunal or through APRA's alternative dispute resolution process. In this respect, the ACCC notes that the Copyright Tribunal has the jurisdiction to require that APRA grant any user a licence on such terms as it considers reasonable, including, for example, the granting of a blanket licence for access to APRA's repertoire with provision for a discount on the licence fee to accommodate direct dealing.

Although complaints have been made to the ACCC through its public consultation process in respect of APRA's applications that APRA refuses to consider offering such licences, to date, no party has sought to argue before the Copyright Tribunal that it should be granted a licence on such terms.

A general condition of authorisation broadly requiring APRA to, for example, offer alternatives to blanket licenses to accommodate direct dealing at the request of any user, as suggested by some interested parties, would be of little practical utility. At one extreme, such a condition could be met by any token offer of an alternative licence by APRA. On the other hand, a condition requiring, for example, that APRA offer 'reasonable alternatives' would leave the extent to which any offer made by APRA was in compliance with such a condition subject to a great deal of uncertainty. As noted, it is clearly the jurisdiction of the Copyright Tribunal, which has been established explicitly for this purpose, to determine the reasonableness of licence schemes offered in the event of a dispute between a music user and APRA.

The ACCC would therefore encourage interested music users to explore alternatives to traditional blanket licenses with APRA. Similarly, in the event that such negotiations are unsuccessful, the ACCC would also encourage the Copyright Tribunal to consider the appropriateness of modified blanket licences for those users for whom there is a realistic possibility of sourcing performing rights directly from composers, should users express a preference for such licences in proceedings before it. The ACCC would be concerned if genuine user preferences for provision of modified blanket licences to accommodate direct dealing were not able to be accommodated in appropriate circumstances, in particular by APRA in the first instance, or failing that, by the Copyright Tribunal. Were this to prove to be the case, this would significantly increase the public detriment generated by APRA's arrangements.

Balance of public benefits and public detriment

Overall, given the uncertainty about how the market would react absent APRA's arrangements, the ability of the Copyright Tribunal to the facilitate direct dealing between music creators and users in some circumstances under APRA's existing arrangements, and the significant public benefits generated by APRA's arrangements, the ACCC considers that APRA's arrangements are likely to result in a public benefit that will outweigh any public detriment. Accordingly, the ACCC grants authorisation to APRA's arrangements for four years.

The ACCC notes the submissions of some interested parties that APRA's arrangements should only be authorised conditional on it being required to modify its input and output arrangements to facilitate greater directly dealing between music users and rights holders. The ACCC has noted specific concerns with such conditions.

Interim authorisation

At the time of lodging its applications, APRA requested that the ACCC grant interim authorisation on the same terms as authorisation was originally granted by the Competition Tribunal in July 2000 for its input, output and distribution arrangements in order to allow these arrangements to continue while the ACCC considered the merits of the substantive applications.

On 30 June 2004, the ACCC granted interim authorisation to APRA's input, output and distribution arrangements until a draft determination was issued, at which time the matter would be reconsidered. At the time of issuing its draft determination, the ACCC extended interim authorisation until the date the ACCC's final determination comes into effect, or if circumstances warrant revocation or amendment of interim authorisation at an earlier stage, until such date as interim authorisation is revoked or amended.

List of Abbreviations

ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
AMCOS	Australasian Mechanical Copyright Owners Society
APRA	Australasian Performing Rights Association
ARIA	Australian Record Industry Association
ASCAP	American Society of Composers, Authors and Publishers
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
CCI	Creative Commons International
Cinema Operators	Village Cinemas Australia, The Greater Union Organisation, Birch, Carroll & Coyle, Reading Entertainment Australia, Australian Multiplex Cinemas, Hoyts Cinemas, Cinema Operators Association of Australia and Australian Entertainment Industry Association – referred to throughout this determination as the 'Cinema Operators.'
CISAC	The International Confederation of Societies, Authors and Composers
Competition Tribunal	The Australian Competition Tribunal
Copyright Tribunal	The Australian Copyright Tribunal
Copyright Act	*The Copyright Act 1968*
CRA	Commercial Radio Australia
DRM	Digital Rights Management
Free TV	Free TV Australia[2]
MMC	Mass Media Communications
Music Council	The Music Council of Australia
Performance rights/performing rights	In this determination, the rights that are assigned by members to APRA including public performance rights, live public performance rights and broadcast rights but not including grand rights.

[2] Free TV's membership comprises the licensees of all commercial television broadcasting services in Australia.

PPCA	Phonographic Performance Company of Australia
PRO	Performance Rights Organisation
SOCAN	Society of Composers, Authors and Music Publishers of Canada
TRIPS	Trade Related Aspects of Intellectual Property Rights
TPA	*Trade Practices Act 1974*

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1. Introduction

Authorisations

1.1 The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act* 1974 (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

1.2 The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

1.3 Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

1.4 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

1.5 Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

1.6 The TPA requires that the ACCC then issue a draft determination in writing proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.

1.7 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.

1.8 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

1.9 Under section 91C of the TPA, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person to whom the authorisation was granted, or another person on behalf of such a person. The ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (outlined at paragraphs 1.3 – 1.8).

Australasian Performing Right Association Limited Applications

1.10 On 2 June 2004, APRA lodged applications for revocation and substitution A90918; A90919; A90921; A90922; A90924; and A90925 with the ACCC. On 23 November 2004, APRA lodged two further applications for authorisation, A90944 and A90945, relating to its arrangements with international affiliate societies (the overseas arrangements).

1.11 APRA's lodged amendments to its applications for revocation and substitution on 27 January 2006. These amendments are discussed at paragraphs 3.7 of this determination.

1.12 APRA was established in 1926 and is a non-profit association of authors, composers and music publishers. APRA administers the rights of public performance, broadcasting and transmission to subscribers to a diffusion service which subsist in the musical works (and in any accompanying words, protected as literary works) written or published by members or by the members of affiliated societies.[3] APRA members assign these rights to it on an exclusive basis and APRA in turn licences the use of the musical works in its repertoire to music users and collects and distributes licence fees.

1.13 APRA is the largest collecting society in Australia – it has over 36,000 direct members in Australia and New Zealand (being composers, songwriters and publishers); nearly 2 million indirect members (being international members under reciprocal and bilateral agreements); licence agreements with more than 65,000 music users; and a musical repertoire of over 2.9 million works (including international works).

1.14 In 1995 and 1997 APRA sought authorisation of its input, output, distribution and overseas arrangements (see paragraphs 1.27 to 1.37 below). In January 1998 the ACCC denied authorisation to APRA's input, output and distribution arrangements. Authorisation was granted to the overseas arrangements until 31 December 2002. In February 1998 APRA sought review by the Australian Competition Tribunal (the Competition Tribunal) of the ACCC's decision in relation to its input, output and distribution arrangements. In July 2000 the Competition Tribunal granted conditional authorisation to these arrangements until 30 June 2004.

1.15 In lodging the 2004 applications APRA has sought to extend the immunity conferred by the Competition Tribunal and the ACCC so as to allow it to continue to give effect to its input, output, distribution and overseas arrangements. As the immunity conferred by the Competition Tribunal was due to expire on 30 June 2004, APRA has sought to 'revoke' its existing authorisations and 'substitute' new authorisations on the same terms for a further period. In broad terms APRA is seeking the 're-authorisation' of its:

- input arrangements – being the assignment of performing rights by members to APRA and the terms upon which membership of APRA is granted;

[3] APRA does not however administer 'grand rights', being:
- the right to perform or broadcast a dramatico-musical work, an oratorio or long choral work, or a work in association with ballet;
- the right to perform a work in a dramatic context.

- output arrangements – being the licensing arrangements between APRA and the users of musical works;
- distribution arrangements – being the arrangements pursuant to which APRA distributes to its members the fees that it has collected from licensees/users; and
- overseas arrangements – being the reciprocal arrangements between APRA and overseas collecting societies pursuant to which each grants the other the right to licence works in their repertoires.

1.16 In respect of its overseas arrangements, authorisation for these arrangements lapsed prior to APRA seeking re-authorisation. Consequently, APRA was not able to seek revocation and substitution of these arrangements. APRA has therefore lodged fresh applications for authorisation of these arrangements on the same terms as original authorised by the ACCC.

1.17 For convenience, APRA's applications for revocation and substitution and their applications for authorisation are collectively referred to as APRA's applications for authorisation throughout this determination.

1.18 APRA's applications are set out in more detail in Chapter 3 of this determination.

Interim authorisation

1.19 At the time of lodging its applications, APRA requested that the ACCC grant interim authorisation upon the same terms as granted by the Competition Tribunal on 20 July 2000 for its input, output and distribution arrangements. APRA submitted that interim authorisation would allow it to continue to engage in acquisition, licensing and distribution arrangements while the ACCC considered the merits of the substantive applications.

1.20 In support of its request for interim authorisation APRA submitted that:

- the grant of interim authorisation on the same terms of the existing authorisation would ensure that the public continues to enjoy the benefits conferred under the existing authorisations;
- interim authorisation was necessary to ensure that APRA could continue to fulfil its functions. In the absence of interim authorisation APRA considered that it would be required to:
  - revoke or suspend all assignments of copyright to it from its more than 36,000 members;
  - terminate or suspend its agreements with overseas collecting societies in other jurisdictions requiring it to administer and collect royalties; and
  - terminate or suspend its agreements with more than 65,000 licensees permitting them to perform or communicate APRA's repertoire of more than 2.9 million works.

1.21 APRA submitted that these actions would mean that its 36,000 members and 65,000 licensees would need to enter into individual arrangements to cover the 2.9 million works currently contained in the APRA repertoire. APRA submitted that this would lead

to increased negotiation costs and increased copyright infringement, leading to a substantial cost to the public.

1.22 The ACCC sought submissions from approximately 115 potentially interested parties in relation to both the substantive applications and APRA's request for interim authorisation. The ACCC received a small number of submissions in relation to the request for interim authorisation. These submissions supported the need for ongoing immunity while the ACCC considered the substantive applications.

1.23 On 30 June 2004, the ACCC granted interim authorisation to APRA's input, output and distribution arrangements. In making this decision the ACCC considered that maintenance of the existing arrangements was preferable while it considered the merits of the applications. The ACCC further noted that as the conduct had been operating for some time, denial of interim authorisation may cause marketplace disruption. The ACCC indicated that interim authorisation would continue until a draft determination was issued, at which time the matter would be reconsidered.

Draft determination

1.24 On 31 August 2005, the ACCC issued a draft determination proposing to re-authorise APRA's arrangements for a further four years.

1.25 At the time of issuing its draft determination the ACCC extended interim authorisation until the date the ACCC's final determination comes into effect, or if circumstances warrant revocation or amendment of interim authorisation at an earlier stage, until such date as interim authorisation is revoked or amended.

1.26 On 16 September 2005, Cinema Operators requested a pre-decision conference in relation to the draft determination. The pre-decision conference was held on 13 October 2005. A copy of the minutes of the pre-decision conference is available on the ACCC's public register. Submissions made at the pre-decision conference are also summarised at Appendix A to this determination.

Previous authorisations

The 1995 applications

1.27 On 17 November 1995, APRA lodged a number of applications for authorisation and notification (A30166 to A30171 and N30714) in relation to its collective administration of performing rights for musical and associated literary works in Australia.

1.28 On 16 October 1996, the ACCC issued a draft determination proposing to grant authorisation to some of the APRA arrangements (being certain input and output arrangements relating to public performance rights) on a conditional basis. The ACCC otherwise proposed to deny authorisation to APRA's arrangements.

1.29 In its 1996 draft determination the ACCC considered that:

- members of APRA should not be required to assign to APRA live public performance rights and broadcast rights in all works (present and future) as a requirement of membership;

- members should be entitled to 'opt out' of the APRA system in respect of some or all live performance rights and broadcast rights for some or all works whilst remaining members of APRA;

- APRA's licence fees should take account of decisions by members to 'opt out' in respect of some or all live performance rights or broadcast rights in some or all works; and

- notice for withdrawal of membership for all members should be reduced from 3 years to 6 months.

1.30 The ACCC noted that, in light of the fact that the APRA arrangements gave rise to the important public benefit of countervailing power, it was prepared to accept that industry participants may wish to develop a mechanism that protected composers in negotiations with powerful users such as commercial television broadcasters.

1.31 The ACCC did not reach a final view in relation to notification N30714 but noted that it would be further considered in light of any changes that may be made to the APRA arrangements following the draft determination.

The 1997 applications

1.32 In 15 November 1997, APRA withdrew the 1995 applications and lodged fresh applications concerning revised conduct (A30186 to A30191 and notification N30751).

1.33 On 3 December 1997, the ACCC issued a draft determination in respect of the 1997 applications. In its 1997 draft determination the ACCC considered that proposed input, output and distribution arrangements were unlikely to give rise to a net public benefit and accordingly proposed to deny authorisation to the arrangements. In particular, the ACCC considered the proposed reduction in the notice period for termination of membership, the development of alternate licence schemes and the introduction of a dispute resolution mechanism would have limited effect on APRA's market power without the introduction of an effective 'opt out mechanism'. It was the ACCC's view that a suitable opt out arrangement should provide that:

- composers are able to opt out on a work by work basis as well as by category of right or form of utilisation;
- 'opting out' may be by way of either assignment of commissioned works or through licence back;
- blanket licence fees should be adjusted to reflect direct dealing; and
- where commissioned works are assigned to a new owner, the fifty per cent distribution rule should no longer apply.

1.34 The ACCC considered that these features would facilitate the efficient use of direct dealing and would minimise the impact upon APRA's repertoire and costs. The ACCC also considered that such a proposal would encourage the efficient allocation of risk taking through commissioning and assignment of works where appropriate.

1.35 The ACCC further considered that the Australian Copyright Tribunal (the Copyright Tribunal) did not appear to be a sufficiently practicable forum for many users of musical

works and may not have the opportunity to consider competition issues in matters before it, the result being that it did not appear to effectively constrain APRA in the use of its market power.

1.36 The ACCC considered however that the overseas arrangements, subject to a condition regarding termination upon the giving of 6 months notice, were likely to result in a net benefit to the public and proposed to grant authorisation to these arrangements.

1.37 On 14 January 1998, the ACCC released its final determination under which it granted authorisation to APRA's overseas arrangements until 31 December 2002. As proposed by its December 1997 draft determination, the ACCC denied authorisation to APRA's applications in respect of its input, output and distribution agreements. The ACCC further concluded that the notified arrangements were likely to result in a substantial lessening of competition, and further, were not likely to result in a benefit to the public sufficient to outweigh the detriment to the public constituted by the lessening of competition. Accordingly the ACCC revoked the immunity conferred by notification N30751.

The July 2000 determination of the Australian Competition Tribunal

1.38 On 4 February 1998, APRA lodged an application for review of the ACCC's determination in respect of its input, output and distribution arrangements with the Competition Tribunal.

1.39 On 20 July 2000, the Competition Tribunal set aside the ACCC's earlier determination and granted conditional authorisation to the APRA arrangements until 30 June 2004. In its determination the Competition Tribunal noted that the blanket licences in respect of its repertoire granted by APRA provided a cost efficient way for the vast majority of licensees to obtain the lawful right to use virtually the worldwide repertoire of music. The Competition Tribunal considered that the criticisms put to it of the blanket licences were misplaced and further that the blanket licence was an essential device for efficient licensing. The Tribunal noted however that the way in which a fee for a blanket licence should be set, and whether there should be provision for adjustment to reflect actual use of the APRA repertoire, was another question. The Competition Tribunal considered that the introduction of a licence back arrangement (altering the existing input arrangements) would be of little effect if there were not also corresponding changes to the output arrangements (adjustment of licence fees).

1.40 The Competition Tribunal noted that steps had been taken in other jurisdictions to curb the exercise of monopoly power by collecting societies in their dealings with their licensees and that bodies such as the Copyright Tribunal have been established to regulate charges and conditions of licences granted by the relevant society under its output arrangements. The Competition Tribunal noted that whilst the procedures of the Copyright Tribunal had been criticised in the proceedings before it, it nonetheless considered that the Copyright Tribunal provided an effective constraint on APRA's dealings with its major licensees. The Competition Tribunal further noted that the expense and complexity of proceedings before the Copyright Tribunal was an inevitable incident of the nature of the disputes which it has been asked to determine.

1.41 The Competition Tribunal considered however that the Copyright Tribunal's processes and costs implicit to those processes were likely to be disproportionate to the licence fees

payable by small users. The Competition Tribunal considered that there should be a simple and quick procedure for dealing with small disputes and imposed an alternative dispute resolution scheme as a condition of authorisation.

1.42 The Competition Tribunal considered that international arrangements recognised that the exclusivity rule is central to the operation of a collecting society, and further that great caution was called for if that rule is to be modified at all. The Competition Tribunal considered that the risk of harm to the essential structure of APRA if works were to be withheld or withdrawn from the repertoire was too great. The Competition Tribunal considered that a non-exclusive licence back arrangement would carry fewer risks and could be introduced without damaging essential features of the APRA system.

1.43 The Competition Tribunal noted that the practical utility of the licence back scheme, including whether it would even be used, was questionable on the evidence before it. The Tribunal nonetheless considered that the scheme should be implemented to test if and how the change affected competition.

1.44 The Competition Tribunal granted authorisation until 30 June 2004.

2. Background[4]

Copyright

General principles

2.1 'Copyright' is a propriety right that is founded on a person's creative skill and labour. As such, it is a form of intellectual property and is not tangible. Copyright laws, such as the *Copyright Act 1968* (Cth) (Copyright Act) are designed to prevent the unauthorised use by others of a work and to reward the creators of works, thereby encouraging further intellectual creativity and innovation.

2.2 Copyright is made up of a bundle of exclusive economic rights to do certain acts with an original work or other copyright subject-matter. Under the Copyright Act these exclusive rights include:

- the right to reproduce the work in a material form;
- the right to publish the work;
- the right to perform the work in public;
- the right to communicate the work to the public; and
- the right to make an adaptation of the work.

2.3 Copyright owners may exercise any of these rights themselves or may give permission to other people to do so by granting a licence. Copyright owners may grant a licence that is subject to certain conditions, such as the payment of a fee, or royalty or limit the licence as to time, place or purpose. Licences may be 'exclusive' (granting specified rights with a guarantee that those rights will be granted to no other person) or 'non-exclusive', allowing the same work to be licensed by more than one user.

2.4 Copyright owners may also assign their rights to third parties. Such assignment must be in writing and signed by or on behalf of the copyright owner. Under the assignment the assignee (for example APRA) becomes the owner of the rights and may licence use of the work and commence infringement proceedings under the Copyright Act in their own right. The copyright in a work is infringed when any act which the copyright owner (or assignor under an exclusive licence) has the exclusive right to do is done by a person in Australia who is not the copyright owner (or his or her licensee). A copyright owner is entitled to seek redress, for example by way of injunction, or a claim for damages from a person infringing copyright.

2.5 The copyright in each type of work has independent existence – this means that for a compact disc there may be a separate copyright in the lyrics, the composition and

[4] The information contained in this section is sourced from submissions provided by APRA (June 2004); the reports of the House of Representatives Standing Committee on Legal and Constitutional Affairs *Don't stop the music! A report of the inquiry into copyright, music and small business* (May 1998) and *Cracking down on copy cats: enforcement of copyright in Australia* (November 2000); the report of the Intellectual Property and Competition Review Committee *Review of intellectual property legislation under the Competition Principles Agreement* (September 2000); and the report of the Copyright Law Review Committee *Jurisdiction and Procedures of the Copyright Tribunal*(December 2000).

arrangement of the music and the sound recording of the work. Further, it is not unusual for these different kinds of copyright to be owned by different people (or entities). In simple terms, the rights often involved in a musical work are:

- mechanical right: being the right to record a song onto record, cassette or compact disc;
- synchronisation right: being the right to use music on a soundtrack of a film or video; and
- performing right: being the right to perform in public and to otherwise communicate the work to the public.

2.6 There are a number of copyright owners that may have rights within the one musical composition, for example:

- the composer (being the artist who wrote the music): composers generally have copyright in the 'tune';
- the lyricist (being the artist who wrote the lyrics, if any): the lyricist generally has copyright in the literary work;
- the arranger (being the artist who arranged the music): arrangers' generally own the copyright in the arrangement; and
- the publisher (who arranges the sale or exploitation of musical works): publishers usually obtain an assignment of the mechanical rights, synchronisation rights and print music rights in exchange for an agreed percentage of the income received by the publisher.

International treaties

2.7 Australia is a party to a number of international copyright treaties and conventions including:

- Berne Convention for the Protection of Literary and Artistic Works (Berne Convention);
- World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement);
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention); and
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (Geneva Phonograms Convention).

2.8 These conventions establish the principle of 'national treatment' whereby each convention member country will afford the same rights to the nationals of other convention countries as it provides to its own nationals under its own law. In Australia, the provisions of the Copyright Act extend to works of nationals, citizens and residents of other convention countries and to works made or first published in those countries.[5] This means that because Australia is a party to the international copyright conventions

[5] By virtue of the *Copyright (International Protection) Regulations* 1969.

outlined above, original works created by Australian citizens or residents are also entitled to the protection given by the copyright laws of all countries which belong to these conventions and vice versa.

2.9 Further, any discrimination against the works of foreign nationals, where those works fall under the protection of the Berne Convention, would amount to violations of both the Berne Convention and the TRIPS Agreement. Collecting societies are therefore required to collect and remit some royalty payments to foreign nationals.

Public performing rights

2.10 The overwhelming majority of music composers in Australia are members of APRA and assign their performing rights to APRA. Users wishing to perform music in public usually obtain the right to perform the music by taking a non-exclusive licence of the performing rights from APRA. Performing rights are made available by APRA by means of non-exclusive blanket licences which give the user a performing rights licence in respect of its entire repertoire.

2.11 Public performance of a musical work includes, for example, sound broadcast of the work via radio, television broadcast of the work, either directly or when the work is embedded in a program or advertisement, performance of works embedded in film exhibitions and live performance of the work. Similarly, causing works to be heard in public, for example in pubs, clubs, cafes, gymnasiums and workplaces, either directly, for example by playing a musical recording containing the work, or indirectly, for example where works are embedded in television or radio broadcasts shown or heard in these establishments, also constitutes public performance of the work for which a royalty to the copyright owner is payable.

2.12 Other than through APRA, users could also obtain the right to perform music by employing composers to produce music for them. Such employers would become owners of the copyright. Alternatively, they could take an assignment of the performing right or an exclusive licence from the copyright owner, before the copyright owner became a member of APRA. Users can also enter into direct arrangements with copyright owners – either in respect of all their works for particular uses or in respect of individual works for particular licenses, under APRA's opt out and licence back provisions (as discussed at paragraphs 3.6 to 3.8)

2.13 The major participants or potential participants in the musical performing rights market fall into six categories:

- composers – the author writers of musical works and of associated literary works;
- owners – the persons who own the performing rights in relation to the musical and associated literary works. Under section 35 of the Copyright Act this includes composers and those who acquire rights from them (for example, music publishers and other assignees, employers and successors of title);
- collecting societies – which represent composers and owners, collect and distribute fees and prevent and enforce infringement. In Australia, APRA is presently the only performing rights collection society;

- music users – those persons who perform or communicate musical and associated literary works;

- industry bodies – many music users do not negotiate or deal directly with APRA but do so through a body that represents the relevant industry as a whole; and

- market regulators – presently the Copyright Tribunal.

The Copyright Tribunal

2.14 The Copyright Tribunal is a specialist administrative body established primarily for the purpose of dealing with disputes regarding statutory licences and certain non-statutory licences. It was established in response to the perceived need to control the exercise by collecting societies of the rights given to them by copyright owners in respect of the public performance and broadcast of their musical works and sound recordings. The Copyright Tribunal has the function of determining remuneration payable under the statutory licence schemes established by the Copyright Act and also those schemes falling within the terms of section 136 of the Copyright Act, where the scheme has been referred to it by a party.

2.15 In its determination in respect of APRA's 1997 applications for authorisation the Competition Tribunal noted that:

> Plainly, the legislative purpose of the Copyright Tribunal in Australia is to act as a curb on potential abuse of monopoly or near monopoly power gained by voluntary collecting societies by aggregating rights of individual copyright owners.[6]

2.16 Relevant sections of the Copyright Act in respect of APRA's arrangements provide:

- Where a licensor (for example, APRA) proposes to bring a licence scheme into operation he or she may refer the scheme to the Copyright Tribunal which can make orders confirming or varying the scheme as it considers reasonable (s154).

- Where a licence scheme is in operation and a dispute arises in respect of the operation of the scheme a licensee or licensor may refer the scheme to the Copyright Tribunal which can make orders confirming or varying the scheme as it considers reasonable (s155 & s156).

- A licensee or potential licensee may apply to the Copyright Tribunal for a determination on reasonable charges and licence conditions (s157).

- A person complying with any order made by the Copyright Tribunal in respect of any of the proceeding sections is deemed to have the necessary licence.

2.17 The ACCC understands that the majority of applications made to the Copyright Tribunal have involved parties that are large institutional licensors of copyright material, principally collecting societies and record companies, and large institutional licensees, principally universities and broadcasters. These applications have generally concerned:

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[6] Applications by Australasian Performing Rights Association [1999] ACompT 3; 16 June 1999, paragraph 62.

- the determination of a rate of equitable remuneration payable under a statutory licence;
- the confirmation or variation of a proposed or existing licence scheme; and
- the review of a failure or refusal to grant a licence or the offer of a licence on charges or conditions that were alleged to be not reasonable in the circumstances.

2.18 The size and complexity of proceedings before the Copyright Tribunal has meant that it has taken some time for the matters to be completed – data indicates that its proceedings have an average lifespan of about 22 months. This has lead to suggestions from some that the Copyright Tribunal is not the most appropriate mechanism of review for smaller licensees or disputes involving small licence fees.

Reviews of copyright in Australia

2.19 Copyright law in Australia has been reviewed on a number of occasions, including:

- *Review of Australian Copyright Collecting Societies*, Shane Simpson, 1995;
- *Report on Intellectual Property Legislation Under the Competition Principles Agreement*, Intellectual Property and Competition Review Committee, 2000; and
- *Jurisdiction and procedures of the Copyright Tribunal*, Copyright Law Review Committee, 2000.

A brief summary of these reviews is provided below.

Review of Australian Copyright Collecting Societies

2.20 In 1994 the Commonwealth Government, as part of its *Creative Nation* policy, announced that a review of Australian collecting societies would be conducted by Mr Shane Simpson. In summary Mr Simpson was asked:

- to describe how the major societies operate;
- to examine their efficiency;
- to examine their equity of operation;
- to obtain information as to their impact on the cultural economy;
- to make recommendations as to how relevant legislation may be amended to promote the efficiency of the societies and the public interest; and
- to make recommendations as to the establishment of new societies.

2.21 In conducting this review Mr Simpson sought and received detailed submissions from Australian collecting societies. In general terms, the review concluded that the collective administration of copyright is often the most effective method of managing the rights, both for the owners of the rights and those who need access to them. While noting the complexity of the processes adopted by the Australian collecting societies, it was considered that such complexity was inherent in administering a wide range of rights on behalf of thousands of owners, for a wide range of uses and users.

2.22 In conducting the review it was noted that the principle issue was not whether collective administration is in itself a good thing, but rather, whether it is being carried out in a way

that is economically effective and equitable to all parties. The review concluded that the Australian societies were generally conducting their activities in an efficient and equitable manner. While it was noted that concerns had been expressed that collecting societies hold positions of great power within their industry sector, as generally each is in a monopoly position, it was considered that this was not necessarily a bad thing. The review concluded that concerns as to the monopoly position of collecting societies would depend upon how that position was exercised by the collecting society. In this respect the review noted that there was no evidence of societies acting to eliminate or damage a competitor. Further, it was considered that while it may appear that the system of exclusive licences could prevent a competitor from entering, the ability of an owner to withdraw their works from a society meant that a competitor was not prevented from persuading right owners to switch to them. In this respect it was noted that there was evidence of competitors successfully entering niche markets.

2.23 The review also considered whether the jurisdiction of the Copyright Tribunal should be expanded and concluded that, in principle, the Copyright Tribunal should have as wide a jurisdiction as possible in respect of licences and licence tariffs. In particular it was considered that:

- the Copyright Tribunal's jurisdiction should include the setting of licence fees, as well as any non-financial terms of agreements with licensors;
- the Copyright Tribunal's jurisdiction should not differentiate between statutory and voluntary licence arrangements; and
- all collecting societies' licence fees and conditions should be open to the potential scrutiny of the Copyright Tribunal. In particular it was noted that such scrutiny was an essential requirement in establishing a working relationship between the society and users of its members' property.

2.24 It was considered that an appropriate body, such as an Ombudsman of Copyright Collecting Societies, should be established to hear disputes in relation to:

- licence applications;
- licensor and licensee inquiries; and
- licensor and licensee complaints.

Report on Intellectual Property legislation under the Competition Principle Agreement

2.25 In September 2000 the *Report on Intellectual Property legislation under the Competition Principles Agreement* was released. This report considered the effect on competition of Australia's intellectual property laws and examined these effects in light of both the laws themselves and the Competition Principles Agreement. As outlined below, the report provided a number of recommendations in relation to the activities of Australian collecting societies and these recommendations have since been accepted in part by the Commonwealth government.

2.26 The report noted that collecting societies, through the collective administration of rights, play an important role in achieving an efficient copyright system. It considered however, that there are potential (negative) effects on competition that can flow from the market position of collecting societies. In particular it was noted that as a collecting

society may, in some circumstances, be the only licensor of certain types of copyright material, there is the potential for the society to abuse its market power to extract higher licence fees. In this respect, the report considered that it may be appropriate for the Copyright Tribunal to play a broader role in reviewing output arrangements, subject to the ACCC playing a 'gate keeper' role in determining whether a reference should be provided to the Copyright Tribunal. The report proposed that in performing this function the ACCC be required to consider:

- any market power that can be exercised by the collecting society;
- whether there are alternative means of dispute resolution that could be used and that would impose less burden on the public; and
- the public interest in balancing public access to copyright material with the legitimate commercial interests of copyright owners.

2.27 The report also recommended that collecting societies be more fully exposed to the authorisation processes of the TPA and proposed a number of amendments to this effect. In particular the report proposed that, in assessing the activities of collecting societies and determining authorisation of those activities, the ACCC should have regard to information concerning input arrangements, distribution patterns, the relative size of copyright payments as between rights holders and creators and administrative costs relative to distribution to rights holders. It was also considered that the ACCC should examine opportunities for reducing any anti-competitive detriment associated with the operation of each society.

2.28 The Government response accepted, in part, the reports recommendation that the Copyright Tribunal play a broader role in reviewing output arrangements, subject to the ACCC playing a 'gate keeper' role in determining whether a reference should be provided to the Copyright Tribunal.

2.29 Specifically, the Government response to this recommendation states*:*

> In relation to the proposed ACCC mechanism, it is agreed that:
>
> - The ACCC be required by statute to issue guidelines on what matters it considers to be relevant to the determination of reasonable remuneration and other conditions of licences that currently can or will be able to be the subject of determination by the Copyright Tribunal under Part VI of the Copyright Act; and
>
> - The Copyright Act be amended to ensure that the Copyright Tribunal has the discretion to take account of the ACCC guidelines and admit the Commission as a party to Tribunal proceedings.
>
> The ACCC will consult with interested parties in developing its guidelines. The main purpose of the guidelines would be to facilitate licence negotiations and minimise resort to the Tribunal for determination. In the event that negotiations failed and one or other party applied to the Tribunal, recourse to the Tribunal would not be restricted in any way. The nature of the ACCC's guidelines would be advisory, not determinative.

2.30 The Government response accepted the reports recommendation that collecting societies be more fully exposed to the authorisation processes of the TPA in respect of conduct that falls within the scope of Part IV of the TPA.

2.31 The Government has not, as yet, implemented its response to these recommendations.

Jurisdiction and procedures of the Copyright Tribunal

2.32 On 20 April 1999, the Attorney-General asked the Copyright Law Reform Committee (the Committee) to inquire into and report on the need for changes to the jurisdiction and procedures of the Copyright Tribunal under Part VI of the Copyright Act. The final report of the Committee, *Jurisdiction and Procedures of the Copyright Tribunal*, was handed down in December 2000 and it is understood that its recommendations are currently under consideration by the Australian Government.

2.33 In its report the Committee described jurisdictions of the Competition and Copyright Tribunals as complementary – the Competition Tribunal considers input arrangements and so determines the structure under which the output arrangements, which fall under the Copyright Tribunal's jurisdiction, are made.[7] In considering whether it would be more appropriate for these functions to be performed by one body, the Committee concluded that the Copyright Tribunal has established expertise in dealing with matters within its jurisdiction and that there would be no additional efficiency or fairness to be achieved if the Competition Tribunal were to assume its functions.

2.34 The Committee also considered whether there should be legislative prescription to assist the Copyright Tribunal in determining what a 'reasonable' licence fee is. While the Copyright Act does not provide a definition of what is meant by 'not reasonable' and 'unreasonably refused', the Copyright Tribunal has previously considered that a reasonable royalty necessitated it to consider what was the 'going rate' – the 'going rate' could not be based upon a few random samples, but was established with reference to a 'multiplicity of similar and directly relevant transactions'. In considering whether a licence was subject to charges or conditions that were not reasonable the Copyright Tribunal has considered that it is relevant to consider the 'going rate' for comparable licences.

2.35 The Committee noted that submissions had been made to it, and separately to the Competition Tribunal[8], that the Copyright Tribunal should be empowered to consider all matters relevant to the case before it and, in particular, should be required to consider competition issues. The Committee concluded that the Copyright Tribunal did have the power to consider all matters relevant to a case and in particular that, while it was not required to consider competition issues, it was of the view that the Copyright Tribunal had given adequate attention to all relevant issues where appropriate. The Committee considered that it was desirable to keep prescription within the Copyright Act to a minimum and on this basis recommended that the Copyright Act not be amended to codify factors to be taken into account when determining what is 'reasonable in the circumstances' in relation to licences.

Code of Conduct for Copyright Collecting Societies

2.36 Following on from the various reviews of the Australian copyright collecting societies, in July 2002 the *Code of Conduct for Copyright Collecting Societies* (the Code) was

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[7] *Jurisdiction and procedures of the Copyright Tribunal*, Copyright Law Review Committee, 2000 at 51 – 55.
[8] *Re Applications by Australasian Performing Right Association* (1999) 45 IPR 53, (1999) ATPR 41-701

introduced. While voluntary in nature, the signatories[9] to the Code reflect the major collecting societies operating in Australia and result in its broad application to the collecting activities conducted in Australia.

2.37 The objectives of the Code are to:

- to promote awareness of and access to information about copyright and the role and function of collecting societies in administering copyright on behalf of Members;
- to promote confidence in collecting societies and the effective administration of copyright in Australia;
- to set out the standards of service that members and licensees can expect from collecting societies; and
- to ensure that members and licensees have access to efficient, fair and low cost procedures for the handling of complaints and the resolution of disputes involving collecting societies.

2.38 The Code also establishes a process of public reporting (by requiring each society to publish a statement of code compliance in its annual report) and a process of independent review (the purpose of which is to monitor code compliance). The first review of the Code was completed by Mr James Burchett QC in September 2003.

2.39 The 2002/2003 Code review provided a general observation that, having considered the information put before it, it did not appear that the Code was not being observed by signatories. The review did note however that there were some instances where it appeared that complaints involved some undue delay or failure to provide adequate explanation of a problem.

2.40 Given the joint operating structures of APRA and the Australasian Mechanical Copyright Owners Society (AMCOS), the review of their compliance with the Code was conducted jointly. In relation to APRA/AMCOS, the review noted that, given the number of licensees and APRA members there is an obvious risk of incurring complaints from a certain number of dissatisfied users. The review noted that in the period 2002/2003 there were 47 complaints broadly relating to licensing issues - a high proportion of which were considered to be expressions of dissatisfaction about copyright law and its application to small businesses. Of those complaints that were likely to have stemmed from errors on APRA/AMCOS's part, the review found that they were responded to by APRA/AMCOS in a frank manner, although upon occasion with an undesirable degree of delay. A small number of complaints were also received from APRA/AMCOS members, all of which were considered to have been responded to in accordance with the provisions of the Code.

2.41 On 28 October 2004, the second annual review of the Code was published. This review noted that in the period 2003/2004 APRA received 36 complaints from licensees or prospective licensees and two complaints from members. The review concluded that,

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[9] The signatories to the Code are APRA, the Australasian Mechanical Copyright Owners' Society Limited (AMCOS), the Australian Writers Guild Authorship Collecting Society Limited, the Australian Screen Directors Authorship Collecting Society Limited, the Copyright Agency Limited, the PPCA and Screenrights.

having regard for the number of transactions APRA was involved in during the year, that lapses on its part leading to justified or possibly justified complaints, had been extremely rare. The review also stated that its analysis suggested that APRA had improved on the generally high standard of its complaints handling procedures of the previous year.

The Australian music industry

2.42 In December 1997, the Australian Bureau of Statistics (ABS) published a survey of the Australian music industry for the financial year 1995/96 entitled *Business of Music, Australia*. This is the only comprehensive study of music activity undertaken by the ABS. The ABS report provides a basic snap shot of the Australian music industry, in particular:

- the size of the Australian Music Industry (153 record companies and distributors; 23 companies manufacturing recorded music; 73 companies publishing music; and 22 companies engaged in sound recording studios);
- the number of persons employed (3889 as at 30 June 1996);
- total income of $1064 million (for the year ended 30 June 1996);
- sales of 50 million units, with a value of $554.6 million; and
- sales of Australian repertoire $90.6 million or 16.35 per cent of total sales.

