



Australian
Competition &
Consumer
Commission

Draft Determination

**Application for revocation and substitution
of authorisations A30082, A30083, A30084,
A30085, A30086 and A30087**

**lodged by the Phonographic Performance Company
of Australia Ltd**

**in respect of
collective licensing arrangements**

Date: 18 July 2007

**Authorisation nos.: A91041 and
A91042**

Public Register no.: C2007/800

Commissioners: Samuel
Sylvan
King
Martin
Smith
Willett

Summary

The ACCC proposes to grant authorisation to the Phonographic Performance Company of Australia Limited for its collective licensing arrangements, subject to conditions, for a period of 5 years.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

The applications for authorisation

On 28 August 1985 the Trade Practices Commission granted authorisation to PPCA and 6 record companies¹ for collective licensing arrangements for the public performance and broadcasting of sound recordings.

Authorisation was previously granted without a time limit. On 10 July 2006 the ACCC formed the preliminary view that there has been a material change of circumstances since authorisation was granted to PPCA in 1985 and accordingly expressed an interest in reviewing the authorisation. PPCA subsequently lodged the current applications for revocation and substitution on 3 April 2007.

PPCA is seeking a substitute authorisation for its collective licensing arrangements which specifically include input licences, output licences, licence out arrangements and distribution arrangements for public performance and transmission rights in sound recordings and music videos.

Background

Copyright collecting societies act on behalf of certain copyright owners to facilitate the administration of copyright licences. Such organisations grant licences to use copyright material, collect royalties from users of copyright material and distribute revenue to owners of copyright.

PPCA is a copyright collecting society who represents the interests of record companies and Australian recording artists. Under PPCA's collective licensing arrangements, owners of sound recordings grant PPCA a non-exclusive right to license the public performance and transmission rights of their sound recordings. The four major record companies in Australia - Sony BMG, EMI, Universal and Warner are licensors under PPCA's arrangements. As a result, the majority of sound recordings commercially released in Australia are covered by PPCA's licences.

¹ EMI Records (Australia) Ltd (A30082), Festival Records Pty Ltd (A30030), CBS Records Australia Ltd (A30084), WEA Records Pty Ltd (A30085), Polygram Records Pty Ltd (A30086) and RCA Ltd (A30087).

Public benefit

The ACCC is satisfied that PPCA's collective licensing arrangements are likely to result in a public benefit from:

- cost savings in the form of administrative, monitoring and negotiations costs, generated from the collective licensing of public performance and transmission rights of sound recordings and music videos
- the collective blanket licence which facilitates compliance with copyright law and provides certainty to users regarding the repertoire they may publicly play or transmit
- collective administration of funds for the PPCA Performers' Trust Foundation and the use of that fund
- meeting consumer demand for a joint product and
- savings from transitioning to the counterfactual of exclusively direct negotiations.

Public detriment

The ACCC considers that PPCA's collective licensing arrangements create scope for PPCA to exercise its market power in the setting of licence fees and terms and conditions which creates a public detriment. However, the ACCC notes that there are some factors which impact on PPCA's ability to exercise its market power including:

- the non-exclusive nature of the arrangements
- the role of the Copyright Tribunal, and the ACCC's new role to become a party to proceedings at the Copyright Tribunal
- the ability of the Copyright Tribunal to direct that a form of alternate dispute resolution process take place between PPCA and a licensee
- the flexibility and availability of PPCA's collective licensing arrangements and
- the statutory cap for the licence fee which broadcasters are required to pay for a licence.

Despite these features PPCA is still in a significant bargaining position in terms of licensing, particularly with regard to smaller copyright users. This is particularly a result of the complexity and costs involved in obtaining licences directly from copyright owners when compared to the costs of obtaining a blanket licence from PPCA.

Balance of public benefit and detriment

Overall, the ACCC is satisfied that the public benefits arising from PPCA's collective licensing arrangements will outweigh the public detriments, subject to the following conditions:

- PPCA amends its Complaints Handling and Dispute Resolution Policy to provide licensees or potential licensees with access to alternative dispute resolution processes, including mediation, neutral evaluation and conciliation. PPCA should

amend its Complaints Handling and Dispute Resolution Policy within 6 months of the date of the final determination.

- PPCA amends any related document (for example, licence agreements, information available on PPCA's website) to reflect that alternative dispute resolution processes, including mediation, neutral evaluation and conciliation, are available to licensees or potential licensees. PPCA should amend any related documents within 6 months of the date of the final determination.
- Each PPCA licensor develop and publish on their respective websites the circumstances in which they would consider entering into direct licences with the users of public performance and transmission rights of sound recordings including the process users should follow to seek such licences. This advice should be published within 6 months of the date of the final determination.
- PPCA gives written notice to licensees of proposed fee increases or other material changes to its public performance output licences. Such written notice must:
 - be provided three months prior to such changes being made and
 - provide an opportunity for discussion between PPCA and the licensees concerning the proposed change.
- PPCA is to publish and maintain an updated list of those sound recordings in its repertoire which are protected under Australian copyright law and therefore covered by the PPCA blanket licence. PPCA is to publish a list within 6 months of the Commission's final determination on its website.

The ACCC seeks comments on the precise terms of these conditions.

Length of authorisation

The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

In this instance, the ACCC proposes to grant authorisation for a period of 5 years.

The next steps

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

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List of abbreviations

ABC	Australian Broadcasting Corporation
ACCC	Australian Competition and Consumer Commission
Act	<i>Trade Practices Act 1974 (Cth)</i>
AHA	Australian Hotels Association
APRA	Australasian Performing Right Association Limited
CLRC	Copyright Law Review Council
Code	Code of Conduct for Copyright Collecting Societies
Commercial Licensing Arrangement	Means PPCA's Input Licences, Output Licences, Licence Out Arrangements and Distribution Arrangements.
<i>Copyright Act</i>	<i>Copyright Act 1986 (Cth)</i>
Copyright Tribunal	Copyright Tribunal of Australia
CRA	Commercial Radio Australia Ltd
Distribution Arrangements	A proposed agreement, arrangement or understanding entered into by PPCA with a licensor pursuant to an Input Licence for the distribution of revenue received by PPCA pursuant to an Output Licence or a Licence Out Arrangement.
Distribution Policy	The policy on allocation and distribution of licensing fee revenue published by PPCA on its website and incorporated in Input Licences by reference.
EMI	EMI Music (Australia) Pty Ltd
Fitness Australia	Fitness Australia Inc
FreeTV	FreeTV Australia Limited
Input Licence	An agreement, arrangement or understanding entered into by PPCA with a licensor of a Public Performance Right or a Transmission Right authorising PPCA to sub-license those rights.
Licence Out Arrangement	An agreement, arrangement or understanding entered into by PPCA with a licensor for the sub-licensing overseas of a Public Performance Right or a Transmission Right.
Output Licence	An agreement, arrangement or understanding entered into by PPCA with a sub-licensee for the sub-licensing of a Public Performance Right or a Transmission right pursuant to an

	Input Licence.
PPCA	Phonographic Performance Company of Australia Ltd
Public Performance Right	The right to play sound recordings and music videos in public.
Related Right	A reproduction right or other right deemed by the PPCA to be necessary for or incidental to the exercise of a Transmission Right under a licence.
Rome Convention	Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961
SBS	SBS Corporation
Shock Records	Shock Records Pty Ltd
SONY BMG	SONY BMG Music Entertainment (Australia) Ltd
TPC	Trade Practices Commission
Transmission Right	The right to communicate to the public (including broadcast) in Australia sounds recordings and associated cinematographic films and any Related Right.
Universal	Universal Music Australia Pty Limited
Vital	Vital Entertainment Solutions Pty Ltd
Warner	Warner Music Australia Pty Limited

1. Introduction

Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act 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 Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.
- 1.3 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 public consultation process when it receives 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.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 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 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 benefit to the public or reduce the public detriment.
- 1.8 Under section 91C of the Act, 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. The ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (outlined in paragraphs 1.4 to 1.7).

The application for authorisation

- 1.9 On 3 April 2007 the Phonographic Performance Company of Australia Ltd (PPCA) lodged an application for revocation of authorisations A30082, A30083, A30084, A30085, A30086 and A30087 and their substitution with authorisations A91041 and A91042.

- 1.10 PPCA is seeking authorisation of its collective licensing arrangements specifically, input licences, output licences, licence out arrangements and distribution arrangements for public performance and transmission rights.
- 1.11 PPCA is seeking authorisation of the arrangements for a period of 10 years.

Chronology

- 1.12 Table 1.1 provides a chronology of significant dates in the consideration of the applications.

Table 1.1: Chronology of applications for authorisations (A91041 – A91042)

DATE	ACTION
3 April 2007	Applications for revocation and substitution lodged with the ACCC.
27 April 2007	Closing date for submissions from interested parties.
25 May 2007	Submission received from PPCA in response to interested party submissions.
18 July 2007	Draft determination issued.

2. The applications for authorisation

Previous Authorisation

- 2.1 On 28 August 1985 the Trade Practices Commission (TPC) (now the ACCC) granted authorisation to PPCA and 6 record companies² for collective licensing arrangements for the public performance and broadcasting of sound recordings.
- 2.2 The arrangements involved the use of standard terms and conditions whereby each record company agreed:
- to grant to PPCA a non-exclusive licence to cause the recordings of the company to be heard in public and to broadcast them and
 - for PPCA to have the right to license others to do so.
- 2.3 Authorisation was granted subject to the following conditions:
- PPCA gives notice of proposed fee increases or other material changes to the licences, three months prior to such alterations being made, and notice is to be given in writing to the relevant trade association(s) and
 - that such notice gives an opportunity for discussion between PPCA and the relevant association concerning any proposed alterations.
- 2.4 Authorisation was previously granted without a time limit. On 10 July 2006 the ACCC formed the preliminary view that there has been a material change of circumstances since authorisation was granted to PPCA in 1985, and accordingly, that it was interested in reviewing the authorisations. PPCA subsequently lodged the current applications for a revocation and substitution on 3 April 2007.

PPCA's current applications for revocation and substitution

- 2.5 PPCA is seeking authorisation of its collective licensing arrangements, specifically input licences, output licences, licence out arrangements and distribution arrangements for public performance and transmission rights.
- 2.6 The collective licensing arrangements potentially raise concerns under the anti-competitive conduct provisions of the Act.³ Consequently, PPCA has lodged the application seeking revocation of authorisations A30082, A30083, A30084, A30085, A30086 and A30087 and their substitution with authorisations A91041 and A91042 with the ACCC.
- 2.7 PPCA's application is made on behalf of itself and on behalf of parties who have entered into, or who enter into, an input licence with PPCA. Under section 88(6) of the

² EMI Records (Australia) Ltd (A30082), Festival Records Pty Ltd (A30030), CBS Records Australia Ltd (A30084), WEA Records Pty Ltd (A30085), Polygram Records Pty Ltd (A30086) and RCA Ltd (A30087).

³ PPCA does not believe its existing or future licensing arrangements breach the Act and has lodged the current applications out of abundant caution, PPCA supporting submission to the ACCC dated 2 April 2007, pp. 8-9.

Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the arrangements.

- 2.8 In addition, PPCA is seeking the authorisation to extend to contracts, arrangements or understandings in similar terms to the conduct proposed to be authorised.

Input licences

- 2.9 PPCA defines an input licence as a proposed agreement, arrangement or understanding entered into by PPCA with a licensor (copyright owner) of a public performance right or a transmission right.

- 2.10 Under an input licence the licensor grants to PPCA a non-exclusive licence to:

- grant licences to potential licensees to cause to be heard in public in Australia, sound recordings and associated cinematographic films (ie music videos) or
- grant licences to potential licensees to communicate (including broadcast,⁴ simulcast via the internet,⁵ webcast,⁶ datacast⁷ and music on hold services⁸) in Australia, sound recordings and associated cinematographic films (including reproduction and other rights necessary to facilitate such communication).

- 2.11 The input licences granted by licensors to PPCA provide that:

- PPCA is obliged to grant a licence of the relevant rights to a person who agrees to abide by the terms and conditions of PPCA's standard licence agreement for sub-licensing those rights
- PPCA may charge a licence fee which is either agreed between PPCA and the licensee, or is determined by the Copyright Tribunal of Australia (Copyright Tribunal)
- PPCA is required to inform a licensee or prospective licensee of their rights to:

⁴ Broadcast is defined in section 10 of the *Copyright Act 1968* (Cth) (*Copyright Act*) as a means of communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* (Cth). A broadcasting service does not include: a service (including a teletext service) that provides only data or only text (with or without associated images); or a service that makes programs available on demand on a point-to-point basis, including a dial-up service.

⁵ That is to transmit a broadcast over the internet where the internet transmission and the broadcast occur simultaneously: PPCA supporting submission to the ACCC dated 2 April 2007, p. 13.

⁶ That is to transmit via the internet to multiple recipient sound recordings and music videos, provided the person receiving the transmission is unable to request particular sound recordings or videos, or make copies of sound recordings or music videos: PPCA supporting submission to the ACCC dated 2 April 2007, p. 13.

⁷ Datacasting service is defined in section 6 of the *Broadcasting Services Act 1992* (Cth) as a service that delivers such content in the form of: data; speech; music or other sounds; visual images (animated or otherwise); any other form; or any combination of forms, to persons having equipment appropriate for receiving such content, where the delivery of the services uses the broadcasting services band.

⁸ eg music played while customers are waiting on hold on the telephone.

- avail itself of a statutory licence to cause recordings to be heard in public under s108 of the *Copyright Act 1968* (Cth) (*Copyright Act*),⁹ or in the case of broadcasting to avail itself of a statutory licence to broadcast sound recordings and associated cinematographic films under s109 of the *Copyright Act*¹⁰
- refer the terms and conditions of a licence to the Board of Review (see paragraphs 2.16 to 2.18) and
- make an application to the Copyright Tribunal with respect to the determination of the licence fee.

