Australian Competition & Consumer Commission

Determination

Application for revocation and substitution of authorisations A90918, A90919, A90921, A90922, A90924, A90925, A90944 & A90945

lodged by

Australasian Performing Right Association Ltd

in respect of

arrangements for the acquisition and licensing of performing rights in music

Date: **16 April 2010**

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Willett

Authorisation nos.:
A91187-A91194 and A91211

Public Register no.:C2009/1688

Summary

The ACCC grants conditional authorisation to the Australasian Performing Right Association Ltd's arrangements for the acquisition and licensing of performing rights in music until 31 October 2013.

The Australasian Performing Right Association Ltd (APRA) is a 'collecting society', providing a centralised means of:

- granting licences to those wishing to perform in public or communicate musical works and associated literary works and
- distributing royalties received pursuant to such licences to its members – composers/songwriters and music publishers.

APRA is the only collecting society in Australia for such musical-work performing rights.

Aspects of APRA's arrangements for the acquisition and licensing of performing rights in Australia were conditionally authorised by the Australian Competition Tribunal (the Competition Tribunal) in 2000.[1] In 2006 the ACCC re-authorised APRA's arrangements until 30 March 2010.

On 30 September 2009 APRA lodged with the ACCC an application for the revocation of authorisations A90918, A90919, A90921, A90922, A90924, A90925, A90944 and A90945 and their substitution with authorisations A91187 to A91194 and A91211. In broad terms, APRA has applied for re-authorisation for its:

- 'input' arrangements – the assignment of performing rights by members to APRA and the terms on which membership of APRA is granted (including APRA's opt out and licence back processes for APRA members dealing directly with music users)
- 'output' arrangements – the licensing arrangements between APRA and the users of musical works (including the 'blanket licence' – or traditional licence APRA offers, for the use of its entire repertoire – and APRA's 'expert-determination' process for disputes with music users)
- distribution arrangements – by which APRA distributes to relevant members the fees it has collected from licensees/users and
- 'overseas' arrangements – the reciprocal arrangements between APRA and overseas collecting societies pursuant to which each grants the other the right to license works in their repertoires.

The establishment and operation of a collecting society like APRA has the potential to raise a number of concerns under Australia's competition law. For example, composers, who might otherwise be competitors, might be agreeing between themselves and with and through a collecting society:

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[1] The Competition Tribunal granted interim authorisation to APRA's arrangements in 1999 and authorisation to its arrangements, as amended to meet conditions imposed by the Competition Tribunal, in 2000: *Re Australasian Performing Right Association Ltd* [1999] ACompT 3 (16 June 1999) and [2000] ACompT 2 (20 July 2000).

- to prevent, restrict or limit the supply and/or acquisition of goods and services
- licensing terms that have the effect of substantially lessening competition and/or
- the terms, including price, on which users will be afforded licences and who will and will not be afforded licences.

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.

The ACCC considers that, in general, APRA offers composers and music users significant benefits by helping users get licences to play music and ensuring songwriters are rewarded for their efforts through royalties.

The ACCC also considers that the arrangements are likely to continue to generate other significant public benefits – for example, the simplification of monitoring and enforcement for APRA under exclusive assignment and blanket licences and the transaction-cost savings and instantaneous access to a comprehensive repertoire afforded to users by blanket licences.

The particular arrangements for which APRA has sought re-authorisation include requirements for the exclusive assignment of works from composers, subject to its opt out and licence back processes, blanket licences for users and its alternative dispute resolution process – which provides for expert determination.

The licence back and dispute resolution procedures in particular were implemented as conditions of the authorisation of APRA's arrangements by the Competition Tribunal in 2000.[2] The Competition Tribunal recognised that APRA's monopoly position and aspects of its arrangements generated public detriments. The changes it made to APRA's system can be characterised as incremental steps – the Competition Tribunal itself described some of the changes as 'a cautious first step' – towards ameliorating these detriments, which were to be monitored for their effect.

The ACCC considers that APRA's arrangements continue to generate a significant level of public detriment compared with the likely alternative of a single collecting society with non-exclusive licensing from composers and different user-licensing arrangements. APRA is a monopoly whose rules generally restrict direct dealing between composers and users. The concentration of members' rights exclusively with APRA means that APRA is able to set prices for access to its repertoire without being subject to competitive constraints.

In its draft determination the ACCC concluded that there can and should be greater opportunity for more price competition between composers (or other rights holders) where it is practical and efficient. The ACCC considered that this has benefits for the parties involved and also provides an alternative to APRA which could constrain at least some of the anti-competitive effects of APRA's arrangements.

Overall, the ACCC considered that where competition can be injected into the acquisition and supply of performing rights at acceptable cost and in a way that does not jeopardise the other benefits or efficiencies produced by APRA's system then this should be promoted. The ACCC

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[2] *Re Australasian Performing Right Association Ltd* [1999] ACompT 3 (16 June 1999) and [2000] ACompT 2 (20 July 2000)

noted that such competition will increase the public benefits from the APRA arrangements whilst decreasing the public detriments.

To this end, the ACCC proposed a condition of authorisation that would have required APRA to introduce a more streamlined process for members wishing to license back works and on-license them directly to users. The ACCC considered that the information members were required to provide APRA in order to license back works was unnecessarily onerous and discouraged direct dealing between members and music users. The ACCC proposed a condition of authorisation such that the member would only be required to provide information that was reasonably needed by APRA in order for APRA to identify the relevant work as being subject to the licence back arrangement at the time of any performance.

In response to the draft determination APRA has amended its licence back provisions. These proposed changes address many of the concerns raised by the ACCC in its draft determination that led to the ACCC proposing to impose a condition of authorisation requiring that APRA offer new streamlined licence back arrangements, and accordingly, the ACCC no longer considers the imposition of such a condition to be necessary.

In the draft determination the ACCC also proposed two other conditions of authorisation. The ACCC now considers that it can be satisfied that, by imposing these conditions, the conduct and arrangements for which APRA has sought re-authorisation are likely to result in a public benefit and that public benefit will outweigh the likely public detriment. The ACCC therefore re-authorises APRA's arrangements until 31 October 2013, subject to two conditions.

Condition C1 – expert determination

There is little incentive for users to deal directly with members if APRA does not offer a genuine discount on blanket licences to reflect direct dealing.

One way to address this issue is to require any expert appointed in respect of a dispute, where the user has raised issues regarding their licence taking into account direct dealing, to express an opinion about direct-dealing and licence-scheme arrangements (without otherwise altering the alternative dispute resolution process).

The ACCC therefore re-authorises APRA's output arrangements subject to the following condition:

Condition C1 – That, as part of its alternative dispute resolution process (contained in Annexure B to the Competition Tribunal's 2000 decision on APRA's arrangements), APRA must require any independent expert appointed to determine a dispute to provide a written report to APRA stating:

1. Whether the user has requested that the expert consider whether APRA offered the user (being a licensee or potential licensee) a licence that takes into account any direct dealing or potential future direct dealing between the user and a copyright owner.

2. 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 past, or potential future 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 contained in the modified blanket licence are reasonable, having regard to the administrative costs to APRA of offering and providing to the user a modified blanket licence.

3. Whether any amendments could be made to the user's licence (or if the user is not a licensee, to the blanket licence offered) so that the licence provides a genuine and workable alternative to the user relying on a blanket licence.

For the purpose of providing his or her report under this condition, the expert may obtain such advice as the expert considers reasonably appropriate (including, but not limited to, economic or financial advice). The costs of any such advice are to be included in the costs of the expert in relation to the dispute.

Condition C2 – reporting to the ACCC

To enable an informed assessment to be undertaken of the effectiveness of the ADR system more generally, the ACCC re-authorises APRA's arrangements subject to the following condition:

Condition C2 – On an annual basis for the duration of this Authorisation, APRA must provide the ACCC with a report about disputes notified to APRA under its alternative dispute resolution process (contained in Annexure B to the Competition Tribunal's 2000 decision on APRA's arrangements) (the ADR Report) for the previous calendar year in accordance with this condition C2:

1. APRA must provide to the ACCC the first ADR Report on 1 May 2011. The first ADR Report will concern Disputes for the period commencing on the date this Authorisation becomes effective and ending on 31 March 2011. All subsequent ADR Reports must be submitted to the ACCC prior to 1 May of each year and will concern disputes for the 12 months ending 31 March of each year (Reporting Period).

2. Each ADR Report must include a description of each dispute including:

    (i) a description of the issue/s the subject of the dispute

    (ii) the outcome sought by the parties to the dispute

    (iii) whether the dispute has been resolved or not

    (iv) a copy of the expert's report to APRA under condition C1 where such a report was produced

    (v) the time taken to conduct the expert determination and

    (vi) the costs associated with conducting the expert determination and the apportionment of the costs to the parties to the dispute.

3. At the same time APRA provides each ADR Report to the ACCC, APRA must also provide the ACCC with a version of the ADR Report for publication on the public register of authorisations maintained in accordance with section 89 of the Act. This version of the report is to include a public description of each of the above points (i) through to (v).

The ACCC grants authorisation, subject to these conditions, until 31 October 2013.

If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 8 May 2010.

Contents

List of abbreviations

ADA	Australian Digital Alliance
ADR	Alternative Dispute Resolution
AIMIA	Australian Interactive Media Industry Association
ALCC	Australian Libraries Copyright Committee
APRA	Australasian Performing Right Association Ltd
Cinema Operators	Village Cinemas Australia Pty Ltd, Greater Union Organisation Pty Ltd, Reading Entertainment Australia Pty Ltd, Australian Multiplex Cinemas Pty Ltd, Hoyts Corporation Pty Ltd and Independent Cinemas Association of Australia.
CISAC	International Confederation of Societies of Authors and Composers
Competition Tribunal	Australian Competition Tribunal
Copyright Act	*Copyright Act 1968*
Copyright Tribunal	Copyright Tribunal of Australia
The Act	*Trade Practices Act 1974*

1. The application for authorisation

1.1 On 30 September 2009 the Australasian Performing Right Association Ltd (APRA) lodged an application for the revocation of authorisations A90918, A90919, A90921, A90922, A90924, A90925, A90944 and A90945 and their substitution with authorisations A91187 to A91194 and A91211 with the ACCC.

1.2 Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). 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. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of this application is contained in Attachment B.

1.3 The Applications were made under section 91C(1) of the Act. Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked (re-authorisation). In order for the ACCC to re-authorise, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.

1.4 APRA seeks authorisation for arrangements for the acquisition and licensing of performing rights in music. In broad terms, these arrangements cover APRA's:

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

1.5 APRA seeks authorisation for a further six years.[3]

1.6 APRA's arrangements are detailed in Chapter 2.

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[3] In response to the ACCC's draft determination proposing to grant conditional authorisation for three years, APRA submitted that authorisation should be granted for four years.

Draft determination

1.7 Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

1.8 On 8 February 2010 the ACCC issued a draft determination proposing to grant conditional authorisation to the proposed arrangements for three years. Broadly, these conditions proposed to require that APRA make processes to facilitate direct dealing between composers and music users less restrictive, that when a dispute is referred to APRA's alternative dispute resolution process that the expert considering the dispute have regard to alternatives to APRA's blanket licensing arrangements and that APRA provide annual reports about the use of its alternative dispute resolution process.

1.9 The conditions proposed by the ACCC and submissions received in response to the draft determination are discussed in the ACCC's assessment of APRA's arrangements in Chapter 4.

1.10 A conference was not requested in relation to the draft determination.

1.11 APRA also lodged amendments to its application for authorisation on 12 March 2010, 16 March 2010, 25 March 2010 and 31 March 2010. Specifically, APRA proposed changes to its licence back and alternative dispute resolution provisions and an increase in the threshold licence value above which it is proposing that the costs of its expert determination process be shared between it and the licensee or potential licensee.

1.12 The ACCC also sought comments from interested parties about these proposed changes.

1.13 APRA's arrangements, including the changes to the arrangements proposed by APRA, are outlined in detail in Chapter 2. The proposed changes, and submissions received from interested parties commenting on the proposed changes are discussed in the ACCC's assessment of APRA's arrangements in Chapter 4.

Interim authorisation

1.14 On 1 March 2010 APRA sought interim authorisation for the arrangements as the existing authorisations for these arrangements were due to expire on 30 March 2010. On 22 March 2010 the ACCC granted interim authorisation. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

1.15 In granting interim authorisation, the ACCC considered that granting interim authorisation would preserve the status quo, allowing APRA, its members and users to continue to engage in these arrangements while the ACCC finalised its consideration of the merits of the substantive application for revocation and substitution.

2. Background to the application

The applicant

2.1 APRA is a collecting society or collection society, established in Australia in 1926. It states that it now has more than 55,000 members. APRA's members – composers/songwriters and music publishers – hold certain copyrights in Australia, being the public performance and communication rights for musical works, which they assign to APRA.

2.2 In APRA's words, it provides a centralised means of

- granting licences to those wishing to perform in public or communicate musical works and associated literary works and
- distributing royalties received pursuant to such licences to composers, songwriters and music publishers.

2.3 APRA is the only collecting (or collection) society in Australia for musical-work performing rights.

2.4 Under the *Copyright Act 1968* (Cth), copyright licensing schemes are either 'statutory' – relating to, for example, the reproduction of printed material for educational institutions and institutions helping people with special needs – or otherwise are 'voluntary'. Certain societies are declared by the Australian Attorney General to be the collecting societies for statutory schemes. Musical performing rights are not the subject of a statutory licence scheme and for the purposes of the Copyright Act, APRA is a 'voluntary' collecting society.

2.5 The 'repertoire' APRA administers includes works by Australian composers and, through agreements with about 70 largely similar institutions overseas, works from overseas composers. APRA states that it has more than 5 million works in its database and that its repertoire includes the majority of commercially available works in the world.

2.6 APRA, a company limited by guarantee, reported 2008/09 operating income of $165.1 million and royalties paid and payable to members and affiliated overseas societies of $139.5 million. The company is tax exempt with respect to copyright income and non-copyright income up to certain limits. It states that its costs, as a percentage of revenue for the 2008-09 year, were about 13 per cent.

2.7 APRA presently administers about 57,000 annual licences resulting in the licensing of about 73,000 businesses.

Copyright

2.8 APRA deals in a particular form of intellectual property – copyright. Intellectual property can be bought and sold and is routinely used as an input for downstream business processes (such as in the case of rights for broadcasters to communicate music and for hospitality venues to perform it in public). As such the ultimate cost may or will

be borne by end consumers – for example, in APRA's case, customers of the 73,000 businesses APRA licenses where licence costs have been passed on to some degree.

2.9 Copyright is a proprietary right or bundle of rights in literary and musical works and related subject matter that protects the expression of ideas rather than the ideas themselves. Copyright laws, such as the Copyright Act, are designed to prevent the unauthorised use by others of a work and to reward the creators of works, thereby encouraging creativity and innovation.

2.10 Copyright is made up of a bundle of economic rights to do certain acts with an original work or other copyright subject matter. Under the Copyright Act, these rights, as they relate to musical works, include:

- rights to reproduce the work in a material form
- rights to publish the work
- rights to perform the work in public
- rights to communicate the work to the public
- rights to make an adaptation of the work
- mechanical right – the right to record a song on to, for example, a record, cassette or compact disc and
- synchronisation right – the right to use music on a soundtrack of a film or video.

2.11 The copyright in each type of work or other subject matter has independent existence – this means that in relation to, for example, a compact disc, there may be a separate copyright in the lyrics, the composition and arrangement of the music and in the CD itself.

2.12 Furthermore, it is not unusual for these different kinds of copyright to be owned by different people or entities. So, within the one composition, there might be, for example, the following copyright owners:

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

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

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

2.15 Some works are 'unprotected' – for example, under the Copyright Act copyrights expire after a certain time and then the work is considered to be 'in the public domain'.

Performing rights and APRA

2.16 APRA deals in particular in two distinct parts of the copyright bundle – the right to perform a work in public and the right to communicate a work to the public (with the latter including the right to broadcast a work, for example by radio or television, and to disseminate it online). APRA often refers to these two copyrights together as performing rights.

2.17 Public performance of a musical work includes, for example:

- sound broadcast of a work via radio or television (either as the featured item or when the work is embedded in a program or advertisement)
- performance as part of a film or live performance and
- causing works to be heard in public – for example in pubs, clubs, cafes, gymnasiums and general workplaces, either directly – for example, by playing a musical recording containing the work – or indirectly – for example, where works are embedded in television or radio broadcasts shown or heard in these establishments.

2.18 The major participants or potential participants in the musical performing-rights area include:

- composers – the author writers of musical works and of associated literary works
- owners – the persons who own the performing rights in relation to the musical and associated literary works. Under section 35 of the Copyright Act this includes composers and those who acquire rights from them (for example, music publishers – often linked to record companies – and other assignees, employers and successors in title)

- collecting societies – these represent composers and other owners and license performing rights, collect and distribute fees and take action to enforce rights and prevent infringement. As noted earlier, in Australia APRA is the only performing-rights collection society.

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

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

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

2.20 There are a number of other ways in which users could also obtain the right to perform music. For example, users could:

- take an assignment of the performing right or an exclusive licence from the copyright owner, say, before the copyright owner became a member of APRA

- after the owner has become an APRA member, that member could use APRA's opt out or licence back processes (as discussed below) to take back certain rights to his, her or its works and enter into direct arrangements with users – either in respect of all of his, her or its works for particular uses or in respect of individual works for particular licences

- employ composers to produce music for them. Such employers would become owners of the copyright.

International treaties and overseas collection societies

2.21 Australia is a party to a number of international copyright treaties and conventions including the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)

2.22 These conventions establish the principle of 'national treatment' whereby each convention member country will afford the same rights to the nationals of other convention countries as it provides to its own nationals under its own law. In Australia, the provisions of the Copyright Act extend to works of nationals, citizens and residents of other convention countries and to works made or first published in those countries.[4] This means that because Australia is a party to the international copyright conventions outlined above, original works created by Australian citizens or residents are also entitled to the protection given by the copyright laws of all countries which belong to these conventions and vice versa.

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

2.23 Further, any discrimination against the works of foreign nationals, where those works fall under the protection of the Berne Convention, would amount to violations of both the Berne Convention and the TRIPS Agreement.

The Copyright Tribunal

2.24 The Copyright Tribunal is a specialist administrative body established primarily for the purpose of dealing with disputes regarding statutory licences and certain non-statutory or 'voluntary' licences.

2.25 The Copyright Tribunal has the function of determining remuneration payable under the statutory licence schemes established by the Copyright Act and also those schemes falling within the terms of section 136 of the Copyright Act, where the scheme has been referred to it by a party.