2.43 The 2001 census of population in housing showed that there were 2,178 people employed in the Recorded Media Manufacturing and Publishing Industry. This figure includes only those people whose main job was in the industry. An ABS Manufacturing Survey found 3381 people were working in the Recorded Media Manufacturing and Publishing Industry in June 2001. There were 332 people who stated that their main job in the week before the census was as a composer. Of these, 170 worked for music and theatre production companies and 51 worked for themselves.[10]

2.44 According to data published recently by the Australian Record Industry Association (ARIA) recorded music sales for the year ended 31 December 2004 show a decline in the overall Australian market when compared to 2003, with total sales of $540 million in 2004 (a decline of approximately 6%). Record companies shipped approximately 58 million audio and music video/DVD units over this period, a decline of approximately 4 percent when compared to 2003 data. ARIA notes however that local repertoire has continued to grow, and is currently at 27% of wholesale sales value.[11]

2.45 Overall, unit sales by the Australian record industry have increased from approximately 42 million units in 1993 to approximately 58 million units in 2004, with an approximate increase in the wholesale value from $431 million to $540 million over this period.[12] According to the ARIA data a wholesale sales 'peak' occurred in 2001 (approximately 62 million units, with an approximate wholesale value of $628 million).

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[10] Arts and Culture in Australia: A statistical Overview, Australian Bureau of Statistics, 25 November 2004.
[11] *Australian Record Sales: Sales by Wholesale Value for the Years Ended 31 December 1994 – 2004* and *Sales by Unit for the Years Ended 31 December 1994 - 2004*, Australian Record Industry Association.
[12] Ibid

2.46 ARIA notes that there are a number of factors that have adversely affected the Australian recording industry in recent times, including the growth in illegitimate CD burning and internet based piracy. A July 2003 study published by ARIA[13] notes that illegitimate channels now account for approximately 10.7% of all music acquired by the general population, with the incidence of such conduct being significantly higher in age groups under 25 years (31% of all music acquired by those 17 and under; 21% for 18-24's).

Digital rights management[14]

2.47 The term Digital Rights Management (DRM) is used to describe a range of techniques and information about rights and rightsholders to manage copyright material and terms and conditions on which it is made available to users in the digital environment. For individual creators it can involve systems which identify the rights and rightsholders associated with particular works and keeps track of their use and (offline or online) registers in which the rights and consents associated with copyright material are recorded and made available to users.

2.48 For producers and publishers, DRM systems can record, track and monitor rights for a range of existing and newly created materials. Where producers, publishers and creators are also traders, the content itself can be made available in digital format, protected by security features which are unlocked after agreements for use have been reached and payment made. Most relevant to musical compositions, works can be encrypted or encoded so that they can only be used, for example, with a password or when certain conditions are met.

2.49 DRM systems can also incorporate payment systems for content used. Such payment can be administered by publishers, producers or creators or through centralised clearing houses.

2.50 In essence, DRM can help creators manage their works online to ensure that they are protected and that their commercial use is paid for, whether they chose to do so individually, through a collection society, or through a commercial agent or other third party.

2.51 While development of DRM systems is still in its early stages, the level of take up is expected to accelerate over the next 5 years.

Creative commons licensing

2.52 Creative commons licences are based on existing copyright systems and provide a means for owners of copyright to retain their copyright while signalling to potential users that they may make certain uses of the work, as specified by the owner, without having to engaging in the time and expense of individual rights clearance.

2.53 One form in which creative commons licences are provided is in machine readable format – Resource Description Framework (RDF) metadata, which describes the work

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[13] *Understanding CD burning and internet file sharing and its impact upon the Australian record industry,* Quantum Market Research, July 2003.

[14] The Information in this section is taken from *A Guide to Digital Rights Management,* Department of Communications, Information Technology and the Arts

according to its key licence terms. The metadata enables online works, licensed under a creative commons licence, to be searched for and identified based on licensing terms.

2.54 Creative commons licences do not allow for royalty payments to be made under the licence, although they can contain a non-commercial licence condition which enables the owner to receive royalties for commercial, public performances. Creative commons licences can also be applied to a work to signal the terms on which use of the work can be made under that licence with users then having the option of entering into a commercial deal in relation to the work.

3. Applications for revocation of authorisation and substitution with replacement authorisation

3.1 On 2 June 2004, APRA lodged applications for revocation of authorisation and substitution with replacement authorisations (A90918; A90919; A90921; A90922; A90924; A90925) with the ACCC. APRA's lodged amendments to its applications for revocation and substitution on 27 January 2006.

3.2 The applications broadly relate to APRA's arrangements governing the acquisition and licensing of the performing rights in its music repertoire. These arrangements were previously authorised by the Competition Tribunal until 30 June 2004. APRA has sought revocation of the Competition Tribunal's authorisations and their substitution with replacement authorisations (on the same terms as granted by the Competition Tribunal) to enable it to continue to give effect to the arrangements. In November 2004 APRA lodged two further applications (A90944 and A90945) relating to its arrangements with international affiliate societies. These arrangements were previously authorised by the ACCC until 31 December 2002. This determination considers both the June and November 2004 applications.

3.3 APRA's applications cover arrangements which may be both exclusionary provisions and, more generally, agreements which may affect competition. In broad terms, an exclusionary provision is an agreement between persons in competition with each other to exclude or limit their dealings with a particular supplier or customer, or a particular class of supplier or customer.[15]

3.4 Agreements which may affect competition will only contravene the TPA if it can be shown that they have the purpose or would have or would be likely to have the effect of substantially lessening competition.[16] Such agreements may include agreements between competitors to 'share' a market and agreements between competitors to cease offering discounts. An agreement between competitors to 'fix' prices is deemed to substantially lessen competition.[17]

3.5 In seeking authorisation APRA does not submit that its arrangements contravene the TPA and does not admit that there is any requirement for authorisation. APRA notes that the ACCC is not required to determine whether conduct will breach the TPA as part of its consideration of an application for authorisation.[18]

Input and overseas arrangements

3.3 APRA's input and overseas arrangements govern the standard form assignment by APRA members, in particular of their 'small' rights, resignation by members and APRA's arrangements with its affiliated international collecting societies.

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[15] Section 4D, *Trade Practices Act* 1974.
[16] Section 45, *Trade Practices Act* 1974.
[17] Section 45A, *Trade Practices Act* 1974.
[18] See also *Re Concrete Carters Association (Vic)* (1977) 31 FLR 193.

3.4 In simple terms APRA's domestic input arrangements involve the assignment to APRA by members of the small performing rights[19] in any musical and associated literary works in which they own copyright and which are created during the continuance of the membership. APRA members broadly include composers, authors and publishers of copyright work or any executor, trustee, beneficiary or next of kin of a deceased member.

3.5 Categories of works which members assign performing rights to APRA in are:

- the right to performance in public – APRA has approximately 50,555 public performance licences in respect of this category of works;
- broadcasting rights – 738 licences;
- the right to communication or transmission to the public other than by way of public performance or broadcast but including transmission to subscribers to a diffusion service – 4,939 licences;
- the right to live performance in public – 5,022 licences;
- the right to performance in public by the exhibition of cinematographic film – 230 licences;
- the right to performance in public by other means – 45,303 licences;
- the sound broadcasting right (radio licence) – 687 licences;
- the television broadcasting right – 51 licences;
- the right of communication or transmission to the public by cable television – 6 licences; and
- the right of communication or transmission to the public by other wired means – 4,939 licences.

3.6 The assignment made to APRA is qualified by:

(a) a members right to reserve – or to later require APRA to reassign – the performing and communication rights in respect of all of the member's works in relation to each category of use ('opt out').

In summary the opt out provisions provide that:

- a member seeking to exercise the right to opt out must give at least 3 months notice, expiring on either 30 June or 31 December (article 17 (c));

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[19] Performing Right – includes public performance rights, live public performance rights and broadcast rights but do not include grand rights. Grand rights are those rights that are not assigned to a collection society and these rights differ between collection societies. APRA defines grand rights to include

(i) dramatico-musical works performed in their entirety;

(ii) in the case only of a public performance, any works or excerpts therefrom, performed in a dramatic context;

(iii) oratorios and large choral works (that is, choral works written to exceed 20 minutes duration), performed in their entirety;

(iv) the whole or any part of any music and of any words associated therewith composed for or used in conjunction with a ballet, if accompanied by a visual representation of that ballet or part thereof.

- requests to opt out may be subject to such preconditions as APRA deems reasonable (article 17(d)(i));
- requests to opt out must be accompanied by the written consent and release from all persons interested in the works in the relevant categories of right (article 17(d)(ii));
- requests to opt out must be accompanied by a written indemnity indemnifying APRA against any claims arising from the use by any licensees of APRA's of the members works in the relevant category of right(s) (article 17(d)(III)); and
- a member can not assign or reassign 'opted out' rights to APRA until the expiry of 12 months from the date of 'opting out' (article 17 (e)).

Members are able to opt out in respect of each of the categories of works noted above.

(b) a member's right to require APRA to grant to the member a non-exclusive licence in relation to any of the members works, so that the member can enter into direct licensing arrangements with particular copyright users ('licence back').

In summary the licence back provisions, as originally submitted for re-authorisation provide:

- a member may only use the licence back provisions when it is seeking to grant a sub-licence of the performing right;
- the member must give APRA a notice which specifies:
  - the title(s) of the work(s);
  - the identity(s) of the proposed sub-licensee(s);
  - the date(s) upon which the performance is to take place (or in the case or a television broadcast sub-licence, the date upon which the proposed sub-licence is to take effect, the period in respect of which the proposed sub-licence will operate and any performance dates which are known to the member);
  - the venue for the performance (or in the case of a television broadcast sub-licence, the geographic location of the performance);
  - in the case of a proposed television sub-licence, the broadcasting or online service and the program or content segment in respect of which the sub-licence is proposed to be granted;

    The notice must also contain a signed consent and release and indemnity from all interested persons.
- the notice must be accompanied by an undertaking to pay APRA's reasonable costs prior to the date of the first performance under the sub-licence and any further reasonable costs incurred by APRA in relation to the granting of the licence back to the member; and
- the sub-licence must be in writing and, if practical, signed by all parties.

3.7 On 27 January 2006, APRA amended its applications for re-authorisation of its licence back arrangements to provide that:

- a member is only required to give one months notice when seeking to grant a sub-license, as opposed to the two months notice previously required (except in the case of performance by television broadcasts where the existing provisions already provided that only one months notice was required);
- the member must give APRA a notice which specifies:
  - only such details of the identity(s) of the proposed sub-licensee(s) as are reasonably necessary to identify whether the sub-licensee has been granted a sub license;
  - only such details of the date(s) upon which the performance is to take place as are reasonably necessary to identify the performances to which the sub-licence relates;
  - only such details of the geographic location and venue of the performance as are reasonably necessary to identify whether the sub-licence extends to a particular area or venue.

3.8 When a member takes a non exclusive licence back, he or she is able to grant licences with respect of the work, but APRA remains entitled to grant non exclusive licences to others. When a member opts out, APRA reassigns the category of rights to the owner, and has no further rights in relation to the member's works for that purpose.

3.9 Composers can also reassign their rights from APRA by resigning their APRA membership. Article 9 of APRA's Articles of Association provides that a member seeking to resign from APRA must provide at least 6 months notice (in writing), ending on either 30 June or 31 December. A shorter notice period may however be accepted by the APRA Board.

3.10 Under article 18 APRA may exercise and enforce the performing right in works written, composed or owned by members of any affiliate society. The exercise of these rights is pursuant to the contractual arrangements between APRA and any such affiliate society.

3.11 The International Confederation of Societies Authors and Composers (CISAC), of which APRA is a member, has established an international licensing system under which each affiliate society will grant to each other affiliate society an exclusive right to licence the works in its repertoire in that other's respective territory. The only exception to this is in respect of the arrangements with the affiliated societies operating in the United States – following action by the United States Department of Justice these societies can only confer non-exclusive rights. As at 1 June 2004, APRA had entered into arrangements with 69 affiliate societies.

Output arrangements

3.12 Pursuant to its Memorandum of Association, APRA's objects include

> *Clause 3 …*
>
> *(b) to assign any rights vested in or controlled by [APRA] and to grant licences, permits or authorities for the use or exercise by others or any such rights.*
>
> *(c) To charge, collect, receive and recover fees and royalties in respect of the use and exercise by others of any rights vested in or controlled by [APRA] and to institute or defend any legal proceedings for the purpose of enforcing or protecting any rights vested in or controlled by [APRA] or for the recovery of damages or fees or royalties.*
>
> *(d) To act as an agent for any person, corporation or organisation in respect of any rights relating to musical, dramatic or literary works.*

APRA's output arrangements are made pursuant to these general powers. These arrangements are briefly set out below.

3.13 APRA's licences are generally granted on a 'blanket' basis – that is, they confer upon licensees an unlimited right to use all of the works within the APRA repertoire. Licences are generally entered into in accordance with a published licence scheme (i.e. users are categorised into licensee groups with each group being the subject of an individual licence scheme based on category of use, as summarised at paragraph 3.5). Licence fees are payable annually in advance on a provisional basis. If actual activity is greater or less than this estimate an adjustment is made to fees as part of APRA's annual reassessment process. The reassessed value forms the basis of the provisional fee for the next licence period.

3.14 APRA submits that its licence fees vary according to the licence scheme. The fee for live performances, for example, is based on a percentage of the gross annual expenditure by the licensee on performing artists and musicians. The fees under other schemes are based on such criteria as the number of persons gaining admission to a premises during a licence year or by reference to the equipment being used to affect public performances.

3.15 A licensee (or, with the consent of APRA, a potential licensee) may request that a licence agreement be referred for 'Expert Determination'. Under the expert determination process the terms and conditions of a licence (including fees) will be reviewed by a former judge with training in alternate dispute resolution. Parties dissatisfied with the expert's determination may seek review by the Copyright Tribunal or Federal Court (as appropriate). According to APRA, two matters have been considered under the expert determination process. In addition to this process, licence schemes may also be referred to the Copyright Tribunal (see paragraph 2.14 to 2.18).

3.16 APRA's output arrangements also establish a process by which it responds to possible copyright infringements by users. This process may, in some circumstances, culminate

in proceedings under the Copyright Act in the Federal Court. According to APRA there are currently 80 matters of possible infringement subject to internal investigation and a further 70 matters that have been referred to APRA's external lawyers for consideration.

Distribution rules

3.17 Article 93 of APRA's Articles of Association provides that APRA shall, after payment of all expenses incidental to its operations, allocate and distribute all moneys received by it through the licensing of rights and distributions from affiliate societies, together with any income earned through the investment of such funds, to members and affiliated societies in accordance with a method of entitlement as determined by the APRA Board. On the basis of this provision the APRA Board has determined and published 'Distribution Rules' governing allocation of funds to members and affiliate societies.[20]

3.18 APRA's distribution rules provide that 'distributable revenue' is equal to its gross revenue less operating expenses and moneys applied by the board for the purpose of promoting the use and recognition of music written or controlled by APRA's members. APRA's costs as a percentage of revenue are currently approximately 13.7%. Distributions to members and affiliate societies are conducted on a six monthly basis (30 June, 31 December) and are based upon the total monetary credit attributable to a work divided by the relevant 'member share'.

3.19 APRA analyses significant volumes of performance data to determine a works 'performance credit'. In general terms, performance credits are based upon the duration and nature of the performance such that the rate at which credits are 'earned' will vary – for example credits attributable to broadcast radio performances differ depending upon whether the performance was 'short', 'long' or resulted from music contained in advertisements. In order to determine the monetary value of a credit, APRA has divided its licences into 'pools' (e.g. free to air television, cinema, radio, concert and live performances). Under this system each pool's total licence revenue is divided by the aggregate credits attributable to that pool – this gives a 'per-credit' rate for the pool. This credit rate is then used to determine a works monetary credit for the relevant pool.

3.20 APRA's distribution rules provide that it will endeavour as far as possible to comply with the resolutions of CISAC related to principles governing the fair and equitable distribution of royalties. While owners of rights are permitted to enter into contractual variations to the APRA distribution rules, such variations are subject to the overriding rule that the share allocable to the writer or writers of a work can not be less than 50%, as required by CISAC.

3.21 The distribution rules also establish a process whereby members and affiliate societies may seek an adjustment to an erroneous distribution as well as formal complaints handling and dispute resolution processes.

Other – the 1997 Notification

3.22 Notification N30751 was lodged by APRA on 15 October 1997 and relates to the alleged exclusive dealing (full line forcing) that may arise by virtue of APRA's method of

[20] A copy of APRA's distribution rules is available from both the ACCC's and APRA's websites.

acquiring a members' performing rights. In simple terms, exclusive dealing may arise when one person that trades with another imposes restrictions upon that others freedom to choose with whom, or in what, it deals. Under APRA's Articles of Association a member's rights are assigned to it on an exclusive basis – thereby restricting their ability to deal directly with licensees and the ability of licensees to deal directly with members.

3.23 Under the TPA notifications do not expire – as such APRA has not sought to revoke and substitute N30751. However, in light of the related nature of this notification to the applications for authorisation, the ACCC proposes to have regard to the notification as part of its assessment of APRA's arrangements.

4. Submissions

4.1 APRA provided a submission in support of its applications.

4.2 The ACCC also sought submissions from a range of interested parties.

4.3 The views of APRA and interested parties are outlined in the ACCC's evaluation of the arrangements in Chapters 6 and 7 of this determination. Submissions lodged by APRA's and interested parties in respect of APRA's applications, and in response the ACCC's draft determination, are also summarised at Attachment A of this determination.

4.4 Copies of public submissions are available on the ACCC's website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

5. Statutory test

5.1 APRA's applications are as follows:

Input arrangements

(1) in respect of the standard form of assignment for APRA members:

(i) an application for authorisation to make and give effect to a contract, arrangement or understanding which would or might be an exclusionary provision within the meaning of section 4D of the TPA ('exclusionary provisions') [A90925]; and

(ii) an application for authorisation to make and give effect to a contract arrangement or understanding a provision of which would or might have the purpose, or effect, of substantially lessening competition within the meaning of Section 45 of the TPA ('agreements affecting competition') [A90921];

(2) in respect of APRA's constitution (in particular articles 9 and 17 – dealing with membership resignation and the assignment of copyright):

(i) exclusionary provisions [A90919]; and

(ii) agreements affecting competition [A90924][21].

Output arrangements

(1) in respect of APRA's licensing arrangements:

(iii) exclusionary provisions [A90918]; and

(iv) agreements affecting competition [A90922].

Distribution arrangements

(1) in respect of APRA's distribution rules:

(i) exclusionary provisions [A90924].

Overseas arrangements

(1) in respect of the APRA's arrangements with affiliated international collecting societies:

(i) exclusionary provisions [A90944]; and

(ii) agreements effecting competition [A90945].

[21] Application A90924 relates to an agreement affecting competition constituted by APRA's Articles of Association which governs both APRA's input and distribution arrangements.

5.2 Applications A90921, A90922, A90924 were made under section 91C of the TPA, and application A90945 under section 88(1) of the TPA, to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA.

5.3 Applications A90918, A90919, A90925 were made under section 91C of the TPA and application A90944 under section 88(1) of the TPA, to make and give effect to arrangements that might be exclusionary provisions within the meaning of section 4D of the TPA.

5.4 In assessing applications made under section 91C and 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA, the relevant test that APRA must satisfy for authorisation to be granted is outlined in sub-sections 90(6) and 90(7) of the TPA.

5.5 Under section 90(6) of the TPA, the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:

- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
- this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.

5.6 Under section 90(7) of the TPA, the ACCC may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:

- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
- this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.

5.7 In assessing applications made under section 88(1) and 91C of the TPA to make and give effect to arrangements that might be an exclusionary provision within the meaning of section 4D of the TPA, the relevant test that APRA must satisfy for authorisation to be granted is outlined in sub-section 90(8) of the TPA.

5.8 Under section 90(8) of the TPA, the ACCC may grant authorisation in respect of a provision of a contract, arrangement or understanding that may be an exclusionary provision if it is satisfied that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

5.9 While there is some variation in the language between the test in sections 90(6) and 90(7) and the test in section 90(8), the ACCC has until recently adopted the previous

view of the Trade Practices Tribunal (now the Australian Competition Tribunal) that, in practical application, the tests are essentially the same.[22]

5.10 This view has recently been reconsidered by the Competition Tribunal and it has found that the two tests are not precisely the same.[23] In particular the Competition Tribunal considered that the test under section 90(6) (applying the same test as under section 90(7)) was limited to a consideration of those detriments arising from a lessening of competition. It was the Competition Tribunal's view that the test under section 90(8) was not so limited.

[22] *Re Media Council of Australia (No 2)* (1987) ATPR at 40-774; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357.
[23] *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

6. ACCC Assessment

6.1 The ACCC's evaluation is in accordance with the statutory tests outlined in Chapter 5 of this determination.

The relevant market

6.2 The first step in assessing the public benefits and public detriments of the conduct for which authorisation is sought is to consider the relevant markets(s) in which the conduct occurs.

6.3 Defining the markets affected by arrangements proposed for authorisation assists in assessing the public benefit and public detriment from any lessening of competition from the arrangements. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets, as it may be apparent that a net public benefit will or will not arise regardless of this definition.

6.4 In its consideration of APRA's original applications for authorisation, the Competition Tribunal, while not specifically defining the relevant market(s), broadly noted the contention of some parties to the proceedings that the relevant market was that for the supply of performing rights in Australia. The Competition Tribunal noted the argument that this broadly defined market could be divided into sub-markets according to users, but did not consider such delineation helpful to its considerations. Ultimately, the Competition Tribunal concluded that the definition of the relevant market was not a particularly critical issue in assessing APRA's arrangements.

6.5 APRA submits that the relevant market is the market in, at least, Australia for the acquisition, by assignment, licence, or otherwise of the performing and communication rights in relation to music. APRA submits that this market definition takes into account substitution possibilities both to users and owners of the relevant performing rights and creators of music.

6.6 APRA notes that while it issues a variety of different licenses to accommodate that fact that different users use music for different purposes and in different ways, licensees are all acquirers of the same product – performing and communication rights.

6.7 Commercial Radio Australia (CRA) contends that this market definition is to broad – failing to take account of the fact that the use of APRA's repertoire by licensees varies from case to case. CRA submits that there are distinct markets in the acquisition of rights for each of the various public performance (e.g. bars and nightclubs, juke boxes, retail outlets), broadcasting and communication uses and that the effect of APRA's arrangements should be considered in each of those markets separately.

6.8 The ACCC is of the view that, in this matter, it is not necessary to comprehensively define the relevant market. In this respect, it is the ACCC's view that its assessment will not be overly affected by possible variations in precise market definition.

6.9 Broadly, the ACCC adopts the view that the relevant market(s) is that for the acquisition and supply of performing rights in Australia. The ACCC notes the submission of CRA that, on the demand side, this market could be further delineated by category of user. However, the ACCC is of the view that its assessment of the public benefits and

detriments generated by APRA's arrangements will not be overly affected by such delineation.

Key features of the market for performing rights in Australia

6.10 Performing rights works have a number of key features:

- Performing rights are a non-rivalrous product. Once a particular work has been created, it is able to be consumed by numerous people at the same time so that the consumption of the work by any one person does not limit the consumption of that same work by another person.

- However, the existence of copyright means that performing rights works are not public goods. In the absence of copyright, it would not be possible for the creator of a work to prevent that work being consumed by anyone who sought to do so. In other words, the work would be non-excludable. However, copyright means that performing rights works are excludable. A party that does not compensate the owner of the performing rights when they consume that performing right is violating copyright. Thus, the existence of copyright means that performing rights involve only one of the two economic characteristics of a public good. They are non-rivalrous but they are excludable.

- APRA claims that the enforcement of copyright over performing rights involves a natural monopoly technology. A production process involves a natural monopoly technology if, at all relevant levels of demand, it is more cost-efficient to have output produced by one firm than by any combination of multiple firms. While, strictly speaking, a natural monopoly technology does not always involve all decreasing average cost, this is the most common form of natural monopoly technology. APRA claims that the enforcement of copyright involves natural monopoly technology in that the establishment of systems to monitor copyright compliance and use involve significant fixed costs.

- The production of a performing rights work involves a fixed cost. This fixed cost is borne each time a new performing rights work is created. However, consistent with these works being non-rivalrous, once a performing rights work is produced, no marginal cost is associated with increased consumption of that work.

- Revenue generated through performing rights licences (APRA's profits) are distributed back to the owners of the rights. However, APRA's profits are not the only source of revenue for these owners.

- In many cases, public performance of a work will generate additional revenue for the owner by encouraging further use of the work, including other broadcasts and performances for which a licence fee is payable and other uses such as record sales.

- Users generally demand multiple performing rights works. Thus while one work may be a substitute for another work to some users the same work may be complementary in other situations. As a result, many users require access to a wide range of performing rights works.

- Users prefer a flow of works to be developed over time. In other words, users would not be satisfied with a simple stock of performing rights that can be played again and again. Users gain extra utility by being able to consume new works that are produced over time.

The future with or without test (the counterfactual)

6.11 The ACCC uses the 'future with or without test' established by the Competition Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the arrangements for which authorisation is sought.[24]

6.12 Under this test, the ACCC compares the public benefits and anti-competitive detriment generated by the arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is often referred to as the counterfactual.

6.13 APRA submits that, absent authorisation, there are three possible alternatives to the current arrangements:

- self administration, either individually or in small groups such as through publishers;
- non exclusive licensing by APRA; or
- the establishment of multiple collection societies.

6.14 No interested parties provided submissions as to the appropriate counterfactual against which APRA's arrangements should be assessed.

6.15 Given the APRA has operated more or less exclusively as the administrator of performing rights within Australia for several decades, and the complexities involved in such administration, whether through APRA or by other means, forecasting how the relevant markets might react absent authorisation is problematic. Indeed, it is unlikely that any single set of arrangements, particularly one that did not raise TPA concerns, could or would be developed to administer all performing rights in Australia.

6.16 In the absence of a single, collective administrator of performing rights in Australia, it is likely that such rights would be administered on a more ad hoc basis. A number of possible alternative means of administering performing rights would be likely to develop to suit specific music creators and users needs. These alternatives would be likely to include a combination of the three possible alternatives postulated by APRA, as well as other alternatives possibly including, in some instances, performing rights not being effectively managed at all. However, in the main, performing rights would be likely to be administered by a number of different collection societies, including possibly through publishers.

[24] See, for example, *Re Australasian Performing Rights Association* (1999) ATPR ¶41-701

Public detriment

Concentration of members' works

6.17 APRA is best characterised as a monopoly of composers who pool their works and, generally, supply blanket licences. Notwithstanding its opt out and licence back provisions, as discussed below, APRA's input arrangements severely limit members ability to licence or assign any or all of their rights directly to users. Notwithstanding that direction negotiation between users and composers would probably mainly occur where the use to be made of the work is known and is predictable and planned, the current input arrangements restrict the ability of users to get access to a proportion of a music creators rights and therefore limit the opportunity for members to compete with each other for user licences and in respect of price.

6.18 For those users who do not or do not always require a blanket licence, a potentially competitive market of individual composers and/or publishers has essentially been replaced by a monopoly whose membership rules current prevent 'cheating' in the form of direct dealing.

6.19 For those users who only require a blanket licence, direct dealing with numerous composers is not an attractive proposition. However, even for those who would prefer to deal with a single collection society, the present concentration of most members' rights exclusively with APRA means that APRA is not constrained by normal competitive pressures in setting prices for access to its repertoire.

6.20 APRA submits that its members could elect to change the present arrangements if they wished. The ACCC notes that while this is the case, few members are likely to wish to change the APRA system which amounts, in effect, a monopoly and price fixing arrangement. Only those members who believe that they can bargain more effectively for themselves would be likely to wish to change the current arrangement and such members are likely to be, at best, a small percentage of all members. Further, given that APRA has been in existence for so long, and has, in effect, been the monopoly supplier in the market for most of that time, most members are likely to find it difficult to contemplate options other than APRA.

6.21 In addition, the ACCC notes that the fact that most APRA members appear to be content with the current system merely indicates that this system is serving those members well. It does not necessarily follow that the system is serving users, or the community more generally, as well.

Opt out and licence back provisions

6.22 APRA's input arrangements provide that a member may require APRA to:

- reassign to it performing rights in relation to all (and only all) their works in a number of categories of use ('opt out'); and

- require APRA to grant to the member a non-exclusive licence in relation to any of the members works to facilitate direct licensing ('licence back').

6.23 Both the opt out and licence back provisions are subject to the member giving APRA specific notice and complying with other conditions as summarised at paragraphs 3.6 and 3.7 of this determination.

6.24 In addition, members may resign from APRA by giving six months notice. A shorter notice period may however be accepted by the APRA board.

6.25 APRA contends that its input arrangements do not act as an absolute and irrevocable assignment of rights as members have the option of terminating their membership of APRA, or alternatively, opting out or licensing back in relation to their works. APRA submits that if music users offered composers terms which amounted to a better deal than that which APRA was able to offer, then composers would deal directly with publishers. APRA further submits that the low level of use of its opt out provisions is indicative of members satisfaction with its current arrangements.

6.26 CRA, Free TV and Cinema Operators submit that APRA's existing opt out and licence back provisions do not facilitate, in any realistic way, the direct negotiation of performing rights. They note the impracticalities, in many instances, of direct dealing on a composer by composer, work by work basis under APRA's arrangements. They submit that there are practical alternatives to a single collecting society, such as publishing arms of major record labels managing their own rights, but that the inflexibility and restrictive nature of APRA's existing opt out and licence back provisions prevent such alternatives developing.

6.27 Specifically, Cinema Operators note that APRA members can not opt out on a work by work basis. Rather, they must opt out in respect of all works in a particular category of use (for example, the right to performance in public in films, television broadcasting rights or radio broadcasting rights). With respect to non-exclusive licensing back, Cinema Operators submit that the restrictive nature of these provisions forecloses any realistic possibility of negotiating rights directly.

6.28 Users also submit that the low level of use of APRA's opt out provisions, rather than being indicative of members satisfaction with its current arrangements, could be indicative of the impracticality of those provisions given the terms and conditions attached to their use.

6.29 The ACCC notes that APRA's opt out provisions are of practical use to members only in very limited sets of circumstances. Specifically, a member would have an incentive to exercise their option to reserve their rights, or require APRA to reassign to them their rights, in relation to a category of works only where the member considered that they, or any other party to whom they chose to assign their rights, would be able to negotiate more favourable terms with those users which it choose to/is able to deal with directly, than they would receive if APRA was to administer those rights on the members behalf.

6.30 In this respect, any member choosing to deal directly with users, or any publisher or alternative collection society administering a smaller repertoire of rights, would, in most instances, have far less bargaining power in negotiating licence fees than does APRA in negotiating on behalf of all its members. Further, the member would be faced with significant competitive constrains in negotiating with any user who also held a blanket licence allowing them to draw on APRA's repertoire in substitution for the members works. This would also inhibit their ability to negotiate as favourable terms as they

might receive by having APRA, which given that its repertoire includes the vast majority of Australian and overseas works, is not faced with the came competitive constraints in its negotiations with users, administer the relevant rights on the members behalf.

6.31 The fact that under APRA's opt out arrangements a member can only withhold or seek reassignment in relation to all (and only all) their works in a number of categories, thereby forgoing all revenue that would otherwise be received from all APRA licence holders in respect of the category of use, acts as a further disincentive to members availing themselves of the opt out provisions to deal directly with users in any particular instance.

6.32 Consequently, in the vast majority of cases, APRA's opt out arrangements are not an effective means of facilitating direct dealing between music owners and users and/or the development of other alternative mechanisms for the administration of performing rights.

6.33 Similarly, while APRA members can terminate their membership (at 6 months notice), for reasons analogous to those discussed above in respect of APRA's opt out provisions, this does not provide, in most instances, an effective means for direct dealing between rights owners, or competing rights administrators, and users.

6.34 While APRA's opt out provisions can only be utilised by members in respect of entire categories of works, and members are unlikely to want to, or indeed have incentives to, self administer, or appoint anyone other than APRA to administer their rights, in respect of entire categories of their works, direct dealing between APRA members and users could still potentially be facilitated through utilisation of APRA's licence back provisions.

6.35 In its draft determination the ACCC expressed concerns that the specific conditions with which members must comply before APRA is required to grant the member a non-exclusive licence in respect of any of the members works limit the practical utility of the licence back provisions.

6.36 Specifically, the ACCC noted that the member must give APRA a notice specifying, amongst other things: the title(s) of the work(s); the identity of each person with whom the member proposes to deal directly in respect of the work (i.e. each sub-licensee); the date on which the performance is to take place and the venue of the performance. As such, the ACCC considered the practical utility of the licence back provisions was limited to those limited instances where intended use of musical works is entirely predictable and planned. In this respect, the ACCC noted that use of musical works in most of the categories of use for which APRA offers licences is not predictable and planned, or at least not predictable and planned far enough in advance to allow direct dealing under the strict terms of APRA's licence back provisions. Therefore, the ACCC concluded in its draft determination that in most cases, APRA's licence back provisions do not provide an effective means for users to obtain a licence to use works in APRA's repertoire other than by dealing directly with it.

6.37 Since the release of the draft determination APRA has amended the conditions with which members must comply before being granted a non-exclusive licence back in respect of their works to address the concerns raised by the ACCC and interested parties.

6.38 Specifically APRA has modified its licence back provisions to:

- reduce the formal period of notice from two months to one;
- only require the member to identify classes of persons with whom the member seeks to deal directly rather than specify precise names of users;
- require that the member only notify the date or dates of performances, or the period of the sub licence, as appropriate for the circumstances of the case; and
- only require specification of the geographical location of performances to the extent necessary to reasonably identify whether the licence extends to a particular area or venue.

6.39 These amendment to APRA's licence back provisions go some way to addressing the concerns raised by the ACCC and interested parties, in so far as they introduce greater flexibility to APRA's licence back system. However, the practical utility of APRA's licence back provisions, as amended, generally remains limited to those instances where intended use of musical works is, by and large, predictable and planned. In this respect, use of musical works in most of the categories of use for which APRA offers licences is generally not sufficiently predictable and planned that APRA's licence back provisions facilitate direct dealing between APRA members and music users.

6.40 However, the ACCC does note APRA's submission that its licence back provisions are designed to strike a balance between the competing goals of promoting competition and the efficient operation of APRA as a collection society. This is discussed in greater detail in the ACCC's assessment of the public benefits generated by APRA's licence back provisions, and the restrictions on the circumstances in which they can be used.

6.41 The ACCC also notes the submissions of interested parties regarding possible further amendments to make APRA licence back provisions more flexible and thereby facilitate greater direct dealing between APRA members and music users, as summarised at Attachment A of this determination. This issue is discussed in section 7 of this determination.

6.42 The one exception to APRA's licence back provisions is in respect of music owners in the United States who are members of United States collection societies affiliated with APRA. As these societies confer only non-exclusive rights in their members' works, there is nothing presently preventing members of these societies negotiating directly with Australian users.

6.43 However, a more fundamental impediment in respect of members using APRA's licence back provisions, or indeed any member of an overseas society dealing directly with Australian users, is APRA's propensity to only offer users blanket licences. In its draft determination the ACCC noted that so long as users are only able to obtain a blanket licence in respect of APRA's repertoire, there is no incentive for a user to acquire rights from a niche society or member directly unless there is a corresponding adjustment to the price the user pays for its APRA licence.

6.44 Therefore, even if APRA's licence back provisions were less restrictive, the incentives for music owners and users to deal directly would still be limited to those instances

where the user did not also require access to other works within the APRA repertoire, or in the event that it did, instances where the user was able to negotiate a transactional licence with APRA for the use of other works in its repertoire, or an adjustment to the blanket licence fee to reflect its use of works where it has negotiated rights directly with the music creator or owner.

6.45 In the absence of such provisions, any prospect of direct dealing is foreclosed, as the user is still forced to pay a licence fee to APRA which not only covers any works where it has negotiated alternative arrangements, but is calculated to reflect use of these works. In effect, the user would be paying to use the works twice.

6.46 The ACCC notes that APRA has stated that it acknowledges the concerns raised by the ACCC in the draft determination regarding its propensity to only offer users blanket licences and that in response it has, and proposes to continue to, actively explore possible alternatives to blanket licenses with interested user groups. This is discussed in further detail in paragraphs 6.120 to 6.124.

Import competition

6.47 As Australia is a net importer of copyright material, user requirements will often consist predominantly of access to overseas works. Users could potentially contract with overseas collection societies, publishers and composers.

6.48 However, APRA's reciprocal arrangements with overseas collecting societies have the effect of preventing or discouraging those societies from competing in Australia by providing access to their repertoire directly to Australian users. This limits the need for the overseas collecting societies to enter the Australian market for the purpose of collecting fees for use of works in their repertoires. In addition, APRA's overseas arrangements severely limit the ability of users to go directly to overseas societies to acquire rights. This decreases the likely entry of new collecting societies or creation of alternative mechanisms because access to overseas repertoires would be denied. In effect, there is an international monopoly which prevents overseas societies from competing against each other and new societies developing outside the existing monopoly.

6.49 With respect to direct dealing, users can presently acquire rights directly from, in particular, United States composers, who retain the right to deal with the performing rights of their works independently of the collecting society of which they are a member. However, APRA's propensity to offer users blanket licences acts as a disincentive for users to contract directly with overseas publishers and composers. As noted, there is no incentive for a user to acquire rights directly from a composer or publisher unless there is a corresponding adjustment to the price the user pays for the APRA licence.

Barriers to entry and new market entrants

6.50 APRA submits that their may be financial barriers to entry in establishing new bodies to administer performing rights due to the costs involved in establishing a system for identifying, recording and verifying music usage, recording and enforcing licence arrangements and distributing licence fees received. APRA submits that this barrier is inherent to the nature of the industry and reflects the economies of scale achieved by a

long established centralised body for collective administration. APRA submits that this barrier would not be affected by whether APRA existed or not.

