



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation and substitution of
authorisations A91187-A91194 and A91211

lodged by

Australasian Performing Right Association Ltd

in respect of

arrangements for the acquisition and licensing of
performing rights in music

Date: 15 October 2013

Authorisation numbers: A91367 - A91375

Commissioners:
Sims
Cifuentes
Walker

Summary

The ACCC proposes to grant conditional authorisation for three years to the Australasian Performing Right Association Ltd (APRA) to continue its arrangements for the acquisition and licensing of performing rights in music.

Authorisation is subject to proposed conditions C1, C2, C3, C4 and C5.

Next steps

The ACCC will seek further submissions in relation to this draft determination before making its final decision. The applicant and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

APRA is a copyright collecting society that provides a centralised means for granting copyright licences to those wishing to broadcast or perform musical works in public (for example, cinemas, restaurants, radio stations, nightclubs and live music venues) and for distributing royalties back to its members. Composers, songwriters and music publishers who become members of APRA participate in these arrangements by assigning all of the performing rights in their current and future works.

On 30 April 2013, APRA lodged an application for re-authorisation of its arrangements that, in broad terms, cover its:

- '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.

APRA's arrangements have previously been authorised on a number of occasions, most recently in 2010.

The ACCC considers that for the foreseeable future without the conduct that is the subject of the authorisation, there is likely to be one major collecting society in Australia for the rights that APRA currently holds, in the context of the current statutory framework for the creation and protection of copyright materials and as a consequence of the substantial efficiencies arising from collective licensing. Absent authorisation of the conduct, this collecting society 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. The ACCC notes that the likely 'future without' is considered in the context of the current regulatory framework as it relates to collecting societies, the Copyright Tribunal and the enforcement of copyright.

Noting this likely future without, only a proportion of the public benefits and detriments associated with the APRA system would arise directly from the conduct that is the subject of the authorisation.

The ACCC accepts that there are significant transaction cost savings resulting from APRA's licensing arrangements which provide instantaneous access to APRA's entire repertoire, and which also result in enforcement and monitoring efficiencies as a result of the exclusivity of APRA's licensing arrangements. This means for example that a café needs only one licence from APRA to cover any and all music they play (for example by playing the radio) and APRA need only check that the café has the correct APRA licence to ensure compliance.

However, this also means that as a virtual monopoly with exclusive rights to its members' works, APRA has significant market power in relation to its dealings with users. In the example above, the café has no choice but to deal with APRA if they want to play music and the café has limited bargaining power. The ability and incentive for users to source license work under competitive conditions is limited.

This can give rise to a number of public detriments in relation to users. For example, it can translate into high fees and allocative inefficiency, a lack of transparency around licensing arrangements, and significant problems associated with commercial dealings with APRA.

APRA's virtual monopoly can also create other inefficiencies for members. For example, individual members may have difficulty ensuring their rights are adequately recognised in distribution arrangements. In addition, APRA's costs may be inefficiently high due to a lack of competitive constraint. This would reduce the revenue pool available for distribution to members.

These concerns are clearly reflected in submissions to the ACCC. The ACCC has received a large number of submissions from interested parties on a wide range of issues associated with APRA's arrangements. Licensees and relevant industry associations in particular raised concerns about the level and structure of fees, the lack of transparency around licensing arrangements, the way in which APRA administers and enforces licences, and the lack of an easy-to-use and independent alternative dispute resolution system. In this context, the impact of APRA's arrangements on small business was particularly evident.

Concerns were also raised by APRA members about APRA's administration, the systems for distributing royalties and consultation arrangements for members.

Since APRA's arrangements were first conditionally authorised in 1999, the approach of the Australian Competition Tribunal and the ACCC has been to impose conditions of authorisation to expose APRA to competition where possible and otherwise mitigate against its market power to reduce the public detriment.

In response to the concerns raised by interested parties, APRA has proposed a range of reforms to its arrangements, including developing a new alternative dispute resolution system, improving transparency around licensing arrangements and publishing further information about opt out and licence back.

In light of this, the ACCC proposes to maintain the conditions which were imposed in 2010 and to include some additional ones in response to interested party concerns. In summary, the proposed conditions:

- continue to require any independent expert appointed to determine a dispute to provide a written report to APRA stating whether APRA offered the user a licence that reflects any direct dealing, where relevant (C1)
- continue to require APRA to provide the ACCC with a report on an annual basis about disputes notified to APRA under its alternative dispute resolution process, including a version for publication by the ACCC (C2)

- require APRA to publish, within 6 months of the ACCC's final determination, as a single document, a comprehensive plain English guide that outlines all of the licence categories individually and includes other specified information (C3)
- require APRA, within 3 months of the ACCC's final determination, to take certain steps to increase awareness of the licence back and opt out provisions provided by APRA, including publishing a plain English guide and launching an education campaign (C4)
- require APRA to implement a revised ADR scheme (C5). The ACCC invites interested parties to comment on the proposed features of that scheme before the ACCC finalises the wording of this proposed condition.

Subject to the proposed conditions, the ACCC is satisfied that the likely public benefits that will result from APRA's arrangements would outweigh the likely detriments and therefore the ACCC proposes to grant authorisation for a further three years.

The ACCC notes that APRA has sought re-authorisation for six years. However, the level of concern raised by interested parties and the potential for the arrangements to generate significant public detriment, mean the ACCC considers it appropriate to review the authorisation after three years. This will also allow the ACCC to consider the effectiveness of the proposed conditions and the steps that APRA has voluntarily undertaken to improve its processes.

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Abbreviations & Glossary

ABC	Australian Broadcasting Corporation
ADA	Australian Digital Alliance
ADR	alternative dispute resolution
AHA	Australian Hotels Association
ALCC	Australian Libraries Copyright Committee
ALH Group	Australian Leisure and Hospitality Group
ALLM	Association of Liquor Licensees Melbourne
Applications	revocation of authorisations A91187-A91194 and A91211 and the substitution of authorisations A91367-A91375 for the ones revoked
APRA	Australasian Performing Right Association Ltd
Blanket licence	gives the user a performing rights licence in respect of APRA's entire repertoire
CISAC	International Confederation of Societies of Authors and Composers
Code	Code of Conduct for Australian Copyright Collecting Societies
Competition Tribunal	Australian Competition Tribunal
Copyright Act	<i>Copyright Act 1968 (Cth)</i>
Copyright Guidelines	<i>ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration</i>
Copyright owner	the owner of the copyright of a work prior to assignment of the copyright to APRA
Copyright Tribunal	Copyright Tribunal of Australia
ICAA	Independent Cinemas Association of Australia
Licensee	users wishing to perform music in public who obtain the right to perform the music by taking a non-exclusive licence for the performing rights from APRA
LPA	Live Performance Australia
Member	members of APRA who assign their performing rights to

	APRA
NACO	National Association of Cinema Operators-Australasia
Performing rights	the right to perform a work in public and the right to communicate a work to the public
PPCA	Phonographic Performance Company of Australia Limited
QHA	Queensland Hotels Association
User	music users - those persons who perform or communicate musical and associated literary works
The Act	<i>Competition and Consumer Act 2010 (Cth)</i>

The application for authorisation

1. On 30 April 2013 the Australasian Performing Right Association Ltd (APRA) lodged an application with the Australian Competition and Consumer Commission (ACCC) for re-authorisation of its arrangements for the acquisition and licensing of performing rights in music (revocation of authorisations A91187-A91194 and A91211 and the substitution of authorisations A91367-A91375 for the ones revoked) (the Applications).
2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (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. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.¹

The conduct

3. APRA seeks re-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.
4. 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 Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

5. APRA seeks re-authorisation as aspects of its arrangements have the potential to breach the Act. For example, composers, who might otherwise be competitors, agreeing between themselves and with and through their collecting society:
 - to prevent, restrict or limit the supply and/or acquisition of goods and services
 - the 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.
6. APRA seeks re-authorisation for six years.
7. APRA's arrangements are detailed in the Background section below.

The applicant

8. APRA is a collecting society (or collection society), established in Australia in 1926. 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.
9. In APRA's words, APRA 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.
10. APRA states that as at 30 June 2012 it had 70,988 members and 60,268 licensees.
11. Under the *Copyright Act 1968* (Cth) (Copyright Act), 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.
12. APRA is the only collecting society in Australia that provides public performance licences covering the copyright in the musical works (e.g. lyrics, composition etc). A public performance licence from APRA is a blanket licence that covers APRA's entire repertoire.
13. 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 10 million works in

its database and that its repertoire includes the majority of commercially available works in the world.

14. APRA, a company limited by guarantee, reported 2011/12 operating income of \$192.3 million and royalties paid and payable to members and affiliated overseas societies of \$161.9 million. The company is tax exempt with respect to copyright income and non-copyright income up to certain limits.

Previous ACCC decisions

15. APRA's arrangements were first authorised (conditionally) by the Australian Competition Tribunal (the Competition Tribunal) in 1999, following the ACCC's determination denying authorisation to APRA's applications, other than for its overseas arrangements. The Competition Tribunal granted authorisation to APRA for four years, subject to APRA amending its Articles of Association (including in respect of licence back) and APRA implementing Alternative Dispute Resolution (ADR).
16. In 2006 the ACCC re-authorised APRA's arrangements for a further four years and in 2010 conditionally re-reauthorised APRA's arrangements for another three and a half years.
17. 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 (opt out and licence back are summarised at paragraphs 50 to 62). The ACCC did not object to this notification.

Background

Copyright

18. Copyright is a bundle of proprietary rights to do certain acts with an original work or other copyright subject matter. 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.
19. In Australia, copyright arises upon the creation of the copyright material, that is, it does not have to be registered (as patents and designs must be if the owner wants protection).
20. Copyright owners may exercise their 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.

21. 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 their own right.
22. Under the Copyright Act, the 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 rights - the right to record a musical work onto, for example, a record, cassette or compact disc
 - synchronisation rights - the right to use music on a soundtrack of a film or video.
23. In the case of a piece of music, it is not unusual for the copyright in different elements of the piece to be owned by different people or entities. For example, within the one piece of music there can be 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 'song'
 - 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.
24. Some works are 'unprotected'. For example, under the Copyright Act copyrights expire after a certain time. Once these rights have expired, the work is considered to be 'in the public domain'.

Performing rights and APRA

25. APRA deals 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 (see paragraph

- 22). This draft determination refers to these two copyrights together as performing rights, consistent with APRA's approach.
26. The right to communicate a work to the public includes the right to broadcast a work, for example by radio or television, and to disseminate it online.
27. 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.
28. The overwhelming majority of music composers in Australia are members of APRA and assign their performing rights to APRA. Users wishing to perform or communicate music in public usually obtain the right to perform the music by taking a non-exclusive blanket licence for the performing rights from APRA. A blanket licence gives the user a performing-rights licence in respect of APRA's entire repertoire.
29. For particular types of use, some licensees may require a licence from APRA and another collecting society. For example, the Phonographic Performance Company of Australia Limited (the PCCA) represents the interests of recording artists and record labels and is the collecting society for the separate copyright that exists in the recording and/or music video of a musical work. When a user wants to broadcast or publicly perform a recording they will usually require two licences – one from APRA and one from the PCCA.
30. There are potentially a number of other ways in which users could obtain the right to perform music that is subject to copyright. For example, users could:
- take an assignment of the performing right or an exclusive licence from the copyright owner, for example before the copyright owner becomes 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 at paragraphs 50 to 62) to take back certain rights in the works and enter into direct arrangements with users - either in respect of all of the works for particular uses or in respect of individual works for particular uses; or
 - employ composers to produce music for them. Such employers would become owners of the copyright.

The role of copyright collecting societies

31. There are transactions costs associated with licensing and enforcing copyright. These include the costs of locating copyright holders, negotiating licences, monitoring and enforcing compliance.
32. High transactions costs can cause markets to fail if they deter otherwise beneficial transactions. This may be the case if transactions costs are high compared with the value of the transaction.
33. The collective administration of copyright through a collecting society is one way to reduce high transactions costs and improve the effectiveness of copyright regimes.
34. 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. Therefore, by providing a single point of access to the rights to use copyright material, collective licensing can potentially deliver substantial transaction cost savings. This can be particularly desirable where entering into direct licences would either be prohibitively expensive or impossible in practice. The ACCC notes that the amount of benefit depends on the type of use, with most benefits accruing to users who do not know in advance what music they want to use.
35. Further, 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. Further, there are network effects that benefit APRA's members and users due to the large number of APRA users and members respectively.
36. However, the benefits of collective licensing must be balanced with the costs associated with the creation and potential exercise of monopoly power. Specifically, collective licensing brings together copyright holders who would otherwise compete against one another. The APRA system replaces direct dealing and the individual licensing and enforcement of performing rights by composers/other rights holders with monopoly licensing. By enabling competitors to act collectively, licence fees are potentially higher, and other licensing terms and conditions potentially more restrictive, than would be the case if competition between copyright holders was retained.
37. Further, absent adequate competitive constraint, APRA may not operate efficiently and may not offer its members and licensees a high quality product in terms of price/royalties, terms and service.
38. As discussed below, the ACCC considers that the most likely future without the APRA arrangements for which it is seeking re-authorisation is one where 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. The ACCC has therefore considered the likely public benefits and detriments against this scenario.

International treaties and overseas collecting societies

39. 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)
40. 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. Because Australia is a party to the international copyright conventions, original works created by Australian citizens or residents are also entitled to the protection given by the copyright laws of all countries which are signatories to these conventions and vice versa.

The Copyright Tribunal

41. The Copyright Tribunal of Australia (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. The Copyright Tribunal deals with cases where a monopoly, or quasi-monopoly, exists due to the role of a copyright collecting society or equivalent licensing body.²
42. The Copyright Act provides for proposed and existing licence schemes³ to be referred to the Copyright Tribunal by a licensor, a potential licensee or their representatives.⁴ In addition, the Copyright Tribunal has the function of determining remuneration payable under the statutory licence schemes established by the Copyright Act.
43. The Tribunal has jurisdiction to confirm or vary a licence scheme or proposed licence scheme. It may also substitute a new scheme for the one referred to it. The Tribunal has the power to make orders as to the charges and conditions that it considers applicable under a licence scheme, or, depending on the circumstances in which the application is made, the charges and conditions that the Tribunal considers 'reasonable in the circumstances', in relation to the granting of a particular licence.⁵

² Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited [2009] ACopyT 2, [30].

³ Licence schemes are defined in s136 of the Copyright Act.

⁴ See section 154-156 of the Copyright Act.

⁵ Copyright Tribunal of Australia website, visited 8 October 2013, <http://www.copyrighttribunal.gov.au/about>.

