

## APRA'S OPERATIONS

1. APRA is a non-profit company incorporated in New South Wales with liability limited by guarantee. It was formed in 1926 to provide a centralised means of:
  - (a) granting licences to those wishing to perform in public or communicate musical works and associated literary works (music); and
  - (b) distributing royalties received pursuant to such licences to composers, songwriters and music publishers.
2. APRA's members are composers, songwriters, music publishers and those who otherwise control the copyright in musical works (such as successors in title to deceased songwriters). APRA's constitution and recent annual reports are Attachments 3 and 4 respectively.
3. The music controlled by APRA is described in more detail below, but essentially, APRA is the owner of the rights of public performance and communication to the public, in the majority of commercially available works in the world.
4. "Performance in public" is not defined in the *Copyright Act*, but has been taken to mean any performance that is not in a domestic or quasi-domestic context. Communicate is defined in the *Copyright Act* as to make available online or to transmit electronically. The right to communicate works to the public is exercised by broadcasters, by those who operate websites that contain music, and by those who transmit music over telephone systems.

### The APRA repertoire

5. Under the terms of its membership agreements with songwriters, APRA obtains the copyright in the performing and communication rights in musical works at the time they are created. Section 197 of the *Copyright Act* permits a copyright owner to assign future copyrights. APRA becomes aware of the musical works that it owns or controls when it is notified by its members and its affiliates that a new work has been created. Most commonly, this occurs when a work is communicated or performed for the first time.
6. APRA also owns or controls for Australia the performing and communication rights in music written by the members of affiliated societies operating in various parts of the world. Most rights conferred by affiliates on APRA are conferred exclusively, except, in the case of the reciprocal contracts with societies operating in the United States. The United States societies confer their respective repertoires on APRA non-exclusively, which has a significant impact on APRA's ability to enforce its rights in US society works, as discussed in section 8.3 of the Submission.
7. As a result of APRA's membership and international input arrangements, APRA controls the performance and communication rights in many millions of works for the territory of Australia.
8. Through the comprehensive monitoring of music use undertaken by APRA, and registrations of works made by APRA members, APRA has in its computer database details of more than 5 million local works. New works are continually

being added to APRA's database, and old works are deleted when their copyright expires.

9. Until around 2000, APRA exchanged the information with the CISAC societies via a list of its active works known as the World Works List (**WWL**), administered by ASCAP, which listed works that were active in territories throughout the world. The WWL only contained works that had been performed or communicated in the last decade. In around the year 2000, the WWL was replaced by the Works Information Database (**WID**), again administered by ASCAP. In 2005 CISAC launched CISNet, a search engine that extracts works ownership data from replicas of society work databases and the WID became a node on CISNet. In 2012, APRA made its database of works available on CISNet as a node.
10. As discussed at section 4.2 of the Submission, APRA and its affiliates are committed to the development of a comprehensive GRD that will be crucial to the efficient administration of licences for online services.

### **Collective administration of copyright**

11. APRA provides a mechanism which furthers the public interest inherent in copyright by:
  - (a) encouraging creativity, by ensuring that songwriters and publishers are adequately compensated for some uses of their works; and
  - (b) facilitating access to those works, by enabling members of the public to have ready and efficient access to the millions of musical works in APRA's repertoire by granting licences for the public performance and communication of those works.
12. APRA submits that collective administration remains the only practical way that this can be achieved<sup>1</sup>.
13. Parts VA, VB and VC of the *Copyright Act* expressly contemplate that copyright will be administered by collecting societies representing creators. Implicit in these sections of the *Copyright Act* is the recognition that collecting societies represent the appropriate and proper mechanism for the administration of copyright and that their operation is integral to the achievement of the appropriate balance of the two public interests central to copyright.<sup>2</sup>

### **Board structure**

14. APRA acts on behalf of and is accountable to its members.
15. Management of APRA is vested in the board. The Board of Directors of APRA is elected by APRA's members. Six writer members are elected to the Board by the writer membership and six publisher members are elected to the board by the publisher membership.

---

<sup>1</sup> See also *Re Applications by Australasian Performing Right Association Ltd* [1999] ACompT 3; (1999) 151 FLR1

<sup>2</sup> Although these parts do not refer to APRA, the second reading speech for the *Copyright Act* does expressly refer to APRA.

16. This structure ensures that a mix of writer and publisher interests are represented on the Board. This mix ensures that APRA remains responsive and accountable to the users who interact with both writer and publisher members.

### **Regulatory environment**

17. Since its establishment in 1926, APRA has been (and continues to be) subjected to various levels of scrutiny from competition powers including the Owen Royal Commission, the ACCC and the Australian Competition Tribunal, which have variously:
  - (a) confirmed the benefits of the APRA system; and
  - (b) established the necessary mechanisms to ensure that APRA does not abuse its monopoly, including the Copyright Tribunal, the Collecting Society Code of Conduct and APRA's current dispute resolution procedures.
18. In addition, APRA is constrained in exercising the power it has as a natural monopoly by, among other things, the following:
  - (a) it grants blanket licences on equal terms to any person in Australia requiring a licence;
  - (b) members are entitled to license back and opt out in relation to their works;
  - (c) the terms of APRA's licences are subject to expert determination; and
  - (d) the terms of APRA's licences are subject to the supervision of an independent statutory tribunal, the Copyright Tribunal.

### **Membership assignment**

19. APRA represents Australian songwriters and music publishers.
20. Each member of APRA is required on joining to assign to APRA the performing rights in all music written or published by the member, including works not yet written.
21. In its decision of June 2000, the Competition Tribunal required that APRA enable members to enter into direct arrangements with users of their music. In November 2000, APRA amended its constitution to enable its members to opt out and license back their works on certain terms. Since that time members' assignments of the performing and communication rights in their music have been qualified by the member's opt out and licence back rights, as well as their long-standing resignation rights.
22. In the course of the 2010 applications, APRA undertook to amend its licence back procedures, and formally did so in November 2010 at the first Annual General Meeting following the ACCC's determination.

