



Australian
Competition &
Consumer
Commission

Determination

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

lodged by

the Australasian Performing Right
Association Ltd

in respect of

arrangements for the acquisition and
licensing of performing rights in music

Date: 6 June 2014

Authorisation numbers: A91367 - A91375

Commissioners:
Rickard
Cifuentes
Court
Walker

Summary

The ACCC has decided to grant conditional authorisation for five 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 conditions requiring APRA to revise its alternative dispute resolution (ADR) scheme and publish plain English guides relating to its licensing regime and members' ability to opt out and obtain licences back.

The ACCC grants conditional authorisation until 28 June 2019.

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.

On 15 October 2013 the ACCC released a draft determination proposing to grant conditional authorisation to the arrangements. The ACCC held a pre-decision conference in relation to the draft determination over two days on 8 November 2013 and 21 March 2014.

On 24 October 2013 the ACCC also granted conditional interim authorisation to APRA to avoid disruption to APRA, its members and licensees when the previous authorisation expired on 31 October 2013.

As noted in the draft determination, 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' the conduct 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 the conduct, 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. There are also 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, 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 obtain direct or source licences 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 inefficiencies for members. For example, individual members may have difficulty ensuring their rights are adequately recognised in distribution arrangements or APRA may not be responsive to the needs of some of its diverse membership. 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 were clearly reflected in submissions to the ACCC, particularly prior to the draft determination and at the pre-decision conference. 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, the consultation arrangements for members and ADR for APRA members. Some APRA members were concerned that APRA is not adequately supporting Australian musicians and that the membership of APRA's Board does not represent the interests of independent musicians.

In response to the concerns raised by interested parties, APRA 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.

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.

The ACCC's draft determination proposed three new conditions of authorisation. Following the draft determination, APRA engaged Resolve Advisors to design an ADR scheme and a plain English expert to produce guides to licensing and opt out/licence back. After consulting APRA's stakeholders, Resolve Advisors proposed a scheme for APRA licensees. The ACCC is satisfied that this scheme is an appropriate and practical response to the issues raised by interested parties about APRA's existing expert determination process.

In light of the feedback from stakeholders and Resolve Advisors during the ACCC's consultation process, the ACCC has decided to impose three conditions of authorisation. In summary, the conditions require APRA to:

- publish, within 3 months of the ACCC's final determination, including as a single document, a comprehensive plain English guide that outlines all of the licence categories individually and includes other specified information (C1)
- within 3 months of the ACCC's final determination, 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 (C2)
- implement a revised ADR scheme (C3) to be managed by an independent facilitator. The scheme must offer informal resolution, mediation, expert opinion and binding determination to licensees and members. The ADR scheme must incorporate a consultative committee to provide feedback and other advisory input to APRA and to the facilitator. This condition incorporates the key features of APRA's existing expert determination process and the conditions which were imposed in 2010, including the ADR reporting requirements.

The ACCC considers that the changes required by the conditions will help alleviate the concerns of interested parties. The plain English licensing guide will assist licensees and potential licensees to understand which licences they require, which in turn may prevent disputes occurring between APRA and its licensees. The plain English guide to opt out/licence back will enhance members' understanding of these facilities and hopefully encourage them to use them more often.

If disputes do arise, the ADR scheme will provide an affordable and practical way for both members and licensees to resolve disputes. This is particularly relevant for small licensees who may have been deterred from using APRA's expert determination process. The independent facilitator, the consultative committee and an independent review of the scheme will help to ensure the relevance and independence of the ADR scheme. The scheme is consistent with, but improves upon, the existing expert determination system.

While not requiring changes as a condition of authorisation, the ACCC also expects APRA to make submissions in any application for re-authorisation about improvements in certain areas. In particular, the ACCC notes that music recognition technology is rapidly evolving and will become increasingly affordable. The ACCC is concerned to ensure that, during the period of authorisation, APRA adopts new technology as appropriate to monitor and record performances. This will lead to improvements in the way royalties are distributed to members, and reduce costs of enforcement. In response to member submissions that APRA's Board is not representative of the membership and is dominated by large players, APRA should also review the structure of its Board and voting rights.

The ACCC will also consider the results of APRA's tariff simplification review, improvements to APRA's licence application forms and other efforts by APRA to alleviate licensee concerns.

Subject to the conditions, the ACCC is satisfied that the likely public benefits that will result from APRA's arrangements will outweigh the likely detriments and therefore the ACCC grants authorisation for five years.

The ACCC notes that APRA has sought re-authorisation for six years. In the draft determination, the ACCC proposed granting authorisation for three years, noting the level of concern raised by interested parties, the potential for the arrangements to generate significant public detriment, and to allow the ACCC to consider the effectiveness of the conditions. Following the draft determination, interested parties continued to hold some concerns. However the ACCC also notes that there have been a number of significant developments since the draft determination, and substantial input from APRA and its stakeholders during a re-authorisation period of over 12 months. In light of the amount of work undertaken to develop a new ADR scheme, the progress already made to address interested party concerns (including development of the plain English guides), and to allow time for the new ADR scheme to become fully operational, the ACCC considers that it is appropriate to grant authorisation for a longer period. The ACCC notes that during this period, the ADR scheme will be overseen by the facilitator, the ADR committee and the independent reviewer. Parties will also have the ability to raise concerns with APRA or the Code Reviewer. The ACCC also notes that the conditions require APRA to arrange an independent review of the ADR scheme after it has been in operation for three years.