44. 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.⁶

45. 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).

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

- May make the ACCC a party to a matter before the Copyright Tribunal if the ACCC applies to be made a party and the Copyright Tribunal is satisfied that it would be appropriate to do so.⁷
- Must, if requested by a party to proceedings concerning voluntary licence schemes, consider relevant guidelines issued by the ACCC.⁸ The ACCC released draft guidelines in November 2006. The ACCC subsequently decided that, prior to finalising any guidelines, it should participate in appropriate proceedings before the Copyright Tribunal in order to both test its new role under the Copyright Act and to further inform the development of the guidelines. The ACCC is currently preparing revised Copyright Guidelines (*ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration*) which it will consult on.

⁶ Re Applications by Australasian Performing Right Association Ltd [1999] ACompT 3, paragraph 62.

⁷ Copyright Act, section 157B.

⁸ Copyright Act, section 157A.

- 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.⁹

Code of Conduct for Copyright Collecting Societies

47. Following 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. Under the Code, each collecting 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.
48. 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.
49. The most recent report of the Code Reviewer was published in March 2013.¹⁰

APRA's arrangements

Input arrangements¹¹

50. APRA's 'input' arrangements include processes for becoming and resigning as a member of APRA and the assignment of rights by APRA members to APRA. 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, a cartel provision or substantially lessen competition.
51. Broadly, APRA's domestic input arrangements involve the assignment to APRA by members of the performing rights in any current and future musical and associated literary works in which they own copyright during the continuance of membership. APRA members include composers, authors and publishers of

⁹ Copyright Act, section 169G.

¹⁰ Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2011 to 30 June 2012, The Hon K E Lindgren AM, QC, March 2013. A copy is available from, for example, <http://www.copyright.com.au/assets/documents/Corporate/Code%20Reviews/code-reviewer-report-2011-12>.

¹¹ Existing authorisations A91188, A91189, A91191, A91192 and substitute authorisations A91368, A91369, A91371 and A91372.

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

52. APRA's processes include standard pre-printed application forms whereby composers/other rights holders agree, essentially, to assign all current and future performing rights to APRA.
53. 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.
54. 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.
55. 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 use must give APRA at least three months' notice expiring on either a 30 June or 31 December.
56. 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. This system of 'licence back' was first introduced as a condition of the Competition Tribunal's 1999 decision. Under the licence back arrangements, APRA also retains the right to grant non-exclusive licences in respect of the works that have been licensed back.
57. Since 2010, members who want to use APRA's licence back system generally give two weeks' notice when seeking to enter into a direct licensing arrangement with a user. For a 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 requires only one week's notice.
58. APRA notes that since the 2010 authorisation it has introduced a dedicated page on its website that explains the differences between the opt out and licence back alternatives and how to exercise those rights. There are also links to copies of the relevant application forms and contact details for relevant APRA staff if a member has queries. APRA also submits that changes to the licence back form now require members wishing to licence back only to provide sufficient information about:
 1. the identity of the works the subject of the licence
 2. the licensee(s) and
 3. the scope of the licence.
59. As foreshadowed in 2010, APRA also made 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 no longer need to be provided.

60. APRA advises that improvements to its licence back and opt out facilities are ongoing.
61. The ACCC considers that the licence back (and to a much lesser extent the opt out) arrangements are key ways in which some competition between APRA members can be achieved in some instances. The ACCC is concerned to ensure that these arrangements are as effective as possible so that direct dealing can be entered into where it is feasible and efficient to do so.
62. Composers can also effectively take back their rights from APRA by resigning their APRA membership.

Output arrangements¹²

63. APRA has sought re-authorisation for its licensing arrangements as agreements that might include exclusionary provisions, a cartel provision or substantially lessen competition.
64. 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.
65. APRA's output arrangements, made under these clauses, are briefly set out below.
66. 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 the category of use. Licence fees are payable annually in advance on a provisional basis based on estimated usage. If actual usage is greater or less than this estimate, an adjustment is made to fees as part of APRA's annual reassessment process. The reassessed licence fee forms the basis of the provisional fee for the next licence period.
67. APRA submits that the structure and amount of its 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

¹² Existing authorisations A91187, A91190 and substitute authorisations A91367 and A91370.

and musicians plus a percentage of gross paid admissions. 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 (for example the number of television screens broadcasting music). These arrangements allow APRA to price discriminate between users.

68. A licensee or, with the consent of APRA, a potential licensee, may request that a proposed 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. The rationale for expert determination is that the Copyright Tribunal may not provide an effective constraint on the exercise of APRA's market power in its dealings with small users, or over small matters. This is because the cost of presenting such a dispute to the Copyright Tribunal would likely offset the licence fee likely to be payable. Thus a mechanism is needed to provide a simple, cost-effective way to resolve such matters.
69. Under the expert determination process the terms and conditions of a licence, including fees, are reviewed by a barrister with expertise in intellectual property matters. Licensees can choose from a panel of three such experts. If an expert cannot be agreed upon then an expert with these relevant qualifications will be nominated by the Australian Commercial Disputes Centre.
70. Parties dissatisfied with the expert's determination may seek review by the Copyright Tribunal or Federal Court (as appropriate).
71. 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.
72. APRA usually pays all costs of the expert. In 2010, APRA made amendments such that where a dispute is about a licence or proposed licence where the estimated annual licence fee proposed by APRA is over \$100,000, then the costs of the expert shall be shared between the parties or as the expert directs. APRA's policy is that the costs of venue hire for the expert determination are shared equally and parties must pay their own costs associated with the determination.
73. According to APRA, since the 2010 authorisation three licensee matters have been referred to expert determination, one to mediation and a further two matters have been settled shortly after being referred to expert determination.
74. 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. As part of this process, APRA has a program of monitoring to detect the unauthorised use of its members' works, for example by sending representatives to venues that are not current licensees or who do not hold the correct licence.

Distribution rules¹³

75. 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 cartel provisions. Under the 50 per cent rule, a writer or writers of the work receive at least 50 per cent of performing right royalties payable in relation to the work.
76. 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.
77. 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 2011/12 financial year were approximately 13 per cent.
78. 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' (free-to-air television, subscription television, cinema, radio, digital delivery, online, and concerts, dance clubs and other 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.
79. In order to collect the necessary data, APRA has a range of systems to monitor how often songs are performed. In the case of television and radio broadcasters, APRA requires large broadcasters to report all songs played, and smaller broadcasters to report songs played for a specified period of time. Revenue for music played in nightclubs is distributed based on a combination of music recognition data (such as using DJ monitor) and ARIA charts data. The amount of data collected determines whether the distribution pool is allocated based on actual music played or by 'analogy'.¹⁴
80. APRA distributes royalties on a quarterly, six monthly or annual basis depending on the distribution category.

¹³ Existing authorisation A91211 and substitute authorisation A91375.

¹⁴ Under distribution by analogy, licence fees are added to an existing distribution pool that is most similar in terms of its music content.

81. 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.
82. 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.
83. 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. For example if an owner believes that their song has been performed but they have not been remunerated, they can apply to APRA to be paid from the Unlogged Performance Pool.

Overseas arrangements¹⁵

84. APRA's 'overseas' arrangements are its arrangements with overseas collecting societies with which it is affiliated.
85. 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, a cartel provision or substantially lessen competition.
86. 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.
87. 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 US competition law. However, these proceedings were ultimately resolved via 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.
88. 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.

¹⁵ Existing authorisations A91193, A91194 and substitute authorisations A91373 and A91374.

Submissions received by the ACCC

89. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
90. The ACCC sought submissions from over 200 interested parties potentially affected by these applications, including APRA members, APRA licensees, industry bodies, government departments and consumer groups. A summary of the public submissions received from APRA and interested parties follows and are further considered in the evaluation chapter of this draft determination. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister

APRA

91. APRA provided a submission with its application which broadly agrees with the ACCC's 2010 determination including the conditions of authorisation.
92. However APRA disagrees with the ACCC's view in 2010 on the following:
 - APRA submits that the arrangement does not lead to prices impermissibly above competitive levels
 - APRA submits that the detection and enforcement costs associated with APRA's operations would be unreasonable if APRA took only non-exclusive rights.
93. In addition, APRA advises that there have been a number of changes since 2010 that are relevant to the ACCC's assessment of the arrangements today (discussed in paragraph 124). APRA submits that these changes either enhance the efficiency and flexibility of the APRA system, thus increasing the benefits flowing from that system, or promote competition thereby reducing any detriment.
94. APRA also provided a series of additional submissions in response to issues raised by interested parties.
95. In particular APRA provided a 'proposal' to make some alterations to its operations in response to concerns raised in interested party submissions. APRA has grouped these changes into 'communications' (with licensees/members), 'transparency of licensing alternatives', 'opt out and licence back information', 'licence negotiation' and 'ADR'.
96. APRA also notes that relevantly it is in the process of making significant changes to its website, including developing online membership and licensing facilities. The new website is currently scheduled to be finished by the end of 2013.

Interested parties

97. The ACCC received submissions from a wide range of interested parties and a summary is provided below.

APRA licensees

98. The ACCC received submissions from the Australian Leisure and Hospitality Group (ALH Group), Dr Jon Sainken, Lounge, the Caxton, Lasseters Hotel Casino, Palace Theatre, Home Nightclub, Alumbra, Bartletts Tavern, The Star, Entertainment Enterprises, Totem Onelove Group, Future Entertainment and Zap Fitness as well as two licensees that wish to remain anonymous. While broadly supporting the existence of a central collecting society, these parties raise concerns with APRA's output arrangement and its effect on competition.
99. Licensees are concerned about how APRA classifies venues, e.g. as nightclubs, and the amount of fees payable. Licensees consider that fees are higher in Australia than overseas, that APRA does not adequately consult on tariff levels, and that increases in the licence fees will result in venues not playing music or closing down, or passing on costs to patrons.
100. Licensees submit that APRA does not provide assistance to licensees to apply for the most appropriate licence. Further, licensees suggest that APRA sometimes uses aggressive tactics towards licensees and licensees feel there is a lack of transparency about how licence fees are distributed to APRA's copyright owners, including APRA's overseas affiliates. To improve transparency, licensees suggest that APRA should publish its entire repertoire.
101. Licensees raised some concerns about utilising APRA's ADR system or appealing to the Copyright Tribunal, and question the efficacy of the Code and the Code Reviewer. A further concern is that APRA's Board does not represent the interests of all stakeholders.
102. Most licensees (and other interested parties) suggest a period of re-authorisation of less than six years, or not granting re-authorisation at all, and have proposed a number of conditions of authorisation.

Representative bodies

103. Submissions were received from the Nightclub Owners' Forum, Live Performance Australia (LPA), the Association of Liquor Licensees Melbourne (ALLM), the WA Nightclub Association, the Queensland Hotels Association (QHA), the National Association of Cinemas Operators (NACO), the Independent Cinemas Association of Australia (ICAA), the Australian Hotels Association (national) (AHA) and the Australian Hotels Association (Victoria) (AHA Victoria).
104. The representative bodies raised similar concerns to licensees.
105. In addition, some suggest that the Commonwealth Government should review the copyright system in Australia.

106. LPA and the ALLM submit that opt out and licence back facilities could be improved. Some parties have concerns with the use of blanket licences and the limited options for discounts off blanket licences.
107. Industry bodies are concerned that the terms of APRA's contracts are weighted too far in APRA's favour.
108. Concerns have also been raised that APRA's expenses are too high and there is a lack of transparency about its expenses.
109. The AHA is cautiously supportive of APRA's 'proposal' (noted in paragraph 95 above), but considers some of the proposals require more detailed consideration.
110. The ALLM and the AHA submit that conditions of authorisation C1 and C2 imposed by the ACCC in 2010 have been of limited impact.

APRA members

111. A group of APRA members raised concerns with APRA's recent changes to the method for collecting data for dance music. The concerns involve APRA's use of the music recognition technology, DJ Monitor, as well as a lack of consultation of members and a lack of information provided to members in advance of the change.

Other

112. The Australian Broadcasting Corporation (ABC) is generally supportive of APRA's collective licensing arrangements and acknowledges the innovative and responsive approach APRA has taken to licensing in the online environment.
113. Nightlife Music submits, amongst other licensee concerns, that APRA should make more adequate public performance licensing arrangements for commercial suppliers. This would enable Nightlife to operate more effectively on behalf of its clients.
114. The Australian Libraries Copyright Committee/Australian Digital Alliance (ALCC/ADA) supports a three year re-authorisation in light of changes in the industry, and raises some of the concerns discussed above.
115. An anonymous submission states that APRA's members are not adequately consulted about issues relevant to them.
116. Wrokdwn submits that APRA does not support Australian talent.
117. The NSW Small Business Commissioner has raised many of the small business concerns raised by licensees and industry bodies, and suggests more involvement from the Federal Government and Small Business Commissioners.

ACCC evaluation

118. The ACCC's evaluation of the proposed arrangement is in accordance with the relevant net public benefit tests¹⁶ contained in the Act. While there is some variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition and weigh the two. In broad terms, the ACCC may grant authorisation if it is satisfied that the benefit to the public would outweigh the public detriments.
119. In order to assess the effect of the proposed arrangements and conduct and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future with and without the conduct the subject of the authorisation.

The relevant areas of competition

120. In assessing the proposed conduct, the ACCC identifies the relevant areas of competition affected by the proposed conduct.
121. In its 2010 determination, the ACCC broadly considered that the relevant area of competition was that for the acquisition and supply of performing rights (in relation to musical works) in Australia. The ACCC considered that the arrangements for which APRA sought re-authorisation then (and for which it seeks re-authorisation now) including its input (rights acquisition by APRA) and output (rights of supply by APRA) arrangements and alternatives, particularly 'direct licensing' between composers/other rights holders and music users fell within this area of competition.
122. In its 2010 determination, the ACCC noted that not all music users' characteristics – including needs, capacities and incentives or motivations – are the same and that APRA's conduct and arrangements could impact on them positively or negatively in different ways. At that time, the ACCC considered that for individual users:
1. music and the rights to perform it can be significant and well-defined inputs to their activities; or more incidental inputs to or features of their businesses and
 2. 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.

¹⁶ Subsections 90(6), 90(7), 90(5A) and 90(5B), 90(8). The relevant tests are set out in Attachment A.