23. Not all of a member's rights in respect of music are assigned to APRA. The member retains the rights under s.31(1)(a) of the *Copyright Act*:
- (i) to reproduce the work in a material form;
  - (ii) to publish the work;
  - (iii) to make an adaptation of the work.
24. APRA members also retain for themselves that part of the s.31(1)(a)(iii) and (iv) rights that relate to certain public performances and communications (unless performed by means of a film):
- (a) dramatico-musical works (such as operas and musicals, where works are written for the show) performed in their entirety;
  - (b) the public performance of works or excerpts of works performed in a dramatic context (with scenery, acting, costumes, dialogue and so on);
  - (c) oratorios and large choral works written to exceed 20 minutes in duration, performed in their entirety; and
  - (d) the whole or any part of any music and lyrics composed for a ballet, if accompanied by a visual representation of that ballet.
25. The rights described in paragraphs 23 and 24 are rights commonly negotiated direct between users such as film and theatrical producers and music publishers, and tend to be the subject of high value transactions.

### **Membership**

26. APRA currently has more than 70,000 local (Australia, New Zealand and other states in the region) members. APRA members generally become members as a result of:
- (a) approaching APRA directly;
  - (b) being invited by APRA to join;
  - (c) promotional events where APRA's profile is raised amongst musicians; and
  - (d) transfers of membership to APRA from an affiliated society.
27. APRA estimates that approximately 80% of applicants for writer membership join APRA without APRA making a direct approach to them. In the year ended 30 June 2012, APRA admitted 5,234 new writer members.
28. Invitations to writer members are responsible for around 20% of new members each year. Invitations are sent to potential members when:
- (a) APRA is notified by a publisher that it has entered into a publishing agreement with a writer who is not an APRA member; or

- (b) a performing right royalty has been earned by works composed by a writer who is not an APRA member. This latter category is responsible for most invitations to writer members.
29. APRA staff members also attend music festivals such as the Tamworth Country Music Festival and speak at music industry conferences and educational seminars. In addition, APRA places small advertisements in music industry publications such as the *Australian Music Industry Directory*. Generally, APRA promotes itself only by sponsoring music related events, including in educational institutions and in media.
30. Occasionally, writer members of affiliate societies transfer to APRA. These transfers occur when a writer becomes a permanent resident or citizen of Australia. Such transfers are uncommon. In the year ended 30 June 2012, 21 new writer members joined APRA from affiliate societies.
31. APRA receives membership applications via its website, and will also send application materials by mail if requested. To be eligible for writer membership, a writer's work must have been performed in public or communicated (APRA does not elect to membership a writer whose work cannot be demonstrated to have been performed or communicated. As at February 2013, APRA had approximately 20 applicants for writer membership whose membership is pending evidence of performance or communication). Copies of APRA's membership application forms are included in Attachment 5.
32. Because the overwhelming majority of APRA members apply to join APRA before they are experienced in the music industry, APRA performs a significant educational role for its membership. Members and potential members often have little experience as performers, have never participated in a contract negotiation and are uninformed about the structure and operation of the various sectors of the music industry. APRA collects brochures from other copyright organisations (including the Australian Copyright Council and Arts Law Centre) and publishes such information (with the consent of the contributing organisation) for members of the industry generally.
33. The writer members of APRA are typically self-employed and range from songwriters who perform their own works –virtual unknowns to writers who are world famous. APRA members write music for live performance, films, television productions, advertisements, and also include classical composers. There is no music genre where APRA does not represent a majority of writers.
34. Many songwriters choose to enter into publishing arrangements with music publishers who administer certain of the rights comprised in the copyright. Around 22% of APRA's writer members are represented by a publishing company.
35. APRA's publisher members range from companies controlled by individual writers to major international publishing companies.
36. To be eligible for publisher membership, a publisher must:
- (a) be a bona fide music publishing company or business that is registered and carried on in Australia or New Zealand, or other smaller states in the region, in which APRA operates;

- (b) control at least one work which has been commercially released or published in some form; and
  - (c) have a publishing agreement with at least one writer who is a member of APRA or an affiliated performing right society.
37. In addition, APRA requires publishers applying for membership to provide the following information in connection with their application:
- (a) a copy of the publisher's certificate of incorporation or registration of business name;
  - (b) details of the person/s owning and carrying on the publishing company or business; and
  - (c) a copy of the publisher's standard contract with writers.
38. A person who controls the copyright in musical works (for example, the legal beneficiary of copyright ownership of musical works written by a deceased member) may apply for associate membership of APRA.
39. Membership of APRA ensures that composers and songwriters receive a minimum of 50% of royalties generated by public performances and communications of their works. Because the performing rights in all works are assigned to APRA, a writer member can be assured that from the start of his or her career, and regardless of the timing, location or scope of any success the member may have, arrangements are already in place to guarantee their participation in the success of their works.
40. Very few writer members, if any, would be in a position to administer their own performing rights. This is the case in any local area, but becomes more pronounced when one considers that the works may be performed and communicated anywhere in the world. It is not only in respect of performances of Australian works by Australian performers that APRA distributes licence fees – APRA also collects and distributes income in relation to performances of works by Australian composers throughout the world, whether by the original artist or as a cover performance. This fact makes collective administration even more obviously the most efficient means of licensing the use of music by performance and communication. APRA also distributes money to overseas societies for local performances of foreign works.
41. Few members terminate their membership of APRA. Of those who do, termination is almost without exception only to enable a member to transfer to an affiliated society because of a change of country of residence. In the year ended 30 June 2012, APRA transferred 24 members to affiliate societies, and there were no other terminations.
42. Writers and publishers are not compelled to join APRA and membership is free.
43. By effectively securing the membership of the majority of Australian composers, and by securing the rights in the world's repertoire of music, APRA ensures that licensees can avoid copyright infringement and pursue business activities secure in the knowledge that the owners of copyright are remunerated for certain use of their works.

44. A confidential list of APRA's members is available on request.

#### **Member services**

45. The relationship with members is at the core of APRA's activities. The membership department of APRA maintains direct contact throughout the member's musical career.
46. The primary focus of the membership department is to provide support to members by supplying and processing membership documentation, maintaining the membership register, and organising and conducting symposiums with members on a regular basis throughout Australia to provide information about APRA's activities. The membership staff hosted 195 events during the year ending 30 June 2012, which were attended by over 7,742 members at APRA's head office and state based offices. The events included information sessions, workshops, and subject specific presentations.
47. A key example of the membership department's initiative in this regard is APRA's Song Summit that has now been held on 3 occasions in 2008, 2010 and 2012. The initiative is supported by the NSW Government and delivers a dynamic, diverse and world-class program of presentations, workshops, seminars and showcases and a music retail exhibition. The 2012 Song Summit focused on both the creative processes and business processes that are important to APRA members. Sessions at the 2012 Song Summit included career development workshops that focused on: technology; the role of artist management; accessing international markets; self producing, publishing and promoting; and song writing skills and techniques.
48. The membership department also represents APRA externally to industry groups and songwriter organisations, and responds to a diverse range of enquiries concerning the general structure and function of APRA. In addition, the department assists in specific aspects of an individual member's relationship with APRA, providing assistance with any aspect of the administration of the performing right in their musical works as may be required.
49. The APRA website is a valuable membership resource. Members are able to login to a secure section of the site which provides a number of online services, including work registration, performance logging and online opt out and licence back application forms. The website also provides access to music users to APRA's online licence applications.