2.12 PPCA may notify licensees, or prospective licensees, of their rights in writing when offering a licence, or by publication on PPCA's website.

Output licences

2.13 PPCA defines an output licence as a proposed agreement, arrangement or understanding entered into by PPCA with a licensee, for the sub-licensing of a public performance right or a transmission right pursuant to an input licence. An output licence has the following essential features:

- PPCA may charge a licence fee which is either agreed to between PPCA and the licensee, or is determined by the Copyright Tribunal
- PPCA shall inform a licensee or potential licensee of their rights to:
 - avail itself of a statutory licence to cause sound recordings to be heard in public under s108 of the *Copyright Act* or in the case of broadcasting to avail itself of a statutory licence to broadcast sound recordings and associated cinematographic films under s109 of the *Copyright Act*
 - refer the terms and conditions of a licence to the Board of Review (see paragraphs 2.16 to 2.18) and
 - make an application to the Copyright Tribunal with respect to the determination of a licence fee.

2.14 PPCA has a non-exclusive right to grant licences for the public performance and transmission rights of sound recordings and music videos.

⁹ Section 108 of the *Copyright Act* states that the copyright in a sound recording that has been published is not infringed by a person who causes the recording to be heard in public if (a) the person has paid the owner of the copyright an amount agreed with the owner, or has given an undertaking in writing to the owner to pay the owner an amount to be determined by the Copyright Tribunal, where an application is made by either party; and (b) in the case of a recording that was first published outside Australia - the recording has been published in Australia, or the prescribed period after the date of the first publication of the recording has expired.

¹⁰ Broadly, section 109 of the *Copyright Act* provides that the copyright in a published sound recording is not infringed by the making of a broadcast of that recording if the maker of the broadcast has given an undertaking in writing to the owner of the copyright in the sound recording to pay the owner an amount (if any) in accordance with an order of the Copyright Tribunal (where an order does not already exist), or where there is an order from the Copyright Tribunal in force requiring the maker of the broadcast to pay the owner of the copyright in the sound recording.

- 2.15 PPCA may notify licensees, or prospective licensees, of their rights in writing when offering a licence, or by publication on PPCA's website.

PPCA's Board of Review

- 2.16 Under all PPCA public performance licences, a licensee may refer the terms and conditions of a licence to a Board of Review if they believe that any of those terms and conditions are unreasonable.¹¹
- 2.17 The Board of Review comprises three members:
- a Chair appointed by the Australian Institute of Arbitrators
 - a member appointed by PPCA and
 - a member appointed by the trade association most closely associated with the licensee's business or industry.
- 2.18 The Board can vary any terms or conditions of the licence and the Board's decision is binding on both PPCA and the licensee.

Licence out arrangements

- 2.19 PPCA defines a licence out arrangement as a proposed agreement, arrangement or understanding entered into by PPCA with a licensor for the sub-licensing of public performance and transmission rights overseas. A licence out arrangement has the same essential features as an input licence.
- 2.20 PPCA has a reciprocal arrangement with the Phonographic Performance Ltd (PPL), the equivalent collecting society in the United Kingdom. Under this arrangement, PPCA licensors may elect to make their repertoire available to PPL, for the UK blanket licence offering.
- 2.21 PPCA offers the same opportunity to PPL members, who may elect to have their repertoire made available to PPCA for inclusion in the PPCA blanket licence. Where an Australian sound recording copyright owner elects to participate in this reciprocal scheme, they execute a separate input agreement with PPCA (known as an overseas mandate input licence). PPCA advised that only a small number of PPCA's licensors have entered into licence out arrangements.

Distribution arrangements

- 2.22 PPCA defines its distribution arrangements as a proposed agreement, arrangement or understanding entered into by PPCA with a licensor pursuant to an input licence for the distribution of revenue received by PPCA pursuant to an output licence or a licence out arrangement.

¹¹ The rights of licensees to a review by the Board of Review is published in the PPCA guide, Complaints Handling and Dispute Resolution Policy, see http://www.pcca.com.au/documents/ComplaintsandDisputesPolicy_000.pdf.

2.23 A distribution arrangement has the following essential features:

- PPCA will grant licences and collect licence fees under the authority granted by an input licence and
- PPCA will apply revenue from the collection of licence fees annually in accordance with (a) the terms and conditions of the input licence and (b) the Distribution Policy.

2.24 PPCA's Distribution Policy, in conjunction with the input licences, governs the allocation and distribution of licensing fee revenue. PPCA's Distribution Policy includes the following essential features:

- allocation rules and guidelines for the determination of revenue attributable to each licensor
- rules for the deduction of expenses and the contribution of a certain proportion of net revenue for charitable purposes, including contribution to the PPCA Performer's Trust Foundation¹²
- distribution rules for the distribution to licensors for the net amount of revenue payable to them
- a direct artist distribution scheme¹³
- obligations of licensors, registered artists and PPCA in relation to the application of the allocation and distribution rules prescribed and
- mechanisms for complaints and dispute resolution.

2.25 PPCA's Distribution Policy is published on PPCA's website.¹⁴ It outlines that the amount PPCA collects from these arrangements, less administration costs,¹⁵ is distributed to copyright owners, registered artists and the PPCA Performers' Trust Foundation at the end of each financial year (the distributable amount).¹⁶

¹² The Performers' Trust Foundation administers grants for the encouragement of the performing arts. The grants are provided on a one-off basis and are determined by the four trustees of the Trust. Two trustees (including the Chairman) are appointed by PPCA, one is appointed by the Musician's Union of Australia and one is appointed by the Media Entertainment and Arts Alliance. See http://www.pcca.com.au/ppca_trust.htm.

¹³ PPCA's Direct Artist Distribution Scheme provides an opportunity for principal Australian artists on protected sound recordings and music videos to direct payment from PPCA for the broadcast or public performance of those recordings and videos. Only artists registered with PPCA are entitled to payment.

¹⁴ http://www.pcca.com.au/documents/PPCADistributionPolicy_000.pdf.

¹⁵ PPCA deducts from licence fee revenue whatever amounts are necessary to pay the expense of the conduct, management, promotion and operation of PPCA. These include: salaries and associated costs; IFPI subscriptions; information technology systems and support; audit, accounting, recruitment, training, advertising and sundry office expenses; printing, stationary, postage and couriers; property related expenses; legal; purchase and processing of airplay logs; telephone and fax; travel and entertainment; bad debts and debt collection expenses; and motor vehicle costs. See PPCA website, Distribution Policy, <http://www.pcca.com.au/documents/PPCADistributionPolicy-June2007.pdf>.

¹⁶ PPCA, http://www.pcca.com.au/licensing_faq.htm#How_does_the_PPCA_distribute_the_money_it_collects_.

- 2.26 The distributable amount is divided into various distribution pools, based on the sources of the licence fee revenue and/or information available to PPCA as to how copyright protected sound recordings and music videos were used.
- 2.27 PPCA's allocation process is based on extensive air play logs for sound recordings. PPCA purchases these logs from the Australasian Performing Right Association Limited (APRA), who represents that the logs are almost a census of commercial and ABC radio broadcasting and are therefore an accurate measure for the use of sound recordings in such broadcasting.¹⁷
- 2.28 In the case of distributions relating to sound recordings used by commercial telecasters, the net income received from FreeTV Australia Limited (FreeTV), will be apportioned on the basis of radio airplay logs received from APRA.¹⁸
- 2.29 PPCA distributes the net receipts from Australian recordings equally between the featured Australian artist and the copyright licensors. PPCA also deducts 2.5% from the distributable surplus to allocate to the PPCA Performers' Trust Foundation.

¹⁷ PPCA Distribution Policy, see http://www.pcca.com.au/documents/PPCADistributionPolicy_000.pdf

¹⁸ *ibid.*

3. Background to the application¹⁹

Copyright

- 3.1 Copyright is the means by which society recognises and rewards creativity and innovation. It does so by providing creators with a bundle of statutory rights. The rights are exclusive rights, which enable creators to control and commercially exploit their creations and innovations.²⁰
- 3.2 The *Copyright Act* accords protection to original literary, dramatic and musical works, as well as published editions of such works.²¹ Protection also extends to films, sound recordings and television and sound broadcasts.²² It applies automatically without the need for registration and lasts for the period of time set out in the *Copyright Act*.
- 3.3 Copyright is infringed when a person who is not the copyright owner in Australia, and without the licence of the owner, does any act which the copyright owner has the exclusive right to do.²³
- 3.4 The precise nature of the acts comprised in the copyright differs according to the nature of the work or subject matter. In the case of literary, dramatic, artistic and musical works, the copyright may, depending upon the nature of the work, include the right to:
- reproduce the work
 - publish the work
 - perform the work in public
 - communicate the work in public
 - make an adaptation of the work
 - reproduce, publish, perform in public or communicate to the public an adaptation of an original work
 - make a copy of a published edition of the work and
 - enter into a commercial rental arrangement in respect of the work reproduced in a sound recording.²⁴
- 3.5 In the case of films, sound recordings and television and sound broadcasts, copyright may, depending upon the nature of the work, include the exclusive right to:
- make a copy of the subject-matter

¹⁹ The majority of the content in this section was sourced from PPCA's supporting submission to the ACCC dated 2 April 2007.

²⁰ PPCA's supporting submission to the ACCC dated 2 April 2007, p. 10.

²¹ *Copyright Act*, Parts III and IV.

²² *ibid.*, Part IV.

²³ *ibid.*, ss 36(1) and 101(1).

²⁴ *ibid.*, s 31 and 88.

- cause the subject-matter to be seen or heard in public
- communicate the subject-matter to the public and
- enter into a commercial rental arrangement in respect of the subject-matter.²⁵

3.6 There are at least two types of copyright in music:

- the copyright in the song, being the lyrics and composition (ie the ‘musical work’) and
- the copyright in the recorded version of the musical work (eg CDs, tapes, DVDs – including music videos).

3.7 Licences in relation to the musical work are primarily available from APRA and licences relating to the recorded version of the musical work may be available directly from individual copyright owners or as a collective licence from PPCA. Businesses that want to play protected music may be required to obtain a licence from APRA and PPCA or individual copyright owners.

Collective administration of copyright

3.8 Copyright collecting societies act on behalf of certain copyright owners to facilitate the administration of copyright licences. Such organisations grant licences to use copyright material, collect royalties from users of copyright material and distribute revenue to owners of copyright.

3.9 Collecting societies provide copyright users with relatively easy access to a large volume of copyright material. PPCA’s collective licensing arrangements offers access to a repertoire of its wide range of sound recordings through the provision of a blanket licence.

3.10 Blanket licences cover all the repertoire of the particular collective society. Collecting societies do not generally grant licences in respect of individual works and other subject matter.

3.11 In addition to PPCA, other Australian collecting societies relating to music include:

- Australasian Performing Right Association (APRA). APRA administers the rights of public performance and communication to the public of music and lyrics for composers, music publishers and other copyright owners. In particular, APRA provides licences for live and recorded music and lyrics to be performed publicly, and licences radio and TV stations, webcasters and organisations playing music on hold.²⁶
- Australian Mechanical Copyright Owners Society (AMCOS). AMCOS licences certain recordings of music and lyrics (such as cover versions of songs which have already been released), and photocopying of sheet music and recording of music by

²⁵ *Copyright Act*, s 85, 86 and 87.

²⁶ Australian Copyright Council, *Information Sheet: Copyright collecting societies*, February 2006.

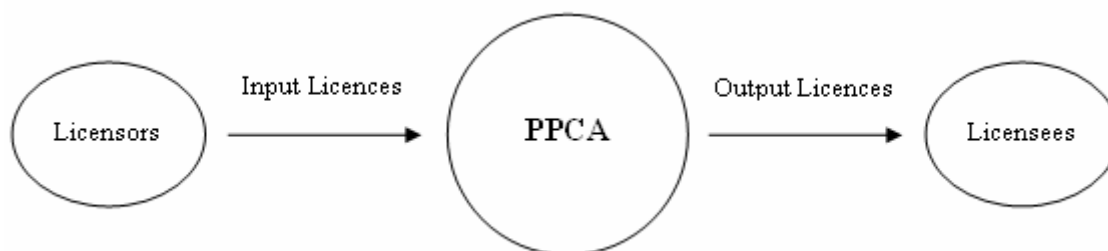
schools on behalf of music publishers. APRA manages the affairs of AMCOS and both organisations' staff and offices have been amalgamated.²⁷

- 3.12 The Australian Recording Industry Association (ARIA) is a national industry association which provides licences on behalf of ARIA members to individuals and organisations who wish to make legitimate reproductions of sound recordings for some specific limited purposes (such as commercial background music suppliers). ARIA's rights to grant licences are non-exclusive. ARIA and AMCOS also provide a joint agreement to cater for the reproduction of sound recordings for private home video use (such as videos of weddings and home videos).²⁸
- 3.13 Comparable collective licensing agencies exist in most countries. Australia is also a party to a number of international copyright treaties and conventions which establish the principle of 'national treatment'. Under this principle, each member country will give nationals of all other countries the same rights that it gives to its own nationals under domestic law.²⁹ It is relevant to note that while the United Kingdom, Ireland, Canada, Germany, Italy and many other European and Asian countries are member countries, the United States is not. The implications of this are discussed at paragraphs 6.90 to 6.100.

The Applicant

- 3.14 PPCA was incorporated in NSW in 1969. It is a national, non-profit company representing the interests of record labels and Australian recording artists. PPCA is a copyright collecting society with two main purposes:
- to provide a central licensing body so persons wishing to use sound recordings for broadcast or public performance purposes can obtain a single comprehensive 'blanket' licence covering repertoire from multiple record companies and recording artists and
 - to provide a similar service for those who own or control copyright.