2.26 The Australian Competition Tribunal (the Competition Tribunal), in its 1999 determination in respect of APRA's 1997 applications for authorisation noted that:

> Plainly, the legislative purpose of the Copyright Tribunal in Australia is to act as a curb on potential abuse of monopoly or near monopoly power gained by voluntary collecting societies by aggregating rights of individual copyright owners.[5]

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

- Where a licensor (for example, APRA) proposes to bring a licence scheme into operation, the licensor may refer the scheme to the Copyright Tribunal, which can make orders confirming or varying the scheme, or substituting for the scheme another scheme proposed by one of the parties, as it considers reasonable (s154).

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

- A licensee or potential licensee may apply to the Copyright Tribunal for a determination on reasonable charges and licence conditions. The Copyright Tribunal can then require any changes to the scheme it considers reasonable (s157).

2.28 Applications to the Copyright Tribunal often involve parties that are large institutional licensors of copyright material, principally collecting societies, and large institutional licensees, such as universities and broadcasters. Applications have generally concerned the confirmation or variation of a proposed or existing licence scheme and the review of a failure or refusal to grant a licence or the offer of a licence on terms or conditions that were alleged to be not reasonable in the circumstances.

2.29 In December 2006 the Copyright Act was amended to provide that the Copyright Tribunal:

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[5] *Re Australasian Performing Right Association Ltd* [1999] ACompT 3 (16 June 1999) para 62.

- May make the ACCC a party to the matter before the Copyright Tribunal if the ACCC asks to be made a party and the Copyright Tribunal is satisfied that it would be appropriate to do so.

- Must, if requested by a party to proceedings concerning voluntary licence schemes, consider relevant guidelines issued by the ACCC – the ACCC released draft guidelines in November 2006 but has stated it does not intend to release another version until it has reviewed the draft in light of its participation in proceedings.

- Refer contesting parties to an alternative dispute resolution process, to be conducted by a Copyright Tribunal member, the Registrar or an outside alternative dispute resolution specialist.

Code of Conduct for Copyright Collecting Societies

2.30 Following on from government reviews of the Australian copyright collecting societies, in July 2002 a voluntary *Code of Conduct for Australian Copyright Collecting Societies* (the Code) was introduced.[6] Under the Code, each society undertakes to treat licensees fairly, honestly, impartially and courteously and must

- ensure dealings with licensees are transparent

- make available to licensees and potential licensees information about licences and licence schemes

- consult with relevant trade associations regarding terms and conditions and

- charge licence fees that are fair and reasonable.

2.31 The Code establishes a process of public reporting, by requiring each society to publish a statement of code compliance in its annual report, and a process of independent review of code compliance. APRA is a signatory to the Code.

APRA's arrangements

Input arrangements – existing authorisations A90919, A90921, A90924 and A90925

2.32 APRA's 'input' arrangements involve such processes as the assignment of rights by APRA members and resignation by members.

2.33 In simple terms, APRA's domestic input arrangements involve the assignment to APRA by members of the performing rights[7] in any musical and associated literary works in which they own copyright and which are created during the continuance of the membership. APRA members broadly include composers, authors and publishers of

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[6] For more information on these reviews, see the ACCC's 8 March 2006 final determination on APRA's applications for revocation and substitution, paragraphs 2.19 to 2.35, available from **www.accc.gov.au/AuthorisationsRegister**

[7] 'Performing Right' does not include 'grand rights' - rights to such works as dramatico-musicals performed in their entirety, choral works written to exceed 20 minutes in duration, performed in their entirety, or music and words used in conjunction with a visual representation of a ballet.

copyright work or any executor, trustee, beneficiary or next of kin of a deceased composer or author.

2.34 APRA has specifically sought re-authorisation for its 'standard form of assignment' and aspects of its Constitution (particularly Articles 9 and 17) as agreements that might include exclusionary provisions or substantially lessen competition (and the ACCC has also considered them in light of the 'cartel-provision' prohibitions found in Part IV of the Act).

2.35 APRA's standard processes include standard pre-printed application forms whereby composers/other rights holders agree to, essentially, assign all current and future performing rights to APRA.

2.36 Article 9 provides that members may resign at six months' notice expiring on 30 June or 31 December or a shorter period accepted by the APRA Board.

2.37 Article 17 includes the stipulation that members will assign performing rights in all their current and future works and the details of the 'opt out' and 'licence back' processes.

2.38 The assignment made to APRA is qualified by a member's right to reserve or to later require APRA to reassign the performing and communication rights in respect of all, but only all, of the member's works in relation to a category of use to enable the member to grant a licence of the performing right. APRA calls this system 'opt out'. Members seeking to opt out in respect of a category of rights and use must give APRA at least three months' notice expiring on either a 30 June or 31 December.

2.39 A member can also require APRA to grant to the member a non-exclusive licence in relation to any of the member's works, so that the member can enter into direct licensing arrangements with particular copyright users. APRA calls this system 'licence back'. Under the licence back arrangements, APRA also retains the right to grant licences in respect of the work. At the time of lodging its application, members seeking to license back works had to provide APRA with at least one month's notice specifying details about the titles of the works, users the member intends to grant a sub-licence to and details of when and how the user will perform the works. In particular, the licence back provisions required members to provide details, as necessary, about dates and venues of proposed performances.

2.40 On 12 March 2010 and 16 March 2010 APRA amended its application for authorisation proposing changes to its licence back provisions. APRA now proposes that members will only be required, generally, to give two weeks notice when seeking to enter into a direct licensing arrangement with a user under the licence back provisions. With respect to live performance of a member's own works, performance by means of cinematograph films and all communications (that is, when works are made available online or transmitted electronically) APRA proposes to require only one week's notice.

2.41 APRA also proposes changes to its licence back provisions to provide further clarification that the details regarding the information its licence back rules require members to provide is not prescriptive. Rather, they represent the range of information that APRA could, depending on the circumstances, require, whereas in practice APRA will only require members to provide sufficient information to identify the works the

subject of the licence, the licensee and the scope of the licence as is reasonably necessary.

2.42 In addition to this general clarification, APRA also proposes specific changes to its licence back provisions to clarify some of the circumstances, particularly in relation to the communication of a work or performance in a cinema, in which the full range of information previously required would not need to be provided.

2.43 Composers can also effectively take back their rights from APRA by resigning their APRA membership.

2.44 APRA states that in November 2008 it

- 'simplified the existing opt out and licence back categories, including by reflecting more modern language and usage practices and shortening notice periods' and
- introduced a new category of licence back that enables members to license their works for on-line non-commercial purposes, at one week's notice.

Output arrangements – existing authorisations A90918 and A90922

2.45 APRA has sought re-authorisation for its licensing arrangements as agreements that might include exclusionary provisions or substantially lessen competition (and the ACCC has also considered them in light of the 'cartel-provision' prohibitions found in Part IV of the Act).

2.46 Pursuant to clause 3 of its Memorandum of Association, APRA's objects include

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

2.47 APRA's output arrangements, made under these powers, are briefly set out below.

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

2.49 APRA submits that its licence fees vary according to the licence scheme. The fee for live performances, for example, is based on a percentage of the gross annual expenditure by the licensee on performing artists and musicians. The fees under other schemes are based on such criteria as the number of persons gaining admission to

premises during a licence year or by reference to the equipment being used to effect performances.

2.50 A licensee or, with the consent of APRA, a potential licensee, may request that a licence agreement be referred for 'expert determination'. The arrangements for expert determination are essentially those imposed as a condition of authorisation by the Competition Tribunal in 2000.[8]

2.51 Under the expert determination process as it stood at the time that APRA lodged its application for re-authorisation, the terms and conditions of a licence, including fees, will be reviewed by a former judge with training in alternative dispute resolution. Parties dissatisfied with the expert's determination may seek review by the Copyright Tribunal or Federal Court (as appropriate). Under the Copyright Act, as discussed above, licence schemes may also be referred to the Copyright Tribunal.

2.52 Disputes are generally dealt with in the licensee's capital city and solicitors may be present if both parties agree. Licensees may also have representative bodies appear on their behalf. If several licensees have similar substantive issues, APRA may request that the disputes be determined together.

2.53 APRA offered in the Competition Tribunal hearing to bear the costs of the 'mediator' but contended that other administrative costs should be shared between the parties. The Competition Tribunal directed that this be so. APRA currently pays all costs of the expert. Costs of venue hire for the expert determination are shared equally and parties must pay their own costs associated with the determination.

2.54 According to APRA, four matters have been considered under the expert determination process. APRA states that in two instances the dispute was resolved satisfactorily through the process while two others resulted in Federal Court proceedings.

2.55 In its current application for revocation and substitution, APRA proposes changes to its dispute resolution processes.

2.56 In its initial application, APRA proposed that where a dispute is regarding a licence or proposed licence where the estimated annual licence fee proposed by APRA is over $50,000, then the costs of the expert shall be shared between the parties or as the expert directs. On 25 March 2010 APRA amended its application. APRA now proposes that these costs be shared where the estimated annual licence fee in question is over $100,000.

2.57 On 12 March 2010 APRA amended its application for authorisation proposing an additional change to the alternative dispute resolution process. Specifically, APRA now proposes that rather than members of its panel of independent experts being former Federal Court Judges, they be barristers with expertise in intellectual property matters. APRA proposes that licensees choose from a panel of three such experts and that if an expert can not be agreed upon that an expert with these qualifications be nominated by the Australian Commercial Disputes Centre.

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[8] *Re Australasian Performing Right Association Ltd* [1999] ACompT 3 para 318 and [2000] ACompT 2.

2.58 APRA's output arrangements also establish a process by which it responds to possible copyright infringements by users. This process may, in some circumstances, culminate in proceedings under the Copyright Act in the Federal Court.

Distribution rules – existing authorisation A90924

2.59 APRA has sought re-authorisation for its distribution arrangements, particularly Article 93 of its Constitution on the allocation of moneys, its Distribution Rules and the '50 per cent rule', because they are agreements that might include exclusionary provisions (and the ACCC has also considered them in light of the 'cartel-provision' prohibitions found in Part IV of the Act).

2.60 Article 93 of APRA's Articles of Association provides that APRA shall, after payment of all expenses incidental to its operations, allocate and distribute all moneys received by it through the licensing of rights and distributions from affiliate societies, together with any income earned through the investment of such funds, to members and affiliated societies in accordance with a method of entitlement as determined by the APRA Board. On the basis of this provision the APRA Board has determined and published distribution rules governing allocation of funds to members and affiliate societies.[9]

2.61 APRA's distribution rules provide that 'distributable revenue' is equal to its gross revenue less operating expenses and moneys applied by the APRA Board for the purpose of promoting the use and recognition of music written or controlled by APRA's members. APRA states that its costs as a percentage of revenue for the 2008/09 financial year were 12.84 per cent.

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

2.63 APRA's distribution pools cover the categories of:

- free-to-air television
- subscription television
- radio
- cinema

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[9] A copy of APRA's distribution rules is available from the ACCC's website at **www.accc.gov.au/AuthorisationsRegister** under the links to this matter.

- concerts and live performances
- dance clubs
- ringtones and digital downloads and
- online.

2.64 APRA distributes most royalties on a six-monthly basis.

2.65 APRA's distribution rules provide that it will endeavour as far as possible to comply with the resolutions of the International Confederation of Societies of Authors and Composers (CISAC), the worldwide peak body for collecting societies, related to principles governing the fair and equitable distribution of royalties.

2.66 APRA states that it is a basic principle of APRA's distribution arrangements that at least 50 per cent of any distribution must be paid to the relevant writer and that this is consistent with CISAC rules.

2.67 The Distribution Rules also provide for a process whereby members and affiliate societies may seek an adjustment to an erroneous distribution as well as for complaints-handling and dispute resolution processes.

Overseas arrangements - existing authorisations A90944 and A90945

2.68 APRA's 'overseas' arrangements are its arrangements with overseas collecting societies with which it is affiliated.

2.69 APRA has sought re-authorisation for its participation in its reciprocal agreements with overseas collecting societies because it considers that they are agreements that might include exclusionary provisions or substantially lessen competition (and the ACCC has also considered them in light of the 'cartel-provision' prohibitions found in Part IV of the Act).

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

2.71 CISAC, of which APRA is a member, has established an international licensing system under which each affiliate society will grant to each other affiliate society an exclusive right to license the works in its repertoire in the society's respective territory. An exception to this is in respect of the arrangements with the affiliated societies operating in the United States of America. In the 1930s the US government brought criminal charges in relation to the collecting societies under its *Sherman Act* 'anti-trust' regime but these were dropped in favour of a civil resolution worked out over many years. Under these 'consent decrees' brokered by the US Department of Justice, US societies take and so confer non-exclusive rights only.

2.72 APRA takes exclusive rights to all the works in the repertoires of affiliated societies and administers these in Australia (with, as noted above, the exception that works from the US are administered on a non-exclusive basis). Similarly, it grants to the overseas

societies exclusive rights to administer the musical works in APRA's repertoire in that overseas society's territory/country.

APRA and the Trade Practices Act

2.73 The establishment of a collecting society like APRA has the potential to raise a number of concerns under Australia's competition law, for example, composers, who might otherwise be competitors, might be agreeing between themselves and with and through their collecting society:

- to prevent, restrict or limit the supply and/or acquisition of goods and services
- licensing terms that have the effect of substantially lessening competition and/or
- the terms, including price, on which users will be afforded licences and who will and will not be afforded licences.

Previous matters considered by the ACCC

2.74 APRA's arrangements were first authorised by the Competition Tribunal in 2000. In 2006 the ACCC re-authorised APRA's arrangements for a further four years.

2.75 On 18 January 2010 APRA lodged a notification for exclusive dealing conduct with regard to APRA's assignment of rights (membership agreement) and Article 17 of APRA's Constitution. Specifically, the notification concerns conduct whereby APRA acquires rights in its members existing and future musical works subject to a condition that the member does not 'opt out' of the APRA system or 'licence back' any of their works unless they comply with certain conditions as summarised at paragraphs 2.37 and 2.38. The ACCC has decided to take no further action in respect of this notification.

3. Submissions received by the ACCC

3.1 The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

3.2 APRA provided a supporting submission and documents with its application for re-authorisation and responses to interested-party submissions made before and after the draft determination. Parts of APRA's submissions and responses and some of the documents it submitted were excluded from the ACCC's public register at APRA's request.

3.3 The ACCC sought submissions from about 100 parties potentially affected by the application, including Australian government departments and agencies, cinema and entertainment-venue operators, entertainment promoters, legal centres, media production companies and media/multimedia/telecommunications entities, record companies and music publishers, retailers, representative bodies for composers/writers, hospitality providers, performing artists, the recording industry, retailers, retail-centre operators, universities and website operators.

Submissions received before the draft determination

3.4 Before the draft determination the ACCC received public submissions from:

- Australian Copyright Council (ACC)
- Australian Digital Alliance and Australian Libraries Copyright Committee (ADA/ALCC)
- Australian Hotels Association (AHA)
- Australian Interactive Media Industry Association (AIMIA)
- Cinema Operators[10]
- Creative Commons Australia
- Fairfax Media Ltd and
- SBS.

3.5 The ACCC received two submissions before the draft determination that were excluded from the public register on request from the submission providers.

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[10] Joint submissions were provided by Village Cinemas Australia, Greater Union, Reading Entertainment Australia, Australian Multiplex Cinemas, the Hoyts Corporation and the Independent Cinemas Association of Australia, collectively referred to in this determination as the 'Cinema Operators.'

Submissions received after the draft determination

3.6 On 8 February 2010 the ACCC issued a draft determination in relation to the application for authorisation. The draft determination proposed to grant authorisation, subject to conditions, for three years.

3.7 A conference was not requested in relation to the draft determination.

3.8 After the draft determination, the ACCC received submissions from APRA and from:

- Association of Liquor Licensees Melbourne (ALLM)
- ADA/ALCC
- AHA
- AIMIA
- Cinema Operators
- Creative Commons Australia
- FreeTV Australia
- Mr Jamison Young
- one party whose submission was excluded from the public register at that party's request.

3.9 The views of APRA and interested parties are outlined in the ACCC's evaluation of the proposed arrangements in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) and by following the links to this matter.

4. ACCC Evaluation

4.1 The ACCC's evaluation of the conduct for which authorisation is sought is in accordance with tests found in:

- sections 90(5A) and 90(5B) of the Act, which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
    - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
    - that benefit, in the case of section 90(5A) 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 were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.
- sections 90(6) and (7) of the Act, which 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 in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
    - that benefit, in the case of section 90(6) 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 was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- section 90(8) of the Act, which 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.

4.2 For more information about the tests for authorisation and relevant provisions of the Act, please see Attachment C.

The market

4.3 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market or area of competition affected by that conduct.

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

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

4.6 Broadly, the ACCC adopts the view that the relevant area of competition is that for the acquisition and supply of performing rights in Australia. Falling within that area of competition are the arrangements for which APRA has sought re-authorisation including its input (rights acquisition by APRA) and output (rights supply by APRA) arrangements; and alternatives, particularly 'direct licensing' between composers/other rights holders and music users.

4.7 The ACCC notes that not all music users' characteristics – including needs, capacities and incentives or motivations – are the same and APRA's conduct and arrangements may impact on them positively or negatively in different ways. The ACCC considers that for individual users:

- music and the rights to perform it can be significant and well-defined inputs to their activities; or more incidental inputs to or features at their businesses and

- they may use a relatively small and well defined repertoire of music that is carefully selected, such as the sound track to a film or a limited set of performances for a specific event, or they may wish to access a wide and largely unpredictable repertoire such as that accessed by broadcasting a radio station in a café.

4.8 The ACCC notes that a number of users may engage in a mix of predictive and spontaneous behaviour and the size of the user's business will not necessarily indicate its predominate style or level of use. An example of a small, spontaneous user of music as an arguably incidental input might be a pub that plays a radio or television station 'in the background', where people on the premises might hear whatever work that station happens to be playing. An example of mixed use might be a cinema chain that can be aware of the works embedded in films being played but could conceivably want to play the radio in its foyer or café.

4.9 Some users may be more interested in and capable of pursuing 'source licensing' – getting rights directly from the composer or a very close agent/intermediary, such as a media agent or publishing company. The typical example given of source licensing is a media-content producer, such as a film production house, dealing directly with a composer for a film soundtrack.