#### **The international system**

50. In virtually all countries that have acceded to the Berne Convention for the Protection of Literary and Artistic Works, single collecting societies exist which collectively administer copyright. The major exception to this is the world's largest single market for music, the United States, which has three collecting societies, and was a comparatively late party to the Berne Convention, ratifying the treaty in 1989, more than 60 years after Australia did so.
51. An international system of reciprocal arrangements has been established by these organisations for the collective administration of performing and communication rights. This system ensures that the public performance and communication rights (which are inherent in musical works in all countries that have acceded to the Berne

Convention) are easily and efficiently licensed and that creativity is rewarded and encouraged wherever works are performed and communicated.

52. APRA and its affiliated societies belong to CISAC. CISAC is the umbrella organisation of performing right societies, and member societies comply with its rules.
53. Subject to developments in the arrangements between collecting societies in Europe (see section 8.2 of the Submission), and subject to the matters in paragraph 55, under the international system, each collecting society grants to the others an exclusive right to license works in its repertoire within the other societies' respective territory. Accordingly, APRA represents songwriters from most significant countries that produce music throughout the world (including, for example, the United States, the United Kingdom, France, Germany, Japan and Brazil). A list of affiliated societies is Attachment 6.
54. Accordingly, APRA also owns or controls for Australia the performing rights in musical works written by the members of affiliated collecting societies operating in various parts of the world. The rights conferred by affiliates on APRA are conferred exclusively, except in the case of the reciprocal contracts with societies operating in the United States of America.
55. The contracts of reciprocal representation between APRA and the two principal United States societies, ASCAP and BMI, are on a non-exclusive basis for APRA's territory. ASCAP and BMI members retain the right to issue licences throughout the world (including Australia) should they wish to do so. The United States societies have different arrangements with their members and affiliates than do other societies because of the terms of Amended Consent Decrees entered into between them and the United States Department of Justice. This has implications for the enforcement of United States copyrights by APRA, discussed at section 8.3 of the Submission. Other than for the United States all of APRA's international input agreements are exclusive. Therefore, APRA owns the performing right in the works of its own members and is either the owner or exclusive licensee in Australia of the performing right in works of members of all societies other than ASCAP and BMI.
56. All other societies grant their rights to APRA on an exclusive basis for Australia and require the societies to grant licences for all public performances of each society's music occurring in Australia by whatever means the performances occur.
57. APRA's affiliation agreements can be terminated by either party, usually on 6 months' notice to take effect at the end of the annual period. The only exceptions to this are:
  - (a) ASCAP (USA) – no period for the giving of notice of termination specified as the reciprocal contracts require annual renewal under the terms of ASCAP's Amended Consent Decree;
  - (b) PRS (United Kingdom) – 12 months' notice required; and
  - (c) SACEM (France) – 3 months' notice.



58. No society has ever sought to terminate its relationship with APRA, although some affiliates have had their relationships with other collecting societies terminated or have been expelled from CISAC due to misconduct, as was recently the case with the Indonesian affiliate, KCI. A new society has been established in Indonesia, under the auspices of CISAC.
59. Centralised and territorial administration of performing rights is the only practical method of facilitating legal usage of music in an environment where usage and the means by which usage is effected are entirely controlled by users, the range of musical works from which they can choose (directly or indirectly) is virtually infinite and where the number of users is potentially the entire population of each country and region. APRA submits that even the use of works online (where territorial restrictions may seem artificial) requires a level of local administration (particularly in relation to monitoring and distribution). Laws relating to online uses are different in each territory, works consumption differs with local populations and international services are typically tailored for each territory in which they operate.
60. APRA's effective participation in this system requires that it receive the exclusive right to publicly perform and communicate works from the overseas collecting societies and grant to its affiliates the exclusive right to publicly perform and communicate works by APRA members. The effect of the non-exclusive arrangements with the United States societies is discussed at section 8.3 of the Submission. The non-exclusivity of online rights in Europe does not detract from the fact that within Europe, APRA's online rights are held collectively by all societies (that is, the principle behind non-exclusivity in Europe is that the EU be treated as a common market, not that societies outside Europe enter that market). APRA's operations are entrenched in a system far greater than it or even the domestic music industry. APRA contributes to the international manufacture of music and, in no small part, to the country's performance of its international obligations under long-standing conventions. The ramifications of any alteration in APRA's operations have considerable potential to be felt throughout the global music industry, and must be contemplated in that framework.
61. It is implicit in all contracts of reciprocal representation with affiliated societies that APRA's licences will be granted to users only on non-exclusive terms to facilitate the widest dissemination possible of each society's music. This is consistent not only with the policy of the *Copyright Act* but also in response to the needs of creators, owners and users.
62. APRA and its affiliates grant in their respective territories, among other licences, non-exclusive blanket licences to users, granting them access to the world's repertoire of music during the term of the licence. Such licences are required as it is impossible to predict which works will be used and the timing of such usage by users because:
- (a) neither APRA nor its members have control over the acquisition of articles containing music (such as CDs, DVDs and MP3s) that are then used to perform music in public – APRA does not and cannot prevent the acquisition of works;
  - (b) the works which are used throughout the life of the licence may well not even be in existence on the date a licence is granted;

- (c) many of the media by which music is performed (for example television, radio and internet streaming and download services) are media of mass communication by which vast numbers of musical works are performed. The only practical means of licensing these usages is by blanket licences because of the scale of usage and the labour and costs that would be incurred in licensing on an individual works basis;
- (d) many users do not know (and will never know) precisely which works they are using. Consider, for example, an hotelier who causes public performances of musical works received in television and radio broadcasts to be performed in public. Such users require instant access to the worldwide repertoire of musical works. It is the purpose of blanket licences to deliver such access, otherwise the administration of performing rights would become impossible;
- (e) where a user exercises the performing right by causing public performances or communications of music and does not obtain a licence to do so, APRA can seek an injunction to restrain further performances, but it cannot stop the user from accessing the music; and
- (f) mass methods of communication, such as television, radio and the internet, enable the same musical work to be used by tens of thousands of licensees throughout the country simultaneously – for example the large number of hotels and clubs using television monitors to provide say, the Academy Awards or the Olympics by means of reception of a television broadcast. That is, by their nature, non-exclusive performing rights are a product of infinite supply – consumption by one user does not diminish the amount available for other users and the usage can occur simultaneously not only in Australia but around the world.