6.51 APRA submits that the need to find a sufficient number of licensees to make their operations viable acts as a further barrier to new entrants. In addition, APRA contends that it is unlikely to be in its members or users interests to establish a rival collection society unless it becomes inefficient to the point where such a society would become viable. APRA submits that this acts as a competitive constraint on it and as an incentive to maintain efficiency of operations.

6.52 Some interested parties submit that member satisfaction with APRA's current arrangements make the establishment of an alternative society unlikely. Others submit that APRA's input arrangements hinder the entry of competition into the market, such as for example, administration of performing rights by major publishing houses or specialised collection agencies. Some interested parties submit that a requirement that members transfer rights to APRA only by way of a non-exclusive licence could serve to foster such competition.

6.53 As noted by APRA, there are significant barriers to entry in establishing new bodies to administer performing rights due to the costs involved in establishing a system for identifying, recording and verifying music usage, recording and enforcing licence arrangements and distributing licence fees received. The ACCC considers that this poses a considerable hurdle to the creation of alternative mechanisms or new entrants into the market.

6.54 However, the ACCC considers that these barriers to entry are further exacerbated by APRA's input arrangements, which, as noted, forestall direct dealing between music owners and users and/or the development of other alternative mechanisms for the administration of performing rights in the vast majority of cases. In effect, potential new entrants are denied access to APRA's repertoire of Australian music, without which the establishment of any alternative arrangements would be unviable. The difficulty in establishing alternative bodies to administer performing rights is further compounded by APRA's arrangements with overseas collection societies, which, with the exception of United States, effectively deny potential new entrants access to the repertoires of those countries.

6.55 In addition, as noted, even absent APRA's restrictive input arrangements, its grant of blanket licences to users further limits the likelihood that other collecting societies will enter the market, or that users will go directly to composers or publishers to acquire their rights.

6.56 Further, APRA's position in the market is such that few members would chose to forgo the benefits of APRA's distribution arrangements in respect of all, or particular categories, of their works in order to join an alternative society with limited market profile and repertoire, or to take advantage of direct negotiation in relation to individual works, categories of works or their entire repertoire.

6.57 In conclusion, the ACCC considers that while the considerable costs involved in establishing an alternative collection society acts as a significant barrier to entry to the market, APRA's input arrangements and its propensity to offer users blanket licences further exacerbate, what are already, significant barriers to entry.

6.58 With respect to APRA's argument that the potential for new entrants to enter the market acts as a competitive constraint on it and an incentive for it to maintain efficiency of operations, the ACCC considers that given existing barriers to entry, both financial and as a consequence of APRA's arrangements, APRA's operations would have to be so inefficient in order to provide sufficient incentives for a rival collection society to enter that the threat of new market entry does not provide any significant competitive constraint on APRA's operations.

Digital rights management

6.59 Background information regarding DRM is provided at paragraphs 2.47 to 2.51 of this determination.

6.60 Free TV Australia (Free TV) submits that technological advancements in DRM are gaining traction and current indications are that there may be wide spread commercial deployment of DRM systems in the near future. Free TV states that DRM is relevant to APRA's arrangements because:

- DRM has the potential to allow for efficient, competitive direct licensing of music between copyright content producers/publishers and end users, and indirect dealing through third parties other than existing collecting societies; and

- APRA's traditional blanket licensing arrangements, which do not provide a refund or similar where a blanket license holder acquires rights directly from a creator, penalise parties that make direct licensing deals with creators, which will impede the deployment of DRM in Australia.

6.61 Consequently, Free TV submits that the anti competitive detriment generated by APRA's arrangements will increase over time as DRM technology develops.

6.62 Similarly, CRA submits that new technology, in particular DRM, has been developed since the existing authorisations were granted. It submits that this technology has the capacity to allow copyright owners, or intermediaries acting on their behalf, to directly licence musical works to users and at the same time monitor or record the use of that music. CRA submits that in effect, DRM has the potential to remove most of the rationales for APRA's centralised operation and monopolistic behaviour.

6.63 The Australia Council for the Arts submits that while the online environment is perhaps facilitating an increased number of direct dealings between copyright users and owners, such technology has not evolved to the degree where it could provide an effective substitute for the licensing services provided by APRA.

6.64 APRA submits that it acknowledges that DRM has the (long-term) potential to significantly reduce monitoring costs in relation to digitally delivered music. However, APRA submits that DRM does not at present, or for the foreseeable future, have the potential to undermine the public benefits of the APRA system as:

- as far as APRA is aware, there is no reasonable foreseeable prospect of DRM facilitating the accurate recording of ownership in the underlying work of all online digitally delivered music;

- DRM would appear to have no role in licensing, and monitoring, except in relation to music delivered online;

- as far as APRA is aware there is no reasonably foreseeable prospect (in any media) of music being delivered exclusively by online delivery platforms;

- even if it were assumed that DRM could somehow provide an accurate online identification of copyright holders in the underlying work, it could not facilitate 'at source' negotiations for the licence of the performing right, between the proposed user and each and every copyright owner; and

- the capacity of APRA to efficiently facilitate the licensing of the performing rights is at the foundation of the public benefits of the APRA system.

6.65 The ACCC notes that the practical utility of DRM, as a tool for administering performing rights, is limited to music made available to users in the digital environment. In this respect, it is not, at the present time, a practical means of administering performing rights for APRA members in relation to the vast majority of users or uses of works. However, as technology in respect of the way users use musical works develops, this may change.

6.66 In the context of music delivered digitally, and in particular, music delivered online, DRM does have the potential, in the immediate future, to develop as an efficient, alternative means of performing rights administration. In this respect, the continued development of DRM will lower barriers to alternative means of administration of performing rights developing, provide a competitive constraint on APRA's administration of performing rights and reduce the anti-competitive detriment generated by APRA's arrangements, particularly in relation to music delivered online.

6.67 However, for reasons analogous to those discussed above, APRA's propensity to only grant blanket licences to users, thereby virtually eliminating incentives for users to enter into alternative arrangements in respect of parts of its repertoire, has the potential to inhibit the development of DRM as a viable alternative means of administering performing rights in Australia by any party other than APRA.

Audio watermarking and audio fingerprinting

6.68 CRA also submits that broadcast monitoring technologies have recently been developed which allow music use to be tracked without using the internet by analysing broadcast signals. CRA states that these technologies use software applications to monitor radio broadcast signals and are able to detect and record songs broadcast either through information embedded in the audio track (audio watermarking) or by recognising the unique characteristics of a song such as its audio waveforms (audio fingerprinting).

6.69 CRA states that audio fingerprinting technology can be used to identify music regardless of whether it's stored/broadcast in an analogue or digital format and that there are already a number of commercial applications for these technologies such as MusicTrace and BlueArrow which is owned by the US performing rights organisation BMI.

6.70 In response, APRA submits that these technologies have been investigated by it, however, they do not link writer and other ownership information to the details of

recording broadcast. APRA argues that there is no basis on which it can be seriously contended that this emerging technology is relevant to the structure and operation of the present market for the licensing of performing rights, or the public benefit balance in relation to APRA's scheme.

6.71 To the extent that such technologies are emerging, they represent the possibility of more accurately and cost effectively monitoring of, in particular, the broadcast of musical works by radio stations. While, as noted by APRA, these technologies, at present, do not identify the copyright owner of the work broadcast they do provide a record of works broadcast.

6.72 However, to the extent that such technology is adopted, its applicability is limited to the monitoring of use of works in those categories which involve broadcast of the work. More traditional means of monitoring use of works would still need to be adopted for other categories of performance. Therefore, while audio fingerprinting has the potential to improve the efficiency of collection societies in monitoring performance of works in some categories of use, it does not, at present, represent a viable alternative means of monitoring performance of works in many categories of use, or of administering performing rights more generally.

6.73 To the extent that audio fingerprinting does improve the efficiency of monitoring of works in some categories, this has the potential to reduce, to some extent, the barriers to entry in establishing alternative bodies to administer performing rights. However, as noted, these barriers are significant, involving the establishment of systems to identify, record and verify music usage, record and enforce licence arrangements and distribute licence fees received, across all categories of performance rights. Other than potentially in respect of the recording of usage of works in categories of performance involving the broadcast of works, audio fingerprinting is unlikely to significantly reduce these costs.

6.74 However, as discussed in relation to DRM, APRA's propensity to only grant blanket licences to users, thereby virtually eliminating incentives for users to enter into alternative arrangements in respect of parts of its repertoire, has the potential to inhibit the development of these technologies as viable alternative means of undertaking the monitoring element of the administration of performing rights for some categories of works in Australia by any party other than APRA.

Creative commons licensing

6.75 Background information regarding creative commons licensing is provided at paragraphs 2.52 to 2.54 of this determination.

6.76 Creative Commons International (CCI) notes that Australian musicians have a strong incentive to join APRA in order to facilitate the collection of royalties in respect of the use of their works, while at the same time APRA generally offers users blanket licences covering its entire repertoire.

6.77 CCI states that after becoming a member of APRA a musician no longer owns all of the rights in his or her current or future works, which precludes them from being able to share any current and future works under a creative commons licence. CCI notes APRA's opt out and licence back provisions but submits that they do not provide a

realistic mechanism for musicians who wish to release some of their works under a creative commons licence.

6.78 Specifically, CCI contends that, for example, where a musician wishes to upload some of their music to their website, then they are communicating it to the public, which APRA controls the rights to. Consequently, musicians can not upload music for their website for non-commercial reasons, such as sharing it with other internet users, without APRA's permission, which it contends it subject to APRA's inflexible licence back provisions.

6.79 APRA submits that the creative commons model seeks to implement a system that is completely different to the APRA model in that it provides free access to music on terms whereas APRA ensures that copyright owners are paid for commercial use of their music.

6.80 APRA further states that if creative commons licences are for non-commercial use then the vast majority will not require performing rights licences as the concept of performance in public excludes for all practical purposes performance in a domestic context. Accordingly, APRA submits that by simply excluding the APRA rights from the licence, creative commons agreements could easily sit with APRA membership.

6.81 With respect to CCI's assertion that the inflexibility of its opt out and licence back provisions means that members who want to put some of their works on the internet are unable to do so, APRA states that a composer who wishes to licence a creative commons work in a manner which might involve 'performance in public' can avail themselves of APRA's licence back regime. Further, APRA submits that if a member is merely seeking to put some of their music on their web site, they would not be sub-licensing use of the work to any other party and therefore would only need to inform APRA that the work was being placed on their website.

6.82 CCI states that APRA's constitution seems to require that other, more onerous, conditions be met before a member is able to place their work on their own web site.

6.83 APRA states that it is putting forward a streamlined proposal to remove perceptions that having to provide details of who would be using works is a barrier to members placing works on their websites. APRA contends that it will be made clear that all members need to do is notify APRA in advance of their intention to place a work on their website.

6.84 APRA also contends that no more than 10 of its members have made enquires to it regarding creative commons licensing and that no member has been granted, or refused, a licence back or opt out for the purpose entering into a creative commons licence.

6.85 The ACCC notes that there is some uncertainty as to the process APRA members are required to follow in order to, for example, post their music on websites, or otherwise make their music available for 'non commercial' use. What is clear is that APRA's licensing arrangements do not extend beyond the 'public performance' of musical works, such that an APRA license is not required for the domestic use of works within its repertoire.

6.86 To the extent that APRA's licence back provisions, or the uncertainty as to their applicability, inhibits the non commercial sharing of musical works for private use, such as through creative commons licenses, this would generate a public detriment.

6.87 However, more generally, the creative commons licensing model is not, nor is it intended to be, an alternative means of monitoring public performance of musical works and/or collecting royalties in respect of public performance.

Monopoly conduct by APRA

6.88 APRA has a virtual monopoly in respect of performance rights licences in Australia: As discussed:

- virtually all music owners in Australia are APRA members;
- APRA's opt out and licence back provisions, even as modified in response to the ACCC's draft determination, significantly limit the possibility of users sourcing performance rights to Australian works by alternative means, such as through direct dealing or specialist collection societies in most cases;
- APRA's arrangements with overseas collection societies similarly foreclose the possibility of users sourcing performance rights to overseas works through other means, other than in the case of US works;
- even if APRA's input and overseas arrangements were less restrictive, by generally offering users blanket licences APRA eliminates incentives for music owners and users to negotiate performing rights other than through it; and
- absent APRA's arrangements, there are still significant financial barriers to alternative collection societies establishing.

6.89 Consequently, music owners and users are prevented from negotiating the terms and conditions of performance rights licences other than through APRA. Essentially, APRA is a monopoly whose membership rules current prevent 'cheating' in the form of direct dealing. This concentration of members rights exclusively with APRA means that APRA would be able to set prices for access to its repertoire without consideration as to what the economically efficient price of those rights would be.

6.90 In addition, the ACCC notes that for many users the product which APRA supplies, performing rights licences, is essential to the viability of their businesses. Television and radio stations, cinema operators and nightclubs, for example, would not be able to operate without some sort of performing rights licence. Consequently, these users are almost compelled to enter into agreements with APRA irrespective of the terms of such agreements.

6.91 As a monopoly supplier, not constrained by import competition or threat of entry, APRA is able to 'give less and charge more.' In the case of non-rivalrous goods such as musical works, where consumption of the work by one person does not limit the consumption of the work by others, giving less does not mean restricting the production of new musical works, but rather limiting access to musical works. For non-rivalrous goods, where there is no opportunity cost of consumption, this represents a misallocation

of resources. Indeed, APRA's ability to charge monopoly prices could encourage excessive production of new works and membership of APRA. Hence, there is both a short run and long run misallocation of resources: in the short run, use of existing works is restricted, but in the long run, there is excessive production of new works.

6.92 While APRA does not restrict output in the sense that it does not refuse access to any of its works, it is able to price discriminate by charging different groups of users and various users within groups different licence fees, and in doing so, raise prices above efficient levels and maximise monopoly rents.

6.93 Efficient pricing of non-rivalrous goods is a complex issue. The short run marginal cost of using existing works is zero, but this would create no incentive for investment in the production of new works. In this respect, APRA submits that price competition would tend to drive price down to zero which would result in market failure.

6.94 APRA also contends that enforcement of copyright contains a high proportion of fixed costs, including establishment of a system for monitoring users and registering works. By contrast, once those systems are in place, the incremental cost of accepting another writer or new work into the system is small as is the marginal cost of supplying (or licensing) rights. Consequently, again, APRA submits that if price was set at marginal cost the inevitable consequence would be market failure.

6.95 To provide incentives for investment in the production of new works the sum of prices paid by all users of a musical work should cover the marginal cost of creating new works. All users, in this context, is not limited to users who wish to publicly perform or broadcast the work, but also users who purchase the work directly, for example through record sales, and users who purchase synchronisation rights in the work or use the work in other mediums.

6.96 Specifically in respect of performing rights, efficient pricing may involve some price discrimination between different categories of users. An added complication is that broadcasting and public performance of a work promotes that work and may increase other use of it, including other broadcasts and performance for which a licence is payable and other uses such as record sales. This will tend to reduce the efficient price for broadcasting and public performance use of the work.

6.97 In order to maximise use of existing works while providing incentives for production of new works, it would be efficient to charge a flat fee for unlimited access to works, but which related to the number of works accessed, with appropriate discounts to reflect savings in transaction and enforcement costs and other efficiency gains associated with bundling through a blanket licence. Hence, APRA's use of a flat fee has efficiency benefits. However, the blanket licences offered by APRA generally fail to take account of any direct dealing that could otherwise occur between music owners and users. Further, unconstrained in setting licence fees, such fees would be determined by APRA's monopoly power.

6.98 It is not for the ACCC to determine here what efficient prices for public performance of APRA's repertoire would be. However, the issues raised indicate the potential effects of APRA's arrangements and reinforce the argument that acting as an unconstrained monopolist APRA would be likely raise prices above economically efficient levels to maximise monopoly rents.

6.99 A further outcome of the limit on competition between APRA members is that better known composers are more likely to have their works performed and broadcast that lesser known composers because it costs the user no more to use a better known composers work. Although members may still compete in relation to the amount of airplay, record sales, etc, and this may have a flow on effect in terms of distributions by APRA, the APRA system displaces price competition between members.

6.100 Overall, APRA's arrangements have the effect of limiting arrangements between music composers and owners and users. They are, for practical purposes, restricted in their ability to deal with each other directly and set their own terms and conditions. For those licensees who are not satisfied with the arrangements offered by APRA and seek alternative arrangements, for example, transactional licences or, at a minimum, an adjustment to APRA's blanket licence to reflect those instances where the user has entered into alternative arrangements for the licensing of use of particular musical works, APRA's general propensity, at least to date, to only offer users blanket licenses also gives rise to anti-competitive effects.

Negotiation of licences and licence terms

6.101 The Music Council of Australia submitted that the licence fees charged by APRA are modest and its monopoly position is not used unfairly to elevate royalty rates. However, a number of major Australian music users submitted that APRA uses its monopoly position to inflate fees and limit the types of licences available to users.

6.102 CRA submits the APRA approaches negotiations with users with the view that it can determine the nature of the scheme and the method pursuant to which licence fees will be calculated in the knowledge that there is no alternative supplier of rights available and that users must have access to its repertoire. CRA contends that the rates which APRA charges are much higher than those that would be charged in a competitive market or one where there was adequate external regulation to constrain APRA's monopoly power. Similarly, Cinema Operators submit that the licence fees imposed on them by APRA are based on a formula reflecting Cinema Operators ability to pay, rather than any assessment of the underlying value of the works.

6.103 Free TV and CRA also state that APRA maintains its output arrangements in their current form (i.e. only offering blanket licences) to ensure maximum leverage when rights are negotiated. Similarly, Cinema Operators submit that the recent application to the Copyright Tribunal for a 257% increase in licences fees paid by them is an unconstrained expression of market power only made possible because APRA's input arrangements prevent, in any realistic way, Cinema Operators from negotiating rights directly.

6.104 Cinema Operators state that rights to public performance through film exhibition could be practically negotiated as an incident of making the film or directly in relation to the film, when the identification of the source of rights and ownership is undertaken by the producer, clearances obtained and other rights negotiated, as occurs in the United States. Cinema Operators state that typically, US film producers secure both a synchronisation licence and a performance licence, on a per film basis, directly from the copyright owner or their agent at the time the producer secures the rights to 'use' the specific music he or she would like to include in the film, with synchronisation licence documents including a

provision granting public performance rights for theatrical exhibition of the film in the US.

6.105 Cinema Operators submit that it would be feasible for them to negotiate Australian performance rights in US films, which constitute 85% of Australian box office, directly at source in a similar manner. However, APRA's monopoly power allows it to impose blanket licences on Cinema Operators with the licence fee calculated as a percentage of total box office and no provision for a discount on the licence fee in the event that Cinema Operators are able to negotiate some licence fees directly. Cinema Operators submit that APRA's blanket licensing arrangements could be easily modified to account for instances where performance rights have been negotiated directly. For example, through provision within APRA's blanket licence fee for a discount on that fee commensurate with the percentage of box office generated by films where performing rights were negotiated directly.

6.106 APRA submits that it has always been (and remains) willing to consider other licence proposals and has never indicated that it is not prepared to consider licensing on terms other than blanket licences. In this respect, APRA states that Cinema Operators have never approached it for a licence other than a blanket licence. APRA further states that it acknowledges that it may be necessary to adjust blanket licence fees in the event that opt out or direct dealing occurs, however submits that this is a matter for negotiation between the parties or, failing agreement, the Copyright Tribunal (as discussed below).

6.107 In its draft determination the ACCC noted the following with respect to APRA's licensing arrangements.

6.108 So long as users are only able to obtain a blanket licence for access to APRA's repertoire there is no incentive for most users to acquire rights directly, unless there is a corresponding adjustment to the price the user pays for its APRA licence. Currently, the blanket licences offered by APRA provide for no such adjustment, nor is there any incentive for APRA to provide for such adjustments, as facilitating direct dealing would both undermine its revenue base and its position as the monopoly supplier of performance rights licences in Australia.

6.109 The ability for users to obtain a discount on APRA's blanket licence fees commensurate with those works within APRA's repertoire for which the user has negotiated a licence directly, or indeed, provision for users to negotiate transactional licences with APRA only in respect of those works where the user has not negotiated a licence directly with the copyright owner, would provide incentives for direct dealing between music owners and users. Arrangements which practically facilitated direct dealing between copyright owners and users would, even if, as would be most likely, provided APRA took account of the alternative means by which users could source performing rights licences in setting its own licence fees, rarely used, provide a significant competitive constrain on APRA in setting the terms and conditions of its licence fees in respect of some users.

6.110 As noted, it is not for the ACCC to determine here what the efficient price and/or type of licence for public performance of APRA's repertoire in each instance would be. However, the issues raised here illustrate that, unconstrained, APRA has the ability, by virtue of its monopoly over the supply of public performance rights in Australia, to raise prices above economically efficient levels and offer licences on terms which foreclose

any real possibility of copyright owners and users exploring means of dealing with each other, other than through APRA.

6.111 In response to the draft determination APRA submits that it acknowledges the concerns raised by the ACCC regarding its licensing arrangements and intends to actively explore possible alternatives to blanket licenses with interested user groups. APRA further submitted that it proposed to modify its application before the Copyright Tribunal in relation to the licence fee for cinematic exhibition, for the purpose of seeking a determination as to the reasonable terms for a modified blanket licence scheme.

6.112 Cinema Operators argue that APRA's stated willingness to consider alternative licensing arrangements is only as a result of being exposed to the authorisation process and in any event, is no constraint on its ability to exploit its monopoly power and that consequently conditions of authorisation are necessary to provide a real alternative to users and promote competition.

6.113 APRA subsequently advised that it had reached agreement with Cinema Operators as to a new rate under the license scheme, that it has terminated its licenses with the cinema industry effective 30 June 2006 and is currently negotiating the remaining terms (other than the rate) of the license scheme. APRA states that it had discussed with Cinema Operators alternatives to a blanket license on a confidential and without prejudice basis but that the license scheme agreed is a blanket license. Having reached agreement with Cinema Operators, APRA advises that it intends to withdraw its reference to the Copyright Tribunal in relation to the license fee for cinematic exhibition.

6.114 APRA further states that should any cinema operator wish to be licensed on terms that take into account any license back or opt out arrangements in respect of particular musical works, APRA will formulate such a scheme and negotiate its terms, and will submit the scheme to the Copyright Tribunal if agreement cannot be reached.

6.115 Free TV also express concerns that APRA's propensity to only grant blanket licences eliminates any incentives for television broadcasts to negotiate directly with composers, for example, to commission works for use in television programs, and allows APRA to exercise maximum leverage in negotiations with music users.

6.116 In response, APRA states that it proposed an alternative licensing scheme in 2001 which reflected use of works but that the television networks decided not to explore this option and instead negotiated a lump sum blanket licence fee. APRA argues that this is the reason that composers have not sought to avail themselves of APRA's licence back provisions to deal directly with television networks to date.

6.117 APRA also notes that its licensing arrangements with commercial radio stations require payment of a different percentage of revenue dependant on actual use of the music in its repertoire. APRA contends that, more generally it from time to time has granted licenses on terms which are adjusted to reflect the fact that not all music performed on particular occasions is control by APRA, that it has never refused to enter into negotiations with any party in relation to the introduction of a modified blanket licence, but that Free TV has never approached it for the provision of a modified licence.

6.118 APRA states that when other users have approached it in the past seeking other than blanket licences, it has considered these proposals on a case by case basis. APRA cites

its arrangements with commercial radio stations and concert promoters as two such examples. APRA contends that these examples reflected APRA's willingness to respond to requests from users for alternative forms of licenses.

6.119 More generally, APRA acknowledges that its current licensing arrangements with Free TV do not provide incentives for direct dealing. However, APRA states that its existing agreement with Free TV expires in 2006, that as noted, APRA accepts the concerns raised by the ACCC in its draft determination regarding the need for it to offer users alternatives to the existing standard blanket licence, that APRA is exploring potential alternative schemes and that it will be offering commercial television broadcasters both a blanket license and a license scheme under which license fees are related to use of music by taking account of any license back or opt out arrangements in respect of particular musical works.

6.120 The ACCC is encouraged by APRA's stated preparedness to actively explore alternatives to blanket licenses with interested music users. As noted, arrangements which practically facilitated direct dealing between copyright owners and users would, even if, as would be most likely, provided APRA took account of the alternative means by which users could source performing rights licences in setting its own licence fees, rarely used, provide a significant competitive constrain on APRA in setting the terms and conditions of its licence fees in respect of some users.

6.121 However, the utility of such arrangements is largely dependant on the terms on which they are offered. In this respect, it remains in APRA's commercial interest not to provide alternatives to blanket licenses, or at least not to provide such alternatives on commercially viable terms, as facilitating direct dealing would both undermine its revenue base and its position as the monopoly supplier of performance rights licences in Australia. As such, the ACCC is not in a position at this early stage to make an assessment of how effective any alternatives to APRA's traditional blanket licenses offered, if in fact such alternatives are developed, will be in facilitating direct dealing between music users and composers and thereby imposing some competitive constraint on the licence terms and conditions offered by APRA.

6.122 More generally, the ACCC notes that direct dealing with composers and other rights holders is unlikely to be a cost effective option for most music users. Indeed, the ACCC notes that even those music users most likely to benefit form the opportunity to deal directly with composers, such as television broadcasters and cinema operators, have previously chosen not avail themselves of the opportunity to enter into arrangements with APRA which would facilitate such direct dealing, at least not on the terms offered by APRA, and instead continue to utilise APRA's blanket licensing arrangements.

6.123 In addition, even where direct dealing might be an otherwise cost effective option to the blanket licenses offered by APRA, the practical utility of APRA's licence back provisions which members would need to avail themselves of in order to deal directly with music users, even as amended, generally remains limited to those instances where intended use of musical works is, by and large, predictable and planned. In this respect, as noted, use of musical works in most of the categories of use for which APRA offers licences is generally not sufficiently predictable and planned that APRA's licence back provisions facilitate direct dealing between APRA members and music users.

6.124 However, as noted, this is not to say that the opportunity to explore alternative licensing arrangements, even if not used, would not place some competitive constraint on the license terms and conditions offered by APRA in respect of some music users.

6.125 The ACCC also notes the submissions of interested parties regarding possible conditions of authorisation which could require APRA to offer alternatives to blanket licenses at the request of music users, as summarised at Attachment A of this determination. This issue is discussed in section 7 of this determination.

6.126 While it was accepted by all parties who provided submissions, including APRA, that, at least at present, it has a monopoly over the supply of performing rights in Australia, APRA submits that it is constrained in its ability to exploit its monopoly position to it and its members advantage by the Copyright Tribunal.

6.127 Given the ACCC's conclusion that APRA, by virtue of the arrangements for which authorisation is sought, currently has a monopoly over the supply of performing rights in Australia which has the potential, if exploited by APRA, to generate significant public detriment, a key question for the ACCC to consider is the extent to which APRA is constrained by the Copyright Tribunal in exercising its monopoly power.

The Copyright Tribunal

6.128 The functions, jurisdiction and processes of the Copyright Tribunal in respect of APRA's licences are summarised at paragraphs 2.14 to 2.18 of this determination.

6.129 APRA submits that the terms of its output arrangements are not strictly within its control, as any person dissatisfied with a licence, or with a decision not to grant a licence, may apply to the Copyright Tribunal for a determination of whether its proposed terms are reasonable or for a variation of an existing licence scheme – in effect the compulsory granting of a licence on the terms determined by the Copyright Tribunal.

6.130 APRA submits that the Copyright Tribunal is an effective mechanism that prevents it from imposing unreasonable terms (including price) under its licence schemes. APRA submits that the purpose of the Copyright Tribunal is to ensure that APRA (and similar collecting societies) do not abuse their monopoly power by unreasonably rasing prices for, or unreasonably restricting the availability of, performing rights in relation to their repertoires. APRA contends that in these regard, Commonwealth Parliament has decided that competition should not be the ultimate regulator of appropriate fees and conditions of copyright licences. APRA states that it acknowledges that the jurisdiction of the Copyright Tribunal over its licensing schemes is comprehensive, and extends to both the terms and amounts of its licences.

6.131 Specifically APRA notes that while it general grants blanket licences for the works in its repertoire, if the Copyright Tribunal could be persuaded that alternatives to blanket licences were reasonable, APRA would be obliged to provide such licences. Similarly, APRA submits that the Copyright Tribunal is the appropriate forum to address any users concerns over licence fees. In this respect, APRA submits that it always seeks to negotiate a mutually satisfactory licence arrangements with users rather than seek recourse to the Copyright Tribunal. Further, it is its practice to refer to the Copyright Tribunal any licence scheme where agreement can not be reached regarding appropriate

licence terms or level of fees, rather than seek to impose its preferred scheme on the user.

6.132 In addition, APRA contends that the existence of the Copyright Tribunal is a powerful tool for licensees in their negotiations with APRA.

6.133 Further, APRA notes the finding of the Competition Tribunal that the Copyright Tribunal provides an effective constraint against APRA abusing its monopoly power in dealing with major users of music.

6.134 ARIA, The Australian Council for the Arts and the Arts Law Council of Australia submit that the ACCC, Copyright Tribunal and Code of Conduct for Australian Collection Societies, effectively regulate APRA's operations and limit any possible abuse of market share by APRA. The Attorney General's Department states that the Copyright Tribunal is authorised under Part VI of the Copyright Act to hear disputes about the terms and conditions of APRA's licences and is the appropriate forum in which to address concerns licensees may have about specific terms and conditions of licenses.

6.135 CRA submits that it would be untenable to refer matters to the Copyright Tribunal whenever an industry agreement is re-negotiated. Further, it is unclear if the orders the Copyright Tribunal is able to make can adequately regulate the terms and conditions on which APRA makes its repertoire available. CRA notes its experience with the Copyright Tribunal which, it submits, resulted in a significant and unjustified increase in fees. It also states that the matter took 4 years to be heard and involved significant legal costs.

6.136 Cinema Operators contend that while the Copyright Tribunal has the jurisdiction to determine the reasonableness of licence fees, it necessarily considers the question of reasonableness in the context of the authorised input arrangements enabling the aggregation of assignment rights and authorised blanket licensing protocol. Consequently, Cinema Operators submit, the Copyright Tribunal considers the reasonableness of licence terms not in the context of a licence for the limited works incorporated in a film by the producers but as a function of a blanket repertoire linked to a total proportion of box office receipts.

6.137 Cinema Operators contend that APRA's applications for authorisation and submissions in support of its applications reflect its refusal to consider any form of licence other than a blanket licence. Cinema Operators submit that, as a consequence, the ACCC must assess the applications on the basis that, if authorisation is granted, the Copyright Tribunal will be asked to determine the reasonableness of licence fees for cinemas solely within the parameters of the particular input and output arrangements (consisting of blanket licences) which comprise APRA's proposed licensing arrangements.

6.138 Consequently, Cinema Operators and Free TV submit that the framework for determining the reasonableness of licence fees is for the ACCC to consider through the authorisation process and can not be determined by the Copyright Tribunal itself.

6.139 Free TV also submits that the role competition issues can or will play in any determination by the Copyright Tribunal is uncertain and that it is conceivable that what the Copyright Tribunal may consider 'reasonable' in any particular case may involve little weight being given to competition issues.

6.140 Consequently, Free TV submits that the ACCC should not, in reaching its determination, place significant weight upon the role the Copyright Tribunal might play in constraining APRA's monopoly power and reducing the anti-competitive detriment of APRA's arrangements.

6.141 In response to CRA's submission that the expense of seeking recourse to the Copyright Tribunal makes it an impractical method of resolving disputes in many instances, APRA submits that given CRA's collective size and commercial interests there is no basis to conclude that the expense of Copyright Tribunal litigation creates an effective barrier to serious challenge by CRA of the reasonableness of APRA terms. APRA states that in previous Copyright Tribunal proceedings CRA have been well resourced and represented. In addition, APRA notes its alternative dispute resolution procedures in respect of small disputes, implemented as a condition of the authorisation previously granted by the Competition Tribunal (as discussed below).

6.142 In response to the Cinema Operators and CRA's submissions that it should offer licensing alternatives other than blanket licences, APRA submits that, in addition to the jurisdiction of the Copyright Tribunal to impose such a licence scheme on it, it has always been (and remains) willing to consider other licence proposals and has never indicated that it is not prepared to consider licensing on terms other than blanket licences. In this respect, APRA states that neither the Cinema Operators or CRA have ever approached it for a licence other than a blanket licence.

6.143 APRA states that it acknowledges that it may be necessary to adjust blanket licence fees in the event that opt out or direct dealing occurs, however submits that this is a matter for negotiation between the parties or, failing agreement, the Copyright Tribunal. Similarly, APRA states that it recognises the validity of the concept of per program licensing as raised by CRA and is prepared to argue such a licence scheme on its merits in the Copyright Tribunal, which it states, is the appropriate forum in which to address this issue.

6.144 With respect to Cinema Operators submission that the Copyright Tribunal is fettered in its determinations as to reasonable fees and licence terms by the nature of any authorisation granted, and specifically by an authorisation granted in the context of APRA generally only offering blanket licences, APRA submits that:

- the Copyright Tribunal is in no way so fettered;
- there is nothing in the Copyright Act to suggest that a blanket licences is the only appropriate form of licence; and
- the provisions of the authorisation granted by the Competition Tribunal do not preclude the Copyright Tribunal from ordering the provision of licences on terms other than through a blanket licence.

6.145 In response to Free TV's submission that the Copyright Tribunal does not have adequate regard to economic principles in determining licence schemes, APRA argues that the most recent decision of the Copyright Tribunal in respect of the licence scheme applicable to Screenrights showed that the overwhelming majority of evidence presented before the Copyright Tribunal is economic in nature.

6.146 Broadly, the Copyright Tribunal is empowered to determine the terms of licence schemes, by confirming or varying the scheme, between APRA and users. It may do so on application by either APRA or a user, and in respect of an existing or proposed scheme. In effect, APRA is bound by any decision of the Copyright Tribunal both in respect of the type of licence offered and the terms on which the licences is offered.

6.147 APRA has argued that in empowering the Copyright Tribunal to perform this function, Commonwealth Parliament has decided that competition should not be the ultimate regulator of appropriate fees and conditions for copyright licences. Similarly, the TPA recognises that the public interest may not always be met by the operation of competitive markets. Hence the authorisation process. However, this recognition that the public interest may not always be met by the operation of competitive markets does not mean that competition issues should not be an important consideration. Rather, it is simply an acknowledgment that the anti-competitive effects of arrangements should be weighed against any offsetting benefits the arrangements might generate in determining whether they are in the public interest. Consequently, the extent to which APRA's monopoly power is effectively regulated by the Copyright Tribunal is still an important factor to be weighed by the ACCC in determining whether authorisation should be granted to APRA's arrangements.

6.148 The ACCC notes the concerns raised by CRA, Free TV and Cinema Operators with respect to the jurisdiction of the Copyright Tribunal. However, clearly, the Copyright Tribunal is empowered under the Copyright Act to vary any scheme, which any party refers to it, as it considers reasonable.

6.149 Cinema Owners have submitted that, if it were to authorise APRA's arrangements on the terms currently sought, the ACCC would be authorising a scheme whereby APRA only offers blanket licences and that as a consequently, any consideration by the Copyright Tribunal of APRA's licensing arrangement would be limited to determining the reasonableness of blanket licences offered. As noted above, APRA has sought authorisation for its output arrangements, the terms of which are clearly governed, in the event of a dispute between APRA and a music user, by the Copyright Tribunals ability to impose such terms as it considers reasonable on any licence granted. It is in this context which the ACCC must consider APRA's arrangements.

6.150 As discussed earlier, output arrangements whereby users are precluded from obtaining other than blanket licences, or a modified blanket licence fee where direct dealing has occurred, would generate significantly greater public detriment than would otherwise be the case. However, in considering APRA's arrangements the ACCC must take account of not only APRA's propensity to offer blanket licences, but also the Copyright Tribunals jurisdiction to require it to offer licences on other terms where it considers it reasonable to do so. Consequently, the ACCC does not consider that any authorisation granted to APRA by it, could or should be interpreted as an endorsement of APRA only offering blanket licences to users or as in any way limiting the Copyright Tribunals ability to impose other licence schemes on APRA. Rather, the appropriate licence scheme for particular users is a matter for the Copyright Tribunal. In this respect, the ACCC notes that Cinema Operators have never sought to argue before the Copyright Tribunal that they should be granted other than a blanket licence.

6.151 However, while the ACCC is satisfied that the Copyright Tribunal has jurisdiction over APRA's output arrangements, the pertinent question for the ACCC to consider is to what

extent regulation via the Copyright Tribunal constrains APRA in exercising its monopoly power.

6.152 User's right to seek recourse to the Copyright Tribunal constrains APRA's ability to exercise its monopoly power in two ways. Firstly, where agreement can not be reached between APRA and a user, the user has the right to have the Copyright Tribunal determine the reasonable terms on which APRA must grant it access to its repertoire. In addition, the availability of recourse to the Tribunal is likely to constrain APRA in negotiating licenses in the first instance.

6.153 However, the ACCC notes the concerns raised by interested parties that while the Copyright Tribunal can determine the 'reasonableness' of licence terms and conditions, in doing so, it is not required to set terms and conditions in accordance with economically efficient pricing principals. In this respect, as noted by the Competition Tribunal, the clearly legislative purpose of the Copyright Tribunal is to act as a curb on potential abuses of monopoly power by collection societies.