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Abbreviations & Glossary

| | |
|----------------------|---|
| ABC | Australian Broadcasting Corporation |
| ADA | Australian Digital Alliance |
| ADR | alternative dispute resolution |
| AHA | Australian Hotels Association (national) |
| AHA Victoria | Australian Hotels Association (Victoria) |
| 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 |
| ARA | Australian Retailers' Association |
| Arts Law | Arts Law Centre of Australia |
| 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 |
| Nightlife | Nightlife Music |
| 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). APRA sought re-authorisation for six years.
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.¹
3. On 15 October 2013, the ACCC issued a draft determination² proposing to grant conditional authorisation to APRA for its arrangements. A conference was requested in relation to the draft determination and held over two days on 8 November 2013 and then reconvened to enable interested parties to discuss the alternative dispute resolution (ADR) scheme proposed by Resolve Advisors on 21 March 2014. The ACCC also granted conditional interim authorisation to APRA's arrangements on 24 October 2013 to avoid disruption to APRA, its members and licensees when the previous authorisation expired on 31 October 2013.

The conduct

4. 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.

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.

² Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

5. These arrangements are described in more detail in the **Background** section below.
6. 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 may 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.
7. APRA seeks re-authorisation for six years.

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 2013 it had 68,150 licensees³ and 79,139 members.⁴
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

³ Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2012 to 30 June 2013, <https://www.screenrights.org/sites/default/files/uploads/CollectingSocietiesCodeReviewersReport2013Final.pdf>, visited 6 June 2014.

⁴ APRA Annual Financial Report, 30 June 2013.

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 69⁵ 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 2012/13 operating income of \$207.7 million and royalties paid and payable to members and affiliated overseas societies of \$174.4 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 arrangements) and APRA implementing an Alternative Dispute Resolution (ADR) system.
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 51 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.

⁵ APRA website, *APRA International Affiliates*, <http://www.apra-amcos.com.au/about/internationalcopyrightroyalties/aprainternationalaffiliates.aspx>, visited 6 June 2014.

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' or musical work
 - the lyricist (being the artist who wrote the lyrics, if any) - the lyricist generally has copyright in the 'song' or literary work
 - the arranger (being the artist who arranged the music) - arrangers generally own the copyright in the arrangement and
 - the publisher (who arranges the sale or exploitation of musical works) - publishers usually obtain an 'assignment' (see below) of the mechanical rights, synchronisation rights and print-music rights in exchange for the

assignor (that is, composers, lyricists and arrangers) getting an agreed percentage of the income received by the publisher.

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 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 make copyright material available by broadcasting or electronically transmitting a work, for example by radio or television, and by disseminating it online.
27. Public performance of a musical work (i.e. any mode of visual or aural presentation) includes, for example:
- playing 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 showing a film or a 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 PPCA) 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 PPCA.
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 a 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 51 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 assessed 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). These treaties help to protect Australian creators' works in signatory countries and also protect foreign creators' works in Australia.
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.⁶
42. The Copyright Act provides for proposed and existing licence schemes⁷ to be referred to the Copyright Tribunal by a licensor, a licensee or their representatives.⁸ In addition, the Copyright Tribunal has the function of determining remuneration payable under the statutory licence schemes established by the Copyright Act.

⁶ Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited [2009] ACopyT 2, [30].

⁷ Licence schemes are defined in s136 of the Copyright Act.

⁸ See section 154-156 of the Copyright Act.

43. The Copyright 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 Copyright 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 Copyright considers 'reasonable in the circumstances', in relation to the granting of a particular licence.⁹
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.¹⁰
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.¹¹
 - Must, if requested by a party to proceedings concerning voluntary licence schemes, consider relevant guidelines issued by the ACCC.¹² The ACCC released draft guidelines in November 2006. The ACCC was subsequently involved in two Copyright Tribunal matters and decided to suspend the finalisation of the Copyright Guidelines to further inform and test its new role

⁹ Copyright Tribunal of Australia website, visited 6 June 2014, <http://www.copyrighttribunal.gov.au/about>.

¹⁰ Re Applications by Australasian Performing Right Association Ltd [1999] ACompT 3, paragraph 62.

¹¹ Copyright Act, section 157B.

¹² Copyright Act, section 157A.

under the Copyright Act. The ACCC is currently preparing revised Copyright Guidelines (*ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration*).

- 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.¹³

Code of Conduct for Copyright Collecting Societies

47. A voluntary Code of Conduct for Australian Copyright Collecting Societies (the Code) was introduced in July 2002. 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 November 2013.¹⁴

APRA's arrangements

50. As discussed above, APRA is seeking authorisation for its input, output, distribution and overseas arrangements, which are discussed below.

Input arrangements¹⁵

51. 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

¹³ Copyright Act, section 169G.

¹⁴ Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2012 to 30 June 2013, The Hon K E Lindgren AM, QC, November 2013. A copy is available from, for example, <https://www.screenrights.org/sites/default/files/uploads/CollectingSocietiesCodeReviewersReport2013Final.pdf>.

¹⁵ Existing authorisations A91188, A91189, A91191, A91192 and substitute authorisations A91368, A91369, A91371 and A91372.

agreements that might include exclusionary provisions, a cartel provision or substantially lessen competition.

52. 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 copyright work or any executor, trustee, beneficiary or next of kin of a deceased composer or author.
53. 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.
54. 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.
55. 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.
56. 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 (such as public performance, live performance or broadcasting) 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.
57. 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.
58. 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.
59. 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.
60. 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.
 61. APRA advises that improvements to its licence back and opt out facilities are ongoing.
 62. 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 notes direct dealing and source licensing provide scope for competition between copyright holders because a potential licensee is likely to have a number of genuine alternatives to choose from. This competition will constrain direct and source licence fees that can be charged. In this regard, the ACCC notes the arrangements in the US for film producers to obtain performing rights at the same time as synchronisation rights to a musical work are obtained. This demonstrates the feasibility of competition between copyright holders for both synchronisation and performing rights.¹⁶ The ACCC is therefore concerned to ensure that the licence back and opt-out arrangements are as effective as possible so that direct dealing and source licensing can be entered into where it is feasible and efficient to do so.
 63. Composers can also effectively take back their rights from APRA by resigning their APRA membership.