123. In relation to its current applications, APRA submits that the relevant areas of competition and the ACCC's observations in relation to music users and acquirers are as applicable as they were in 2010.¹⁷
124. However, APRA submits that there have been a number of changes in relation to technological developments in the way in which music is accessed, used and stored. For example:
- the streamlining and promotion of APRA's licence back procedures
 - enhanced alternative dispute resolution procedures for APRA licensees
 - the growth of digital music markets in Australia
 - more sophisticated technology enabling piracy
 - distribution efficiency improved through technology. This includes improvements in reporting and distribution technology which have allowed APRA to be more efficient and effective in collection and distribution of royalties
 - more flexible blanket licences through technological developments. APRA submits that with the greater use of digital music and with technological developments since 2010, the process of ascertaining the proportion of APRA controlled and non-APRA controlled music used by a licensee has become more feasible and less costly
 - more effective compliance with the Code
 - development of the Global Repertoire Database (GRD) and potential solutions for central global licensing. APRA submits that the GRD is an essential element of licensing online communications on a worldwide basis.
125. The ACCC notes, as it did in 2010, that some users may be more interested in and capable of pursuing 'source licensing', that is, obtaining rights directly from the composer or a very close agent/intermediary, such as a media agent or publishing company. In 2010, the ACCC gave the example of source licensing by a media-content producer, such as a film house, dealing directly with a composer for a film soundtrack.

Future with and without

126. To assist in its assessment of the conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.

¹⁷ APRA, Submission in support of authorisation applications A91367-A91375, dated 30 April 2013, Part A, p. 11.

127. APRA submits that there are a number of potential scenarios in the future without the conduct. However, APRA accepts that the most likely future without the conduct in the short to medium term is that in which there is one major collecting society that obtains rights from composers or other rights holders on a non-exclusive basis, instead of the exclusive basis on which APRA obtains them now. This is consistent with the ACCC's assessment in 2010.
128. APRA submits that under the Copyright Act a non-exclusive licensee does not have the same rights of action and remedies and cannot bring infringement proceedings (discussed further under Public Benefits below).
129. APRA does not accept that under the likely future without the conduct any changed scope for competition, for example source licensing, would be substantial, having regard to the changes in, or enhanced utilisation of, APRA's licence back and opt out facilities since 2010. These changes include the simplification of the licence back procedures, an information page on APRA's website, and advertising about the availability of opt out and licence back arrangements.
130. The ALLM submits that the most likely future without the conduct would comprise one non-exclusive central collecting society for composers' rights while also allowing true and transparent competition through non-exclusive input agreements.
131. The AHA submits that it lacks sufficient information about APRA's repertoire and distribution revenues to properly consider the likely scenarios in the future without the conduct. The AHA considers that, absent the conduct, there would be interest from some businesses to source specific playlists and negotiate copyright tariffs accordingly. The AHA submits that this negotiation could be with the copyright holder direct, APRA, a new collecting society focusing on niche markets, or through an agent of the copyright holder or collecting society.
132. Dr Sainken submits that a realistic future without the conduct could see three or four competing collecting clubs which are allowed a maximum share of the exclusive rights to music in a particular genre. A particular collecting club could offer genres for sale separately as well as offering blanket licences. Composers could sell their rights exclusively or non-exclusively for a maximum of three years at a time. APRA submits that this situation would be inefficient as music users may be required to take out a licence from each club.
133. The ACCC continues to consider that the most likely future without the conduct 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 their property.
134. In these circumstances, it is also possible that some rights holders would not grant a licence to APRA for all their musical works, as they may want to place a scarcity value on some of those rights. Instead of the current situation under which rights holders must assign all current and future performing rights to APRA upon becoming an APRA member, rights holders could choose whether to license only some of their repertoire to APRA. However the ACCC anticipates

that most APRA members would continue to license all their musical works to APRA, given that this licence would be non-exclusive. That is, members could enter into particular direct arrangements and still have APRA collect royalties for any other uses of the member's entire repertoire.

135. The ACCC considers, as it did in 2010, that entry of a second collecting society is unlikely in the near future as APRA's operations feature: sunk costs in specialised knowledge and systems; economies of scale and scope; and network economies or effects which collectively mean that entry barriers are high. In addition, APRA's dominant market share would also deter new entry. The ACCC also notes that most countries around the world have only one major collecting society for each particular form of copyright.
136. APRA's system, in which it holds exclusive rights to its members' works, currently prevents direct dealing between rights holders and users, other than by utilising APRA's licence back and opt out systems. In a future without the proposed conduct, where rights would be held on a non-exclusive basis (and where rights holders might only grant APRA a licence for some of their musical works), the ACCC considers that there is the potential that members and users would make alternative licensing arrangements rather than relying entirely on APRA's system.
137. For example, members and users may be more likely to enter into direct licensing arrangements if they do not have to apply to APRA to licence back or opt out. The process would be less reliant on negotiations with APRA and thus may be quicker and cheaper. To the extent that the existence of licence back and opt out arrangements are not widely known or fully understood, the flexibility of non-exclusive licensing (and the possibility of only licensing some of their musical works to APRA) might provide some members and users with greater incentive and ability to enter into direct negotiations.
138. The ACCC notes that APRA does not accept that in the likely future without the conduct any changed scope for competition (for example, source licensing) would be substantial. The ACCC accepts 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 costs would be considerably inflated and likely to wipe out the gains from competitive pricing.
139. However, the ACCC considers that for certain users with more 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.
140. 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 increased direct dealing and competition between suppliers and acquirers.

141. The ACCC also notes that changes in technology may also encourage further developments in, for example music recognition technology.
142. The ACCC notes that in its 1999 determination, the Competition Tribunal observed that the blanket licence format is offered by collecting societies worldwide, and is generally recognised as the essential device for efficient licensing of the use of music in all but a few circumstances.¹⁸ The ACCC considers that in the likely future without the conduct, APRA would still unilaterally offer blanket licences, albeit that the blanket licence may cover slightly fewer works if some composers grant APRA a licence over only some (but not all) of their musical works. This is discussed further below under **Public benefit**.
143. The ACCC also notes that there is currently a notification in place for 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. For the purposes of assessing the application for reauthorisation, the ACCC has treated the notified conduct as forming part of the conduct that is the subject of the authorisation. In other words, it has proceeded on the basis that the notification would be in place in the future with but not in the future without, and that the relevant exclusive dealing conduct would not be protected by the notification. The ACCC has taken this approach on the basis that the matters that are relevant in assessing the benefits and detriments of the notified conduct are largely the same as the matters that are relevant in assessing the authorisation application.
144. In summary, the ACCC considers that in the likely future without the conduct there would be one major collecting society which obtains rights to the vast majority of musical works from composers on a non-exclusive basis and offers blanket licences to licensees.

Public benefit

145. Public benefit is not defined in the Act. However, the 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.¹⁹
146. APRA submits that the proposed conduct will continue to deliver public benefits, as found by the ACCC in its 2010 determination, including:
- Transaction cost savings arising from a blanket licence
 - Enforcement and monitoring cost savings under an exclusive licence arrangement

¹⁸ Re Applications by Australasian Performing Right Association Ltd [1999] ACompT 3, paragraph 333.

¹⁹ 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.

- Long-standing, 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
147. APRA submits that recent changes in the industry have led to an increase in these public benefits.
148. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Transaction cost savings through use of blanket licences

149. APRA submits that the ACCC's findings in 2010 in relation to the public benefit generated by APRA's blanket licence reducing transaction costs remain equally applicable to its current arrangements.
150. The ACCC accepts that APRA's input and output arrangements can reduce the transaction costs in dealings with both its members and users. In turn a reduction in transaction costs should lead to more efficient licensing and improved incentives for production of musical works.
151. For users, APRA's blanket licence arrangements provide transaction cost savings as a licensee need only enter into a single transaction with APRA for all of his/her music use rather than negotiate individually with a large number of individual performing rights owners. This view is broadly supported by the ABC which submits, provided APRA maintains transparency and efficiency in its blanket licence arrangements, they offer a cost effective and streamlined alternative to dealing directly with copyright holders.²⁰
152. This is particularly valuable for the many users who 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 these types of users require is immediate access to a comprehensive repertoire of musical works.
153. Similar savings result for APRA members who are the owners of the copyright. By assigning their rights to APRA upon membership, owners save both time and cost from dealing with each individual user.
154. The ACCC recognises that APRA's blanket licences also offer licensees certainty 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 being unlicensed.
155. However, as discussed earlier, the ACCC considers that blanket licences to users are likely to exist in both the futures with and without the conduct although users may not get the same degree of certainty of coverage from an APRA

²⁰ Australian Broadcasting Corporation, Submission, 20 May 2013, p.1.

blanket licence under the future without. This raises a question about the extent to which any public benefit arises from the conduct that is the subject of authorisation (i.e. blanket licences). The answer to this question lies in the exclusivity of rights obtained by APRA from composers and the assignment by a member of all their rights.

156. In the future without the conduct, where APRA obtains rights from composers on a non-exclusive basis and where members may potentially license only some of their repertoire to APRA, the ACCC considers that there is less certainty about the comprehensiveness of the repertoire administered by APRA since composers would continue to hold a separate interest in the copyright in their musical works and may license some or all of their works completely independently of APRA.
157. Compared to the future without the conduct, the ACCC considers that an arrangement where APRA offers blanket licences while obtaining rights from composers on an exclusive basis and for all the member's rights delivers a benefit in the form of increased certainty for users that that they are licensed in respect of virtually the entire worldwide repertoire of musical works.
158. This view is consistent with the approach of the Competition Tribunal, which stated in its 1999 determination:

...that the nexus between APRA's ability to assure users that they have certainty of coverage of all a writer's works and the viability of the whole system is vital. It seems, therefore, that the exclusive assignment demanded by APRA as a condition of membership is as much as anything a mechanism for providing certainty to users and the use of the blanket licence is a means of reducing the costs to users²¹

and

APRA'S ability to offer the blanket licence relies on a sufficient comprehensiveness of the repertoire of musical works for which APRA can offer to license the performing rights. The comprehensiveness of the repertoire in turn relies on two elements of APRA's arrangements, first the requirement that members assign the performing right of effectively all their works to APRA for administration on their behalf, and secondly APRA's reciprocal agreements with other collecting societies.²²

159. Overall, the ACCC considers that aspects of APRA's arrangements and conduct generate public benefits by providing a degree of transaction cost savings for licensees through increased certainty regarding the completeness of APRA's repertoire. The level of benefit will depend on the user's requirements and will differ between users.

Monitoring and enforcement efficiencies

160. APRA submits that the exclusivity of its input arrangements allows it to monitor and enforce infringements of copyright.

²¹ Re Applications by Australasian Performing Right Association Ltd [1999] ACompT 3, paragraph 296.

²² Re Applications by Australasian Performing Right Association Ltd [1999] ACompT 3, paragraph 209.

161. APRA submits that, in accordance with the statutory regime established under the Copyright Act only a copyright owner or exclusive licensee can bring infringement proceedings for a breach of copyright. In APRA's view, it is not possible for a non-exclusive licensee to bring infringement action without joining the copyright owner and even in these circumstances APRA submits it is not clear that this action would be permissible.
162. APRA submits that detection of unauthorised performances requires a substantial monitoring system for an enormous number of public performances, broadcasts and communications both in Australia and worldwide. It becomes financially viable to enforce performing rights rigorously only if the costs of monitoring and of bringing the proceedings can be spread over a large number of works in relation to which rights can be enforced.
163. APRA submits its exclusive input arrangements facilitate this in the following ways:
- only one body incurs the costs of the monitoring necessary for detecting infringements (and this also serves the purpose of monitoring the use of licensed works for the purpose of determining the various members' shares of distributions) and as a result these costs are not needlessly duplicated
 - only one body incurs the costs of bringing the infringement proceedings and as a result a consistent approach to enforcement is adopted and the enforcement costs are not needlessly duplicated
 - the costs can be spread over a very large number of works so that the maximum benefit of those infringement proceedings which are instituted can be extracted in the interests of all members of APRA and
 - the costs of the enforcement proceedings are reduced because APRA, as the owner of the relevant rights, has title to sue and no other party needs to be joined.
164. APRA submits that if non-exclusive licences were given by copyright owners to APRA, the costs of monitoring for unauthorised performances would be substantially increased. This is because in addition to monitoring use, APRA would also have to establish whether any particular performance which was monitored had been licensed by the copyright owner or any other person with the right to grant non-exclusive licences in respect of the work in question. What this might involve would be likely to vary with the differing circumstances of the copyright owners and their arrangements for licensing. In APRA's view it would involve a potentially substantial increase in costs of monitoring for infringement.
165. The ACCC accepts that the exclusive assignment of all performing rights to APRA – opt out and licence back aside – and the mechanism of the blanket licence enables APRA to more effectively monitor and enforce copyright compared to a situation with non-exclusive arrangements. Exclusive licensing of all rights lessens the costs of establishing a breach and allows APRA to focus on establishing whether the user has the correct licence rather than having to establish whether licences have been obtained for the particular works being performed and from whom the licences were obtained.

166. As a result of members having the choice to only license some of their rights, APRA would first have to check that the particular work(s) had been licensed to APRA. This has the potential to complicate and slow down the process for taking infringement action.
167. The ACCC also accepts that, in the likely future without the conduct, APRA would face greater practical complexities in taking copyright infringement action, as it would not be the exclusive owner of the relevant copyright. These complexities would arise, primarily, from the fact that any enforcement action by APRA would be based on an underlying copyright in which the owner of the copyright would still hold a separate interest. For example, proving the chain of title (chain of ownership) may be more difficult and APRA would need to establish that no other licence had been granted to the alleged infringer. There may therefore be circumstances in which the owner of the copyright, as well as APRA, would incur additional costs in relation to any such action, despite the fact that the copyright owner has granted a non-exclusive licence to APRA.
168. In the event that the potential for APRA to take action in its own right is adversely affected by non-exclusivity, this may increase uncertainty for both users and APRA's members. However, the ACCC notes, as it did in 2010, that there may be other means by which APRA could provide assistance to its members to take infringement action. 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.
169. To the extent that the alternative of non-exclusive licensing and the option to license only some rights to APRA might affect the potential for copyright infringement action by APRA and might allow uncertainty over the exact ownership, however temporary, the ACCC accepts that some users may take advantage of such uncertainty to avoid paying licence fees if APRA was only granted rights on a non-exclusive basis. However, the ACCC considers 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.
170. The ACCC also considers that monitoring and enforcement costs may be reduced by developing technology, some of which APRA has referred to as increasing the likely benefits from its input arrangements. To the extent that this technology is available in the market and otherwise mitigates APRA's costs of monitoring and enforcement of performing rights, the ACCC considers that the magnitude of the public benefit arising from monitoring and enforcement efficiencies may be reduced.
171. However, the ACCC also notes that APRA has an increased incentive under its exclusive input arrangements to invest in and develop technology that reduces monitoring and enforcement costs that may not be present to the same extent in a non-exclusive regime.
172. As it did in 2010, the ACCC accepts that there is a public benefit in preserving the 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 if APRA's arrangements were no longer in place. However, the ACCC notes that to the extent that APRA's arrangements increase the

effectiveness of monitoring and enforcement of performing rights it helps reduce free-riding on musical works.