6.154 While the Copyright Tribunal can clearly take account of these issues in determining licence terms and conditions, such terms and conditions are not necessarily set in accordance with these principals. In this respect, the ACCC understands that in determining the reasonableness of a licence fee one of the factors which the Copyright Tribunal has regard to is the 'going rate' for comparable licences. However, given that APRA is the monopoly supplier of performing rights in Australia and, absent the Copyright Tribunal, is able to set licence fees accordingly, the going rate for licences fees, in most instances, is not likely to be a rate which would accord with economically efficient pricing of the rights.

6.155 This is not to suggest that economic efficiency should necessarily be the overriding consideration in Copyright Tribunal deliberations or that the Copyright Tribunal has failed to take account of such considerations in the past. However, establishing efficient prices for performing rights, irrespective of the user and the context in which the licence is required, is problematic. There is only very limited information regarding what efficient prices for performing rights might be which the Copyright Tribunal is able to draw on in setting licence terms and conditions. In this respect, the Copyright Tribunal is forced to rely on the best available market information, being the 'going rate' for like performing rights. However, as noted, given APRA's monopoly in the market for performing rights, the going rate is no indication of what the efficient price for performing rights would be.

6.156 While it may be difficult for the Copyright Tribunal to assess what reasonable prices for performing rights would be, as summarised at paragraphs 2.25 to 2.31 of this determination, the Report on Intellectual Property Legislation Under the Competition Principles Agreement recommended, and the Government response to the report agreed, that guidelines should be developed to facilitate licence negotiations between parties, and where such negotiations fail, to assist the Copyright Tribunal in its deliberations.

6.157 The ACCC notes that the Federal Government has not as yet implemented its response to this part of the Review's recommendations. It is not for the ACCC to canvas in this forum what form its guidelines might take, particularly as the final form of the legislation enacting this recommendation has not yet been tabled and the envisaged

public consultation process to be undertaken in developing the guidelines has not yet occurred.

6.158 However, in respect of APRA's arrangements, it is relevant to note that the recommendation, and its acceptance by the Federal Government, is indicative of general concerns regarding the matters which the Copyright Tribunal currently has effective regard to in determining licence terms and conditions. To the extent that such concerns do arise, this indicates the extent to which the Copyright Tribunal is not a fully effective constraint on APRA's exercise of its monopoly power.

6.159 The ACCC also notes the submissions of interested parties that hearings before the Copyright Tribunal are generally costly and time consuming. APRA has submitted that the fact that there is no filing fee for Copyright Tribunal applications, no requirement for parties to have legal representation and that the Copyright Tribunal can conduct proceedings in an informal manner mitigate the cost involved in seeking recourse to it. However, the reality is that, for most users, availing themselves of the Copyright Tribunal in seeking a ruling on the terms of access to APRA's repertoire is a costly and time consuming process. This is not a criticism of proceedings conducted in the Copyright Tribunal per se. Rather, it is the practical reality of any dispute between large and significant users of performing rights and APRA, over issues as complex as the reasonable terms and conditions of access to APRA's repertoire, argued out through legal avenues.

6.160 As such, to the extent that the Copyright Tribunal does constrain APRA's ability to exercise its monopoly power to 'charge more and give less' it only does so beyond the point where the cost to the user of seeking recourse to the Copyright Tribunal would be less than the difference between the price which the user could negotiate with APRA directly and that which it considers that the Copyright Tribunal would be likely to impose. That is to say that, irrespective of users ability to refer licences to the Copyright Tribunal, APRA is still able to exercise its monopoly power to set terms and conditions as it sees fit up to the point where the cost to users is so excessive as to make it cost effective to seek recourse to the Copyright Tribunal. In this respect, the ACCC notes that for many, particularly smaller users, given the relative costs of an APRA licence and of seeking recourse to the Tribunal, APRA is not constrained by the Copyright Tribunal at all.

6.161 Consequently, while the Copyright Tribunal constrains APRA to some extent, it is still far from completely constrained by the Copyright Tribunal in its ability to set prices to extract monopoly rents from users and offer licences on terms which foreclose any real possibility of copyright owners and users exploring means of dealing with each other, other than through APRA.

Alternative dispute resolution process

6.162 APRA submits that in addition to the Copyright Tribunal, it is also regulated in a manner which prevents detrimental effects flowing from its monopoly by the expert determination process in respect of disputes with licensees and potential licensees implemented by APRA as a condition of the authorisation granted by the Competition Tribunal.

6.163 Broadly, APRA's alternative dispute resolution process provides that a licensee may request that a licence agreement be referred for 'Expert Determination' including in respect of the terms of the licence. Under the expert determination process, the terms and conditions of the licence will be reviewed by a former judge with training in alternate dispute resolution. Potential licensees may also have disputes referred to expert determination, but only with the agreement of APRA.

6.164 Disputes are generally dealt with in the licensees capital city and solicitors may be present it both parties agree. Licensees may also have representative bodies appear on their behalf. If several licensees have similar substantive issues, APRA may request that the disputes be determined together. Parties dissatisfied with the expert's determination may seek review by the Copyright Tribunal or Federal Court (as appropriate).

6.165 APRA pays all costs of the independent expert. Costs of venue hire for the expert determination are shared equally and parties must pay their own costs associated with the determination.

6.166 The alternative dispute resolution process was introduced as a condition of the authorisation granted by the Competition Tribunal in 2000, in recognition of the fact that the Copyright Tribunal can be an expensive and time consuming forum in which to resolve disputes.

6.167 APRA submits that the dispute resolution process developed enables independent, inexpensive resolution of disputes and enables conditions that are appropriate to exceptional or unusual circumstances, or to individual music users, to be imposed. APRA further contends that: this facility has only been utilised twice, which is indicative of a general acceptance of APRA's licence schemes in the market; and that when the facility has been used it has been an effective mechanism for resolving disputes.

6.168 CRA states that APRA's dispute resolution process has done nothing to significantly reduce its monopoly power and that APRA has produced no evidence to support its claims that it has.

6.169 The ACCC received one confidential submission from an industry representative organisation stating that greater clarity was required with respect to the application of the alternative dispute resolution process.

6.170 The ACCC notes that the expert determination process appears to provide a relatively inexpensive and straight forward alternative to referring disputes over the terms of a licence to the Copyright Tribunal.

6.171 However, the ACCC notes that there are no set criteria in accordance with which the independently appointed expert must determine the terms of licence arrangements. Rather, the process simply provides that, in the event that a dispute is referred to the expert determination process, the expert will 'make a determination on the dispute.' The ACCC notes that the independent experts who determine disputes, being former judges trained in various methods of alternative dispute resolution, while likely to be expert at determining disputes in a manner which represents a practical compromise between the parties positions, are unlikely to have expertise in determining what the efficient price for the licence being sought would be. That is to say, the alternative dispute resolution

process is likely to elicit outcomes which represent a compromise between the position of the two parties, whose positions may or may not have been reasonable in the first instance, which would not necessarily accord with the efficient price of the rights being sought.

6.172 The lack of guidance as to matters experts can or will have regard to in resolving disputes between APRA and users raises similar concerns to those discussed above in relation to the Copyright Tribunal. Specifically, absent such guidance, the extent to which APRA's alternative dispute resolution process might otherwise act as an effective constraint on its exercise of its monopoly power is limited.

6.173 Further, the ACCC notes that there are limits to the utility of the expert determination process. Specifically, it can only be utilised in respect of disputes between APRA and existing licensees, unless APRA agrees otherwise. In addition, the experts ruling may be referred to the Copyright Tribunal (or the Federal Court if appropriate) by either party.

6.174 More generally, even this relatively inexpensive process is not necessarily a significant constraint on APRA's capacity to exercise its monopoly power in respect of the myriad of small users of works in its repertoire. For example, for a small coffee shop or café which plays background music, the relative costs of an APRA licence, and of seeking recourse to the alternative dispute resolution process, are such that seeking recourse to the expert determination process would not be a cost effective option. Consequently, APRA is not significantly constrained by users rights of recourse to the alternative dispute resolution process in setting prices for these categories of users.

6.175 The ACCC also notes the concerns expressed regarding the application of the alternative dispute resolution process to resolving disputes between APRA and groups of users regarding licence fees. If these concerns are well founded, it would be unlikely that the alternative dispute resolution process would serve as any sort of meaningful constraint on APRA's exercise of its monopoly power in respect of most users.

6.176 The ACCC notes that the expert determination process has been rarely used since introduced. This would appear to be at odds with the more general concerns raised about the terms of licences granted by APRA, both in formal submissions and anecdotally to the ACCC. The low incidents of referral of matters to the expert determination process may be indicative of user satisfaction with the terms of licences proposed by APRA. Alternatively, it may be that users have not been made sufficiently aware of the availability of the expert determination process. Or, it may be that the range of disputes to which the process is applicable limits its practicality and utility, or that, more generally, users are not sufficiently confident that the expert determination process will satisfactorily resolve their disputes and/or that disputes will not be escalated to the Copyright Tribunal.

6.177 The ACCC is not in a position, based on the information currently available to it, to ascertain why the expert determination process has rarely been used. While it would appear that the expert determination process provides an relatively quick and inexpensive means by which disputes between APRA, and particularly smaller users, can be dealt with, should the concerns regarding the applicability and utility of the process outlined above prove well founded, the process would provide very little constraint on APRA's ability to exercise its monopoly market power in respect of it dealings with most users.

6.178 In this respect, the ACCC would welcome any information interested parties may wish to submit as to why the expert determination process has rarely been used. Similarly, interested parties may wish to comment on the related issue of whether the lack of criteria or guidance as to matters independently appointed experts must have regard to in determining disputes limits the utility of the process and, if this is the case, the sort of criteria to which experts appointed to hear disputes under the alternative dispute resolution process should have regard.

Collecting Societies Code of Conduct

6.179 APRA submits that it is also effectively regulated by the Code of Conduct for Australian Collecting Societies which is a voluntary code which requires it to, among other things, maintain proper standards of transparency in dealings with members and licensees. APRA submits that, in particular, the Code requires it to maintain a complaints procedure which is regularly audited.

6.180 The ACCC welcomes initiatives such as the Code of Conduct for Australian Collection Societies, to the extent that they establish transparent, expedient and cost effective processes for organisations to receive and handle complaints made against them. In this respect, the ACCC notes that the most recent review of the Code found that, having regard for the number of transactions APRA was involved in during the 2003/2004 financial year, that lapses on its part leading to justified or possibly justified complaints, have been extremely rare.

6.181 However, having a process for the handling of complaints against APRA, does not, in itself, serve to reduce its capacity to impose licence terms and conditions on users which reflect its position as a monopoly provider of performance rights licences in Australia.

Competition absent APRA's arrangements

6.182 APRA submits that price competition is respect of performing rights would tend to drive price down to marginal cost, which given the public good nature of performing rights, would be zero. APRA submits that this would result in market failure as composers would have no incentive for the composition of new works.

6.183 However, in contrast, in arguing that its arrangements produce the public benefit of ensuring availability of the widest possible range of musical works, APRA submits that in an environment where composers assigned their performing rights to major producers, assignees would be likely to respond to their monopoly in the particular right by restricting supply and increasing price wherever possible.

6.184 As noted in identifying the counterfactual against which it is assessing APRA's arrangements (paragraphs 6.11 to 6.16) the ACCC considers that absent APRA's arrangements, performing rights would be likely to be administered through a number of means, including:

- self administration, either individually or in small groups such as through publishers;
- the establishment of multiple collection societies; and

- possibly, some composers performing rights not being effectively managed at all.

6.185 However, in the main, performing rights would be likely to be administered by a number of different collection societies, including possibly through publishers.

6.186 Predicting how the market for performing rights would respond if it was subject to some form of competition is problematic. Where a number of collection societies offered different bundles of works, the extent to which those societies would compete to supply performing rights would depend on the substitutability of their repertoires. To the extent that alternative bundles of works are not close substitutes, there would be, at best, limited price competition between collection societies. In contrast, where bundles of works were close substitutes, there would be significant price competition between societies.

6.187 The degree to which repertoires of works are substitutable depends, largely, on the category of user. For example, if a number of collection societies repertoires each contained the works of a number of popular artist, then a radio station playing popular works would most likely need access to each of the collection societies repertoires. That is to say, a radio station specialising, for example, in current top 40 hits, would need licences to the performing rights of most if not all such hits to remain commercially viable.

6.188 The exception would be if two collection societies were able to grant performing licences in respect of the same bundle of works. In this instance, given that the societies would be directly competing to supply the same bundle of works, the competitive process would be likely to drive down the price of performing rights for these works. However, for this reason, composers would be unlikely to assign their rights to more than one collection society. More generally, in order for collection societies to directly compete in this way, they would have to not just be able to offer performing rights in respect of some works in common, but significant numbers of works in common, otherwise a licence from each would still be required to avoid significant holes in the users repertoire.

6.189 In contrast, where a user sought, for example, a performing rights licence in respect of a small number of works in a particular genre, but did not have a particular preference with respect to specific works within the genre, then it would be the case that different societies would directly compete to supply such rights. In these circumstances, competition between societies would be likely to drive down the cost of performing rights for users.

6.190 It is difficult to speculate how the market would react if performing rights were administered by a number of competing societies. Indeed, it is unlikely that such conclusions could be drawn unless the market was in fact opened up to some form of competition.

6.191 Most likely, competition would be limited in respect of the supply of performing rights to those users who required access to the full range of APRA's existing repertoire, and/or whose use of works was spontaneous and unpredictable. However, a more competitive market may develop for the supply of performing rights to users who require access only to a limited range of works and/or whose use was predictable and planned.

Price competition and market failure

6.192 As noted, APRA submits that price competition is respect of performing rights would tend to drive price down to marginal cost, which given the public good nature of performing rights, would be zero. APRA submits that this would result in market failure as composers would have no incentive for the composition of new works. However, in contrast, in arguing that its arrangements produce the public benefit of ensuring availability of the widest possible range of musical works, APRA submits that that in an environment where composers assigned their performing rights to major producers, assignees would be likely to respond to their monopoly in the particular right by restricting supply and increasing price wherever possible.

6.193 While the ACCC agrees that if competition in respect of performing rights forced prices down to marginal cost, incentives for the creation of new works would be reduced, the ACCC does not accept that such incentives would be eliminated.

6.194 Fees paid for performing rights licences are only one form of revenue which composers derive from the creation of new works. Other major sources of revenue for composers are those generated by the direct sale of works, most significantly, record sales, and fees for synchronisation rights when works are embedded in films, television programs, advertisements and other mediums. In addition, the public performance of works in itself generates revenue for composers by encouraging future record sales and use of the work in other mediums. In this sense, public performance of a work is also an advertisement of the work.

6.195 Therefore, while inadequate compensation in respect of performing rights would act as a disincentive for the creation of future works, it would not eliminate such incentives. However, this is not to suggest that composers should not be adequately rewarded for the performance or broadcasting of their works and receive a share of the profits generate by such performance or broadcast.

6.196 More generally, the ACCC does not consider that introducing greater competition into the market for performing rights would eliminate incentives for the creation of future works in any event.

6.197 If music composers were required to self administer their performing rights, even assuming that this could be done effectively, then, each composer would be offering a slightly differentiated product. However, in this respect, any individual composers works are likely to be close enough substitutes for that of other composers within the same musical genre that the individual would lack any meaningful bargaining power in negotiations with users. Consequently, the competitive process would, except in the case of highly sought after works for which close substitutes were not available, drive prices down close to zero, reducing incentives for the creation of new works.

6.198 However, as noted, the counterfactual against which the ACCC has assessed APRA's arrangements is one where, in the main, performing rights would be likely to be administered by a number of different collection societies.

6.199 Where performing rights were administered by a number of competing societies the potential for the competitive process to drive prices down to the marginal cost of performing works in their repertoires would be limited, as different collection societies

would be offering different bundles of works. Consequently, as noted, competition between collection societies would be limited. As each societies repertoire would not be a perfect, and in the case of many users not a close, substitute for others, prices would be unlikely to be driven down to marginal cost by the competitive process.

6.200 In respect of the direct commissioning of works by users, for example where a user requires an original composition, while competition between composers would be likely to be intense, potentially forcing the price of the work down to marginal cost, by definition, given that the work in this instance has yet to be created, the marginal cost of providing the work would include a return to the composer on creating it. In addition, as noted, this marginal cost would not need to be met solely by performance rights fees, but by all revenue generated by the work once created.

6.201 Apart from performing rights being administered by a number of collection societies, the other way in which competition in respect of performing rights could be facilitated is through direct dealing between composers and users under APRA's present arrangements. As noted, the facilitation of such competition would be dependent on blanket licences granted by APRA containing provision for a discount on the blanket licence where a user had obtained performing rights in a work in APRA's repertoire directly. Currently, blanket licences granted by APRA contain no such provision.

6.202 In addition, as noted, even if APRA were to provide licences on terms that did not eliminate incentives for direct dealing, the restrictive nature of its opt out and licence back provisions foreclose any realistic prospect of direct dealing in most cases, other than in respect of US works.

6.203 However, to the extent that direct dealing between composers and users could otherwise occur, for reasons analogous to those discussed above, the ACCC does not consider that this form of competition would result in prices being set at marginal cost. Specifically, individual composers and APRA would not compete directly as they would be offering differentiated products. While an individual composer would be seeking to supply performing rights in one of, or a bundle of, their individual works, APRA would be granting blanket licences in respect of its entire repertoire. Where the composer sought to undercut APRA in respect of performing rights fees for his or her works, in order for APRA to match or better the composers offer, it would have to reduce the price of its blanket licence, thereby forgoing revenue which it would otherwise derived in respect of the rest of its repertoire from the user. The exception would be if the user was only seeking a performance rights licence in respect of the particular composers works.

6.204 Therefore, while greater capacity for direct dealing between composers and users would place some competitive constraint on blanket licence fees offered by APRA, particularly if direct dealing between users and composers became widespread, and indeed APRA would place some competitive constraint on licence fees offered by individual composers, such competition would be unlikely to drive prices down to marginal cost.

6.205 Consequently, the ACCC does not accept that introducing competition, in the form of performing rights being administered by a number of collection societies, or in the form of direct dealing between composers and users under APRA's current arrangements, would eliminate incentives for the creation of future works.

Distribution rules

6.206 APRA's distribution rules provide that it shall, after payment of all expenses incidental to its operations, allocate and distribute all moneys received by it through the licensing of rights and distributions from affiliate societies, together with any income earned through the investment of such funds, to members and affiliated societies. Distribution is based on a system of 'performance credits' which provide for distributions to members broadly based on the frequency and type of use (e.g. television, radio, cinema) of works. While owners of rights are permitted to enter into contractual variations to the APRA distribution rules, such variations are subject to the overriding rule that the share allocable to the writer or writers of a work can not be less than 50%. This rule is in line with the CISAC resolutions relating to principles governing fair and equitable distribution of royalties.

6.207 APRA submits that its members have great incentive to promote competition for performance of their works as its distribution rules ensure that members receive distributions which substantially reflect demand for each users work, which in turn reflects the popularity of, or demand for, the work among members of the listening and viewing public. As such, APRA submits that copyright owners compete to have their works either fixed in a medium that enables performance or broadcast – such as a record or film – or performed live and to have their works performed or broadcast as much as possible (for example on radio).

6.208 The ACCC agrees that directly linking payment to composers with demand for their works, maintains a level of ongoing competition between composers to have their works heard.

Conclusion on public detriment

6.209 APRA has a virtual monopoly in respect of performance rights licences in Australia: As discussed:

- virtually all music owners in Australia are APRA members;
- APRA's opt out and licence back provisions, even as modified in response to the ACCC's draft determination, significantly limit the possibility of its members and music users negotiating performance rights to Australian works by alternative means, such as through direct dealing or niche societies in most cases;
- APRA's arrangements with overseas collection societies similarly foreclose the possibility of users sourcing performance rights to overseas works through other means, other than in the case of US works;
- even if APRA's input and overseas arrangements were less restrictive, by generally offering users blanket licences APRA eliminates incentives for music owners and users to negotiate performing rights other than through it; and
- absent APRA's arrangements, there are still significant financial barriers to alternative collection societies establishing.

6.210 Consequently music owners and users are prevented from negotiating the terms and conditions of performance rights licences other than through APRA. Essentially, APRA is a monopoly whose membership rules current prevent 'cheating' in the form of direct dealing. This concentration of members rights exclusively with APRA means that APRA would be able to set prices for access to its repertoire without consideration as to what the economically efficient price of those rights would be.

6.211 While APRA does not restrict output in the sense that it does not refuse access to any of its works, it is able to price discriminate by charging different groups of users and various users within groups different licence fees, and in doing so, raise prices and maximise monopoly rents. In addition, for users who are not satisfied with the type of licence generally offered by APRA, at least to date, (i.e. blanket licences) the failure by APRA to offer products that meet the requirements of the market also gives rise to anti-competitive effects.

6.212 While it was accepted by all parties who provided submissions, including APRA, that it has a monopoly over the supply of public performance rights in Australia, APRA submits that it is constrained in its ability to exploit its monopoly position, to it and its members advantage, by the Copyright Tribunal.

6.213 The Copyright Tribunal is empowered to determine the 'reasonableness' of licence terms and conditions. In doing so, it can take account of what the efficient price for performance rights to APRA's repertoire for the user would be as well as what sort of licence is appropriate for the user. However, the Copyright Tribunal is not bound by these principles in setting licence terms and conditions.

6.214 More generally, hearings before the Copyright Tribunal are generally costly and time consuming, limiting its utility to licensees or potential licensees, and consequently, the constraint in places of APRA's ability to exploit its monopoly. In addition, where the Copyright Tribunal does constrain APRA, it is a costly means of doing so.

6.215 APRA is also subject to an expert determination process in respect of disputes with licensees. While this process provides a relatively quick and inexpensive means by which disputes between APRA, and particularly smaller users can be resolved, its utility, and consequently, the constraint in places on APRA, is also limited.

6.216 The offering of alternatives to its traditional blanket licenses by APRA could, depending on the terms on which such licenses were offered, also act as a constraint on APRA's ability to exploit its monopoly position in some circumstances. In this respect, the ACCC is encouraged by APRA's stated preparedness to actively explore alternatives to blanket licenses with interested music users. However, the ACCC is not in a position at this early stage to make an assessment of how effective any alternatives to APRA's traditional blanket licenses offered, if in fact such alternatives are developed, will be in facilitating direct dealing between music users and composers and thereby imposing some competitive constraint on the licence terms and conditions offered by APRA.

6.217 More generally, the ACCC notes that direct dealing with composers and other rights holders is unlikely to be a cost effective option for most music users. In addition, even where direct dealing might be an otherwise cost effective option to the blanket licenses offered by APRA, the practical utility of APRA's licence back provisions which members would need to avail themselves of in order to deal directly with music users,

even as amended, generally remains limited to those instances where intended use of musical works is, by and large, predictable and planned. In this respect, as noted, use of musical works in most of the categories of use for which APRA offers licences is generally not sufficiently predictable and planned that APRA's licence back provisions facilitate direct dealing between APRA members and music users.

6.218 However, as noted, this is not to say that the opportunity to explore alternative licensing arrangements, even if rarely used, will not place some competitive constraint on the license terms and conditions offered by APRA in respect of some music users.

6.219 In conclusion, by entrenching its monopoly in the market for performing rights in Australia APRA's arrangements generate significant public detriments. Unconstrained, music users would be forced to deal with APRA on whatever terms it saw fit, including in respect of licence fees and types of licences offered. While the Copyright Tribunal and expert determination process, together with the potential development of alternatives to traditional blanket licenses, constrain APRA's ability to exploit its monopoly to some extent, the ACCC is not satisfied that they provide such a constrain that APRA is forced to offer performance rights licences on terms which accord, or are close to, the efficient price for public performance of its repertoire. Nor is APRA constrained, in respect of users who wish to negotiate some performing rights directly at source, to the extent that it is forced to offer licences that accommodate direct dealing between music composers and users.

6.220 Absent APRA's arrangements, performing rights would, in the main, be likely to be administered by a number of collection societies. It is difficult to speculate how the market would react if this was the case. Competition would be, at best, limited in respect of the supply of performing rights to those users who required access to the full range of APRA's existing repertoire, and/or whose use of works was spontaneous and unpredictable. Although, there would be greater potential for a more competitive market to develop for the supply of performing rights to users who require access only to a limited range of works and/or whose use is predictable and planned, leading to performing rights being supplied to these users at prices which more closely accord with the economically efficient price of those rights.

6.221 However, in respect of most users, it is not clear, based on the high degree of uncertainty as to how the market would react if a number of collecting societies provided performing rights in respect of limited repertoires of works, that the outcome would be prices and/or otter licence terms and conditions significantly closer to the efficient price for performing rights than is the case under APRA's arrangements.

6.222 Although, as noted, making APRA's existing arrangements less restrictive so as to facilitate greater direct dealing between composers and users, would act as a significant competitive constraint on APRA in respect of its dealings with some users.

Public benefit

Cost savings

Administration and monitoring

6.223 APRA submits that its input arrangements involve substantial efficiencies and benefits in that only one body incurs the cost of the monitoring necessary for detecting infringements and for the purpose of determining members' shares of distributions and as a result these costs are not needlessly duplicated.

6.224 The Australian Broadcasting Corporation submits that APRA's offering of blanket licences represents a significant reduction in the administrative burden that would otherwise be necessary where it required to seek individual clearances from copyright owners from time to time.

6.225 The Australian Council for the Arts, the Australian Broadcasting Corporation and ARIA also submit that blanket licensing provides certainty to licensees who, in many cases, will have no knowledge of the identity of copyright owners, as well as providing the convenience of a single licence covering the multiplicity of copyright owners and copyrighted material.

6.226 APRA has approximately 36,000 Australian and New Zealand members, who have contributed in excess of 800,000 works to its repertoire. In addition, APRA's arrangements with overseas collection societies mean it controls, within Australia, in excess of another 2 million works. This represents virtually the entire world's repertoire of musical works.

6.227 Clearly, significant cost savings accrue to its members from APRA's collective administration of the works in its repertoire compared to a situation where each member was required to administer their own works, or, more likely, a small number of niche societies each managed part of the repertoire of works currently controlled by APRA. Specifically, costs involved in monitoring use of works for the purpose of calculating licence fees payable and distribution of monies collected through licence fees to members and for the purpose of detecting infringement of copyright, would be duplicated if more than one collection society administered performing rights. This is particularly the case as, if the works in APRA's repertoire were split between a number of collection societies, many users would continue to perform or broadcast works held by most, if not all, the competing societies.

6.228 Similarly, users save on the administrative costs that would otherwise be incurred in establishing which of the worldwide repertoire of music they are able to use. If copyright over different works were administered by different collection society, there would, unless an individual user negotiated a licence with each society or individual administering rights, holes in the repertoire of works individual users would have a licence to perform or broadcast. In these circumstances, establishing where such holes existed and ensuring that only works over which the user had a performing rights licence were used, would be likely to involve considerable administrative expense.

6.229 APRA has submitted that these cost savings are to some extent dependent on it offering users blanket licences. APRA has submitted that if it granted users licences other than

blanket licences it would have to monitor users to verify which works were being played and perform compliance checks on licensees to ensure other works were not being performed without a licence.

6.230 While some users, in particular, those whose use of musical works is spontaneous and unpredictable, require access to a broad range of music within APRA' repertoire, where use of music is predictable and planned, access to the whole repertoire is often not required. However, as noted, APRA, generally only offers users blanket licences covering its entire repertoire. APRA argues that fees in respect of its blanket licences are set according to use, or anticipated use of works in its repertoire, rather than the volume of works covered by the licence. Some users have submitted that such fees are set based on users ability to pay.

6.231 If APRA's assertion that licence fees are based on use of its works is correct, then offering blanket licences in respect of its repertoire is unlikely to generate significant savings on its administration and monitoring costs, particularly in respect of some major users such as television and radio stations and cinema exhibitors.

6.232 Even under its blanket licence arrangements APRA still needs to monitor use of its works in order to determine appropriate licence fees for users and to determine the distribution of royalties to members, although such monitoring would necessarily be more stringent if APRA was also checking for instances where unlicensed use of works was occurring. However, systems can be envisaged that would not place additional administrative and monitoring costs on APRA. For example, Cinema Owners submit that they should be able to negotiate blanket licences with APRA but with provision for a discount on the blanket licence fee to account for those works in relation to which Cinema Operators have negotiated performing rights directly. Provided, as suggested by Cinema Operators, the onus was on the user to demonstrate to APRA that it had a licence negotiated directly with the copyright owner in respect of the relevant works, APRA's administration and monitoring costs would not be increased significantly.

6.233 While such a system would place an additional administrative burden on the user, users would only be likely to participate in such arrangements if they considered that the benefits, in the form of lower licence fees, would offset any increase in administration costs incurred.

Negotiation costs

6.234 APRA submits that its output arrangements provide easy, efficient and cost effective access by music users to virtually all music performed publicly in Australia and eliminate significant burdens for music users, the cost of various negotiations with music owners and the need to obtain new or different licences when performance is varied from that which is planned.

6.235 APRA submits that the efficiencies inherent in its system depend on the peculiar nature of the product, performing rights, and are achieved because, under the APRA system:

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

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

6.236 The Australian Council for the Arts submits that if competition was opened up to a number of players, it would be necessary to approach a number of organisations, and determine which held the relevant rights, before a licence could be obtained. It submits that APRA's arrangements benefit the public as it is less time consuming and expensive to negotiate with a single body.

6.237 Similarly, the Australian Council for the Arts, the Australian Broadcasting Corporation and ARIA submit that APRA's output arrangements enable licenses for the use of musical works to be easily obtained through negotiation with a single body.

6.238 Cinema Operators submit that the transaction coast savings for users and composers generated by APRA's licensing arrangements do not apply in so far as they apply to negotiation of rights by Cinema Operators. They submit that the transaction costs involved in negotiating these rights directly during the film production process are likely to be quite low and that securing rights at this time would involve absolute certainty of the works involved with no need to secure certainty through access to the entire APRA repertoire.

6.239 There are significant transaction cost savings for most music users from being able to deal exclusively with APRA in respect of performing rights. In particular, smaller users, or those whose use is spontaneous and unpredictable, are likely to achieve significant transaction cost saving through dealing exclusively with APRA regarding all their licensing needs, be they accommodated through a blanket licence, or other types of licensing arrangements, than if they were required to enter into agreements separately with a number of licensors.

6.240 Similarly, large users, and/or those whose use of musical works is predictable and planned are also likely to achieve significant transaction costs savings through being able to deal with a single collection society. However, in these cases, it is not clear that duplicate licences would necessarily raise a user's licensing fees. Multiple licences obtained from a number of collection societies may cost a user less than does the existing blanket licence, the value of which is arguably set at a monopoly price. More competitive licence fees may more than offset increased transaction costs. For example, Cinema Operators have indicated that they may be able to lower their licensing costs by dealing with some composers directly.

6.241 However, more generally, the administration of the performing rights in respect of virtually the entire world wide repertoire of musical works through a single collection society generates significant negotiation cost savings for both music owners and the overwhelming majority of users.

Weighing the public benefit of cost savings accruing to APRA members

6.242 As noted, much of the benefit from efficiency gains, in the form of administration, monitoring and negotiation cost saving, resulting from APRA's arrangements, accrues directly to APRA and its members. Given that APRA is a monopolist, albeit subject to the jurisdiction of the Copyright Tribunal, in the market for the provision of performing rights, unconstrained by competitive pressures in respect of the prices and other terms

and conditions on which it provides licences, it is unlikely that these cost saving would, in the main, be passed on to music users and the community more generally. That is to say, the benefit of these cost savings are likely to be enjoyed, primarily, by APRA members, in the form of greater remuneration for use of their works.

6.243 In contrast, those cost savings accruing to users are likely to be more broadly dispersed in the community, both because users themselves a drawn from a broad cross section of the community, and because competition within those markets in which many users operate mean that cost savings to users are likely to be passed on in the form of lower prices and improved levels of service for consumers.

6.244 This raises the question of how much weight should be given, in the context of the net public benefit test, to those benefits likely to be enjoyed primarily by APRA members.

6.245 In past considerations of this issue the Competition Tribunal has describe public benefits as including:

> anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements…the achievement of the economic goals of efficiency and progress.[25]

6.246 In its recent consideration of *Qantas Airways Limited (2004)* the Competition Tribunal gave specific consideration to whether benefits must accrue to consumers to be public benefits. Specifically, the Competition Tribunal stated that:

> while the Tribunal does not require that efficiencies…necessarily be passed on to consumers, in some circumstances, gains that flow through only to a limited number of members of the community will carry less weight.[26]

6.247 The Competition Tribunal further stated that:

> Benefit to the public is to be given a broad definition which, in addition to group interests, takes into account (with appropriate weighting) individual interests to the extent that such interests are considered by society to be worthy of inclusion and measurement.[27]

6.248 In accordance with this principle the Competition Tribunal concluded in *Qantas* that cost savings are a public benefit where they are passed on to consumers, passed back to 'a range of shareholders' as dividends or reinvested in the firm.[28]

6.249 In assessing weight, the Competition Tribunal stated that the nature and characterisation of the benefit and identity of the beneficiaries was relevant. On cost savings specifically, the Competition Tribunal stated that the weight given to them 'may vary subject to who takes advantage of them and the time period over which the benefits are received'.[29]

6.250 With regard to the *Qantas* matter itself, the Competition Tribunal took account of all benefits, whether they were passed on to consumers or retained by Qantas. However, the latter were given 'due weighting' (or weighed 'accordingly') because they initially accrued to Qantas and would not necessarily be passed through fully to consumers.

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[25] *Victorian Newsagency (1994) ATRP 41-357 at 42,677*
[26] *Qantas Airways Limited* [2004] ACompT 9 at 50
[27] Ibid at 51
[28] Ibid
[29] Ibid

6.251 In APRA's case, the cost savings generated by its arrangements are reflected in royalties paid by it to composers for use of their works. In this respect, APRA has approximately 36,000 members, drawn from a broad cross section of society. However, in the 2001 census only 332 persons listed composer as their primary occupation. Whilst the spread of benefits to APRA members as a result of the cost saving generated by its arrangements is likely to be broader than this, these benefits would be likely to accrue, in the main, to that proportion of APRA membership who do, or have in the past, produced collections of works which are widely or frequently used.

6.252 More generally, Australia is a net importer of music. Therefore, most performing rights fees, and consequently, the benefits of the cost savings accruing to APRA through its collective administration of performing rights, are in fact remitted to overseas composers. However, this is offset, to some extent, by APRA's arrangements with overseas societies, which allow Australian composers, to the extent that their works are used overseas, to enjoy the benefits of the cost saving generated by overseas societies collective administration of performing rights. Although, as noted, given that Australia is a net importer of music, on balance, overseas artists would be likely to enjoy greater benefits as a consequence of APRA's collective administration of performing rights in Australia than Australian artists would as a result of similar collective administration in overseas jurisdictions.

6.253 However, the encouraging of continued activity by APRA members leads to enhanced creative and cultural activity which can be enjoyed by all Australians. Therefore, notwithstanding that the benefits of some of the cost savings accruing as a result of APRA's arrangements may not be passed on to consumers, and that that which isn't is enjoyed, to a large extent, by overseas composers, the ACCC considers that, while carrying less weight than if they were passed through, significant weight should be accorded to those cost saving the benefits of which accrue primarily to APRA's members.

6.254 However, as noted, these benefits, as with most of the benefits of APRA's arrangements, are achieved by virtue of its monopoly position in the market. Consequently, they must be balanced against the detriment generate by APRA's arrangements in assessing whether authorisation should be granted.

Copyright protection and enforcement efficiencies

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

- only one body incurs the costs of bringing infringement proceedings resulting in a consistent approach to enforcement and preventing unnecessary duplication of these costs;
- 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 interest of all members; and
- the cost of the enforcement proceedings are reduced as APRA, as the owner of the relevant rights, has title to sue and no other party needs to be joined to proceedings.

6.256 APRA submits that unless it can take effective enforcement proceedings in cases of infringement of copyright, music users will not bother to obtain a licence from it. APRA submits that this is the fundamental purpose of members assignments and that in this regard, the public good characteristic of performing rights are important.

6.257 APRA submits that in an environment where it held non-exclusive licences, infringers would be encouraged to test the limits of APRA's control because:

- APRA would not be able to assert with certainty that it controlled the rights;
- there may be difficulties in producing all of the relevant chain of title documents, particularly when the chain is complex;
- it would be necessary to prove not only that APRA had the relevant rights in the work, but also that no other license had been granted; and
- it would be prohibitive to conduct legal proceedings because of the high costs.

6.258 APRA submits that, in addition to increased costs, there is a risk that if music users perceive that APRA has difficulty establishing the alleged owner's title and in the absence of any other (even oral) non-exclusive licence, this will encourage music users to fight infringement proceedings and to refuse to take licences at all.

6.259 CRA submits that even as a non-exclusive licensor, APRA would still be able to prosecute infringement cases, if its members so desired, under a power of attorney. More generally, it submits that record company affiliated publishers have the resources and experience to conduct investigations and prosecute cases of copyright infringement on their own. CRA states that it is its understanding that in the case of the Phonographic Performance Company of Australia's (PPCA), whose input arrangements are based on a non-exclusive licence of rights from the relevant record companies, ARIA prosecutes copyright infringement cases.

6.260 The ACCC accepts that some users may take advantage of the uncertainty of copyright ownership if APRA was only granted licences on a non-exclusive basis, or if different composers rights were administered by different collection societies, to avoid paying licence fees.

6.261 The ACCC also accepts that the costs of actions would be increased if the input arrangements were not assignments or exclusive licences from members. In particular, there would be the prospect of duplication of enforcement proceedings. In addition, proving the chain of a title may be more difficult than proving the assignment or exclusive licence to APRA, and proceedings are likely to involve APRA establishing that no other licence has been granted to the alleged infringer. However, the ACCC is of the view that the increase in cost in this respect would not be enormous. This is especially so considering that the ACCC understands that as a practical matter, APRA always joins a copyright owner as a party to an enforcement action whether or not it is required as a matter of law.