### **Blanket licences**

- 63. APRA licenses the use of the performing and communication rights in the works it controls. APRA's licences are almost always granted on a blanket basis – that is, the licence is in respect of all of the works in the APRA repertoire.
- 64. Centralised administration of performing rights through APRA and its affiliates has evolved as the norm for the entertainment and communications industries because it is impractical for writers and publishers to license performances of musical works individually.
- 65. It is APRA's experience that this is the licence that most users require.
- 66. As described above, in essence, APRA controls in Australasia virtually the entire world's repertoire of works. Accordingly, a user wishing to perform or communicate works is able to obtain a licence from APRA as a "one stop shop".
- 67. APRA licensees include cinemas, television stations, radio stations, nightclubs, theatres, pubs, karaoke bars, digital music suppliers, ringtone operators, telecommunications companies, fitness centres; retail premises, sporting fixtures, educational institutions, and businesses using music on hold.

68. APRA presently administers approximately 59,000 annual licences, resulting in the licensing of approximately 82,000 businesses.
69. Performing rights are public goods. Consumption (performance) by one person does not exhaust or diminish the amount of the right available for anyone else. Once a work has been made available to one person, it is available to all.
70. It is impossible for most users to know in advance or predict which works will be used or the time at which they will be used. It is likewise impossible for the overwhelming majority of members to know which, if any, of their works will be performed by any user at any time. APRA grants non-exclusive licences of all of the works in its repertoire, enabling licensees to perform in public or communicate any of the works controlled by APRA.
71. The blanket licence allows users – the overwhelming majority of whom are unaware in advance of what works will be performed – complete freedom to perform almost any music whatsoever the world’s repertoire of works, in the knowledge that the performance will not infringe copyright. That is, on a narrow view, the user is purchasing the non-exclusive public performance rights with respect to all works in APRA’s repertoire. But, viewed more broadly, the user is purchasing the *freedom* to perform in public *any* of the works in APRA’s repertoire. APRA considers that freedom to be a particularly appealing commodity sold in each blanket licence.
72. If users were able to inform APRA accurately in advance of what works would be performed on a given occasion, APRA would be able to grant a licence for those works only. However, the majority of users cannot, and do not want to have to. For example, a television broadcaster is unaware in advance (and often after the event) precisely what music is contained in films, programs and advertisements. Likewise, a cinema that performs music embedded in its films is usually unaware of what music will be performed before (and sometimes even after) the films are screened. But the point being made here is even more apparent in the overwhelming majority of APRA licensees, who cannot know, without going to extremely onerous lengths (even if they could recognise each song), what music was being performed – such as café, restaurants or retail stores who perform background music to the public by way of a radio or television, and not as their primary business.
73. Even if users were able to notify APRA in advance of what works were to be performed, the costs of transactional licensing would be greater not smaller.
74. Even where licensees are able to identify the works used after the event, blanket access to all works within APRA’s repertoire is of enormous value to licensees. For example, download services offer vast numbers of tracks for sale – for example iTunes is reported as having more than 26 million tracks available on its store, and its offering increases regularly. The alternative to a single blanket licence would be for licensees to clear each song separately, or for Apple to deal with a multiplicity of publishers and aggregators. As can be seen at Attachment 19, many popular works have a number of unrelated owners, and the inefficiency of negotiating with and reporting to a greater number of licensors would be considerable. The APRA arrangements ensure that, for Australia, online music services need only negotiate a single licence for musical works, and report usage to a single licensor.

75. The nature of the grant of the licence also needs to be distinguished from the way in which the licence fee is calculated. In a number of instances, where the licensee can provide detailed reporting in relation to music use after the event, APRA calculates licence fees on a per work basis. This is the case under the digital download licence – a blanket licence is granted, the licensee reports each track sold, and the licence fee is a percentage of the price of each track, subject to minima.

### **Public performance licensing**

76. APRA's public performance licensing activities are widespread and diverse. There are many licence schemes in operation covering public performances in venues such as hotels, nightclubs, restaurants, shops, fitness centres and other places where music is performed in public, whether by means of radio or television receivers, records, background music services or live performances. APRA's public performance licence schemes are in Attachment 7.
77. As discussed above, APRA administers approximately 59,000 annual public performance licences, resulting in the licensing of approximately 82,000 businesses. Many venues have more than one licence (for example, hotels commonly hold licences for live, nightclub and background music use). Some licences relate to hundreds of premises, such as the licence agreements with supermarket chains and large fitness centres.
78. During the year ending 30 June 2012, APRA's Licensing Services department entered into approximately 9,500 new annual licences and around 4,000 one-off event licences, which included concerts, dance parties, festivals and music used in theatrical performances.
79. A confidential list of APRA's public performance licensees is available on request.
80. The fee paid to APRA by a licensee varies according to the licence scheme. The fee for live performances, for example, is based on a percentage of the gross annual expenditure by the licensee on performing artists and musicians. The fees under other schemes are based on such criteria as the number of persons gaining admission to a licensee's premises during a licence year or by reference to the equipment being used to effect public performances. In this way price differentiation for live performance and other schemes is determined by market forces (the venue and its customers). APRA's percentage, although fixed, will ensure that distributions to the relevant members reflect the market's price differentiation. Other licence schemes provide for fixed licence fees based on factors such as the type of music device and the size of the premises.
81. APRA seeks to license in Australia all persons and corporations publicly performing or communicating, or authorising the public performance of works within the APRA repertoire. Licences are generally confined to particular venues. The licences usually renew automatically at the end of each annual period unless notice of termination has been served or the premises has undergone a change of ownership.
82. APRA requires users to make accurate disclosure of their music usage according to the criteria specified in each licence scheme. This is to ensure that premises are properly licensed and that correct licence fees are assessed and paid. APRA attempts to verify the information given to it, by the best information available to

APRA at the time. In APRA's experience, users frequently understate their music usage. Alternatively, users sometimes complete application forms but fail to pay the fees at all, particularly in cases where licences generate low levels of fees. Subject to credit control policies, APRA never refuses to grant a licence.