Output arrangements¹⁷

64. APRA has sought re-authorisation for its licensing arrangements as agreements that might include exclusionary provisions, a cartel provision or substantially lessen competition.
65. 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.
66. APRA's output arrangements, made under these clauses, are briefly set out below.

¹⁶ See Besen, SM, (2008), 'Regulating intellectual (property) monopolies', *Competition and Consumer Law Journal*, Vol, 16(2), for a discussion of source licensing in the United States.

¹⁷ Existing authorisations A91187, A91190 and substitute authorisations A91367 and A91370.

67. 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.
68. 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 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 broad types of users.
69. Where APRA and a licensee cannot agree on the price or terms of a licence, 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 in many cases is likely to be higher than the amount of the licence fees in dispute. Thus a mechanism is needed to provide a simple, cost-effective way to resolve such matters.
70. Under the existing 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.
71. Parties dissatisfied with the expert's determination may seek review by the Copyright Tribunal or Federal Court (as appropriate).
72. 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.
73. 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. This formed part of the conduct authorised by the ACCC in 2010.

74. According to APRA, two matters have been resolved by expert determination between 2010/11 and 2013/14, with four matters unresolved and nine matters resolved before going to determination.
75. 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 rules¹⁸

76. 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.
77. 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.
78. 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 were approximately 13 per cent in 2013.¹⁹
79. 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, and unlogged performance). 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

¹⁸ Existing authorisation A91211 and substitute authorisation A91375.

¹⁹ See APRA website, http://apra-amcos.com.au/downloads/file/about%20apra/2011_Comparative_international_expense_to_revenue_ratios.pdf, visited 6 June 2014.

credit rate is then used to determine a work's monetary credit for the relevant pool.

80. 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'.²⁰
81. APRA distributes royalties on a quarterly, six monthly or annual basis depending on the distribution category.
82. 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.
83. 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.
84. 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 arrangements²¹

85. APRA's 'overseas arrangements' are its reciprocal agreements with overseas collecting societies with which it is affiliated.
86. APRA has sought re-authorisation for these arrangements because it considers that they are agreements that might include exclusionary provisions, a cartel provision or substantially lessen competition.
87. 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.
88. 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

²⁰ Under distribution by analogy, licence fees are added to an existing distribution pool that is most similar in terms of its music content.

²¹ Existing authorisations A91193, A91194 and substitute authorisations A91373 and A91374.

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.

89. 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. Even if APRA were to move to non-exclusive overseas arrangements, the exclusive reciprocal arrangements between other overseas collecting societies would remain in place (APRA is a small part of the global licensing environment and is not able to substantially influence CISAC's arrangements).

Submissions received by the ACCC

90. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
91. 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 determination. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

Prior to the draft determination

APRA

92. APRA provided a submission with its application which broadly agrees with the ACCC's 2010 determination including the conditions of authorisation.
93. However APRA disagreed with the ACCC's view in 2010 on the following:
 - APRA submits that the arrangements do 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.
94. In addition, APRA advises that there have been a number of changes since 2010 that are relevant to the ACCC's current assessment of the arrangements (discussed in paragraph 155). 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.

95. APRA also provided a series of additional submissions in response to issues raised by interested parties.
96. In particular APRA provided a 'proposal' (grouped into 'communications', 'transparency of licensing alternatives', 'opt out and licence back information', 'licence negotiation' and 'ADR') to make some alterations to its operations in response to concerns raised in interested party submissions. The proposals included: an improved website with links to information relevant to licensees/members (including about the general performance licence schemes, opt out/licence back, and a negotiation protocol); and engaging a third party expert in dispute resolution to advise APRA in the design of a bespoke ADR system.
97. APRA also notes that relevantly it is in the process of making significant changes to its website, including developing online membership and licensing facilities.

Interested parties

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

APRA licensees

99. 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.
100. 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.
101. 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.
102. Licensees raise 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.

103. Most licensees (and other interested parties) suggest a period of re-authorisation of less than the six years sought by APRA and have proposed a number of conditions of authorisation. Some interested parties propose not granting re-authorisation.

Representative bodies

104. 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).
105. The representative bodies raised similar concerns to licensees.
106. In addition, some suggest that the Commonwealth Government should review the copyright system in Australia.
107. 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.
108. Industry bodies are concerned that the terms of APRA's contracts are weighted too far in APRA's favour.
109. Concerns have also been raised that APRA's expenses are too high and there is a lack of transparency about its expenses.
110. The AHA is cautiously supportive of APRA's 'proposal' (noted in paragraph 96 above), but considers some of the proposals require more detailed consideration.
111. The ALLM and the AHA submit that previous conditions of authorisation C1 and C2 imposed by the ACCC in 2010 have been of limited impact.

APRA members

112. 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

113. 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.
114. Nightlife Music (Nightlife) submits, amongst other licensee concerns, that APRA should make more adequate public performance licensing arrangements for commercial music suppliers such as Nightlife. This would enable Nightlife to operate more effectively on behalf of its clients.

115. The Australian Libraries Copyright Committee/Australian Digital Alliance (ALCC/ADA) support a three year re-authorisation in light of changes in the industry, and raises some of the concerns discussed above.
116. An anonymous submission states that APRA's members are not adequately consulted about issues relevant to them.
117. Wrokdwn submits that APRA does not support Australian talent.
118. 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.