Figure 3.1 PPCA's collective licensing arrangements in Australia



- 3.15 PPCA currently has four shareholders: SONY BMG Music Entertainment (Australia) Ltd (SONY BMG); EMI Music (Australia) Pty Ltd (EMI); Universal Music Australia Pty Limited (Universal); and Warner Music Australia Pty Limited (Warner). The four

²⁷ Australian Copyright Council, *Information Sheet: Copyright collecting societies*, February 2006.

²⁸ ARIA website, Licensing, see <http://www.aria.com.au/pages/licensing.htm>.

²⁹ PPCA supporting submission to the ACCC dated 2 April 2007, p. 12.

shareholding companies collectively control between 80% and 90% of the sound recordings commercially released in Australia.³⁰ As a result, the majority of recordings commercially released in Australia are covered by PPCA's blanket licences.

3.16 PPCA has an eight member Board which is comprised of:

- a representative from each of the shareholder licensors
- two elected representatives from the artist community
- a representative from the artist management sector and
- a representative elected by the non-shareholder licensors.

3.17 The day to day management of PPCA is delegated to the CEO who is appointed by the Board.

3.18 The artist representatives are drawn from PPCA's register of artists. An election is held annually to fill these positions, which have a two year fixed term and which are appointed in a staggered manner. The licensor representative has a term of one year and is similarly appointed by election.

Licensors

3.19 PPCA currently has approximately 638 licensors under its arrangements,³¹ including individual recording artists and record companies. In addition to the four major record companies – SONY BMG, EMI, Universal and Warner, there are many other smaller labels, including Vital Entertainment Solutions Pty Ltd (Vital), Shock Records Pty Ltd (Shock Records), Liberation Music, Gold Label Records Ltd and Melody Records that are PPCA licensors.³²

Licensees

3.20 Commercial users who play protected sound recordings or music videos in public as part of their business require a licence from the owner/s of copyright.

Public performance licences

3.21 PPCA has approximately 43 600 public performance licences.³³ PPCA notes that organisations which typically hold an output licence for public performance rights include cinemas, restaurants, nightclubs, fitness centres, cafes, shopping centres, bars and dance parties. A growing number of business operators play recorded music to create an atmosphere which suits their type of business.

³⁰ Phonographic Performance Company of Australia Limited under section 154(1) of the *Copyright Act 1968* (Cth) [2007] ACopyT1, para 64.

³¹ PPCA supporting submission to the ACCC dated 2 April 2007, p. 33.

³² PPCA website, Current Licensors, see http://www.ppc.com.au/licensors_labels.htm; PPCA's supporting submission to the ACCC dated 2 April 2007, p. 9.

³³ PPCA supporting submission to the ACCC dated 2 April 2007, p. 33.

- 3.22 Licensees are required to pay a tariff for the right to publicly play a sound recording or music video. PPCA currently has 28 tariff categories which differ according to the use of the sound recordings and music videos as determined by PPCA by different businesses. Some of the major tariff categories include Tariff M Commercial or Professional Premises, Tariff R Restaurants/Cafes, Tariff HM Music on Hold and Tariff V Fitness Centres, Gymnasiums, Health Clubs and similar establishments.
- 3.23 PPCA advise that in most cases the tariff directly relates to the extent to which sound recordings are played by the licensee and the size (or potential size) of the audience. For music videos the tariff relates directly to the number of areas, and the number and size of the screens where the music videos are shown together with the size (or potential size) of the audience.³⁴
- 3.24 PPCA notes that it allows proportional refunds in certain circumstances³⁵ and at any stage throughout the annual licence period PPCA may reassess and amend the annual fee to take account of changes in the level of usage.

Transmission rights

- 3.25 Broadcasters, such as commercial and community radio broadcasters, and commercial and pay television providers, will also require an output licence for transmission rights.
- 3.26 There is no standard licence or tariff for licensees who wish to broadcast or transmit a sound recordings. Licences for broadcast rights are typically negotiated directly between PPCA and the licensee or between PPCA and a relevant industry association. For example, PPCA negotiates licences with industry representative bodies, including FreeTV³⁶ and Commercial Radio Australia Ltd (CRA).³⁷ PPCA also has individual broadcast and transmission agreements with the Australian Broadcasting Corporation (ABC), SBS Corporation (SBS), Foxtel, Optus, Austar and Sky Channel.
- 3.27 The *Copyright Act* currently provides a statutory cap on the licence fee that a radio broadcaster is required to pay. In the event that PPCA and radio broadcasters are unable to reach agreement on the licence fee, section 152(8) of the *Copyright Act* provides that the Copyright Tribunal is unable to require a radio broadcaster to pay more than 1% of broadcasters' gross income as a licence fee. The ACCC understands that the Commonwealth Government has agreed to remove this legislative cap.³⁸

³⁴ PPCA website, http://www.ppc.com.au/licensing_faq.htm#How_are_business_licence_fees_determined_.

³⁵ PPCA's refund policy provides for four circumstances in which a potential refund will be considered. These are: if the venue stops playing music; if the business closes; if the business is sold; or if a reassessment reduces the annual fee to an amount less than that already paid. See

http://www.ppc.com.au/licensing_faq.htm#does_ppca_have_a_refund_policy.

³⁶ FreeTV represents the interests of commercial free-to-air television.

³⁷ Commercial Radio Australia Pty Ltd represents the interests of commercial radio broadcasters.

³⁸ Attorney-General's Department media release 14 May 2006, see

http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balance_-_082006.

The Copyright Tribunal of Australia

- 3.28 The Copyright Tribunal is a specialist administrative Tribunal, established under Part VI of the *Copyright Act*. Its membership, functions, powers and procedures are set out in the *Copyright Act* and the *Copyright Tribunal (Procedure) Regulations 1969*.
- 3.29 The Copyright Tribunal consists of a president (who must be a judge of the Federal Court of Australia), any number of deputy presidents (who must be, or have been, judges of a Federal Court or a state or territory Supreme Court), and other members who have appropriate qualifications.
- 3.30 One of the key rationales for establishing the Copyright Tribunal was to counterbalance the perceived monopoly or potential monopoly positions of collecting societies and to provide an arena for disputes relating to the collective administration of copyright.
- 3.31 Proposed and existing licensing schemes can be referred to the Copyright Tribunal. A licensor who proposes to bring a licence scheme into operation may refer the scheme to the Tribunal.³⁹ A party to a dispute which has arisen under an existing scheme may also refer that scheme to the Tribunal.⁴⁰ A licensee or potential licensee is able to apply to the Copyright Tribunal to seek a determination as to whether the terms of the licence are reasonable.⁴¹
- 3.32 The *Copyright Amendment Act 2006* (Cth) has expanded the range of licences that may be subject to an application to the Copyright Tribunal. The Tribunal now has jurisdiction in relation to all licences administered by a collecting society. The Copyright Tribunal also has discretion to allow the ACCC to become a party to Tribunal proceedings if the ACCC applies and the Tribunal is satisfied that it would be appropriate to do so.⁴²

The tariff review process

- 3.33 PPCA may review its tariffs for public performance licences. The tariff review process involves a number of steps including:
- reviewing the current tariff structures and rates charged by other collecting societies in other jurisdictions
 - engaging an independent economist to review the existing PPCA rates and ascertain whether the existing rates properly reflect the economic value of the sound recordings
 - negotiation with the relevant industry, wherever possible, to seek a mutually satisfactory licence arrangement and
 - if agreement cannot be reached on appropriate licence terms or the level of fees at an industry level, PPCA's practice is to refer the matter to the Copyright Tribunal.

³⁹ *Copyright Act*, s 154.

⁴⁰ *ibid.*, s 155.

⁴¹ *ibid.*, s 157.

⁴² *ibid.*, s 157B.

Recent review of Tariff E

- 3.34 PPCA recently reviewed Tariff E (Nightclubs, Fixed Discotheques and Discotheque Promoters). In October 2004, PPCA referred its proposed licence scheme relating to nightclubs and dance parties to the Copyright Tribunal. The hearing in the Copyright Tribunal was in June 2006. The final decision was handed down on 10 July 2007. The Tribunal approved an increase in Tariff E.⁴³

Current review of Tariff V

- 3.35 PPCA began a review of Tariff V which concerns the fee for the use of sound recordings in exercise classes in 2006. It applies to fitness centres, gymnasiums, health clubs, spas and solariums.
- 3.36 On 8 December 2006, PPCA issued formal proceedings in the Copyright Tribunal. The Copyright Tribunal will conduct a review of the Fitness Class Tariff, and will determine a reasonable fee for the Fitness Class Tariff on the basis of economic and other evidence. The ACCC has been made a party by consent and the question of the terms on which the ACCC is to participate in the proceedings has been reserved for further determination.

Code of Conduct for Copyright Collecting Societies

- 3.37 The Code of Conduct for Copyright Collecting Societies (the Code) came into effect in July 2002 and was amended in May 2007. It is a voluntary code of conduct which PPCA is a party to.
- 3.38 The Code is intended 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
 - promote confidence in collecting societies and the effective administration of copyright in Australia
 - set out the standards of service that members and licensees can expect from collecting societies and
 - 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.⁴⁴
- 3.39 Each member agency agrees to adhere to standards set out in the Code, which govern all aspects of operation including dealings with members and licensees the distribution of remuneration and licence fees, expenses, governance, accountability, complaints and disputes.

⁴³ Phonographic Performance Company of Australia Limited under section 154(1) of the *Copyright Act 1968* (Cth) [2007] ACopyT1.

⁴⁴ *Code of Conduct for Copyright Collecting Societies*, Chapter 1.

- 3.40 Compliance with the Code is recorded in each member collecting society's annual report and is monitored in an annual independent review. Each collecting society is required to report annually to the Code Reviewer, reporting on the number of complaints it has received and how those complaints have been resolved. The Code Reviewer will have expertise in administrative law, copyright law and/or licensing practices.⁴⁵ Currently, the Code Reviewer is former Justice of the Federal Court of Australia and former President of the Copyright Tribunal, Mr James Burchett QC.
- 3.41 Licensees have the opportunity at least once every 3 years to make written submissions on the operation of the Code, including any amendments that are necessary.⁴⁶

⁴⁵ *Code of Conduct for Copyright Collecting Societies*, Chapter 5.

⁴⁶ *ibid.*

4. Submissions received by the ACCC

- 4.1 PPCA provided a supporting submission with its application for revocation and substitution. A summary of PPCA's submission is contained in paragraphs 4.5 to 4.7. A full copy of PPCA's submissions is on the ACCC's website (www.accc.gov.au).
- 4.2 The ACCC also sought submissions from a broad range of interested parties potentially affected by the application, including radio and television broadcasters, music, entertainment and performance entities, retailers, nightclubs and discotheques, jukebox operators, amusement centres, shopping centres, restaurants and caterers, sports arenas, recreational entities, skating rinks, fitness centres and health clubs, conference centres, relevant industry associations, consumer groups and relevant government departments. The ACCC received public submissions from:
- Attorney-General's Department, Information Law and Human Rights Division
 - Australian Broadcasting Corporation
 - Commercial Radio Australia Ltd
 - EMI Music (Australia) Pty Ltd
 - SBS Corporation
 - Australian Hotels Association
 - Fitness Australia Inc
 - FreeTV Australia Limited
 - Shock Records Pty Ltd
 - SONY BMG Music Entertainment (Australia) Pty Limited
 - Universal Music Australia Pty Limited
 - Vital Entertainment Solutions Pty Ltd
- 4.3 A summary of the views of interested parties are outlined at paragraphs 4.9 to 4.31. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.
- 4.4 PPCA's submission and those of interested parties are considered by the ACCC in Chapter 6.

PPCA's supporting submission

- 4.5 PPCA submits that considerable public benefits result from its collective licensing arrangements. Broadly, those benefits include:
- the pro-competitive effect PPCA has on the market

- the cost savings to copyright owners and users from PPCA's collective licensing arrangements
 - copyright compliance and enforcement efficiencies
 - upholding copyright and competitive trading in public performance rights and transmission rights
 - certainty for users
 - meeting consumer demand for a joint product
 - making funds available by PPCA (including through the PPCA Performers' Trust Foundation) for public benefit purposes and
 - avoidance of costs of transition to the counterfactual world of exclusive direct licensing.
- 4.6 PPCA considers that there would be a devastating effect on competition in relevant markets if the arrangements were not re-authorised, as in the counterfactual PPCA would no longer be a major competitor.
- 4.7 PPCA considers that the arrangements do not result in a net public detriment, or any other kind of detriment. PPCA submits that its collective licensing arrangements would not be likely to lessen competition in net terms when account is taken of the highly pro-competitive effect of having PPCA as a major competitor in the relevant markets.

Interested party submissions

- 4.8 While some concerns were raised by interested parties, with the exception of the Australian Hotels Association (AHA), no party objected to the re-authorisation of PPCA's collective licensing arrangements.

Attorney-General's Department, Information and Human Rights Law Division

- 4.9 The Attorney-General's Department supports, in principle, the collective administration of licensing for the use of copyright. The Department considers that collective administration of copyright makes a major contribution to convenient user access to copyright material, secures an economic return to copyright owners and assists to make copyright workable in practice.

Australian Broadcasting Corporation

- 4.10 The ABC supports PPCA's application and submits that the blanket licence allows the ABC to conduct its business across its broad range of activities, making use of sound recordings within the scope of PPCA's members' repertoire. The ABC submits that the blanket licence represents a significant reduction in fees and in the administrative burden it would incur if it were required to seek individual clearances from copyright owners.

- 4.11 The ABC queries whether it is beneficial to the public to authorise PPCA's collective licensing arrangements which provides PPCA with monopoly power for 10 years, and instead suggests a term of 4 or 5 years.