ACCC conclusion on public benefits

173. The ACCC considers that APRA's arrangements are likely to result in public benefits from:
- transaction cost savings particularly resulting from the near comprehensive coverage of APRA's blanket licences which provide instantaneous access to APRA's entire repertoire
 - increased certainty for users that they are licensed in respect of virtually the entire worldwide repertoire of musical works, resulting from the combination of APRA's blanket licences and exclusivity of rights, coupled with an assignment of all rights, and
 - enforcement and monitoring efficiencies as a result of the exclusivity of APRA's licensing arrangements and a reduction in uncertainty. This reduces free riding on the creativity of copyright owners and results in a public benefit in preserving the incentives for the future creation of musical works and that APRA's arrangements achieve this outcome.

Public detriment

174. Public detriment is also not defined in the Act but the 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.²³

175. APRA has a virtual monopoly in respect of performing rights licences in Australia because:
- virtually all music owners in Australia are APRA members
 - members are required to make an assignment of all their current and future works
 - APRA's opt out and licence back provisions 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 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 (albeit that users may be able to negotiate discounts off blanket licence fees) APRA reduces

²³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

incentives for music owners and users to negotiate performing rights other than through it, as long as those users still have some residual requirements to access APRA's repertoire

- absent APRA's arrangements, there are still significant entry barriers to alternative collecting societies being established. To the extent that economies of scale and scope and network externalities exist, it is generally most efficient to have only one collecting society.

176. The ACCC considers that collecting societies such as APRA act as clearing houses and may be thought of as 'two-sided' platforms that facilitate transactions between copyright creators and users. A two-sided platform serves two distinct groups whereby the value of participating on one side of the platform rises with the number of participants on the other side. In relation to APRA, this means that for many users, the value of obtaining a licence to access APRA's repertoire increases with the size of APRA's repertoire and membership. Similarly, for copyright holders, because users want a comprehensive repertoire, copyright holders will want to be part of that repertoire which attracts the maximum number of licensees.
177. These network effects and economies of scale and scope in the collective administration of copyright generally make it efficient for a single entity to administer rights collectively. As a consequence of this and other barriers to entry discussed previously, a collecting society such as APRA will have market power in both the acquisition and supply of performing rights. This is particularly the case for members and users for whom there is effectively little option than to deal with APRA.
178. The ACCC notes that APRA's user base features: a relatively small number of highly 'visible' media enterprises paying large fees, both per licence and in total; and a very large number of smaller users each paying considerably less per licence.
179. The ACCC acknowledges that some detriment arises from APRA's position as a monopoly supplier of a comprehensive repertoire of musical works and would arise both in the future with and without. Similarly, detriments may also arise as a result of its market power in relation to the acquisition of performing rights from composers in both the future with and without. However, in the future without the conduct, where APRA would acquire rights on a non-exclusive basis and members would be free to licence their works independently, users are more likely to have options other than a blanket licence and APRA would likely be subject to more competitive pressure.
180. Compared to the likely future without the conduct that is the subject of the authorisation, the ACCC considers that APRA's arrangements generate significant public detriment. APRA is however constrained in the future with the conduct by the conditions of authorisation (discussed further below) which may assist in reducing the public detriment, as well as by the Copyright Tribunal and the Code.

181. Set out below is the ACCC 's assessment of public detriments in the following categories:

1. Pricing
2. Allocative and dynamic efficiency
3. Cost efficiency
4. Conduct of APRA and its employees and agents
5. Restricted access to overseas works

followed by a discussion of:

6. Factors that may mitigate against detriments (opt out and licence back, effective dispute resolution using ADR or the Copyright Tribunal, the Code, and representation on APRA's Board)
7. Other changes requested by interested parties.

Pricing

182. A number of APRA licensees submit that the lack of competitive constraint on APRA results in it setting unfair licence fees and terms. Further, interested parties submit that APRA's fee structure lacks transparency and that APRA applies its categories of licence in an unclear or inconsistent manner. For example:

- A number of interested parties submit that licence fees are too high and have been rising.²⁴ Further, increases in fees could negatively impact the viability of venues and will be passed on to patrons.²⁵
- The ALCC/ADA, LPA, ALLM and AHA submit that APRA can set fees above the competitive level and reflect its market power.
- Alumbra, Nightlife, Dr Sainken and the ALCC/ADA submit that the ACCC should introduce competition or more effective checks and balances. Nightlife notes that APRA is systematically reducing the commission paid to existing background music suppliers who act as agents.²⁶
- The ALLM submits that licence fees do not reflect the value to the user and APRA has set fees to mirror the PPCA's fee structure.
- The ALLM and Alumbra submit that APRA's fees are significantly higher than the fees of its overseas counterparts.

²⁴ ALH Group, Lounge, Dr Sainken, The Caxton, Lasseters Hotel Casino, Palace Theatre, The ALLM, Alumbra, The ICCA, The AHA and an Anonymous interested party.

²⁵ The ALLM, Nightclub Owners Forum, Lasseters Hotel Casino, QHA, Totem/Future, an anonymous interested party and LPA.

²⁶ Background music suppliers generally create playlists of recorded music and music videos tailored to a specific business' requirements. Some background music suppliers also organise the necessary licences on the business' behalf, including an APRA licence.

- A number of interested parties submit that there is inconsistent application of tariffs, the tariff structure is confusing, and generally the structure of tariffs results in uncertainty for licensees. It also results in some licensees paying more than others in similar venues, including where deals are offered to some licensees but not others.²⁷
- A number of parties submit that increases in tariffs are not consulted upon and there should be increased transparency to the whole process.²⁸
- Palace, the ALLM and the AHA submit that the terms of licences reflect a high level of market power for APRA, specifically the payment of fees clause, auditing of a licensee's books and the obligation to provide a list of music performed/reproduced to APRA.
- The LPA submits that the reporting and remitting obligations placed on licensees create a high level of administrative burden.
- The ALH Group and Totem/Future submit that APRA has not kept pace with technological developments in relation to its licensing.
- The ALLM and the NSW Small Business Commissioner submit that a number of APRA's arrangements breach the Australian Consumer Law and the Act.

183. A number of interested parties request the ACCC to impose conditions particularly to increase the transparency around the setting of licence fees and guidelines and principles for licensing. For example:

- The Star submits that the ACCC's conditions of authorisation should provide more certainty about the application of tariffs, and require APRA to review its tariffs in consultation with users.
- The ALLM suggests requiring APRA to provide a factual basis and guarantees for their fee structure and an independent review of licensing schemes in consultation with content users.
- LPA submits that the ACCC should impose conditions to improve licensing conditions.
- The QHA submits that areas for improvement include increased transparency around the setting of licence fees. Further, the assessment and application process/forms should be simplified in consultation.

184. APRA responded to many of the concerns raised by interested parties, submitting:

- In most cases the determination of which licence scheme applies to a business is straightforward. APRA considers that its general

²⁷ The ALLM, The Star, Dr Sainken, the AHA, ALH Group, Home Nightclub, an anonymous interested party, ZAP Fitness, The Caxton and Totem/Future.

²⁸ The ALLM, Alumbra, Bartletts Tavern, ALH Group, Palace Theatre and The Star.

performance licence applications are relatively self-explanatory, however complexities arise where a single premises requires a number of different licences due to different music uses. APRA submits that licensees can utilise licensing representatives and a '1300 number' (which received 10,884 calls in 2011/12) to answer queries.

- In setting new tariffs, APRA considers the value of music to the user, the value of the music to the audience, any relevant benchmarks (including overseas rates), parameters associated with licensing, and any benefits that can be gained from administrative simplicity.
 - It consults widely with licensee representative bodies and large licensees prior to formulating new tariffs and has a preference to introduce new schemes by agreement with licensee representative bodies. For example, in 2008 it consulted widely with the Australian nightclub industry, including industry associations, in relation to the formulation of this licence. APRA submits that the nightclub licence scheme was substantially the same as the one approved for the PCCA at the Copyright Tribunal, and that it felt it had a responsibility to its members to revise APRA's scheme. APRA submits that it provided all venues with one month's notice and that there is overall market acceptance of the scheme.
 - Contrary to the ACCC's view in 2010, APRA does not consider that its arrangements lead to prices impermissibly above competitive levels.
 - It is already in the process of developing standard and simplified licence terms across most licence schemes and online licensing solutions will make the licensing process more streamlined.
 - It proposes to develop a plain English guide to each general performance licence scheme to be published on APRA's new website. The guides will be user friendly to encourage side-by-side comparison of the licence schemes available and the types of uses covered, as well as examples of licence fee calculation. APRA will also publish these guides on its existing site as they are developed, expected by 31 October 2013.
 - It proposes to make available on its existing and new website a negotiation protocol that it will follow for all licence scheme tariff increases. The protocol will require APRA to notify licensee and potential licensee bodies of the ADR facilities available.
185. In the ACCC's view, APRA owns or controls the performing rights in the vast majority of musical works created throughout the world, with no significant competitive constraint. The ACCC considers that APRA's exclusive licensing arrangements strengthen its monopoly position and ability to impose terms relatively free from competitive constraint.
186. The ACCC notes that many licensees have limited, if any, alternatives to APRA's blanket licence. For APRA each licensee is one of many but for many licensees APRA's blanket licence is a necessary input into 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, because of the importance of music performance to their business, they have little alternative other than to enter into agreements with APRA.

187. The ACCC notes that the submissions received indicate that APRA is able to raise prices and offer contract terms to its licensees that are in APRA's favour as a result. For example, since 2006 APRA has increased licence fees beyond CPI for background music, cinemas, fitness classes and recorded music for dance use.
188. APRA's membership rules are generally not structured to encourage direct dealing – individual licensors and licensees negotiating directly over price and other terms where this is feasible and efficient. This concentration of members' rights exclusively with APRA means that APRA would, absent any alternative such as that provided by a licence back, be able to set prices for access to its repertoire free from competitive constraints, thus earning monopoly rents. The ACCC notes that the Copyright Tribunal may provide some constraint on APRA's ability to earn monopoly rents in some instances. This is discussed further in paragraphs 264 to 273.
189. APRA is able to maximise its monopoly rents by engaging in price discrimination across user groups. APRA price discriminates through the use of a range of licensing arrangements that impose different licence fees on various groups of users according to differences in the groups' willingness to pay for a blanket licence. APRA is also able to price discriminate within user groups through the use of pricing structures that capture differences in individual group members' willingness and ability to pay, such as those based on percentage of box office. The efficiency aspects of APRA's pricing conduct are discussed in the following section.
190. APRA submits that this price discrimination does not correlate to APRA possessing market power or APRA setting fees above a competitive level.²⁹ The ACCC notes that market power is necessary for price discrimination. In the absence of market power, users who are charged a high price will be able to switch to a lower-priced competitor so that price differences that are unrelated to costs will be competed away. The ACCC recognises APRA's ability to price discriminate is affected by a user's willingness to pay which relates in part to the use to which the licensed repertoire will be put and whether it is incidental to or part of the income generating activity of that user.
191. The ACCC notes that there are certain mechanisms which help to mitigate against the public detriment of APRA's exclusive licensing and output arrangements. Some of these were introduced by APRA to satisfy conditions for authorisation imposed by the Competition Tribunal in 1999, and have been subsequently amended, to a limited extent, in later ACCC authorisation decisions. These are discussed at paragraphs 261 to 346 below.
192. A number of interested party concerns related not only to the level of fees but also the difficulty of knowing which licence applies and concerns with how APRA determines that.

²⁹ APRA, Submission in support of authorisation applications A91367-A91375, dated 30 April 2013, at paragraphs 9.1.18 - 9.1.20.

193. In this regard, the ACCC notes that APRA has undertaken to produce a licensing guide. The ACCC considers that an appropriate guide would enhance the transparency of APRA's licensing arrangements to licensees and is likely to mitigate the potential detriment that arises from there being no comparable comprehensive information available from other sources. To ensure APRA proceeds on this basis, the ACCC proposes to impose a condition of authorisation that would require APRA to produce this plain English guide to its licence schemes (condition C3). This aims to assist licensees to choose the most appropriate licence, to understand the tariff that is likely to apply, as well as providing guidance about whether licence fees are negotiable. The ACCC anticipates that this will enable licensees to make more informed decisions about the appropriateness of a particular licence and enable them to engage more effectively with APRA in any licence negotiations.

Allocative and dynamic efficiency

194. Many of the concerns raised by interested parties in relation to pricing (at paragraph 182) also relate to the effect of APRA's arrangements on the efficient use of recorded music.
195. The ACCC recognises that perfect price discrimination can result in an efficient allocation of resources and utilisation of the APRA repertoire in the short run. Blanket licensing can also encourage users to maximise their usage of the repertoire. However, APRA is unlikely to be able to perfectly price discriminate. Furthermore, 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 the form of supply and therefore output. This is particularly the case for those users who are not willing to pay for access to the entire APRA repertoire but would be willing to pay at least the marginal cost of access to part of the repertoire. Such users would be deterred from obtaining an APRA licence. To the extent that this arises there will be some under-utilisation of the APRA repertoire.
196. The ACCC also notes that many users will require a separate licence from both APRA and from the PPCA if they wish to publicly perform a recording. Both collecting societies have market power and engage in price discrimination so as to maximise their monopoly rents. Where users require a licence from both APRA and PPCA, each licence fee is likely to include a mark-up from the marginal cost of providing the licence so that the combined licence fee will effectively include a 'double markup'. This may mean that the combined price of both licences exceeds some users' willingness to pay. This will be inefficient if users who are deterred from obtaining the licences would be willing to pay at least the combined marginal cost of the two licences.
197. In the long run, the ACCC considers that the APRA system may result in a misallocation of resources in relation to the production of new works. APRA distributes its licence fees (including monopoly rents) to composers and publishers broadly in proportion to the use of their works and has an open entry policy for new works and new composers. If individual composers are unable to affect the licence fee and the amount of revenue they receive, they will create new works until their royalty payment (or average revenue, which includes monopoly rent and exceeds the marginal value of an addition to the repertoire)

equals the marginal cost of producing an additional work. At this point, marginal value is less than marginal cost and there will be excess production.³⁰

198. The way in which APRA distributes royalties may also affect the production of musical works. Production may be inefficient if APRA's method of distribution distorts the signals and incentives for production. A number of interested parties raised concerns about APRA's distribution of royalties, for example:

- A number of interested parties submit that there is a lack of transparency around how licence fees are distributed and the system used to ensure that performers receive their rightful royalties³¹
- A number of interested parties are concerned about the proportion of, or lack of transparency around, monies collected by APRA that are paid to affiliate societies³²
- The ALLM submits that APRA repatriates primarily to major label artists and their subsidiaries, while independent artists are incidental in APRA's business model
- LPA and the ICAA are concerned that APRA collects royalties for music that is out of copyright or otherwise not in APRA's repertoire
- The ALLM has concerns with APRA requiring licensees to install proprietary music recognition technology and APRA should justify its use
- An anonymous party queries why only 50% of royalties in relation to a work is paid to a composer and why APRA payments have moved from quarterly to bi-annually
- A group of APRA members raised concerns about APRA's trial of DJ Monitor. The members are not confident that the DJ Monitor system proposed by APRA will capture all of the dance music works performed. The group is concerned about the lack of information provided to them about DJ Monitor and its accuracy and the absence of consultation undertaken by APRA.