6.262 In addition, the ACCC notes that a large number of works presently administered by APRA are US derived, and therefore already held by APRA only on a non-exclusive basis. In this respect, APRA has submitted no evidence which would suggest that

infringement of copyright in respect of these works, or that the cost of bringing legal action in respect of such infringements, is any greater than with respect of the remainder of its repertoire in which it holds exclusive licences.

6.263 However, more generally, the ACCC does accept that there would be greater incidents of copyright infringement, and associated costs of enforcing copyright if different composers rights were administered by different collection societies.

6.264 By virtue of APRA's grant of blanket licences, users can be certain that they are licensed in respect of virtually the entire world wide repertoire of musical works. This has benefits for users in that they do not have to check whether more than one licence is required, decide whether to obtain an additional licence, with the associated transaction costs, or risk not having a licence. Making licences available in such a way that encourages users to meet their legal obligation also minimises free riding and encourages efficient resource allocation.

6.265 In this respect, the ACCC considers that APRA's arrangements, and in particular its grant of blanket licences generate significant public benefits through containing monitoring and enforcement costs and ensuring artists are remunerated for use of their works.

6.266 This public benefit is likely to be greater in respect of multiple small users with spontaneous and unpredictable requirements (e.g. cafes, fitness centres, hotels and retail stores) that it is in respect of large users (such as broadcasters and cinemas) or users who have limited requirements or can predict their requirements. This is because incentives to 'cheat' or to risk infringement are not so great for predictable or large users as transaction costs may be able to be spread over a large revenue base, the chances of being caught are likely to be higher and the cost of infringement may be greater.

Market failure absent the arrangements – enforcement of performing rights

6.267 Beyond the enforcement efficiencies generated by its input and output arrangements, APRA submits that, historical experience of countries with collection societies and present day experience of countries without collection societies is that without an effective collection society there is no market in performing rights and accordingly no competition at all, by reason that:

- Individual copyright owners are not in a position to prevent unlicensed performance of their works even though copyright law gives them the right to do so, making performance rights worthless irrespective of the work's popularity.

- Even if copyright infringements could be enforced, generally, individual composers have significantly less resources to do so that do those who may infringe their right.

6.268 APRA submits that collecting societies establish an element of countervailing market power so as to protect and enforce music creators rights, creating an environment where competition can take place.

6.269 The ACCC accepts that, for the reasons outlined by APRA, absent effective administration of performing rights, users are likely to free ride with the effect that music

creators would not be appropriately remunerated for the broadcast and performance of their works, reducing incentives to create new works.

6.270 Therefore, the relevant question for the ACCC is whether, absent APRA's arrangements, performing rights in Australia would be effectively administered. As noted in identifying the counterfactual against which to assess APRA's arrangements (paragraphs 6.11 to 6.16) the ACCC considers that absent APRA's arrangements performing rights in Australia would be administered on a more ad hoc basis with a number of alternative means of administering performing rights being likely to develop to suit specific composers and users needs. These alternatives would be likely to include:

- self administration, either individually or in small groups such as through publishers;
- the establishment of multiple collection societies; and
- possibly, some composers performing rights not being effectively managed at all.

6.271 In respect of the first two of these three possible alternatives, performance rights would still be enforced, composers remunerated for the broadcast and performance of their works and incentives to create new works would remain. That is not to say that the alternatives to APRA's arrangements identified would be as efficient a means of administering performing rights. Whether or not they would be is discussed above. However, whether these alternatives to APRA's arrangements would be as efficient a means of administering performing rights or not, it is unlikely that their adoption would lead to widespread free riding by users and ultimately, market failure.

6.272 However, APRA's arrangements ensure that virtually all music creators rights are protected. As noted, absent APRA's arrangements, it is possible that some music creators rights would not be adequately protected. It is impossible for the ACCC to estimate how widespread this effect would be. Indeed, it would remain in all composers interest to ensure that their rights were properly protected through one or other of the various other avenues for smaller scale collective, or individual, administration which would be likely to develop. However, at the very least, it could be expected that if APRA ceased to collectively administer all its members rights, many members rights would not be effectively administered in the transition period while other licensing alternatives developed.

6.273 Effective administration of performing rights is essential to ensuring that a functional market for performing rights exists. The ACCC considers that APRA's arrangement generate a public benefit by achieve this more effectively than would be the case if alternative arrangements were to be entered into.

Countervailing market power

6.274 APRA submits that its output arrangements protect music owners from exploitation by major music users who, to a substantial degree, have monopoly power in the negotiation of licence fees. Specifically, APRA submits that because of their relatively small numbers, major users may be in a position to exercise monopoly power against composers and songwriters, particularly those that are not well established, with the effect that composers would not be fairly remunerated for their works and less new

works would be produced. APRA submits that redressing this imbalance between individual composers and large users is a public benefit.

6.275 Similarly, ARIA and the Australian Council for the Arts submit that collective licensing ensures that all copyright owners, both large and small, are able to receive equitable remuneration in respect of their licenses and safeguards against composers being pressured into assigning rights to a music publishers or commissioning agent on terms that are disadvantageous to the composer, thereby supporting the Australian music sector.

6.276 Individual music composers are, generally, likely to be in a comparatively weak bargaining position in negotiating performance and broadcasting rights, particularly when negotiating with large users, primarily because of:

- differences in comparative negotiating skills and expertise and resources able to be committed to the negotiating process between composers and larger users;
- the difficulty for individual music creators in enforcing their copyright rights in event that a licensing arrangement can not be negotiated; and
- the close substitutability of the works of individual composers within the same genre both with other local works and the vast repertoire of overseas works.

6.277 The consequence of such a bargaining power imbalance, is generally, the negotiation of arrangements to the commercial advantage of the party in the stronger bargaining position. That is not to say that the party in the weaker bargaining position will necessarily be disadvantaged as a result, but rather that, as with any commercial arrangement, the party in the stronger bargaining position will seek to secure the most favourable deal for itself.

6.278 The ACCC has recognised in the past that redressing an imbalance in bargaining power between parties to a commercial negotiation can generate public benefits. However, the ACCC does not focus on whether a mere change in the amount of bargaining power is, in itself, a public benefit. Rather, the ACCC will focus on the likely outcomes resulting from the change in bargaining positions. Indeed, the ACCC has recognised that the ability to collectively bargain can, in some circumstances, give the bargaining unit a degree of countervailing power that goes well beyond that necessary to address any imbalance in market power issues. In some cases, it can simply reverse any imbalance in market power.

6.279 In this instance, as noted in its conclusion on the public detriments of APRA's arrangements, the ACCC considers that APRA's arrangements confer onto it a monopoly in respect of performing rights in Australia which, while constrained to an extent by the Copyright Tribunal and APRA's alternative dispute resolution process, it is able to exploit to generate significant public detriment. In short, APRA's arrangements confer onto its members a degree of countervailing power which goes far beyond that which would be necessary to redress any imbalances in bargaining power between individual members and users. Indeed, subject to the limited constraints of the Copyright Tribunal and APRA's alternative dispute resolution process, any imbalance in market power is, in effect, reversed.

6.280 The ACCC also notes that to the extent that imbalances in bargaining power between individual composers and users are of concern, such imbalances would be, in most cases, effectively addresses under the counterfactual against which the ACCC has assessed APRA's arrangements. That is, where alternative means of administering performing rights, most likely including a number of niche societies, were developed.

6.281 The ACCC accepts that there is a public benefit in preserving incentives for the future creation of musical works, and that APRA's arrangements achieve this outcome. Although, as noted, this is not to say that such incentives would be eliminated absent APRA's arrangements. However, the ACCC does not consider that there are public benefits beyond this in the degree of countervailing bargaining power that APRA's arrangements confer to its members.

Certainty of repertoire for users

6.282 APRA states that under the blanket licences it grants, licensees can guarantee that no matter what music they perform or communicate they will not be infringing copyright. APRA contends that if there were significant 'gaps' in its repertoire, it would be required to publish a list of works in its repertoire and know those that were not. APRA submits that music users (particularly those unable to predict in advance exactly which works will be played) would be forced to either obtain licences from all possible sources or invest enormous resources in determining which works they could and couldn't play. Alternatively, users may chose to ignore the provisions of the *Copyright Act* because of the complexity of compliance and low risk of detection, with associated public detriment.

6.283 Interested parties also submitted that there are administrative efficiencies in users only having to deal with one organisation in respect of rights to musical works.

6.284 The administrative cost saving which accrue from APRA's collective administration of performing rights are discussed above. In addition to these direct cost savings, users also enjoy the associated benefit of unfetted access to virtually any work in the world musical repertoire without risking infringing copyright. While the benefits of such freedom of performing or broadcasting musical works is reflected in licence fees, the ACCC recognises that there is a public benefit in a system of collective administration which facilitates such licences being able to be offered.

6.285 However, the ACCC notes that such benefits are predominantly in respect of users who are not necessarily in a position to preselect all the music they wish to buy, such as radio broadcasters, cafes, fitness centres etc, many of whom are unlikely to care, or even know, what music is played. As noted above, where use of music is predictable and planned, and known well in advance, access to the whole of APRA's repertoire is often not required. For such users, there is less benefit in the certainty of repertoire that APRA's blanket licences provide.

Availability of widest range of copyright musical works

6.286 APRA contends that if non-exclusive licensing leads to a degradation of the enforcement and protection system that Australia may not be able to guarantee effective and cost efficient protection of copyright. APRA submits that if this occurs there is substantial

risk that those who control rights to music overseas will not participate in the Australian market, restricting the range of musical works available.

6.287 APRA further submits that if there were various repertoire owners competing in the market, less popular works would be avoided by those owners producing the result that only the more popular works would be readily available. APRA submits that it would be most unlikely that 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.

6.288 As noted, the ACCC considers that, absent APRA's arrangements, there would be a greater risk of copyright infringement by users. However, it is not clear that this would cause overseas collection societies not to participate in the Australian market as, absent any form of administration of performing rights in overseas works (i.e. if these societies withdrew from the Australian market), copyright infringement in respect of those works would be likely to increase further. That is to say, in many cases, these works would be likely to continue to be performed absent any form of administration of performing rights. It is therefore more likely that overseas societies would enter into arrangements with one or more of the competing repertoire owners for the continued administration and enforcement of performing rights.

6.289 Therefore, while the ACCC accepts that collective administration of such rights through a single collection agency is a more efficient and effective means of enforcing copyright, it does not consider that it would necessarily be the case that less efficient and effective arrangements would cause overseas rights holders to cease participating in the market.

6.290 The ACCC also accepts that if there were various repertoire owners competing in the market, less popular works would be less likely to be effectively administered as the commercial incentives to administer rights in respect of works which users and the public value less highly would not be as great as with more popular works. Indeed, the cost of administering some rarely used works may be greater than the commercial return.

6.291 However, to the extent that APRA's arrangements do make accessible to users works which might no otherwise be available, this is reflected in the licence fees paid by users. Indeed, many of these works are available not just because of the efficiencies and economies of scale in APRA's administration of performing rights, but also because APRA is able to charge prices in excess of those which might otherwise prevail for access to its repertoire. Consequently, the availability of such works is at the expense of users who must pay more for access to the whole of APRA's repertoire.

6.292 Therefore, while the ACCC considers that there is a public benefit in making available the widest range of copyright musical works, provide that this can be achieved in a cost effective manner, given that under APRA's arrangements this is achieved at the expense of users who may not otherwise be prepared to pay for such variety, the ACCC does not accept this as a public benefit flowing from APRA's arrangements.

Export earnings

6.293 APRA states that under a non-exclusive licensing 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% of the licence fees generated from the licensing of

performing rights, will not be accepted as a member of APRA or any other collecting society operating under CISAC rules. As a result, unless that assignee can monitor performances, grant licences and recover licence fees, it is most unlikely that any performing rights fees will be collected. APRA submits that particularly in relation to overseas performances, overseas societies will not accept that persons membership and as a result, whatever earnings that may have been generated will not be returned to Australia.

6.294 APRA's distribution arrangements include a "fifty percent rule" under which APRA ensures that composers obtain at least 50% of the licence fee generated from the licensing of performing rights. CISAC rules require that all member societies comply with this rule. As noted by APRA, an assignee who did not comply with this rule would not be able to rely on APRA or international collection societies to monitor performances, grant licences and recover licence fees on their behalf. However, for this very reason, the ACCC considers it very unlikely that any assignee would not comply with CISAC's fifty percent rule. In doing so, the assignee would in effect be forgoing all potential international earnings in respect of broadcasting and performance of the relevant works except, in the highly unlikely instances, where the assignee was able to negotiate licences and enforce these rights directly.

Overseas arrangements

6.295 APRA submits that its arrangements with overseas societies increase the repertoire it is able to offer users which is of benefit to the listening and viewing public. APRA states that absent its arrangements, either, another collecting society would have to be formed to licence the performing rights in relation to overseas compositions on behalf of its affiliated societies, or the affiliated societies' repertoire would not be available in Australia for public performance.

6.296 As noted in the ACCC's consideration of the counterfactual against which it has considered APRA's arrangements, absent APRA other forms of collective administration of performing rights would be likely to develop. These would include provision between overseas collection societies and Australian alternatives to APRA for the administration of performing rights in respect of overseas societies repertoires in Australia. Consequently, the ACCC considers that Australian users would still have access to the international repertoire of musical works. However, analogous to the ACCC's discussion of APRA's administration of performing rights generally, administration of rights to overseas works would not be likely to be as efficiently managed under alternatives to APRA's arrangements.

Transition to a new system

6.297 As noted, absent APRA's arrangements, performing rights would most likely be administered by a number of different collection societies. Beyond the administrative, monitoring and negotiation cost savings generated by APRA's arrangements relative to this counterfactual noted above, the transition from the present arrangement to a market where a number of societies administered performing rights would be likely to generate additional costs for both composers and users, in the form of cost associated with the establishment of a new system.

6.298 It is difficult to speculate as to how significant the costs involved in implementing a new system for performing rights administration would be. For one, these costs would be dependant on the form any such alternative system or systems would take. At the very least, they would involve a number of organisations developing performing rights administration, monitoring and enforcement systems similar to those employed by APRA, albeit on a smaller scale.

6.299 In addition, there is likely to be considerable uncertainty, for both composers and users as to who administers performing rights in respect of individual works and whether valid licences in respect of works are held. It is difficult to speculate how long the transition to effective alternative systems of performing rights administration would take. However, in the short term, it is possible that performing rights in respect of many works would not be effectively administered at all.

6.300 Therefore, the ACCC considers that there is a public benefit in maintaining the present arrangements to the extent that this avoids the costs that would otherwise be incurred in the transition to alternative systems for the administration of performing rights.

6.301 However, unlike other cost savings and efficiencies generate by APRA's arrangements, which, all else being equal, continue to accrue as long as APRA's arrangements continue in their current form, costs incurred in the transition to a new system would be one off costs. As such, the benefit of avoiding these costs should be weighed over the life of APRA's arrangements.

Conclusion on public benefit

6.302 Significant cost savings accrue from APRA's collective administration of performing rights in Australia. Specifically, costs involved in monitoring use of works for the purpose of calculating licence fees payable and distribution of monies collected through licence fees to members and for the purpose of detecting infringement of copyright are reduced where one collection society administers performing rights.

6.303 Users, and in particular, those users whose use of musical works is spontaneous and unpredictable, save on the administrative costs that would otherwise be incurred in establishing which of the worldwide repertoire of music they are able to use. If copyright over different works were administered by different collection society, there would, unless an individual user negotiated a licence with each society or individual administering rights, be holes in the repertoire of works individual users would have a licence to perform or broadcast.

6.304 However, whilst these cost saving to APRA, its members, and users, are directly attributable to APRA's collective administration of performing rights, they are not, in the main, dependant on APRA offering blanket licences in respect of its entire repertoire as APRA has submitted.

6.305 The administration of the performing rights in respect of virtually the entire world wide repertoire of musical works through a single collection society also generates significant negotiation cost savings for both music owners and the overwhelming majority of users as music owners and users only have to deal with one organisation.

6.306 As a consequence of APRA's arrangements users also enjoy the benefit of unfetted access to virtually any work in the world musical repertoire without risking infringing copyright. However, such benefits are predominantly in respect of those users whose use is spontaneous and unpredictable.

6.307 APRA's arrangements, and in particular its grant of blanket licences also generate significant public benefits through containing enforcement costs as there would be greater incidents of copyright infringement, and associated costs of enforcing copyright, if different composers rights were administered by different collection societies.

6.308 In addition to the direct cost saving attributable to the efficiencies generated by APRA's collective administration of all performing rights in Australia, performing rights are also administered more effectively under APRA's arrangements than would otherwise be the case. Effective administration of performing rights is essential to ensuring that a functional market for performing rights exists. Absent effective administration of performing rights, users are likely to free ride with the effect that music creators would not be appropriately remunerated for the broadcast and performance of their works, reducing incentives to create new works. Whilst, performing rights in respect of most members works would still, at least in the long run, be likely to be effectively administered under alternatives to APRA's arrangements, this would not necessarily be the case universally. In addition, many members rights would not be likely to be effectively administered in the transition to an alternative system or systems.

6.309 APRA's arrangements also generate a public benefit by avoiding the significant costs that would be incurred in the transition to alternative systems for the administration of performing rights.

6.310 The ACCC does not consider that there are public benefits, beyond preserving incentives for the future creation of musical works, in the degree of countervailing bargaining power that APRA's arrangements confer to its members. Indeed, as noted in the ACCC's conclusion on the public detriments of APRA's arrangements, the ACCC considers that APRA's arrangements confer onto its members a degree of countervailing power which goes far beyond that which would be necessary to redress any imbalance in bargaining power between individual composers and users and, in effect, allows APRA to raise prices above economically efficient levels and extract monopoly rents from users.

7. Balance of Public Benefits and Anti-Competitive Detriments

7.1 APRA administers performing rights in respect of virtually the entire world wide repertoire of musical works in Australia. In doing so, it generates significant public benefits.

7.2 It is far more efficient for APRA to administer performing rights than it would be for a number of competing societies to do so. Cost to composers in administering performing rights and monitoring use of works are reduced. Similarly, users costs are reduced as they enjoy unfetted access to virtually any work in the world musical repertoire through a single performing rights licence. Although, such unfetted access is of far greater benefit to users who are not in a position to preselect all the music they wish to buy or whose use of musical works is spontaneous and unpredictable that to users whose use is predictable and planned and known well in advance.

7.3 APRA's arrangements also result in significant negotiation cost savings for both its members and the overwhelming majority of users as both members and music users only have to deal with one organisation.

7.4 APRA's arrangements, and in particular its grant of blanket licences, also generates significant public benefits through containing enforcement costs, as there would be greater incidents of copyright infringement, and associated costs of enforcing copyright, if different composers rights were administered by different collection societies.

7.5 By reducing incidents of infringement of copyright, APRA's arrangements also protect incentives for the creation of new works more effectively than would otherwise be the case.

7.6 In addition, significant costs would be incurred in the transition to an alternative system or systems of performing rights administration if APRA was to discontinue its present arrangements.

7.7 However, these benefits of APRA's arrangements, while significant, also come at considerable cost.

7.8 APRA has a virtual monopoly in respect of performance rights licences in Australia. Consequently music owners and users are prevented from negotiating the terms and conditions of performance rights licences other than through APRA. Essentially, APRA is a monopoly whose membership rules prevent 'cheating' in the form of direct dealing. This concentration of members rights exclusively with APRA means that APRA would be able to set prices for access to its repertoire without consideration as to what the economically efficient price of those rights would be.

7.9 APRA is constrained, to some extent, in its exercise of its monopoly power by the Copyright Tribunal which is empowered to determine the 'reasonableness' of licence terms and conditions. However, while the Copyright Tribunal may have regard to what the efficient price for performing rights licences would be, it is not bound by these principles in determining reasonableness. In addition, seeking recourse to the Copyright Tribunal is generally a costly and time consuming process, limiting its utility to users and consequently, the extent to which it constrains APRA's exercise of its market power.

7.10 Similarly, while APRA's expert determination process provides a relatively quick and inexpensive means by which disputes between APRA, and particularly smaller users can be resolved, its utility, and consequently, the constraint in places on APRA, is also limited.

7.11 The ACCC notes that APRA has amended its application since the release of the draft determination introduce greater flexibility to its license back provisions. However, the utility of these provisions, as amended, is still very limited.

7.12 In addition, APRA has stated that it intends to actively explore alternatives to blanket licenses with interested user groups. However, the extent to which, if such alternatives are developed, this is likely to result in greater direct dealing between music users and composers, thereby imposing greater competitive constraints on APRA, is also limited.

7.13 In conclusion, by entrenching its monopoly in the market for performing rights in Australia APRA's arrangements generate significant public detriments. Unconstrained, music users would be forced to deal with APRA on whatever terms it saw fit, including in respect of licence fees and types of licences offered. While the Copyright Tribunal and expert determination process, and to the extent that they are developed, alternatives to APRA's blanket licensing arrangements, constrain APRA's ability to exploit its monopoly, they do not provide such a constrain that APRA is forced to offer performance rights licences on terms which accord, or are close to, the efficient price for public performance of its repertoire. Nor is APRA constrained, in respect of users who wish to negotiate some performing rights directly at source, to the extent that it is forced to offer licences that accommodate direct dealing between music composers and users.

7.14 Absent APRA's arrangements, performing rights would, in the main, be likely to be administered by a number of collection societies. However, given there would only be limited substitutability between the repertoires of societies, competition between societies, particularly in respect of users requiring access to the full range of APRA's repertoire, and/or whose use of works is spontaneous and unpredictable, would, at best, be limited. Although their would be greater potential for a more competitive market to develop for the supply of performing rights to users who require access only to a limited range of works and/or whose use is predictable and planned.

7.15 However, in respect of most users, it is not clear, based on the high degree of uncertainty as to how the market would react if a number of collecting societies provided performing rights in respect of limited repertoires of works, that the outcome would be prices and/or other licence terms and conditions significantly closer to the efficient price for performing rights than is the case under APRA's arrangements.

7.16 However, making APRA's existing arrangements less restrictive so as to facilitate greater direct dealing between composers and users, would act as some competitive constraint on APRA in respect of its dealings with some users.

Facilitation of direct dealing

7.17 The specific conditions with which APRA members must comply before being able to avail themselves of APRA's opt out and/or licence back provisions limit their practical utility. In effect, they foreclose the possibility of music composers and users negotiating performing rights directly, except in limited instances. The one exception is in respect of

US composers who retain the right to licence the performing rights in their works independently of the collecting society of which they are a member.

7.18 APRA's opt out and licence back provisions were first introduced in 2000 as a condition of the authorisation granted to APRA's arrangements by the Competition Tribunal, which concluded that there should be capacity for direct dealing between APRA members and users. As noted, in the course of the ACCC's consideration of APRA's current applications it has amended its licence back provisions to make them more flexible. The Competition Tribunal noted that the practical utility of the opt out and licence back provisions developed by it, including whether they would ever be used, was questionable. Similarly, the ACCC considers the utility of these provisions, as amended, is still very limited. However, the Competition Tribunal considered that the provisions should be implemented to test if and how their introduction affected competition in the market.

7.19 Specifically, the Competition Tribunal considered that unless there was also a mechanism for adjustments to the blanket licence fees paid to APRA where users had negotiated some performing rights directly at source, the introduction of the opt out and licence back provisions would have little practical effect. However, the Competition Tribunal considered that the question of the method and formula for adjusting licence fees was one for the Copyright Tribunal to consider on a case by case basis.

7.20 Irrespective of the utility or otherwise of its opt out and licence back provisions, APRA's propensity to date to only offer users blanket licences is a fundamental impediment to music composers and users dealing directly. So long as users are only able to obtain a blanket licence in respect of APRA's repertoire there is no incentive for a user to acquire rights from a composer directly unless there is a corresponding adjustment to the price the user pays for its APRA licence.

7.21 In the absence of provision for such adjustments any prospect of direct dealing is foreclosed as the user is still forced to pay a licence fee to APRA which not only covers any works where it has negotiated alternative arrangements, but is calculated to reflect use of these works. In effect, the user would be paying to use the works twice.

7.22 Some users, in particularly Cinema Operators, have submitted that, but for APRA only granting users blanket licences, it would feasible to obtain rights directly at source, particularly in relation to US works which are assigned to collection societies on a non-exclusive basis.

7.23 In its draft determination the ACCC noted that APRA's blanket licensing arrangements could be modified to account for instances where performance rights have been negotiated directly. For example, by way of adjustments to blanket licence fees roughly proportional to the volume of works used for which the users had negotiated performing rights directly. Alternatively, in the case of Cinema Operators for example, the adjustment could be proportional to the percentage of box office revenue generate by films where the exhibitor had negotiated performing rights directly at source. If the onus was placed on the user to demonstrate that they had directly sourced performing rights in respect of the relevant works such adjustments could, once a formula for their calculation was established, be calculated without placing an undue administrative burden on APRA.

7.24 The ACCC noted that the ability for users to obtain such adjustments would provide incentives for direct dealing between music owners and users. Arrangements which practically facilitated direct dealing between composers and users would, even if, as would be most likely, provided APRA took account of the alternative means by which users could source performing rights licences in setting its own licence fees, rarely used, provide a significant competitive constraint on APRA in setting the terms and conditions of its licence fees for those users where direct dealing would be an otherwise practical alternative.

7.25 In this respect, the ACCC is encouraged by APRA's stated preparedness, in response to the draft determination, to actively explore alternatives to blanket licences with interested music users. Although, as noted, it is too early to assess how effective any such alternatives, if developed, will be. Further, instances where direct dealing is likely to be a cost effective alternative to APRA's blanket licenses are limited. In addition, even is these instances, the utility of discounted blanket licenses is likely to be restricted to those limited classes of users whose use of musical works is, by and large, predictable and planned.

7.26 However, as noted, making APRA's existing arrangements less restrictive so as to facilitate direct dealing between composers and users, would act as some~~a~~ competitive constraint on APRA in respect of its dealings with some users.

7.27 In this respect, some interested parties have submitted that any authorisation granted by the ACCC should be subject to conditions requiring that APRA offer alternatives to its blanket licensing arrangements to accommodate direct dealing between music users and rights holders.

7.28 It is not for the ACCC to determine the reasonableness of licence fees, or other licence terms and conditions, for public performance of APRA's repertoire in each instance. This is a matter for negotiation between the parties, or, failing that, determination by the Copyright Tribunal or through APRA's alternative dispute resolution process. In this respect the ACCC notes that, to date, no party has sought to argue before the Copyright Tribunal that its blanket licence for access to APRA's repertoire should contain provision for a discount to accommodate direct dealing. However, as also noted, APRA's opt out and licence back provisions are of little if any practical utility to most users without such provision.

7.29 In this respect, a general condition of authorisation broadly requiring APRA to, for example, offer alternatives to blanket licenses to accommodate direct dealing at the request of any user, as suggested by some interested parties, would be of little practical utility. At one extreme, such a condition could be met by any token offer of an alternative licence by APRA. On the other hand, a condition requiring, for example, that APRA offer 'reasonable alternatives' would leave the extent to which any offer made by APRA was in compliance with such a condition subject to a great deal of uncertainty. Where disagreement between the parties as to the reasonableness of an alternative licence offered arose, any arbiter of whether the offer was in accordance with the condition of authorisation, be they the ACCC or otherwise, would in effect be being asked to make a determination as to the reasonableness of the licence fee/scheme offered by APRA to a particular user. As noted, this is clearly the jurisdiction of the Copyright Tribunal which has been established explicitly for this purpose.

7.30 In addition, there is likely to be merit in further refining the conditions with which APRA members must comply before they are able to avail themselves of the opt out and/or licence back provisions. While APRA has moved to introduce greater flexibility into the use of its licence back provisions, these provisions, as they currently stand, significantly limit the realistic possibility of music composers and users negotiating performing rights directly, except in limited instances.

7.31 However, it is difficult to assess whether further refinements to these provisions would increase there utility, without undermining the essential features of APRA's system of collective administration of performing rights, unless there is provision for discounts on blanket licences to accommodate direct dealing so as to enable the effectiveness of the existing opt out and licence back provisions to be tested.

7.32 The ACCC would therefore encourage interested music users to explore alternatives to traditional blanket licenses with APRA. Similarly, in the event that such negotiations are unsuccessful, the ACCC would also encourage the Copyright Tribunal to consider the appropriateness of modified blanket licences for those users for whom there is a realistic possibility of sourcing performing rights directly from composers, should users express a preference for such licences in proceedings before it. The ACCC would be concerned if genuine user preferences for provision of modified blanket licences to accommodate direct dealing were not able to be accommodated in appropriate circumstances, in particular by APRA in the first instance, or failing that, by the Copyright Tribunal. Were this to prove to be the case, this would significantly increase the public detriment generated by APRA's arrangements.

Conclusion on balance of benefit and detriment

7.33 The ACCC considers that APRA's arrangements generate significant public detriment. APRA is able to set performing rights licence terms and conditions without regard to what the economically efficient price for those rights would be and without regard for the type of performing licence which would be most suitable for different classes of users. Although, APRA is constrained, to some extent, in its ability to do so by the Copyright Tribunal.

7.34 However, it is not clear that, absent APRA's arrangements – that is, where a number of collection societies each managed part of APRA's existing repertoire – that the outcome would be prices and/or other licence terms and conditions which more closely accorded with the efficient price for performing rights for different categories of users. For users where different bundles of works are not close substitutes (i.e. where a user requires access to a large part of APRA's existing repertoire such that different works are complimentary goods) there would, at best, be limited price competition between collection societies. In contrast, for users where different bundles of works are close substitutes, there may be significant price competition between societies. While the ultimate impact on the terms and conditions on which performing rights licences would be offered is unclear, the cost to composers of licensing their rights would certainly increase.

7.35 Consequently, while the ACCC considers that APRA's arrangements generate significant public detriment, the level of public detriment generated by APRA's arrangements relative to the situation which would prevail absent its arrangements is less clear.

7.36 Overall, given the uncertainty about how the market would react absent APRA's arrangements, the ability of the Copyright Tribunal to facilitate direct dealing between music creators and users in some circumstances under APRA's existing arrangements, and the significant public benefits generated by APRA's arrangements, the ACCC considers that APRA's arrangements are likely to result in a public benefit that will outweigh any public detriment. Accordingly, the ACCC proposes to grant authorisation to the arrangements.

7.37 The ACCC notes the submissions of some interested parties that APRA's arrangements should only be authorised conditional on it being required to modify its input and output arrangements to facilitate greater direct dealing between music users and rights holders. The ACCC has noted specific concerns with such conditions.

Term of authorisation

7.38 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.

7.39 APRA submits that authorisation should be granted for a period not less than that of the authorisation originally granted by the Competition Tribunal, being 4 years.

7.40 Free TV submits that at present, Australia's mass media communication (MMC) industry, including the free to air broadcasting industry, is in a state of transition due to various factors including: the Digital television Broadcast Review and various other regulatory reviews currently underway; platform proliferation due to alternative distribution channels such as mobile phones and the internet; and the introduction of 'timeshifting' with the development of personal video recorders.

7.41 Free TV submits that these matters will impact greatly on the way in which participants in the MMC industry use and distribute music. They submit that there is likely to be much greater clarity around these issues by mid-2006.

7.42 In addition, Free TV submits that the monopoly position of various copyright collection societies around the world has been coming under increasing scrutiny from competition regulators. It states that recent developments include:

- the European Commission accusing music collecting societies in 16 countries of cartel behaviour as a result of the so called 'Santiago Agreement' which provides a one stop shop for licensing by participating collecting societies of online music downloading or streaming services from all territories across Europe; and

- the European Commission's Internal Market Division publishing its Communication on the management of copyright and related rights which Free TV states, favours legislation to ensure the proper governance and transparency of collecting societies.

7.43 Free TV submits that Australia will benefit from watching international developments on the regulation of collecting societies, especially as new platforms such as the internet offer global (rather than territory specific) distribution opportunities. Free TV contends that mid-2006 is likely to be an appropriate time to review how developments in other countries play out.

7.44 Given these issues, Free TV submits that the appropriate time to fully review APRA's arrangements would be mid-2006. It submits that a 4 year authorisation would risk delaying important innovations for the Australian public and potentially result in significant anti-competitive effects.

7.45 In respect of changes to the MMC industry, APRA submits that there is no basis for the contention the proliferation of new platforms will provide a platform to eliminate the transactions costs and practical difficulties associated with direct dealings between copyright holders and users. APRA submits that platform proliferation in fact increases the importance of its blanket licence system because:

- the proliferation of delivery platforms increases the number of transactions necessary to licence the performance of music in the market place: and
- the availability of blanket licences significantly lowers barriers to entry relating to the development and exploitation of new music delivery platforms.

7.46 APRA submits that it is unclear how the development of personal video recorders has the capacity to affect the value to broadcasters of music performed in television transmissions. It submits that if such an effect could be established this would be a matter for the Copyright Tribunal to consider in approving licence fees.

7.47 In respect of developments in overseas jurisdictions, APRA contends the Free TV's submission 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 if there was an interest by any entity in competing with APRA in relation to licensing foreign works, the scope for that competition already exists through at least two means, neither of which to APRA's knowledge have ever been utilised:

- because APRA only has a non-exclusive licence from US collection societies, it would be open for another collection society to set up in Australia, and seek a licence from the same American societies; and
- it would be open to publishers in Australia to seek to cause the opt out of the copyright in the works which they control, and seek directly to licence those works.

7.48 APRA submits that, 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. APRA contends that 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 Australia by its physical isolation from other jurisdictions.

7.49 APRA submits that it is not surprising that 'cross-boarder' issues are of significant interest in Europe, while at the same time being of limited significance in Australia because:

- the existence of the European Market creates pressures to take active steps to minimise the practical and legal effect of national boundaries within Europe; and

- there is unquestionable greater competitive pressure between national collection societies in relation to licensing of works in a particular territory, arising from the close physical proximity of the European territories, which facilitates physical entry by the collecting societies into markets in other territories.

7.50 While developments in the MMC industry may impact on the way in which the industry uses and distributes music, it is difficult to envisage how changes such as those postulated by Free TV would impact on the administration of performing rights, either in respect of users in the MMC industry or more generally. In the absence of any evidence to the contrary, it would appear that these developments, while possibly changing some of the ways and contexts in which works are used, would not have the potential to impact significantly on the administration of performing rights.

7.51 With respect to developments in overseas jurisdictions, the ACCC notes that there has been no suggestion of involvement by APRA in the cartel behaviour the subject of the European Commission's investigation.

7.52 More generally, the ACCC notes the potential for new platforms, such as DRM, to offer alternative means of administering performing rights. The development of these platforms, at least as they apply to administration of performing rights other than for works delivered by digital means, are still in there infancy.

7.53 Similarly, the ACCC notes that other technological advances, such as the development of audio fingerprinting technologies allowing to use of some music to be tracked by analysis broadcast signals, also has the potential to reduce costs involved in monitoring usage of works in some instances. However, while this has the potential to improve the efficiency of collection societies monitoring performance of works in some categories of use, it does not, at present, represent a viable alternative means of monitoring performance of works in many categories of works, or of administering performing rights more generally.

7.54 In any event, to the extent that such platforms do develop, they would, all else being equal, tend to reduce the anti-competitive detriment generated by APRA's arrangements by establishing competing avenues of performing rights administration, and thereby strengthen the case for authorisation being granted.

7.55 However, as discussed in the ACCC's evaluation of the effects on competition of APRA's arrangements, the restrictive nature of APRA's arrangements, and in particular, its grant of blanket licences, does have the capacity to inhibit new forms of performing rights administration being developed by any party other than it. The ACCC would be concerned if the development of otherwise viable means of performing rights administration was stymied by APRA's arrangements. However, the ACCC also notes the power of the Copyright Tribunal to require APRA to offer licences on terms that the Copyright Tribunal considers reasonable.

7.56 The ACCC considers that authorising APRA's arrangements for four years will allow sufficient time for an assessment to made, in the event that any user seeks to negotiate a

discounted blanket licence[30], or other form of licence, with APRA, directly or through the Copyright Tribunal, of the effectiveness of the existing arrangements in accommodating such requests, without entrenching APRA's arrangements to the extent that they would preclude other means of performing rights administration developing should such alternative become otherwise more viable. In this respect, an authorisation of any shorter duration is unlikely to be sufficient for an assessment to be made at the expiration of the authorisation of the effectiveness of the Copyright Tribunals processes in accommodating requests, for example, for discounted blanket licences and/or the impact of the granting of such licences on constraining APRA's exercise of its market power. Further, the ACCC is able to review whether authorisation of APRA's arrangements continues to be in the public interest at an earlier stage should any material changes in the market, such as the technological advances in systems of performing rights administration, occur, particularly if concerns arose that APRA's arrangements were limiting the development of such alternatives.

7.57 Therefore, the ACCC proposes to grant authorisation for a period of four years. As noted, the ACCC may review the authorisations prior to their expiry if there has been a material change of circumstances since authorisation was granted.

7.58 More generally, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which it decision is made actually eventuate in practice and the appropriateness of the authorisation in the current market environment.

7.59 It is open for APRA to reapply for authorisation at the expiration of the authorisations. In the event that an application for re-authorisation is received by the ACCC, whether re-authorisation should be granted would be considered based on the circumstances at that time.

[30] That is, a blanket licence with provision for a discount on the licence fees where the users has negotiated performing rights for some of the works in APRA's repertoire directly.

8. Determination

The applications

8.1 The Australian Competition and Consumer Commission (ACCC) granted authorisation to A30189 and A30192 on 14 January 1998 in response to applications from the Australasian Performing Rights Association (APRA) for authorisation of its overseas arrangements.