Commercial Radio Australia Ltd

- 4.12 CRA is the peak industry body for commercial radio stations in Australia and generally accepts there is public benefit in the collective administration of copyright.
- 4.13 CRA notes the administrative advantages and reduced transaction costs associated with acquiring rights to recorded works through one collecting agency, and the certainty created for members as to what the licence covers.
- 4.14 However, CRA submits that the aggregation of rights give PPCA monopoly power in the various markets for the acquisition of rights in recorded works. CRA submits that even though the licences from PPCA members are non-exclusive, they are invariably exercised collectively in the broadcast industry. CRA also submits that while the Copyright Tribunal, in theory, regulates PPCA's monopoly power, the costs and delays in Copyright Tribunal proceedings factor as a strong disincentive to following that course. Therefore further constraints should be placed on PPCA in relation to its dealings with third parties.
- 4.15 CRA submits that PPCA should be required to:
- amend its Dispute Resolution Policy to include mediation, neutral evaluation and conciliation as alternative avenues to resolve issues. This would reduce the differences between the procedures for licensors and licensees and create a more level playing field.
 - collect and provide information, and inform licensees, about which recordings are not protected, to assist in negotiations and provide greater comfort that licensees are only paying for those recordings which are protected by copyright. It may also allow some licensees to be more selective about their play lists.
- 4.16 CRA notes that the 10 year period sought by PPCA is too long, and submits that authorisation should be granted for a period of 5 years so the activities of PPCA can be regularly reviewed.

SBS Corporation

- 4.17 SBS supports in principle PPCA's application and notes that collective licensing is a convenient means for obtaining the licence which it needs for its broadcast purposes provided that the collecting society works well, is transparent and efficient. Also, SBS submit support of the application as, in light of the digital communications revolution that have taken place since PPCA was first authorised in 1985, SBS requires a broader range of communication rights than those available under the current Broadcast Licence Agreement, including PPCA's proposed transmission rights.
- 4.18 SBS further note that the *Copyright Act* allows for a number of exceptions which cover various situations where the permission of the copyright owner is not required to use the copyright material for specified purposes. SBS consider that authorisation should be

granted subject to a condition that PPCA is not permitted to contract out of these exceptions in the *Copyright Act* in its output licences.

Australian Hotels Association

- 4.19 The AHA generally supports the concept of collection societies, though notes that in the area of copyright a collecting society compounds monopoly power.
- 4.20 The AHA does not accept the public benefits claimed by PPCA. In particular, the AHA submits that PPCA does not bring a pro-competitive dynamic to the industry. This assumes that PPCA competes with its shareholders and the AHA submits it is not aware of any instance where PPCA and its shareholders have acted in competition with each other.
- 4.21 The AHA submits it has attempted to deal directly with the PPCA shareholder companies and only 1 company responded (by declining until after the resolution of the relevant hearing before the Copyright Tribunal).
- 4.22 The AHA suggested that if authorisation is granted, it should be subject to conditions that relate to:
- blanket licences
 - an ability to opt in and opt out
 - an effective dispute resolution regime and
 - publicising details of non-protected music recorded in the US involving US artists.
- 4.23 In a second submission made by the AHA following the Copyright Tribunal's decision of the nightclubs and dance party tariff (see paragraph 3.34), the AHA raised concern over the cost of the Tribunal process including the need to engage in experts. The AHA also noted that Copyright Tribunal decision to discount the tariff by 20% to take account of unprotected recordings.
- 4.24 The AHA considers that authorisation should be granted for a period of 3 years.

Fitness Australia Inc

- 4.25 Fitness Australia Inc (Fitness Australia) does not object to PPCA's application but submits authorisation should be granted subject to conditions, and that a 10 year authorisation is too long – 5 years is more appropriate. Fitness Australia notes PPCA has an effective monopoly in the licensing of rights for recorded works as a result of its aggregation of rights which creates an unequal bargaining position for parties.
- 4.26 Fitness Australia suggest the following conditions be imposed to address the issue of unequal bargaining power:
- an obligation on rights holders to offer separate licences to third parties for the use of music at reasonable tariffs. Fitness Australia submits that such a condition would ensure that PPCA's non-exclusive licensing arrangement is non-exclusive in practice.

- develop mandatory guidelines for conducting negotiations with licensees, especially in relation to changes to rates payable by licensees. Fitness Australia submits that this condition would ensure that all parties are aware of the process and timeframes to be met during negotiations of licences.
- disclosure of repertoire covered by the licence. Fitness Australia submit that PPCA should be required to collect information about unprotected sound recordings and provide the information publicly so that licensees are aware of which recordings do not require a licence.
- an amended alternative dispute resolution procedure which includes mediation, neutral evaluation and conciliation.

FreeTV

- 4.27 FreeTV supports, in principle, PPCA's application for authorisation of its collective licensing arrangements, however notes some areas of concern. FreeTV submits that any authorisation granted to PPCA should not extend to blanket licences for music videos. FreeTV submits that the number of record companies producing music videos is small, and the number of videos is small, so arrangements should take place on an individual basis directly between the relevant broadcaster and the owner of the music video.
- 4.28 FreeTV also considers that PPCA should be required to:
- amend its dispute resolution policy to include mediation, neutral evaluation and conciliation as alternative avenues for licensees to resolve issues with PPCA and
 - collect and provide information about, and inform, licensees as to which recordings are not protected.
- 4.29 FreeTV also submits that authorisation should not be granted for a period of 10 years given PPCA's monopoly power, possible advancements in technology and new platforms for delivering content which may impact on the arrangements. FreeTV suggests a 4 year period for authorisation.

Vital Entertainment Solutions Pty Ltd

- 4.30 Vital submits that PPCA has represented its rights on a very fair and easily terminable contract for 3 years and supports PPCA's application for authorisation. Vital submits that it would be detrimental to their business activities to grant licences with individual broadcasters/users for each public performance and broadcasting right. While they could issue licences to individual broadcasters/users, Vital submits that it could only be done at a cost which would be uncommercial and uneconomic.

Shock Records Pty Ltd, SONY BMG Music Entertainment (Australia) Pty Limited, Universal Music Australia Pty Limited, EMI Music (Australia) Pty Ltd

- 4.31 Shock Records, SONY BMG, Universal and EMI have submitted in support of PPCA's application and agree that the collective licensing arrangements will have a pro-competitive effect on the licensing of public performance rights and will generate public benefits as claimed by PPCA.

5. The net public benefit test

- 5.1 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person whom the authorisation was granted or another person on behalf of such a person.
- 5.2 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (as outlined in Chapter 1).
- 5.3 Broadly under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.

Application A91041

- 5.4 PPCA is seeking a substitute authorisation to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 5.5 The relevant test is found in section 90(8) of the Act.
- 5.6 Section 90(8) states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

Application A91042

- 5.7 PPCA is seeking a substitute authorisation to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests are found in sections 90(6) and 90(7) of the Act.
- 5.8 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or 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 result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application of the tests

- 5.9 There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).
- 5.10 The Australian Competition Tribunal has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.⁴⁷
- 5.11 However, the Australian Competition Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.⁴⁸
- 5.12 Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 5.13 Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7).

Definition of public benefit and public detriment

- 5.14 Public benefit is not defined in the Act. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁴⁹
- 5.15 Public detriment is also not defined in the Act but the Australian Competition Tribunal has given the concept a wide ambit, including:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁵⁰

⁴⁷ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

⁴⁸ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

⁴⁹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

⁵⁰ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

Future with-and-without test

- 5.16 The ACCC applies the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.⁵¹
- 5.17 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Length of authorisation

- 5.18 The ACCC can grant authorisation for a limited period of time.⁵²

Conditions

- 5.19 The Act also allows the ACCC to grant authorisation subject to conditions which the ACCC considers necessary in order to satisfy the net public benefit test.⁵³

Future and other parties

- 5.20 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:
- persons who become party to the contract, arrangement or understanding at some time in the future⁵⁴
 - persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.⁵⁵

⁵¹ Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

⁵² Section 91(1).

⁵³ Section 91(3).

⁵⁴ Section 88(10).

⁵⁵ Section 88(6).

6. ACCC evaluation

- 6.1 The ACCC's evaluation of PPCA's collective licensing arrangements is in accordance with the net public benefit test outlined in Chapter 5 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the collective licensing arrangements.

The market

- 6.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 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 PPCA submits that the relevant markets are:
- the acquisition and supply of licences for public performance rights for sound recordings and music videos in Australia and
 - the acquisition and supply of licences for transmission rights for sound recordings and music videos in Australia.
- 6.5 PPCA submits that these are separate markets because public performance rights and transmission rights are not typically regarded as substitutes by licensors or licensees.
- 6.6 Submissions from interested parties did not specifically address the issue of market definition.
- 6.7 Broadly, and for the purpose of these applications, the ACCC accepts that PPCA's arrangements are relevant to the acquisition and supply of licences for public performance rights and transmission rights for sound recordings and music videos in Australia.
- 6.8 While both PPCA and individual copyright owners offer licences to users of public performance and transmission rights, the ACCC notes that the licences cover different repertoire which may limit the extent of substitutability between them.
- 6.9 The ACCC is of the view that, in this matter, its assessment will not be significantly affected by possible variations in precise market definition.
- 6.10 PPCA identified the following key features that apply to the acquisition and licensing of public performance rights and transmission rights of sound recordings and music videos:
- they are a non-rivalrous product. Once a particular sound recording or music video has been created, it is able to be used by numerous persons 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.

- they are non-excludable given the compulsory licensing provisions under section 108 and 109 of the *Copyright Act*.
- in many cases, public performance of a sound recording or music video will generate additional revenue for the owner by encouraging further use of the product, including other broadcasts and performances for which a licence fee is payable, and other uses such as record sales.
- users generally demand a licence in relation to multiple public performance and transmission rights. Thus while one sound recording or music video may be a substitute for another recording to some users it is often likely to be complementary to other recordings. As a result, many users require the rights to publicly perform or transmit a wide range of recordings.
- users prefer a flow of sound recordings and music videos to be developed over time. In other words, users would not be satisfied with a limited stock of rights that can be used again and again. Users gain extra utility by being able to consume the rights to use new recordings that are produced over time.
- users can obtain a non-exclusive licence from PPCA or directly from the copyright owner.
- no other collecting society currently competes against PPCA in the relevant markets, and it is unlikely that another society would enter the market as there is no profit incentive to do so.
- PPCA does not licence rights on behalf of overseas collective societies, except to the limited extent of its reciprocal arrangements with PPL. Under this arrangement PPCA licences rights on behalf of a number of copyright holders who are not directly represented in Australia.

The counterfactual

- 6.11 As noted in Chapter 5 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the ‘future with-and-without test’.
- 6.12 PPCA submits that the counterfactual scenario will be a world without the PPCA collective licensing scheme or any other similar collective licensing scheme. PPCA submits that the effect of this is that licences for all public performance rights and transmission rights will only be able to be acquired by exclusive dealings directly between users and copyright holders.
- 6.13 PPCA also submits that there is no practical likelihood that a second collective licensing society would enter the markets and compete against PPCA because there is no apparent profit incentive to attract entry into the market.
- 6.14 The AHA submits that the counterfactual proposed by PPCA should not be accepted. The AHA submits that the counterfactual would not be a world of exclusively direct

licensing between the copyright owner and the licensee. The AHA did not put forward an alternate likely counterfactual.

- 6.15 The ACCC considers that a number of counterfactual situations may be possible although the ACCC considers that absent authorisation PPCA would not be able to collectively license sound recordings and music videos. It may be possible that absent PPCA's arrangements, a number of other collecting societies could develop. Alternatively, users of sound recordings and music videos may be required to seek licences and negotiate directly with numerous copyright owners for access to their material. In either case, there would be a need to seek and obtain multiple licences in order to access the rights to publicly perform sound recordings and music videos that can currently be obtained through a single PPCA blanket licence.
- 6.16 In the circumstances the ACCC will assess the matter against the counterfactual that absent PPCA's arrangements there will be direct licensing between users and copyright owners.

Public detriment including anti-competitive detriment

- 6.17 PPCA submits its collective licensing arrangements do not generate any anti-competitive detriment because the arrangements are pro-competitive. PPCA submits that its collective licensing arrangements provide an alternative avenue for the licensing of public performance and transmission rights.
- 6.18 PPCA submits that any anti-competitive detriment generated by the arrangements would be limited by:
- the non-exclusive nature of its input and output licences
 - the role of the Copyright Tribunal
 - PPCA's alternative dispute resolution procedure
 - the Code of Conduct for Copyright Collecting Societies and
 - the statutory cap on licence fees for broadcasters.
- 6.19 The main issues raised by interested parties relate to:
- PPCA's market power in the market for the acquisition and supply of licences for public performance rights and transmission rights for recorded works
 - PPCA's alternative dispute resolution procedure and
 - that PPCA should be required to provide information on which recordings are not protected under Australian copyright law and therefore do not require a licence from PPCA.
- 6.20 The ACCC's assessment of the public detriments generated by PPCA's collective licensing arrangements follows.