³⁰ Besen, SM, Kirby SN and Salop SC (1992), "An Economic Analysis of Copyright Collectives, *Virginia Law Review*, Vol, 83, pp. 383-411 show that if all members of a collective receive an equal share of the collectives revenue, membership will grow until the revenue per member equals the marginal cost of producing a song. This will exceed the efficient number of musical works, which requires that musical works continue to be produced until the *marginal* value of an additional song equals the marginal cost of producing it. If marginal value declines as the number of musical works increases, then average revenue will exceed marginal value.

³¹ An anonymous party, Palace Theatre, LPA, Entertainment Enterprises, Home Nightclub, ALLM and Nightlife.

³² The Nightclub Owners Forum, Place Theatre, Alumbra, Entertainment Enterprises, LPA and the ALLM.

199. Interested parties have suggested conditions of authorisation including:
- Nightlife suggests imposing conditions to enable more adequate licensing arrangements for commercial suppliers, including greater detail about the royalty distribution model
 - The ALLM suggests complete transparency on the distribution of royalties, requiring APRA to report on the amount of fees distributed to overseas collecting societies
 - The ALLM proposes the introduction of an accurate and simple data collection system to assist in the distribution of royalties. The ALLM submits that APRA could use the international DDEX reporting standard to more accurately calculate royalties
 - ALCC/ADA submit that the following information should be made transparent:
 - Royalties distributed to authors, creators, record companies and individual record companies with income above a certain threshold. Royalties distributed by record companies to authors and creators
 - Amount of royalties undistributed and their use
 - The group of APRA members suggests the following conditions of authorisation:
 - Require APRA to include its entire repertoire in the DJ monitor database
 - Require APRA to use an alternative system other than, or in addition to, DJ monitor
 - Require APRA to install its music recognition technology in a range of different venues and to rotate them regularly
 - Require APRA to advise members of its distribution policy prior to implementation
 - Require APRA to conduct a formal assessment of the works reported from DJ monitor, set lists and the ARIA Club Charts, and report to its members on the findings and the distribution percentage going forward
 - APRA should be required to recalculate the royalties for the period where members were not aware DJ monitor was in use.
200. APRA advises that it distributes money to copyright owners whose works have been communicated or performed in public (in Australia and overseas). APRA submits that after expenses and a 1.75% allocation to music grants, APRA allocates all revenue received for distribution to members and affiliate societies. APRA submits that it now distributes quarterly to members, more frequently in the case of some overseas income.

201. APRA notes that Australia is a net importer of music. In its distribution in the year ending 30 June 2012, APRA paid approximately 40% (\$162.8 million) of distributable revenue to overseas collecting societies on behalf of foreign writers for local performances of foreign works. APRA received \$22 million from overseas societies.
202. APRA submits that it employs 48 staff in its distribution department, including a number of expert music researchers who identify performed works reported by licensees. APRA notes that it applies its Distribution Rules and Practices, and submits that as far as possible, APRA's distribution directly corresponds to the musical works performed. APRA submits that this is largely a function of the level of reporting reasonably able to be provided by licensees.
203. APRA submits that members are able to notify APRA of particular performances that may not have been reported and APRA allocates money to an unlogged performances pool for that purpose. Members who perform their own works live are also able to notify APRA through the Live Performance Return system.
204. In relation to the complaint from the group of APRA dance music members about the implementation of DJ Monitor, APRA does not consider that it is appropriate to consider the matter in the authorisation process but will forward the complaint to the Code Reviewer as a breach of the Code. APRA has provided further information about the matter and the steps it is taking to alleviate member concerns.
205. The ACCC considers that there may be dynamic inefficiencies generated by the APRA system to the extent that APRA's distribution of revenues does not reflect the value placed by users on different works. APRA generally distributes revenues according to the use of works in each revenue pool (APRA's clients either keep full records or take part in a survey system), thereby reflecting the extent and probably the value of use. However, not all types of users provide such information and distributions may therefore not accurately reflect use and value. Revenue is also allocated to different pools for programming and advertising, which may or may not reflect relative values. In addition, within some pools uses are weighted according to factors such as time of day, length and type of music (featured, background or theme). Time of day and length may reflect the value of use but they appear to be used selectively e.g. time of day is used for television but not for radio. It is less clear that the weights accorded to different types of music will accurately reflect the value of those musical works. To the extent that APRA's distribution system does not accurately reflect the value placed on different types of works, incentives for the creation of new works will be distorted.
206. The ACCC notes that this problem may be accentuated by the practice of calculating distributable revenue by deducting APRA's costs from gross revenue. This means that a higher proportion of costs will be deducted from high fee paying users, which may not accurately reflect where those costs are incurred. For example, monitoring and enforcement costs in relation to the numerous small value users seem likely to be relatively high compared to those for the small number of high value users.

207. The ACCC considers that to the extent possible, APRA's members should be remunerated in proportion to the value of actual performances of their works. This helps to reduce any dynamic inefficiencies arising from the APRA system.
208. The ACCC notes that APRA appears to have a thorough process for allocating royalties, and in some categories does so based almost exactly on the actual songs played (for example, in the case of broadcast radio and television). The ACCC notes that APRA continues to improve its mechanisms for collecting performance data, particularly as technology improves. The ACCC encourages APRA to continue to do so, particularly in light of the possibilities opened up by developments in music recognition and other technology, to better reflect what music is actually being played.
209. However, the ACCC also recognises that there are logistical difficulties in collecting accurate records of all copyright material performed. The ACCC acknowledges that there is a balance to be struck between accurately monitoring music use and the costs to APRA and licensees of doing so. Further, the ACCC has not received widespread concerns from APRA members about the existing distribution system, other than in relation to the new system for electronic dance music.
210. The ACCC notes that interested parties have indicated that conditions of authorisation may assist to provide increased information about the process for calculating royalties and transparency about actual distribution, and improvements to the DJ Monitor system.
211. The ACCC accepts that APRA should be responsive to questions from its members and licensees about how it calculates and distributes royalties, including to overseas affiliate societies, as well as questions specific to a particular member's royalties.
212. However, the ACCC does not consider that a condition is necessary or appropriate at this time. The ACCC notes that there are existing mitigating factors, such as the ability for members to seek to deal directly with users by utilising licence back (and opt out to a lesser extent) (noting the promotion of these facilities under proposed condition C4, discussed below), and the guidance provided by the Code. Further, APRA's Board is comprised of APRA members who are likely to raise concerns if APRA's distribution practices are not in the interests of its members. The breadth of the proposed new ADR process should also allow members to raise concerns about distribution practices, in addition to members having the option to raise concerns directly with APRA or the Code Reviewer. The ACCC encourages any members who are dissatisfied to take advantage of these avenues if appropriate.

Cost efficiency

213. The ALLM submits that APRA's revenues have increased 76% between 2003/04 and 2011/12 while expenses increased 110%. The ALLM submits that APRA has spent \$23.4 million on property, plant and equipment (\$6.6 million on land and \$12.7 million on property) that would otherwise be paid to its members.
214. The ICAA submits that APRA may not maximise its administrative efficiency to maximise returns to its members.

215. An anonymous submission suggests that it is not possible from APRA's financial reports to separate out AMCOS expenditure, staff and administrative costs, nor expenses arising from conference attendance by APRA staff. Further, the party considers that APRA's expenses should be assessed in absolute terms, rather than a percentage of income.
216. The ALCC/ADA submits that APRA should provide access to transparent distribution and revenue data to assist licensees in negotiating competitive prices with APRA, as opposed to the aggregated revenue data.
217. APRA submits that its expenses to revenue ratio is one of the lowest in the world (13.44% in 2011).
218. Licensees have suggested imposing conditions of authorisation to increase transparency around APRA's expenditure. In particular:
- The ALLM suggests requiring APRA to publish a list of its plant and equipment expenses. Also, a clear breakdown of legal, infrastructure, development and administration costs
 - ALCC/ADA submits that the following information should be made transparent:
 - Benefits paid to APRA executives, staff and consultants
 - Amounts spent on litigation, legal costs and policy/government lobbying.
219. In the absence of competitive constraint, APRA may not have an incentive to minimise its expenses, control its costs or implement changes to improve its cost efficiency. This would result in a reduction in the royalties available for distribution to its members, or may redirect funds away from programs valued by its members.
220. However, the ACCC does not consider that a condition of authorisation is necessary or appropriate at this time.
221. If APRA was operating inefficiently, and its members were aware of this fact, the ACCC would expect there to be dissatisfaction from APRA's members who have an incentive to ensure that APRA is as efficient as possible as this maximises the revenue that is available for distribution. The ACCC has not received submissions which indicate widespread concern from APRA members about APRA's cost efficiency. In fact, most of the submissions raising this concern were received from APRA licensees.
222. APRA's performance can be benchmarked against APRA's overseas peers. APRA has provided data which indicates that its expense to revenue ratio has remained between 12% and 13% between 2005/06 and 2011/12. In recent international benchmarking of affiliate societies provided by APRA, APRA's ratio ranks sixth out of more than 50 societies.
223. In the event that APRA members have concerns about APRA's expenses and administration, the ACCC would welcome submissions from those parties

affected, and encourages members to put this issue to APRA or the Code Reviewer directly.

224. In addition, the ACCC notes that APRA's operations are managed by its Board, which includes members representing the interests of different member groups. APRA's operations are also influenced to some extent by the requirements of the Code and APRA's Constitution.

Conduct of APRA and its employees and agents

APRA's dealings with its licensees

225. Interested parties have raised a number of concerns about how APRA and its employees conduct themselves in dealing with licensees or potential licensees.
226. APRA notes that a number of the complaints raised in interested party submissions have been dealt with through APRA's complaints handling process. APRA submits that it will address any new complaints raised as well as forwarding them to the Code Reviewer.
227. APRA submits that it commits considerable resources to the training of its staff members, including regarding dealing with members of the public and compliance with the Code.
228. APRA submits that it takes the Code extremely seriously and may impose sanctions against employees whose conduct has been found to be in breach of the Code. APRA observes that since the implementation of the Code, the number of complaints received by APRA has decreased.
229. APRA submits that APRA conducts 'spot checks' for a variety of purposes, including to verify works performed for distribution purposes, to collect evidence of venues that are not licensed, or to verify unconfirmed information provided by a licensee.
230. However, a number of interested parties have raised concerns about the lack of assistance that APRA provides to licensees when the licensee applies for a licence. For example:
- Caxton, QHA, AHA, AHA Victoria, AHA Queensland, LPA and an anonymous party submit that APRA staff do not assist licensees adequately, for example by explaining tariff options, helping to fill in forms or otherwise assisting industry to navigate their rights and obligations. This leads to licensee confusion and disputes.
 - The AHA submits that APRA's licensing material is not useful
 - The AHA submits that APRA staff do not assist licensees with the complaints process, instead providing licensees with aggressive letters of demand.

231. A number of interested parties have also made submissions to the effect that APRA acts in an intimidating manner towards licensees or potential licensees. For example:
- A number of parties submit that APRA is at times aggressive towards licensees and potential licensees during the licensing process³³
 - The NSW Small Business Commissioner considers there are a number of contraventions of the Act in APRA's arrangements, including misleading contract negotiations, and aggressive and intimidating customer service interactions
 - The Caxton, the WA Nightclub Association and the QHA submit that APRA's staff are motivated by a commission pay structure
 - The ALLM, Alumbra and the QHA submit that the ACCC should consider APRA's use of undercover operatives. The ALLM submits that APRA does not offer ADR to users from the outset. The ALLM considers that there may be hundreds of disputes that are not reported to the APRA Complaints Officer by licensees for fear that the information they provide will be used against them.
232. APRA's conduct may reflect its exercise of market power. Alternatively, the conduct may be a principal-agent type issue where APRA employees may be acting in their own interests, rather than those of APRA and its members.
233. The ACCC notes that interested party submissions indicate that due to its position as an effective monopoly, APRA may be less willing to assist its licensees and may be engaging in behaviour that these licensees experience as less than cooperative. Licensees who rely on music for their business may lack the information, knowledge and time to assess whether the correct licence(s) has been applied.
234. APRA's behaviour towards its licensees may be exacerbated by the lack of alternatives that many licensees have to dealing with APRA. However, the ACCC acknowledges that APRA is acting within its rights to enforce the rights of its members by taking action against unlicensed music users, albeit that such action should not be unnecessarily threatening.
235. Most of the concerns raised by interested parties relate to interactions with APRA licensing representatives, where potential principal-agent issues arise. The ACCC acknowledges that APRA's objective may be to comply with the Code and to foster good working relationships with its licensees in order to maintain the reputation of APRA and its revenue flow. However in some cases APRA's staff receive commissions based on the licences they sell. The payment of commissions can create incentives for employees to act in ways that are not consistent with APRA's interests or intentions. For example, commissioned employees may employ tactics that are intended to sell more licences or more expensive licences rather than providing APRA's desired level of customer services and/or matching licensees with the most appropriate licence.

³³ An anonymous submission, The Caxton, Zap Fitness, the NSW Small Business Commissioner, Bartletts Tavern, the QHA and Totem/Future.