Following the draft determination

Submissions in relation to interim authorisation

119. The ACCC received public submissions in regard to interim authorisation from the AHA, the Australian Retailers Association (ARA), the QHA, ALH Group, LPA, the AHA Victoria, Clubs Australia and the NSW Small Business Commissioner. Interested parties were supportive of the granting of interim authorisation, subject to certain conditions.

Pre-decision conference

120. On 21 October 2013, a pre-decision conference was requested by the AHA to discuss the draft determination.
121. Following the draft determination, APRA engaged Resolve Advisors to design a new independent ADR system. As part of this process, Resolve Advisors commenced a series of stakeholder consultations.
122. In light of these ongoing consultations, the ACCC proposed that the conference be held over two days. The first day of the conference, held in Melbourne on 8 November 2013, discussed the following issues:
 - Licensee matters including: publication of the plain English guides and application forms; timing for publication of the ACCC's Copyright Guidelines; concerns about APRA's ADR system; whether it is appropriate for Small Business Commissioners to resolve licensee disputes; the level of APRA's tariffs and the impediments to parallel importing of performing rights licences; concerns about the efficacy of the Copyright Tribunal; a proposal to introduce a mandatory code of conduct for societies such as APRA; and APRA phasing out commissions paid to APRA staff.
 - Member matters including: concerns about APRA's ADR system; and whether APRA adequately supports its members.
123. The second day of the conference, held in Melbourne on 21 March 2014, discussed:
 - The ADR scheme proposed by Resolve Advisors including: the scope of the scheme; an appropriate ADR scheme for APRA members; the timeframe for publication of ADR determinations; costs and fees of using the scheme; the

independence of the scheme, the facilitator and the experts; the process for choosing experts for the pool; and the option to utilise a Small Business Commissioner to resolve disputes.

- The plain English guide to licence fees including: timing for publication of the guide; and the need for plain English application forms.
- Access to APRA's repertoire and parallel importing.
- Member issues including: the level of support provided to Australian musicians by APRA; considerations for an ADR scheme for members; and reporting by APRA to its members.
- The possible introduction of an independent committee to oversee the ADR scheme.

124. Records of the two days of the conference may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

Submissions in relation to the draft determination

125. The ACCC received further public submissions in response to the draft determination from APRA, Resolve Advisors and various interested parties.

126. APRA's comments on the draft determination focus on the conditions of authorisation, which it does not oppose. APRA has recommended that the ADR scheme proposed by Resolve Advisors be adopted and that Resolve Advisors be appointed as dispute facilitator. APRA has also responded to interested party submissions.

127. Resolve Advisors has provided documentation regarding the process of its review of APRA's ADR system, its recommended ADR scheme and comments about the proposal to introduce an ADR committee.

128. The AHA reiterates its previous submissions (summarised at paragraphs 104 to 111 above). The AHA commented on the conditions of authorisation, particularly in regards to plain English guides/application forms for licensing and the costs to applicants of the ADR scheme.

129. LPA agrees with the ACCC's conclusion on public benefits and detriments. LPA also supports the proposed conditions of authorisation and recommends including a further condition of authorisation requiring APRA representatives to declare that they are paid a commission and requiring APRA to be more transparent about the licence fees collected under each licence category.

130. Nightlife is generally supportive of the ACCC's draft determination and the proposed conditions, subject to some comments. Nightlife submits that APRA's distribution model should provide greater detail.

131. The ALLM reiterates its submission that APRA's monopoly power results in high licence fees. The ALLM submits that APRA does not inform licensees of important matters. The ALLM suggests that APRA should make its licence application forms plain English. The ALLM also suggests improvements to APRA's repertoire search.

132. Casinos & Resorts Australasia is concerned about APRA's licensing process and fees.
133. Dr Sainken reiterates his previous concerns (summarised at paragraphs 99 to 103 above).
134. The Association of Australian Musicians raises member concerns including the viability of Australian musicians, APRA's Board membership, the existing dispute resolution process, distribution arrangements and information provided by APRA to members. The Association also raises concerns about the timetable for re-authorisation.
135. Dr Robert Crain (an APRA member) submits that small Australian musicians are disadvantaged in many respects and are disregarded by APRA. Mr Crain has concerns about the system of voting for APRA's Board.
136. Wrokdawn submits that the three major US labels dominate the Australian airwaves at the expense of Australian independent artists.
137. Ms Amanda Kay raises concerns with APRA's proposal to move to tiered royalty collection and a per pool system to pay for APRA's administrative costs.
138. An anonymous interested party considers that APRA should update its contract with artists to be non-exclusive.
139. The NSW Small Business Commissioner reiterates its previous concerns (see paragraph 118) and has provided suggestions about the form of the plain English guide to licensing.

Submissions in relation to proposed ADR scheme and revised draft conditions

140. The ACCC sought submissions from interested parties regarding the ADR scheme proposed by Resolve Advisors, the proposed appointment of Resolve Advisors as the facilitator of the ADR scheme and the ACCC's revised draft conditions of authorisation.
141. The Australian Small Business Commissioner and LPA generally support the proposed ADR scheme. Lounge supports the proposed ADR scheme but is concerned that the ACCC's draft determination does not address APRA's monopoly.
142. In the context of the proposed ADR scheme, Mr Graham Hardie (an APRA licensee) has concerns about APRA's monopoly position, the consultation conducted by Resolve Advisors on the ADR scheme and APRA not adhering to the Code.
143. Mr Crain submits that the ADR system does not address his concerns as an APRA member. The Arts Law Centre of Australia (Arts Law) is concerned that the proposed ADR scheme does not currently address member disputes and is also concerned about the ADR fees. Clubs Australia also objects to the proposed fee structure.
144. The Victorian Small Business Commissioner does not support the proposed ADR scheme or the appointment of a dispute facilitator, submitting that the scheme is excessively complex.