Market strength of PPCA in issuing output licences

- 6.21 Under PPCA's collective licensing arrangements copyright owners (ie record companies) of sound recordings and music videos grant PPCA a licence to license certain public performance and transmission rights to users of copyright.
- 6.22 PPCA submits that it does not have market power for the acquisition and supply of public performance and transmission rights as PPCA does not have an exclusive right to license these rights. Further, PPCA submits that assuming it does have market power, if it were to misuse its market power, it would be at the risk that copyright owners and users would no longer partake in its arrangements.
- 6.23 A number of interested parties⁵⁶ submitted that the collective licensing arrangements for public performance and transmission rights of sound recordings and music videos increase the market power of PPCA.
- 6.24 The AHA considers that in the area of copyright, collecting societies strengthen market power through the aggregation of competitors' rights.
- 6.25 Fitness Australia submits that it is not practical for licensees to negotiate separate licences with all the relevant copyright owners and ensure complete compliance with copyright laws. Fitness Australia submits that this impracticality and the aggregation of rights through PPCA's collective licensing arrangements make PPCA an effective monopoly for the licensing of rights for recorded works.
- 6.26 PPCA's arrangements allow copyright owners of sound recordings and music videos to pool their rights together to be supplied under a single blanket licence to users. The ACCC considers that allowing copyright owners to pool their rights, removes the competitive pressure that would otherwise exist if copyright owners were competing individually to license their rights.
- 6.27 The ACCC considers that bringing together the rights of parties who would normally compete with each other in the supply of copyright material creates scope for collecting societies to exercise market power in the setting of licence fees and conditions because parties wishing to use copyright have limited, if any, alternatives.
- 6.28 PPCA submits that its member record companies do not act collectively to set the licence fees or terms and conditions of the output licences that PPCA offers to users. PPCA advised that it sets the licence fee (and related terms and conditions of the licence) independently from its members. PPCA advised that the process of negotiating and settling licence fees is conducted by the CEO (or a delegate of the CEO) who is not a representative of any record company.
- 6.29 While PPCA submits that record companies are not collectively involved in setting the licence fees and related terms and conditions of PPCA's output licences, an effect of PPCA's collective licensing arrangements is that PPCA sets a common licence fee (and related terms and conditions) for the sound recordings and music videos which record companies have licensed PPCA to collect licence fees for. Without PPCA's collective

⁵⁶ Fitness Australia submission dated 11 May 2007, Free TV submission dated 14 May 2007, Australian Hotels Association submission dated 7 May 2007 and Commercial Radio Australia submission dated 30 April 2007.

licensing arrangements, record companies would act individually to license the public performance and transmission rights of the sound recordings and music videos that they each own.

6.30 The ACCC notes comments by PPCA that no other collective licensing society competes against PPCA in Australia for the public performance or transmission rights of sound recordings and music videos, and it is unlikely that one would enter the market to do so. PPCA submits that there is no profit incentive for a second collecting society to license public performance and transmission rights. The ACCC accepts that there are a number of factors which limit the entry of another collecting society, including the presence of PPCA as the incumbent.

6.31 Overall, the ACCC is of the view that PPCA's collective licensing arrangements create scope for PPCA to exercise market power in the setting of licence fees and results in a public detriment. This market power is created by:

- the ability of record companies to collectively pool their public performance and transmission rights in sound recordings and music videos which allows them to adopt a common front on licence fees and terms and conditions in the output licences granted to users and
- PPCA being the sole supplier of blanket licences for public performance and transmission rights in sound recordings and music videos.

6.32 The ACCC considers that the anti-competitive detriment resulting from a collecting society's input and output arrangements will be more limited where the arrangements:

- do not prevent direct negotiation between copyright owners and users
- are as unrestrictive as possible and strike an appropriate balance between facilitating the administration of copyright and allowing flexibility in licensing as appropriate
- allow adjustments to blanket licences in appropriate circumstances, including an appropriate adjustment to the fee
- are clear and readily available to users and
- allow for alternative dispute resolution processes where appropriate.

The extent to which these features limit the detriments in PPCA's arrangements are discussed at paragraphs 6.33 to 6.80.

Non-exclusivity of arrangements

6.33 PPCA's collective licensing arrangements give PPCA the non-exclusive right to grant licences for the public performance and transmission rights of sound recordings and music videos on behalf of its members. The nature of the non-exclusive licence means that users may choose to approach copyright owners directly and negotiate for access to these rights, or obtain a blanket licence through PPCA.

- 6.34 PPCA submits that users have an up front choice to obtain a licence directly from copyright owners, and submits that this significantly reduces any market power it may be considered to have.
- 6.35 However, interested parties raised concerns about the extent to which direct licences are offered by individual copyright owners. Fitness Australia stated that to its knowledge, no significant rights holders currently offer separate licences. Similarly, CRA submits that even though PPCA's licences are non-exclusive, rights are invariably exercised collectively in the broadcast industry which effectively gives PPCA monopoly power.
- 6.36 The AHA submitted that its unsuccessful attempt to negotiate directly with the four major PPCA shareholder companies in March 2006 indicates that PPCA and its shareholders do not act in competition with each other.
- 6.37 Fitness Australia submits that the ACCC should impose a condition which requires copyright owners to offer separate licences to third parties for the use of music at reasonable tariffs to ensure that PPCA's non-exclusive licensing arrangement is non-exclusive in practice. The AHA also submits that the ACCC should impose a number of conditions relating to blanket licences and the ability for a licensee to opt in and opt out. The ACCC notes that the AHA did not provide details of what type of conditions could be imposed.
- 6.38 In general, the ACCC considers that if licensees have the option of negotiating a licence directly with the owners of copyright, it is likely to place some competitive constraint on collecting societies in setting licence terms and conditions. This competitive constraint will exist where the collective licensing arrangements do not deter direct dealings between copyright owners and users of the copyright material.
- 6.39 The ACCC notes that direct negotiations between a licensee and a copyright owner may not occur very often due to the attractiveness of both the coverage of PPCA's blanket licence, and the cost savings experienced by both licensors and licensees by using PPCA's collective arrangements (see paragraphs 6.112 to 6.121).
- 6.40 The ACCC understands that direct licences currently exist for both the public performance and transmission of sound recordings and music videos. The ACCC understands that direct licences are more prevalent for the broadcasting of music videos, as opposed to direct licences for public performance of sound recordings. Such direct licences for the broadcast of music videos currently exist for pay television networks, production companies and community television networks, such as for Channel V, Channel 31 and the production companies of Eclipse TV and Jungle Music.
- 6.41 In this regard, the ACCC notes the submission by FreeTV that the arrangements should not extend to the issuance of blanket licences in respect of music videos as these rights are invariably acquired directly from record companies. The ACCC understands that it is currently industry practice to negotiate for the public performance and transmission rights of music videos directly with copyright owners despite the existence of blanket licences.
- 6.42 In the case of public performance of sound recordings, the ACCC understands that direct licences for public performance rights are more likely to be granted for one off or

specific events, as opposed to the circumstance where an ongoing licence is required by the user. Specific or one off events for which direct licences exist include playing a sound recording at an event such as a concert, for promotional purposes at sporting events, or for the synchronisation of a recording in a television commercial or film where both reproduction and public performance rights exist.

- 6.43 The ACCC notes that a record company's decision to enter into a direct licence with a licensee is influenced by the costs involved in negotiating a licence with the licensee. Such costs may include the cost of negotiating the licence agreement, determining the licence fee and compiling the agreement. These costs are likely to be weighed against the value the record company will receive from negotiating a direct licence and whether the company has the resources to enter into direct agreements with users. The ACCC also notes the existence of PPCA's blanket licence may act as a disincentive for record companies to directly deal with users.
- 6.44 Overall, the ACCC considers that while PPCA's arrangements allow for direct licensing, record companies may have limited incentive to directly deal with users. Although, at the same time, it is noted that the needs of users may suit direct licensing in limited circumstances. The ACCC considers that the non-exclusive nature of PPCA's collective licensing arrangements provides a limited check on the anti-competitive detriment arising from the potential of PPCA to exercise its market power.
- 6.45 This check could be greater where record companies developed and published advice as to the circumstances in which they would consider direct licences and the process users should follow to seek such licences. Such transparency would encourage both licensors and users to enter direct licensing discussions in mutually beneficial circumstances. The ACCC proposes to impose a condition to increase transparency around protected sound recordings (see paragraph 6.160).
- 6.46 The ACCC notes that the issue of opting in and out of the arrangements is not feature which is relevant to PPCA's collective licensing arrangements. The ACCC notes that PPCA's collective licensing arrangements are non-exclusive, that is copyright owners and users can enter into direct licences without impacting on the blanket licences offered by PPCA. The ACCC considers that the ability to directly license is a real option (though limited to certain circumstances) and is not prevented by PPCA's collective licensing arrangements. As such, the ACCC does not consider it necessary to impose a condition along the lines suggested by the AHA.

The Copyright Tribunal of Australia

- 6.47 The functions, jurisdiction and process of the Copyright Tribunal in respect of PPCA's licences are summarised at paragraphs 3.28 to 3.32 of this draft determination.
- 6.48 PPCA submits that the Copyright Tribunal's intended role is to act as a safeguard against the possible misuse of any market power that copyright collecting societies may hold. PPCA submits that it relies on the Tribunal as a forum for reviewing proposed changes to its tariffs. PPCA submits that this process is highly beneficial to all parties (ie PPCA, licensors and licensees) because it resolves possible disputes and provides an effective determination of the appropriate licence fee.

- 6.49 PPCA submits that it approaches the determination of licence fees in a similar manner to that of the Copyright Tribunal, through the use of economic experts. PPCA believes that the licence fees which PPCA impose rarely differ from the fees arrived at by the Copyright Tribunal. PPCA submits that this is an indication of the influence the Copyright Tribunal has in constraining PPCA from exercising market power.
- 6.50 However, CRA submits that while in theory the Copyright Tribunal regulates PPCA's market power, in practice the costs and delays of proceedings are a strong disincentive for licensees to commence proceedings. The AHA also note that it and the other respondents to the nightclub and dance party tariff review spent a significant amount during the proceedings. The AHA advised that it and the other respondents had insufficient funds to engage economic experts to assess the proposed tariff increase by PPCA.
- 6.51 PPCA submits that any delay or costs associated with Copyright Tribunal proceedings do not make it a less effective constraint on the possible exercise of its market power. PPCA notes that while there may be delays and costs associated with Copyright Tribunal proceedings, parties are not required to physically attend the Copyright Tribunal.
- 6.52 The ACCC notes the reason for the Copyright Tribunal's existence to provide some counterbalance to PPCA's market power (see paragraph 3.30). The ACCC understands that proceedings in the Copyright Tribunal are aimed to be conducted with as little formality, and as quickly, as possible. However, matters before the Copyright Tribunal are often quite complex. Licensees may require legal representation and other experts, for example economic experts, particularly as collecting societies are almost certain to be legally represented.
- 6.53 As such, the ACCC considers that, to the extent that the Copyright Tribunal does constrain PPCA's ability to exercise its market power, this only occurs to 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 PPCA directly and that which it considers that the Copyright Tribunal would be likely to impose. Particularly, in respect of smaller users, given the relative costs of a PPCA licence and of seeking recourse to the Copyright Tribunal, the Copyright Tribunal may not adequately constrain PPCA's market power.
- 6.54 The Copyright Tribunal's explicit power to make the ACCC a party to the proceedings if it considers it appropriate may further constrain PPCA's ability to exercise market power. The ACCC may seek to become a party to Tribunal matters where it considers it to be in the public interest. The ACCC will take on the role of bringing its own analysis and expert opinions on the views expressed by the parties before the Tribunal, to assist the Tribunal to come to a decision which reflects an appropriate balance between access to copyright material and the rights of copyright owners to receive returns. In May 2007, the ACCC was made a party to the review of the Fitness Class Tariff by consent (see paragraphs 3.35 to 3.36).

Alternative Dispute Resolution procedure

- 6.55 PPCA submits that in addition to the Copyright Tribunal, it is also constrained through its dispute resolution procedure which gives copyright owners and licensees the option to invoke certain procedures for the settlement of disputes where they arise.
- 6.56 PPCA has released its Complaints Handling and Dispute Resolution Policy,⁵⁷ as required by the Code of Conduct for Australian Collecting Societies. The policy outlines the procedure for making a complaint and for the resolution of a dispute for both licensees and licensors. A complaint may be made by licensors who believe that PPCA has made a mistake in calculating payments or if they are unhappy with PPCA's service, or from licensees about the terms and conditions of the licence (including the licence fee).
- 6.57 Where a dispute arises between PPCA and a licensor, PPCA will refer it to mediation. Mediation will be administered by the Australian Commercial Disputes Centre, in accordance with the Centre's Guidelines for Commercial Mediation.⁵⁸ Mediation is not actively promoted by PPCA as being available to licensees (see paragraph 6.58).
- 6.58 Where a dispute arises between PPCA and a licensee about a licence, the licensee may refer the terms and conditions of the licence (including the licence fee) to a Board of Review, if they consider the terms and conditions unreasonable. An outline of the composition and functions of the Board of Review is at paragraphs 2.16 to 2.18.
- 6.59 Fitness Australia submits that the Board of Review process has demonstrated to be costly and not dissimilar to a Copyright Tribunal proceeding which makes it difficult for licensees to utilise. Fitness Australia, CRA and FreeTV believe that other forms of dispute resolution, particularly mediation,⁵⁹ neutral evaluation⁶⁰ and conciliation,⁶¹ would provide a less costly process through which to resolve a dispute and should be included in PPCA's Complaints Handling and Dispute Resolution Policy.
- 6.60 In response to interested parties submissions, PPCA submits it is impossible to assess the practical value or feasibility of amending its Complaints Handling and Dispute Resolution Policy. PPCA submits its policy contains an appropriate means for resolving disputes for licensees, and in any event, the recent amendments to the *Copyright Act* provide for the Copyright Tribunal to impose other forms of alternative dispute resolution.

⁵⁷ See PPCA's website, http://www.pzca.com.au/documents/ComplaintsandDisputesPolicy_000.pdf.

⁵⁸ Ibid.

⁵⁹ A method of dispute resolution which includes undertaking any activity for the purpose of promoting the discussion and settlement of disputes, bringing together the parties to any dispute for that purpose, and the follow up of any matter being the subject of such discussion or settlement. Mediation should be conducted with as little formality and technicality, and with as much expedition, as possible, Butterworths Australian Legal Dictionary.

⁶⁰ A dispute resolution process where parties present information to an evaluator who assesses the relative strengths and weaknesses of each side's case, and offers an opinion as to the likelihood of liability being found by a court and probably damages or range of damages. Neutral evaluation will usually take place at an early stage in litigation or prior to litigation being commenced, Encyclopaedic Australian Legal Dictionary.

⁶¹ A method of alternative dispute resolution in which a third party attempts to facilitate an agreed resolution of a dispute in accordance with relevant legal principles. In Australia, conciliation is distinguished from mediation in terms of the conciliators input to the substance of the agreement.