4.10 In terms of APRA's user base, APRA states that it administers about 57,000 annual licences to cover about 73,000 businesses. According to APRA's 2008-09 Annual Report, the company received the following licence revenues:

Broadcasting and television	$78.7 million
General and 'mechanical'	$41.9 million
Distributions received from affiliated (overseas) societies	$20.5 million[11]

4.11 The ACCC notes that APRA's user base features a relatively small number of highly 'visible' media enterprises paying large fees each and in total and a very large number of smaller users – with the typical example of cafes – each paying considerably less per licence.

4.12 APRA price discriminates between classes of users according to willingness to pay.

4.13 As APRA states, the fee licensees pay varies according to the licence scheme – for example, the fee for live performance is based on a percentage of the licensee's gross annual spending on performing artists and musicians, while the fees under other schemes are based on such criteria as the number of people admitted to a venue or by reference to the sound systems used.

The counterfactual

4.14 The ACCC applies the 'future with-and-without test' established by the Competition Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.[12]

4.15 Under this test, the ACCC compares the public benefit and detriment generated by arrangements in the future if the conduct the subject of the authorisation application occurs with those benefits and detriments generated if the conduct the subject of the authorisation does not occur. 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'.

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

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

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[11] The ACCC notes that APRA administers the Australasian Mechanical Copyright Owners Society Limited and its 'mechanical rights', which are counted in the above figures, and that about 14 per cent of the above figures represents APRA's New Zealand operations.

[12] Re *Australasian Performing Right Association Ltd* [1999] ACompT 3; (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.

4.17 Given APRA has operated more or less as the sole administrator of performing rights within Australia for several decades and the complexities involved in such administration, whether through APRA or by other means, forecasting how the relevant markets might otherwise operate is difficult. Indeed, it is unlikely that any single set of arrangements, particularly one that did not raise concerns under the Act, could or would be developed to administer all performing rights in Australia. Indeed, in some instances, some performing rights might not be effectively managed at all.

4.18 The ACCC considers that the most likely counterfactual for the near to medium term is that there would still be one major collecting society but that it would obtain rights from composers or other rights holders on a non-exclusive basis, instead of the exclusive basis on which APRA obtains them now. That is, the original rights holder would retain the capacity to deal with his, her or its property. Another feature of the counterfactual circumstance would be changed scope for competition and, for example, for 'source licensing'.

4.19 This is not to say that the ACCC considers this scenario is or is not the 'best' or only medium or longer term future for this area of activity. The ACCC also notes that ever-evolving information and communications technology continues to offer the opportunity to decrease transaction costs and such innovation is likely to drive or at least feature in future outcomes. The ACCC considers such innovation should be encouraged and not hampered.

4.20 APRA stands in the place or stead of direct dealing between composers/other rights holders and users but the ACCC considers that the counterfactual for the near to medium term future is not likely to see widespread self-administration by composers and direct dealing between composers and users. The reasons for this include the high costs of licensing, monitoring and/or enforcement for individual composers – for example, compared with the APRA fee per user at issue in many cases – and the fact that many users have unpredictable requirements.

4.21 Nor is the counterfactual likely to be multiple collecting societies. The ACCC assesses that competition within Australia to APRA from another similar collecting society or other collecting societies is unlikely in the near to medium term. The ACCC notes that APRA's operations involve some sunk costs in specialised know-how and, for instance, monitoring and enforcement systems; and they feature economies of scale and scope and network economies or effects. Furthermore, once an incumbent collecting society has a dominant market share, it will be difficult to entice composers and other rights holders or users to use a new entrant.

4.22 The ACCC notes that most countries around the world have only one major collection society for each particular copyright. The ACCC notes the example of Canada, where there were once two collecting societies but they merged. The notable exception is the United States of America, which has three.

4.23 The ACCC notes that the collecting society in Australia for rights related to sound recordings, Phonographic Performance Company of Australia Ltd, and the US's three music-rights collecting societies take non-exclusive rights from their members. The ACCC further notes that for a very significant body of works sought by Australian users – those from the US – APRA now does and can only offer non-exclusive rights in Australia. The ACCC lastly notes that under what is sometime known as the *Alden-Rochelle* and related anti-trust arrangements in the US, source licensing – that is,

producers licensing works directly from composers or their close agents – in the US film production industry is the norm.[13]

Public benefit

4.24 Public benefit is not defined in the Act. However, the 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.[14]

4.25 The ACCC's analysis proceeds on the basis that APRA has sought re-authorisation for particular aspects of its arrangements and conduct and it is these – within the context of APRA's overall system – that must be closely analysed for their likely benefits (and any limitations on those benefits) in comparison with the alternative of the counterfactual.

General benefits of intermediaries – collecting societies, other 'clearing houses' and agents

4.26 Many of APRA's submissions relate to claimed benefits of, for example, its general existence, including as a sole collecting society, in comparison with a situation of more than one collecting society or no intermediaries at all. However, as noted above, the ACCC considers that the most likely counterfactual in the near to medium term is that there would still be one major collecting society but that it would obtain rights from composers or other rights holders on a non-exclusive basis; and that a feature of this counterfactual situation would be changed scope for competition and, for example, for source licensing.

4.27 The APRA system replaces direct dealing and the individual licensing and enforcement of performing rights by composers/other rights holders with monopoly licensing. While the ACCC is not aware of any attempts to quantify their size, the ACCC considers that there are clearly efficiency benefits arising from the APRA system, including savings in 'search' costs (for example, choosing works and bringing buyer and seller together), transaction costs and enforcement costs.

4.28 As stated above, the alternative near to medium term future is not likely to be very widespread self-administration by composers and direct dealing between composers and users, for reasons including the high costs of licensing, monitoring and/or enforcement for individual composers – for example, compared with the fee per user at issue in many cases – and the fact that many users have unpredictable requirements.

4.29 Collecting societies act as clearing houses, such that composers do not need to separately locate the often numerous users and potential users of their works and users do not have to separately locate the often numerous sources of musical works to which they seek access. Multiple transactions are reduced to a relatively small number, with each composer and user dealing only with APRA.

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[13] For a discussion of source licensing in the US, see Besen, 'Regulating Intellectual Property Monopolies', (2008) 16 CCLJ 184

[14] *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.

4.30 As stated above, the ACCC notes that APRA's operations feature economies of scale and scope. Given the large number of small and widely dispersed users of any individual work, the cost of monitoring use and enforcing rights for the individual composer would often be prohibitive, which could in turn result in free riding and reduced returns to composers, perhaps diminishing the incentives for creative activity. Economies of scope can be achieved by APRA simultaneously monitoring for the use of and enforcing the rights to its entire repertoire of musical works.

APRA's submissions

4.31 Submissions from APRA of particular relevance to the counterfactual the ACCC has adopted follow.

Acquisition and supply of rights

4.32 APRA submits that exclusive assignment and blanket licences produce benefits for both composers and users in the areas of protection, enforcement and infringement.

4.33 APRA submits its input arrangements confer on it the ability to protect, monitor and enforce each member's rights in the most efficient fashion.

4.34 As explained in Chapter 2, on taking APRA membership, composers assign performing rights to all their current and future works – giving APRA exclusive rights.

4.35 APRA submits that if it held rights only non-exclusively, the cost of infringement would escalate to a prohibitive level, including because of the degree of difficulty in obtaining all necessary documents to prove the chain of title. APRA states that the Copyright Act provides that a person must be the owner or exclusive licensee of the copyright in a work to commence proceedings for infringement. APRA submits that if APRA's rights were non-exclusive, APRA would not be able to commence proceedings and composers and publishers would be required to prosecute all infringements.

4.36 Similarly, APRA submits that in an environment where it held non-exclusive licences, infringers would be encouraged to test the limits of APRA's control, including encouraging music users to fight infringement proceedings and to refuse to take licences at all because:

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

4.37 APRA states that under the blanket licences it grants, licensees can be guaranteed that, no matter what music they perform or communicate, they will not be infringing copyright. APRA contends that if there were significant 'gaps' in its repertoire, it would be required to publish a list of works in its repertoire and know those that were not in its repertoire.

4.38 APRA submits that blanket licences allow users, the overwhelming majority of whom are unaware in advance of what works will be performed, complete freedom to perform any music whatsoever in the world's repertoire of work. APRA states that if users were able to accurately inform it in advance what works would be performed, APRA would be able to grant a licence for those works only. However, the majority of users cannot do so.

4.39 APRA further submits that, even if users could inform it in advance of the works that would be performed, the costs of transactional licensing would be significant.

4.40 APRA submits that music users, particularly those unable to predict in advance exactly which works will be played, would be forced to either obtain licences from all possible sources or invest enormous resources in determining which works they could and couldn't play. Alternatively, users may choose to ignore the provisions of the Copyright Act because of the complexity of compliance and low risk of detection, with associated public detriment.

4.41 APRA submits that it has shown a willingness to enter into blanket licences that provide for a discount on the licence fee if the user licenses performing rights in some works in APRA's repertoire directly.

4.42 APRA gives the examples of its commercial-radio licence scheme having different rates depending on the percentage of airtime occupied by APRA music; and of a form of modified blanket licence it has concluded in the digital-download industry. APRA states that this is based on transactions by the licensee rather than a percentage of revenue.

4.43 APRA states that for these agreements with certain mobile-phone ringtone and digital-download providers, 'as the nature of these digital services is highly analogous in its structure with traditional record sales, the tariff is transactional'. APRA states that the licence fee is assessed on a work-by-work basis – for example, no licence fee would be applied to the sale of public domain works or non-music (for instance, comedy tracks) or to the sale of APRA works where a member has either obtained a licence back or opted out.

4.44 APRA states that:

> Importantly, this transactional tariff structure is only possible because licensees report sales on a work-by-work basis. Without this level of reporting, APRA would be unable to offer a transactional tariff structure of this nature…
>
> The [ringtone and digital-download] examples demonstrate the ability of APRA's existing arrangements to accommodate blanket licences (which are required by users) which provide for a discount on the licence fees in the event that a user licenses performing rights for some of the works in APRA's repertoire directly. This is particularly so in the digital download and ringtone markets, where timely and sufficient reporting is usually available from licensees.
>
> APRA remains willing to discuss the introduction of similar discounted blanket licence arrangements in other music markets, provided satisfactory reporting can be given.

Bargaining power

4.45 APRA submits that composers appreciate being able to resist the bargaining pressure from producers and others who wish to acquire their rights directly for a lump sum, by

knowing that the performing right is no longer theirs to assign. APRA argues that in this way they can ensure that they can participate in the success of their work when otherwise they are likely to have received only a lump sum payment that is not calculated according to the value of the work in terms of public performances. APRA argues that redressing this imbalance is a public benefit.

Distribution arrangements – the '50 per cent rule'

4.46 APRA's distribution arrangements include a '50 per cent rule' under which, APRA states, it ensures that composers obtain at least 50 per cent of the licence fee generated from the licensing of performing rights. APRA states that CISAC rules require that all member societies comply with this rule.

4.47 APRA states that under a non-exclusive licensing regime, persons who take assignments of performing rights from an Australian composer and who do not wish to allow the composer to obtain at least 50 per cent of the licence fees generated from the licensing of performing rights will not be accepted as a member of APRA or any other collecting society operating under CISAC rules. As a result, unless that assignee can monitor performances, grant licences and recover licence fees, it is most unlikely that any performing rights fees will be collected. APRA submits that particularly in relation to overseas performances, overseas societies will not accept that person's membership and as a result, whatever earnings that may have been generated will not be returned to Australia.

Overseas arrangements

4.48 APRA notes that through its overseas arrangements it can collect and distribute income in relation to the performance of works by Australian composers throughout the world and distribute money to overseas societies for local performance of foreign works.

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

Submissions from other interested parties

4.50 No party opposed re-authorisation outright. Concerns expressed with APRA's arrangements are discussed in the Public Detriments section of this draft determination.

4.51 The Australian Copyright Council supported the application, submitting that 'the relative ease with which an APRA licence can be obtained encourages authorised use of music', that it was its experience that it is good for a composer to be an APRA member before entering a contract with a publishing business or for commissioned work and that, according to the 2008 review of APRA's complaint handling under the Code of Collecting Societies, APRA had handled disputes well.

ACCC view

4.52 The ACCC considers that APRA offers composers and music users significant benefits in terms of helping users get licences to play music and ensuring songwriters are rewarded for their efforts through royalties.

4.53 The ACCC considers that aspects of exclusivity, blanket licences and some other characteristics of APRA's current conduct and arrangements do produce public benefits compared with the alternative of the counterfactual. As discussed below, the ACCC considers that in some cases the balance of costs and benefits might differ as between different user groups.

Acquisition and supply of rights – blanket licence

4.54 Blanket licences provide transaction-cost savings as licensees need only enter into a single transaction with APRA for all their needs. Many users do not know in advance which musical works they will be performing and may not even have control over these (for example, where a radio station is played on the premises or a broadcaster or live performer takes 'requests'). The key product feature which they require is immediate access to a comprehensive repertoire of musical works.

4.55 By virtue of APRA's grant of blanket licences, users can be certain that they are licensed in respect of virtually the entire worldwide repertoire of musical works. This has benefits for users in that they do not have to check whether more than one licence is required, decide whether to obtain an additional licence, or risk not having a licence. This freedom to be able to, once a licence is obtained, use virtually the entire worldwide repertoire of musical works is, in itself, of significant benefit to users. In addition, it reduces the transaction costs that would otherwise be associated with negotiating licences directly. Further, making licences available in such a way that encourages users to meet their legal obligation also minimises breach of copyright and encourages efficient resource allocation.

4.56 The ACCC considers that aspects of APRA's arrangements generate public benefits by providing a valued product to users and by containing monitoring and enforcement costs and ensuring artists are remunerated for use of their works.

4.57 The ACCC notes that blanket licences offer more benefits to some users than others, depending on the user's requirements.

Acquisition and supply of rights – exclusivity

4.58 The ACCC considers that the exclusive assignment of all performing rights to APRA – opt outs and licence backs aside – and the mechanism of the blanket licence do enable APRA to assume that anyone performing musical works requires a licence from it, lessening to some degree the cost of establishing a breach of rights. APRA can focus its enforcement efforts on establishing whether users are licensed or not, rather than having to establish whether licences have been obtained for the particular works being performed and from whom.

4.59 The ACCC stated in the draft determination that it was not satisfied that APRA, as it claimed, could not take copyright infringement action if it was not the exclusive owner of the relevant copyrights. Section 115 of the Copyright Act provides that the 'owner' of a copyright may bring an action for an infringement of the copyright.

4.60 The ACCC stated that there was nothing stopping APRA, in licensing discussions with its member artists, appropriately wording a licence so as to, for example, gain exclusivity over rights of action and non-exclusivity over all other parts of the copyright work. Additionally, there may be other means by which APRA could provide assistance to its members if they are required to take copyright infringement action personally. This could include the provision of legal representation and funding of any enforcement action such as occurs in other areas, for example personal injury law.

4.61 The ACCC stated that it considered that APRA has many acceptable and reasonable administrative options open to it to obtain authority from as many members as is necessary to take action on their behalf, most likely through simple standard forms at the time that composers apply for membership.

4.62 The ACCC noted that APRA already appeared familiar with such administrative options for gaining authorities and consents, as clause 2 (Grant of Authority Pending Election as Member) of APRA's current standard membership-application form for writer members, subclause 5, provides:

> For the purpose of collecting and recovering fees or if there is any unauthorised exercise of any of the Performing Rights in the Works, I authorise APRA to commence such proceedings in my name as it may decide including recovery of fees or damages and injunctions to restrain unauthorised performance.

4.63 The ACCC accepted that the costs of actions might be increased to some degree if members' rights were not assigned exclusively to APRA. In addition, proving the chain of a title may be more difficult and APRA would need to establish that no other licence has been granted to the alleged infringer.

4.64 The ACCC further stated that, to the extent that the alternative of non-exclusive licensing can allow uncertainty over exact ownership, however temporary, the ACCC accepts that some users, probably minor ones, may take advantage of such uncertainty to avoid paying licence fees if APRA was only granted licences on a non-exclusive basis. However, the ACCC considered it unlikely that the most high-profile and easily monitored users – who also pay the highest fees to APRA – would risk infringement by taking advantage of the ambiguity created by non-exclusive licensing.

4.65 In response to the draft determination, APRA submitted that while the ACCC's adoption of the counterfactual of non-exclusive input arrangements did not impact on the re-authorisation of its arrangements, the ACCC's consideration of the obstacles to non-exclusive arrangements were based on misconceptions. APRA stated that, to sue, it could be appointed as an agent of the copyright owner but this would solve none of the issues APRA had raised about the expense of proving a chain of title that includes non-exclusive licences.

4.66 APRA submitted that the costs associated with litigation of this kind were far greater than the ACCC appeared to concede. These include the cost of locating the copyright owner and preparing affidavit evidence, with APRA members often being on tour. APRA stated that publisher members would also need to be joined; writers and publishers would want their own legal advice, possibly at APRA's cost; and APRA would need to negotiate indemnities with each member to be joined.

4.67 The ACCC notes APRA's further submissions and acknowledges the challenges non-exclusive licensing might present. However, for the reasons discussed above, the

ACCC remains of the view that if rights held by APRA were non-exclusive, the increase in the cost of detection and enforcement would not be unreasonable.

Developments in APRA's arrangements regarding blanket licences and exclusivity

4.68 The ACCC notes that in its 2006 final determination in these matters it stated that it was 'encouraged by APRA's stated preparedness, in response to the draft determination, to actively explore alternatives to blanket licences with interested music users'. The ACCC welcomes the fact that APRA was able to reach agreement on a form of modified licence with certain digital download and ringtone providers. In response to the draft determination, APRA also provided details of other examples where discounts on licences have been negotiated to reflect direct dealing between the user and APRA members. For example, in relation to events where fees payable by the event promoter to APRA take account of direct deals done with the promoter under licence back provisions by any artist appearing at the event. However, more generally it appears to the ACCC that progress in this area has at best been very limited.

4.69 The ACCC welcomes APRA's statement that it remains willing to discuss the introduction of similar discounted blanket licence arrangements in other music markets.

Bargaining power

4.70 The bargaining power issue raised by APRA relates to the bargaining power of composers in negotiating with both acquirers of the rights and users who seek a licence to use their works.

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

- differences in comparative negotiating skills and expertise and resources able to be committed to the negotiating process between many composers and larger users
- the difficulty for individual music creators in enforcing their copyright rights in the event that a licensing arrangement can not be negotiated and
- the fact that composers are likely to have to deal with large, well-resourced users in many cases as these users are a significant source of potential business.