8.2 The Australian Competition Tribunal granted conditional authorisation to A30186, A30187, A30188, A30190, A30191 and A30193 on 20 July 2000, in response to applications from APRA for authorisation of its input, output and distribution arrangements.

8.3 In particular, authorisation was granted to APRA for its:

- input arrangements – being the assignment of performing rights by members to APRA and the terms upon which membership of APRA is granted;
- output arrangements – being the licensing arrangements between APRA and the users of musical works;
- distribution arrangements – being the arrangements pursuant to which APRA distributes to its members the fees that it has collected from licensees/users; and
- overseas arrangements – being the reciprocal arrangements between APRA and overseas collecting societies pursuant to which each grants the other the right to licence works in their repertoires.

8.4 Pursuant to section 88(10) of the TPA, the applications were also expressed so as to apply to any additional parties that subsequently become a party to the arrangements.

8.5 On 2 June 2004, APRA lodged applications for revocation of authorisations A30186, A30187, A30188, A30190, A30191 and A30193 and their substitution with authorisations A90918, A90919, A90921, A90922, A90924 and A90925 on the same terms, except for the period of authorisation.

8.6 On 23 November 2004, APRA lodged two further applications for authorisation, A90944 and A90945. These applications relate to APRA's overseas arrangements, authorisation of which expired on 31 December 2002.

8.7 Applications A90921, A90922, A90924 were made under section 91C of the TPA, and application A90945 under section 88(1) of the TPA, for authorisation to make and give effect to a provision of a contract, arrangement or understanding, which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

8.8 Applications A90918, A90919, A90925 were made under section 91C of the TPA and application A90944 under section 88(1) of the TPA, for authorisation to make and give effect to a provision of a contract, arrangement or understanding where the provision is or may be, an exclusionary provision within the meaning of section 4D of the TPA.

Statutory test

8.9 Having regard to the public benefits and detriments likely to flow from the authorisations the ACCC is satisfied:

- Pursuant to section 91C(7) of the TPA, that the conduct for which authorisation is sought under A90921, A90922, A90924 is likely to result in public benefits that outweigh the public detriment constituted by any lessening of competition that would be likely to result from the arrangements;

- Pursuant to section 91C(7) of the TPA, that the conduct for which authorisation is sought under A90918, A90919, A90925 is likely to result in such a benefit to the public that the arrangements should be allowed to occur;

- Pursuant to section 88(1) of the TPA, that the conduct for which authorisation is sought under A90944 is likely to result in public benefits that outweigh the public detriment constituted by any lessening of competition that would be likely to result from the arrangements;

- Pursuant to section 88(1) of the TPA, that the conduct for which authorisation is sought under A90945 is likely to result in such a benefit to the public that the arrangements should be allowed to occur.

Determination

8.10 The ACCC therefore **grants** authorisation to applications A90918, A90919, A90921, A90922, A90924, A90925, A90944 and A90945 for four years for the conduct described at paragraph 8.3.

Interim authorisation

8.11 At the time of lodging applications A90918, A90919, A90921, A90922, A90924 and A90925, APRA sought interim authorisation for the conduct the subject of those applications. On 30 June 2004, the ACCC granted interim authorisation until the date of the ACCC's draft determination. On 31 August 2005, the ACCC extended interim authorisation until the date the ACCC's final determination comes into effect, or if circumstances warrant revocation or amendment of interim authorisation at an earlier stage, until such date as interim authorisation is revoked or amended.

Date authorisation comes into effect

8.12 This determination is made on 8 March 2006. If no application for review of the determination is made to the Australian Competition Tribunal (Competition Tribunal), it will come into force on 30 March 2006. If an application for review is made to the Competition Tribunal, the determination will come into effect:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or

- where the application is withdrawn – on the day on which the application is withdrawn.

Attachment A: Submissions

APRA's supporting submission

The relevant market

APRA submits that the relevant market for the purpose of assessing its applications is the market in, at least, Australia for the acquisition, by assignment, licence, or otherwise of the performing and communication rights in relation to music. APRA submits that this market definition takes into account substitution possibilities both to users and owners of the relevant performing rights and creators of music.

APRA notes that while it issues a variety of different licenses to accommodate that fact that different users use music for different purposes and in different ways, licensees are all acquirers of the same product – performing and communication rights. Accordingly, APRA submits that the wide market definition it suggests is appropriate.

The counterfactual

APRA submits that absent authorisation there are three possible alternatives to the current arrangements:

- Self administration, which APRA submits would require every writer to enter into a contract with every user of his or her music. APRA submits that this would be logistically impossible for both writers and users. APRA notes that writers could form smaller groups or have their rights administered by music publishers of which there are approximately 260 in Australia. However, APRA submits that users would still have to obtain licenses from at least those 260 publishers as well as from writers self-administering and foreign publishers without local sub publishers.

- Non exclusive licensing by APRA which APRA contends would result in wide spread uncertainty as users would not know who to contract with to obtain a licence, and APRA and its members would need to be in constant contact regarding whether particular licences had been granted. APRA contends that as a result the cost of licences would increase significantly.

- Multiple collection societies. APRA notes that there is currently no restriction on the establishment of alternative collection societies. APRA submits that the lack of industry support for the formation of alternative collection societies is indicative of members satisfaction that APRA meets their needs and requirements in a responsible, cost effective and efficient manner.

APRA submits that the consequences of alternatives to its arrangements would be:

- Increased levels of infringement as detection and enforcement of infringement would become more difficult. APRA submits that this would ultimately lead to a diminution of Australian musical creative endeavour, decreased export earnings and loss of income to writers and publishers.

- Higher costs to users as alternative societies competed to attract members by offering higher royalty rates.

- Disadvantage to users who would lose the freedom of being able to perform almost all works in the world repertoire in the knowledge that their APRA licence allows them to do so.

- Increase monitoring and enforcement costs to APRA and ultimately, reduced returns to its members, due to the uncertainty multiple licensees would create.

Performing rights as public goods

APRA contends that performing rights are public goods. Specifically, consumption (performance) by one person does not exhaust or diminish the amount of the right available for anyone else. Once a work is available to one person it is available to all.

APRA submits that it is impossible for most users to know or predict which works will be used or the time at which they will be used. APRA states that it grants non-exclusive licenses for all of the works in its repertoire, enabling licensees to perform in public any of the works in the APRA repertoire. APRA submits that it is likewise impossible for the overwhelming majority of members to know which, if any, of their works will be performed by any user at any time.

Consequently, APRA submits that very few writer members, if any, would be in a position to administer their own performing rights, particularly considering that such works may be performed or communicated anywhere in Australia or the world. APRA submits that this makes collective administration the most efficient means of licensing the use of music by performance and communication.

Input arrangements – public detriment

Price competition

APRA submits that price competition is not lessened by its input arrangements as the public good nature of performing rights does not lend itself to price competition.

APRA contends that price competition would tend to drive price down to zero which would result in market failure. In addition, APRA submits that the price of access to its repertoire (licence fees) as a proportion of total costs is negligible for most if not all music users compared to their other costs and revenue. APRA submits that in these circumstances it is not the price of music that determines its demand and use but rather popularity, appropriateness and quality of particular pieces of music. Thus, APRA submits, reducing price or engaging in other forms of price competition is not likely to have an appreciable effect on demand.

In addition, APRA notes the power of the Copyright Tribunal to determine ‘reasonable’ prices, which it submits is a powerful factor compelling APRA to negotiate fees at a reasonable level.

APRA submits that the public benefits normally achieved by price competition among suppliers are achieved in this instance in other ways through the distribution of licence fee pools by reference to the frequency, type and length of use of the music in question so that demand and payment are directly linked.

Non price competition

APRA submits that there is fierce non price competition among its members both in relation to the exercise of the rest of their copyright (including the reproduction rights – sale of records, synchronisation into films and so on) and in the exercise of performing rights. Firstly, copyright owners compete to have their works either fixed in a medium that enables performance or broadcast – such as a record or film – or performed live. Secondly, they compete to have their works performed or broadcast as much as possible (for example on radio).

APRA notes the symbiotic relationship between performance on radio and television and record sales. In addition, APRA submits that its members have great incentive to promote competition for performance of their works because APRA's distribution rules provide that the more a work is performed the greater the reward for the member. APRA contends that the form which this competition takes is related to the wider music industry which also involves record companies, makers of video clips, television and film production companies, promoters of concerts, stage shows and similar persons and groups.

APRA submits that its input arrangements in no way limit this competition. Rather, if APRA did not take an assignment of composers' rights and was not in a position to effectively perform its functions, it submits that this form of competition would be likely to be reduced considerably.

Opt out provisions and non exclusive rights

APRA states that its input arrangements do not act as an absolute and irrevocable assignment of rights as members have the option of terminating their membership of APRA, or alternatively opting out or licensing back in relation to their works. APRA submits that if music users offered composers terms which amounted to a better deal than that which APRA was able to offer then composers would deal directly with publishers. APRA submits that there is no real or substantive competitive difference between a non-absolute and revocable assignment and a non-exclusive licence in this context.

APRA notes under its articles, persons must give six month notice if they wish to terminate their membership of APRA. However, APRA submits that this requirement is rarely enforced if the member requests a shorter period, for example, if a members wishes to terminate their membership to join an overseas society. APRA submits that in these cases termination does not reduce its repertoire as the overseas society will be represented in Australia by APRA.

More generally, APRA submits that a six month period of notice is necessary as: APRA grants blanket licences and is contractually bound for a reasonable period to be able to licence members works; and APRA requires time to distribute royalties from foreign societies.

APRA also submits that the effect of the introduction of the opt out and licence back facility required by the Competition Tribunal in its previous authorisation of APRA's arrangements has been to eliminate any detrimental effect of its monopoly by allowing members to remove works from its system for specific purposes.

Boycotts and exclusionary or discriminatory practices

APRA submits that its input arrangements do not create a boycott or the potential for a situation with a similar effect. APRA states that it does not refuse membership to any composer,

songwriter or publisher that satisfies the requirements for membership, nor does it charge any joining or membership fees.

APRA notes that its assignment in not an absolute and irrevocable transfer of property. Rather, the transfer of rights lasts only as long as the assignor remains a member of APRA. In addition, APRA submits that members retain a certain degree of control over their rights by means of their voting power in general meetings and the opt out and licence back mechanisms.

Barriers to entry and new entrants to the market

APRA contends that there may be financial barriers to entry in establishing new bodies to administer performing rights due to the costs involved in establishing a system for identifying, recording and verifying music usage, recording and enforcing licence arrangements and distributing licence fees received. However, APRA submits that this barrier is inherent to the nature of the industry and reflects the economies of scale achieved by a long established centralised body for collective administration. APRA submits that this barrier would not be lowered by having a greater number of participants in the market or be affected by whether APRA existed or not.

APRA notes that unless a potential new entrant had a substantial repertoire of works which all, or some specific group of, music users might wish to use, they would be unlikely to be able to find a sufficient number of licensees to make their operations viable. APRA contends that the only persons likely to have the ability to offer large scale repertoires are the affiliated overseas societies or major publishers and broadcasters.

APRA submits that it would be unlikely to be in these parties interests, or even in the interest of major users, to form a rival society unless APRA became inefficient and the level of investment necessary to establish a rival society became economically feasible. APRA submits that this acts as a competitive constraint on it, and as an incentive for it to maintain efficiency of operations.

APRA contends that its input arrangements do not act as a deterrent to new entry in the event that its operations become inefficient or otherwise inappropriate.

Input arrangements – public benefits

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

- only one body incurs the cost of the monitoring necessary for detecting infringements and for the purpose of determining members' shares of distributions and as a result these costs are not needlessly duplicated;

- only one body incurs the costs of bringing infringement proceedings resulting in a consistent approach to enforcement and preventing unnecessary duplication of these costs;

- 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 interest of all members; and

- the cost of enforcement proceedings are reduced as APRA, as the owner of the relevant rights, has title to sue and no other party needs to be joined.

Countervailing market power against music users

APRA submits that historical experience of countries with collection societies and present day experience of countries without collection societies is that without an effective collection society there is no market in performing rights and accordingly no competition at all.

APRA submits that this has two causes:

- Individual copyright owners are not in a position to prevent unlicensed performance of their works even though copyright law gives them the right to do so, making performance rights worthless irrespective of the work's popularity.

- Even if copyright infringements could be enforced, generally, individual composers have significantly less resources to do so than do those who may infringe their rights. Further, because of their relatively small numbers, major users may also be in a position to exercise monopoly power against composers and songwriters, particularly those that are not well established.

APRA submits that the result of this imbalance in bargaining power is that music users can effectively ignore the rights of individual music owners if there is no collective administration with the inevitable result that there will be no market.

APRA submits that collecting societies establish an element of countervailing market power so as to protect and enforce music creators rights, creating an environment where competition can take place.

Countervailing power for composers against producers and other rights acquirers

APRA submits that its members, absent its arrangements, would be unable to resist bargaining power from producers and others who wish to acquire their rights directly for a lump sum. APRA submits that it arrangements ensure that composers can participate in the success of their works rather than simply receive a lump sum not calculated according to the value of the work in terms of public performance. APRA submits that redressing this imbalance is a public benefit.

Certainty of repertoire

APRA states that under the blanket licences it grants licensees can guarantee that no matter what music they perform or communicate they will not be infringing copyright. APRA contends that if there were significant 'gaps' in its repertoire, it would be required to publish a list of works in its repertoire and know those that were not. APRA submits that music users (particularly those unable to predict in advance exactly which works will be played) would be forced to either obtain licences from all possible sources or invest enormous resources in determining which works they could and couldn't play. Alternatively, users may chose to ignore the provisions of the Copyright Act because of the complexity of compliance and low risk of detection, with associated public detriment.

Avoidance of duplication of licenses

APRA submits that a consequence of non-exclusive licensing would be duplication of licences. APRA states that, if for example, more than one person held non exclusive right, music users would not know who to obtain a licence from, or indeed, whether they need a licence from all rights holders. Additionally, questions would arise as to who would bring enforcement proceedings if no licence was taken. APRA submits that this would result in an unnecessary increase in costs or degradation of the system of copyright protection.

Enforcement efficiencies

APRA states that if it held only non-exclusively rights to its members works, the cost of infringement would escalate to a prohibitive level. APRA submits that if its rights were held non-exclusively, composers and publishers, rather than APRA, would have to prosecute all infringements of copyright as the Copyright Act provides that only the owner or exclusive licensee of the copyright in a work can commence proceedings for infringement.

APRA submits that in an environment where it held non-exclusive licences, infringers would be encouraged to test the limits of APRA's control because:

- APRA would not be able to assert with certainty that it controlled the rights;
- there may be difficulties in producing all of the relevant chain of title documents, particularly when the chain is complex;
- it would be necessary to prove not only that APRA had the relevant rights in the work, but also that no other license had been granted; and
- it would be prohibitive to conduct legal proceedings because of the high costs.

APRA contends that non-exclusive rights would be likely to result in widespread infringement of copyright, with users being prepared to infringe copyright in the knowledge that the cost of proceedings and the difficulty involved in conducting such proceedings would make it unlikely that they would ever be made to account for their infringement or compelled to obtain a licence.

Availability of widest range of copyright musical works

As noted, APRA submits that in an environment of non-exclusive rights, composers would be less likely to be able to resist assigning their performing rights to major producers. APRA submits that such assignees are likely to respond to their monopoly in that particular right by restricting supply and increasing price wherever possible with the consequence that works would not be as freely available or available at as reasonable prices as currently offered by APRA.

In addition APRA contends that if non-exclusive licensing leads to a degradation of the enforcement and protection system that Australia may not be able to guarantee effective and cost efficient protection of copyright. APRA submits that if this occurs there is substantial risk that those who control rights to music overseas will not participate in the Australian market, restricting the range of musical works available.

APRA further submits that if there were various repertoire owners competing in the market, less popular works would be avoided by those owners producing the result that only the more

popular works would be readily available. APRA submits that it would be most unlikely that 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.

Ensuring Australia receives export earnings which would otherwise be irrecoverable

APRA states that under a non-exclusive licensing 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% of the licence fees generated from the licensing of performing rights, will not be accepted as a member of APRA or any other collecting society operating under CISAC rules. As a result, unless that assignee can monitor performances, grant licences and recover licence fees, it is most unlikely that any performing rights fees will be collected. APRA submits that particularly in relation to overseas performances, overseas societies will not accept that persons membership and as a result, whatever earnings that may have been generated will not be returned to Australia.

Output arrangements – public detriment

APRA submits that as the terms of its output arrangements are not strictly within its control, as any person dissatisfied with a licence, or with a decision not to grant a licence, may apply to the Copyright Tribunal for a determination of whether its proposed terms are reasonable, or for a variation of an existing licence scheme – in effect the compulsory granting of a licence on the terms determined by the Copyright Tribunal, its output arrangements do not have the effect of lessening competition.

APRA submits that the Copyright Tribunal is an effective mechanism that prevents it from imposing unreasonable terms (including price) under its licence schemes. APRA submits that the purpose of the Copyright Tribunal is to ensure that APRA (and similar collecting societies) do not abuse their monopoly power by unreasonably rasing prices for, or unreasonably restricting the availability of, performing rights in relation to their repertoires. APRA contends that in these regard, Commonwealth Parliament has decided that competition should not be the ultimate regulator of appropriate fees and conditions of copyright licences. APRA states that it acknowledges that the jurisdiction of the Copyright Tribunal over its licensing schemes is comprehensive, and extends to the terms and amounts of its licences. In addition, APRA contends that the existence of the Copyright Tribunal is a powerful tool for licensees in their negotiations with APRA.

APRA submits that its distribution rules and the Copyright Tribunals supervision of its output arrangements, ensure reasonable and fair compensation to the composer and reasonable and fair charges to music users.

APRA submits that in addition to the Copyright Tribunal, it is also regulated in a manner which prevents detrimental effects flowing from its monopoly by the Collecting Society Code of Conduct and the expert determination process in respect of disputes with licensees and potential licensees implemented by APRA as a condition of the authorisation granted by the Competition Tribunal.

APRA submits that the dispute resolution process developed enables independent, inexpensive resolution of disputes and enables conditions that are appropriate to exceptional or unusual circumstances, or to individual music users, to be imposed. APRA further contends that: this facility has only been utilised twice, which is indicative of a general acceptance of APRA's

licence schemes in the market; and that when the facility has been used it has been an effective mechanism for resolving disputes.

Blanket licences

APRA submits that its blanket licenses allows users – the vast majority of whom are unaware in advance of what works will be performed – complete freedom to perform almost any music whatsoever in the world's repertoire of works, in the knowledge that the performance will not infringe copyright.

APRA submits that such licences are required because it is impossible to predict which works will be used and the timing of such usage by users because:

- neither APRA nor its members have control over the acquisition of articles containing musical works (e.g. CD's, DVD's, MP3's) that are then used to perform music in public;

- works used through the life of the licence may not even exist when the licence is granted;

- many of the mediums through which musical works are performed (e.g. television and radio) are mediums of mass communication. The scale of usage in these mediums and labour costs which would be incurred in licensing on an individual works basis makes such licensing impractical;

- many users do not know (and never know) precisely which works they are using. For example, a hotelier who causes public performance of musical works received in television and radio broadcasts.

APRA contends that if users were able to accurately inform it in advance of what works would be performed on a given occasion, it would be able to grant a licence for those works only. However, APRA argues that the majority of users can not. For example, television broadcasters are unaware in advance (and often after the event) precisely what music is contained in films, programs and advertisements. Similarly, cinema owners are usually unaware of what musical work will be performed before (and sometimes after) they are performed.

APRA submits that even if users were able to notify it what works were to be performed in advance, the cost of transactional licences would be significant. Specifically, APRA would need to confirm that particular works were in its repertoire and verify which works were to be played as well as perform compliance checks on every such licence so that other works were not performed without a licence.

APRA submits that if other than blanket licences were allowed there would be great scope and incentive for music users to cheat and to infringe copyright knowing that the likelihood of detection and infringement proceedings would be small.

APRA submits that its use of blanket licences should not be seen as limiting price competition between individual compositions because the blanket licence is a different product which is more than a right to the individual compositions and because there is no substantial price competition in any event in that the choice of which musical works to use is not usually determined by price.

APRA further notes that while it generally grants blanket licences to the works in its repertoire, if the Copyright Tribunal could be persuaded that alternatives to blanket licences were reasonable, APRA would be obliged to provide those other licences.

Output arrangements – public benefits

APRA submits that its output arrangements:

- provide easy, efficient and cost effective access by music users to virtually all music performed publicly in Australia;
- eliminate significant burdens for music users, the cost of various negotiations with music owners and the need to obtain new or different licences when performance is varied from that which is planned;
- eliminate the threat and likelihood of infringements actions against the user;
- provide protection for music owners from exploitation by major music users who, to a substantial degree, have monopoly power in the negotiation of licence fees;
- increase program diversity and encourage the writing of music by granting access to virtually all copyright works in the world and allowing a return on creativity based on type and amount of performance;
- lead to reduced transaction costs (including identification costs, information costs and transaction time costs) and reduced copyright infringement;
- offer unplanned, rapid and indemnified access to a wide range of compositions;
- allow copyright owners to take advantage of economies of scale in performance rights licensing; and
- provide music owners the ability to protect and enforce their rights which might otherwise be difficult if not impossible.

APRA submits that its output arrangements (and in particular its offering of blanket licences) ensure that the greatest possible number of copyright works is available to be communicated or publicly performed with no limit on who can obtain a licence. APRA states that there is little if any indication that music users or consumers do not want the immediate and unlimited access to the overwhelming majority of copyright works in the world.

Distributions rules

APRA submits that its distribution rules achieve the result that the distributions received by each APRA member reflects substantially, and in direct proportion, the demand for each members work by music 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.

APRA submits 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.

Accordingly, APRA states that its distribution arrangements do not have a negative impact on competition in the music performing rights market. Rather, it contends that their impact is beneficial as they reflect a competitive outcome as far as composers, songwriters and publishers are concerned.

Overseas arrangements

APRA submits that its arrangements with overseas societies increase the repertoire it is able to offer users which is of benefit to the listening and viewing public. APRA submits that there is at present no other society or body apart from it with the facility for monitoring the use of, and collect and enforce the rights in relation to, those works whose performing rights are controlled by its affiliated overseas societies. Accordingly, APRA states that the only result of striking down the arrangements between it and its affiliated societies would be either:

- to require the establishment of another collecting society to licence the performing rights in relation to overseas compositions on behalf of the affiliated societies, with associated duplication of costs and expenses already incurred and an increase in the costs of licensing compared to present costs; or

- if no separate society to licence the performing rights of affiliated societies was established, the affiliated societies' repertoires would probably not be available in Australia for public performance, resulting in a very significant lessening of legal access of the Australian public to foreign musical works and possible breaches by Australia of its international obligations under the Berne convention.

Efficiencies and benefits in APRA's activities as a 'clearing house' in the licensing of performing rights

APRA submits that the efficiencies inherent in its system depend on the peculiar nature of the product, performing rights, and are achieved because, under the APRA system:

- music users only have to deal with one organisation;

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

- the Copyright Tribunal only has to make one determination in relation to each type of licence scheme (unless particular circumstances are relevant to an individual licence);

- there is one body establishing and recording who is entitle to the performing rights and the difficulties for music users in contracting, 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 is eliminated.

Benefits of competition are achieved by APRA's arrangements

APRA submits that the benefits which normally flow from competition and especially price competition, such as the encouragement of innovation, proper allocation of resources to meet demand and the encouragement of investment, also result from the operation of APRA's system.

APRA contends that this comes about because the price and revenue rewards which usually flow in a competitive market from greater demand are reproduced under the APRA system where higher demand (that is, greater number of performances) results in directly proportionate higher distributions.

Period of authorisation

APRA submits that authorisation should be granted for a period not less than that of the authorisation originally granted by the Competition Tribunal, being 4 years.

Interested parties submissions

The ACCC sought submissions from around 115 interested parties involved or potentially interested in the licensing of performing rights. The Commission received substantive public submissions in response from:

- Attorney Generals Department;
- Cinema Operators[31];
- Free TV Australia[32];
- Commercial Radio Australia;
- Screenrights;
- Australian Broadcasting Corporation;
- Australian Record Industry Association;
- Festival Mushroom Records;
- Australian Council for the Arts;
- Arts Law Centre of Australia; and
- Music Council of Australia.

The relevant market

Commercial Radio Australia (CRA) contends that the market definition submitted by APRA – the market in Australia for the acquisition of the performing and communication rights in musical works – fails to take account of the fact that the use of its repertoire by licensees varies from case to case. CRA submits that there are distinct markets in the acquisition of rights for each of the various public performance (e.g. bars and nightclubs, juke boxes, retail outlets), broadcasting and communication uses and that the effect of APRA's arrangements should be considered in each of these markets separately.

CRA submits that the relevant market for its purposes is that for the right to broadcast musical works on commercial radio stations. It submits that in this market supply side substitution does not exist, and consequently, that there is no competitive pressure on APRA to set commercial prices for access to its repertoire. On the demand side, it submits that its members can not currently acquire rights to APRA's worldwide repertoire from anyone else.

CRA contends that the market for acquisition of rights by its members is contestable but that the way in which APRA currently operates precludes the development of competition in this market.

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[31] Village Cinemas Australia, The Greater Union Organisation, Birch, Carroll & Coyle, Reading Entertainment Australia, Australian Multiplex Cinemas, Hoyts Cinemas, Cinema Operators Association of Australia and Australian Entertainment Industry Association – referred to throughout this draft determination as the 'Cinema Operators'.

[32] Free TV's membership comprises the licensees of all commercial television broadcasting services in Australia.

Input arrangements – public detriment

Opt out provisions and non exclusive rights

The Arts Law Centre of Australia submits that while the online environment is perhaps facilitating an increased number of direct dealings between copyright users and owners, such technology has not evolved to the degree where it could provide an effective substitute for the licensing services provided by APRA.

CRA submits that APRA's aggregation of its rights gives it monopoly power in the various markets for the acquisition of performance and communication rights in musical works. It submits that the opt out and licence back provisions adopted by APRA have failed to constrain its power to act as a monopolist in its dealings with users.

Similarly, Cinema Operators state that on June 23 2003, APRA filed a reference in the Copyright Tribunal seeking a 257% increase in the licence fee paid by Cinema Operators for the right to publicly perform (by reason of the screening of a film) musical works and associated literary works incorporated in or used in a film. Cinema Operators submit that this is an unconstrained expression of market power only made possible because APRA enjoys the right to aggregate by assignment the public performance rights of authors of musical works thus preventing in any realistic way, Cinema Operators from rationally and prudently negotiating such rights directly.

CRA submits that the alternative to its current input arrangements postulated by APRA, that is, users having to negotiate directly with thousands of composers, hundreds of publishers and a host of equivalent international collection agencies, is not accurate given the tendency of composers to deal with their rights through music publishing companies. CRA contends that rights to popular musical works are likely to be concentrated and controlled by major record companies through their publishing arm. In this respect, CRA contends that the global music industry is highly concentrated and controlled by the 'Big 5' major entertainment conglomerates. CRA submits that this Big 5 control the publishing rights of approximately 90% of Australia's top 100 most broadcast recordings in 2003.

CRA submits that these conglomerates, particularly through their publishing arms, may be in a position to administer performing rights, particularly as they already pool their rights in respect of all their most popular works. Given this, CRA questions whether the economies of scale in rights administration and licensing could be exploited effectively by several 'specialist collection agencies' rather than a monopoly collection society such as APRA.

Cinema Operators submit that APRA's opt out provisions do not provide a workable mechanism to negotiate the rights to publicly perform musical works and associated literary works embedded in a film as an incident of screening that film.

Cinema Operators contend that APRA's opt out and licence back provisions should be changed to allow for greater flexibility in their application. They submit that the current opt out measures could be made less restrictive by allowing a member to require APRA to reassign specific categories of rights in relation to a certain work or works, rather that *all* of a member's works within a specific category of rights. They submit that the 'all or nothing' nature of the opt out arrangements are a disincentive to members availing themselves of these provisions.

With respect to license back measures, Cinema Operators submit that these could be made less restrictive by imposing fewer and less onerous restrictions on their use. Cinema Operators note that at present, members are required to nominate all persons to whom the member intends to grant a sub-licence. Further, members are required to nominate to APRA the dates on which performances are to take place, geographic location and venue of performances at least two months prior to the date of the first performance under the sub licence. They submit that these requirements make the sub-licensing of rights in the context of exhibiting films impractical as confirmation of date of first exhibition may not be known until a month before the film is released and the date on which the film will ceased to be exhibited is usually not known in advance.

Cinema Operators further submit that the time periods imposed on members to notify APRA that they intend to avail themselves of the opt out and/or licence back provisions should also be reduced or eliminated so as to allow members to utilise these measures at any time.

Cinema Operators contend that with these amendments it will be easier for rights owners (composers/lyricists or their publishing company) to deal directly with end users.

Specifically, Cinema Operators submit that the practical and sensible time to secure a right to public performance of a musical work necessary for screening of a film is at the time during the production sequence inherent in producing the film when the musical works are identified, selected, determined and commissioned by the producer. They submit that downstream public performance rights can be practically negotiated as an incident of making the film or directly in relation to the film, when the identification of the source of rights and ownership is undertaken by the producer, clearances obtained and other rights negotiated, as occurs in the United States. They submit that such licenses could be secured between rights owners and cinemas, or between rights owners and film producers. They submit that this would create effective alternatives for APRA members in circumstances where collective management is not appropriate for their needs.

Cinema Operators state that in the US performance rights in music in cinemas are not the subject of separate licence fees and licence arrangements between cinema owners and Performance Rights Organisations (PROs). They submit that in the US, public performance rights are secured by producers of films at the same time as synchronisation rights are obtained. Cinema Operators state that typically, film producers secure both a synchronisation licence and a performance licence, on a per film basis, directly from the copyright owner or their agent at the time the producer secures the rights to 'use' the specific music he or she would like to include in the film with synchronisation licence documents including a provision granting public performance rights for theatrical exhibition of the film in the US. Cinema Operators note that this arrangement is unique to the US and to the cinema industry.

Cinema Operators state that historically the US situation was similar to that in Australia with PROs obtaining exclusive public performance rights from members and granting blanket licences to cinemas. However, various anti trust cases and consent decrees between PROs and the US Department of Justice resulted in these arrangements being undone.

Cinema Operators note that producers of United States films buy public performance rights for the US only. Copyright owners assign public performance rights to the rest of the world to their PRO with rights enforced and fees collected through reciprocal arrangements with PROs in other countries.

Cinema Operators consider that the US model has relevance to Australia as the majority of films exhibited in Australia are of US origin with films produced in the US contributing 85% of Australian box office revenue.

Cinema Operators submit that direct negotiation of these rights would not damage APRA's role in other fields of public performance management. Rather, it would make efficient sense, harmless to APRA's broad role as a collection society.

With respect to APRA's submission that the low level of use of its opt out provisions indicates that its members are satisfied with its current arrangements, CRA and Free TV Australia (Free TV) submit that APRA has provided to evidence to support this view and that it is equally arguable that the low levels of opt out are a consequence of high barriers to entry resulting from APRA's input arrangements and the lock in effect of the blanket licences it offers to users.

Similarly, Cinema Operators submit that the fact that APRA's opt out and license back provisions are rarely used is evidence that its natural monopoly has not been severely eroded by their introduction as APRA contends. They submit that it is impractical for members to use the opt out and licence back provisions because of the terms and conditions attached to the exercise of those rights.

Barriers to entry and new entrants to the market

The Music Council of Australia (Music Council) submits that there is no significant dissatisfaction with APRA's services among composers and publishers and consequently, that it is unlikely that composers and publishers would seek to establish an alternative society. The Music Council further states that there is no indication that any other organisation is seeking to offer these services and that there are clear reasons for having a single collection society provide these services.

The Arts Law Centre of Australia submits that to create greater competition in the area of public performance rights administration would appear to require the establishing of a second collecting society. The Arts Law Centre of Australia believes that the financial costs as well as practical difficulties in achieving this would not be balanced by any significant benefit to consumers or APRA members.

CRA submits that APRA's input arrangements hinder the entry of competition into the relevant markets. It submits that because APRA requires members to assign their rights to it (in addition to it only offering blanket licences to members) its opt out and licence back provisions have not affected its monopoly position and that a significant amount of inertia has to be overcome before other options can be used. CRA argues that the low levels of other options attests to the fact that barriers to entry are still to high.

CRA submits that there is no reason that members can not transfer their rights to APRA by way of a non-exclusive licence as occurs in the United States. It submits that this would produce a significantly different negotiating environment for users than under the current arrangement whereby members assign their rights to APRA.

CRA notes that the Phonographic Performance Company of Australia's (PPCA) input arrangements are based on a non-exclusive licence of rights from the relevant record companies which, it submits, has not hindered its ability to operate.

The ACCC received one confidential submission suggesting that authorisation be withdrawn and genuine opportunities created for at least one other collection society to enter the market. It was submitted that this would encourage APRA to respond commercially to licensees (and members) and not to habitually resort to the Copyright Tribunal.

Free TV submits that technological advancements in Digital Rights Management (DRM) are gaining traction and current indications are that there may be wide spread commercial deployment of DRM systems by 2005/2006. Free TV states that DRM is relevant to APRA's arrangements because:

- DRM has the potential to allow for efficient, competitive direct licensing of music between copyright content producers/publishers and end users, and indirect dealing through third parties other than existing collecting societies; and

- APRA's traditional blanket licensing arrangements, which do not provide a refund or similar where a blanket license holder acquires rights directly from a creator, penalise parties that make direct licensing deals with creators which will impede the deployment of DRM in Australia.

Consequently, Free TV submits that the anti competitive detriment generated by APRA's arrangements will increase over time as DRM technology develops.

Input arrangements – public benefits

Countervailing market power against users

The Australian Record Industry Association (ARIA) submits that collective licensing ensures that all copyright owners, both large and small, are able to receive equitable remuneration in respect of their licenses.

Certainty of repertoire & avoidance of duplication of licenses

The Australian Council for the Arts submits that if competition was opened up to a number of players, it would be necessary to approach a number of organisations, and determine which held the relevant rights, before a licence could be obtained. It submits that APRA's arrangements benefit the public as it is less time consuming and expensive to negotiate with a single body.

CRA notes that there a some administrative advantages in dealing with a single collecting agency in respect of rights to musical works.

CRA submits that even as a non-exclusive licensor, APRA would still be able to prosecute infringement cases, if its members so desired, under a power of attorney. More generally, it submits that record company affiliated publishers have the resources and experience to conduct investigations and prosecute cases of copyright infringement on their own. CRA states that it is its understanding that in the case of the PPCA's, whose input arrangements are based on a non-exclusive licence of rights from the relevant record companies, ARIA prosecutes copyright infringement cases.

Countervailing power for composers against producers and other rights acquirers

The Australian Council for the Arts submits that APRA's input arrangements safeguard against composers being pressured into assigning rights to a music publishers or commissioning agents

on terms that are disadvantageous to the composer, thereby supporting the Australian music sector.

Efficiency of administration

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.

Output arrangements – public detriment

The Music Council states that the licence fees charged by APRA are modest and its monopoly position is not used unfairly to elevate royalty rates.

ARIA submits that the Copyright Act invests the Copyright Tribunal with the jurisdiction to determine relevant licence fees in circumstances where parties are unable to agree, which provides appropriate protection for all parties against the possibility of a negotiation impasse.

CRA submits the APRA approaches negotiations with users with the view that it can determine the nature of the scheme and the method pursuant to which licence fees will be calculated in the knowledge that there is no alternative supplier of rights available and that users must have access to its repertoire. It submits that as a consequence, APRA is able to extract monopoly rents from users. CRA contends that the rates which APRA charges are much higher than those that would be charged in a competitive market or one where there was adequate external regulation (for example, forcing APRA to set prices equal to the marginal cost of supplying the relevant rights) to constrain APRA's monopoly power.

CRA submits that it would be untenable to refer matters to the Copyright Tribunal whenever an industry agreement is renegotiated. Further, it is unclear if the orders the Copyright Tribunal is able to make can adequately regulate the terms and conditions on which APRA makes its repertoire available. CRA notes its experience with the Copyright Tribunal which, it submits, resulted in a significant and unjustified increase in fees. It also states that the matter took 4 years to be heard and involved significant legal costs.

CRA states that APRA's new dispute resolution process has done nothing to significantly reduce its monopoly power and that APRA has produced no evidence to support its claims that it has.

The Australian Council for the Arts and the Arts Law Centre of Australia submit that the ACCC, Copyright Tribunal and Code of Conduct for Australian Collection Societies effectively regulate APRA's operations and limit any possible abuse of market share by APRA.

The Attorney General's Department state that the Copyright Tribunal is authorised under Part VI of the Copyright Act to hear disputes about the terms and conditions of APRA's licences and is the appropriate forum in which to address concerns licensees may have about specific terms and conditions of licenses.

Cinema Operators contend that while the Copyright Tribunal has the jurisdiction to determine the reasonableness of licence fees, it necessarily considers the question of reasonableness in the context of the authorised input arrangements enabling the aggregation of assignment rights and authorised blanket licensing protocol. Consequently, Cinema Operators submit, the Copyright Tribunal considers the reasonableness of licence terms not in the context of a licence for the

limited works incorporated in a film by the producers, but as a function of a blanker repertoire linked to a total proportion of box office receipts.

Cinema Operators contend that APRA's applications for authorisation and submissions in support of its applications reflect its refusal to consider any form of licence other than a blanket licence. Cinema Operators submit that, as a consequence, the ACCC must asses the applications on the basis that, if authorisation is granted, the Copyright Tribunal will be asked to determine the reasonableness of licence fees for cinemas solely within the parameters of the particular input and output arrangements (consisting of blanket licences) which comprise APRA's proposed licensing arrangements.