- 6.61 PPCA further submits that it is willing to undertake mediation or other alternative dispute resolution processes if a user requests so, and if it is appropriate in the circumstances. PPCA notes that recently, upon request by a licensee, it agreed to participate in mediation, although ultimately the mediation did not proceed, as the licensee subsequently changed its mind.
- 6.62 The ACCC notes that the Board of Review process has been initiated on 2 occasions, and has not been initiated by a licensee in the past 5 years. The low incidence of referral to the Board may be indicative of either user satisfaction with the terms of licences proposed by PPCA, or, it may be that users are not satisfied that the Board of Review provides an effective means of dispute resolution. The ACCC has no information to ascertain why the Board of Review process has rarely been used. The ACCC would welcome further information on the effectiveness of the Board of Review process.
- 6.63 The ACCC notes interested party comments that the Complaints Handling and Dispute Resolution Policy should be amended to include other forms of dispute handling mechanisms such as mediation, neutral evaluation and conciliation.
- 6.64 The ACCC notes that section 169A of the *Copyright Act* states that upon an application or reference to the Tribunal, the President or Deputy President may direct that the proceeding or any matter arising out of the proceeding, be referred for a particular alternative dispute resolution process (other than conferencing).⁶² Therefore, a licensee may make an application or reference to the Tribunal seeking a direction from the Tribunal that the matter be referred for a particular alternative dispute resolution process.
- 6.65 However, the ability to access alternative dispute resolution processes through the Copyright Tribunal has only become an option with the *Copyright Act* amendments in 2006 and therefore licensees may not fully aware of this option. The ACCC notes that while this option is available, the process of applying to the Tribunal may act as a deterrent for many licensees, although the ACCC accepts that it may be too early to know if this is the case.
- 6.66 However, the ACCC considers that, given that PPCA offers alternative dispute resolution processes when asked, it would provide more certainty for licensees if provision for mediation, neutral evaluation and conciliation were included in PPCA's Complaint Handling and Dispute Resolution Policy as alternative dispute resolution processes. The ACCC considers it appropriate that licensees are informed by PPCA about all options of review which are available for seeking a review of the licence fees and terms and conditions imposed by PPCA.

⁶² Section 10 of the *Copyright Act* defines alternative dispute resolution process as the procedures and services for the resolution of dispute, and includes: conferencing; mediation; neutral evaluation; case appraisal; conciliation; and procedures or services specified in the regulations, but does not include: arbitration; and court procedures.

Code of Conduct for Copyright Collecting Societies

- 6.67 The Code has been outlined in paragraphs 3.37 to 3.41.
- 6.68 PPCA submits that it is effectively regulated by the Code and submits that no rational collecting society would wish to be the subject of an adverse report by the Code Reviewer.
- 6.69 The ACCC notes that the Code is designed to ensure a minimum level of protection for all who deal with collecting societies and appoints an independent Code Reviewer to oversee that this is occurring. Collecting societies may voluntarily adhere to the Code.
- 6.70 The Code Reviewer is currently former Justice of the Federal Court of Australia and former President of the Copyright Tribunal, Mr James Burchett QC. The Code Reviewer monitors and prepares annual reports on the level of compliance by collecting societies with the obligations imposed on them by the Code, and also reviews the Code itself, which occurs every 3 years.
- 6.71 The ACCC welcomes initiatives such as the Code to the extent that they establish standards for copyright societies to meet in administering their collective copyright licensing schemes. The ACCC notes the most recent Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2005 to 30 June 2006 found PPCA to be in compliance with the Code.
- 6.72 The ACCC considers however that the Code does not reduce PPCA's capacity to impose licence terms and conditions on users which reflect its dominant position as a provider of licences for public performance and transmission rights in Australia. The Code may however provide some influence on PPCA's conduct through the threat of a public adverse report by the Code Reviewer.

Statutory Cap on licence fees for radio broadcasters

- 6.73 The *Copyright Act* currently has a statutory cap on licence fees paid by radio broadcasters for sound recordings. The cap falls under s152(8) of the *Copyright Act* and prohibits the Copyright Tribunal from ordering a radio broadcaster to pay a fee that is more than one per cent of the broadcaster's gross annual income.
- 6.74 The ACCC considers that the statutory cap offers some constraint on PPCA's ability to determine licence fees for radio broadcasters. However, the ACCC notes that on 14 May 2006 the Attorney-General's Department issued a media release announcing a number of proposed changes to the *Copyright Act*. One proposed change was the removal of the statutory cap on licence fees paid by radio broadcasters for using sound recordings. There is no information from the Commonwealth Government of when this proposed legislative change may occur.

Flexibility and availability of PPCA's collective licensing arrangements

- 6.75 The ACCC notes that PPCA's collective licensing arrangements allow for flexibility in the licensing of public performance and transmission rights of sound recordings and music videos for both licensors and licensees.

- 6.76 Licensors are able to terminate their input agreements with PPCA by providing 90 days notice to PPCA. Upon termination PPCA is unable to grant a licence for the sound recordings or music video clips of the licensor. In any event, as noted at paragraphs 6.33 to 6.44, PPCA's collective licensing arrangements allow for copyright owners to directly negotiate and deal with users of sound recordings.
- 6.77 A licensor can also amend the input agreement with PPCA by adding or deleting the name of any Label (sound recordings are released under a label) which PPCA has the licence to negotiate on behalf of the licensor. Therefore, a licensor can vary the sound recordings which it grants PPCA the right to license public performance and transmission rights on its behalf.
- 6.78 For licensees, the standard output licence provides for the licence fee to be varied when there is a material change in the use of the licensed sound recordings or music videos. Upon notification to PPCA in writing, a licensee may have the licence fee varied to accommodate for any change in the use of their current licence.
- 6.79 PPCA also has a refund policy which provides that PPCA may consider requests for licence fees to be refunded. Circumstances in which the PPCA may provide a refund include:
- if the business closes down
 - if the business is sold or
 - if a reassessment reduces the annual fee to an amount less than that already paid.⁶³
- 6.80 The ACCC notes that details about applying for a blanket public performance or transmission licence are readily available to users. In particular, PPCA provides forms and information on its website for users who wish to apply for a public performance and/or transmission licence for sound recordings or music videos. Licensees are also able to notify PPCA of any changes to their details or use of sound recordings or music videos by completing a form which is available on PPCA's website.

Distribution Policy

- 6.81 PPCA's Distribution Policy is published on PPCA's website⁶⁴ and is outlined at paragraphs 2.24 to 2.29. Briefly, the Policy outlines how the monies PPCA collects from its arrangements (less administrative costs) are distributed to copyright owners, registered artists and the PPCA Performers' Trust Foundation at the end of each financial year (the distributable amount).⁶⁵
- 6.82 The distributable amount is divided into various distribution pools, based on the sources of the licence fee revenue and/or information available to PPCA as to how copyright protected sound recordings and music videos were used. The allocation process is based on air play logs for sound recordings which PPCA purchases from APRA. APRA represents that the logs are almost a census of commercial and ABC

⁶³ PPCA website, http://www.pzca.com.au/licensing_faq.htm#does_ppca_have_a_refund_policy.

⁶⁴ http://www.pzca.com.au/documents/PPCADistributionPolicy_000.pdf.

⁶⁵ PPCA, http://www.pzca.com.au/licensing_faq.htm#How_does_the_PPCA_distribute_the_money_it_collects_.

radio broadcasting and therefore are an accurate measure for the use of sound recordings in such broadcasting.⁶⁶ PPCA submits that this ensures that licensors receive distributions which substantially reflect the demand for each licensor's rights.

- 6.83 The ACCC considers that the incentive for a particular record company to separately negotiate a licence fee or, at the extreme, to waive the licence fee (eg allowing free broadcasting rights as a trade-off for airplay) is diminished by the convenience and efficiencies provided by PPCA's collective arrangements. However, by directly linking payment to copyright owners with the demand for their work maintains a level of ongoing competition between copyright owners to increase the popularity of their recorded works and therefore have their works heard. As such, the ACCC considers there to be minimal public detriment derived from PPCA's Distribution Policy.

Reproduction rights

- 6.84 ARIA is responsible for licensing reproduction rights on behalf of its members for the reproduction of sound recordings for specific purposes. PPCA submits that under the collective licensing arrangements some limited rights which are incidental to, and which are adjunct to, the broadcast and communication rights that PPCA currently holds will be transferred to PPCA, including:
- the 'ephemeral extension' statutory licence under section 107(5) of the *Copyright Act*⁶⁷
 - reproduction licences from some uses of sound recordings in television and film production made for broadcast where section 107 does not apply and
 - reproduction licences to facilitate internet based transmissions.
- 6.85 The previous authorisation granted to PPCA did not include these rights.
- 6.86 FreeTV submits that although there are advantages for users being able to negotiate for both public performance and transmission rights and reproduction rights together with PPCA, the new ability to license these rights will expand PPCA's rights and in turn its monopoly power.
- 6.87 PPCA submits that other reproduction rights are intended to remain with ARIA, principally 'dubbing' rights, which ARIA grants to background music providers to allow the development of music systems for use in commercial premises. PPCA notes that it would be impracticable to transfer such rights from ARIA to PPCA as many rights holders prefer to deal with reproduction licensing directly rather than collectively.

⁶⁶ PPCA Distribution Policy, see http://www.ppc.com.au/documents/PPCADistributionPolicy_000.pdf

⁶⁷ Section 107 of the *Copyright Act* provides that copyright in a sound recording is not infringed by the making of a copy of a sound recording in certain circumstances where the person making the copy is entitled to broadcast the recording. The licence granted under section 107 is void unless all copies of the sound recording made under the section are destroyed or in some circumstances delivered to the Australian Archives within 12 months from first use, unless the copyright owner consents to the retention for a longer period. As an adjunct to the general broadcast licence, PPCA may seek to grant licences allowing broadcasters to keep copies of sound recordings beyond the 12 month period permitted under the *Copyright Act*.

- 6.88 The ACCC notes that PPCA's collective arrangements are non-exclusive and that users are not bound to obtain these rights through PPCA and have the choice to obtain these rights directly from copyright owners. PPCA has advised that many copyright owners prefer to deal with reproduction licensing directly, rather than collectively. The ACCC understands that direct licences do exist for reproduction rights, especially where the use of the sound recording also requires a public performance or transmission right. For example, for the synchronisation of a sound recording to a film or advertisement.
- 6.89 The ACCC considers that the transfer to PPCA of some reproduction rights akin to the public performance and transmission of sound recordings and music videos does not result in significant public detriment. The ACCC would be concerned if direct licensing ceased to be a real option for licensees now that these rights have been included in the PPCA collective licensing arrangements.

Protected recordings vs unprotected recordings

- 6.90 FreeTV, CRA, AHA and Fitness Australia have noted that PPCA does not have the rights in relation to all sound recordings as some overseas recordings are unprotected. Broadly, interested parties submit that PPCA has the ability to access information about whether specific recordings are protected or not, and consider that PPCA should be required to provide this information to licensees.
- 6.91 In particular, CRA submits that PPCA should provide this information to licensees so that they can have comfort that they are only paying for protected recordings. Similarly, Fitness Australia submits that having this information would assist in conducting negotiations and would allow greater choice for the licensees as to what they play. Fitness Australia and the AHA submit that the ACCC should impose a condition requiring PPCA to publicise details of those sound recordings which are unprotected and consequently not covered by PPCA's repertoire.
- 6.92 The AHA noted that in the recent nightclub and dance party tariff review, the Copyright Tribunal discounted the proposed tariff increase by 20% to take into account the amount of unprotected sound recordings. The AHA submits that discussions with PPCA and the record companies have failed to establish a process to identify the sound recordings which are unprotected. The AHA does not accept that PPCA licensors do not have the capacity to identify which recordings are unprotected.
- 6.93 The ACCC notes that the issue raised by interested parties about unprotected recordings focused on unprotected US recordings.
- 6.94 The ACCC notes that not all recordings are protected under Australian copyright law as a result of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961 (Rome Convention). Member countries of the Rome Convention have a reciprocal arrangement to provide the same copyright rights in that country to other member countries, and as such protect international recordings under domestic copyright law. The United States is not a member country and its recordings are not automatically protected under Australian copyright law by virtue of the Rome Convention.

- 6.95 However, PPCA submits that the process for determining whether a recording is protected or unprotected is complex. PPCA submits that this complexity is created because of the following:
- There is not a set of simple guidelines which outline the criteria of a protected or unprotected recording. For example, there is no clear category of ‘US recordings’ to which a simple rule could be applied.
 - Determining whether a recording is protected requires obtaining certain information about the recording and applying a series of tests to assess whether there are connecting factors to a protected country. This information may not be readily ascertainable. Such factors include establishing:
 - who made the recording including their citizenship or residency. Under the *US Free Trade Agreement Implementation Act 2004*, the *Copyright Act* was amended such that any person who participates in the performance recorded on the sound recording becomes a maker of that recording
 - if it was made by a record company, their place of incorporation
 - the place where the recording was recorded (ie the location of the recording studio)
 - that date of release and
 - the place where the recording was first released.⁶⁸
- 6.96 PPCA submits that obtaining a blanket licence for public performance and transmission rights means that users do not need to determine whether or not a sound recording is protected or unprotected, because the blanket licence protects the licensee from infringing copyright regardless of whether the recording is protected or not.
- 6.97 Further, PPCA submits that it would be impractical for a licensee to only play unprotected US recordings because the majority of US recordings are protected by way of some connecting factor. PPCA noted that in the context of the review of Tariff E (see paragraph 3.34), PPCA analysed a sample of US recordings to determine what percentage of US recordings were unprotected. The Copyright Tribunal appeared to accept PPCA’s analysis that approximately 80% of US sound recordings are protected.⁶⁹
- 6.98 The ACCC notes that if a user is able to determine which recordings are unprotected and the user only plays unprotected recordings, it would not require a licence from PPCA to publicly perform or broadcast those sound recordings. However, the ACCC considers it would only be in limited circumstances that a user would wish to only play unprotected sound recordings given that the majority of recordings, including those from the US, are likely to be protected. Further, the ACCC notes that the process for

⁶⁸ PPCA’s website, see http://www.pzca.com.au/licensing_faq.htm#nightclub.