236. Interested parties suggest potential conditions of authorisation to improve APRA's interactions with its licensees and members. For example:
- The ALLM suggests requiring APRA to report annually the number of legal actions commenced against licensees
 - The QHA suggests assessment and application process/forms to be simplified in consultation
 - The AHA (supported by the NSW Small Business Commissioner) submits that the ACCC should impose conditions to address the alleged misleading or deceptive conduct of APRA with respect to contractual negotiations and representations by requiring:
 - Licence application forms disclosing available tariff options, the basis for determining the applicable tariffs, the ability to negotiate terms. The clause relating to audit, playlists and reconciliation to be removed
 - Address alleged coercive and bullying behaviour by requiring a staff manual to be approved by the ACCC, requiring staff training (NSW Small Business Commissioners suggests ISO9000 or 14000), introducing a small claims process for claims less than \$20,000 (accountant/auditor), requiring a fairer ADR for claims above \$20,000
 - The ACCC setting guidelines on setting tariffs, including introducing an Independent Review Board with guidelines set by the ACCC. The decision of this Board would be ratified by the ACCC
 - Allow licence assessment procedures to be performed by agents subject to APRA providing transparent policies and procedures
 - APRA to publish its repertoire of works and distribution revenues.
237. The ACCC considers that the Code (see paragraphs 47 to 49) exists to provide a minimum level of acceptable conduct by collecting societies and the Annual Report of the Code Reviewer publicises how each society's performance is tracking. The ACCC accepts that APRA endeavours to comply with the Code and that it has policies and procedures and staff training in place to facilitate this, and that incremental improvement has resulted. The ACCC also notes APRA's willingness to acknowledge the concerns raised by interested parties during the ACCC's consultation process.
238. APRA also has an internal process for addressing formal complaints regarding its actions and the ADR process for parties in dispute with APRA about APRA's terms. APRA has identified that some of the issues raised in interested party submissions were dealt with through these processes. However the ACCC notes that a number of licensees have indicated that they are reluctant to use the existing ADR process.

239. The ACCC notes that APRA intends for its revised ADR system to take account of member and licensee complaints as well as disputes. If parties consider the new process is more accessible and provides them with increased incentives to raise complaints/disputes, this could result in the satisfactory resolution of individual disputes/complaints, as well as highlighting areas for improvement for APRA. The ACCC's proposed condition C5 is intended to ensure that the new ADR system will incorporate features to encourage its use and produce timely and independent decisions.
240. The ACCC also encourages members and licensees with concerns about APRA's conduct to make formal complaints either to APRA or directly to the Code Reviewer. This will enable the Code Reviewer to provide feedback about APRA's conduct and its progress from year-to-year, as well as encouraging APRA to make changes.
241. The ACCC also notes that APRA has undertaken to provide new public guidance material about its licence schemes to assist licensees to make decisions independent of APRA (and the ACCC proposes to impose condition C3 to address this proposal). Nonetheless, the ACCC considers licensees should be able to assume that APRA representatives are available to assist them and that the information provided to them is factually correct. The ACCC considers that an improved ADR process, in combination with the Code, should improve interactions between APRA and its members and licensees.
242. APRA also proposes to develop a new website that will include prominent links from the home page and the licensee and membership likely entry points to information about ADR and complaints, opt out and licence back, and expenses to revenue ratios and benchmarking information. APRA advises that it will take immediate steps to make links to that material more easily located on its existing website.
243. The success of these changes, in addition to any further efforts by APRA to alleviate licensee concerns, will be relevant to the ACCC's consideration of any future application for re-authorisation.

APRA's dealings with its members

244. Given APRA's role, function and structure, it would generally be expected to act in the best interests of its members. However, an anonymous interested party has raised concerns that:
- APRA members are not always kept informed of developments, such as the current application for re-authorisation
 - APRA is not transparent with its members about funds spent on seminars, including APRA's Song Summit, the APRA Awards and lobbying activities
 - the rights APRA takes from members upon joining APRA are not clearly and transparently explained, for example the ability of members to collect their own income from overseas territories.
245. The ACCC also notes the concerns raised by a group of members about the implementation of DJ Monitor (see paragraphs 198 and 199).

246. The ACCC notes that APRA holds as one of its objectives 'To protect and promote the interests of members in relation to their musical, literary and dramatic works'. The ACCC considers that APRA should act in the best interests of all of its members.
247. In this regard, the ACCC notes that APRA members are diverse and may accordingly have diverse interests. Where interests diverge, the ACCC considers APRA's decision making should ensure that the interests of some members (such as large publishers) do not necessarily take precedent over other members (such as small composers). In this regard, the ACCC notes that generally it is small independent members that have raised concerns.
248. The ACCC also notes the role of the Code and APRA's Constitution in directing APRA in its interaction with its members. For example, the Code requires member societies to treat members (and licensees) fairly and courteously, to have a clear policy for distributing revenues to members, and to develop and publicise appropriate complaints and disputes processes. Further, APRA's Board is comprised of APRA members and should represent member interests (although the importance of representative Board membership is discussed at paragraphs 344 to 346).
249. The ACCC considers that APRA should ensure that its members are well informed of its activities and are consulted in a timely manner on changes and developments. For example, APRA could provide additional email updates to its members. The ACCC encourages APRA members who consider their interests are not being represented to engage with APRA. The ACCC notes that members affected by the use of DJ Monitor provided feedback to APRA, resulting in APRA taking steps to address the members' concerns.
250. Further, to the extent that aggrieved members do not currently raise issues directly with APRA, the proposed new ADR system may provide a more structured process for members to have their issues considered.
251. APRA could also review the composition of its board to ensure that all types of members are appropriately represented.
252. The ACCC does not propose to impose a condition of re-authorisation in relation to APRA's dealings with its members at this time. However the ACCC may require APRA to demonstrate improvements in this area in any future application for re-authorisation. The ACCC also seeks feedback from APRA and interested parties, particularly small APRA members, in relation to this issue.

Restricted access to overseas works

253. The ALLM notes that its members were unsuccessful in entering alternative licensing arrangements with the Canadian collecting society (SOCAN) and the UK collecting society (PRS). The ALLM has asked the ACCC to look at making changes enabling the parallel importing of music copyright from overseas collecting societies.
254. The ACCC remains of the view 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.

255. As a result, source licensing that would otherwise be efficient (for example, in conjunction with the licensing of synchronisation rights for movies) cannot occur for overseas works other than in the US, which limits the potential use of source licensing.
256. The ACCC notes that constant improvements in information technology and communications mean that it is easier for service and product providers to deal and make offers across borders.
257. The ACCC considers that the difficulty in the creation of other methods to administer performing rights, such as through overseas collection societies, is compounded by APRA's arrangements with those societies. These arrangements have the effect of preventing or discouraging those societies from competing in Australia by providing access to their repertoire directly to Australian users.
258. In addition, APRA's overseas arrangements severely limit the ability of users to go directly to overseas societies or even foreign original rights holders such as composers to acquire rights. This decreases the likelihood of entry of new collecting societies or creation of alternative mechanisms because access to overseas repertoires and works would be denied or at least hampered.
259. 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 as long as there is a residual licensing requirement from APRA.
260. However the ACCC recognises that there is no obvious alternative to the current arrangement with overseas collecting societies at this time. The ACCC also notes (as it has previously) that there are public benefits arising from the overseas arrangements – for example, the long-standing and apparently stable and orderly arrangements for an aspect of Australia's trade in intellectual property gives Australian parties an easier option than dealing directly with overseas users or societies. As discussed under Public Benefits, the exclusive arrangement with (most) other collecting societies results in enforcement cost savings.

Factors that may mitigate against detriments

261. The ACCC considers that the anti-competitive detriment resulting from a collecting society's licensing 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
 - provide for an effective alternative dispute resolution processes where appropriate.³⁴
262. The ACCC notes that there are certain mechanisms which help to mitigate against the public detriment of APRA's exclusive licensing and output arrangements. In part these were introduced by APRA as a condition of authorisation by the Competition Tribunal in 1999, and have been subsequently amended, to a limited extent, in later ACCC authorisation decisions. In addition, the Copyright Tribunal and the Code have the potential to further mitigate detriment.
263. APRA agrees with the ACCC's 2010 determination and submits that the detriment is mitigated by the licence back and opt out facilities. APRA submits that greater scope for competition has been achieved by the enhancement of the licence back and opt out facilities. APRA also considers the Copyright Tribunal, APRA's ADR process and the ACCC's conditions of authorisation C1 and C2 assist in mitigating detriment. APRA also considers that developments over the last three years have reduced any potential competitive detriment, rather than increasing it.

Copyright Tribunal

264. A number of interested parties have made submissions about the costs and difficulties associated with use of the Copyright Tribunal in seeking to resolve a dispute with APRA.
265. Dr Sainken submits that the Copyright Tribunal is expensive, underequipped to govern sufficiently, has limited remedies and does not have the resources to independently research its decisions. Dr Sainken submits that users have insufficient funds to match the volume of material presented by APRA in hearings.
266. The WA Nightclub Association submits that the Copyright Tribunal should be made more accessible and less expensive, and should have the power and means to make its own enquiries.
267. The Star submits that the Copyright Tribunal is not a viable option for recalibrating the value of tariffs or tariff reforms as it places too much onus on copyright users rather than APRA.

³⁴ 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, paragraph 6.33.

268. The QHA submits that the Copyright Tribunal lacks efficacy.
269. Entertainment Enterprises submits that the Copyright Tribunal is held formally, is costly, is held in Sydney and applicants run the risk of costs being awarded against them. The ALCC/ADA submit that there are considerable costs and resource constraints to be considered in taking Copyright Tribunal action. The NSW Small Business Commissioner considers the Copyright Tribunal is too legalistic and expensive for dispute resolution.
270. The ACCC has previously observed that in determining whether or not a licence scheme is unreasonable, it is unclear whether and to what extent the Copyright Tribunal may consider competition issues.³⁵ The Copyright Tribunal has stated:
- Given the genesis of the [Copyright] Tribunal and the roles and functions of the [Australian Competition and Consumer] Commission, as described above, it is tolerably clear that the Tribunal should have regard to competition and the promotion of consumer welfare in references such as that presently before the Tribunal. That consideration, however, is not an overriding one.³⁶
271. The ACCC remains of the same view about the role of the Copyright Tribunal in mitigating the public detriment of the arrangement as in its 2010 determination. In 2010, the ACCC considered 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.
272. 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.
273. 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.
274. The ACCC also notes that the ACCC's Copyright Guidelines, once finalised, may assist parties which utilise economic experts and engage in the collation of evidence in proceedings in the Copyright Tribunal. The ACCC considers the Copyright Guidelines may also aid licence negotiations.

³⁵ Australasian Performing Right Association Limited, Authorisations A30186-A30193, 14 January 1998 at paragraph 8.1.13.

³⁶ Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited [2009] ACopyT 2, paragraph 34.

Dispute resolution

275. The Nightclub Owners Forum submits that hospitality venues do not have the resources to mount a legal challenge against APRA, relative to APRA's resources.
276. The ALLM submits that the low number of reported disputes reflects reluctance by licensees to make complaints to APRA in case it leads to unwanted attention from APRA or escalation to the Copyright Tribunal. The ALLM notes that APRA may avoid disputes by offering confidential 'deals' to some licensees. The ALLM submits that APRA should support its claim that ADR mitigates potential detriment.
277. Totem/Future have been advised by APRA that they could refer disputes to Expert Determination, mediation or the Copyright Tribunal, however these processes are costly, lengthy and licensees are fearful that APRA will close down their venue/event.
278. The AHA submits that many of its members will not pursue any legal address or complain to the ACCC, state consumer affairs, the Copyright Tribunal or the Code Reviewer.
279. The NSW Small Business Commissioner submits that APRA has inadequate complaints handling and dispute resolution processes. The Commissioner submits that any party should be able to refer a dispute to any Small Business Commissioner for independent, low cost and effective resolution.
280. The NSW Small Business Commissioner submits that the ACCC and the Federal Government should review: whether the current APRA framework is effective in achieving its objectives; whether the Code should be strengthened and made mandatory; whether APRA is meeting the expectations of the Code, for example with respect to dispute resolution; whether the annual Code review is working effectively; whether Copyright Tribunal dispute resolution is effective; and whether the ACCC should issue guidelines to the Copyright Tribunal to assist with pricing.
281. APRA submits that complaints (matters raised in writing in which APRA's conduct or actions are criticised) are dealt with internally, in accordance with APRA's complaints procedure and are reported to the Code Reviewer. APRA submits that disputes (matters raised in writing in which a decision made by APRA is criticised) are either resolved by commercial negotiation or referred to expert determination or mediation with the agreement of the disputant.
282. APRA considers that it does not use a disproportionate level of legal representation in its dealings with licensees and that it is untrue that licensees have not had adequate legal representation in hearings.
283. Dr Sainken submits that APRA's ADR is ineffectual and little used. Totem/Future consider that the limited use of ADR indicates its limited practicality and utility. An anonymous submission raises that ADR is inappropriate and unhelpful to the average APRA composer/performer.

284. The ALLM and The Star submit that the legal costs to applicants to ADR are substantial. The ALCC/ADA submit that there are considerable costs and resource constraints to be considered in utilising expert determination.
285. The AHA and the QHA submit that small businesses are not aware of ADR or are scared to use it. The QHA submits that the current conflict resolution process is complex, costly and enables APRA to bully individual venues. The QHA notes that APRA runs all elements of the system and enforcement.
286. Entertainment Enterprises submits that dispute resolution is not equitable (given APRA's resources), requires the licensee to run a hearing like at the Copyright Tribunal, and is heard by an expert from a panel of barristers who is more likely to be bound by legal precedent than the licensee's industry. Mediation is also expensive and may ultimately end up at ADR or the Copyright Tribunal. Entertainment Enterprises does not consider that APRA's ADR satisfies the requirements of paragraph 1.3(d) of the Code.
287. The AHA submits that groups of small businesses should be able to utilise ADR, however they would require a collective bargaining notification.
288. APRA submits that it offers ADR to any licensee or potential licensee whose dispute escalates out of its licensing department. APRA disagrees that its ADR facility is too expensive and endeavours to keep the process as informal and unintimidating as possible. APRA submits that its experience is that major licensees (such as large digital service providers or broadcasters) are accustomed to settling disputes by negotiation rather than expert determination.
289. APRA submits that since 2008, the majority of disputes with licensees relate to the classification of premises as 'nightclubs'.
290. Interested parties have suggested conditions of authorisation including:
- The ALLM suggests requiring APRA to report on disputes resolved by APRA offering confidential 'deals'
 - The ALLM suggests an independent, affordable and equitable moderation process
 - The Star submits that the ACCC's conditions of authorisation should provide more effective dispute resolution regarding tariffs
 - The QHA submits that ADR should be simplified, better explained and underpinned by a simple dispute resolution path
 - Totem/Future ask for conditions to address their concerns.
291. In response to interested party concerns, APRA advises that it will engage a third party expert in dispute resolution to advise APRA in the design of a bespoke ADR system, taking account of the need to manage members' complaints under the Code, relatively small licensee complaints, and major industry disputes. APRA will request a system that incorporates a 'small claims' tier of resolution for licensee disputes over factual matters and will ask the expert to advise APRA in relation to the appropriate licence fee level or other

criteria having regard to APRA's operations. APRA will also ask that the new system also incorporates timelines for the resolution of disputes, particularly so that small disputes can be resolved quickly and with minimum administrative burden to all parties. APRA will ask the expert to advise in relation to the implementation of a system that is as independent of APRA as reasonably possible.