145. Several parties commented on the proposed appointment of Resolve Advisors as dispute facilitator. Ms Jane Slings (an APRA member), Casinos and Resorts Australasia, the AHA and LPA submit that they do not have a concern with the appointment of Resolve Advisors. An anonymous interested party, Mr Crain and Mr Hardie submit that Resolve Advisors is not sufficiently independent to run the scheme.
146. Several parties commented on the proposed ADR committee, including APRA, Resolve Advisors, Mr Crain, the AHA, the ALLM, LPA, Nightlife, Arts Law, Mr Hardie, the WA Nightclub Association, Boomtick and an APRA licensee. Interested parties are generally supportive of an ADR committee; however APRA and Resolve Advisors have some concerns.
147. The AHA, LPA and APRA provided comments on the revised draft conditions of authorisation. These parties overall are supportive of the revised draft conditions but have suggested some specific amendments.
148. APRA, the NSW Small Business Commissioner, LPA, Nightlife, the ALLM and the AHA have also provided further comments about the appropriate period of authorisation.

ACCC evaluation

149. The ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests²² 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.
150. 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

151. In assessing the proposed conduct, the ACCC identifies the relevant areas of competition affected by the proposed conduct.
152. 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

²² Subsections 90(6), 90(7), 90(5A) and 90(5B), 90(8). The relevant tests are set out in Attachment A.

within this area of competition. The ACCC considers that these conclusions remain appropriate in respect of the current application for re-authorisation.

153. 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.
154. 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 2010.²³
155. 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

²³ APRA, Submission in support of authorisation applications A91367-A91375, dated 30 April 2013, Part A, p. 11.

- 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.
156. 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. As noted at paragraph 62, the situation in the US demonstrates the feasibility of such arrangements.

Future with and without

157. 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.
158. 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.
159. 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).
160. 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.
161. 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.
162. 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.

163. 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.
164. 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.
165. 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.
166. 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.
167. 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.
168. 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.

169. 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.
170. 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 (see also paragraph 62 above). 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.
171. 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.
172. The ACCC also notes that changes in technology may also encourage further developments in, for example music recognition technology.
173. 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.²⁴ 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**.
174. 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 (see paragraph 17). For the purposes of assessing the application for re-authorisation, 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.
175. 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

²⁴ Re Applications by Australasian Performing Right Association Ltd [1999] ACompT 3, paragraph 333.

majority of musical works from composers on a non-exclusive basis and offers blanket licences to licensees.

Public benefit

176. 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.²⁵

177. 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
- 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.

178. APRA submits that recent changes in the industry have led to an increase in these public benefits.

179. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Transaction cost savings through use of blanket licences

180. 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.

181. 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.

182. 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

²⁵ *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.

blanket licence arrangements, they offer a cost effective and streamlined alternative to dealing directly with copyright holders.²⁶

183. 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.
184. 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.
185. 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.
186. 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 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. The answer to this question lies in the exclusivity of rights obtained by APRA from composers and overseas collecting societies and the assignment by a member of all their rights.
187. 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.
188. 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 they are licensed in respect of virtually the entire worldwide repertoire of musical works.
189. 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

²⁶ Australian Broadcasting Corporation, Submission, 20 May 2013, p.1.

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 users²⁷

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.²⁸

190. 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

191. APRA submits that the exclusivity of its input arrangements allows it to monitor and enforce infringements of copyright.
192. 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 (APRA provided the confidential opinion of Dr Mark Leeming SC in support of this view).
193. 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.
194. 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

²⁷ Re Applications by Australasian Performing Right Association Ltd [1999] ACompT 3, paragraph 296.

²⁸ Re Applications by Australasian Performing Right Association Ltd [1999] ACompT 3, paragraph 209.

- 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.
195. 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.
196. APRA submits that in the US, where collecting societies obtain the rights of their members on a non-exclusive basis, those societies are unable to enforce their respective rights as effectively as APRA. Difficulties of procedure, public relations and principle arise under the US jurisdiction. In particular, a US collecting society's agreement with its members can include a right to take enforcement action on a member's behalf; however, unlike APRA members, a US member will be made a party to the proceedings (potentially without the member's knowledge). APRA submits that this can result in risks for the member, such as costs, discovery orders or bad public relations. APRA submits that it is also a concern that in the course of taking action against a user for performing a large range of works, the collecting society would identify only a sample of the relevant artists, rather than taking action on behalf of the whole membership.
197. The ACCC accepts that the exclusive assignment of all non-US 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.
198. 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.
199. 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.

200. 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.
201. 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.
202. 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.
203. 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.
204. 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

205. 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 (coupled with an exclusive assignment of all rights) which provide increased certainty for users that they are licensed in respect of virtually the entire worldwide repertoire of musical works, 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.

Public detriment

206. 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.²⁹

207. 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 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

²⁹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

economies of scale and scope and network externalities exist, it is generally most efficient to have only one collecting society.

208. 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.
209. 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.
210. 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.
211. 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.
212. 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.
213. 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

214. 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.³⁰ Further, increases in fees could negatively impact the viability of venues and will be passed on to patrons.³¹
- The ALCC/ADA, LPA, the ALLM and the 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.³²
- 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.
- 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.³³

³⁰ ALH Group, Lounge, Dr Sainken, the Caxton, Lasseters Hotel Casino, Palace Theatre, the ALLM, Alumbra, the ICCA, the AHA and an anonymous interested party.

³¹ The ALLM, the Nightclub Owners Forum, Lasseters Hotel Casino, the QHA, Totem/Future, an anonymous interested party and LPA. Following the draft determination, Casinos and Resorts Australasia.

³² 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.

³³ The ALLM, The Star, Dr Sainken, the AHA, ALH Group, Home Nightclub, an anonymous interested party, ZAP Fitness, the Caxton and Totem/Future.