Cinema Operators note APRA's submission that the Copyright Tribunal is in no way fettered or constrained in relation to the terms on which licence schemes are determined. However, they submit that APRA has failed to acknowledge that the terms of the input and output arrangements of its licensing scheme could not be varied in any way which would take APRA's conduct outside the scope of the conduct authorised by the ACCC.

Cinema Operators submit that the framework for determining the reasonableness of licence fees is for the ACCC to consider through the authorisation process and can not be determined by the Copyright Tribunal itself.

The ACCC also received one confidential submission that the Copyright Tribunal inevitably has a bias towards APRA due to the regularity of its appearances and its familiarity with it.

Blanket licences

CRA submits that APRA's use of blanket licences has the effect of 'locking in' users, precluding the development of alternative forms of licensing arrangements with other potential rights licence providers. It submits that the modifications made to APRA's input arrangements can not have any meaningful impact without an equivalent modification to its output arrangements.

Free TV and CRA state that blanket licences do not, as APRA has suggested, take account of direct dealing between a user and composer. They contend that this ensures that users do not have any incentive to deal with composers or content producers directly as, in effect, the user would be paying for the relevant works twice, once under the blanket license and again to the composer directly. They submit that APRA has maintained its output arrangements in their current form to ensure maximum leverage when rights are negotiated.

Cinema Operators submit that the blanket licensing arrangements forced on them are inappropriate as the body of musical works contained in a film:

- is determined at the time of production of the film;
- is therefore pre-determined and finite;
- is not subject to substitution or random episodic selection from the entire APRA repertoire;
- is easily and readily identifiable;
- is fixed in the medium of the film;

- is small in number in comparison to the overall size of the entire APRA repertoire; and

- is subject to extensive due diligence and investigation in order to identify the bundle of rights in an existing musical work or associated literary work, or alternatively, subject to arrangements for the commissioning of the works which necessarily establishes the chain of rights so that producers can obtain clearances and in particular, the synchronisation rights.

Consequently, Cinema Operators submit that there is no need for, or utility in, blanket licences being imposed on them as such licences are not adapted to an efficient granting of the public performance rights in works in films. They content that what is needed is a licence for the specific, identifiable pieces of music within a film shown. They submit that a large scale cinema operator exhibits approximately 200 films a year with an average of 20 musical works per film. Thus they would require access to only around 5,000 of APRA's works per annum. In this respect, they note the United States system where such licences are negotiated at the same time as synchronisation rights are negotiated.

Cinema Operators contend that APRA seeks to extract a percentage of the total gross box office receipt on the basis of a blanket licence. They submit that, as a consequence, APRA receives a share of gross revenue irrespective of the minimalism in the use of its repertoire knowing that Cinema Operators have no real use for that repertoire. Further, Cinema Operators submit that the licence fees imposed on them by APRA are based on a formula reflecting Cinema Operators ability to pay, rather than any assessment of the underlying value of the works.

Further, Cinema Operators contend that by offering only blanket licenses, APRA forecloses any real opportunity, or incentive, to negotiate rights directly.

Cinema Operators contend that rather than being restricted to a blanket licence and a licence fee calculated by reference to box office revenue, the following options should be available:

- Cinema owners should be able to negotiate a transactional licence directly with rights owners on a per film or periodic basis.

- Cinema owners should be able to negotiate a transactional licence with APRA on a per film or periodic basis.

- Film producers should be given the ability to negotiate a non-exclusive licence for public performance rights in Australia directly with the rights owner at the same time as they secure the synchronisation rights.

Cinema Operators submit that these alternative forms of licences would not necessarily have to replace APRA's blanket licence regime – rather, they could operate in addition to it to provide the music user with the incentive to try to licence some music directly even if it had to licence other music under a blanket licence.

Cinema Operators submit that while direct licensing would only be feasible where the transaction costs involved in negotiation and collection would not outweigh the benefits of direct licensing, a significant number of APRA members, in particular publisher members, are capable of effectively absorbing such administrative costs due to their size and profitability.

In addition, Cinema Operators note that they would still require a blanket licence to cover use of music in foyers, toilets, staffrooms etc within the cinema complex. They submit that such a licence could be granted on similar terms to other businesses which publicly perform music on their premises, and based on factors such as size or capacity of premises.

Cinema Operators proposal for direct negotiation with rights holders

As noted, Cinema Operators submit that they should have the opportunity to negotiate directly with rights holders (composers or producers) or distributors. They submit that if they had this opportunity they would be able to operate in a competitive environment for the securing of public performance rights in the music and associated lyrics in films exhibited by them.

Cinema Operators submit that for any film intended for release in Australian cinemas, Australian distributors are almost invariably appointed during the course of the production process and often shortly after the commencement of that process. Cinema Operators state that there are alignments between major film distributors in Australian and the major United States film producers and distributors with all major United States studios having representatives in Australia.

Cinema Operators contend that given the alignments between major Australian distributors and major United States film producers and distributors who routinely acquire performing licence rights (at least in so far as those licenses pertain to exhibiting films within the United States), Australian distributors could secure performing right licences in sufficient time to be passed through to Australian cinema operators. Further, they submit that, if cinema operators were able to negotiate film hire with Australian distributors on the basis that such supply included the relevant performing right licences, the distributors would have more than ample incentive to procure those licences.

Cinema Operators submit that there is no reason to believe that a balanced commercial bargain reflecting the interests of rights owners and cinema operators could not be struck. They contend that rights owners would have incentive to negotiate transactional licences directly with distributors or cinema operators, particularly if those negotiations would deliver outcomes more advantageous to rights owners than those which would otherwise be achieved through the existing scheme.

Cinema Operators submit that, should they secure such licences, the transactional arrangement for the payment of royalties to APRA would remain essentially the same. The Cinema Operator would notify APRA of its gross box office receipts for the next financial year based on the previous financial year. Following the first year in which the Cinema Operator had negotiated licence fees from alternative sources to APRA, the notification would include a deduction of the gross box office receipts for any films exhibited by the Cinema Operator for which the Cinema Operator had negotiated a licence from any source other than APRA (that is, a production company, distributor or other rights holder), together with a certificate from the rights holder from whom the licence was secured evidencing the licence.

Cinema Operators note that while they are not currently prevented from negotiating directly with rights holders, at least with respect to United States films, which make up 85% of Australian box office receipts, given that they are already force, by virtue of the blanket licence provided by APRA, to obtain these rights from APRA, there is no commercial incentive for them to source these rights directly. However, if there was provision for the APRA blanket

licence fee to be discounted along the lines submitted, such commercial incentives would be created.

Cinema Operators states that APRA, as the collecting society, would retain all its present rights and role as the source of public performance rights as they relate to music and lyrics in film, but it would not be the exclusive source of those rights as is presently the case.

In response to questions raised by APRA regarding whether rights owners and users would take up the opportunity to deal directly with each other, Cinema Operators state that APRA has not asserted that such direct dealing would be unworkable. Cinema Operators submit that if opportunities were created for users to negotiate directly with rights holders, in many, if not most cases, users would elect to continue to deal with APRA. However, the existence of alternatives would act as a competitive constraint on APRA. In this respect, Cinema Operators submit that it would be up to users to identify and engage in commercial dealing necessary to secure performance rights outside APRA's current licensing arrangements.

With respect to APRA's submission that film distributors and Cinema Operators may not have sufficient notice of the repertoire of musical compositions in films to be able to negotiate licences directly before a films release, Cinema Operators note that under its current licensing arrangements with APRA it is not necessary to obtain such information. Consequently, as a matter of practice, such information has not been sought in advance of a film opening. However, Cinema Operators submit that, as noted, for any film intended for release in Australian cinemas, Australian distributors are almost invariably appointed during the course of the production process and often shortly after the commencement of that process. Cinema Operators state that there are alignments between major film distributors in Australian and the major United States film producers and distributors with all major United States studios having representatives in Australia. Accordingly, Cinema Operators submit that Australian distributors would be able to obtain cue sheets during production, which for both Australian and foreign produced films usually concludes several months before the film is released in Australia.

Cinema Operators note the argument that if distributors were to assume responsibility for negotiation of pass-through performing rights licences that availability of these rights could be used selectively to prejudice independents. However, Cinema Operators submit that dealings between film distributors and cinema operators in Australian are governed by a voluntary Code of Conduct for Film Distribution and Exhibition. They submit that this Code is intended to implement self regulation of the film distribution and exhibition industries in Australia and that it contains a range of provisions to ensure a framework for fair and equitable dealing between all distributors and exhibitors.

Output arrangements – public benefits

The Australian Broadcasting Corporation submits that APRA's offering of blanket licences represents a significant reduction in the administrative burden that would otherwise be incurred where it required to seek individual clearances from copyright owners from time to time.

The Australian Council for the Arts submits that APRA's output arrangements enable licenses for the use of musical works to be easily obtained through negotiation with a single body. It submits that if competition was opened up to a number of players, it would be necessary to approach a number of organisations, and determine which held the relevant rights, before a licence could be obtained.

Cinema Operators submit that the transaction cost savings for users and composers generated by APRA's licensing arrangements do not apply in so far as they apply to negotiation of rights by Cinema Operators. They submit that the transaction costs involved in negotiating these rights directly during the film production process are likely to be quite low and that securing rights at this time would involve absolute certainty of the works involved with no need to secure certainty through access to the entire APRA repertoire.

ARIA submits that blanket licensing provides certainty to licensees who, in many cases, will have no knowledge of the identity of copyright owners, as well as providing the convenience of a single licence covering the multiplicity of copyright owners and copyrighted material.

Cinema Operators state that the benefit conferred by blanket licenses, the freedom to use any music as required, has no application to their operations where such freedom is neither desired nor necessary.

The Australian Council for the Arts submits that the relative ease and efficiency with which an APRA licence can be obtained encourages music users to comply with copyright laws, minimising copyright infringements and ensuring composers are rewarded for their creativity.

Distributions rules

The Australian Council for the Arts submits that the 50% rule prevents publishers and other interests from appropriating these royalties, guaranteeing income for composers and supporting the Australian music industry.

Technological changes since previous authorisation was granted

CRA submits that new technology, in particular DRM, has been developed since the existing authorisations were granted. It submits that this technology has the capacity to allow copyright owners, or intermediaries acting on their behalf, to directly licence musical works to users and at the same time monitor or record the use of that music. CRA submits that in effect, DRM has the potential to remove most of the rationales for APRA's centralised operation and monopolistic behaviour.

Period of authorisation

Free TV submits that the public benefits of APRA's arrangements may have decreased, and the anti-competitive detriment increased, since the Competition Tribunals authorisation was granted. However, it submits that the ongoing technological, regulatory and other market changes and developments mean that the most appropriate time to conduct a full review of APRA's arrangements is likely to be mid 2006.

Free TV submits that at present, Australia's mass media communication (MMC) industry, including the free to air broadcasting industry, is in a state transition due to various factors including:

- the Digital Television Broadcast Review and various other regulatory reviews currently underway;

- platform proliferation due to alternative distribution channels such as mobile phones and the internet; and

- the introduction of 'timeshifting' with the development of personal video recorders.

Free TV submits that these matters will impact greatly on the way in which participants in the MMC industry use and distribute music. They submit that there is likely to be much greater clarity around these issues by mid-2006.

In addition, Free TV submits that the monopoly position of various copyright collection societies around the world has been coming under increasing scrutiny from competition regulators. It states that recent developments include:

- the European Commission has accused music collecting societies in 16 countries of cartel behaviour as a result of the so called 'Santiago Agreement' which provides a one stop shop for licensing by participating collecting societies of online music downloading or streaming services from all territories across Europe; and

- the European Commission's Internal Market Division published its Communication on the management of copyright and related rights which Free TV states, favours legislation to ensure the proper governance and transparency of collecting societies.

Free TV submits that Australia will benefit from watching international developments on the regulation of collecting societies, especially as new platforms such as the internet offer global (rather than territory specific) distribution opportunities. Free TV contends that mid-2006 is likely to be an appropriate time to review how developments in other countries play out.

Given these issues, Free TV submits that the appropriate time to fully review APRA's arrangements would be mid-2006. It submits that a 4 year authorisation would risk delaying important innovations for the Australian public and potentially result in significant anti-competitive effects.

General comments

The Audio Visual Copyright Society (Screenrights) supports APRA's applications for re-authorisation. It considers that APRA's arrangements provide a clear public benefit to consumers in the licensing of rights in circumstances where they would not otherwise be capable of administration by copyright owners on an individual basis.

APRA's response to interested parties submissions

Cinema Operators submissions

APRA submits that the Cinema Operators submissions:

- 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;

- fail to acknowledge the scope for direct dealing already facilitated by the existing opt-out and license back provisions under APRA's constitution;

- exaggerate the significance of the modifications proposed by Cinema Operators 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

- fail to acknowledge the increase in transaction costs and copyright infringement likely to be associated with the implementation of the proposed modifications.

By way of background, APRA states that in the 2003/2004 financial year it distributed $2,364,148 from money collected from Australian cinemas (of $2,666,175 collected). It submits that this distribution was in respect of 4,878 musical works in 347 films, owned by 24,166 writers and publishers, being 8,791 unique sharers or copyright owners.[33] APRA submits that of these 347 films, 32 were Australian (although not necessarily containing Australian music) and of the 4,878 works, 1,237 were local works, owned by 395 unique local sharers.

APRA states that that there were 2,678 changes of ownership in respect of these works during the 2003/2004 financial year, including changes of catalogue between publishers and termination of publishing agreements. Of these changes of ownership, it states that 190 were in respect of local works.

APRA submits that films shown in weeks commencing 5, 12 and 19 August 2004 for which it has cue sheets (29 of 74) show that the percentage of film during which music was performed ranged from 20% to 99.38% showing 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.

Abuse of monopoly position

Pricing strategy

APRA submits that allegations that it abuses its monopoly position are without foundation. With respect to Cinema Operators claims that its application to increase their licence fees by 257% is an 'unconstrained expression of market power' it submits that the Copyright Tribunal is the appropriate forum in which to address the issue of appropriate license fees. APRA further submits that the mere application by it to the Copyright Tribunal for a determination as to the reasonableness of a licence fee can not be characterised as an unconstrained expression of

[33] Sharer means a person entitle to share in the copyright distribution, which includes the songwriters, their publishers, and their successors in title.

market power and notes that it has not bough the proposed licence scheme into operation, which it is entitle to do under section 154 of the Copyright Act.

With respect to Cinema Operators submission that their licence fees are not properly reduced to reflect the fact that the licence is for 'a discreet incidental or dependant use of predetermined works' APRA submits that:

- on a quantitative level, music is an important component of films;
- qualitatively, music plays a fundamental role in the success of a film;
- there is no basis to dismiss the rights owned by APRA as mere 'incidental' rights of minimal significance; and
- the value of music in a film and the reflection of the value in the APRA fee is a matter for the Copyright Tribunal.

With respect to the assertion that license fees are set based on APRA's perception of users ability to pay rather than an assessment of the underlying value of the work, APRA submits that it bases fees on its belief of the value of the music to be used and not on ability to pay. APRA submits that in any event, the question of the appropriate fee is a matter for the Copyright Tribunal.

Cinema Operators also submit that fees paid by them are not reduced to properly reflect that musical works derive a 'free rider' effect from the exhibition of films. In response, APRA submits that it does not accept that owners derive a significant free rider effect by the exhibition of films and that in any event, cross promotional benefits from the inclusion of music in films flow both ways.

Blanket licences

In response to the Cinema Operators submission that APRA's imposition of a blanket licence system is evidence of abuse of its monopolistic power, APRA notes the comments of the Competition Tribunal that 'some users do not understand the blanket license concept, and assume that, by offering a blanket licence for users of a large repertoire, APRA is forcing them to pay needlessly high licence fees'.

APRA submits that blanket licences do not force unwanted works on users. Rather, they are a cost effective method of ensuring that licensed users are authorised to use whatever music they perform. APRA contends that blanket licence fees are not set to reflect the repertoire of music covered by the licence, but rather, to reflect the value of music used and the value of the comprehensive nature of the licence offered, which ensures copyright infringement does not occur regardless of music used.

In response to the Cinema Operators submission that at no time has APRA offered alternatives to blanket licences, APRA submits that:

- the fact that is has expressed a preference for blanket licences is not indicative of market power with respect to the determination of the general structure of licences as the jurisdiction of the Copyright Tribunal with respect to setting licence structures in not circumscribed by the stated preferences of APRA; and

- it has always been (and remains) willing to consider other licence proposals and has never indicated that it is not prepared to consider licensing on terms other than blanket licences. In this respect, APRA states that Cinema Operators have never approached it for a licence other than a blanket licence.

APRA acknowledges that it may be necessary to adjust blanket licence fees in the event that opt out or direct dealing occurs, however submits that this is a matter for negotiation between the parties of, failing agreement, the Copyright Tribunal (as discussed below).

Negotiation processes

In response to Cinema Operator complaints about it exercising 'market power in the negotiation process' APRA submits that:

- in light of the opportunity of any user to seek a determination by the Copyright Tribunal, it has no capacity to unilaterally impose terms on users or otherwise exert market power in the negotiating process;

- it is its practice to negotiate with users rather than impose terms on them on a take it or leave it basis, and in the event that a negotiated agreement can not be made, parties are able to refer schemes to the Copyright Tribunal; and

- it 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 alternative dispute resolution process as approved by the Competition Tribunal.

Role of the Copyright Tribunal

APRA notes the finding of the Competition Tribunal that the Copyright Tribunal provides an effective constraint against APRA abusing monopoly power in dealing with major users of music.

With respect to Cinema Operators submission that the Copyright Tribunal is fettered in its determinations as to reasonable fees and licence terms by the nature of any authorisation granted, and specifically by an authorisation granted in the context of APRA generally only offering blanket licences, APRA submits that:

- the Copyright Tribunal is in no way fettered or constrained in relation to the terms on which licence schemes are determined as its powers extend to consideration of licence schemes generally, not just to schemes involving the traditional form of blanket licence;

- there is nothing in the Copyright Act to suggest that a blanket licences is the only appropriate form of licence or that fees should be calculated as a percentage of box office. It is open to the Copyright Tribunal, on application, to authorise alternative licence schemes. However, Cinema Operators have never sought alternative licences from either APRA or the Copyright Tribunal; and

- the provisions of the authorisation granted by the Competition Tribunal do not preclude the Copyright Tribunal from ordering the provision of licences on terms other than a blanket licence.

Proposed system modifications

APRA notes the modifications to its existing arrangements proposed by Cinema Operators to allow:

- the negotiation of transactional licences directly with rights owners;
- the negotiation of transactional licences directly with APRA; and/or
- the negotiation of non-exclusive rights directly with Australian rights owners

APRA contend that these modifications are based on a number of questionable assumptions.

<u>"Pass through" licence of performing rights will be negotiated during the production process</u>

APRA states that:

- with respect to Cinema Operators negotiating transactional licences directly with rights owners – with respect to the US repertoire, they are free to do so as APRA only holds non-exclusive licence in respect of US works. Consequently, the modifications proposed by Cinema Operators will have no application in respect of practice in relation to US films, which contribute 85% of Australian box office revenue;
- with respect to negotiating a transactional licence directly through APRA – the terms of licences between users and APRA are a matter for the Copyright Tribunal; and
- with respect to negotiating non-exclusive rights directly with Australian rights owners – APRA's opt out and licence back provision provide a reasonable opportunity for this to occur. However, APRA questions the practical utility, both for film producers, and Cinema Operators, of doing so.

<u>Performing rights licence will be in place before exhibition of the film</u>

APRA states that:

- It is by no means clear that distributors (let alone cinema operators) would have sufficient notice of the repertoire of musical compositions in films to allow negotiations of performance rights before a films release as cue sheets in relation to music synchronised in a film are generally not provided significantly in advance of the films opening.
- Even if sufficient time to negotiate licences was available there is no basis for confidence that licences could be secured as:
    - in relation to non-Australian music, there is no basis for assuming that it would be legally practical or possible to negotiate individual performing right licences in relation to Australian exhibition of films without the assistance of APRA; and

- in relation to Australian works, there are doubts as to the feasibility and practicality of securing performing rights licences including over: who negotiates for cinemas (either individually or collectively); and who negotiates for the copyright holders.

APRA also submits that given the sunk costs involved in acquiring the distribution rights to a film and marketing the film, copyright holders would hold significant bargaining power in negotiations held close to release date which could be used by the rights holder to demand extravagant terms.

Existing opt out and licence back procedures

APRA submits that its existing opt out and licence back procedures create considerable scope for direct dealing (by producers or cinema operators) with copyright holders in relation to the licensing of performing rights. They submit that any member with a significant body of work in film may elect to opt out in relation to film performance and negotiate these rights directly. Further, a writer or publisher could take a non-exclusive licence in respect of their works in films and negotiate directly.

With respect to criticisms that the opt out provisions apply only in respect of all of a members works in relation to a particular category of work, APRA submits that unlike a non exclusive licence back, opting out creates a hole in APRA's repertoire which has significant implications for the efficiency of its operations. Specifically, if is repertoire is diminished, APRA submits that it has to inform all relevant licence holders that certain works are no longer contained within its repertoire and possibly renegotiate licence fees with those users demanding different licence terms due to the loss of works, causing significant costs and administrative inconvenience. In addition, APRA would be required to notify overseas collection societies. APRA notes that if its opt out provisions were available in respect of individual works it would have to go through this process every time a work was withdrawn from its repertoire.

With respect to criticisms of the notification period required for members to opt out in respect of a category of works, APRA submits that 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 created by the opt out.

APRA notes the criticism of its licence back provision by Cinema Operators and in particular criticism of the requirements to nominate: the person to whom the member intends to grant a sub licence; date or dates on which it is proposed performance under the sub-licence will take place; and geographic location and venue of the performance.

APRA submits that these notification provisions are important because it 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.

More generally, APRA submits that the fact that its opt out and licence back provisions are not being used in relation to cinema does not necessarily indicate that they are overly restrictive or ineffective. Rather, it may be that these provisions are not attractive to members due to the transaction costs involved and the difficulties in estimating a fair value for the performing right.

APRA also submits that the existence of such provisions in themself is an effective competitive constraint on its conduct.

In addition, APRA contends that, to its knowledge, no cinema operator has asked a writer or publisher to deal directly in respect of performing rights.

With respect to United States films, APRA submits that there is noting in its current rules and procedures which preclude Australian distributors from obtaining a direct licence from major US film producers and distributors.

Impact of proposed modifications on beneficial operation of the APRA system

APRA notes the submission of Cinema Operators that the introduction of procedures which better facilitate direct dealing in relation to performance rights imbedded in films will not affect the broader administrative functioning of APRA in its wider role as a collecting society. APRA submits that for the reasons summarised in its original submission in support of its applications, the modifications proposed by Cinema Operators 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.

Commercial Radio Australia (CRA) submission

By way of background, APRA states that in the 2003/04 financial year:

- 2MMM in Sydney broadcast 2,229 different works represented by 3,348 sharers of whom 738 were local APRA members. Of works performed, 448 were first broadcast during 2003/04 and works that were performed during the period had 464 ownership changes during the period.

- 3MEL (NOVA) in Melbourne broadcast 2,351 different works represented by 5,524 sharers of whom 735 were local APRA members. Of works performed, 1,145 were first broadcast during 2003/04 and works that were performed during the period had 958 ownership changes during the period.

Approaches to negotiations

APRA notes CRA's submission that because no practical alternative to APRA exists, it approaches negotiations from a position of absolute power which allows it to adopt an 'all or nothing' approach.

In response APRA submits that the mere fact that there are no licensing alternatives does not mean that it is unconstrained as:

- licensees have recourse to APRA's dispute resolution processes;

- dissatisfied licensees can apply to the Copyright Tribunal; and

- dissatisfied writers can seek to opt out.

With respect to complains about the 'take it or leave it' nature of standard contracts offered by it APRA submits:

- as concluded by the Competition Tribunal, there is nothing unusual or intrinsically anti-competitive about APRA simplifying its administrative processes by applying practices

to aggregates of members, users and works. Rather, it is imperative to efficient administration of APRA's procedures;

- dissatisfied users can apply to the Copyright Tribunal and/or to the Code Reviewer under the Collecting Societies' Code of Conduct; and

- APRA is responsive in negotiations to consider any alternative proposals for licensing arrangements.

Monopoly fees and the Copyright Tribunal

CRA raise similar concerns to those expressed by Cinema Operators, and addressed by APRA above, as to it exercising monopoly power in setting licence terms and fees.

In addition, CRA submits that the expense of seeking recourse to the Copyright Tribunal makes it an impractical method of resolving disputes in many instances. In response, APRA submits that given its collective size and commercial interests there is no basis to conclude that the expense of Copyright Tribunal litigation creates an effective barrier to serious challenge by CRA of the reasonableness of APRA terms. APRA states that in previous Copyright Tribunal proceedings CRA have been well resourced and represented. In addition, APRA notes its alternative dispute resolution procedures in respect of small disputes, implemented as a condition of the authorisation previously granted by the Competition Tribunal.

APRA notes CRA's submission that the goal of regulation should be to force APRA to set prices equal to the marginal cost of supplying the relevant rights. In response, APRA notes that copyright enforcement contains a high proportion of fixed costs, including establishment of the system for monitoring users and registering works. By contrast, once those systems are in place, the incremental cost of accepting another writer or new work into the system is small as is the marginal cost of supplying (or licensing) rights. APRA submits that if price was set at marginal cost the inevitable result would be market failure.

Material change to the market

CRA submits that developments in DRM have the capacity to dramatically alter the market so that the detriment arising from APRA's arrangements will outweigh the benefits. In response APRA submits that the introduction of DRM will not materially affect the benefits and detriments of its arrangements. APRA submits that DRM does not in itself constitute or provide a platform for the delivery of music, or the licensing of copyright therein. Rather, it is a technology which encodes and implements rules in relation to the dissemination and use of digital format music recording.

APRA contends that it is possible that CRA intended to submit that it is the general systems for the internet delivery of sound recording in digital format (such as MusicPoint, which supplies digital format music over the internet utilising DRM technology), rather than DRM technology specifically, which constitutes a material change of circumstances since authorisation was granted in 2000.

APRA states that in order to provide a system which creates a satisfactory alternative to it, it would be essential that the system was able to facilitate:

- the identification of the owners of copyright in the underlying musical works;

- the negotiation of licensing in relation to those works;

- the monitoring of performance of those works, and the calculation of royalty entitlements; and

- the enforcement of breaches of copyright, in relation to the unauthorised use of musical works.

APRA submits that systems such as MusicPoint do not present have capacity (or foreseeable potential) to facilitate all these processes.

In addition, APRA notes that even if such an alternative system was feasible, it would be of little practical use as a means by which users of broadcast rights could be licensed, monitored and enforced, unless it was universally adopted.

Alternatives to blanket licences

Per program licences

In response to CRA's submission that it should offer licensing alternatives other than blanket licences, APRA submits it 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 states that it 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, which it states, is the appropriate forum in which to address this issue.

APRA submits that as noted by the Competition Tribunal, it is plainly within the Copyright Tribunals power to approve schemes that allow for fee adjustments to blanket licences, but that the main difficulty with the introduction of such alternatives is the complexity of working out how such adjustment mechanisms would work and the transaction costs involved in putting them into practice. APRA submits that CRA has not offered any suggestions as to how this difficulty could be overcome.

APRA submits that the main problems with implementing per program licences are:

- the difficulties of negotiating the per program fee, which would need to take account of both the role of music in the program and the advertising revenue generate by the program: and

- the sheer number of negotiations that would be necessary given the number of programs broadcast on radio.

APRA submits that the complexity and volume of these negotiations, and the associated increased administrative costs to APRA, would be such that per program licences would not necessarily lead to lower licence fees.

APRA notes the use of per program licences in the US, but submits that there are two important differences between the US and Australian markets which increase the appeal and utility of per program licensing in the US:

- transaction costs associated with the negotiation of per program licences are relatively small in the US, both because of the extent of syndication of programs, and because there is consistent advertising content; and

- unlike in Australia, US collection societies do not 'offer tiered' licences which adjust the level of licence fee to the relative amount of music performed on the program. Consequently, there is greater incentive in the US for high revenue, low music programs to explore alternatives to blanket licences.

Assignment back

APRA submits that CRA's proposal that major music publishing houses or specialised collecting agencies (by for example, record label or music genre) administer performing rights is based on three assumptions which do not necessarily hold:

- that there is high concentration of popular music controlled by major publishers;

- that major publishers would be willing to take on the role administering performing rights; and

- that writers would wish their rights to be administered in this manner.

APRA submits that the major publisher which holds an interest in an underlying musical work is often not related to the record company producing and distributing the sound recording in the work. APRA submits that this absence of synchronicity between record companies and publishers is often accentuated by the frequency of multiple ownership of the copyright underlying musical works.

APRA further submits that of the 850,768 local works in its repertoire only 45,378 are owned or controlled by major publishers. In respect to the radio broadcasts discussed above, APRA submits that for 2MMM, 27% of works are published by majors only (with 4% of those having an unpublished share) and for NOVA, 20% of works were published by majors only (with 10% of those having an unpublished share).

APRA also notes that a number of artists do not have publishing contracts at all – for example, John Butler who recently won major APRA and ARIA awards has neither a publishing nor a record contract.

APRA notes that it would still remain in the market for the purpose of 'mopping up' those works not licensed to a major publisher and to licence foreign works not licensed to a major publisher.

APRA submits that any assignment back would:

- significantly increase transaction costs associated with licensing and enforcement, both for APRA, the alternative collecting societies, and users as discussed previously;

- fail to provide the complete security for uses that the APRA blanket licence currently does;

- reduce the bargaining power of writers who would need to deal directly with major publishers;

- jeopardise proper enjoyment by writers and publishers of their copyright interest;

- discourage creative activity and lead the market failure; and

- reduce diversity of songs played on radio.

Non-exclusive licences

APRA states that it is implicit in the CRA's assignment back proposal that APRA would receive only non-exclusive licences in musical works. In response, APRA notes the findings of the Competition Tribunal 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.[34]

Free TV submission

Material changes in the market

Technological advances

APRA notes Free TV's submission that technological advances in 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. APRA acknowledges that DRM has the (long-term) potential to significantly reduce monitoring costs in relation to digitally delivered music. However, APRA submits that DRM does not at present, or for the foreseeable future, have the potential undermine the public benefits of the APRA system as:

- as far as ARPA is aware, there is no reasonable foreseeable prospect of DRM facilitating the accurate recording of ownership in the underlying work of all online digitally delivered music;

- DRM would appear to have no role in licensing, and monitoring, except in relation to music delivered online;

- as far as APRA is aware there is no reasonably foreseeable prospect (in any media) of music being delivered exclusively by online delivery platforms;

[34] Application by Australasian Performing Rights association [1999] ACompT 3; 16 June 1999, paragraph 350.

- even if it were assumed that DRM could somehow provide an accurate online identification of copyright holders in the underlying work, it could not facilitate 'at source' negotiations for the licence of the performing right, between the proposed user and each and every copyright owner;

- the capacity of APRA to efficiently facilitate the licensing of the performing rights is at the foundation of the public benefits of the APRA system; and

- APRA strongly rejects the submission that it is unlikely that it will 'foster the development of innovative technologies like DRM' by reason of its effective monopoly position as APRA incurs significant costs in monitoring the use of works giving it a strong commercial incentive to develop DRM technology to reduce those costs.

Mass media communication industry in a state of flux

APRA notes Free TV's submission that increases in the number of distribution platforms raises issues of how music should be licensed and distributed on these platforms and that the development of personal video recorders which allow users to skip advertisements may impact on how the mass media communication industry uses and licences music.

APRA submits that there is no basis for the contention the proliferation of new platforms will provide a platform to eliminate the transactions costs and practical difficulties associated with direct dealings between copyright holders and users. APRA submits that platform proliferation in fact increases the importance of its blanket licence system because:

- the proliferation of delivery platforms increases the number of transactions necessary to licence the performance of music in the market place: and

- the availability of blanket licences significantly lowers barriers to entry relating to the development and exploitation of new music delivery platforms.

APRA submits that it is unclear how the development of personal video recorders has the capacity to affect the value to broadcasters of music performed in television transmissions. It submits that if such an effect could be established this would be a matter for the Copyright Tribunal to consider in approving licence fees.

Overseas developments

APRA notes Free TV's submission that the prevalence of cross boarder activity overseas in relation to licensing of performance rights calls into question the justification for the exclusivity of the rights that APRA presently takes from foreign collection societies.

APRA submits that there is significant public benefit in its retention of exclusive licence rights in relation to foreign works because of the significant increase in transaction costs associated with monitoring and enforcing non-exclusive rights.

APRA contends the Free TV's submission 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 if there was an interest by any entity in competing with APRA in relation to licensing foreign works, the scope for that competition

already exists through at least two means, neither of which to APRA's knowledge have ever been utilised:

- because APRA only has a non-exclusive licence from 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; and

- it would be open to publishers in Australia to seek to cause the opt out of the copyright in the works which they control, and seek directly to licence those works.

APRA submits that, 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. They contend that 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 Australia by its physical isolation from other jurisdictions.

APRA submits that it is not surprising that 'cross-boarder' issues are of significant interest in Europe, while at the same time being of limited significance in Australia because:

- the existence of the European Market creates pressures to take active steps to minimise the practical and legal effect of national boundaries within Europe; and

- there is unquestionable greater competitive pressure between national collection societies in relation to licensing of works in a particular territory, arising from the close physical proximity of the European territories, which facilitates physical entry by the collecting societies into markets in other territories.

Submissions in response to the draft determination

Generally, interested parties confined their comments at the pre-decision conference and in written submissions in response to the draft determination to the public detriment identified by the ACCC as resulting from APRA's collective administration of performing rights in Australia.

General comments

Cinema Operators submit that the ACCC's draft determination does not adequately address limitations or conditions which could be imposed on APRA, as conditions of authorisation, to mitigate the 'significant public detriment' and 'considerable cost' to users and the general community identified by the ACCC as flowing from APRA's arrangements.

In this respect, Free TV notes the Competition Tribunals Reasons for Decision in respect of APRA's original applications for authorisation which states, at paragraph 313, that:

…if aspects of APRA's collective administration which are identified as anti-competitive can be modified so as to remove or lessen the potential for detriment without impairing essential components of APRA's operations, then authorisation should be granted on terms that bring about those modifications.

Opt out and licence back provisions

Cinema Operators submissions and APRA's response

Cinema Operators argue that APRA's arrangements deny them the opportunity to reduce their operating costs by negotiating performing rights licences directly at source. Cinema Operators state that United States movie studios/producers are able to negotiate performance rights for Australian cinema operators at the same time as they purchase the rights for the US market. Cinema Operators argue that this would place some competitive constraint on APRA in its pricing of performing rights licences.

Cinema Operators state that the ACCC should grant conditions of authorisation requiring that:

- APRA allow members to opt out in respect of certain types of users within a particular category of works;
- APRA allow members to opt out with respect to particular works within a class of works; and
- APRA allow members to nominate the name of particular users and works when exercising their licence back rights, rather than a whole category of users or rights.

Cinema Operators also submit that so long as members are only able to opt out in respect of a class of broadcast or performance, meaning the member will forego their rights in respect of performance or broadcast of all works in that class, APRA's opt out clauses are of little practical utility.

Cinema Operators note APRA's contention that opt out provisions would be of little utility as it is more practical for rights owners to deal through APRA. Cinema Operators contend that while this may be the case generally, the option for users to deal directly with rights owners would constrain APRA' ability to exercise its monopoly power.

In response, APRA notes that members have the option of taking a non exclusive license back in respect of works or opting out in respect of categories of works. APRA states that, for example, any APRA member can opt to withdraw their works form its repertoire in respect of cinema exhibition and negotiate directly with Cinema Operators.

APRA contends that the Cinema Operators proposed amendment to its license back provisions allow members to nominate the name of a particular user and a particular musical work rather than a whole category of users or rights is unnecessary as this is presently possible under the existing arrangements.

APRA states that members opting out in respect of particular users within a particular category of works is impractical because:

- opting out involves the re-assignment of copyright to the member and that such transfer of ownership may be limited by reference to class of act, geographic area and time under the Copyright Act;

- the utility of such a provision would be limited as it is more practical for rights owners to deal with Cinema Operators as a category of users rather than individually;

- transaction costs for APRA would increase significantly as it is required to keep records of works it is and is not entitle to license; and

- members opting out and assigning rights in respect of musical works embedded in films exclusively to cinema operators would constrain competition in the cinema market as any cinema operator not party to the arrangement would be unable to screen the film.

More generally, APRA states that the underlying purpose of the restrictions on members ability to opt out and licence back is to ensure that it is aware of all instances where a member directly licences use of their works and to prevent it taking enforcement action against users who have negotiated rights directly with members.

APRA notes the suggestions of the ACCC and users that its licence back provisions could be streamlined and submits that it remains willing to discuss any modifications which can be accommodated without unduly frustrating the underlying purpose of these provisions. In this respect, APRA states that it is proposing to modify its licence back provisions to:

- reduce the formal period of notice from two months to one;

- only require the member to identify classes of persons with whom the member seeks to deal directly rather than specify precise names of users;

- require that the member only notify the date or dates of performances, or the period of the sub licence, as appropriate for the circumstances of the case; and

- only require specification of the geographical location of performances to the extent necessary to reasonably identify whether the licence extends to a particular area or venue.

On 27 January 2006, APRA amended its applications for revocation and substitution, modifying its license back provisions as proposed. Specific details of the amendments are provided at paragraph 3.7 of this determination.