292. APRA expects that a design will be able to be prepared before 31 October 2013 with a view to implementation by 1 January 2014. APRA will offer the new ADR options to existing disputants.
293. The ACCC considers that the anti-competitive detriment resulting from a collecting society's licensing arrangements will be more limited where the arrangements allow for effective dispute resolution processes. Such processes act as a constraint on the collecting society's market power by helping to redress imbalances in bargaining power.
294. 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.³⁷
295. APRA's outline of its dispute resolution procedure (endorsed by the Competition Tribunal and included as Annexure B to its 2000 decision) is at Attachment B to this draft determination.
296. The ACCC is of the view that the expert determination process potentially provides a relatively inexpensive and straight forward alternative to resolving disputes by way of proceedings in the Copyright Tribunal.
297. However the ACCC is concerned that the expert determination process has rarely been used since it was introduced (two matters have been resolved by expert determination between 2010/11 and 2012/13, with four matters unresolved and seven matters resolved before going to determination). Given the comments received by interested parties the ACCC is concerned the low incidence of referral to the expert determination process is indicative 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.
298. The ACCC notes that the conditions of authorisation introduced in 2010 required the expert to consider and report on whether a discount to a blanket licence was

³⁷ Re Australasian Performing Right Association Ltd [1999] ACompT 3 (16 June 1999) at paragraph 318.

appropriate and required APRA to report to the ACCC on matters considered in ADR.

299. However interested party concerns remain about the need for an appropriate 'small claims' dispute resolution process that is well publicised and that suits small businesses and/or minor claims.
300. APRA advises that it intends to make information about ADR more prominent on its website and that it will engage a dispute resolution expert to design an ADR system suited to addressing different types of disputes and complaints.
301. While noting that benefits have arisen from the existing ADR system, the ACCC considers it is an appropriate time to review APRA's dispute resolution process to ensure that it is effective and accessible to parties wanting to use it. The ACCC is therefore encouraged that APRA is looking to take this step. The ACCC also encourages APRA to consider whether its existing processes are suited to members raising disputes, rather than focussing on licensees.
302. Interested parties have suggested the ACCC impose conditions to encourage an improved dispute resolution process.
303. The ACCC considers that APRA's proposed changes are likely to address a substantial portion of the concerns of licensees in relation to the current dispute resolution system, and are therefore likely to improve the effectiveness of the ADR system.
304. The ACCC is proposing to impose a condition of authorisation (C5) to ensure that changes to the ADR system are made, and that those changes incorporate certain features that will improve the effectiveness of the system in mitigating APRA's market power. Some of these features include internal and external mechanisms to resolve disputes/complaints that will be available to both members and licensees/potential licensees and a requirement for an education program including a plain English guide. The ACCC seeks submissions from APRA and interested parties on the proposed features of the revised ADR system.

Opt out and licence back

305. A number of interested parties have made submissions in support of options for users to deal directly with rights owners and perceive these as ways to impose a degree of competition on APRA.
306. Interested parties, including LPA, also note APRA's progress over time in relation to opt out and licence back, but submit that more needs to be done to enhance the use of these facilities. The ALLM and NACO submit that opt out and licence back are unlikely to mitigate the detriment associated with APRA being a monopolist as they only provide a limited constraint. The LPA and the ALLM note that there are still barriers to the use of opt out and licence back, including the notice period and \$200 fee.
307. Dr Sainken, the ALLM, NACO, the ICAA, and the ALCC/ADA consider there should be alternatives to blanket licences and that fees should be reduced proportionately in order to facilitate source licensing. The ALLM submits that there should be an option that falls between blanket licences and direct licensing

(i.e. where venues pay a percentage of the blanket licence fee). Further, Dr Sainken, Entertainment Enterprises, the ICAA, Nightlife and the ALLM submit that APRA should publish its repertoire and the ALLM proposes the introduction of an accurate and simple data collection system.

308. APRA acknowledges that the take-up of its licence back and opt out facilities by members remains relatively low but is increasing. APRA submits that it informs members of the availability of opt out and licence back in materials provided to members on joining APRA, on its website and in 'APRAP', and that members can speak to APRA staff for assistance. APRA considers that licensees' industry associations are well aware of opt out and licence back.
309. APRA submits that direct dealing with APRA members is only likely to be attractive to licensees who use the works of a small number of APRA members, for example music on hold and live tours.
310. APRA submits that it is not practical for it to publish its repertoire as it involves a large amount of data (more than 10 million works) that is constantly changing and would be inefficient. APRA already has a works search function on its website.
311. APRA submits that if a user believes it is performing music by an author who is not a member of any collecting society, APRA will verify the author's membership.
312. Interested parties have suggested conditions of authorisation, including:
 - LPA submits that the ACCC should impose conditions to improve licence back and opt out
 - Dr Sainken submits that the ACCC should require APRA to introduce alternatives to blanket licences
 - The ALLM, Nightlife and Dr Sainken suggests requiring APRA to progressively publish its repertoire.
313. In response to interested party concerns, APRA proposes to make plain English information about members' ability to opt out and licence back available on the main licensee page of APRA's new website. This will give examples of typical opt out and licence back situations, and explain what impact the opt out or licence back would be likely to have on the member and the licensee. APRA will also take immediate steps to make existing information more obviously available to licensees on its existing website.
314. The opt out and licence back arrangements are designed to temper the supply restrictions associated with APRA's exclusive assignment and its 'all or nothing' blanket licences. These options for direct dealing have the potential to provide alternatives to the blanket licence where feasible and therefore increase competition in the acquisition and supply of performing rights.
315. Licence back and opt out provisions were introduced in 2000 in compliance with the Competition Tribunal's directions. The ACCC considered that this was a significant step towards encouraging a degree of competition in the acquisition

and supply of performing rights. However in 2010, the ACCC considered that APRA's licence back and opt out arrangements were unnecessarily complex and as such the ACCC proposed conditions to modify article 17(g) of its constitution to make these arrangements easier to use. These changes reduced the notice period for licence backs and the information required to be provided by applicants.

316. The ACCC considers that further incentives to encourage the use of opt out and licence back may be required.
317. The ACCC notes that APRA has over 70,988 members but that there have only been 125 instances of the use of licence back and 4 instances of the use of its opt out provisions between 2001 and April 2013. It is not clear whether this low rate of use is because of widespread user and member satisfaction with APRA's blanket licences or difficulties with the opt out and licence back arrangements.
318. 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, consistent with its view in 2010, 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 (while noting that there is significant non-price competition between composers, for example, to get their works broadcast). The ACCC considers that this provides an alternative to licensing through APRA which could constrain at least some of the anti-competitive effects of APRA's arrangements.
319. In 2010, the ACCC noted 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 eliminate the gains from competitive pricing.
320. The ACCC considered, 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.
321. Therefore the ACCC considered that in the area of licensing rights in works to predominately 'predictive' users in particular there is likely to be further scope for and benefit from increased direct dealing and competition between suppliers and acquirers.
322. 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 where otherwise permitted (e.g. US works), 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 still require blanket licences in respect of APRA's

repertoire for some of their needs, 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.

323. Therefore 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.
324. Overall, the ACCC remains of the view 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 decrease the public detriments of the APRA arrangements.
325. The ACCC noted in its 2010 determination 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.³⁸
326. In 2010, the ACCC noted that it would continue to monitor APRA's progress, and given the commitments APRA had made, expected to see significant progress in improving the accessibility of APRA's licence back provisions moving forward. The ACCC notes in particular APRA's simplification to article 17 of its constitution to reduce the information requirements when applying for opt-out and licence back.
327. However the ACCC notes that interested parties continue to have concerns and that there has been no notable increase in the usage of opt out or licence back since these improvements were made under the 2010 authorisation. The ACCC considers that some parties remain unaware of these arrangements or are not able to use them easily. For example, despite the simplification of article 17(g), a person reading Article 17(g) or the application form without having actually approached APRA regarding a licence back may think that APRA requires exhaustive information about the licence back. Instead, APRA's intention was that members provide only enough information so that APRA can identify the party with whom the member has directly licensed. To the extent that such misconceptions exist, this limits the perceived utility of APRA's licence back provisions.
328. The ACCC acknowledges that APRA proposes to make plain English information about the opt out and licence back provisions and usage available on the main page of APRA's new website by 31 October 2013 and take steps to make the existing information more obviously available to licensees on its existing website. The ACCC proposes a condition (C4) until this is in place, in order to promote the efficient use of the opt-out and licence back provisions and

³⁸ *Re Australasian Performing Right Association* [1999] ACompT 3 (16 June 1999) Summary Statement.

to therefore increase the extent to which those provisions will mitigate the detriment that arises from the absence of any competitor to APRA.

329. The ACCC's aim is to ensure that any party that would like to enter direct licensing arrangements is not hindered from doing so by APRA's processes. To help ensure that parties use opt out and licence back where feasible and efficient, the ACCC is proposing to require APRA to make this plain English information available on its website before the ACCC releases a final decision. The ACCC also proposes to require APRA to further increase awareness of these facilities and ensure that it offers appropriate discounts off blanket licences that reflect the value of direct dealing, noting the opportunities that evolving technology will present.
330. The ACCC notes the efficient use of the opt out or licence back provisions may be promoted through a reduction in the price charged by APRA to users of these provisions and through improved transparency and processes.
331. The ACCC has previously concluded that due to APRA's arrangements with overseas collecting societies APRA is unable to provide its members with worldwide licence back. Any reforms in this area would necessarily need to be centrally coordinated, involving discussions with CISAC, other collecting societies and major rights holders such as music publishers. However the ACCC encourages APRA to continue to explore this issue with its overseas counterparts, noting the growing importance of digital and online distribution.

Code of Conduct

332. The ALLM questions the power of the Code Reviewer to affect change. The ALLM considers that the Code Review may not accurately reflect the level of disputes.
333. The WA Nightclub Association suggests that the Code Reviewer should perhaps be paid out of licence fees to facilitate independence.
334. Entertainment Enterprises considers that the Code Reviewer position should be reviewed and replaced by a Government person or body funded by the collecting societies. Entertainment Enterprises submits that its complaint to the Reviewer about the introduction of 'Recorded music for dancing' did not receive a direct response. Entertainment Enterprises also submits that this licence is not consistent with the requirements of the Code.
335. Entertainment Enterprises considers that the government should implement a mandatory code.
336. The Code of Conduct for Australian Collecting Societies sets out the standards of service that members and licensees can expect from collecting societies. An independent Code Reviewer reports on compliance.
337. As note in its 2010 determination, the ACCC welcomes initiatives such as the Code, 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 go some way in dealing with these types of issues. The Code also sets general standards of behaviour for its member societies.

338. However, the ACCC remains of the view 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.
339. The ACCC understands that while the Code does not impose sanctions on signatories, it creates a culture in which member societies endeavour to maintain performance in line with their peers. Public annual Code Reviewer reports act as an incentive for member societies to perform well based on the criteria reported.
340. In light of this, the ACCC encourages APRA to report more widely to the Code Reviewer on issues raised by interested parties, particularly disputes (the ACCC notes that APRA has agreed to do so in the case of matters raised in this authorisation process). The ACCC understands that at present APRA provides the Reviewer with a copy of its ADR Report and information about complaints. The ACCC considers that information about all written disputes, not just those that are escalated to formal ADR, will provide valuable information about APRA's adherence to the Code and the efficacy of its dispute resolution procedures.

Representation on APRA's Board

341. The ALLM is concerned that APRA's Board of mostly professional publishers has the discretion to direct royalties with no accountability. The ALLM suggests other parties should be represented on the Board.
342. An anonymous submission agrees that the APRA Board is heavily weighted towards major publishers.
343. Entertainment Enterprises submits that APRA's Board composition does not reflect all the parties to licensing agreements (and in particular licensees).
344. The APRA Board comprises twelve Directors. Of these, six are representatives of publisher members elected by the votes of all publisher members and six are writer members elected by the votes of all writer members; of these latter, five are elected by the Australian writers and one by the New Zealand writers.
345. The ACCC notes that having board representation for all APRA member groups (including small and independent composers) as well as licensees would ensure that the interests of various stakeholders are taken into account in decision making, rather than only a subset of members (see APRA's dealings with its members above).
346. The ACCC notes the interested party concerns raised and considers that APRA should look into addressing these concerns. This could include the addition of a board member appointed to represent the interests of independent and niche writers/composers/producers. The ACCC will take account of any improvements in this area in any future application for re-authorisation.

Other changes requested by interested parties

347. In addition to the concerns and suggested conditions of authorisation noted above, interested parties have also asked the ACCC to require other changes.

348. These include:

- The Nightclub Owners Forum submits that the ACCC should require APRA and the PPCA to merge
- The Nightclub Owners Forum submits that the Federal Government or the ACCC should review the current system of copyright administration to increase competition
- Dr Sainken submits that the ACCC should require further changes as the current mechanisms are not effective in negating APRA's monopolistic power. For example, introducing competing collecting societies, increasing funding to the Copyright Tribunal and requiring the Copyright Tribunal to undertake its own research
- Zap Fitness supports conditions or independent bodies that limit APRA's misuse of market power
- An anonymous submission suggested a number of conditions of authorisation on a confidential basis.

349. In general, the ACCC considers that the above changes fall outside of the scope of the ACCC's role in assessing an application for authorisation. There are more appropriate avenues for considering these changes. The ACCC has not reached a view on whether these changes would be appropriate.

ACCC conclusion on public detriments

350. As noted above, the ACCC considers that APRA would have an effective monopoly under both the future with and without the conduct that is the subject of the authorisation and that detriments will arise under both. However the magnitude of these detriments will depend on the extent of competitive pressure placed on APRA.

351. Under the likely future without the conduct that is the subject of the authorisation, the ACCC anticipates that there would be some increase in licensing arrangements outside of APRA's system. This is likely to result in some reduction in APRA's monopoly power and a reduction in the detriments identified by the ACCC above, namely:

- lack of price competition
- allocative and dynamic inefficiencies
- cost inefficiencies
- the standard of conduct of APRA and its employees
- APRA's dealings with its members, and
- restricted access to overseas works.