4.72 The consequence of such a bargaining-power imbalance is generally the negotiation of arrangements to the commercial advantage of the party in the stronger bargaining position.

4.73 However, in this instance, as discussed in detail in the ACCC's consideration of the public detriments resulting from APRA's arrangements, the ACCC considers that APRA's arrangements confer on it a virtual monopoly in respect of performing rights in Australia. While constrained to an extent by the Copyright Tribunal, APRA is able to exploit this monopoly to generate significant public detriment. In short, APRA's arrangements confer on its members a degree of bargaining power that goes far beyond that which would be necessary to redress any imbalances in bargaining power between individual members and users.

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

Distribution arrangements and the '50 per cent rule'

4.75 APRA argues that under a non-exclusive licence regime a party other than APRA that has been assigned performing rights by a composer to administer on his or her behalf but then did not comply with the 50 per cent rule would not be able to rely on APRA or international collection societies to monitor performances, grant licences and recover licence fees on his, her or its behalf.

4.76 For this very reason, the ACCC considers it very unlikely that any such assignee would not comply with the 50 per cent rule. In doing so, the assignee could in effect be forgoing all potential international earnings in respect of broadcasting and performance of the relevant works, except in the highly unlikely instances where the assignee was able to negotiate licences and enforce these rights directly.

Overseas arrangements

4.77 The ACCC considers that it is a public benefit that there are long-standing and apparently stable and orderly arrangements for an aspect of Australia's trade in intellectual property (in this case Australia being a net importer of copyrights, with a net outflow of licence fees). These arrangements give Australian parties an easier option than seeking to go directly to overseas users or societies.

4.78 To the extent that some of the overseas rights are administered exclusively, the public benefits flowing from this exclusivity in enforcement activities are discussed in paragraphs 4.58 to 4.67. The ACCC has discussed in these same paragraphs exclusive versus non-exclusive assignment and repertoire. The ACCC does not accept APRA's argument that non-exclusive licensing would lead to the withdrawal of overseas-sourced works and rights from the Australian market or not to any material degree.

Public detriment

4.79 Public detriment is also not defined in the Act but the 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.[15]

4.80 As in its analysis of likely public benefits above, the ACCC's analysis of likely public detriments proceeds on the basis that APRA has sought re-authorisation for particular aspects of its arrangements and conduct and it is these – within the context of APRA's overall system – that must be closely analysed for their likely detriments (and possible mitigating factors) in comparison with the alternative of the counterfactual.

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

APRA's submissions before the draft determination

4.81 APRA's submissions before the ACCC's draft determination included the following.

4.82 APRA submitted that its arrangements do not lessen price competition as there is unlikely to be any significant level of price competition in any event. APRA further submitted that there is fierce non-price competition between composers to, for example, get their works broadcast and APRA's input arrangements in no way inhibit this.

4.83 APRA argued that its monopoly is significantly eroded by its opt out and licence back provisions because they allow composers and music users to deal directly. APRA submitted that its opt out and licence back provisions are particularly useful where composers wish to enter into arrangements with users who only wish to use a limited range of works, such as for example, for music played to customers 'on hold' during telephone calls. APRA stated that in such instances it has suggested to licensees that they may wish to consider dealing directly with a member of APRA by way of a licence back agreement.

4.84 APRA argued that its opt out and licence back provisions are well known and accepted in the market and the low level of their use indicates that dealing with APRA remains the most efficient means of dealing with performing rights.

4.85 In addition, APRA submitted that it is constrained by the Copyright Tribunal. It submits that the purpose of the Copyright Tribunal is to ensure that APRA (and similar collecting societies) do not abuse their monopoly power by unreasonably raising prices for or unreasonably restricting the availability of performing rights in relation to their repertoires.

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

4.87 APRA noted that the Copyright Tribunal has the ability to establish the prices it considers to be 'reasonable' in various circumstances and the power to confirm and vary other terms and conditions of licences.

4.88 APRA also argued that the ability of the ACCC to appear as a party and provide assistance in Copyright Tribunal proceedings further strengthens the level of constraint that the Copyright Tribunal provides in relation to APRA's exercise of its monopoly power.

4.89 Further, APRA also noted the ability for the Copyright Tribunal to order parties to engage in mediation conducted through the auspices of the Copyright Tribunal.

4.90 APRA submitted that utilisation of its alternative dispute resolution process demonstrates that it is effective in resolving disputes and that licensees are relatively satisfied with its arrangements for granting licences. APRA argued that the process is an effective, quick and inexpensive mechanism for resolving disputes.

4.91 APRA submitted that its experience in developing the Code of Conduct for Australian Collecting Societies and the annual Code review have assisted in APRA developing processes that ensure that complaints are bought to the attention of senior management and dealt with appropriately.

4.92 APRA submitted that the Code is an effective mechanism that ensures that APRA does not abuse its monopoly power or otherwise behave contrary to the public interest.

4.93 APRA stated that the impact of the Code is best evidenced by the dramatic reduction in complaints that have been recorded against APRA in the years since the Code was adopted. APRA cited by way of example that it received 52 complaints for the year ending 30 June 2003 but only 11 for the year ending 30 June 2009.

Interested party submissions before the draft determination

4.94 The ACCC notes the following submissions received from other interested parties before the draft determination.

4.95 The Australian Digital Alliance and Australian Libraries Copyright Committee (ADA/ALCC), in a joint submission, argued that APRA has significant scope to take advantage of its market power when setting licence fees, that there are no real constraints to it doing so and that this has the potential to create a significant anti-competitive detriment.

4.96 Fairfax Media Ltd submitted that APRA's monopoly has led to a complete lack of transparency in licence pricing and that ultimately Fairfax has no choice but to accept terms offered by APRA. The ADA/ALCC similarly submitted that there is not enough transparency in APRA's dealings with licensees.

4.97 Two submissions excluded from the public register at the request of the parties making the submissions argued that APRA is able to rely on its market power in setting licence terms and conditions and that smaller users have little recourse when APRA increases licence fees.

4.98 Similarly, the Australian Interactive Media Industry Association (AIMIA) submitted that APRA's arrangements preclude competitive pricing for the licensing of musical works and that there is no mechanism for the objective benchmarking of APRA's licence fees.

4.99 Cinema Operators and ADA/ALCC submitted that APRA's opt out and licence back provisions do not effectively constrain its monopoly position and are ill-adapted to the efficient granting of public performance rights. ADA/ALCC submitted that authorisation should be subject to a condition recognising what it submits is the desire of parties to use alternative forms of licence, that APRA's new 'non-commercial licence back' arrangement is unworkable and that there should be a licence for 'occasional use'.

4.100 A party whose submission was excluded from the public register submitted that artists would be happy to waive fees in direct dealings with particular sectors and institutions but APRA's direct-dealing processes have proved unworkable. Another party, whose submission was also excluded from the public register, submitted that APRA's opt out and licence back processes are too bureaucratic and not working in areas such as podcasts (a form of digital download).

4.101 Creative Commons Australia stated that the new online non-commercial licence back is a good step but it and other licences do not allow for broadcast or performance or use via any services that incorporate advertising. It stated that APRA needs to publish policies on licensing in various online contexts and should streamline the opt out and licence back processes.

4.102 Fairfax submitted that APRA has not entertained discounted licences for direct dealing.

4.103 The Australian Hotels Association (AHA) submitted that it is important that APRA members can withdraw from universal coverage as long as efficiencies are maintained.

4.104 Cinema Operators submitted that composers will only have an incentive to deal with users directly when they are in a more favourable negotiating position than APRA, which will be rare given APRA's monopoly position. Cinema Operators also submitted that there is no incentive for users to seek to acquire rights directly from APRA unless there is a corresponding decrease in the price they pay APRA under their blanket licence.

4.105 Cinema Operators argued that the relatively low level of use of APRA's opt out provisions reflect these disincentives to direct dealing. They also submitted that licence backs requiring notification of the time and place of performance are not workable.

4.106 Cinema Operators submitted that APRA's blanket-licence fee arrangements are not subject to competitive constraint. Cinema Operators argued that blanket licences are not necessary to support the efficient collection of licence fees for the performance of works in the course of the exhibition of films where the works that will be performed in a film are readily identifiable and known in advance.

4.107 Cinema Operators submitted that APRA's input, output and overseas arrangements preclude the development of direct licensing arrangements in Australia and prevent Cinema Operators directly obtaining performance rights in US films, which constitute about 85 per cent of the Australian 'box office'. In particular, Cinema Operators argued that APRA's blanket licences provide no incentives for direct dealing to occur.

4.108 Cinema Operators stated that they are not aware of APRA having offered any 'discounted blanket licences' that would account for instances where rights have been acquired directly or having undertaken any active exploration with users about such licences.

4.109 On this point, APRA submitted that it has reached agreement on a blanket-licence scheme with Cinema Operators that will run until 2016 and that during negotiation of that agreement all licensing options were canvassed fully by the parties.

4.110 Cinema Operators submitted that the available evidence does not support APRA's assertion that its dispute resolution process is effective in resolving disputes and that its licensees are relatively happy with the arrangements for licences granted, as the process has only been used a very small number of times and in the majority of cases did not result in successful resolution.

4.111 Cinema Operators submitted that the availability of expert determination does not provide any significant restraint on APRA's monopoly power as there is no requirement for the expert to consider matters directed at whether licence fees and other terms and conditions are competitive or efficient.

4.112 The ADA/ALCC argued that the ADR process is rarely used because of its limited practicality and utility. ADA/ALCC argued that the changes to the process sought by APRA should not be authorised but, rather, that the dispute resolution process should be strengthened.

4.113 The ADA/ALCC and Cinema Operators submitted that the Code of Conduct for Australian Collecting Societies is an ineffective constraint on APRA's market power as it does not effectively deal with issues around the terms and conditions, including price, that APRA offers.

4.114 SBS submitted that APRA must refine what SBS says are increasingly burdensome reporting requirements.

ACCC's view

4.115 APRA has a virtual monopoly in respect of performance-rights licences in Australia as:

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

4.116 In the ACCC's view, compared with the counterfactual, that is, APRA remaining as the major collecting society but only obtaining rights from composers or other rights holders on a non-exclusive basis, instead of the exclusive basis on which APRA obtains them now, APRA's arrangements generate significant public detriment. Essentially, APRA is a monopoly whose membership rules generally hamper direct dealing – individual sellers and buyers or licensors and licensees negotiating directly over price and other terms. This concentration of members' rights exclusively with APRA means that APRA would be able to set prices for access to its repertoire without being subject to competitive constraints.

4.117 While APRA does not restrict output in the sense that it does not refuse access to its works as a bundled product, the conduct of only supplying an 'all or nothing' bundle is itself a restriction on supply and therefore output. Indeed, the opt out, direct negotiation and licence back arrangements discussed above are designed to overcome the supply restrictions associated with APRA's bundling conduct.

4.118 Further, APRA is able to price discriminate by charging different groups of users different licence fees and, in doing so, raise prices above competitive levels and maximise monopoly rents. In other words, in exercising monopoly pricing, APRA has

the ability and incentive to price discriminate across licence schemes and so has widespread opportunity to extract 'consumer surplus' – essentially, potentially pricing for each group up to the highest price that group's members are willing to pay, even if that price is higher in real terms than for another user group.

4.119 If price discrimination is imperfect in that it groups together users with different willingness to pay, some potential users unwilling to pay the group price might also be excluded from performing music altogether and so a less than optimal amount of music might be performed.

Mitigating detriment and securing benefit

4.120 As evidenced by the counterfactual it has adopted, the ACCC recognises that in the near to medium term at least, competition between composers will not be the norm and might never be. However, the ACCC considers that there can and should be greater opportunity and conditions for more price and non-price competition between composers/other rights holders where it is practical and efficient. The ACCC considers that this has benefits for the parties involved and also provides an alternative to APRA which could constrain at least some of the anti-competitive effects of APRA's arrangements.

4.121 Overall, the ACCC considers that where competition can be injected into the acquisition and supply of performing rights at acceptable cost and in a way that does not jeopardise the other benefits or efficiencies produced by APRA's system then this should be promoted. Such competition will increase the public benefits from the APRA arrangements whilst decreasing the public detriments.

4.122 The ACCC notes the Competition Tribunal's similar conclusions that in so far as aspects of APRA's collective administration that have been identified as anti-competitive can be modified to remove or lessen detriment without impairing APRA's essential components, authorisation should be granted on terms that bring about those modifications.[16]

4.123 The ACCC notes that for many users with unpredictable requirements for access to a large repertoire of music, direct dealing with composers is unlikely to be a desirable alternative for either party. Transaction and enforcement costs would be considerably inflated and likely to wipe out the gains from competitive pricing.

4.124 The ACCC considers, however, that for certain users with, for example, predictable requirements (either in part or in total) for access to musical works, direct dealing can present an attractive option. For example, performing rights for films, television programs and advertisements (for television, radio and cinema) could be negotiated at source (along with synchronisation rights) and often at the same time as commissioning the works. Other possibilities for direct or source licensing would appear to be the use of pre-packaged music in, for example, cinema foyers or fitness classes.

4.125 Therefore the ACCC considers that in the area of licensing rights in works to predominately 'predictive' users in particular – for instance, film producers/cinema operators – there is likely to be further scope for and benefit from increased direct dealing and competition between suppliers and between acquirers.

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[16] *Re Australasian Performing Right Association* [1999] ACompT 3 (16 June 1999) Summary Statement

4.126 The ACCC notes that the US has a particular 'anti-trust' regime that regulates performing rights in its film industry, under which performing rights are licensed 'at source' along with synchronisation rights . The ACCC notes that collecting societies are effectively precluded from a role but there has not been market failure.

4.127 The ACCC acknowledges the particular circumstances of media and entertainment production, where producers can often 'shop around' between composers and works at the time of production. The ACCC notes that this widely patronised industry is an example of where music is not an insignificant part of and input to the product offered, and any cost savings and/or efficiency gains attainable in this industry would represent not insignificant public benefits if consumers gain a fair share of the savings or efficiencies.

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

4.129 The ACCC considers that the counterfactual is most likely to involve a situation of one collecting society but with changed scope for competition and source licensing – and therefore an increased but still not necessarily extremely widespread amount of direct dealing. As discussed above, likely scenarios include an increased scope for and amount of source licensing – for example, a relatively small group of background-music composers offering their services to, say, a range of advertising companies.

4.130 The ACCC considers that individual works and bodies of works are differentiated products and will each have a small element of pricing power. They are most likely to be able to always extract at least their marginal value, including by realising value across a range of different uses of the work – both in terms of aspects of the copyright bundle and across different mediums.

4.131 The ACCC notes that performing rights represent only one of a number of uses of and potential revenue streams from a musical work. Composers' incentives to produce particular types of music will be influenced by demand from recording artists (often the composers themselves) and record companies, film and television producers as discussed above, live performers and other users or commissioning parties.

4.132 Major sources of revenue for composers are those generated by the direct sale of works, most significantly record sales, and fees for synchronisation rights when works are embedded in films, television programs, advertisements and other mediums. In addition, the public performance of works in itself generates revenue for composers by encouraging future record sales and use of the work in other mediums. In this sense, public performance of a work is also an advertisement of the work.

4.133 The ACCC considers that composers/other rights holders are likely to factor such other revenue streams and incentives into their performing-rights bargaining. The ACCC notes that in some music industries in various countries, those behind particular works and bodies of work wishing to encourage their performance have on occasions in fact paid upfront 'payola' of various forms instead of just seeking payment, such is the incentive on the owner to have works used.

4.134 The ACCC agrees with APRA's submission that there is significant non-price competition between composers, for example, to get their works broadcast.

Acquiring and supplying rights

4.135 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.[17]

4.136 As noted above, APRA's input arrangements provide that, to become APRA members, composers/rights holders must assign (give over exclusive ownership of) the performing rights in all their works, present and future.

4.137 APRA's Constitution further provides that a member may require APRA to:

- reassign to it performing rights in relation to all (and only all) their works in one or more categories of use ('opt out'). Members seeking to opt out in respect of a category of works must give APRA at least three months' notice expiring on either a 30 June or a 31 December and
- grant to the member a non-exclusive licence in relation to any of the member's works to facilitate direct licensing ('licence back'). Under the licence back arrangements, APRA also retains the right to grant licences in respect of the work.

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

4.139 At the time of seeking re-authorisation for its arrangements, Article 17 subsection (g) of APRA's Constitution, which provides for licence backs, read as follows:

> It is a pre-condition of a Licence Back that:
>
> (i) the purpose of the licence is to enable the member to grant a sub-licence of the Performing Right
>
> (ii) the member provides the Association with not less than 1 month's notice (in a form reasonably determined from time to time). The notice must specify:

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[17] See also the ACCC's Determination: Application for revocation and substitution of authorisations A30082-A30087 lodged by the Phonographic Performance Company of Australia Ltd in respect of collective licensing arrangements, 27 September 2007, para 6.33

1. the title/s of the relevant work or works;

2. such details as are reasonably necessary to identify whether a particular person has been granted a sub-licence;

3. such details regarding the date or dates of the performance as are reasonably necessary to identify the performances to which the sub-licence relates;

4. such details regarding the geographic location and venue of the performance as are reasonably necessary to identify whether the sub-licence extends to a particular area and venue;

5. where applicable, the broadcasting or on-line service and the program or content segment in respect of which the proposed sub-licence will be granted; and must contain

6. a signed consent to the proposed sub-licence and release and indemnity in a form reasonably required by the Board from time to time from all Interested Persons; and must be accompanied by:

    a. an undertaking to pay reasonable costs to the Association, in accordance with the [APRA] Board's published schedule of costs (if any), prior to the date of the first performance or the date on which the proposed sub-licence is to take effect; and

    b. an undertaking to pay to the Association such further reasonable costs which may be incurred by the Association in connection with and/or arising out of the granting of the licence back to the member;

(iii) the sub-licence must be in writing and if practical, signed by all parties.

4.140 The Competition Tribunal imposed this article, which it considered was a cautious relaxation of the requirement of exclusive assignment, to test if and how that change affected competition.[18]

4.141 APRA states that since introducing opt out and licence back provisions in 2000 in compliance with the Competition Tribunal's directions, the provisions have been used 52 times.

The ACCC's draft determination

4.142 In its draft determination the ACCC noted that it had received a number of submissions from interested parties arguing that these licence back provisions have proven to be unworkable.

