## APRA'S SUBMISSIONS IN RESPONSE TO DRAFT DETERMINATION DATED 8 FEBRUARY 2010

APRA welcomes the opportunity to comment on the ACCC's Draft Determination dated 8 February 2010.

### Overview

The ACCC has recommended the imposition of three conditions on APRA's continuing authorisation:

1. **APRA must offer new streamlined licence-back arrangements for Members in certain circumstances.**

   APRA believes that in relation to licences-back for certain types of use it will be able to streamline its processes. These submissions outline the factors that APRA considers relevant to determining those types of use and to streamlining its licence-back processes in those areas.

   APRA also provides confidential details regarding the licences-back that have occurred, in particular the licensing outcomes of certain licences-back, in order to address some of the concerns raised by the ACCC.

2. **That, as part of its dispute resolution process, APRA must require the independent expert to provide a written report to APRA stating whether APRA offered the user a genuine discount on the user's blanket licence to take into account any direct dealing between the user and the copyright owner; and whether any amendment could be made to the user's licence back (*sic*) so that the licence provides a genuine and workable alternative to the user relying on a blanket licence.**

   APRA has no objection in principle to the independent expert being required to provide this report, if the user has requested an alternative form of licence and there are direct dealings or the potential for direct dealings.

   In these submissions, APRA comments on the wording of this recommendation, and also provides further confidential information about its licensing activities in order to address some of the concerns raised by the ACCC.

3. **That APRA must provide the ACCC with annual reporting in relation to disputes notified to APRA under its alternative dispute resolution process.**

   APRA has no objection to this condition.

4. **Other issues**

   Length of authorisation

   APRA is disappointed that the ACCC has indicated an intention to make the authorisation for a period of three years only, in view of APRA's request for a six year term. APRA makes submissions in this document relating to this, and in particular submits that the authorisation should be no shorter than previously granted, namely, for a period of four years.

   ADR costs

APRA believes that where sophisticated users and disputes are involved, it is reasonable that licensees and APRA share the costs of expert determination, or at least that costs be a matter for the expert to determine. APRA's proposal is that the point at which licensees should share in the costs of expert determination is when annual licence fees would exceed $50,000. APRA notes that less than 1% of its licences (approximately 230 of 61,910 licences across APRA's three licensing departments) are of a value over $50,000. Further submissions regarding this are made below.

**Submissions**

1. APRA notes that it has not had the opportunity to respond to the two submissions referred to at paragraph 3.4 of the Draft Determination.

2. APRA wishes to address briefly the matters raised by the ACCC in its discussion of the counterfactual in the Draft Determination. The ACCC expresses the view that the most likely counterfactual is that APRA obtain its rights on a non-exclusive basis. In the present case, this view does not impact on APRA's authorisation, however there are a number of matters that need to be stated.

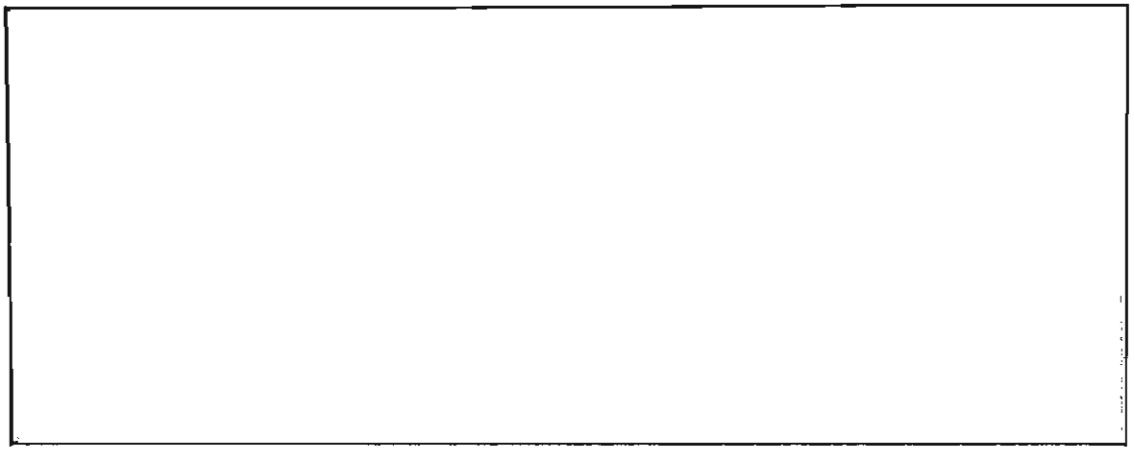
3. The ACCC's consideration of the obstacles to non-exclusive input arrangements seems, with respect, to be based on a number of misconceptions. The first is in relation to APRA's right to sue (Draft Determination 4.59 -4.68). APRA's understanding of the law is as follows. The rights comprised in the copyright in a work are set out in section 31 of the Copyright Act 1968. A statutory right of action is conferred on the copyright owner by section 115. The only exception to this is that an exclusive licensee may commence proceedings for interlocutory relief (section 119) but must join the owner in any proceedings for final relief (section 120).