352. The ACCC also recognises the factors that mitigate APRA's monopoly position, particularly licence back (and to a lesser extent opt out) to the extent that they are used, effective dispute resolution via ADR or the Copyright Tribunal, and potentially arising from the minimum standards required of signatories to the Code. The ACCC considers that these measures go some way in reducing the detriments, although further progress is possible (noting the proposed conditions of authorisation).
353. In summary, the ACCC considers that the arrangements continue to generate a significant level of public detriment compared to the likely alternative of a single collecting society with non-exclusive licensing from composers and alternative user licensing arrangements.

Balance of public benefit and detriment

354. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
355. In the context of applying the net public benefit test in subsection 90(8)³⁹ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁴⁰
356. For the reasons outlined in this draft determination the ACCC is satisfied, subject to the proposed conditions of authorisation, that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.
357. Accordingly, the ACCC proposes to grant conditional authorisation.

Length of authorisation

358. The Act allows the ACCC to grant authorisation for a limited period of time.⁴¹ 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, and to ensure the authorisation test continues to be met.
359. In this instance, APRA seeks authorisation for six years.
360. Some interested parties submit that the re-authorisation should not be granted or should only be granted for a shorter time.

³⁹ The test at subsection 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.

⁴⁰ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

⁴¹ Subsection 91(1).

361. Interested parties consider there are a number of reasons to limit the period of authorisation:
- LPA submits that APRA needs to improve its licence back and opt out and licensing conditions. The QHA and the ICAA submit that alternative licensing mechanisms or licensing regimes should be able to emerge
 - The ABC, Totem/Future, the ALLM, the QHA, NACO, the ICAA and ALCC/ADA note changes in the market relating to technology. These include: the current rapidly converging media environment; the exponential change in technology; digital consumption of music; the development of the GRD; changes in commercial structures as a result of the emergence of new technologies; and digital film projection/cloud storage
 - The ALLM considers there are detriments to members, licensees and the general public from the arrangement. Palace Theatre submits that APRA is a monopoly that is causing APRA licensees hardship. The AHA submits that the arrangement breaches the Act
 - NACO notes the international environment, particularly developments in Europe
 - The ALCC/ADA notes the ALRC review, and a push for Government to address unauthorised use of copyright works
 - The ICAA submits that the ACCC should continue to monitor the concerns raised. Entertainment Enterprises also considers that there should be more regular review of the authorisation.
362. The NSW Small Business Commissioner submits that authorisation should be granted for 6-12 months while the ACCC investigates the allegations against APRA. LPA submits that the ACCC should grant re-authorisation for one year.
363. Totem/Future, NACO, the ICAA and the ALCC/ADA support a three year authorisation. Nightlife supports conditional re-authorisation for three years. The QHA submits that authorisation should be granted for 2-3 years. The AHA supports conditional authorisation for three and a half years. The ALLM rejects APRA's request for a six year authorisation, proposing granting an authorisation for two or three years, if at all, subject to the ALLM's concerns being addressed. The ABC submits that authorisation should be for no more than four years.
364. Palace Theatre objects to a six year authorisation.
365. APRA agrees that the industry continues to undergo change. APRA submits that it has proven that it is well placed to deal with whichever advancements develop in the foreseeable future.
366. The ACCC notes the level of concern raised by interested parties in relation to APRA's arrangement and the potential for the arrangement to generate significant public detriment.

367. The ACCC also notes the submissions of interested parties that changes in the industry, including advances in technology, may impact on any future assessment of the public benefits and detriment of APRA's arrangement.
368. The ACCC would also like to review the effects of APRA's proposed changes, discussed above, and any conditions of authorisation ultimately imposed by the ACCC sooner than the six years proposed by APRA.
369. Given these matters, the ACCC proposes to re-authorise the arrangements for a period of three years.

Draft determination

The application

370. On 30 April 2013 the Australasian Performing Right Association Ltd (APRA) lodged an application for the revocation of authorisations A91187-A91194 and A91211 and substitution of authorisations A91367-A91375 for the ones revoked with the ACCC. Applications A91367-A91375 were made using Form FC Schedule 1, of the Competition and Consumer Regulations 2010. Relevantly the initial authorisations were made under subsection 88(1) and 88(1A) of the Act for its:
- '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.
371. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

372. For the reasons outlined in this draft determination, and subject to the proposed conditions below, the ACCC considers that in all the circumstances the proposed arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
373. For the reasons outlined in this draft determination, and subject to the proposed conditions below, the ACCC is also satisfied that the proposed arrangements for which authorisation is sought are likely to result in such a benefit to the public that the conduct should be allowed to take place.

374. The ACCC therefore **proposes to grant** authorisation to applications A91367-A91375 **on condition that** APRA complies with the following proposed conditions C1, C2, C3, C4 and C5.

Conditions

375. The ACCC acknowledges the progress APRA has made to address the concerns raised by interested parties in their current submissions and APRA's proposal in respect of transparency of licensing alternatives, opt out/licence back information and alternative dispute resolution.
376. The ACCC is proposing conditions to address the outstanding concerns of interested parties that relate to the identified detriment and to ensure that the measures proposed by APRA are effective, so that the public benefits continue to outweigh the detriments to the public.

<p>The ACCC seeks APRA's and interested parties' views on the proposed conditions.</p>

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. All 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).

Condition C3 – Transparency of licence fees:

Within 6 months of the ACCC's final determination, APRA must publish, as a single document, a comprehensive plain English guide that outlines all of the licence categories individually. The guide must also include:

- a. A table summarising each type of licence and licence category, the basis on which fees are determined, and the range of fees payable for each licence and licence category listed.
- b. An introduction that includes an overview of the licence categories and their use.
- c. Definitions of each of the licence categories - for example, Recorded music for dancing use, Dance party, Featured music event and TV/large screen.
- d. Examples of common types of licensees and the fees payable by them (e.g. nightclubs, hotels, gyms, cafes), the licence categories commonly utilised by each of those types of licensees, and the range of fees payable by each of those types of licensees.
- e. Guidance on whether fees are negotiable and if so in what circumstances.

- f. Information that encourages licensees to contact APRA if they have any concerns, including the types of assistance available and the numbers to call.
- g. The options available to licensees for resolving a dispute about licence fees, or about other licence terms and conditions.

Once published, the guide must be provided to all new or renewing licensees and must be prominently displayed on APRA's website (www.apra.com.au). The homepage must have a prominently displayed link to the guide as well as available links on the relevant section of APRA's website. APRA must also provide the comprehensive plain English guide, and information about how to obtain additional copies of the guide, to relevant industry associations (that is, industry associations that have musical work copyright holders, or licensees or potential licensees, as members) on publication.

APRA must provide a copy of the plain English guide to the ACCC, prior to publishing.

APRA must publish a revised, and up to date, version of the guide by 30 June each year.

Condition C4 – Comprehensive plain English guide and education campaign for the opt out and licence back provisions:

Within 3 months of the ACCC's final determination, APRA must take the following steps to increase awareness of the licence back and opt out provisions provided by APRA:

- a. APRA must publish on the APRA website, and via an email distribution to members and licensees, a comprehensive plain English guide explaining:
 - the purpose, scope and content of the opt out and licence back provisions
 - the situations where using those provisions might be of benefit to members and licensees
 - the steps involved in applying to make use of the licence back and opt out provisions
 - examples of how the opt out and licence back provisions have been used to date;

and attaching the APRA application forms for the licence back and opt out provisions.

- b. include a standard plain English paragraph in renewal correspondence sent to licensees and members each year, outlining the availability and scope of the opt out and licence back provisions, and providing the web address for the guide referred to in condition 4a above, as well as information about how to apply.

- c. Launch an education campaign to its members and licensees, following on from its email distribution of the plain English guide, which may include offering a seminar to members and licensees, outlining the situations in which opt out and licence back could be utilised and the benefits to members and licensees and the process involved.
- d. As part of APRA's educational campaign in this regard, APRA must offer to send representatives out to talk to members and licensees that could benefit from these facilities.

Condition C5 – Alternative Dispute Resolution:

The ACCC proposes to include a condition in its final determination that requires APRA to implement a revised ADR scheme. In particular, the ACCC notes that interested parties have asked for there to be a small claims process. The ACCC invites interested parties to comment on the proposed features of that scheme, as set out further below.

1. The ACCC is currently contemplating that such a condition will require the amended ADR process to have the following features:
 - a. A 3 tier mechanism for resolving disputes/complaints as follows:
 - (i) Tier 1 – first response: An initial response by APRA to the complaint or dispute within 7 days of lodgement, and an informal meeting or discussion between APRA and the complainant, in an attempt to resolve the dispute quickly and efficiently within 28 days of the lodgement of the complaint/dispute.
 - (ii) Tier 2 – external resolution: an external dispute/complaints process that is wholly external to APRA, which involves the handling and resolution of the dispute / complaint, including disputes/complaints about factual matters, by an independent decision maker.
 - (iii) Tier 3 – APRA's existing ADR process ('expert determination' as outlined in Annexure B of the Competition Tribunal's 2000 decision), amended to incorporate the additional features set out below.
 - b. an independent manager to be responsible for the operation of the ADR scheme, including for referring disputes / complaints to tier 2 or tier 3 (other than at the instigation of the complainant).
 - c. a right for the complainant to refer a dispute / complaint to tier 2 or tier 3 at any time.
 - d. a right for the complainant (at their discretion) to take part in the ADR process in person, or via telephone or videoconference.
 - e. a requirement that the independent decision maker (tier 2) must be a barrister, accountant, auditor, nominated small business commissioner or other person with industry specific experience, and that the expert (tier 3) must continue to be a barrister with expertise in intellectual property matters or a former judge who has been trained in various methods of alternative dispute resolution.

- f. a requirement that the identity of the decision maker (tier 2) or expert (tier 3) will be as agreed between the parties, or otherwise as nominated by an appropriate independent body.
 - g. a requirement that the procedures, processes and timeframes for tier 2 and tier 3 complaints / disputes be otherwise as determined by the decision maker (tier 2) or expert (tier 3) in their discretion.
 - h. a requirement that the manager, the decision maker (tier 2) and the expert (tier 3) be wholly independent of APRA.
 - i. for tier 2 and tier 3 complaints / disputes having a value of \$100,000 or more, a requirement that the tier 2 / tier 3 costs of such disputes (excluding the parties' own costs) be shared equally between APRA and the complainant.
 - j. a requirement that APRA must otherwise meet the costs associated with the ADR process (excluding the complainant's own costs).
 - k. an appropriate timeframe for determining the identity of the decision maker (tier 2) or expert (tier 3).
2. The ACCC is also currently contemplating that such a condition will include:
- a. a requirement that APRA educate licensees, potential licensees, industry bodies and members about the operation of the new ADR process by publishing a plain English guide to the process, and by making that guide available in a prominent position on its website, and on request.
 - b. a requirement that APRA make the revised ADR process fully available, on and from 1 January 2014, to all licensees and members.

Conduct for which the ACCC proposes to grant authorisation

377. The ACCC proposes to revoke authorisations A91187-A91194 and A91211 and grant conditional authorisations A91367-A91375 in substitution to APRA for its standard arrangements for the acquisition and licensing of the performing rights in its music repertoire for three years.
378. Further, the proposed re-authorisation is in respect of the arrangement as amended by APRA as it stands at the time authorisation is granted. Any changes to the arrangement during the term of the proposed authorisation would not be covered by the proposed authorisation.
379. This draft determination is made on 15 October 2013.

Further submissions

380. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a

conference to discuss the draft determination, pursuant to section 90A of the Act.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide 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 subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 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.

Subsections 90(6) and 90(7) 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 subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- 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

- 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.

Attachment B - Annexure B to the Competition Tribunal's 2000 decision on APRA's arrangements

Alternative dispute resolution procedure to be implemented by APRA in accordance with the determination of the Australian Competition Tribunal

ALTERNATIVE DISPUTE RESOLUTION AT APRA

From time to time, disputes arise between APRA and its licensees, or potential licensees.

The dispute might relate to the terms of the licence, whether a licence is required at all, or how much music is being played at the licensee's premises.

These disputes can nearly always be referred to the Copyright Tribunal or to the Federal Court to be resolved. APRA realises that the Copyright Tribunal and the Federal Court can be expensive and time consuming dispute resolution forums.

APRA has established a procedure to attempt to resolve disputes with licensees or potential licensees, which is cheaper and quicker than the Copyright Tribunal and the Federal Court. The process is called Expert Determination.

If you have a dispute with APRA regarding a licence or a proposed licence, you can refer the dispute to the Expert Determination procedure. The dispute will be determined quickly. If a licensing officer at APRA suggests that a dispute be referred to Expert Determination, you should seriously consider agreeing to the suggestion.

One of the issues which may be determined by the expert is the date from which any APRA licence may apply. The process is not intended to delay any obligation to obtain a licence.

If several licensees have similar substantive issues with APRA, APRA may suggest that the disputes be determined together. If the expert has previously determined a substantive issue and a similar issue arises at a later date, APRA may argue that the dispute resolution process should not apply.

The procedure for Expert Determination is as follows:

1. If during your negotiations with a licensing officer from APRA a dispute arises, either you or the licensing officer may suggest that the dispute be referred to Expert Determination. This should only occur if it seems unlikely that the dispute can be resolved by negotiation. If you are not already a licensee of APRA and you ask to have the dispute determined by an expert, APRA must agree. If you already have an APRA licence, you may be required to have the dispute referred to Expert Determination, under the terms of your licence.
2. Once you have agreed that the dispute should be referred to Expert Determination, APRA's licensing officer will refer the matter to APRA's ADR liaison officer. The liaison officer will take a detailed note of the matters in dispute, and will contact you to make arrangements for the Expert Determination.

3. Disputes will be determined by one of a panel of three independent experts. All members of the panel are former judges who have been trained in various methods of alternative dispute resolution.
4. On a date which is convenient to you, APRA and the independent expert will be appointed. The dispute will be dealt with at a venue which is as close to your place of business as possible (usually, the capital city in your state).
5. Before the date which has been set down for dealing with the dispute, you and APRA may submit any written statements or other documents which support your arguments relating to the dispute. These should be forwarded to the ADR liaison officer.
6. At the Expert Determination, you will be given an opportunity to present your arguments to the independent expert. APRA will also be given an opportunity to present its arguments. If both parties wish, they may have their solicitors present to assist them. If you agree to have a representation body appear on your behalf, you may.
7. The expert will then make a determination of the dispute. If either you or APRA is dissatisfied with the determination, the dispute may be referred to the Copyright Tribunal or the Federal Court (whichever is the appropriate body).
8. APRA will pay for the costs of the independent expert, including professional fees and travel expenses. 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.

If you would like any details about the process, please contact [*Person to be nominated by APRA*].