4.143 The ACCC considered that the changes to APRA's input arrangements required by the Competition Tribunal in 1999-2000 were a significant first step towards encouraging more competitive acquisition and supply of rights. However, the ACCC considered that:

- the complexity of the licence back provisions acts as a substantial disincentive to direct negotiation between copyright owners and users and

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[18] *Re Australasian Performing Right Association Ltd* [1999] ACompT 3 (16 June 1999) para 356

- the provisions appear to be more restrictive than necessary to strike an appropriate balance between facilitating the administration of copyright and allowing direct negotiation between copyright owners and users.

4.144 The ACCC noted that APRA has over 55,000 members but that there have only been 52 instances of the use of its opt out and licence back provisions in 10 years. The ACCC considered that APRA had not established that this low rate of use is because of widespread user and member satisfaction with APRA's arrangements.

4.145 The ACCC considered that APRA's complex and rigid resignation, opt out and licence back provisions are of practical use to members in only very limited sets of circumstances.

4.146 While APRA members can terminate their membership at six months' notice, terminating the entire relationship with APRA will not in many cases be an attractive incentive towards direct dealing between rights owners and users seeking to direct deal with them; and the six-month timeframe does not permit dynamic commercial responses to opportunities.

4.147 The ACCC also considered that in the majority of cases, APRA's opt out and licence back arrangements are not an effective means of facilitating direct dealing between music owners and users and/or the development of other mechanisms for the administration of performing rights.

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

4.149 In particular, a composer might have one 'hit' work over which, for example, multiple users might wish to negotiate to gain exclusive rights or assignment. Under APRA's current arrangements this and many other potential transactions and scenarios would not be possible.

4.150 The ACCC noted that direct dealing between APRA members and users could still potentially be facilitated through utilisation of APRA's licence back provisions.

4.151 However, the ACCC considered that the practical utility of APRA's licence back provisions is limited. For example, a member considering licensing back a work must comply with significant and exacting notification requirements, which in some cases may simply be impossible to comply with.

4.152 The ACCC considered that these arrangements did not appear to strike an appropriate balance between facilitating the administration of copyright and allowing flexibility in licensing as appropriate.

4.153 In particular, the ACCC considered that Article 17 appears to require that APRA members provide more detail than may be needed in some instances. In some cases the additional details required to be provided appear to be sufficiently onerous so as to discourage use of the licence back provisions.

4.154 The ACCC noted that one way to reduce what appear at times unnecessarily onerous notification conditions would be to require members licensing back works to simply state which work has been licensed back, for what purpose and from what date and no more – as is now the case with APRA's new online non-commercial licence back process.

4.155 The ACCC accepted that there may be some instances in which APRA being fully informed of who will perform licensed back works when and where may in some cases help with its enforcement and monitoring. However, the ACCC considered that it is only in these instances where this additional information should be required.

4.156 In line with the Competition Tribunal's intent, the ACCC considered it appropriate for APRA to introduce a more 'streamlined' commercial licence back in its Constitution.

4.157 The ACCC therefore proposed to re-authorise APRA's input arrangements subject to a condition that would have the effect of requiring that APRA must offer new streamlined licence back arrangements for members in relation to those categories of work where only a subset of the existing pre-conditions in article 17(g) of APRA's Constitution are reasonably needed by APRA in order for it to identify the relevant work as being subject to the licence back arrangement at the time of any performance.

4.158 The ACCC was deliberately not prescriptive about the form this proposed condition would take. Rather, the ACCC sought the views of interested parties about what categories of use this streamlined licence back process should apply to and what information should be required to be provided by members to APRA, to assist in drafting this condition.

4.159 In addition to concerns about APRA's current licence back provisions the ACCC also considered that in relation to dealing with most users, a fundamental impediment to members using APRA's licence back provisions, or indeed any member of an overseas society dealing directly with Australian users, is APRA's propensity to offer users blanket licences and there being no discount to these licences that incentivises direct dealing. So long as users generally obtain blanket licences in respect of APRA's entire repertoire, there is no incentive for a user to acquire rights from a niche society or member directly unless there is a corresponding adjustment to the price the user pays for its APRA licence.

4.160 Therefore, even if APRA's licence back provisions had less onerous reporting requirements, the incentives for music owners and users to deal directly would still be limited to those instances where the user did not also require access to other works within the APRA repertoire, or in the event that it did, instances where the user was able to negotiate a transactional licence with APRA for the use of other works in its repertoire or an adjustment to the blanket-licence fee to reflect its use of works where it has negotiated rights directly with the music creator or owner.

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

4.162 APRA owns or controls the performing rights in the vast majority of musical works wherever created throughout the world, with, in the ACCC's view, no significant competitive constraint. APRA's monopoly power is demonstrated at times in the 'take it or leave it' way in which it conducts some of its licensing activities.

4.163 The ACCC therefore noted that users have limited, if any, countervailing bargaining power. For APRA each user is only one of many but for many users the product which APRA supplies, performing-rights licences, is essential to the viability of their businesses. Television and radio stations, cinema operators and nightclubs, for example, would not be able to operate without some sort of performing-rights licence. Consequently, these users are almost compelled to enter into agreements with APRA.

4.164 APRA submitted that it has shown a willingness to enter into blanket licences that provide for a discount on the licence fee if the user licences performing rights in some works in APRA's repertoire directly.

4.165 APRA gave the examples of its commercial-radio licence scheme having different rates depending on the percentage of airtime occupied by APRA music; and of a form of modified blanket licence it has concluded in the digital-download industry. APRA stated that this licence form is based on transactions by the licensee rather than a percentage of revenue.

4.166 As stated above, the ACCC welcomed the fact that APRA was able to reach agreement on a form of modified licence. The ACCC noted that no licence fee would be applied to the sale of certain works, including where an APRA member has opted out. The ACCC welcomed APRA's statement that it remains willing to discuss the introduction of similar discounted blanket licence arrangements in other music markets.

4.167 The ACCC noted however that in the four years since APRA expressed to the ACCC an intention to actively explore alternatives to blanket licences, it appears there have only been a handful of either offers or acceptances of such alternatives. As such, the ACCC did not consider that APRA has shown that it has established genuine, workable alternatives to its traditional blanket licences.

Submissions in response to the draft determination

4.168 The AHA, Free TV, Cinema Operators, Creative Commons and ADA/ALCC all supported the proposed condition of authorisation that would require APRA to develop more streamlined licence back provisions.

4.169 Cinema Operators argue that APRA's current licence back arrangements are cumbersome and are not well suited to granting of performance rights for music in films. In respect of licence back arrangements for music performed in the exhibition of films Cinema Operators submitted that it would be sufficient for APRA to know the title of the work licensed back, the period of the sub-licence and the territory to which the sub-licence related.

4.170 The ADA/ALCC also submits that APRA's licence back provisions are too inflexible, particularly as they relate to licensing back for the purpose of making content available online, for example through social networking sites.

4.171 The ADA/ALCC argues that the information requirements under APRA's licence back provisions should be simplified. The ADA/ALCC also argues that, for the purposes of

providing online content, members should be able to licence back the use of their works worldwide from APRA, rather than just in Australia.

4.172 Creative Commons Australia argues that many APRA members are likely to already be in technical breach of their APRA membership agreements by providing their material online, through their own websites and social networking sites, without having entered into licence back arrangements with APRA. Creative Commons Australia argues that APRA licence back provisions should be made more flexible to more easily facilitate APRA members providing their material online with legal certainty.

4.173 Cinema Operators also noted that more streamlined licence back provisions would be of little benefit if they were not accompanied by a commensurate reduction in blanket licence fees charged by APRA.

4.174 The Association of Liquor Licensees Melbourne (representing bar and nightclub proprietors) and FreeTV Australia (representing free to air television networks) state that direct dealing between their members and APRA members would be of little practical utility. In particular, FreeTV, while supportive of the proposed condition, submits that for licensees with unpredictable requirements for access to music (such as television stations) direct dealing with composers is unlikely to deliver any real benefit and is of practical use in only very limited circumstances.

4.175 With respect to blanket licences, the ALLM submits that where their members are able to provide APRA with a list of tracks played APRA should offer discounts on blanket licences having regard to the tracks played that fall outside APRA's repertoire.

4.176 APRA states that it is willing to modify its requirements for licence back to the extent possible while maintaining the efficiency of its licensing system. APRA states that it 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.

4.177 APRA also states that modifications to a number of its blanket licences, as a result of members' licences back, are already occurring with significant commercial impact.

4.178 APRA cites examples of:

- Licence back for live tours whereby an APRA member embarking on a tour licences back rights in their compositions and deals directly with the concert promoter, with any licence fee payable by the promoter to APRA discounted to reflect works where the concert promoter has sourced rights directly from the artist.

- Licence back for events whereby similarly, any fee payable by the event promoter to APRA takes account of direct deals done with the promoter under licence back provisions by any artist appearing at the event.

- Licence back for music on hold whereby APRA members licence back for the purpose of dealing with a music user that may only require access to one, or a very limited range, of musical works.

4.179 APRA also states that while Article 17(g) contains a list of information a member is required to provide in order to license back, in practice APRA only ever requires the

minimum amount of information to ensure that it does not also license or attempt to license use of the work. APRA states that this includes the name of the work and location and time of performance. APRA states that more specific information is only required as necessary. APRA confidentially provided examples of licence back agreements with members where it has not required all the information listed in Article 17(g) to be provided because such information was not necessary given the nature of the licence back.

4.180 Accordingly, APRA believes that its licence back provisions are not overly restrictive.

4.181 However, APRA states that it accepts that a person reading Article 17(g) without having actually approached APRA regarding a licence back may think that APRA requires more information than it actually does.

4.182 To address this APRA has proposed changes to its licence back provisions aimed at clarifying that it only requires from members granting sub-licences to users under APRA's licence back such information as is necessary to ensure that APRA does not seek to grant a licence where one already exists (through direct dealing).

4.183 APRA has also proposed changes to its licence back provisions to reduce the current notice period of one month. Specifically, APRA will only require one week's notice for live performance of a member's own works, performance in films and for all communication of works (that is, where they are made available online or electronically transmitted). For all other public performances APRA will require two weeks' notice.

4.184 The licence back provisions have also been amended to specifically clarify that:

- where the sub-licence granted by the member is general rather than in relation to a particular performance or communication, only the term of the sub-licence, rather than details about times and dates of performances, is required to be provided and

- in respect of, effectively, broadcast and online performances/communications, only the territory where the member has granted the sub-licence, and not further details regarding the geographical location and venue of performances, is required to be provided.

4.185 Article 17(g), with changes proposed by APRA marked up, now reads:

(g) It is a pre-condition of a Licence Back that:

(i) the purpose of the licence is to enable the member to grant a sub-licence of the Performing Right

(ii) the member provides the Association with ~~not less than 1 month's notice~~ notice as set out in sub-paragraph (h) (in a form reasonably determined from time to time). The notice must ~~specify~~ provide sufficient information to identify the works the subject of the licence, the licensee, and the scope of the licence, including (as appropriate):

1. the title/s of the relevant work or works;

2. the name of the licensee and such other details as are reasonably necessary to identify whether a particular person has been granted a sub-licence;

3. the term of the licence, or if the licence is for particular performances or communication only, such details regarding the date or dates of the performance or communication as are reasonably necessary to identify the performances or communication to which the sub-licence relates;

4. the territory of the licence, or if the licence is for a public performance (as opposed to a communication) such details regarding the geographic location and venue of the performance as are reasonably necessary to identify whether the sub-licence extends to a particular area and venue;

5. where applicable, the broadcasting or on-line service and if the licence is restricted to particular programs or content segments, the program or content segment in respect of which the proposed sub-licence will be granted, and if the licence is for the performance of works by means of cinematograph film, the title of the film in which the work appears.

The notice must contain:

1. where applicable, a signed consent to the proposed sub-licence and release and indemnity in a form reasonably required by the Board from time to time from all Interested Persons; and ~~must be accompanied by:~~

2.

   a. an undertaking to pay reasonable costs to the Association, in accordance with the [APRA] Board's published schedule of costs (if any), prior to the date of the first performance or communication or the date on which the proposed sub-licence is to take effect; and

   b. an undertaking to pay to the Association such further reasonable costs which may be actually incurred by the Association in connection with and/or arising out of the granting of the licence back to the member to the extent that such costs exceed the costs identified in the Board's published schedule.

(h) Notice

For live performances of the member's own works, performances by means of cinematograph films, and for all other communications, the Association requires one week's notice. For all other public performances, the Association requires two weeks' notice.

4.186 APRA also states that it intends to provide improved information to members and licensors about the legal implications of APRA's input and output arrangements and its policies in respect of online activities.

4.187 APRA also proposes to make its licence back forms accessible to non-members on its website and include comprehensive information about licence back in its membership educational programs.

4.188 In response to the proposed changes Cinema Operators argue that the reference in clause 17(g)(ii)(4), relating to the territory of the licence, to geographic location and venue of the performance, should be removed so that members are simply required to provide such details as reasonably necessary. Cinema Operators argue that this would, for example, allow members to specify, for example, 'all cinemas [of the licensee] in Australia' as a territory without having to provide further details of geographic location of those cinemas.

4.189 Creative Commons Australia submits that it welcomes these changes and that the changes appear to address its main concerns regarding the ability of APRA members to distribute their material online with legal certainty.

4.190 Creative Commons Australia also states that it welcomes APRA's proposal to provide members with improved information about its input and output arrangements as they relate to online activities and provide more publicly accessible information about its licence back provisions.

4.191 The ADA/ALCC and Creative Commons note that APRA's licence back provisions are limited to Australia. The ADA/ALCC and Creative Commons argue that in order to facilitate direct dealing between APRA members and providers of online content APRA members need to be able to license back the worldwide rights to their works.

ACCC view

4.192 The ACCC notes the further information provided by APRA clarifying that while Article 17(g) contains a list of information a member is required to provide in order to license back, in practice APRA only ever requires the minimum amount of information to ensure that it does not also license or attempt to license use of the work.

4.193 In support of this, APRA provided, on a confidential basis, examples of licence back agreements where it has not required all the information in Article 17(g) to be provided because such information was not necessary given the nature of the licence back.

4.194 However, notwithstanding this, as noted by APRA, a person reading Article 17(g) without having actually approached APRA regarding a licence back may think that APRA requires more information than it actually does. To the extent that such misconceptions exist, this limits the utility of APRA's licence back provisions regardless of how they are applied in practice.

4.195 APRA has provided clarification in relation to this issue in its further submissions. In particular, the ACCC welcomes APRA's public statements that it has no wish to constrain its members from entering into direct licensing arrangements and will only require the minimum amount of information needed to effect licences back. APRA also states that it will provide additional information to members and users about the ease with which the licence back provisions can be used.

4.196 The ACCC will continue to monitor progress in this regard, and given the commitments APRA has made, expects to see significant progress in improving the accessibility of APRA's licence back provisions moving forward.

4.197 More importantly, the ACCC welcomes APRA's proposal to amend Article 17(g) to more explicitly reflect that only sufficient information to identify the works the subject of the licence, the licensee and the scope of the licence is required.

4.198 APRA also proposes to provide additional information, to both members and music users about these requirements.

4.199 Other proposed changes to the licence back provisions significantly reduces the administrative complexities of the licence back provisions in some cases: in particular, the reduction in the notice period, removing the need to provide details about times and dates of performances where the sub-licence granted by the member is general rather

than in relation to a particular performance or communication, and removing the need to provide any information about the geographic location of a performance, other than the territory, for broadcast and online communication of works.

4.200 As noted in some submissions, for many music users, in particular, those with unpredictable requirements for access to music, direct dealing with APRA members is likely to be of little practical utility. However, for others, whose use of music can be more predictable and planned, the ACCC considers that the changes to its licence back provisions proposed by APRA strike a more appropriate balance between facilitating the administration of copyright and allowing direct negotiation between copyright owners and users.

4.201 These proposed changes address many of the concerns raised by the ACCC in its draft determination that led to the ACCC proposing to impose a condition of authorisation requiring that APRA offer new streamlined licence back arrangements. Accordingly, the ACCC no longer considers the imposition of such a condition to be necessary.

4.202 While the ACCC is satisfied that the changes to APRA's licence back provisions strike a more appropriate balance between facilitating the administration of copyright and allowing direct negotiation between copyright owners and users, as also discussed above, direct dealing will be of no use to most music users unless there is a corresponding adjustment to the price the user pays for its APRA licence.

4.203 This issue is discussed in greater detail in paragraphs 4.264 to 4.288.

4.204 The ACCC notes the concerns expressed by Cinema Operators that Article 17(g) still requires, in respect of public performance, such as use of music in a film, that such details about geographical location and venue as are reasonably necessary to identify whether a sub-licence extends to a particular area or venue be provided. Cinema Operators argue that a member should simply be able to state, in respect of location and venue 'all cinemas [of the licensee] in Australia'.

4.205 The ACCC considers that stating 'all cinemas [of the licensee] in Australia' would be sufficient to satisfy the requirement as presently drafted. That is, such information would be sufficient to identify all areas and venues to which the sub-licence extends and that removal of the words 'regarding geographic location and venue' as suggested by the Cinema Operators, would not add any additional flexibility to this provision.

4.206 The ACCC also notes the concerns raised by the ADA/ALCC that APRA's licence back provisions only apply in Australia, whereas online works are often communicated worldwide.

4.207 The ACCC understands that this is due to APRA's reciprocal arrangements with overseas collection societies under which APRA takes exclusive rights to all the works in the repertoires of affiliated societies and administers these in Australia (with the exception that works from the US are administered on a non-exclusive basis) and grants to the overseas societies exclusive rights to administer the musical works in APRA's repertoire in that overseas society's territory/country. Accordingly, at present, APRA is not able to provide its members with a worldwide licence back for their works as the rights to administer their works overseas have been granted to these overseas collection societies.

4.208 In order to be able to provide members with a worldwide licence back APRA would have to modify or rescind its arrangements with each overseas collection society. Doing so would be difficult, and, unless APRA decided to rescind its arrangements with each overseas society, would be subject to each overseas society agreeing to the modification. In addition, doing so would likely be contrary to the resolutions of the International Confederation of Societies of Authors and Composers, the worldwide peak body for collecting societies, to which APRA and its overseas counterparts have agreed.

4.209 Further, if APRA was able to make such changes to its agreements with each overseas collection society, such that APRA only conferred to each society the right to administer the rights in its repertoire on a non-exclusive basis, the ongoing administrative burden in managing this process would also be difficult.

4.210 Each time an APRA member licensed back rights to some of their works APRA would have to inform every overseas collection society about this and each overseas collection society would then have to ensure that it did not also license the work, or seek to enforce a licence for the work, or works in its territory for the particular user or users that the licence back related to.