4. APRA could be appointed as agent of the copyright owner to sue (Draft Determination 4.62). However, this would solve none of the issues raised by APRA involved with the expense of proving a chain of title that includes non-exclusive licences. Examples of the costs of such actions have previously been provided to the ACCC. APRA submits that the costs associated with litigation of this kind are far greater than appears to be conceded by the ACCC. These costs include the costs of locating the copyright owner and preparing affidavit evidence – APRA's writer members are often on tour and it can be difficult to arrange meetings with them for the length of time required for this process. APRA's publisher members would also need to be joined, and both publishers and writers would in the majority of cases wish to receive their own legal advice, possibly at APRA's cost. APRA would also need to negotiate indemnities with each member to be joined. APRA presumes that the ACCC is not suggesting at 4.61 and 4.62 of the Draft Determination that APRA would commence proceedings on behalf of members who had chosen to issue direct licences and whose rights subsequently had been infringed – APRA would find it difficult to justify spending other members' money on such actions.

5. Of perhaps greater concern would be the process by which APRA would alter its existing rights to be non-exclusive. *APRA's existing rights are those of ownership*. In respect of those rights, in millions of works, APRA would be required to terminate its existing agreements to have them replaced with non-exclusive licences. A major problem with this is that most of APRA's rights come from composers, many of whom have subsequently signed agreements with publishers that are subject only to the "prior rights of APRA". On termination, some of those rights will accordingly revert not to composers but to music publishers. The complexity of the system of rights ownership would mean that it would be very difficult and prohibitively expensive for composers to verify what rights they should receive from APRA. The process would involve close

examination and legal analysis of tens of thousands of contracts in respect of millions of works.

6. With reference to paragraph 4.66 of the Draft Determination, to the best of APRA's knowledge APRA has never joined copyright owners as parties to infringement actions. It certainly has not done so routinely. To do so would be to vastly increase APRA's costs and reduce its efficiency in that and other ways, and to potentially expose those copyright owners to boycott action by music users. Such copyright owners would also be exposed personally to liability for legal costs in the event of an unsuccessful action, a risk that is now accepted by APRA.

7. 


8. APRA notes the comments made by cinema operators, summarised in the Draft Determination at paragraphs 4.104 to 4.109. Attachment A CONFIDENTIAL to this submission comprises copies of correspondence with solicitors for the Cinema Operators, and a draft licence scheme offered to the Cinema Operators, in the course of the negotiations referred to in paragraph 4.109, showing that the Cinema Operators were offered a licence scheme that provided licence fees dependent on APRA music used. This offer was rejected in favour of the blanket licence scheme that will be in force until 2016.

9. With reference to paragraph 4.119, APRA does not accept all of the assertions made therein. Where music use is central to a licensee's business, APRA charges licences fees based on a percentage of revenue. This is clearly inappropriate in circumstances where music is not a product of the licensee's business.