⁶⁹ Phonographic Performance Company of Australia Limited under section 154(1) of the *Copyright Act 1968* (Cth) [2007] ACopyT1, para 109.

determining whether a sound recording is unprotected is complex, expensive and that there is not always perfect information available, even for PPCA and copyright owners.

- 6.99 The ACCC notes that PPCA and copyright owners of sound recordings are likely to be in a better position to access the necessary information to determine whether a sound recording is protected.
- 6.100 The ACCC would be concerned if PPCA was collecting licence fees for the use of unprotected sound recordings. However, the ACCC notes that PPCA's licences only include protected sound recordings. PPCA submits that the licence fee charged to licensees therefore only covers those recordings which are protected, and accordingly distributes royalties only for protected recordings. The ACCC considers that PPCA is in a position to publish a list of those recordings which are protected under Australian copyright law and are therefore covered by PPCA's blanket licence. Requiring PPCA to publish such a list will provide information to users as to what sound recordings are covered by PPCA's blanket licence. As such, the ACCC proposes to impose a condition (see paragraph 6.160).

Contracting out of exceptions in the *Copyright Act*

- 6.101 The *Copyright Act* provides for a number of exceptions whereby a user is not infringing copyright by using the works without a licence. Some of these exceptions are:
- Fair dealing for purpose of research or study, s 40
 - Fair dealing for purpose of criticism or review, s 41
 - Fair dealing for purpose of parody or satire, s 41A
 - Fair dealing for purpose of reporting news, s 42 and
 - Exception for the reproduction for purpose of judicial proceedings or professional advice, s 43.
- 6.102 SBS submits that authorisation should be granted subject to the condition that PPCA is not permitted to contract out of the exceptions in the *Copyright Act* in its output licences.
- 6.103 In responding to SBS' submission, PPCA submits that the possibility of contracting out of the *Copyright Act* is not an issue that has arisen under PPCA's collective licensing arrangements in the past and that PPCA is not aware of any situation where it is purported to have contracted out of any exceptions under the *Copyright Act*.
- 6.104 Further, PPCA submits that authorisation is not an appropriate regulatory mechanism for entrenching statutory exemptions under the *Copyright Act*.
- 6.105 The ACCC notes that in October 2002 the Attorney-General released the Copyright Law Review Committee's (CLRC) report, *Copyright and Contract*. This report examines the way contracts are being used in the digital environment to set the terms and conditions of access to, and use, of copyright material. It looks at the effect this has on the copyright balance as set out in the *Copyright Act*, and, in particular, the exceptions to the exclusive rights of copyright owners. The report also investigates

whether or not it should be possible to displace the exceptions set out in the legislation by contractual means.

6.106 The ACCC notes a recommendation made by the CLRC:

the *Copyright Act* be amended to provide that an agreement, or a provision of an agreement, that exclude or modifies, or has the effect of excluding or modifying, the operation of ss. 40, 41, 42, 43, 43A, 48A, 49, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, 111A of the Act, has no effect.⁷⁰

6.107 The ACCC notes that the Commonwealth Government has not, to date, responded to the CLRC report. The ACCC considers that the ability to contract out of the statutory exceptions is a policy issue for the Commonwealth Government and is not relevant to the ACCC's role in assessing applications for authorisation. The ACCC does not consider that the issue is a result of PPCA's collective licensing arrangements.

ACCC conclusion on public detriments

6.108 The ACCC considers that PPCA's collective licensing arrangements create scope for PPCA to exercise market power in the setting of licence fees (and terms and conditions) and results in a public detriment. However, the ACCC notes the following factors may impact, to some extent, on PPCA's ability to exercise this market power including:

- the non-exclusive nature of the arrangements
- the role of the Copyright Tribunal, and the ACCC's new role to become a party to proceedings at the Copyright Tribunal
- the ability of the Copyright Tribunal to direct that a form of alternate dispute resolution process take place between PPCA and a licensee
- the flexibility and availability of PPCA's collective licensing arrangements and
- the statutory cap for the licence fee which broadcasters are required to pay for a licence.

6.109 Despite the existence of these factors, the ACCC considers that PPCA is still in a significant bargaining position.

Public benefit

6.110 PPCA submits the collective licensing arrangements will deliver a range of public benefits, including:

- a highly pro-competitive effect as a result of PPCA participating in the markets for the acquisition and supply of licences for public performance and transmission rights in Australia

⁷⁰ Copyright Law Review Committee, *Copyright and Contract*, 2002, p. 274.

- cost savings resulting from the administration, monitoring and negotiation of blanket copyright licences for public performance and transmission rights
- copyright compliance and enforcement efficiencies
- upholding copyright and competitive trading in public performance rights and transmission rights
- certainty for users
- meeting consumer demand for a joint product
- funds made available by PPCA (including through the PPCA Performers' Trust Foundation) for public benefit purposes and
- avoidance of costs of transition to the counterfactual of exclusively direct licensing.

6.111 The ACCC's assessment of the public benefits likely to result from PPCA's collective licensing arrangements follows.

Reduced administration, monitoring and negotiation costs

6.112 PPCA submits that the collective licensing arrangements create substantial efficiencies in the administration and monitoring of users and licensors obligations under copyright law. PPCA submits that under the collective licensing arrangements, only one organisation:

- incurs the monitoring costs for detecting infringements and
- monitors the use of works for the purpose of determining members' shares of distributions.

6.113 PPCA submits that its members (ie copyright owners) save both time and costs by having PPCA perform these tasks on their behalf. PPCA submits that without PPCA's collective licensing arrangements, members would be required to carry out these tasks individually which would result in multiplication of costs between copyright owners.

6.114 PPCA also submits that it is able to monitor compliance on a collective basis by conducting random sample inspections and looking for breaches of copyright in relation to the rights of any or all of its members. PPCA states that an individual licensor would not be able to achieve the same efficiencies in looking for breaches.

6.115 PPCA submits that users will also benefit from the collective licensing arrangements by saving on the administrative costs associated with obtaining individual licences with each copyright owner. PPCA's collective blanket licence means that users are able to obtain a single licence which covers the use of material from multiple copyright owners. PPCA submits that users will experience cost savings by avoiding the need to identify and locate individual copyright owners for each song/music video for which they require a licence.

6.116 Further, PPCA submits that the collective licensing arrangements remove the burden of having to individually negotiate with copyright owners, the cost of conducting these

negotiations with copyright owners, and the need to obtain new or different licences when the public performance or transmission rights are varied, for example when a new copyright owner releases a sound recording or music video.

- 6.117 Interested parties generally support the use of blanket licences as a convenient and cost effective means for providing and obtaining access to publicly perform or transmit a range of sound recordings and music videos.⁷¹
- 6.118 Although, the AHA submits that the cost savings achieved by the arrangements are to the benefit of PPCA and its shareholders, and stated that it would be happy to deal with more than one copyright owner.
- 6.119 Generally, the ACCC considers that collecting societies provide the creators of copyright material with the opportunity to efficiently and effectively gain returns for use of their copyright material, in particular, by minimising the costs of administering licences for the use of copyright and the costs for enforcing the rights of copyright owners. The ACCC considers that collecting societies also provide copyright users with relatively easy access to a large volume of copyright material. The user is not required to identify and negotiate with individual copyright owners and may gain rights to a wide range of material through one licence, thereby significantly reducing transaction costs.
- 6.120 The ACCC considers that licensors and licensees will benefit from reduced monitoring, negotiation and administrative cost savings derived from PPCA's collective licensing arrangements. Copyright owners will experience cost savings as PPCA collectively monitors compliance with copyright laws on behalf of its members, and negotiates and issues licences on their behalf. Users will experience cost savings by dealing with only one body for their licensing needs, who can provide licences for public performance and transmission rights for a large range of sound recordings.
- 6.121 Overall, the ACCC considers that PPCA's collective licensing arrangements will result in significant reductions in administration, monitoring and negotiation costs and that these cost savings will be experienced by both licensees and licensors. PPCA's collective licensing arrangements do not prevent users that wish to deal directly with copyright owners to do so.

Compliance with copyright law and certainty for users

- 6.122 PPCA submits that without its collective licensing arrangements, users would not be able to obtain a blanket licence for a wide range of sound recordings and would need to:
- check whether they are required to obtain more than one licence from individual copyright owners and

⁷¹ FreeTV submission dated 14 May 2007, SBS Corporation submission dated 27 April 2007, Commercial Radio Australia submission dated 30 April 2007, Australian Broadcasting Corporation submission dated 30 April 2007, Vital Entertainment submission dated 14 May 2007, SONY BMG submission dated 15 May 2007, EMI Music Australia submission dated 27 April 2007 and Universal Music submission dated 15 May 2007.

- decide whether to obtain an additional licence, with the associated transaction costs, or risk not having a licence.
- 6.123 PPCA submits that in the counterfactual, where direct licensing is only available, it is unlikely that potential licensees would be willing to undertake the time and cost of negotiating directly with each and every copyright holder, which would lead to a breakdown in the operation of competitive trading of public performance rights and transmission rights.
- 6.124 PPCA submits that this may lead to users taking advantage to free ride, with the effect that copyright holders would not be appropriately remunerated for the public performance and transmission rights of their sound recordings and music videos.
- 6.125 PPCA submits that the blanket licence under its collective licensing arrangements allows licensees to play a range of sound recordings and music videos with the comfort that they will not infringe copyright law. PPCA submits that without the collective licensing arrangements users would not have this certainty. PPCA submits that certainty is particularly important for users who are not necessarily in a position to preselect all the sound recordings and music videos they wish to use (for example radio broadcasters, cafes, fitness centres).
- 6.126 The ACCC considers that PPCA's blanket licences allow users to be certain that they are licensed to publicly perform and transmit sound recordings and music videos which are available in PPCA's repertoire. This would assist users to comply with their obligations under the *Copyright Act*. The ACCC accepts that in the counterfactual where direct licensing is only available it would be burdensome on both copyright owners and users to ensure this level of compliance.
- 6.127 The ACCC considers greater compliance and the efficient enforcement of copyright law generates some benefit as it ensures that copyright holders are remunerated for use of their works.

Provision of a blanket licence

- 6.128 PPCA submits that its collective licensing arrangements are pro-competitive because they provide an alternative avenue for the licensing of public performance rights and transmission rights. PPCA submits that the non-exclusive nature of its arrangements means that users can obtain a licence from PPCA or deal directly with copyright owners. PPCA submits that this means there is a constant presence of competition in the market.
- 6.129 PPCA licensors including, SONY BMG, Universal, EMI and Shock Records also submit that the collective licensing arrangements are pro-competitive.
- 6.130 Fitness Australia, CRA, FreeTV and AHA do not consider that PPCA adds to the competitive dynamics of the market, as PPCA is essentially a monopoly distributor of public performance and transmission rights.
- 6.131 As noted at paragraphs 6.21 to 6.32 the ACCC considers that PPCA's collective licensing arrangements create scope for PPCA to exercise market power in the setting of licence fees. Further, the ACCC does not consider that direct licences offered by individual copyright owners are perfect substitutes for the blanket licences offered by

PPCA which covers a wide ranging repertoire (see paragraph 6.8). Therefore, the ACCC does not accept that PPCA's collective licensing arrangements are pro-competitive as claimed.

- 6.132 PPCA also submits that the collective licensing arrangements meet consumer demand for a joint product – that is, a blanket licence for public performance and transmission rights of sound recordings and music videos which covers the repertoire of all of PPCA's licensors. PPCA submits that consumer demand for blanket licences is evident from the large number of public performance and transmission licences that have been granted to date (see paragraph 3.21).
- 6.133 The ACCC accepts that the blanket licences offered by PPCA satisfy a demand and need by users for a convenient means of obtaining access to licences to publicly perform or transmit a wide range of sound recordings and music videos. The ACCC notes that the non-exclusive nature of PPCA's right to license public performance and transmission rights also allows users to obtain direct licences if this better suits their needs. The ACCC accepts that PPCA's collective licensing arrangements generate a public benefit by meeting consumer demand for a collective product.

Transition to a new system

- 6.134 PPCA submits its collective licensing arrangements will avoid the costs of transitioning to the counterfactual situation of exclusively direct licensing.
- 6.135 PPCA submits that the transition to a system of exclusively direct licensing would impose costs to both copyright owners and users. Copyright owners would have to expand and/or strengthen their administrative systems for licensing, and their monitoring and enforcement regimes of their public performance rights and transmission rights. PPCA submits the aggregate costs of such systems would exceed the cost of collective licensing and monitoring and enforcement under the collective licensing arrangements.
- 6.136 PPCA further submits that users will be required to preselect all the sound recordings and music videos they wish to use, identify the copyright owners with whom they would need to negotiate with, and approach them directly to negotiate licence terms and conditions. This may ultimately mean entirely changing their operating procedures.
- 6.137 PPCA submits that some of the costs incurred in moving to the counterfactual of exclusively direct licensing would be transitional and one-off costs, but note that there would also be considerable ongoing costs. For example:
- copyright owners would have ongoing additional costs in running their systems for direct licensing and for monitoring and enforcing copyright.
 - users would have additional ongoing costs of having to identify the relevant copyright holders to be approached for direct licences, and carrying out negotiations with them.
- 6.138 The ACCC notes that it is difficult to speculate how significant the costs involved in moving to the counterfactual of exclusively direct licensing between copyright owners and users will be.