83. Generally, APRA licence fees are payable annually in advance based on an informed estimate of expected activity in the premises on a provisional basis. If actual activity is greater or lesser than estimated, an adjustment is made to fees at the end of the annual period by the process of reassessment. Credits and refunds follow this process.
84. In circumstances where a licensee can demonstrate that it is under financial duress or suffering from cash flow difficulties, APRA has exercised its discretion to offer licensees periodic payment plans such that APRA's annual licence fees are instead paid in advance on a quarterly or monthly basis. APRA has found that offering flexible payment terms in times of financial hardship has resulted in an improved rate of compliance by licensees with their payment obligations generally.
85. APRA has licensing representatives located in most States of Australia. Licensing representatives are required to:
  - (a) initiate contact with unlicensed music users;
  - (b) explain the nature and extent of APRA's rights to license;
  - (c) explain the nature of APRA's licensing schemes and methods of charging;
  - (d) establish the licence schemes under which the user requires licences;
  - (e) provide licence applications reflecting the user's actual usage of APRA's property; and
  - (f) correspond with licensees with respect to reassessment forms.
86. Licensing representatives receive comprehensive training and guidance in order to assist them in the conduct of their work. Apart from ensuring that the representatives are up to date in their knowledge of APRA and its operations, they also receive specific internal training in relation to a number of customer service related obligations, including privacy, the Code of Conduct, and competition and consumer issues. APRA can provide copies of training materials on request.
87. APRA's licensing representatives send correspondence to users to explain the nature of APRA's rights and requesting that appropriate licences be obtained. This correspondence is followed up with telephone calls and personal attendances wherever necessary.
88. Licensing representatives also generate and receive mail, make and receive telephone calls, attend meetings and perform a variety of other licensing activities. During the year ending 30 June 2012, the Licensing Services department administered approximately 390,950 contacts with licensees.

89. Licensing representatives rely on their observations of the premises, other information obtained about the premises from advertisements and elsewhere, and their experience as licensing representatives in order to form an opinion as to whether information provided by a user is accurate.
90. If APRA is satisfied that the information supplied by an applicant for a licence is accurate, then, subject to the payment of the first year's licence fee, APRA will grant the licence.
91. All APRA public performance licence agreements other than those relating to a specific event contain a clause providing for the reassessment of licence fees at the end of each annual period. Under this provision the licensees must provide information of their music usage according to the criteria specified in each licence scheme in a reassessment form. This information is used to make any necessary adjustments to the provisional licence fees paid 12 months earlier, so that if actual activity was less than estimated, the licensee is given a credit or refund, or if activity was greater than expected an additional debit is made in APRA's records. The reassessment form is also used as a basis to calculate the provisional fees for the next licence period. APRA prepares an invoice in which the following information is set out:
  - (a) particulars of licences held;
  - (b) provisional fees during the previous period;
  - (c) the amount of any adjustment to previously paid provisional fees; and
  - (d) the amount of the provisional fees to be paid for the next licence year.
92. The terms of the agreements provide that any notification of changes in usage reported in a reassessment form are deemed to amend the licence agreement in accordance with the reported changes.
93. APRA frequently experiences difficulty in obtaining reassessment forms at all, or reassessment forms that disclose the use of music in accurate terms.
94. Accordingly, APRA is revising the reassessment process to make it more efficient for APRA and less burdensome on licensees. In the future, music use will be reassessed at the end of the first licence year, and from that point the licensee will be obliged to notify APRA of any material change in music use, but will not be required to complete a reassessment from every year.
95. Licensing representatives monitor activity in their respective regions by reference to advertisements, discussions with contacts in the music industry, liquor licensing police and, their presence in each region. Each licensing representative maintains a gig track in which details of activity are stored (such as the number of discotheques or live artist performers).
96. APRA also employs staff to assist licensing representatives in the process of licensing and reassessment. Employees are located in capital cities throughout Australia and are required to attend venues for the purpose of checking the type of entertainment being carried on, the number of admissions to each premises and price of admission. All compliance reports prepared by staff are used by APRA as a

means of checking the accuracy of each proprietor's licensing arrangements and the information supplied at the end of each licence period for the purpose of reassessment of fees.

97. Licensing representatives may focus on particular premises for review by a process described internally as special reassessments. They cause a note to be placed on APRA's computer system so that when the licensee provides music use information, it will be forwarded to the licensing representative. If it appears that the activity reported in the licence agreement is insufficient, they undertake communications with the proprietor in an attempt to obtain more accurate figures. The representatives select such premises based on their observations in the field and the observations of compliance officers in compliance reports and by making comparison with reported activity in previous periods.
98. APRA's accounts department renders all invoices for licence fees. The invoices are based on information supplied by licensees in re-assessment forms and certificates of gross or net revenue.
99. APRA has a well-established procedure for dealing with debtors. Public performance licence fees, in particular, can be difficult and expensive to collect because:
  - (a) many public performance licence fees are for small amounts; and
  - (b) some businesses prolong the time for payment for as long as possible.
100. APRA acknowledges the complexities involved in small businesses complying with their copyright obligations, in particular the fact that separate licences are required from APRA and PPCA for the public performance of musical works and sound recordings. APRA is considering how music licensing arrangements for small businesses might be simplified.

## **Broadcast and online licensing**

### Broadcast

101. APRA's Broadcast and Online licensing department employs 10 people (not including the staff involved in distribution). The department receives around 30 enquiries each week, from businesses or individuals who wish to use music in some online capacity or are looking to establish a digital music service. A significant amount of time is spent in discussions with these potential licensees, approximately 20 hours per week.
102. APRA has licensing arrangements in place with all public and commercial television and radio broadcasters; with all subscription television service providers; and with community and narrowcast broadcasters. APRA has 261 commercial radio licensees, 52 commercial television licensees, 10 pay television licensees and licences with SBS and the ABC. In addition, APRA administers the licences for 400 community/ narrowcast radio stations and 6 community/narrowcast television stations. Confidential copies of APRA's broadcast licences are included in CONFIDENTIAL Attachment 8.