**C1 – Licence-back modifications**

10. First, APRA is willing to modify the requirements for licence-back to the maximum extent possible consistent with the efficient operation of APRA's licensing, distribution and enforcement activities. APRA has no wish to constrain its members from entering into direct licensing arrangements with music users, and has never refused to grant a licence-back when one has been sought. Indeed, there have been occasions when APRA has suggested to members and users that a direct licence would be a more appropriate mechanism than an APRA blanket licence (for example, where a user is performing a single work only, as occurs in many contexts where users perform advertisements for their own products). APRA can provide confidential examples of such situations on request.

11. However, APRA does wish to explore the reasoning behind the ACCC's proposed imposition of C1.

12. APRA agrees that the licence-back mechanism is inextricably linked with APRA's licensing operations. APRA understands that there is little incentive for users to enter into direct deals if there is no commensurate reduction in the licence fee paid to APRA. APRA also believes that rational users will compare the price of APRA's blanket licence, which permits the performance or communication of all works in APRA's repertoire, with the price of a direct licence for limited works, and will enter into the licensing arrangements that best suit their needs. However, a point of fundamental importance is that the APRA blanket licence acts as a ceiling on any price that a copyright owner might otherwise negotiate, and so in direct dealings under licences-back copyright owners are not able to negotiate freely.

13. APRA already discounts from its blanket licences to take account of licences-back. In APRA's submissions in support of its application, it provided confidential summary information in relation to the licences-back granted at the request of members. However, this information did not set out the licensing implications of the members' actions. APRA believes that the modifications to a number of its blanket licences, as a result of members' licences-back, are already occurring with significant commercial impact.

14. **Licences-back for Live Tours:** APRA's licence-back arrangements are often utilised by members in the context of live tours where the touring artist is a singer/songwriter. APRA estimates that approximately 20% of all licences-back entered into fall within this category.

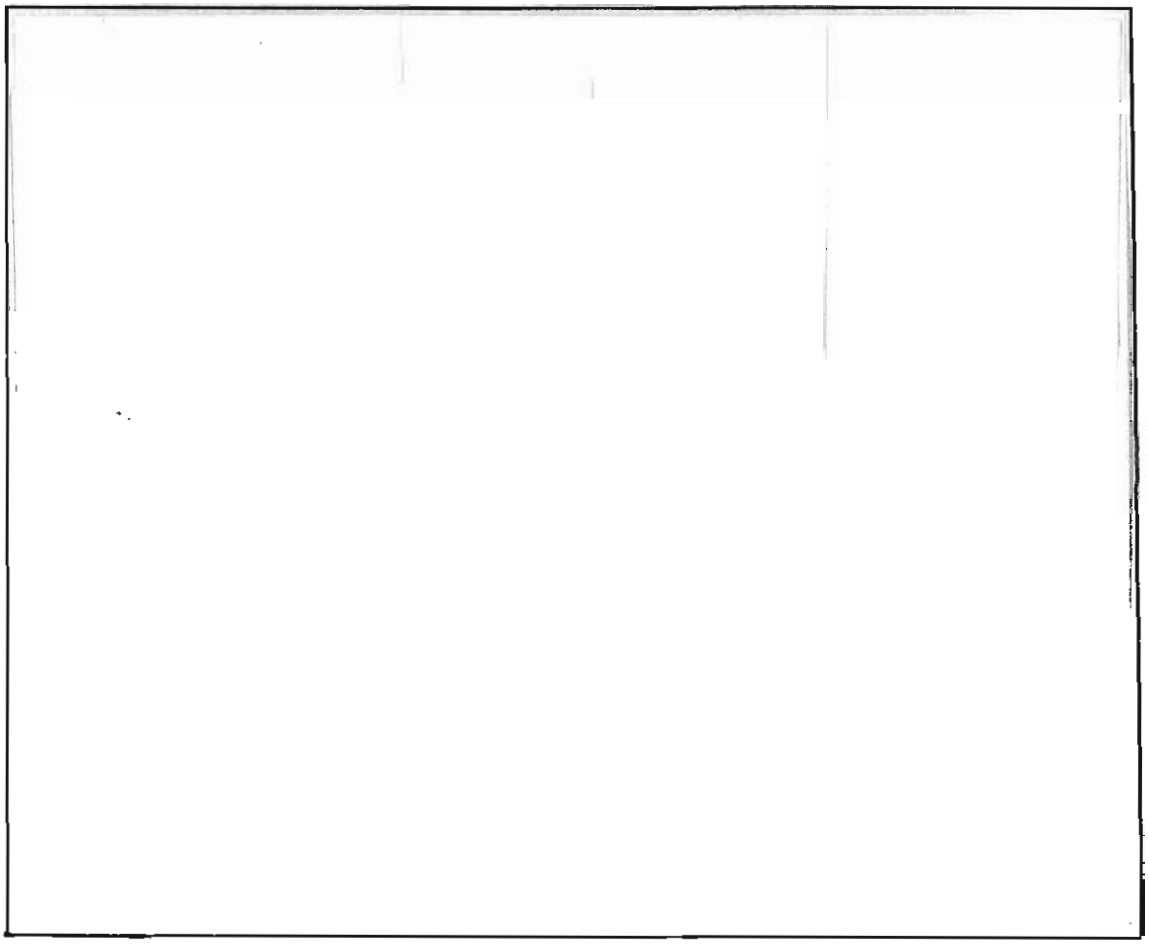
15. Live tours are typically licensed by APRA under its concert promoters' licence. Licence fees under the concert promoters' licence are calculated as a percentage of gross sums paid for admission to the concerts, multiplied by the "Music Use Percentage" (which is the duration of the works within APRA's repertoire performed at the concerts, divided by the duration of all musical works performed at the concerts, expressed as a percentage). Where APRA members license back their works for the purposes of a live tour, APRA treats these works as falling outside of APRA's repertoire for the purposes of calculating the Music Use Percentage, thereby effectively discounting the licence fees otherwise payable under the licence.