4.211 Similarly, every time a member of an overseas society took a non-exclusive licence back for one of his, her or its works on a worldwide basis, the overseas society would have to inform APRA and APRA would have to ensure that it did not also license use of the work in Australia for the particular user or users.

4.212 The ACCC accepts that the current arrangements between collection societies are not well suited to members wishing to deal directly with online content providers with respect to the worldwide rights in individual works. However, given the issues noted, the ACCC does not consider that APRA taking reassignment of members' worldwide rights from overseas collection societies to allow them to license back these rights to members is a practical option at this time.

4.213 However, given the growing importance of digital and online distribution, which usually takes place over the largely borderless internet, the ACCC encourages APRA and other interested parties to explore and discuss these issues further. Any reforms in this area would necessarily need to be centrally coordinated, involving discussions with overseas entities such as CISAC, other collecting societies and major rights holders such as music publishers. While APRA is not in a position to drive this process alone, the ACCC considers that such options should be explored by APRA with its overseas counterparts.

4.214 More generally, the ACCC notes that, through opting out of APRA in respect of particular categories of rights, members could deal directly with a particular class of user or users on a worldwide basis while still having APRA administer their rights for other classes of users.

The Copyright Tribunal

4.215 APRA submits that it is constrained by the Copyright Tribunal. Broadly, the Copyright Tribunal is empowered to determine the terms of licence schemes – by confirming or varying the scheme – between APRA and users. It may do so on application, by either APRA or a user, and in respect of an existing or proposed scheme. In effect, APRA is

bound by any decision of the Copyright Tribunal, both in respect of the type of licence offered and the terms on which the licences are offered.

4.216 The ACCC is also able to be made a party to Copyright Tribunal proceedings.

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

4.218 However, the Copyright Tribunal constrains APRA's ability to exercise its monopoly power only beyond the point where the cost to the user of seeking recourse to the Copyright Tribunal would be less than the difference between the price which the user could negotiate with APRA directly and that which it considers that the Copyright Tribunal would be likely to impose. That is to say, irrespective of a user's ability to refer licences issued to the Copyright Tribunal, APRA is still able to exercise its monopoly power to set terms and conditions as it sees fit up to the point where the cost to users is so high as to make it cost-effective to seek recourse to the Copyright Tribunal. In this respect, the ACCC notes that for many, particularly smaller users, there is no economic incentive to seek recourse to the Copyright Tribunal and therefore the Copyright Tribunal is a less effective constraint on APRA's pricing for these users. The ACCC notes that this point is not a criticism of the operation of the Copyright Tribunal, as such access issues arise with all such bodies.

4.219 APRA argues that the Copyright Tribunal's power to make the ACCC a party to the proceedings if it considers it appropriate further constrains its ability to exercise market power. The ACCC may seek to become a party to Copyright Tribunal matters where it considers it to be in the public interest, for example, when the Copyright Tribunal's decision will have a broad impact and when the ACCC considers it is in a unique position to assist the Copyright Tribunal. The ACCC will take on the role of bringing its own analysis and expert opinions on the views expressed by the parties before the Copyright Tribunal, to assist the Copyright 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.

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

APRA's alternative dispute resolution process – expert determination

4.221 The anti-competitive detriment resulting from a collecting society's input and output arrangements will be more limited where the arrangements allow for alternative dispute resolution processes where appropriate.

4.222 APRA's current alternative dispute resolution processes were required as a condition of authorisation by the Competition Tribunal in 1999-2000 and are an important aspect of

the arrangements for which re-authorisation is sought. The ACCC notes the Competition Tribunal's comments that

> The Tribunal agrees that some form of ADR process is desirable and would lessen one potential anti-competitive consequence of the APRA system. We consider that the introduction of such a process would encourage APRA to be more receptive to the complaints of its users and lessen the types of complaints that we heard about APRA's inflexibility and resistance to modifying licences to meet changing circumstances.[19]

4.223 In its initial application APRA proposed certain changes to its dispute resolution processes. APRA submitted that it was not appropriate that, in the case of disputes with parties that have significant assets and sophisticated interests, APRA be either

- required to offer expert determination or
- that it bears the cost of such a process.

4.224 APRA clarified that it did not propose to remove the right of such large users to use its expert determination process. However, APRA argued that in cases where there is a dispute and the estimated annual licence fee and the licence that APRA proposes is over $50,000, APRA and the licensee or potential licensee should share the costs of the expert equally or as the expert directs.

The ACCC's draft determination

4.225 In its draft determination the ACCC considered that the expert determination process, currently contained in APRA's alternative dispute resolution process, appeared to provide a relatively inexpensive and straight forward alternative to resolving disputes by way of proceedings in the Copyright Tribunal.

4.226 However, the ACCC considered that APRA's alternative dispute resolution process has some significant shortcomings. For example, there are no set criteria in accordance with which the expert must determine the terms of licence arrangements. Rather, the process simply provides that, in the event that a dispute is referred to the expert determination process, the expert will 'make a determination on the dispute'.

4.227 The ACCC noted that the expert determination process has rarely been used since it was introduced. This would appear to be at odds with the more general concerns raised about the terms of licences granted by APRA, both in formal submissions and anecdotally to the ACCC.

4.228 The ACCC noted that the low incidence of referral of matters to the expert determination process may be indicative of user satisfaction with the terms of licences proposed by APRA. Alternatively, it may be that the range of disputes to which the process is applicable limits its practicality and utility, or that, more generally, users are not sufficiently confident that the expert determination process will satisfactorily resolve their disputes and/or that disputes will not be escalated to the Copyright Tribunal.

4.229 In summary, the ACCC considered that APRA's alternative dispute resolution process potentially provides a quick and inexpensive means for disputes between APRA and

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[19] *Re Australasian Performing Right Association Ltd* [1999] ACompT 3 (16 June 1999) at para 318

current or potential licence holders to be resolved. However, the practical utility of the current process appears to be limited in many instances.

4.230 The ACCC also noted that this appears to be in contrast with the increasing importance being placed on alternative dispute resolution processes by governments, lawyers and the community generally. For example, alternative dispute resolution processes are now mandated in many courts, regardless of (i) the size and/or complexity of the dispute or (ii) the size or sophistication of the parties to the dispute.

4.231 With respect to the proposal for costs of the expert determination process to be shared where the licence APRA is proposing is over $50,000, the ACCC stated in its draft determination that, at first glance, this submission appeared to have some merit. Such significant or sophisticated users could be expected, in the event of a dispute, to apply to the Copyright Tribunal to resolve the dispute.

4.232 However, this was in contrast with the procedure approved by the Competition Tribunal as a condition of authorising APRA's arrangements in 1999-2000, whereby APRA would bear the costs of the expert, without reference to the size of the annual licence fee of the disputing party.[20]

4.233 The ACCC also stated that APRA had not presented any information to suggest that the costs currently borne by it in funding experts and its share of other costs are unreasonable. Nor had APRA provided any reasons why it considered the $50,000 licence fee threshold is an appropriate cut-off point.

4.234 The ACCC stated it would welcome information from APRA to justify its proposals that it make changes to its expert determination process in disputes where the estimated annual licence fee under the licence that APRA proposes is over $50,000.

4.235 However, at that time, the ACCC did not consider that it was necessary to depart from the Competition Tribunal's decision and proposed not to authorise the proposed changes to the expert determination process.

4.236 With respect to APRA's proposal to insert an acknowledgment in the explanation of its ADR process of the option of alternative methods of dispute resolution, the ACCC stated that it welcomed APRA's willingness to consider different methods of resolving disputes.

4.237 In relation to dispute resolution in general, however, the ACCC considered the alternative dispute resolution procedure offered by APRA had not kept pace with reforms in alternative dispute resolution. The ACCC invited APRA and interested parties to comment on alternatives to the present system of expert determination for disputes offered by APRA, including whether more comprehensive alternative dispute resolution procedures were required. The ACCC noted that this might include mediation and arbitration in addition to the expert determination presently offered by APRA.

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[20] *Re Australasian Performing Right Association Ltd* [2000] ACompT 2 (20 July 2000) Annexure B

Submissions in response to the draft determination

4.238 The Association of Liquor Licensees Melbourne (ALLM), the AHA and one submission excluded from the public register supported the ACCC draft decision not to authorise the proposal for the costs of the expert determination process to be shared where the licence APRA is proposing is over $50,000.

4.239 The ALLM also stated that some of its members had not used the expert determination process because of concerns about, for example, the impartiality of the expert. The ALLM stated that confidence in the expert's independence is crucial to encouraging users to take advantage of the determination process and confidence could be assured by requiring the ACCC to approve the expert, according to a set of independence criteria.

4.240 The ALLM further argued that APRA should offer a mediation process, including as a first step before expert determination and the Copyright Tribunal, paid for by APRA, with the mediator required to report on the same issues as the expert.

4.241 FreeTV Australia states that the ADR procedures should be more comprehensive with licensees able to elect which forms of dispute resolution they wish to adopt (including whether to commence Copyright Tribunal proceedings).

4.242 APRA submits that sophisticated licensees do not wish to participate in expert determination. APRA believes this is because large corporations, especially multinationals, object to agreeing to be bound prior to the determination. In APRA's experience, they would prefer more conciliatory forms of ADR, in particular mediation, that offer the opportunity for facilitated, mutually acceptable outcomes.

4.243 APRA submitted that the ACCC should reconsider its draft decision not authorise the proposal for costs of the expert determination process to be shared where the licence APRA is proposing is over $50,000. APRA submitted that this proposal is not inconsistent with the aims of the Competition Tribunal, as ADR paid for by APRA would still be available to most users. APRA argues that the aims of the Competition Tribunal in requiring expert determination were to provide smaller users with a cheaper and quicker means of resolving disputes than the Copyright Tribunal.

4.244 APRA states that it selected $50,000 because fewer than 1 per cent of licensees pay more than that to APRA. APRA provided the ACCC with a confidential list of licensees paying more than $50,000 a year.

4.245 APRA also submitted that the costs of using the expert determination process have generally been in the range of $5000 to $12,000.

4.246 APRA also submitted that the requirement, as part of the ADR process established by the Competition Tribunal, that the expert be a retired Federal Court Judge is proving impossible to meet.

4.247 In relation to this issue, on 12 March 2010, APRA amended its application for authorisation proposing changes to its ADR process to remove the requirement that the expert be a retired Federal Court Judge and allow the other party to the dispute some say in the expert appointed. Specifically, the relevant provision of APRA's ADR process now reads:

3. Disputes will be determined by one of a panel of three independent experts. All members of the panel will be barristers with expertise in intellectual property matters who have not been retained to advise APRA or represent APRA in legal proceedings. APRA will ask you to choose from three such barristers, and if you cannot choose, APRA will ask the Australian Commercial Disputes Centre to nominate a barrister with these qualifications.

4.248 In response to these proposed changes the ALLM argues that barristers are not the appropriate choice as experts, because barristers conduct mediation based on the adversarial habits of the litigation system. The ALLM submits that there exists many reputable and professional ADR practitioners and that a list of such organisations should be generated by APRA to allow users a choice of experts.

4.249 With regard to the licence fee threshold above which costs would be shared between the parties, the ALLM submits that the nightclub tariff paid by its members to APRA will reach $1.05 per patron in the coming years. The ALLM states that when this occurs 90 per cent of its members will pay more than $50,000 a year in licence fees to APRA.

4.250 On 25 March 2010 APRA further amended its application for authorisation, proposing that the amount of annual licence fees above which the costs of the expert should be shared between APRA and the licensee should be $100,000.

4.251 APRA stated that it had initially chosen $50,000 mindful that it had a significant number of licensees with capacity to share costs, in circumstances where disputes were likely to be commercially significant and expensive to resolve. However, APRA submits that there are a number of individual premises, such as nightclubs, whose proprietors pay to APRA amounts slightly above $50,000 and whose fees are likely to increase during the period of three years for which the ACCC proposed to re-authorise APRA's arrangements. APRA states that having considered the list of licensees likely to be affected by the proposal, APRA now considers the appropriate threshold to be $100,000. APRA provided a confidential list of users whose licence fees are in excess of $100,000.

4.252 The relevant provision of APRA's ADR process now reads:

8. In most cases (including all casual licences), APRA will pay for the costs of the independent expert, including professional fees and travel expenses. Other than under casual licences, if your annual APRA licence fees are more than $100,000, you and APRA will share the costs of the independent expert equally or as directed by the independent expert. The cost of the venue for the Expert Determination must be shared equally between the parties. You must pay your own costs associated with the determination.

ACCC's view

4.253 APRA now proposes that the cost of the expert determination process is to be shared, or otherwise split as determined by the expert, where the licence APRA is proposing is over $100,000. In its draft determination the ACCC stated the initial proposal, that costs be shared where the proposed licence fee is in excess of $50,000, had some merit. However, the ACCC did not consider that APRA had sufficiently substantiated the need for a change to the procedure, whereby all such costs are borne by APRA, as approved by the Competition Tribunal. The ACCC invited APRA to provide further information about this issue.

4.254 The ACCC has reviewed the information provided confidentially by APRA about licensees whose licence fees are in excess of $100,000. Those paying licence fees in excess of $100,000 are generally large corporate entities with significant financial resources and access to significant legal expertise.

4.255 Further, disputes in relation to licence fees with such significant users would likely involve complex and detailed economic arguments that would be less likely to be quickly and easily resolved by the expert appointed under the ADR process.

4.256 Indeed, disputes with such users that can not be resolved between the parties are generally referred to the Copyright Tribunal rather than APRA's ADR process.

4.257 Given this, the ACCC considers it would be appropriate for such users to share the cost of the expert determination process, particularly as the expert will have the discretion to apportion costs as he or she considers it appropriate, rather than costs automatically being split between the parties.

4.258 Accordingly the ACCC proposes to authorise the change to APRA's ADR process which provides that, other than for casual licences, if the annual fee proposed by APRA is more than $100,000 the cost of the independent expert will be shared between the parties as directed by the expert.

4.259 With respect to APRA's proposal that the expert determining disputes no longer be a retired Federal Court Judge, the ACCC notes that APRA has had significant difficulty in finding retired Federal Court Judges available to hear disputes. The ACCC understands that on at least one occasion another expert has had to be appointed because no retired Federal Court Judge was available.

4.260 APRA now proposes that the other party to the dispute choose from one of a panel of three barristers with expertise in intellectual property matters, who have not been retained to advise APRA or to represent APRA in legal proceedings. If the user considers none of these barristers suitable, the Australian Commercial Disputes Centre will appoint an expert with equivalent expertise.

4.261 The ACCC considers that having barristers with expertise in intellectual property matters serve as experts is a realistic and acceptable proposal. Concerns have been expressed with the independence of barristers that may be retained on an APRA panel. However, the ACCC considers that users having a choice of three barristers and the 'fallback' option of the Australian Commercial Disputes Centre nominating a barrister with appropriate expertise, addresses these concerns.

4.262 The ACCC further considers that nothing should prevent APRA and users from agreeing between them that another type of expert, such as a lawyer or non-lawyer accredited specialist mediator, including from organisations specialising in offering such staff and services, be used.

4.263 In addition, users dissatisfied with the outcome of the ADR process are still able to refer their dispute to the Copyright Tribunal or Federal Court as appropriate.

Expert determination – conditions of authorisation

4.264 In its draft determination the ACCC also raised more general concerns about the expert determination process and proposed conditions of authorisation to address these concerns.

Condition proposed in the draft determination about matters the expert has regard to

4.265 The ACCC stated in its draft determination that it considered that after a decade of experience, the intentions of the Competition Tribunal, by imposing an alternative dispute resolution process on APRA as a condition of authorisation, do not appear to have been met. The ACCC was not satisfied that the expert determination process as it has operated to date has, for example, assisted in:

- creating conditions conducive to direct negotiation between copyright owners and users by determinations on licence schemes
- creating licences that are as unrestrictive as possible and strike an appropriate balance between facilitating the administration of copyright and allowing flexibility in licensing as appropriate and
- allowing adjustments to blanket licences in appropriate circumstances, including an appropriate adjustment to the fee.

4.266 The ACCC stated that it saw particular scope for more progress on the last point. The ACCC considered that there was little incentive for users to directly deal with members if APRA does not offer a genuine discount on licences to reflect direct dealing.

4.267 The ACCC stated that at this stage, it is unclear why there has not been more change.

4.268 In its draft determination, the ACCC proposed to require, as part of APRA's alternative dispute resolution process, that the independent expert express an opinion about these matters. Those opinions expressed by experts would then be reported to the ACCC under a further reporting condition discussed below. The ACCC stated that it was not the intention of the proposed condition to otherwise affect the operation of APRA's alternative dispute resolution process.

4.269 In the draft determination the ACCC proposed to impose the following condition.

Proposed condition regarding expert determination proposed in the draft determination – That, as part of its alternative dispute resolution process (contained in Annexure B to the Competition Tribunal's 2000 decision on APRA's arrangements), APRA must require any independent expert appointed to determine a dispute to provide a written report to APRA stating:

1. whether, in the expert's opinion, APRA offered the user (being a licensee or potential licensee) a genuine discount on the user's blanket licence to take into account the direct dealing between the user and the copyright owner. In expressing this opinion, the expert must have regard to whether any increase in administrative costs, charges and expenses contained in the modified blanket licence are reasonable, having regard to the administrative costs to APRA of offering and providing to the user a modified blanket licence.

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

Submissions in response to the draft determination

4.270 The ADA /ALCC submitted that there is a definite need for APRA to adjust its blanket licences to the circumstances and uses of its licensees and the expert acting in APRA's expert-determination process should be required to express an opinion on factors in addition to the ones the ACCC has proposed in its draft determination. In particular, they argue that the expert should be required to express a view about whether APRA offers cultural institutions and other users a genuine discount to blanket licence fees to reflect non-commercial use. They further argue that the expert should also identify user classes and needs and suggest licence amendments accordingly.

4.271 Immediately following the draft determination APRA submitted the following.

4.272 APRA has no objection in principle to a requirement that an expert determining disputes between APRA and licensees or potential licensees report on alternative licensing models offered. APRA states that it accepts that it must offer alternatives to the blanket licence where this is suitable for the user and that this already occurs.

4.273 APRA did suggest changes to the drafting of the condition to reflect that the expert should report on alternative forms of licences only in relation to disputes where the user has requested an alternative form of licence or there are direct dealings or the potential for direct dealings.