103. APRA is in the process of renegotiating its licence agreements with pay television operators.
104. APRA's licensing arrangements with broadcasters are relatively well established and stable. Unlike licensees in the public performance licensing area, most broadcast licensees are sophisticated music users with access to significant resources for the negotiation of contractual terms. Also unlike the public performance area, there are relatively few new entrants into the broadcast market.
105. Accordingly, APRA does not need to concentrate its efforts in the day-to-day licensing of broadcasters, other than when long-term agreements need to be renegotiated. Resources in this area are focused on monitoring and reporting, including ensuring that reporting obligations are complied with. Television broadcasters report providing APRA electronically with cue sheets (showing the details of music used in programs) and logs (showing programs broadcast). APRA monitors broadcasts and verifies that cue sheets and logs are correct. APRA also obtains cue sheets from other sources, such as members who have written music for particular programs, and other collecting societies.
106. Metropolitan radio broadcasters report electronically to APRA with a comprehensive log of the music they have broadcast. This is facilitated by the music programming software used by most commercial broadcasters. Because of the detail and accuracy of the reporting, APRA is able to calculate licence fees depending on the precise percentage of airtime occupied by music.
107. Pay television broadcasters report electronically in the same way as commercial television broadcasters, although they are even more dependent on the provision of cue sheets and even logs by overseas channel packagers. APRA's resources in this area are focused on ensuring timely reporting, and monitoring broadcasts.
108. APRA's international relations department also monitors broadcast licensees in foreign territories, to ensure that APRA's affiliated societies are identifying and distributing for broadcasts of Australian works overseas. To this end, APRA liaises with its affiliated societies to provide cue sheets for productions containing Australian works, and closely monitors distributions from overseas to ensure that all broadcasts have been accounted for.

### Digital

109. Australia is seen internationally as an early adopter of digital music services, now consistently targeted by innovative international digital music players as part of early-stage international expansion plans.
110. Australia's leading digital music market position has been developed on the back of strong competition, both from new local offerings and international expansions. Simple and efficient licensing procedures and stability of copyright laws have provided the foundation for such competition. A robust copyright regime is often a prerequisite for an international service provider to launch in foreign territories. As the owners of the Pandora service recently stated in their SEC filing:

"Further, in jurisdictions where copyright protection has been insufficient to protect against widespread music piracy, achieving market acceptance of our service may prove difficult as we would need to convince listeners to stream our service when they could otherwise download the same music for free. As a result of these obstacles, we may find it impossible or prohibitively



expensive to enter foreign markets, or entry into foreign markets could be delayed, which could hinder our ability to grow our business."<sup>3</sup>

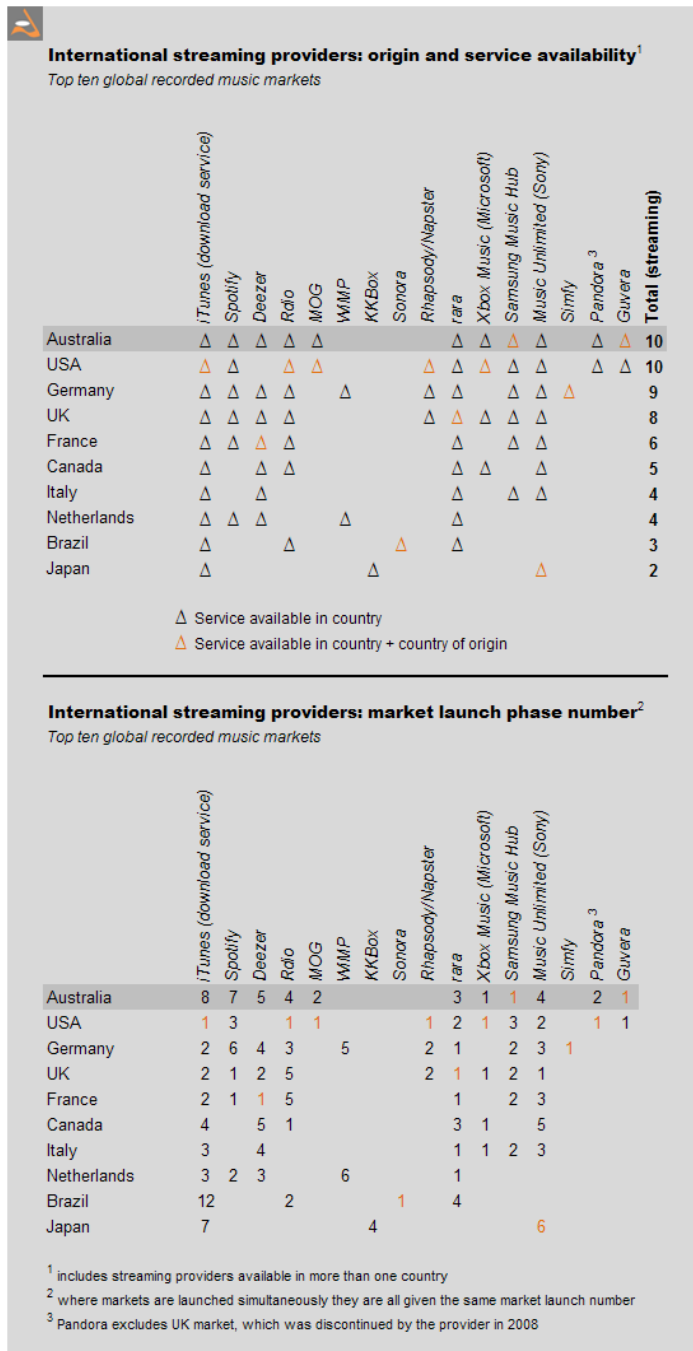
111. There are currently around 30 licensed digital music services available in Australia<sup>4</sup>, including traditional download, subscription-based and advertising-supported services. Of these licensed services around half are Australian.
112. Although the number of licensed offerings available in each market generally reflects the size and rank of that country's recorded music market, Australia boasts more digital offerings per capita than any other top-ten market except the Netherlands. The total number of digital offerings available in Australia is similar to that of Canada, Italy and the Netherlands and is greater than that of Japan, the region's largest recorded music market<sup>5</sup>.
113. Australia is now considered a key market for international expansion, and increasingly is one of the first markets international players commercially launch outside their home region. This is evident in the development to date of the next phase of the digital market: subscription and streaming services. Seen by many as the future of digital music, the aggressive rollout of these services in Australia provides an illustrative example of Australia's position as an attractive and fertile digital music market.
114. By October 2012, almost all major international streaming providers had launched in Australia, with 10 services available from providers with more than only one country of operation – equal top of the top ten markets with the US and more than in Germany and the UK with 9 and 8 respectively, as shown in the table below.

---

<sup>3</sup>Pandora SEC filing p.29.