16. In order for APRA to take into account any licence-back when licensing concert promoters for live tours, in practice APRA only requires that members submit their licence-back application form one week prior to the tour, setting out the name of the tour and the performers, date and venue for each concert. However, consistent with the licensee's reporting obligations under the concert promoters' licence, APRA also requires that either the licensee or the member subsequently provide, within 30 days of the final concert of the tour, comprehensive reporting setting out all works performed at each concert and identifying the works the subject of the licence back. Without this information, APRA would be unable to calculate the Music Use Percentage under the licence and would therefore be unable to apply the correct discount to its licence fees.

17 [redacted]

18. **Licences-back for Events:** APRA's licence-back arrangements are commonly utilised where members wish to directly license the public performance of their works at individual events. APRA licenses individual events under different licences, depending on the type of event. APRA regularly licenses individual events under its Special Purpose Featured Music (**SPFM**) licence. APRA's fees under this licence are calculated as a percentage of gross sums paid for admission to the event, multiplied by the duration of music controlled by APRA, expressed as a percentage of the total duration of the event. APRA works the subject of a member's licence-back are treated as falling outside of APRA's repertoire for the purposes of calculating the licence fees, thereby effectively discounting the fees otherwise payable in respect of the event.

19. APRA does require reasonable prior notice of any licence-back for individual events so that it is aware of the direct licensing arrangement and can ascertain whether an APRA licence is also required for the event. In some circumstances, APRA has to negotiate with the licensee in advance in relation to how the licence-back will affect the APRA licence. In practice, APRA typically requires that members submit their licence-back application forms for individual events one month in advance of entering into any direct licence, however APRA acknowledges a shorter notice period may be workable. The information that APRA requires from members in licence-back applications for individual events is limited to the date the licence-back commences, the title of the relevant works if known, and the name, date and venue of the event. However, in accordance with its reporting obligations under its SPFM licence, APRA requires either the member or event organisers to provide it with a detailed running schedule of the event, including details and duration of all works performed, within 30 days after the event. Without this information APRA would be unable to calculate the discount to be applied as a result of the directly licensed works.