4.274 APRA states that the majority of disputes involve matters such as the number of attendees at a premises or whether the use of music is 'featured' or 'background' and that as the issue of the availability of an alternative to a blanket licence is not an issue in such disputes it should not be considered or reported on in relation to these types of disputes.

4.275 APRA suggested that the proposed condition be re-drafted so that reporting is only required where the user has obtained any direct licences from APRA members for the performances or communications the subject of the dispute.

4.276 APRA also suggested redrafting to paragraph 1. of the proposed condition such that is would read, with APRA's additions marked up.

1. Whether, in the expert's opinion, APRA offered the user (being a licensee or potential licensee) ~~a genuine discount of~~ 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 contained in the modified blanket licence ~~reflected in the licence offered~~ are reasonable, having regard to the administrative costs to APRA of offering and providing to the user a modified blanket licence ~~the licence offered~~.

4.277 In response, Cinema Operators submitted that APRA's proposed wording for the condition requiring the expert to consider issues of direct licensing and discounted

blanket licences requires he or she to do so only if the user had obtained any direct licences from APRA members.

4.278 Cinema Operators submit that this is inappropriate as it precludes consideration of these issues when the licensee may be seeking to negotiate a discounted blanket licence which takes account of any future direct licensing. Cinema Operators also noted that this would restrict the operation of the provision to circumstances where the user has obtained direct licences from APRA members – without taking into account direct licensing from non-APRA members (for example, US copyright holders) of music in the APRA repertoire.

ACCC's view

4.279 The ACCC remains of the view that the independent expert should be required to express a view about alternatives to blanket licences in appropriate circumstances. The ACCC notes that no interested party, including APRA, has objected, in principal, to this condition.

4.280 Noting the views of APRA and interested parties the ACCC does propose to modify the wording of the condition to clarify that the expert should only report on these issues where they are relevant to the dispute being considered. However, for the reasons noted by Cinema Operators, the drafting changes proposed by APRA narrow the scope of circumstances in which the expert will consider these issues more than was intended by the ACCC or likely intended by APRA. Accordingly, the ACCC does not propose to directly adopt the re-drafting suggestions proposed by APRA.

4.281 The ACCC also notes that determining the pricing and other terms for licensing intellectual property is complex. In particular, there is only limited information on which to draw in determining what appropriate licence terms and conditions should be, and very little information at all about the form that alternatives to blanket licensing could take and/or appropriate discounts on blanket licences to take account of direct dealing.

4.282 Under APRA's proposed amendments to its expert determination process, the experts appointed would be barristers with intellectual property expertise. The ACCC considers that the expert determination process is likely to be aided further in some instances if the barrister appointed to consider the dispute was able to draw on other outside economic and/or financial expertise in determining the dispute. This is not to say that such additional outside expertise will always be necessary or appropriate. However, there are some instances where it is likely to assist the barrister appointed in reaching a decision.

4.283 The ACCC appreciates that the parties to a dispute are likely to introduce economic or other outside expert evidence of their own in support of their arguments. However, the ACCC considers that in addition to any information the parties introduce, the expert should, where he or she considers it necessary, be able to draw on independent advice on these issues.

4.284 The ACCC notes that nothing in the current expert determination process provisions precludes such additional outside expertise being drawn on to assist in determining disputes. The ACCC considers however that the option for the expert to do so should be explicitly recognised and proposes to include such explicit recognition in the

condition of authorisation regarding matters to which the independent expert should have regard.

4.285 More generally, the ACCC notes that there may be other instances where a dispute does not involve consideration of alternatives to a blanket licence and/or discounts on blanket licences to reflect direct dealing where it may also be beneficial for the barrister appointed to hear the dispute to draw on economic or other expertise in reaching his or her decision.

4.286 The ACCC considers it appropriate that where the expert has commissioned such input or advice the cost of doing so should be included as part of the cost of the independent expert.

4.287 The ACCC re-authorises APRA's arrangements subject to the following condition.

Condition C1 – That, as part of its alternative dispute resolution process (contained in Annexure B to the Competition Tribunal's 2000 decision on APRA's arrangements), APRA must require any independent expert appointed to determine a dispute to provide a written report to APRA stating:

1. Whether the user has requested that the expert consider whether APRA offered the user (being a licensee or potential licensee) a licence that takes into account any direct dealing or potential future direct dealing between the user and a copyright owner.

2. 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 past, or potential future 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 contained in the modified blanket licence are reasonable, having regard to the administrative costs to APRA of offering and providing to the user a modified blanket licence.

3. Whether any amendments could be made to the user's licence (or if the user is not a licensee, to the blanket licence offered) so that the licence provides a genuine and workable alternative to the user relying on a blanket licence.

For the purpose of providing his or her report under this condition, the expert may obtain such advice as the expert considers reasonably appropriate (including, but not limited to, economic or financial advice). The costs of any such advice are to be included in the costs of the expert in relation to the dispute.

4.288 The ACCC considers that the changes to the reporting requirements proposed by the ADA/ALCC go beyond the scope of what should be required of a reporting condition designed to be of general application across all users. The ACCC considers that the issues raised by the ADA/ALCC are issues that would ordinarily be considered by the expert in any dispute in which they were raised and were at issue.

Condition proposed in the draft determination about reporting to the ACCC

4.289 In its draft determination the ACCC stated that it wished to assess the implementation and effects of the conditions imposed and other progress and developments at APRA and in the sector over the proposed length of re-authorisation.

4.290 In coming to its conclusions and devising proposed conditions, the ACCC had considered the possible merits and effects of other options for the sector, such as opt out by work, a capacity for composers to hold particular works back from the APRA repertoire on joining APRA and/or the realisation of the counterfactual – default non-exclusive licensing by composers to APRA (as is the case for the US collecting societies).

4.291 The ACCC stated that it wished to assess developments over the period of proposed re-authorisation to better assess whether the conditions devised now will by that time have brought any or sufficient progress or indications that progress is forthcoming; or whether other options such as those discussed immediately above must be reconsidered.

4.292 Accordingly, the ACCC proposed to re-authorise APRA's arrangements subject to a condition requiring that APRA provide the ACCC with an annual report about disputes notified to APRA under its alternative dispute resolution process in the previous year. The proposed condition also required APRA to provide a version of the report suitable for inclusion on the public register.

Submissions in response to the draft determination

4.293 The AHA submits that it supports the proposed condition, with a suggestion that a copy of the public version of APRA's report be sent to all that register an interest with APRA to receive it. The Cinema Operators also supported the proposed condition.

4.294 APRA states that it has no objection to the proposed condition.

ACCC view

4.295 For the reasons discussed above the ACCC re-authorises APRA's arrangements subject to the following condition.

Condition C2 – On an annual basis for the duration of this Authorisation, APRA must provide the ACCC with a report about disputes notified to APRA under its alternative dispute resolution process (contained in Annexure B to the Competition Tribunal's 2000 decision on APRA's arrangements) (the ADR Report) for the previous calendar year in accordance with this condition C2:

1. APRA must provide to the ACCC the first ADR Report on 1 May 2011. The first ADR Report will concern Disputes for the period commencing on the date this Authorisation becomes effective and ending on 31 March 2011. All subsequent ADR Reports must be submitted to the ACCC prior to 1 May of each year and will concern disputes for the 12 months ending 31 March of each year (Reporting Period).

2. Each ADR Report must include a description of each dispute including:

(i) a description of the issue/s the subject of the dispute

(ii) the outcome sought by the parties to the dispute

(iii) whether the dispute has been resolved or not

(iv) a copy of the expert's report to APRA under condition C1 where such a report was produced

(v) the time taken to conduct the expert determination and

(vi) the costs associated with conducting the expert determination and the apportionment of the costs to the parties to the dispute.

3. At the same time APRA provides each ADR Report to the ACCC, APRA must also provide the ACCC with a version of the ADR Report for publication on the public register of authorisations maintained in accordance with section 89 of the Act. This version of the report is to include a public description of each of the above points (i) through to and including (v).

4.296 With respect to the AHA's submission that the public version of these reports should be provided to all interested parties who express an interest in receiving them, the public versions of the reports will be available from the ACCC's website shortly after 1 May of each year.

Code of Conduct

4.297 The Code of Conduct for Australian Collecting Societies is designed to ensure a minimum level of protection for all who deal with collection societies and an independent Code Reviewer reports on compliance.

4.298 As stated in its draft determination, the ACCC welcomes initiatives such as the Code of Conduct, to the extent that they establish transparent, expedient and cost-effective processes for organisations to receive and handle complaints made against them. The Code appears to be an effective means of dealing with these types of issues.

4.299 However, the ACCC considers that the Code does not reduce APRA's capacity to impose licence terms and conditions on users which reflect its position as a monopoly provider of performance rights licences in Australia.

Distribution arrangements

4.300 As stated in its draft determination, the ACCC considers that due to APRA's monopoly and the absence of competitive pressure to determine licence fees, the subsequent distribution of royalties may result in a misallocation of resources.

Overseas arrangements

Submission in response to the draft determination

4.301 The ALLM states that ALLM members have attempted to source rights from foreign collecting societies because, they argue, their fees are less exorbitant than APRA's, specifically noting approaches to the Canadian and United Kingdom societies. In both

cases the ALLM states that members were told the foreign society was not prepared to negotiate with them and they should approach APRA.

ACCC view

4.302 The ACCC considers that the world-wide array of reciprocal agreements between national-monopoly collecting societies generates public detriments in Australia, most keenly felt in relation to non-US works exclusively administered by APRA. APRA's arrangements with overseas collection societies largely foreclose the possibility of users sourcing performance rights to overseas works through other means, other than in the case of US works.

4.303 The ACCC notes that constant improvements in information technology and communications mean that every year it is easier for service and product providers to deal and make offers across borders. In this regard, the ACCC notes the emergence of such commercial on-line and cross-border music licensors as jamendo.com and beatpick.com

4.304 The ACCC considers that the difficulty in the creation of other methods to administer performing rights discussed elsewhere in this draft determination is compounded by APRA's arrangements with overseas collection societies, which have the effect of preventing or discouraging those societies from competing in Australia by providing access to their repertoire directly to Australian users. This limits the need for the overseas collecting societies to enter the Australian market for the purpose of collecting fees for use of works in their repertoires.

4.305 In addition, APRA's overseas arrangements severely limit the ability of users to go directly to overseas societies or even original rights holders such as composers to acquire rights. This decreases the likely entry of new collecting societies or creation of alternative mechanisms because access to overseas repertoires and works would be denied or at least hampered.

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

4.307 The ACCC considers that for the exclusively held works, the conclusions found above from paragraph 4.58 to 4.67 hold.

Digital and online music

4.308 Rights assigned by APRA members include the right to perform the work in public (for example, in pubs and cinemas) and the right to communicate the work in public (for example through broadcast or online means). APRA collectively defines these as 'performing rights'.

4.309 In respect of most classes of use, APRA develops licensing schemes that are then, generally, applied to all users in that class. For example, the licence scheme for nightclubs provides that nightclubs pay a set fee per patron. APRA has stated that it

prefers to develop general licence schemes that are applied to all businesses in an industry rather than negotiate individual arrangements with each potential licensee in an industry.

4.310 However, in some circumstances, where APRA does not consider that a licence scheme can be developed that suitably captures the divergent business models of participants in a particular industry, it will negotiate licensing arrangements with each user individually rather than develop a licence scheme to apply to all users in that industry.

Submissions in response to the draft determination

4.311 Creative Commons submits that while the ACCC's draft determination focused on public performances of music works less attention was given to communication of works through online means.

4.312 Creative Commons submits that online distribution is the area in which the music user and distribution is most rapidly changing and in which musicians and users are presented with the broadest array of licensing and distribution options.

4.313 Creative Commons argues that to ensure maximum market utility and licensing flexibility for musicians and users, mechanisms should be introduced through which APRA members may distribute their works via commercial social networking and revenue-sharing services with legal certainty and, ideally, have the choice to use the full suite of Creative Commons licences, including those that allow commercial use.

4.314 The AIMIA argues that APRA should engage closely with the digital media sector so that it is aware of emerging business models and can adopt a sensitive and sophisticated approach to licence fees. The AIMIA states that two example areas of growth for which collaborative answers need to be found are video on-line and user-generated content.

4.315 The AIMIA argues that APRA should as a matter of priority work with the digital media industry to develop a published licensing scheme for the use of music in video online.[21] AIMIA further submits that re-authorisation should be conditional on APRA engaging with the digital media industry via a formal consultation process.

4.316 APRA states that it is willing to provide improved information for APRA members and licensors on the legal implications of its input and output arrangements and its policies with respect to common online activities.

ACCC's view

4.317 As discussed at paragraphs 4.192 to 4.214, under changes to APRA licence back provisions there now exists a relatively straight forward system whereby members can licence back in respect of the right to communicate their works in public in Australia to facilitate direct dealing with users.

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[21] In a submission before the draft determination, SBS noted that APRA had entered into a number of short-term 'experimental' licences with various online service providers and it also supported the view that APRA should as a priority work with the digital media industry to develop a published licence scheme for the use of music in video online. SBS said that within coming years it might expect that it would have a single licence from APRA to cover all its Charter activities rather than separate licences for broadcasting and online/new media respectively.

4.318 The ACCC notes that there will be difficulties and complexities in dealing with new, rapidly evolving and arguably divergent business models and many approaches might be possible, ranging from widely applicable published licensing schemes to individually tailored licence settlements. In particular, the range of different revenue models for online content providers (such as through subscription fees, usage charges or not charging users at all and relying on advertising revenue) make it difficult in some circumstances to develop a licence scheme that would have broad application. This is in contrast, for example, to the licence scheme for nightclubs where the licence fee payable is based on a simple and commonly applicable reference point – being number of patrons entering the venue.

4.319 The ACCC welcomes the fact that – as a result of the settlement in December 2009 of Copyright Tribunal proceedings between it and major digital download providers Apple, Sony, Universal and Telstra – APRA now has a published licence scheme for 'a la carte' digital downloads of music and music videos in Australia.[22] APRA itself notes that digital music services account for about one quarter of the recorded music market and that figure is increasing each year. APRA also has published licence schemes for, for example, mobile phone ringtone providers and certain webcasts and on-demand music services (for example, for material made available via online 'streaming' such as music-news programs and movie trailers).

4.320 The ACCC further understands that, although APRA has apparently concluded individual licence deals for many online providers, general licence schemes for the following digital and online applications are, at this time, 'under review':

- Portal Sites – websites that use music in a wide range of applications: for example, those of traditional media outlets including broadcasters and aggregators.

- User Generated Content Sites – where the providers facilitate the making, supply and dissemination of the content submitted by users: for example, MySpace, Facebook and YouTube.

4.321 Indeed, it is in APRA's best interest, and is their stated preference, to develop licensing schemes rather than deal with licensees individually, where possible. This is supported by the fact that for most classes of users APRA does use licence schemes.

4.322 Given that online applications represent and/or are driving much of the business growth and innovation in the use of musical works and performing rights, the ACCC will continue to review the issue of online applications, including the possible development of licence schemes for these types of users, in any future assessments of APRA's arrangements.

Balance of public benefit and detriment

4.323 In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

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[22] *Australasian Performing Right Association Ltd and Australasian Mechanical Copyright Owners Society Ltd* [2009] ACopyT 2 (17 December 2009)

4.324 In the context of applying the net public benefit test in section 90(8)[23] of the Act, the Competition Tribunal commented that:

> ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.[24]

4.325 The ACCC considers that APRA offers composers and music users significant benefits in terms of helping users get licences to play music and ensuring songwriters are rewarded for their efforts through royalties.

4.326 The ACCC also considers that the arrangements are likely to continue to generate other significant public benefits – for example, the simplification of monitoring and enforcement for APRA under exclusive assignment and blanket licences and the transaction-cost savings and instantaneous access to a comprehensive repertoire afforded to users by blanket licences.

4.327 However, the ACCC considers that APRA's arrangements continue to generate a significant level of public detriment compared with the likely alternative of a single collecting society with non-exclusive licensing from composers and different user-licensing arrangements. APRA is a monopoly whose rules generally restrict direct dealing between composers and users. The concentration of members' rights exclusively with APRA means that APRA is able to set prices for access to its repertoire without being subject to competitive constraints.

4.328 The ACCC considers that it can be satisfied that, on the imposition of certain conditions noted further below, the conduct and arrangements for which APRA has sought re-authorisation are likely to result in a public benefit and that public benefit will outweigh any likely public detriment.

4.329 The ACCC notes the following conclusions of the Competition Tribunal in the APRA matter:

> The overwhelming conclusion arising from the evidence and from the review of overseas experience is that bodies like APRA that engage in the collective administration of performing rights in music are considered as necessary and desirable to ensure the proper enjoyment by writers and publishers and to provide, in the vast majority of cases, an efficient, cost effective means of enabling users of music to obtain lawful access to a virtually unlimited repertoire. The achievement of these ends is recognised as being strongly in the public interest. No other way of administering performing rights in music is suggested by the evidence.[25]

4.330 The ACCC notes the further following conclusions of the Competition Tribunal that:

> The proper approach is that which has been followed in the overseas inquiries and decisions which we have reviewed: Is a particular feature of APRA's Articles and Rules essential to the operation of APRA as an efficient collecting society?...If aspects of APRA's collective administration which are identified as anti-competitive can be modified so as to remove or lessen the potential for detriment without impairing essential components of APRA's operations, then authorisation should be granted on terms that bring about those modifications.

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[23] 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.

[24] *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

[25] *Re Australasian Performing Right Association Ltd* [1999] ACompT 3 (16 June 1999)

4.331 The ACCC notes that these conclusions are consistent with the ACCC's conclusion that the core element of the most likely counterfactual is that there would still be one major collecting society in the near to medium term at least.

4.332 The ACCC also notes the Competition Tribunal's finding in 1999 that:

> At present APRA's policies are pitched to achieve user compliance and efficient internal administration, and show a degree of indifference to the interests and understandable concerns of users. Only a little choice of licensing schemes is offered, and schemes on offer are designed to suit public performance licence administration, even in the case of television and diffusion licences. This behaviour is suggestive of a monopoly, convinced of its virtue, and encourages resentment and hostility among users. The Tribunal considers this behaviour is damaging to APRA's reputation, and potentially a public detriment that could weigh against APRA in future reviews of APRA's system under competition law. It is to the public benefit that APRA understands and responds to changes in the market for music in ways that seek to accommodate the needs of music users. Competition laws require as much from the holder of a privileged monopoly. It is not suggested that APRA should resile from the pursuit of its members' interests, but timely and sufficient responses to reasonable user concerns should mark future policies and behaviour of APRA, both in the public interest and in the interests of its members.
>
> The Tribunal has considered how to encourage response to changing circumstances. We consider that if APRA's input arrangements were modified to allow opt out [licence back] for single works for performance in carefully defined circumstances that would be a significant first step. The Tribunal recognises that such a modification would have potential risk to the integrity and utility of the APRA system, and would need to be monitored closely.[26]

4.333 In its draft determination the ACCC considered that in the more-than-a-decade since that 'significant first step', APRA has increased revenue and membership numbers despite the changes to its system. However, many of the submissions lodged by interested parties in relation to the 2006 and current re-authorisation applications indicate that a number of users, including classes of users, remain dissatisfied with APRA.