- A number of parties submit that increases in tariffs are not consulted upon and there should be increased transparency to the whole process.³⁴
 - 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.
 - 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.
215. A number of interested parties requested that the ACCC 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.
216. 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 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

³⁴ The ALLM, Alumbra, Bartletts Tavern, ALH Group, Palace Theatre and The Star.

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 PPCA 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.
- 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.

217. In a submission following the draft determination, the ALLM submits that due to the way fees are calculated, nightclubs pay a relatively higher licence fee than live concerts in order for APRA to maximise revenues.
218. After the draft determination, Dr Sainken submits that ACCC oversight of APRA is defective, as evidenced by the higher charges paid for licensing in Australia compared with other jurisdictions. Dr Sainken submits that a recent case he took to the Copyright Tribunal was settled when APRA saw that the evidence would have supported a change in rates for all. APRA submits that this is a misrepresentation of the situation.
219. In response to interested party submissions, APRA submits that rates charged in different countries are relevant to setting fees but not directly comparable, noting: collecting societies have different structures; copyright laws differ; fees are calculated differently; licences are categorised differently; and exchange rates/taxes vary.
220. In the ACCC's view, APRA owns or controls the Australian 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.

221. 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.
222. 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.
223. 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 327 to 336.
224. APRA is able to maximise its monopoly rents by engaging in price discrimination across user groups whereby various groups are offered different licences according to differences in the groups' willingness to pay. 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.
225. APRA submits that this price discrimination does not correlate to APRA possessing market power or APRA setting fees above a competitive level.³⁵ The ACCC notes that market power is necessary for price discrimination. In the absence of some degree 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.
226. 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

³⁵ APRA, Submission in support of authorisation applications A91367-A91375, dated 30 April 2013, at paragraphs 9.1.18 - 9.1.20.

subsequently amended, to a limited extent, in later ACCC authorisation decisions. These are discussed at paragraphs 324 to 417 below.

227. 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. 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.
228. To ensure APRA proceeded on this basis, in the draft determination the ACCC proposed to impose a condition of authorisation that would require APRA to produce this plain English guide to its licence schemes. This was intended 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.
229. The ACCC has retained the requirement for a plain English guide to its licence schemes as a condition of authorisation (new condition C1). A discussion of the development of the conditions of authorisation, including submissions received following the draft determination, is provided under **Conditions** below.
230. The ACCC notes that interested parties have requested that in addition to producing a plain English guide to licensing, APRA should be required to produce simplified plain English licence application forms. As noted above, APRA advises that it is in the process of simplifying its tariffs. Given APRA is taking steps to revise its tariffs (with resulting changes to the application forms), the ACCC has not imposed a condition of authorisation at this time. However the ACCC expects that improvements to the licence application forms will have been completed and will be taken into account in any application for re-authorisation.

Allocative and dynamic efficiency

231. Many of the concerns raised by interested parties in relation to pricing (at paragraphs 214, 217 and 218) also relate to the effect of APRA's arrangements on the efficient production and use of recorded music.
232. As noted in the previous section, APRA engages in price discrimination across user groups on the basis of differences in groups' willingness to pay for a blanket licence. 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.³⁶ 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

³⁶ Under perfect, or first degree, price discrimination, a monopolist is able to charge the maximum that each individual user is willing to pay for a unit of the product.

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.

233. The ACCC further 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 the 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.
234. In the long run, the ACCC considers that APRA's distribution rules may result in a misallocation of resources in relation to the production of new works. Efficiency requires that new works are produced until the additional value (the marginal value) created by a new work equals the marginal cost of producing the work. 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 price takers, they will create new works until their royalty payment (or average revenue, which includes monopoly rent) equals the marginal cost of producing an additional work. This will tend to lead to more production than would be the case if creators had better price signals.³⁷
235. The way in which APRA distributes royalties may also affect the production of musical works and lead to inefficiencies 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 royalties³⁸
 - 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 societies³⁹

³⁷ 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.

³⁸ An anonymous party, Palace Theatre, LPA, Entertainment Enterprises, Home Nightclub, the ALLM and Nightlife. Nightlife reiterated this point in a submission following the draft determination.

- 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.

236. 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

³⁹ The Nightclub Owners Forum, Palace Theatre, Alumbra, Entertainment Enterprises, LPA and the ALLM.

- 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.

237. In submissions following the draft determination, an anonymous interested party submits that the internet has reduced the dependence on publishers and record companies such that APRA should update its contract with artists to be non-exclusive to allow artists and the public to innovate in new ways.

238. 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.

239. APRA notes that Australia is a net importer of music. In its distribution in the year ending 30 June 2013, APRA paid approximately 34% (\$60 million of a total \$177.4 million) of distributions to overseas collecting societies on behalf of foreign writers for local performances of foreign works. APRA received \$21.7 million from overseas societies.⁴⁰

240. 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.

241. 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

⁴⁰ APRA Sustainability Report 2012-2013, <http://sustainability.apra-amcos.com.au/>, visited 6 June 2014.

performances pool for that purpose. Members who perform their own works live are also able to notify APRA through the Live Performance Return system.