20. 

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21.

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22. [redacted]

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23. **Licences-back for Music on Hold:** APRA's licence-back arrangements are most commonly utilised by members who wish to directly license businesses in relation to their use of music on hold. APRA estimates that approximately 50% of all licences-back entered into fall within this category. It is APRA's experience that direct licensing is more prevalent in the music on hold market than other areas. Businesses are often happy to use a music on hold product that features a limited repertoire of works, rather than use (for example) radio broadcasts as their on hold music, which would require an APRA blanket licence.

24. For licence-back applications in respect of music on hold, APRA only requires reasonable prior notice of its members' direct licensing arrangements so that it does not itself attempt to license the business in respect of its use of music on hold. In practice, APRA typically requires that members submit their licence-back application forms for music on hold one month in advance of entering into any direct licence, however APRA acknowledges a shorter notice period may be workable. The information that APRA requires from its members submitting licence-back applications for music on hold is limited to the date the licence-back commences, the title of the relevant works, together with name and address of the business entering into the direct licence.

25. [redacted]

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**Proposed changes to licence-back**

26. As stated above, APRA is willing to make changes to its licence-back provisions in order to make the facility as accessible and member-friendly as possible. APRA does not consider the current form of the licence-back to present an obstacle to utilisation of

the facility, but accepts that some members may be intimidated by the details of the Constitutional provisions and the paperwork. APRA submits that there is no evidence of any body of complaint that suggests members have difficulty exercising their rights.

27. The changes made in 2008 were intended to reduce many of the technical requirements of APRA's licence-back procedure. Generally, APRA has not enforced the one month notice requirements, and in practice (as shown above), has required as little as one week's notice of the licence-back.

28. Essentially, the notice requirements for licences-back depend on the licence adjustments to be made for the user:

(a) for digital downloads and other transactional licences, no prior notice is required;

(b) if the user is already a party to a licence agreement with APRA that contains a provision for the adjustment of the licence fee for the use of non-APRA works (such as the commercial radio licence scheme, the concert promoters' licence, the special purpose featured music licence and certain other digital licences), minimal prior notice is required as long as the work has not yet been used (obviously, if the user has actually used the work in reliance on the APRA licence, it cannot expect to negotiate a direct licence after the event);

(c) if the user is a party to a blanket licence that does not provide for an adjustment, the user would be required to terminate or renegotiate its agreement with APRA. The length of time required for this would depend on the type of licence. If, for example, a pub that had previously been licensed under a live performances licence entered into a direct arrangement with a songwriter or group of songwriters, it would be straightforward for those writers to obtain a licence-back for all performances of their works (or specified works) at that pub. The owner of the pub would either terminate the APRA licence (and not perform any other works), or could maintain the licence and exclude revenue earned on the nights when those writers performed only their own works.

29. The essence of the requirement for notice in the licence-back provisions is that the user must obtain the copyright licence before the work is used. This is because, for certainty, all parties need to know the terms on which the work is used. APRA cannot be expected to go to the trouble and expense of licensing an event, for example, only to have the licensee enter into different arrangements after the event – even if that were legally possible, which APRA submits it is not. In addition, as stated above, in some circumstances it will be reasonable for APRA to formulate a different licence scheme rather than a simple pro rata adjustment to a blanket licence fee. This is because the costs of administering a licence on other than a whole of repertoire basis can be greater than those of the simple blanket licence.

30. In terms of the information that is required by APRA for a licence-back, APRA only requires sufficient information to ensure that it does not also license or attempt to license the use of the work. This will include the name of the work and the location and time of the performance. The more specific the direct licensing arrangement entered into by the APRA member, the more specific the information will need to be. The amount of information required by APRA is also a function of whether the proposed user has existing arrangements with APRA, and the nature of those arrangements.