- 6.139 The ACCC accepts that some costs incurred by the transition to a new system would be one off costs, such as the implementation of administrative systems to accommodate for direct negotiations, and stronger enforcement systems. As such, the benefit of avoiding these costs should be weighed over the life of PPCA's arrangements.
- 6.140 The ACCC has also recognised that there are ongoing costs to both copyright owners and users if all public performance and transmissions rights were to be directly licensed (see paragraphs 6.112 to 6.121).
- 6.141 The ACCC therefore considers that there is some public benefit in maintaining the collective licensing arrangements to the extent that this avoids the one-off costs that would otherwise be incurred in the transition to an exclusively direct licensing system for the administration of public performance and transmission rights, but does not place significant weight on such savings.

PPCA Performers' Trust Foundation

- 6.142 The PPCA Performers' Trust Foundation was established in 1975 for the purpose of promoting and encouraging music and the performing arts. PPCA has funded and co-administered the Foundation with the Musician's Union and the Media Entertainment and Arts Alliance.
- 6.143 PPCA submits that the funds provided by the Foundation are a significant public benefit that flows directly from the collective licensing arrangements. The funds are used for:
- concert performances at or for charitable institutions such as hospitals or homes for the aged
 - scholarships for the promotion and encouragement of musical and theatrical education
 - promotion and encouragement of the performing arts to the general public
 - the aid or assistance of any beneficiary who, in the opinion of the Trustees, is unable to adequately maintain themselves.
- 6.144 PPCA submits that in the counterfactual, without the collective licensing arrangements, it is unlikely that such a fund could exist. PPCA submits that even if copyright owners were each to fund similar projects to those funded by the Foundation, the administrative costs would be multiplied which would substantially reduce the level of funds available for distribution.
- 6.145 The AHA disagrees and submits that industry could set up a similar fund to the PPCA Performers' Trust Foundation which does not require PPCA to act as a central body for its administration.
- 6.146 While another central body could administer the scheme, the ACCC considers that without PPCA's collective licensing arrangements it would be unlikely that funds to the Performers' Trust Foundation would be maximised. The ACCC considers that the distribution of funds from PPCA's collective licensing arrangements to the Trust for the purposes described in paragraph 6.143 generates public benefit.

ACCC conclusion on public benefits

6.147 Overall the ACCC considers the collective licensing arrangements will generate public benefit. Specifically, the ACCC considers there is benefit generated through:

- cost savings in the form of administrative, monitoring and negotiations costs, generated from the collective licensing of public performance and transmission rights of sound recordings and music videos
- the collective blanket licence which facilitates compliance with copyright law and provides certainty to users regarding the repertoire they may publicly play or transmit
- collective administration of funds for the PPCA Performers' Trust Foundation and the use of that fund
- meeting consumer demand for a joint product and
- savings from transitioning to the counterfactual of exclusively direct negotiations.

Balance of public benefit and detriment

6.148 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, PPCA's collective licensing arrangements are likely to result in a public benefit that will outweigh any public detriment.

6.149 In the context of applying the net public benefit test, the Australian Competition Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁷²

6.150 As noted, the ACCC considers PPCA's collective licensing arrangements will generate public benefit. Specifically, the ACCC considers there is benefit generated through:

- cost savings in the form of administrative, monitoring and negotiations costs, generated from the collective licensing of public performance and transmission rights of sound recordings and music videos
- the collective blanket licence which facilitates compliance with copyright law and provides certainty to users regarding the repertoire they may publicly play or transmit
- collective administration of funds for the PPCA Performers' Trust Foundation and the use of that fund
- meeting consumer demand for a joint product and

⁷² Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22. The Tribunal made this comment in respect of the test in s 90(8) of the Act. The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

- savings from transitioning to the counterfactual of exclusively direct negotiations.
- 6.151 While PPCA's collective licensing arrangements are likely to result in a public benefit, the ACCC considers that PPCA's collective licensing arrangements allow owners of sound recordings and music videos to pool their rights to be supplied under a single blanket licence to users, thereby removing the competitive pressures that would exist if copyright owners competed individually to license their rights. The existence of PPCA's arrangements may act as a disincentive for record companies to directly deal with users. PPCA's collective licensing arrangements create the scope for PPCA to exercise market power in the setting of licence fees and conditions because parties wishing to use copyright have limited, if any, alternatives.
- 6.152 The ACCC notes that there are some factors which impact to some extent on PPCA's ability to exercise this market power including:
- the non-exclusive nature of the arrangements
 - the role of the Copyright Tribunal, and the ACCC's new role to become a party to proceedings at the Copyright Tribunal
 - the ability of the Copyright Tribunal to direct that a form of alternate dispute resolution process take place between PPCA and a licensee
 - the flexibility and availability of PPCA's collective licensing arrangements and
 - the statutory cap for the licence fee which broadcasters are required to pay for a licence.
- 6.153 Despite these features PPCA is still in a significant bargaining position in terms of licensing, particularly with regard to smaller copyright users. This is particularly a result of the complexity and costs involved in obtaining licences directly from copyright owners when compared to the costs of obtaining a blanket licence from PPCA.
- 6.154 The Act allows the ACCC to grant authorisation subject to conditions.⁷³
- 6.155 The ACCC considers the non-exclusive nature of PPCA's collective licensing arrangements provides a limited check on PPCA's ability to exercise its market power. The ACCC considers this check would be greater where record companies developed and published advice as to the circumstances in which they would consider direct licences and the process users should follow to seek such licences. Such transparency would encourage both licensors and users to enter direct licensing discussions in mutually beneficial circumstances.
- 6.156 The ACCC considers that an additional check on PPCA's market power would be to make alternative dispute resolution processes more accessible to both licensors and licensees. While the Board of Review is currently available for licensees the ACCC has not been provided with enough information to be able to assess its effectiveness. The ACCC notes that while mediation, neutral evaluation and conciliation are available

⁷³ Section 91(3).

upon application to the Copyright Tribunal to both licensees and licensors making them available as part of PPCA's Complaint Handling and Dispute Resolution Policy would increase the awareness and perhaps accessibility. The ACCC notes that as PPCA has advised that it already offers mediation to licensees upon request, and that PPCA would be required to enter into mediation, neutral evaluation and conciliation upon application to the Copyright Tribunal, it would not be onerous to require PPCA to amend its Policy to include provision for this.

- 6.157 The ACCC considers that PPCA is in a position to publish a list of those recordings which are protected under Australian copyright law and are therefore covered by PPCA's blanket licence. Requiring PPCA to publish such a list will provide information to users as to what sound recordings are covered by PPCA's blanket licence and will increase the transparency of PPCA's arrangements.
- 6.158 The ACCC notes that pursuant to a condition of the 1985 authorisation PPCA was required to give written notice of proposed fee increases or other material changes to licences and to provide an opportunity for discussion between PPCA and the relevant industry association (see paragraph 2.3). The ACCC notes it is PPCA's current practice to review tariffs for its public performance licences and to negotiate with the relevant industry, where possible, to seek a mutually satisfactory licence arrangement (see paragraph 3.33). The ACCC considers that PPCA's current tariff review process (including the requirements of the 1985 condition) provides an opportunity for licensees to have input into proposed changes to PPCA's tariffs for public performance licences and should continue in the future.
- 6.159 The ACCC notes the submission by Fitness Australia that a condition requiring PPCA to develop mandatory guidelines for conducting negotiations with licensees, especially in relation to changes to rates payable by licensees should be imposed. The ACCC notes that many licensees or users of sound recordings and music videos may not be experienced in conducting negotiations with an organisation such as PPCA in determining an appropriate licence fee. While noting that licensees may benefit from some guidance from PPCA on what is involved in conducting negotiations, the ACCC does not consider it necessary to impose this condition. Nonetheless, licensees would benefit from adequate notice such as that provided by the 1985 condition.
- 6.160 Overall, the ACCC is satisfied that the public benefits arising from PPCA's collective licensing arrangements will outweigh the public detriments, subject to the following conditions:
- PPCA amends its Complaints Handling and Dispute Resolution Policy to provide licensees or potential licensees with access to alternative dispute resolution processes, including mediation, neutral evaluation and conciliation. PPCA should amend its Complaints Handling and Dispute Resolution Policy within 6 months of the date of the final determination.
 - PPCA amends any related document (for example, licence agreements, information available on PPCA's website) to reflect that alternative dispute resolution processes, including mediation, neutral evaluation and conciliation, are available to licensees or potential licensees. PPCA should amend any related documents within 6 months of the date of the final determination.

- Each PPCA licensor develop and publish on their respective websites the circumstances in which they would consider entering into direct licences with the users of public performance and transmission rights of sound recordings including the process users should follow to seek such licences. This advice should be published within 6 months of the date of the final determination.
- PPCA gives written notice to licensees of proposed fee increases or other material changes to its public performance output licences. Such written notice must:
 - be provided three months prior to such changes being made and
 - provide an opportunity for discussion between PPCA and the licensees concerning the proposed change.
- PPCA is to publish and maintain an updated list of those sound recordings in its repertoire which are protected under Australian copyright law and therefore covered by the PPCA blanket licence. PPCA is to publish a list within 6 months of the Commission's final determination on its website.

6.161 The ACCC seeks comments on the precise terms of the proposed conditions.

6.162 The ACCC considers that these conditions will ensure that the public benefits generated by PPCA's collective licensing arrangements will outweigh the public detriments and accordingly the ACCC proposes to grant authorisation.

Length of authorisation

6.163 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

6.164 In this instance, PPCA seeks authorisation for its collective licensing arrangements for a period of 10 years.

6.165 CRA, Fitness Australia, ABC, FreeTV and the AHA all submitted that an authorisation period of 10 years is too long and suggested alternative time periods between 3 and 5 years.

6.166 FreeTV submits that authorisation should not be granted for a 10 year period due to the possible technological advancements and developments in new platforms for the delivery of content which may occur during the 10 year period. FreeTV submits that it is conceivable that within a short period of time, other methods of licensing may become available which may have an impact on the arrangements. As such, FreeTV submits authorisation should be granted for a 4 year period.

6.167 PPCA submits that technological advancements will not radically change licensing arrangements in the short term. PPCA further submits that the existing authorisations had been in place for over 20 years without giving rise to complaints about misuse of market power, with the exception for the complaint made by the AHA in 2006.

6.168 The ACCC considers that a limited period of time for authorisation of PPCA's arrangements will provide an additional check on PPCA's ability to exercise its market

power. As such, the ACCC proposes to grant authorisation to PPCA's collective licensing arrangements for a period of 5 years.

Similar contracts, arrangements or understandings

- 6.169 PPCA has sought authorisation to extend to contracts, arrangements or understandings in similar terms to the conduct proposed to be authorised.
- 6.170 The ACCC notes that PPCA has not provided any details of the nature of the similar contracts, arrangements or understandings. The ACCC notes that without further information from PPCA on the nature of the similar arrangements it is unable to grant authorisation to extend to such arrangements.

7. Draft determination

The application

- 7.1 On 3 April 2007 the Phonographic Performance Company of Australia Limited (PPCA) lodged an application for revocation of authorisations A30082, A30083, A30084, A30085, A30086 and A30087 and their substitution with authorisations A91041 and A91042.
- 7.2 The substitute authorisations sought by PPCA relate to its collective licensing arrangements for public performance and transmission rights of sound recordings and music videos. PPCA's collective licensing arrangements include input licences, output licences, licence out arrangements and distribution arrangements.
- 7.3 Authorisation was sought for the collective licensing arrangements under sections 88 and 91C of the *Trade Practices Act 1974* (the Act) to:
- make or give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act (A91041) and
 - make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, or substantially lessening competition within the meaning of section 45 of the Act (A91042).

The net public benefit test

- 7.4 For the reasons outlined in Chapter 6 of this draft determination, and subject to the conditions below the ACCC is satisfied the arrangements for which authorisation is sought under:
- A91041 are likely to result in such a benefit to the public that the arrangements should be allowed to take place and
 - A91042 are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
- 7.5 The ACCC therefore **proposes to grant** authorisation to applications A91041 and A91043 **on condition that:**
- PPCA amends its Complaints Handling and Dispute Resolution Policy to provide licensees or potential licensees with access to alternative dispute resolution processes, including mediation, neutral evaluation and conciliation. PPCA should amend its Complaints Handling and Dispute Resolution Policy within 6 months of the date of the final determination.
 - PPCA amends any related document (for example, licence agreements, information available on PPCA's website) to reflect that alternative dispute resolution

processes, including mediation, neutral evaluation and conciliation, are available to licensees or potential licensees. PPCA should amend any related documents within 6 months of the date of the final determination.

- Each PPCA licensor develop and publish on their respective websites the circumstances in which they would consider entering into direct licences with the users of public performance and transmission rights of sound recordings including the process users should follow to seek such licences. This advice should be published within 6 months of the date of the final determination.
- PPCA gives written notice to licensees of proposed fee increases or other material changes to its public performance output licences. Such written notice must:
 - be provided three months prior to such changes being made and
 - provide an opportunity for discussion between PPCA and the licensees concerning the proposed change.
- PPCA is to publish and maintain an updated list of those sound recordings in its repertoire which are protected under Australian copyright law and therefore covered by the PPCA blanket licence. PPCA is to publish a list within 6 months of the Commission's final determination on its website.

7.6 The ACCC seeks comments on the precise terms of the proposed conditions.

Conduct for which the ACCC proposes to grant authorisation

- 7.7 The ACCC proposes to grant authorisation to PPCA for its collective licensing arrangements for a period of 5 years.
- 7.8 The authorisation the ACCC proposes to grant under the Act will apply to all current and future parties who have entered into an input licence with PPCA (PPCA licensors).
- 7.9 Further, the proposed authorisation is in respect of PPCA's collective licensing arrangements as they stand at the time authorisation is granted. Any changes to the collective licensing arrangement would not be covered by the proposed authorisation.
- 7.10 This draft determination is made on 18 July 2007.

Further submissions

- 7.11 The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.