APRA submits that the effect of these changes is that:

- there may not be any need to specify the precise names of users, and that it will be sufficient to identify users by reference to a class of persons such that, for example, it may be sufficient for the notice to specify 'all commercial radio stations in NSW;'

- notification of precise dates of performance may not be necessary; and

- there may be no need to specify the precise areas and venues, and that it may be sufficient to identify by reference to classes of venue or broad areas.

Free TV's submissions re APRA's opt out provisions and APRA's response

Free TV submits that it is appropriate for the ACCC to only grant APRA authorisation if such authorisation is conditional on APRA's member opt out and licence back provisions being modified so as to improve the practical utility and efficacy of their operation. Specifically, Free TV submits that APRA's input arrangements should be modified to allow opt out on a work by work basis.

Free TV considers that APRA's input arrangements are anti-competitive and, as it submits has been demonstrated by overseas experience, can be modified so as to remove or lessen the potential for detriment without impairing essential components of APRA's operations.

Free TV submits that such amendments would remove barriers to direct dealing for music users who only require limited access to musical works and whose use of such works is predictable and planned, without undermining the essential features of APRA's collective administration of performing rights.

Free TV cites the example where a television network directly commissions a composer to create music for a specific television program. Free TV submits that in such circumstances the network should be able to ensure exclusivity in respect of the works commissioned, but that APRA's opt out provisions, by preventing opt out on a work by work basis, and licence back provision, by preventing exclusive licence back, prevent this. Further, Free TV argues that even if these restrictions were removed, APRA's propensity to offer blanket licences means that there is no incentive for the television network to negotiate performance rights in the works directly with the composer.

Free TV argues that facilitating direct dealing would not undermine the essential features of APRA's collective administration of musical works more generally, as there is no need for works commissioned exclusively for a specific television program to be included in APRA's repertoire. Consequently, Free TV states, excluding such works from its repertoire would not increase APRA's monitoring or enforcement costs.

In response to concerns that less restrictive opt out arrangements might create additional costs for APRA, particularly if it were required to inform license holders of any holes in its repertoire created by members opting out in respect of some works, Free TV contends that if this was the case, such additional costs would be reflected in the license fees negotiated by APRA and, for

example, the television networks taking advantage of the opt out arrangements. Free TV states that it may be that, ultimately, dealing solely with APRA may be the most cost effective means of licensing performing rights in musical works, but that opportunities to explore whether other alternatives are or could be cost effective should at least be made available.

With respect to concerns that opt out on a work by work basis may create 'holes' in APRA's repertoire, Free TV contends that this is already the case in respect of works of composers who are not members of APRA or an equivalent overseas collection society and works that are the subject of APRA's existing opt out arrangements.

Specifically, Free TV submits that opt out on a work by work basis would not increase APRA's administrative obligations beyond those currently necessary given:

- the existence and availability of APRA's searchable database of works;
- APRA already has administrative processes in place, including for the updating of its database, in respect of opt out in respect of categories of rights in works;
- APRA does not currently license all works worldwide; and
- APRA only holds non-exclusive right in respect of the repertoires of US collection societies.

APRA submits that although Free TV argues that its existing arrangements are unsatisfactory for composers and broadcasters, no composer or music publisher has made such a claim. Moreover, APRA contends that its arrangements are standard industry arrangements which apply throughout the world, ensuring payment for actual use rather than on an estimate of likely success of a program that might never be put to air.

APRA notes that if members were able to licence specifically commissioned works exclusively to a television network as proposed by Free TV then when, for example, the television program was broadcast in public, such as for example at a pub or club, the proprietor of the premises would not be licensed for the public performance of the work. APRA states that it is for this reason that APRA's license back provisions need to remain non-exclusive, allowing it to license the performance of works in such contexts.

APRA further notes that it licences use of the vast majority of musical content embedded in television programs. APRA explains that typically each program has a cue sheet which details musical works embedded in the program, some of which have been directly commissioned for the program and many of which have not. APRA states that there are millions of such cue sheets, each typically containing details of dozens of works. APRA notes that it has to determine which of the works contained in each cue sheet it has licence over. APRA contends that a system whereby members were able to remove works from its repertoire on a work by work basis would be unworkable, particularly as most users require blanket licences covering all works they are likely to broadcast or perform.

In response, Free TV submits that enforcement issues in respect of such works could become the responsibility of the broadcaster and/or music publisher. In addition, Free TV argues that the composer would be compensated by the broadcaster for works commissioned and that any revenue forgone in respect of public performance of the work is likely to be relatively insignificant in this context.

APRA contends that opting out in respect of individual works would significantly impact on its administrative costs as:

- notwithstanding Free TV's assertion to the contrary, there is a real question as to whether APRA would be legally obliged to notify users in relation to any work the subject of an opt out (even if the work had been commissioned directly by a broadcaster). In particular, APRA submits that if large holes developed in its repertoire, licensees would insist on notification by APRA of the scope and limitations of its license; and

- individual opt out would increase APRA's transaction costs in relation to monitoring of music performance and calculation of license fees.

APRA also contends that the increased costs associated with the creation of holes in its repertoire would be borne not only by it but by licensees who, if not assured of effective blanket licensing from APRA would have to monitor the copyright status of the works they propose to perform and seek to negotiate licenses in respect of those works falling outside the scope of the APRA license. APRA contends that such transaction costs could potentially be massive.

With respect the Free TV's submission that the detriment caused by the creation of holes in APRA's repertoire is limited by the fact that such holes already exist and that difficulties can be addressed by the broadcaster by an 'express or implied license' APRA submits that:

- it is incorrect to assert that there are currently large holes in APRA's repertoire as few Australian composers are not APRA members and those who do opt out for some type of use are writers of music that does not have widespread performance outside that use (in particular, purpose written music on hold);

- in any event, the fact that administrative problems may exist with respect of existing holes in its repertoire does not address the submission that such problems will be significantly exacerbated by increasing the size of those holes; and

- the proposal for an 'express or implied license of general application, for the public performance' of musical works is complex and uncertain and does not eliminate the cost and inconvenience associated with APRA having to inform licensees of holes in its repertoire.

Free TV states that APRA's website has a search function which allows music users to ascertain whether a particular work is contained within its repertoire. Free TV argues that, while the situation might be different for, for example, a café owner, at least in respect of large users like television networks, this is a useful function which allows them to identify any holes in APRA's repertoire without undermining the essential features of APRA's collective administration of performing rights.

APRA submits that Free TV's submission in respect of its searchable data base does not take account of APRA's previous submission that this database is not and does not purport to be a comprehensive list of APRA's repertoire and does not contain a large amount of information that is required for proper licensing of musical works.

More generally, APRA states that the non-exclusive licence back provisions developed by it as a condition of the authorisation granted by the Australian Competition Tribunal in 2000 were

designed to address the concerns raised by Free TV. APRA states that these provisions have been used extensively, such as in relation to 'music on hold.'

Free TV also notes that APRA members can licence back on a work by work basis and that it is not clear why work by work opt out could not also be accommodated as is the case in the US and Canada.

In response, APRA states that

- through use of its licence back provisions, Australian copyright owners are able to cause APRA to be vested only with non-exclusive rights;

- the US system is inappropriate in the Australian regulatory environment as US collecting societies only receive non-exclusive licences in their members works in the first instance whereas in Australia APRA hold rights in works exclusively so as to allow it to more efficiently undertake enforcement action on behalf of its members (as it does not then have to seek the copyright owners consent to do so);

- in Canada there is no provision for composers to take their works out of the repertoire of collection societies, on an exclusive or non-exclusive basis; and

- in Europe, there is no provision for the opt out of individual works. Rather, opt out provisions are typically similar to the category based opt out regime presently used by APRA, which is based on the model approved by European competition authorities for the German collection society GEMA.

With respect to the Canadian arrangements, Free TV responds that it has obtained information from the Canadian Association of Broadcasters, and confirmed with the Society of Composers, Authors and Music Publishers (SOCAN) that its members are able to obtain non-exclusive licenses from SOCAN in respect of their works for the purpose of enabling modified blanket licenses (MBL). That is, Free TV submits, members of SOCAN can obtain a non-exclusive license from SOCAN to enable the composer to directly sub-license the performing right in their work to a television broadcaster for use in a program. Free TV states that this is as a consequence of the decision of the Copyright Board of Canada regarding public performance of musical works dated 19 March 2004. Free TV submits that the MBL's enable television broadcasters and television operators to reduce the amount of royalties they pay to SOCAN when they air programmes that do not use music for which they need a SOCAN license.

APRA states that it is not aware of any instance where its existing license back provision have proved too inflexible to allow license back and that in any event, the modifications it proposes to its license back provisions provide sufficient practical flexibility to address all the concerns raised by Free TV in relation to the scope of its license back provisions.

Free TV's submissions re APRA's license back provisions and APRA's response

Free TV contends that APRA's licence back provisions should be made less restrictive. In particular, Free TV notes that a composer seeking a non-exclusive licence back of the performing rights in respect of the television broadcast of a particular work is required to give APRA one months notice of: the title of the work(s); the identity of all persons to whom the members intends to grant a sub-licence; the date on which the sub-licence takes effect; the period in respect of which the sub-licence will operate; any performance dates know to the

member at the time of entering into the sub-licence; the geographical location of the performance; and the broadcast or on-line service and the program or content segment in respect of which the sub-licence will be granted.

Free TV submits that the notification of such details is impractical in circumstances where a broadcaster wishes to obtain the rights from a composer to synchronise a musical work in the soundtrack of a television program. In particular, Free TV submits that*:*

- the television programme may be licensed by the broadcaster to other broadcasters (i.e. all sub-licensees may not be known at the time of obtaining the synchronisation license);
- licenses should be perpetual as it is not practical to license from a composer for a limited period of time; and
- specific performance dates and geographical location in the context of television programs are unlikely to be known at the time of negotiating rights with a composer.

Free TV considers that for APRA's administrative purposes and to enable APRA to identify non-infringing performance of the work it should be sufficient to identify:

- the title of the work;
- the broadcaster entering into the synchronisation licence and any sub-licensees known at that time;
- the class of persons who may be additional sub-licensees;
- the date the sub-licence takes effect and ceases, including, if applicable, a perpetual license;
- the scope of the communication right in respect of the work(s) for which the broadcast is licensed;
- the name of the program, programmes or content segment in respect of which the sub-licence will be granted; and
- if necessary, additional sub-licensees licensed by the broadcaster as they become know.

Free TV contends that APRA's principal objection to more liberal licence back provisions is that 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. Free TV argues that its proposal provides APRA with all necessary information to achieve this.

With respect to the modifications to its licence back provisions proposed by APRA, Free TV submits that:

- APRA proposal to formally require specification only of such details as are reasonably necessary to identify whether a particular user has been granted a licence does not provide sufficient certainty as to what details APRA will consider reasonably necessary in any particular instance;

- APRA's proposal that members only notify the date or dates of performances, or the period of the sub licence, as appropriate for the circumstances of the case is not directly relevant to Free TV's concerns as television broadcasts are not as prescriptive in this respect as generally applicable provisions; and

- APRA's proposal to only require specification of the geographical location of performances to the extent necessary to reasonably identify whether the licence extends to a particular area or venue does not provide sufficient certainty as to what details will necessary in particular instances.

Free TV notes the ACCC's comments in its draft determination that it is difficult to assess whether further refinements to APRA's existing opt out and licence back provisions would increase their utility without undermining the essential features of APRA's collective administration of performing rights, unless there is provision for adjustments to blanket licences to accommodate direct dealing such that the effectiveness of the existing provisions can be tested. However, Free TV, noting that this would require a party to seek recourse to the Copyright Tribunal for variation of APRA's traditional blanket licence, submits that this is not likely to occur, at least in a manner or to an extent that will usefully inform the ACCC as to whether the existing opt out and licence back provisions should be modified or refined.

Free TV submits that unless modifications are made to APRA's opt out and licence back provisions there is little utility in seeking to argue for a modified blanket licence before the Copyright Tribunal. Free TV argues that this may explain why to date no party has sought to argue before the Copyright Tribunal that its blanket licence for access to APRA's repertoire should contain provision for a discount to accommodate direct dealing.

In response APRA submits that this argument incorrectly assumes that:

- there is no present scope for direct dealing under the existing input arrangements; and

- the introduction of modifications to blanket licences will only be driven by users whereas APRA has in the past (for example, in respect of commercial television and radio), and intends to in the future (for example, in respect of cinema operators), formulate licensing schemes which make provision for modified blanket licences.

APRA submits that its existing licence back provisions were drafted in collaboration with, and consented to by, FACTS before the discharge of the 1999 Competition Tribunal proceedings. APRA submits that FACTS subsequently negotiated a licensing arrangement with it for a lump sum blanket licence, in spite of an offer by APRA to charge less where less APRA music was used.

APRA states that to its knowledge, no user in the field of commercial television has ever sought to deal directly with an APRA member and that there is no basis for the assertion that its licence back provisions are unworkable in relation to commercial television.

In summary, APRA argues that the submissions of the Cinema Operators and Free TV:

- fail to acknowledge that the determination of the appropriate structure for APRA's operations necessitates a balance between the competing goals of promoting competition, and the efficient operation of APRA as a collecting society;

- fail to acknowledge the extent of the detriment caused to the efficient operation of its arrangements, by further modification of its input arrangements;

- fail to acknowledge the capacity of the existing input arrangements to accommodate direct dealing;

- exaggerate the need for reform in order to facilitate direct dealing;

- fail to interpret properly the reasoning in the ACCC's draft determination; and

- fail to articulate meaningful and workable proposals.

Import competition

Cinema Operators state that the ACCC should grant conditions of authorisation requiring that APRA's arrangements with overseas collecting societies be made non-exclusive modelled on the existing United States system.

Free TV notes that APRA has submitted that if there was an interest by any entity in competing with APRA in relation to licensing foreign works, the scope for that competition already exists through at least two means, neither of which to APRA's submits have ever, to its knowledge, been utilised:

- because APRA only has a non-exclusive licence from US collection societies, it would be open for another collection society to set up in Australia, and seek a licence from the same American societies; and

- it would be open to publishers in Australia to seek to cause the opt out of the copyright in the works which they control, and seek directly to licence those works.

In response, Free TV states that APRA only has non-exclusive licences in respect of the use of United States' works in Australia, with all of its other licences in respect of overseas works being exclusive for Australia. Free TV submits that this severely limits the ability of any competing licensor to compete effectively with APRA in Australia, as they would not be able to offer licenses to works from any overseas jurisdiction other than the United States.

Further, Free TV submits that in any event, it has recently made enquiries as to whether the American Society of Composers, Authors and Publishers (ASCAP), the major performing rights collecting society in the United States, would be willing to licence the performing rights in its repertoire in Australia. Free TV states that ASCAP's response was that it is unwilling to do so, and any person who wished to licence its repertoire in Australia should approach APRA.

Free TV argues that the primary reason no existing foreign collecting society has set up in Australia in competition with APRA is that (other than the United States collecting societies) no such society is legally capable of setting up in Australia and licensing its works in competition with APRA due to APRA's exclusive overseas licensing arrangements. Free TV submits that even the United States collecting societies have little incentive to do so, because they would be unable to licence any works other than their own repertoire in Australia, thus severely limiting their ability to compete with APRA. Free TV submits that APRA's assertion is therefore completely unfounded and ignores the anti-competitive effect of its own arrangements with overseas collecting societies.

With respect to APRA's contention that 'cross border' issues are of significant interest, and provide greater incentives for collection societies to operate across boarders in Europe, whilst at the same time being of limited significance in Australia, Free TV states that it does not disagree with the contention that greater competitive pressure may arise in Europe due to the European Market and the close physical proximity of countries in Europe. However, Free TV does not agree that the physical isolation of Australia prevents or inhibits setting up of competing societies in Australia. Free TV contends that performing rights in works are intangible goods, and there are little or no physical barriers to the licensing and use of such works. Consequently, Free TV submits, there is no evident reason why transaction costs associated with establishment of a business in Australia should be significantly greater than in any other part of the world. Free TV submits that the essential impediment to any interest arising in relation to competition between collecting societies in Australia is the anti-competitive overseas licensing arrangements put in place and maintained by APRA.

APRA argues that proposals to make its arrangements with overseas societies non-exclusive would be prejudicial to the cost effective enforcement of copyright in foreign works as only a copyright owner may bring proceedings for infringement of copyright. As a non-exclusive licensor in its foreign repertoire, APRA submits that it would be unable to bring such enforcement proceedings. APRA contends that it is for this reason that it does not currently rely on works from the US, which are assigned to US collection societies on a non-exclusive basis, in its infringements proceedings, although when required to do so it is able to demonstrate – at considerable cost – the validity of its non exclusive licence and the absence of any prior licence.

APRA further submits that foreign collection societies and composers would be unlikely to be interested in dealing directly with Australian users and that it was for the very purpose of avoiding this type of transaction that its reciprocal arrangements with overseas societies were established. In this respect, APRA contends that overseas collection societies would be unlikely to be interested in commencing licensing in the Australian market because of:

- the relative efficiency of APRA's operation generated by its economies of scale; and

- the fact that the society is unlikely to be able to offer repertoire sourced other than from its home territory because of the scheme of reciprocal arrangements between national collecting societies which confer rights on societies which are limited to the territorial scope of the country in which the societies are situated.

With respect to US musical works, APRA notes that these as works are assigned to US collection societies on a non-exclusive basis and that there was nothing currently preventing music users sourcing these rights directly. Similarly, APRA notes that in other jurisdictions if a member opts out of their collection society Australian users are free to deal with them directly.

However, APRA does acknowledge, as discussed below, the need to modify its output arrangements to reflect such direct dealing should it occur.

Barriers to entry and new market entrants

CRA submits that broadcast monitoring technologies have recently been developed which allow music use to be tracked without using the internet by analysing broadcast signals. CRA states that these technologies use software applications to monitor radio broadcast signals and are able to detect and record songs broadcast either through information embedded in the audio track

(audio watermarking) or by recognising the unique characteristics of a song such as its audio waveforms (audio fingerprinting).

CRA states that audio fingerprinting technology can be used to identify music regardless of whether it's stored/broadcast in an analogue or digital format and that there are already a number of commercial applications for those technologies such as MusicTrace and BlueArrow which is owned by the US performing rights organisation BMI.

In response, APRA submits that these technologies have been investigated by it, however, they do not link writer and other ownership information to the details of recording broadcast. APRA argues that there is no basis on which it can be seriously contended that this emerging technology is relevant to the structure and operation of the present market for the licensing of performing rights, or the public benefit balance in relation to APRA's scheme.

Creative commons licensing

CCI notes that Australian musicians have a strong incentive to join APRA in order to facilitate the collection of royalties in respect of the use of their works, while at the same time APRA generally offers users blanket licences covering its entire repertoire.

CCI states that after becoming a member of APRA a musician no longer owns all of the rights in his or her current or future works, which precludes them from being able to share any current and future works under a creative commons licence. CCI notes APRA's opt out and licence back provisions but submits that they do not provide a realistic mechanism for musicians who wish to release some of their works under a creative commons licence. CCI states that a musician wishing to utilise a creative commons licence would have to forgo APRA membership and thereby all revenues that APRA would otherwise collect in respect of their works.

CCI submits that as a consequence, Australian musicians who elect to become APRA members can not enjoy any of the benefits of creative commons licensing and can not participate in the global network of creative commons licences and tools that facilitate global dissemination and enjoyment of their works. CCI contends that this places Australian musicians at a considerable disadvantage relative to their overseas counterparts.

Specifically, CCI contends that, for example, where a musician wishes to upload some of their music to their website, they are communicating it to the public, which APRA controls the rights to. Consequently, musicians can not upload music for their website for non-commercial reasons, such as sharing it with other internet users, without APRA's permission, which it contends it subject to APRA's inflexible licence back provisions. Further, CCI states that downstream users would not have the right to further communicate the song for non-commercial purposes without paying APRA a license fee.

In this respect, CCI submits that APRA's model is focused on collection of royalties for performance and communication to the public regardless of whether it is for commercial or non-commercial purposes. CCI argues that an exception to APRA's membership arrangements is needed to allow musicians the flexibility to license their material directly to users under creative commons non-commercial licenses via websites and other digital networks.

CCI submits that the modifications to APRA's input and output arrangements to facilitate use of creative commons licences by its members could include APRA acting as an agent for its members in its administration of their performing rights or modifying APRA's opt out and

licence back provisions to make them simpler for artists who wish to opt out for given works or wish to allow non-commercial use of their work.

APRA refutes the assertion that creative commons licensing is a significant development stating that the figures cited by CCI regarding the use of creative commons licences relate to various forms of copyright material other than music, including text and digital images and give no indication of the level of music licensing. APRA states that no more than 10 of its members have made enquires to it regarding creative commons and that no member has been granted, or refused, a licence back or opt out for the purpose entering into a creative commons licence.

APRA submits that the creative commons model seeks to implement a system that is completely different to the APRA model in that it provides free access to music on terms whereas APRA ensures that copyright owners are paid for commercial use of their music. APRA states that creative commons is part of the open source software movement and as such is not a means of self administration of existing works.

APRA further states that if creative commons licences are for non-commercial use then the vast majority will not require performing rights licences as the concept of performance in public excludes for all practical purposes performance in a domestic context. Accordingly, APRA submits that by simply excluding the APRA rights from the licence, creative commons agreements could easily sit with APRA membership.

APRA also states that one of the principal difficulties it has with the creative commons model is the uncertainty of the term 'commercial' which is not defined by the Copyright Act. APRA submits that many users of the creative commons system may be confused by the term, and that these licences may therefore be the subject of litigation in the future when copyright owners and users disagree over the extent of the licence.

APRA notes CCI's submission which states that 'the Creative Commons licensing model requires the musician or their authorised representative to retain all rights to their work, in order to effectively licence and exploit those works.' APRA contends that this necessarily entails the opt out of the work from the APRA repertoire which would create holes in the repertoire and undermine the efficient operation of APRA as a collection society.

With respect to CCI's assertion that the inflexibility of its opt out and licence back provisions mean that members who want to put some of their works on the internet were unable to do so, APRA states that a composer who wishes to licence a creative commons work in a manner which might involve 'performance in public' can avail themselves of APRA's licence back regime. Further, APRA submits that if a member is merely seeking to put some of their music on their web site, they would not be sub-licensing use of the work to any other party and therefore would only need to inform APRA that the work was being placed on their website. Specifically, to the extent that the licensed 'non-commercial' use does not involve 'performance in public' there is no need for any licence from APRA to use the work.

CCI states that APRA's constitution seems to require that other, more onerous, conditions be met before a member is able to place their work on their own web site.

APRA states that it is putting forward a streamlined proposal to remove perceptions that having to provide details of who would be using works is a barrier to members placing works on their websites. APRA contends that it will be made clear that all members need to do is notify APRA in advance of their intention to place a work on their website.

In response, CCI submits that it wishes to enable its licensing to complement APRA's licensing arrangements, thereby enabling Australian musicians to use creative commons to authorise certain uses of some or all of their works, whilst still having the option to receive royalties from APRA in relation to those same or different works. CCI states that approximately two-thirds of creative commons license adopters choose a licence that contains a non-commercial licence option suggesting that most licensors wish to reserve the right to collect royalties through other means, including collective rights management agencies such as APRA.

CCI notes that it is currently working with US collection societies so that existing commons deeds for non-commercial licensed works can contain a statement inviting the user to make use of the work beyond that permitted by the creative commons license to activate a link to a site which could facilitate a commercial rights license.

Monopoly conduct by APRA

Negotiation of licences and licence terms

Cinema Operators reiterate their earlier submissions that APRA's blanket licensing arrangements should incorporate provision for discounts where end users source some of their rights directly in order to remove financial impediments to direct dealing. Cinema Operators also support the concept of transactional licences as an alternative to existing blanket licences.

Cinema Operators argue that they are forced to deal with APRA, which they contend is able to demand licences fees set with regard to its position as the monopoly supplier of performing rights licences. Cinema Operators cite by way of example, APRA's recent proposal to increase licence fees paid by Cinema Operators by 257%. Cinema Operators state that APRA's proposed licence fee represent approximately one percent of box office revenue.

Cinema Operators note that 80% of Cinema Operators annual box office revenue is generated by 25 films, but that APRA's arrangements provided disincentives to negotiate performing rights licences directly in respect of the music contained in those films. Cinema Operators argue that APRA adopts a one size fits all approach to negotiations whereas users like Cinema Operators do not require a blanket licence covering APRA's entire repertoire.

Cinema Operators state that if they were able to negotiate with composers directly they could still require a licence from APRA in respect of those works where rights were not negotiated directly, but that this licence could, assuming it was in the form of the traditional blanket licence offered by APRA, provide for a discount on the licence fee paid equivalent to the percentage of box officer revenue generated by films where performing rights licenses had been negotiated directly. However, Cinema Operators contend that without provision for such discounts, there is currently no incentive for Cinema Operators to source rights other than through APRA.

Therefore, Cinema Operator submit that any authorisation granted to APRA should be conditional on APRA being required to:

- offer blanket licenses which provide for a proportional discount where a user secures rights directly from a rights holder; and

- offer transactional licenses as an alternative to, and in addition to, blanket licenses.

Free TV contends that APRA's current output arrangements generate significant anti-competitive detriment and that, in particular, its propensity to only grant blanket licences, along with its restrictive opt out and licence back provisions, are fundamental impediments to direct dealing between composers and music users. Free TV argues that APRA's restrictive input and output arrangements allow it to exercise maximum leverage in negotiations with music users, that the efficiency of the prices offered by it are unable to be tested and that music users are forced to pay monopoly prices to APRA. Free TV also argues that so long as these arrangements remain in place, APRA had no incentive to develop alternative, perhaps more efficient, means of licensing.

Free TV considers that these aspects of APRA's collective administration are anti-competitive and, as it submits has been demonstrated by overseas experience, can be modified so as to remove or lessen the potential for detriment without impairing essential components of APRA's operations.

Free TV submits that it is appropriate for the ACCC to only grant APRA authorisation if such authorisation is conditional on APRA granting modified blanket licences or per-program licences to end users which take account of licensing of works by the end user direct from the copyright owner or from third parties.

Free TV states that modified blanket broadcast licences which take account of direct dealing are offered to commercial television licensees by the Society of Composers, Authors and Music Publishers of Canada (SOCAN). Free TV submits that these modified blanket licences permit broadcasters and other licensees to reduce the amount of royalties they pay to SOCAN when they use non-SOCAN music, either because the music is not in SOCAN's repertoire or because the rights have otherwise been cleared. Free TV notes that SOCAN was first required to introduce such modified blanket licences by decision of the Copyright Board in 1997 and that having had the benefit of experience of the introduction and implementation of such modified blanket licences, the modified blanket licence structure was recently maintained by the Board in its 1998-2004 tariff decision (released 19 March 2004).

Free TV also notes that pursuant to Consent Decrees with the United States Government, per-program commercial television licences are offered by ASCAP and Broadcast Music Inc. in the United States of America as an alternative to blanket licences. Free TV contends that such per-program licences are currently utilised by a large number of local television stations in preference to blanket licences. Free TV states that these per-program licence take account of actual use of the collecting society's repertoire in the licensee's television programming, thereby allowing for direct licensing (i.e. from a composer or music publisher) and source licensing (i.e. from a program's producer or distributor) by the licensee. Free TV contends that following completion of a lengthy investigation by the Department of Justice the ASCAP Consent Decree was modified in 2001 and the per-program licence provisions were retained and strengthened.

Free TV submits that the experience in Canada and the United States indicates that the use of licensing models that take account of direct or third party dealing are efficacious and practical to implement. Free TV considers that both the Canadian modified blanket licence and the United States per-program licences offered by the respective collecting societies in those countries, provide an important limitation on the market power that would otherwise be enjoyed by those collecting societies by enabling and creating an incentive for direct and third party licensing transactions in competition with the offering of the collecting society.

Free TV notes APRA's submission prior to the draft determination that it has always been (and remains) willing to consider other licence proposals and has never indicated that it is not prepared to consider licensing on terms other than blanket licences. However, Free TV considers that this statement is self serving as to its knowledge, APRA first volunteered this information in the context of its current authorisation application, and has never in the past indicated any willingness to consider alternative licensing models to the unmodified blanket licence.

APRA submits that it takes very seriously the ACCC's encouragement in its draft determination of the generation of alternatives to blanket licenses and proposes to actively explore possible arrangements with interested user groups. APRA further submits that it proposes to modify its present application before the Copyright Tribunal in relation to the licence fee for cinematic exhibition, for the purpose of seeking a determination as to the reasonable terms for a modified blanket licence scheme.

Cinema Operators argue that APRA's stated willingness to consider alternative licensing arrangements is no constraint on its ability to exploit its monopoly power and that consequently conditions of authorisation are necessary to provide a real alternative to users and promote competition.

APRA subsequently advised that it had reached agreement with Cinema Operators as to a new rate under the license scheme, that it has terminated its licenses with the cinema industry effective 30 June 2006 and is currently negotiating the remaining terms (other than the rate) of the license scheme. APRA stated that it had discussed with Cinema Operators alternatives to a blanket license on a confidential and without prejudice basis but that the license scheme agreed is a blanket license. Having reached agreement with Cinema Operators, APRA advised that it intends to withdraw its reference to the Copyright Tribunal in relation to the license fee for cinematic exhibition.

APRA further states that should any cinema operator wish to be licensed on terms that take into account any license back or opt out arrangements in respect of particular musical works, APRA will formulate such a scheme and negotiate its terms, and will submit the scheme to the Copyright Tribunal if agreement cannot be reached.

With respect to Free TV's submission that APRA's output arrangements do not provide any incentive for direct dealing, APRA states that it proposed an alternative licensing scheme in 2001 which reflected use of works but that the television networks decided not to explore this option and instead negotiated a lump sum blanket licence fee. APRA argues that this is the reason that composers have not sought to avail themselves of APRA's licence back provisions to deal directly with television networks to date.

APRA also notes that its licensing arrangements with commercial radio stations require payment of a different percentage of revenue dependant on actual use of the music in its repertoire. APRA contends that, more generally it from time to time has granted licenses on terms which are adjusted to reflect the fact that not all music performed on particular occasions is control by APRA, that it has never refused to enter into negotiations with any party in relation to the introduction of a modified blanket licence, but that Free TV has never approached it for the provision of a modified licence.

APRA states that when other users have approached it in the past seeking other than blanket licences, it has considered these proposals on a case by case basis. APRA cites its arrangements

with commercial radio stations and concert promoters as two such examples. APRA contends that these examples reflected APRA's willingness to respond to requests from users for alternative forms of licenses.

More generally, APRA acknowledges that its current licensing arrangements with Free TV do not provide incentives for direct dealing. However, APRA states that its existing agreement with Free TV expires in 2006, that as noted, APRA accepts the concerns raised by the ACCC in its draft determination regarding the need for it to offer users alternatives to the existing standard blanket licence, that APRA is exploring potential alternative schemes and that it will be offering commercial television broadcasters both a blanket license and a license scheme under which license fees are related to use of music by taking account of any license back or opt out arrangements in respect of particular musical works.

APRA notes the more general concerns expressed by the Cinema Operators regarding the level of licence fees but argues that licensing arrangements between APRA and the Cinema Operators are a matter for negotiation between the parties, or, failing that, consideration by the Copyright Tribunal.

More generally, APRA notes that the licence rate proposed by it in its reference to the Copyright tribunal was comparable with overseas rates. Specifically, APRA states that rates throughout Europe are approximately 1% of gross box office revenue whereas the rate it proposed in its reference to the Copyright Tribunal was 0.85% of box office revenue.

APRA states that it appears that the Cinema Operators were suggesting that APRA was attempting to impose a significant increase in licence fees on them. APRA states that all it did was refer a proposed license scheme to the Copyright Tribunal for a decision on what is a fair and equitable licence scheme.

APRA contends that issues regarding the equity and fairness of specific licensing schemes are matters for the Copyright Tribunal and that both the ACCC, in its draft determination, and the Competition Tribunal in its consideration of APRA's arrangements, have supported this view.

APRA states that while it is exploring alternative licensing schemes, it does not favour a condition of authorisation requiring it to develop such schemes. APRA argues that the ACCC should not become the default regulator of licence schemes between APRA and music users as any alternative schemes developed should be case specific having regard to the fairness and operability of the scheme in the specific circumstances. APRA states that for the ACCC to impose such a condition would constitute an inappropriate usurpation of the jurisdiction of the Copyright Tribunal.

APRA submits that apart from considerations of the appropriate division of jurisdiction between the Copyright Tribunal and the ACCC, modifications to the existing licence scheme can not considered in the abstract as the imposition of modifications necessarily entails the prescription of price, and other terms relevant to the licence. APRA submits that it would not be appropriate for the ACCC to make authorisation subject to a general condition to the general effect that APRA make available 'reasonable alternatives to the blanket licence.'

Cinema Operators note that APRA has indicated that it accepts the view put by the ACCC in its draft determination that alternatives to its standard blanket licensing arrangements should be developed to suit particular users needs. However, Cinema Operators state that it was only through being exposed to the authorisation process that APRA was considering alternative

licensing schemes. Cinema Operators contend that it is critical that a condition requiring the development of alternative licensing schemes be incorporated into any authorisation granted. Cinema Operators argue that if this is not the case, APRA will continue with its existing arrangements and these issues will not be raised again until re-authorisation of these arrangements was sought.

Free TV similarly states that it is pleased that APRA had indicated that it proposes to develop alternatives to its tradition blanket licences but that, rather than leaving it to APRA to develop such alternatives, a condition of authorisation should be imposed requiring it to do so.

Free TV submits that if it were left to APRA to determine the circumstances in which alternatives to blanket licenses might be appropriate, and the suitable form of such alternatives, there would be no certainty for users that any appropriate licensing model would be proposed, or that any real constraint on APRA's monopoly power would eventuate.

Free TV submits that, in the context of the commercial television broadcasting industry, authorisation of APRA's output arrangements should be granted subject to condition that APRA offer broadcaster on request, as an alternative to a blanket license, a license authorising the broadcaster to exercise the communication right in respect of the APRA repertoire, the fee for which is reduced taking into consideration the extent to which the broadcaster exercises the communication right:

- in respect of works for which such communication right has been assigned by APRA to, or reserved by, a member of APRA; and/or

- in respect of works from the APRA repertoire for which the broadcaster has otherwise acquired a license to exercise such communication right.

APRA submits that this condition is unworkable as if implemented it would either be applied:

- Strictly in accordance with its terms, in which case it could be satisfied by a token offer of a scheme with a reduced fee (irrespective of any consideration of whether the scheme provides a reasonable alternative); or

- Subject to implied proviso that the alternative scheme must provide a reasonable alternative to the APRA blanket license which would be so uncertain as to mean that APRA would not know whether it was acting within the terms of the authorisation.

APRA reiterates that it considers that the appropriate forum for a discussion of license schemes is the Copyright Tribunal.

The Copyright Tribunal

Free TV contends that the scope of the considerations that the Copyright Tribunal may or will currently take into account in making a determination in respect of a licence scheme is unsettled and subject to dispute. In particular, Free TV submits that the role competition issues can or will play in any determination by the Copyright Tribunal is uncertain and that it is conceivable that what the Copyright Tribunal may consider 'reasonable' in any particular case may involve little weight being given to competition issues.

Consequently, Free TV submits that the ACCC should not, in reaching its determination, place significant weight upon the role the Copyright Tribunal might play in constraining APRA's monopoly power and reducing the anti-competitive detriment of APRA's arrangements.

With respect to concerns that the Copyright Tribunal does not have adequate regard to economic principles in determining licence schemes, APRA argues that the most recent decision of the Copyright Tribunal in respect of the licence scheme applicable to Screenrights showed that the overwhelming majority of evidence presented before the Copyright Tribunal is economic in nature.

APRA submits that the reason the Copyright Tribunal was established in the first instance was to curtail APRA's exercise of its monopoly power and that it was surprising to hear concerns expressed that it did not adequately consider economic issues, as this was the specific reason that it was established.

APRA states that matters before the Copyright Tribunal are heard by a presiding member, being a member drawn from a panel of Federal Court judges, and two lay members drawn from a panel of lay members including economic experts. APRA argues that the Copyright Tribunal is able to have adequate regard to all matters put before it or which it raises itself.

APRA submits that it is clearly within the Copyright Tribunal's jurisdiction to take account of competition principles and that questions of economic efficiency would inevitable be highly material to any final determination. In addition, APRA submits that the Copyright Tribunal has jurisdiction to taker account of matters above and beyond questions of economic efficiency.

Free TV states that it does not disagree with the ACCC's statement in its draft determination that it is not for the ACCC to determine the reasonableness of licence fees, or other licence terms and conditions, for public performance of APRA's repertoire in each instance. However Free TV submits that it is appropriate for the ACCC to impose suitable conditions of general application upon the form of licences granted by APRA to end users. In this respect, Free TV argues that unless a general framework to facilitate direct dealing is required by the ACCC as a condition of authorisation, it can not be guaranteed that the Copyright Tribunal will be able to adequately take account of competition issues in assessing specific license schemes.

Cinema Operators state that given that APRA's input and output arrangements raise concerns under the *Trade Practices Act* 1974 (TPA) the authorisation process is the relevant forum within which to address those arrangements. Cinema Operators argue that while the Copyright Tribunal is able to address the issue of the appropriate licence fee in particular circumstances, the structure of the arrangements which allow APRA to conduct business is a matter for the ACCC to consider through the authorisation process.

Competition absent APRA's arrangements

In relation to the ACCC's conclusion as to the uncertainty that would prevail if APRA's ability to collectively administer performing rights on behalf of all its members was removed, Cinema Operators state that the ACCC's contention in its draft determination appears to be that this would result in a number of small collection societies competing with each other. Cinema Operators submit that there are other realistic alternatives to this scenario to which regard should be given.