242. 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 in a public submission to the ACCC about the matter and the steps it is taking to alleviate these members' concerns.
243. Following the draft determination, the Association of Australian Musicians submitted that it is concerned that Australian musicians are not receiving adequate royalties, with most APRA members receiving less than \$400 in royalties annually. The Association suggests that community media, which are supportive of local artists, should report playlists year-round rather than only four weeks a year, in order to pay composers more equitably (and similarly, small retail businesses should fully report what they play). The Association also supports the use of music recognition technology in royalty collection.
244. In response, APRA submits that it distributes according to performance data. While APRA takes steps to help encourage the performance of Australian music, it is apparent from licensee reporting that a large amount of foreign music is performed/communicated in Australia. APRA advises that it supports the use of music recognition technology when efficient, noting the significant cost of implementing this technology.
245. APRA submits that it licenses four community television stations, totalling \$35,000 in fees annually, which is distributed by analogy with commercial television (the community stations do not report playlists). APRA licenses approximately 300 community radio stations which pay relatively low fees. APRA requires only four weeks of reporting to ensure that the costs of distribution are not incommensurate with the licence fees received, and noting that the community radio sector is not in a position to provide more detailed reporting.
246. APRA submits that it is considering moving to deducting actual costs of collecting and distributing royalties from each distribution pool, rather than deducting total costs from general revenue. APRA also consulted on a proposal to pay members performing at venues that pay higher licence fees a higher rate and also to use music recognition technology to collect data regarding the use of music in television and radio advertisements. APRA's Board is due to make a decision on these issues in due course.
247. Ms Kay does not support the proposed move to tiered royalty collection (instead preferring a pay per song system) and allocation of actual administrative costs to each pool. The Association of Australian Musicians does not support APRA's licensing and distribution practices applicable to concerts and live performances generally, submitting that it would disadvantage most Australian musicians.
248. 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 (such as distribution by analogy). 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 of the work may reflect the value of use but these criteria appear to be applied to some pools but not others 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.

249. The ACCC notes that this problem may be accentuated by the practice of calculating distributable revenue by deducting APRA's costs from gross revenue (noting however that APRA is considering making changes to this as discussed above). 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.
250. 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. Comprehensive reporting of performances of music would be ideal. However, there are costs for measuring and reporting usage that need to be taken into account.
251. The ACCC notes that APRA appears to have a considered 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, excluding community media). The ACCC notes that APRA continues to improve its mechanisms for collecting performance data, particularly as technology improves.
252. However innovation is likely to continue to produce a range of new and cheaper technologies in the short to medium term. APRA should continue improving its collection mechanisms in light of the possibilities opened up by these developments and growth in music recognition and other technology, so that royalty payments better reflect what music is actually being played. The ACCC recognises that APRA may have a reduced incentive to invest in improved data collection technology as a result of a lack of competition. Further, the members of APRA's Board, who themselves receive APRA royalties, may not have the incentive to adopt changes that could result in more efficient distribution if it is not in their interests to do so (see **Representation on APRA's Board** below). The ACCC would be concerned if APRA is not adopting new technology or other changes that would result in more efficient distribution.
253. 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. The ACCC considers that the record keeping requirements for community media (i.e. distribution by sample or analogy) is an example of this. The ACCC also recognises that members have competing interests and APRA must take account of all of these interests in making decisions about distribution.

254. 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.
255. 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. APRA should also be willing to make changes to its procedures when it is fair and practical to do so.
256. APRA should consider ways that improvements can be made to collection of play data and the ACCC will consider APRA's progress in any future application for re-authorisation. 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 that may place some constraint on APRA, 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 condition C2, 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, noting however concerns about member representation on APRA's Board and whether the interests of the Board members are aligned with the interests of the membership more generally (discussed below under **Representation on APRA's Board**).
257. 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

258. 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.
259. The ICAA submits that APRA may not maximise its administrative efficiency to maximise returns to its members.
260. 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.

261. The ALCC/ADA submit 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.
262. APRA submits that its expenses to revenue ratio is one of the lowest in the world (13.44% in 2011).
263. 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
 - The ALCC/ADA submit 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.
264. Following the draft determination, the Association of Australian Musicians submits that members would like to see more detailed accounting of all administrative expenditure. Noting its current reporting practices, APRA does not consider that more detailed reporting of expenditure would result in greater efficiency or increased distribution.
265. 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.
266. However, the ACCC does not consider that a condition of authorisation is necessary or appropriate at this time.
267. 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.
268. 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 2012/13. In recent

international benchmarking of affiliate societies provided by APRA, APRA's ratio ranks sixth out of more than 50 societies.⁴¹

269. In the event that APRA members have concerns about APRA's expenses and administration, the ACCC encourages members to put this issue to APRA or the Code Reviewer directly.
270. 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

271. Interested parties have raised a number of concerns about how APRA and its employees conduct themselves in dealing with licensees or potential licensees.
272. 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:
- The Caxton, the QHA, the AHA, the AHA Victoria, the QHA, 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.
273. 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 process⁴²
 - 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

⁴¹ See APRA website, http://apra-amcos.com.au/downloads/file/about%20apra/2011_Comparative_international_expense_to_revenue_ratios.pdf, visited 6 June 2014.

⁴² An anonymous submission, the Caxton, Zap Fitness, the NSW Small Business Commissioner, Bartletts Tavern, the QHA and Totem/Future.

- 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.
274. In a submission following the draft determination the ALLM submits that APRA does not always inform licensees of important matters, such as the recent review of the Code.
275. 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.
276. 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. APRA has also advised that it will cease paying commissions to its representatives.
277. 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.
278. APRA submits that it 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.
279. 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.
280. 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.
281. 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.
282. 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 have received commissions based on the licences they sell (although APRA recently announced that it has decided to cease paying commissions). 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.

283. 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, and 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 (the NSW Small Business Commissioner suggests ISO9000 or 14000), introducing a small claims process for claims less than \$20,000 (accountant/auditor), and 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.
284. 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.