31. For example, to refer to the ACCC's example at 4.218 of the draft determination, if a composer were to enter into a direct licence with a cinema in his or her home town for

performances of works contained in a particular film, the composer would need to notify APRA of the name of the film and the name of the cinema. The ACCC is mistaken in its understanding that cinemas provide APRA with cue sheets detailing music use in films. In fact, cinemas provide APRA with no information regarding films screened or music use in those films, although APRA is entitled to ask for details of which films have been screened. The cinema owner may require a licence from APRA if there are works in the film not written by that composer, or if other films are to be screened. The cinema licence requires APRA to negotiate reasonable terms if there is a material reduction in the works in APRA's repertoire used by the cinema. Obviously the costs of administering such a licence might mean that the appropriate licence fee is not a simple discount from the blanket licence fee otherwise charged, but these are terms that could be reasonably the subject of negotiation.

32. If a member wishes to grant a licence for a single work to be broadcast on a single episode of a television program, by the original broadcaster only, APRA will only require the details of the work and the episode and the broadcaster.

33. Attachment B to this submission comprises copies of APRA's existing licence-back application forms together with the relevant articles from APRA's Constitution. As previously indicated, APRA is willing to co-operate with the ACCC and make amendments to these documents in order to make the licence-back procedure as accessible and easy to use as possible while taking into account the considerations outlined at 28 to 30 above.

**Condition C2 – expert determination**

34. APRA has no objection in principle to a requirement that an expert determining disputes between APRA and licensees or potential licensees, include in his or her report a statement regarding alternative licensing models offered.

35. Because of increased administration costs, it will not always be the case that an alternative licensing model will be a simple discount from APRA's published blanket licence fee. However, APRA accepts that it must offer alternatives to the blanket licence where this is suitable for the user, and paragraphs 14 to 25 above set out how this already occurs.

36. However, APRA believes that the ACCC may be mistaken as to some of the elements of the existing APRA expert determination process, and as to the effect of APRA's proposed changes.

37. In particular, in response to paragraph 4.187, it is precisely because the ADR process has not been able to be developed that APRA is seeking the changes proposed.

38. The Competition Tribunal required the implementation of an expert determination process because of the perceived (and acknowledged by APRA) expenses and delays involved in Copyright Tribunal proceedings. The Copyright Tribunal is a forum that is most suited to the determination of disputes between large commercial interests, or of licence schemes that will affect a large number of licensees who may not be able to be represented in negotiations on an individual level.

39. From time to time, APRA does have disputes with licensees and people who APRA believes require licences. APRA always offers ADR to such people. Expert determinations are conducted in the user's home state, at APRA's cost. The principal cost of such determinations is the cost of the expert, as generally rooms are used for which no charge is made. Each party pays its own legal costs, if any.

40. In relation to the shortcomings of the ADR process identified by the ACCC, APRA says:

(a) APRA regards the lack of criteria as providing flexibility for the expert. For example, an expert recently determined that a potential licensee was required to enter into a licence agreement with APRA, but from a date later than the relevant use had occurred. That expert also made findings as to attendance figures at the premises, and night of operation. APRA notes that the Copyright Tribunal also has no criteria other than reasonableness in all the circumstances;

(b) it is incorrect to say, as in paragraph 4.173, that the expert determination facility is only available to potential licensees with the agreement of APRA. Rather, it is the potential licensee who has the right to elect to participate in expert determination. APRA regards itself as bound to offer the facility to any user with whom it has a dispute;

(c) it is APRA's experience that users with whom it has disputes are either in dispute with the need to obtain a licence, or with the terms of the licence offered. The latter category of user is far more likely to participate in ADR than the former. APRA cannot compel non-licensees to participate in ADR;

(d) APRA has also found that sophisticated licensees do not wish to participate in expert determination. In particular, APRA believes that this is because large corporations, especially multinationals, object to agreeing to be bound prior to the determination. It is APRA's commercial experience in negotiations with such companies, that they would prefer to use more conciliatory forms of ADR, in particular mediation, that give the parties an opportunity to reach a facilitated outcome that is mutually acceptable;