<sup>4</sup><http://www.pro-music.org/legal-music-services-australasia.php>.

<sup>5</sup>Ibid.



115. Generally, services launch in Europe and North America first, but Australia is usually the next phase. Some services use Australia as a test market – for example, Samsung’s Music Hub was developed in Australia and first launched here ahead of both US and Europe. Australia was also a first-launch market for Microsoft’s Xbox Music and Sony Entertainment’s Music Unlimited. Guvera, the innovative Australian ad-supported free streaming service that was ranked #8 of 2010’s top music start-ups by Billboard Magazine, also first launched in Australia before expanding to the US.
116. Spotify has launched in Australia, and is yet to launch in the much bigger Asian market of Japan. The US-based streaming innovator Rdio, created by the founders of Skype, also launched in Australia before other larger music markets including the UK, France and Japan.

117. Australia's reputation as an efficient, stable and copyright-friendly digital music market is also evidenced by being one of only three countries to currently commercially offer the world's largest Internet radio service, Pandora. Other than its home market of the US – where the service now has more than 50 million subscribers – the service is only licensed internationally in Australia and New Zealand (in both countries by APRA).
118. Alongside Canada and the UK, Australia was the first international market to receive iTunes Match, Apple's latest cloud-based digital music offering. The service was launched in Australia in December 2011, just one month after it debuted in the US in November 2011 – and prior to other Western European markets including Germany, France and the Netherlands. Other Asian markets did not launch until June 2012, when it was launched in 12 markets (notably, the service is still not available in Japan).
119. The digital market attracts many potential music users, and in APRA's observation each potential service is slightly different. For this reason, it has been extremely difficult to publish licence schemes that will apply to all licensees in a particular category.

#### **Government and schools licensing**

120. APRA has licence agreements with educational institutions and government departments, which extend or administer the statutory licences contained in the *Copyright Act*. APRA also participates in the statutory licences as a member of Copyright Agency and Screenrights.
121. Specifically, APRA has the following educational and government licences:
  - (a) APRA Schools Performance Licence Agreement and APRA|AMCOS|ARIA Music Recordings and Access Licence with all government schools in Australia and most Catholic and Independent schools;
  - (b) APRA|AMCOS|ARIA|PPCA NSW Regional Conservatoriums Agreement which covers primary and secondary school students only;
  - (c) APRA|AMCOS|ARIA|PPCA Tertiary Music Agreement which covers 38 universities through Universities Australia;
  - (d) Over 2,000 licence agreements with local, state and federal government bodies.

#### **Enforcement**

122. In the case of users of music who persistently and knowingly use APRA's music without a licence, the licensing department instructs APRA's external lawyers. All referrals include a description of the facts and copies of all correspondence and notes of telephone and in person attendances. APRA's external lawyers had 30 open infringement and debt recovery files as at 31 March 2013.
123. Matters are only referred to APRA's external lawyers when licensing representatives fail to secure licences despite repeated efforts. A matter will only be referred to APRA's external lawyers after a licensing representative has sent at least

two letters, made numerous telephone calls and usually had one or more personal visits with the user. Copies of APRA's General Licensing department's standard correspondence and educational material for licensees are contained in Attachment 11.

124. APRA's external lawyers send a detailed letter of demand, again referring to the ability to have disputes determined under APRA's expert determination facility or the Copyright Tribunal. APRA's external lawyers also send a number of letters, and attempt to resolve matters by telephone communications or by organising meetings between APRA representatives and the music user.
125. If APRA's external lawyers cannot resolve the matter, the licensing representative is instructed to attend the premises to obtain evidence of infringement of copyright. Evidence is obtained by the representative attending the premises and taking full details of any performances of musical works that take place. APRA identifies the works performed, and matches the works against the details contained in its database. APRA identifies the composers of the works, and verifies the assignment from the composer – either to APRA or an affiliated society. Once evidence of infringement has been obtained, APRA's solicitors again write to the licensee specifying the music that has been performed and detailing APRA's rights in relation to that music.
126. Occasionally, as an option of last resort, APRA commences proceedings for infringement of copyright. APRA has commenced infringement proceedings several times in the last 3 years. In only one instance did the matter proceed to a final hearing. In that matter, APRA was awarded damages of \$12, 267.83 plus interest (\$2601), plus costs, plus additional damages totalling \$135,000.
127. APRA's communication licensees (particularly the major broadcast licensees), digital download and online streaming licensees are relatively compliant compared to APRA's public performance licensees. There is no necessity for licensing representatives to visit such licensees to detect the use of APRA's works, and most report music via a complex electronic interface with APRA.
128. APRA's legal resources in the area of broadcast and online licensing are expended on the negotiation and drafting of licence agreements, rather than enforcement. In relation to online licensing, APRA has focussed its attentions on education of licensees, and on contributing to industry run test cases (such as *Roadshow v iiNet*, in which APRA intervened in the Full Federal Court and in the High Court), educational programs (such as the Music Matters campaign) and policy initiatives (such as the Australian Law Reform Commission inquiry into copyright in the digital economy).

#### **Distribution**

129. APRA distributes revenue arising out of the licensing of music in accordance with its distribution rules. Generally, APRA distributes money collected under specific licence schemes in accordance with information collected about music use under those schemes. For example, revenue from radio is distributed according to detailed logs provided by radio stations. Digital download revenue is distributed to the owners of tracks actually sold.

130. APRA's costs as a percentage of its revenue for the audited financial year ending 30 June 2012 were approximately 12.82%. This is amongst the lowest cost to distribution ratio of any performing rights collecting society around the world.
131. APRA's distribution rules include the "fifty per cent rule", under which APRA ensures that composers obtain at least 50% of the licence fees generated from the licensing of performing rights.
132. APRA's applications for authorisation in connection with its blanket licence output arrangements relate to alleged agreements affecting competition between APRA and its members in respect of the fifty per cent rule.