4.334 In its draft determination the ACCC concluded that there can and should be greater opportunity for more direct licensing and more price competition between composers (or other rights holders) where it is practical and efficient. The ACCC considered that this has benefits for the parties involved and also provides an alternative to APRA which could constrain at least some of the anti-competitive effects of APRA's arrangements.

4.335 Overall, the ACCC considered that where competition can be injected into the acquisition and supply of performing rights at acceptable cost and in a way that does not jeopardise the other benefits or efficiencies produced by APRA's system then this should be promoted. The ACCC noted that such competition will increase the public benefits from the APRA arrangements whilst decreasing the public detriments.

4.336 To this end, the ACCC proposed a condition of authorisation that would have required APRA to introduce a more streamlined process for members wishing to license back works and on-license them directly to users. The ACCC considered that the information members were required to provide APRA in order to license back works was unnecessarily onerous and discouraged direct dealing between members and music users. The ACCC proposed a condition of authorisation such that the member would only be required to provide information that was reasonably needed by APRA in order

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[26] *Re Australasian Performing Right Association Ltd* [1999] ACompT (16 June 1999) paras 345 and 346

for APRA to identify the relevant work as being subject to the licence back arrangement at the time of any performance.

4.337 In response to the draft determination APRA has amended its licence back provisions. These proposed changes address many of the concerns raised by the ACCC in its draft determination that led to the ACCC proposing to impose a condition of authorisation requiring that APRA offer new streamlined licence back arrangements. Accordingly, the ACCC no longer considers the imposition of such a condition to be necessary.

4.338 In the draft determination the ACCC also proposed two other conditions of authorisation.

4.339 In this respect the ACCC notes the conclusions of the Competition Tribunal in the 2007 *Medicines Australia* case that:

> A condition may be imposed upon authorisation for reasons which include the following:
>
> 1. In a case in which there is no or insufficient public benefit in the proposed contract, arrangement, understanding or conduct satisfying the ACCC for the purposes of s 90(6) or 90(8) that authorisation can be granted, a condition may be imposed requiring a variation of the proposal which would yield the requisite public benefit. Such a condition may:
>
> (i) reduce the anti-competitive detriment of the proposal for the purposes of s 90(6);
> (ii) reduce the public detriment which would otherwise cause the claimed public benefit to be discounted;
> (iii) increase the public benefit to a level assessed by the ACCC to be sufficient for the purposes of the applicable statutory test.
>
> 2. In a case in which a theoretically sufficient public benefit has been identified a condition may be imposed to vary the proposal so that the likelihood of the benefit resulting is raised to a sufficient level.
>
> 3. In a case in which the proposal has satisfied the relevant public benefit test under s 90(6) or 90(8) as the case may be, a condition may be imposed without which the ACCC would not be prepared to exercise its discretion in favour of authorisation. The range of permissible conditions under this head is necessarily limited by the range of considerations relevant to the exercise of the discretion. While not in terms mandated by the conditioning power, it would be appropriate in exercising that power that the ACCC (or the Tribunal) have regard to any burdens it may impose upon the party seeking authorisation.[27]

4.340 The ACCC considers that it can be satisfied that, by imposing these conditions, the conduct and arrangements for which APRA has sought re-authorisation are likely to result in a public benefit and that public benefit will outweigh any likely public detriment. The ACCC therefore has decided to re-authorise APRA's arrangements, subject to two conditions.

Condition 1 – expert determination

Condition C1 – That, as part of its alternative dispute resolution process (contained in Annexure B to the Competition Tribunal's 2000 decision on APRA's arrangements), APRA must require any independent expert appointed to determine a dispute to provide a written report to APRA stating:

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[27] *Re Medicines Australia Inc* [2007] ACompT 4 (27 June 2007) para 133

1. Whether the user has requested that the expert consider whether APRA offered the user (being a licensee or potential licensee) a licence that takes into account any direct dealing or potential future direct dealing between the user and a copyright owner.

2. 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 past, or potential future 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 contained in the modified blanket licence are reasonable, having regard to the administrative costs to APRA of offering and providing to the user a modified blanket licence.

3. Whether any amendments could be made to the user's licence (or if the user is not a licensee, to the blanket licence offered) so that the licence provides a genuine and workable alternative to the user relying on a blanket licence.

For the purpose of providing his or her report under this condition, the expert may obtain such advice as the expert considers reasonably appropriate (including, but not limited to, economic or financial advice). The costs of any such advice are to be included in the costs of the expert in relation to the dispute.

Condition 2 – reporting to the ACCC

Condition C2 – On an annual basis for the duration of this Authorisation, APRA must provide the ACCC with a report about disputes notified to APRA under its alternative dispute resolution process (contained in Annexure B to the Competition Tribunal's 2000 decision on APRA's arrangements) (the ADR Report) for the previous calendar year in accordance with this condition C2:

1. APRA must provide to the ACCC the first ADR Report on 1 May 2011. The first ADR Report will concern Disputes for the period commencing on the date this Authorisation becomes effective and ending on 31 March 2011. All subsequent ADR Reports must be submitted to the ACCC prior to 1 May of each year and will concern disputes for the 12 months ending 31 March of each year (Reporting Period).

2. Each ADR Report must include a description of each dispute including:

   (i) a description of the issue/s the subject of the dispute

   (ii) the outcome sought by the parties to the dispute

   (iii) whether the dispute has been resolved or not

   (iv) a copy of the expert's report to APRA under condition C1 where such a report was produced

   (v) the time taken to conduct the expert determination and

(vi) the costs associated with conducting the expert determination and the apportionment of the costs to the parties to the dispute.

3. At the same time APRA provides each ADR Report to the ACCC, APRA must also provide the ACCC with a version of the ADR Report for publication on the public register of authorisations maintained in accordance with section 89 of the Act. This version of the report is to include a public description of each of the above points (i) through to (v).

Conduct for which the ACCC grants authorisation

4.341 As discussed, APRA lodged amendments to its application for re-authorisation on 12 March 2010, 16 March 2010, 25 March 2010 and 31 March 2010.

4.342 In particular, on 12 March 2010, APRA lodged amendments to the process by which the expert under its ADR process will be determined. On 12 March and 16 March 2010 APRA lodged amendments to Article 17(g) of its constitution (licence back). On 25 March 2010 APRA amended its application to increase the threshold licence value above which it was proposing, as part of its initial application, the costs of its expert determination process between it and the licensee or potential licensee would be shared from $50,000 to $100,000.

4.343 On 12 March 2010 APRA also amended its application, removing from its explanation of the ADR process the explicit acknowledgment of the availability of alternative forms of ADR for resolving disputes, such as mediation. APRA had proposed the addition of such an acknowledgment in the explanation of its ADR process as part of its initial application for re-authorisation. In proposing to remove this explicit acknowledgment, APRA was not proposing that the right to explore alternative options of dispute resolution methods be removed.

4.344 On 31 March 2010 APRA amended its application to re-include this acknowledgment in the explanation of its ADR process.

4.345 The ACCC grants authorisation to APRA's application as amended on these dates.

Length of authorisation

4.346 The Act allows the ACCC to grant authorisation for a limited period of time.[28] 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.

The ACCC's draft determination

4.347 In its initial application for revocation and substitution, APRA sought re-authorisation for six years.

4.348 Submissions on the period of authorisation before the draft determination included the following.

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[28] Section 91(1).

4.349 APRA submitted that the costs of applying for revocation and substitution are significant and that APRA has demonstrated a willingness and ability to operate within the terms of its authorisation since 2000. APRA submitted that it should be permitted a longer period of time (than previously authorised) so as to enable continued efficient operation of APRA's core business.

4.350 APRA also noted the ACCC's power to consider revoking existing authorisations if there is a material change of circumstance during the life of an authorisation.

4.351 SBS and AIMIA submitted that APRA must consult with industry in developing new digital-media licences. SBS and the AIMIA submitted that given rapid developments in the media industry, and digital media in particular, a period of authorisation of four years would be more appropriate.

4.352 Cinema Operators submitted that authorisation should be granted for three years, and the ADA/ALCC submit that authorisation should be granted for two years, to provide for ongoing review of the arrangements by the ACCC. Fairfax similarly argued that, given the speed of changes in the digital information and entertainment industry, authorisation should be granted for three years.

4.353 In its draft determination, the ACCC noted that while it considered that the public benefits of APRA's arrangements continued to outweigh the public detriment, the ACCC had identified the arrangements as generating significant public detriment. The ACCC also noted the submissions of interested parties that future technological developments, particularly in relation to digital media, may impact on any future assessment of the public benefits and detriment of APRA's arrangements.

4.354 Given the ongoing concerns about the potential public detriment generated by APRA's arrangements the ACCC proposed to limit the authorisation to a period of three years.

Submissions in response to the draft determination

4.355 Cinema Operators, the Association of Liquor Licensees Melbourne, the AHA, and the ADA/ALCC all submitted that authorisation should be granted for three years.

4.356 In particular, FreeTV submitted that authorisation should be limited to three years, given rapid changes in technology and market conditions for content delivery – for example, digital downloads, streaming, Internet Protocol television, mobile telephony and digital television – and the potential for innovations to decrease transaction costs. Free TV also argued that collection societies are currently seeking to increase licence fees and that in that environment the duration of authorisation should be limited.

4.357 APRA noted that its arrangements were previously authorised for four years and argued that there is nothing foreshadowed, in terms of potential technological developments or changes to APRA's processes, that would warrant a shorter authorisation than this.

4.358 APRA also argued that the authorisation process is expensive and time consuming.

4.359 Accordingly, APRA argued, authorisation should be granted for four years.

ACCC view

4.360 As noted, while the ACCC is satisfied that, subject to the conditions discussed above, the public benefits resulting from APRA's collective administration of performing rights continues to outweigh the public detriment, in reaching this conclusion the ACCC has identified that APRA's arrangements generate significant public detriment.

4.361 The ACCC again also notes the submissions of interested parties that technological developments, particularly in relation to digital media, may impact on any future assessment of the public benefits and detriment of APRA's arrangements.

4.362 Given this the ACCC remains of the view that an authorisation period of around three years is appropriate.

4.363 However, condition of authorisation C2 imposed by the ACCC requires APRA to provide an annual report, by 1 May each year, about disputes notified to APRA under its alternative dispute resolution process. If APRA's arrangements are authorised for a further three years, this authorisation would expire at around the same time as the report due on 1 May 2013.

4.364 The ACCC considers that an assessment of any application for re-authorisation submitted by APRA at the expiration of this authorisation would be usefully informed by having available at the time re-authorisation is considered the most recent report about disputes notified to APRA under its alternative dispute resolution process.

4.365 Given the statutory timeframes for considering applications for authorisation, applications for re-authorisation are generally lodged six months before the expiration of the existing authorisation.

4.366 Accordingly the ACCC proposes to re-authorise APRA's arrangements until 31 October 2013. This will allow any application for re-authorisation APRA lodges to be submitted at around the same time as the ACCC receives APRA's 1 May 2013 report about disputes notified to APRA under its alternative dispute resolution process.

5. Determination

The application

5.1 On 30 September 2009 the Australasian Performing Right Association Ltd (APRA) lodged applications for revocation of authorisations A90918, A90919, A90921, A90922, A90924, A90925, A90944 and A90945 and the substitution of authorisations A91187 to A91194 and A91211 with the ACCC.

5.2 Applications A91187, A91188, A91192, A91193 and A91211 were made under section 91C(1) of the Act. Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked (re-authorisation). In order for the ACCC to re-authorise, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process. Relevantly, the ACCC may grant authorisation under:

- section 88(1A) of the Act, to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act and

- section 88(1) of the Act, 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.

5.3 Applications A91189, A91190, A91191 and A91194 were made under section 91C(1) of the Act. Relevantly, the ACCC may grant authorisation under:

- section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act), and

- section 88(1) of the Act 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.

5.4 APRA seeks authorisation for arrangements for the acquisition and licensing of performing rights in music. In broad terms, these arrangements cover APRA's:

- 'input' arrangements – the assignment of performing rights by members to APRA and the terms on which membership of APRA is granted

- 'output' arrangements – the licensing arrangements between APRA and the users of musical works

- distribution arrangements – by which APRA distributes to relevant members the fees it has collected from licensees/users and

- 'overseas' arrangements – the reciprocal arrangements between APRA and overseas collecting societies pursuant to which each grants the other the right to license works in their repertoires.

The net public benefit test

5.5 For the reasons outlined in Chapter 4 of this determination the ACCC considers that, subject to certain conditions being imposed, in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

5.6 The ACCC is also satisfied that, subject to certain conditions being imposed, the conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.

5.7 The ACCC therefore **grants authorisation** to applications A91187 to A91194 and A91211.

Conduct for which the ACCC proposes to grant authorisation

5.8 The ACCC grants authorisation to the arrangements until 31 October 2013.

5.9 The ACCC grants authorisation to the arrangements as amended on 12 March 2010, 16 March 2010, 25 March 2010 and 31 March 2010.

5.10 This authorisation is subject to the conditions outlined below.

5.11 This determination is made on 16 April 2010.

5.12 The attachments to this determination are part of the determination.

Conditions

Condition C1 – That, as part of its alternative dispute resolution process (contained in Annexure B to the Competition Tribunal's 2000 decision on APRA's arrangements), APRA must require any independent expert appointed to determine a dispute to provide a written report to APRA stating:

1. Whether the user has requested that the expert consider whether APRA offered the user (being a licensee or potential licensee) a licence that takes into account any direct dealing or potential future direct dealing between the user and a copyright owner.

2. 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 past, or potential future 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 contained in the modified blanket licence are reasonable, having regard to the administrative costs to APRA of offering and providing to the user a modified blanket licence.

3. Whether any amendments could be made to the user's licence (or if the user is not a licensee, to the blanket licence offered) so that the licence provides a genuine and workable alternative to the user relying on a blanket licence.

For the purpose of providing his or her report under this condition, the expert may obtain such advice as the expert considers reasonably appropriate (including, but not limited to, economic or financial advice). The costs of any such advice are to be included in the costs of the expert in relation to the dispute.

Condition C2 – On an annual basis for the duration of this Authorisation, APRA must provide the ACCC with a report about disputes notified to APRA under its alternative dispute resolution process (contained in Annexure B to the Competition Tribunal's 2000 decision on APRA's arrangements) (the ADR Report) for the previous calendar year in accordance with this condition C2:

1. APRA must provide to the ACCC the first ADR Report on 1 May 2011. The first ADR Report will concern Disputes for the period commencing on the date this Authorisation becomes effective and ending on 31 March 2011. All subsequent ADR Reports must be submitted to the ACCC prior to 1 May of each year and will concern disputes for the 12 months ending 31 March of each year (Reporting Period).

2. Each ADR Report must include a description of each dispute including:

    (i) a description of the issue/s the subject of the dispute

    (ii) the outcome sought by the parties to the dispute

    (iii) whether the dispute has been resolved or not

    (iv) a copy of the expert's report to APRA under condition C1 where such a report was produced

    (v) the time taken to conduct the expert determination and

    (vi) the costs associated with conducting the expert determination and the apportionment of the costs to the parties to the dispute.

3. At the same time APRA provides each ADR Report to the ACCC, APRA must also provide the ACCC with a version of the ADR Report for publication on the public register of authorisations maintained in accordance with section 89 of the Act. This version of the report is to include a public description of each of the above points (i) through to (v).

Interim authorisation

5.13 On 1 March 2010 APRA requested interim authorisation for the arrangements. The ACCC granted interim authorisation on 22 March 2010. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

5.14 This determination is made on 16 April 2010. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 8 May 2010.

Attachment A — the authorisation process

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.

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'.

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.

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.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

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.

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.

Attachment B — chronology of ACCC's assessment

DATE	ACTION
30 September 2009	Application for revocation and substitution lodged with the ACCC.
11 November 2009	Closing date for submissions from interested parties on the application.
16 December 2009	Submission received from APRA in response to interested party submissions.
8 February 2010	Draft determination issued.
1 March 2010	Application for interim authorisation lodged with the ACCC.
1 March 2010	Closing date for submissions on the draft determination.
12 and 16 March 2010	Further submissions and amendments to the application received from APRA.
22 March 2010	ACCC granted interim authorisation.
23 March 2010	Closing date for submissions about APRA's further submission and amendments to the application.
25 March 2010	Further amendment to the application received from APRA.
31 March 2010	Further amendment to the application received from APRA.
16 April 2010	Final determination issued.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

(1) The Commission shall, in respect of an application for an authorization:

(a) make a determination in writing granting such authorization as it considers appropriate; or

(b) make a determination in writing dismissing the application.

(2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(4) The Commission shall state in writing its reasons for a determination made by it.

(5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:

(a) that the provision would result, or be likely to result, in a benefit to the public; and

(b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and

(ii) the provision were given effect to.

(5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:

(a) that the provision has resulted, or is likely to result, in a benefit to the public; and

(b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

(6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;

(b) the proposed covenant were given, and were complied with; or

(c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

(a) make a determination granting:

(i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or

(ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or

(iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or

(iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

(b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;

(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Competition Tribunal) has found that the tests are not precisely the same. The Competition 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.[29]

However, the 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.[30]

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.

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). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.[31]

Future and other parties

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 future[32]

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[29] *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.

[30] *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.

[31] Section 91(3).

[32] Section 88(10).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.[33]

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation[34]. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.[35] The Act limits applications for minor variation to applications for:

> ... a single variation that does not involve a material change in the effect of the authorisation.[36]

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.[37] The ACCC may also review an authorisation with a view to revoking it in certain circumstances.[38]

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.[39] The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.[40]

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[33] Section 88(6).
[34] Section 90(10A)
[35] Subsection 91A(1)
[36] Subsection 87ZD(1).
[37] Subsection 91B(1)
[38] Subsection 91B(3)
[39] Subsection 91C(1)
[40] Subsection 91C(3)