(e) however, where a dispute is about the terms of a published licence scheme, APRA does have some concerns with mediation as the ADR model. APRA cannot compromise of the substantive terms of its licence schemes where licensees are competing with each other. For that reason, expert determination is an important part of APRA's need to license under a transparent and publicly available process;

(f) it is APRA's understanding that the aims of the Competition Tribunal, as stated, were to provide smaller users with a cheaper and quicker means of resolving disputes with APRA than were available through the mechanism of the Copyright Tribunal. This objective has proved to be useful, but not in relation to larger users. It is for this reason that APRA has proposed that licences with a value or potential value of $50,000 should be able to be resolved by ADR methods other than expert determination (at the user's option) and that the costs of the expert or facilitator should be shared between the parties or divided at the facilitator's direction or by agreement. APRA believes that this is a far more commercially realistic approach to ADR in respect of disputes between large companies;

(g) APRA has selected $50,000 as the point at which the ADR method could become the subject of agreement between the parties, because very few licensees pay more than that amount to APRA. As stated above, fewer than 1% of APRA's licensees incur licence fees above $50,000 per annum. APRA is happy to identify in confidence those licensees who pay more than $50,000;

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(h) the costs of expert determination for the disputes that have been referred have been in the range $5,000 to $12,000. APRA believes that disputes are more likely to be resolved where all parties to the dispute have invested in the process.

(i) in response to paragraph 4.172, APRA notes that in practice it always seeks the approval of the other party to the dispute in relation to APRA's proposed choice of expert in any expert determination process; and

(j) APRA is also concerned that the requirement that the expert be a retired Federal Court Judge (which was a requirement proposed by APRA to the Competition Tribunal, on the basis of expertise, not a requirement imposed at the instigation of the Tribunal) is proving impossible to comply with.

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41. APRA requests the ACCC to reconsider its decision not to approve the changes proposed by APRA. APRA would be pleased to discuss a higher licence fee cut off for a more flexible, commercial approach to be permitted. APRA does not believe that this is inconsistent with the stated aims of the Competition Tribunal, since the ADR option, paid for by APRA, would remain in the case of the vast majority of users.

42. APRA submits that condition C2 should read:

That, as part of its alternative dispute resolution process ... APRA must require any independent expert appointed to determine a dispute to provide a written report to APRA stating as applicable:

- whether the user has sought an alternative to the blanket licence.
- if so, whether, in the expert's opinion, APRA offered the user (being a licensee or potential licensee) a licence that reflects a genuine and workable commercial alternative to the user's blanket licence to take into account the direct dealing between the user and a copyright owner. In expressing this opinion, the expert must

have regard to whether any increase in administrative costs, charges and expenses reflected in the licence offered are reasonable, having regard to the administrative costs to APRA of offering and providing the licence offered.

- whether any amendments could be made to the user's licence or a blanket licence offered so that the licence provides a genuine and workable alternative to the user relying on a blanket licence.

**Condition C3 – reporting**

43. APRA has no comment regarding proposed condition C3.

**Length of authorisation**

44. The ACCC has given no reason for the shortened period of the authorisation proposed to be granted. APRA submits that there is nothing that would suggest it inappropriate to grant an authorisation that is no shorter than the authorisations previously granted – four years.

45. In particular, the previous authorisations have noted the possibility of technological developments occurring within a four year period that might mean that the market for performing rights is significantly altered. There is nothing in the submissions before the Tribunal that suggests that is the case here. In particular, no changes have been foreshadowed in relation to the administrative processes which APRA needs to undertake in order to verify use of copyright in particular cases. In fact, technological developments seem to be such that there is an increasing use of vast numbers of works for small transaction prices, a type of use that is particularly suited to collective licensing.

46. The authorisation process is expensive and time consuming. In particular, it is very draining on internal management resources. In the absence of evidence of likely change (and noting in any event that the ACCC can revoke an authorisation if a material change in fact occurs), APRA submits the authorisation should be for a period of four years. APRA notes that a longer period is consistent with the majority of authorisations granted in the last 12 months.