#### **Distribution rules**

133. APRA's Board of Directors approve distribution rules from time to time, in accordance with APRA's constitution. A copy of APRA's distribution rules and practices, current as at March 2013, is Attachment 12.
134. The legal power and responsibility for determining the method by which APRA's revenue (consisting of licence fees collected within Australasia, royalties received from affiliated societies and interest earned on investments) is allocated and distributed rests with the Board of Directors under article 93. Allocations made by the Board are final and binding except that the Board may consider and admit claims made by an interested person within three years of the date of the allocation or distribution concerned (article 94).
135. In formulating the distribution rules, the Board is bound to comply with the terms of any agreements between APRA and its members and between APRA and its affiliated societies (article 93(b)). In addition, although not binding upon the Board, the resolutions of CISAC concerning the principles governing the fair and equitable distribution of royalties are complied with, wherever possible.
136. It is a basic principle of APRA's distribution that at least 50% of any distribution must be paid to the relevant writer. This enshrines the principle that copyright and APRA's operation are designed to reward and encourage creativity by rewarding authors for the exploitation of their works. This is also consistent with the rules of CISAC.
137. The review of the distribution rules is a complex and difficult subject. The Board of Directors takes into account the views of the membership, objective data regarding performances, the approaches of affiliated societies to the process and method of distribution and the views of APRA's independent statistician, AC Nielsen.
138. The distribution rules are clearly a matter of great interest and importance to the membership and, as a matter of fairness and equity, the rules are reviewed reasonably frequently to ensure that distributions reflect the value of usage of members' works.
139. APRA is a members' organisation, controlled by members and run for the benefit of the membership. The majority of member enquiries relate to distribution issues – usually related to a particular member's entitlement rather than the philosophy of the rules.

140. Since August 2011, APRA has made quarterly general distributions of royalties to members and affiliates of the licence fees and any interest earned (prior to that date, distributions were made twice each year). APRA also makes interim distributions of overseas earnings (royalties earned in foreign territories and remitted to APRA by its affiliates for distribution to members). The amounts distributed are the gross amounts received by APRA less administration costs.
141. The International Department also processes and pays four additional “mini distributions” of foreign royalties to APRA writers each year. Foreign earnings are distributed monthly when the distributable amount exceeds A\$1.00 for writers paid by Electronic Funds Transfer into local bank accounts and A\$50.00 for overseas resident writers who are paid by Telegraphic Transfer into foreign bank accounts or by draft.
142. In order to make distributions, APRA and its affiliates must maintain comprehensive records of musical works, details of the composers, authors, publishers and sub-publishers together with the shares each party has in each work and the society of which each is a member. In addition, details of many millions of contracts between composers and publishers, and publishers and sub-publishers are maintained to record changes in ownership of works over time, and retentions of interests. Further information is available regarding the nature of publishing contracts and the type of documentation maintained by APRA, on request.
143. Information about APRA’s distributions is available in great detail. Rather than attempt to anticipate the ACCC’s interest in the distribution procedure, APRA offers to produce such reports as the ACCC may request, in relation to APRA’s revenue and distribution, for such periods as are available, over the past ten years.

### **Monitoring**

144. The principal function of the process of distribution is to allocate performance data to the music performed by APRA’s licensees and to identify the respective writers and publishers of those works, and the share of performing right royalties to which each is entitled.
145. The distribution department receives (often as a result of repeated reminders) music performance reports from radio and television stations, concert promoters, members and many other types of users of copyright music, including cinemas, discos and airlines.
146. By way of example, free-to-air television broadcasters provide APRA with monthly broadcast logs (which detail what programmes went to air) and certain cue sheets (which list the individual works used in a programme). To assist in the collection and processing of this data, APRA has developed with television broadcasters an electronic data interchange EDI specification to standardise reporting formats. APRA receives broadcast logs for all commercial free-to-air and national broadcaster channels, comprising almost 650 monthly reports per annum. In addition, APRA identifies and matches almost 200,000 music cue sheets to the programs broadcast on free-to-air television each year and, of these, around 50,000 cue sheets have to be sourced (because APRA does not already have the cue sheet on file) from third parties such as broadcasters, local writers, local television producers and overseas affiliates.

147. Similarly, commercial radio broadcasters provide APRA with a quarterly file listing the works they broadcast (identified by title, composer and performer) and the number of times each work was put to air. Last year APRA processed over 2 million hours of broadcasting across 264 commercial radio stations distributing royalties to more than 27,000 unique works per quarter. APRA also obtains information for non-playlist music, for example music used in advertisements and episodic material. For community radio broadcasters, APRA employs a simplified sample-based data collection process to take account of their relative size and funding. However, because many community radio stations do not use computerised music scheduling software, returns are often hand-written which significantly increases the manual administrative workload required for APRA to process them.
148. APRA also conducts a full census analysis of music synchronised on film and publicly performed in cinemas and maintains a database of film cue sheets.
149. With regard to digital download services, the volume of data APRA receives and processes for download sales is vast. APRA has had to develop sophisticated systems to process the data including investment in data matching algorithms, additional servers to handle volumes and storage issues, new programming to enable distributions.
150. To assist in the processing of monthly sales files that APRA receives from digital services (which can contain in excess of 100,000,000 lines of data), APRA has developed its own reporting format and has also worked closely with major online licensees and updated its systems to accept reports in the international DDEX reporting standard. APRA was, so far as it is aware, the first society to use the DDEX reporting format to process and distribute royalties from download services.
151. APRA is able to provide any further detail about the distribution process and its analysis of music use, including statistics regarding the number of performances analysed, as the ACCC may wish to see.
152. APRA constantly explores opportunities for obtaining more accurate information of music usage in an attempt to improve the accuracy of distributions made to writers, publishers and affiliates. For example, APRA is currently investing in trials of music recognition software, with the cooperation of licensees, to ensure accurate distribution of royalties for the performance of music in nightclubs.
153. APRA not only conducts its work as a collecting society for Australian composers, authors and other copyright owners, but also for New Zealand creators and copyright owners, and some smaller states in the region. The New Zealand operation is managed out of offices in Auckland. The New Zealand General Manager reports to APRA's Chief Executive Officer.
154. New Zealand members obtain a substantial benefit from their membership of an Australasian organisation. New Zealand members obtain the benefit of APRA's efficient system for acquisition of rights, information technology, distribution analysis and processing, and documentation. All members benefit from the economies of scale made possible by the Australasian operation.
155. As APRA has developed considerable infrastructure for the collation and analysis of large volumes of information regarding the title to works and performances,

APRA also assists other collecting societies on a commercial basis in the collation of data, analysis of performance data and process of distribution. It administers Australasian Mechanical Copyright Owners Society Limited (**AMCOS**), and assists Audio-Visual Copyright Society Limited (**Screenrights**) and Phonographic Performance Company of Australia Limited (**PPCA**) on commercial terms, providing a valuable service to these other societies (enabling them to operate at lower cost than they would otherwise be able) while also partially offsetting the administration costs of the operation to APRA members.