285. APRA also currently 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.
286. The ACCC notes that APRA is in the process of revising its 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 condition of authorisation C3 is intended to ensure that the new ADR system will incorporate features to encourage its use and produce timely and independent decisions (informed by the ADR scheme proposed by Resolve Advisors).
287. 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.
288. 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 is imposing condition C1 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 and the removal of commissions, should improve interactions between APRA and its members and licensees.
289. 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 has also made links to that material more easily accessible on its existing website.
290. A discussion of the development of the conditions of authorisation, including submissions received following the draft determination, is provided under **Conditions** below.
291. 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

292. 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.
293. The ACCC also notes the concerns raised by a group of members about the implementation of DJ Monitor (see paragraphs 235 and 236).
294. In submissions following the draft determination, the Association of Australian Musicians submits that the amount of opportunities, gigs and income for Australian musicians is in decline. The Association notes however that APRA is supportive of the More Aussie Music Campaign.
295. The Association of Australian Musicians submits that Australian musicians require more information about all areas of APRA's activities, including promotion of issues affecting Australian musicians. The Association also submits that APRA should provide more comprehensive data accompanying a member's distribution reports.
296. Following the draft determination, Mr Crain submits that small Australian musicians are disadvantaged in many respects and are disregarded by APRA, such as by not responding to member correspondence. Mr Crain has asked APRA to do a number of things to address member issues including: conducting an industry survey; setting minimum venue/booker standards including creating a committee; an internet feedback page for performers; and defending live music venues.
297. In a submission following the draft determination, Wrokdwn submits that the three major US labels dominate the Australian airwaves at the expense of Australian independent artists.
298. APRA submits that it communicates fulsomely with members, particularly via its website but also through its many publications, emails and events.
299. APRA submits that it is active in supporting Australian musicians, including allocating grants, hosting industry events and establishing the National Live Music Office. APRA submits that it cannot agree to dedicate time to every member initiative.
300. APRA submits that it cannot provide information regarding music use to its members where that information is confidential to APRA and the licensee and notes that this reporting would increase APRA's costs. However, APRA submits

it is developing a Member App which will provide members with greater flexibility to both access and log information relevant to their performances and earnings, and will enable members to access detail relating to their royalty revenue streams.

301. 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.
302. 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.
303. 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 412 to 417).
304. 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. Further, as discussed under **Allocative and dynamic efficiency** above, APRA should be responsive to questions from its members about how it calculates and distributes royalties. 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.
305. 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. Members will also be represented on the ADR committee. Members who would like increased input can nominate to be on the committee or provide comments and suggestions to committee members. This feedback will then be provided to the facilitator, and APRA if relevant, for actioning.
306. APRA could also review the composition of its board to ensure that all types of members are appropriately represented.
307. The ACCC has not imposed 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.

Restricted access to overseas works

308. The ALLM notes that its members were unsuccessful in entering alternative blanket licensing arrangements with the Canadian collecting society (SOCAN) and the UK collecting society (PRS). The ALLM has asked the ACCC to allow the parallel importing of music copyright from overseas collecting societies, thus facilitating greater competition between overseas collecting societies and APRA. The ALLM reiterated this point following the draft determination and sought the ACCC's response.
309. In a submission following the draft determination, APRA states that the ALLM's proposition is flawed. APRA submits that songwriters and publishers join a single society, and each society licenses the performance of its works by its members in each other territory throughout the world. For example, APRA licenses rights in its repertoire to the US societies. This does not mean that those societies control Australian performing rights, but rather control the performing rights in Australian works for the US territory only.
310. APRA submits that a landscape where societies could license rights worldwide is likely to result in the withdrawal of rights from societies that in the opinion of members undervalue those rights (and perhaps withdrawal by collecting societies). APRA submits that this would result in a situation where local collecting societies control a far from complete repertoire, reducing the benefits of the collective licence and requiring licensees to enter into multiple licence agreements.
311. Further, APRA submits that the market for performing right licences is different in each territory throughout the world, which is why there are different prices charged by collecting societies in those territories. An overseas society licensing public performances of a particular kind in Australia would be required to look at the same factors that APRA takes into account when setting prices in this market and in APRA's view may arrive at the same result.
312. The ACCC understands that the ALLM is raising the possibility of potential competition from overseas collecting societies in respect of the grant of performing rights licences in Australia. The ACCC notes that this is different to 'parallel importing', which is a term more commonly used to refer to the importation of legitimate products without the permission of the local copyright owner.
313. The ACCC notes that while the parallel importation of some products – most notably, books - is restricted by the *Copyright Act 1968*,⁴³ that Act does not restrict either the parallel importing of sound recordings or the offering of performing rights licences by overseas collecting societies. . It is APRA's overseas arrangements (which arise from international agreements between collecting societies) that restrict collecting societies licensing in other territories, not the Copyright Act.

⁴³ See sections 37, 38, 102 and 103 of the *Copyright Act 1968*.

314. Under APRA's overseas arrangements which are currently authorised:
- the grant by overseas collecting societies of exclusive rights in their repertoire to APRA effectively precludes potential competition from overseas collecting societies by preventing them from otherwise offering licences for performances of their members' works in Australia; and
 - overseas collecting societies can only obtain a licence for the repertoire of other collecting societies for performances in their own territory, and thus not for performances in Australia (as noted under **Overseas arrangements** above).
315. As a result, overseas collecting societies do not have the rights to grant a licence, of either some or all of its members' works or the world-wide repertoire, for performances in Australia. APRA's overseas arrangements therefore prevent users who wish to perform music in Australia, such as the ALLM's members, from sourcing a licence (either for some or all of a society's repertoire only or for the worldwide repertoire) from an overseas collecting society.
316. APRA's arrangements with overseas collection societies, when combined with the exclusive rights that APRA and the non-US collecting societies obtain from their members, also largely foreclose:
- the possibility of Australian domestic users sourcing performance rights for the performance of an overseas work in Australia through other means such as direct and source licensing, other than in the case of US works
 - the possibility of overseas domestic users sourcing performance rights for the performance of an Australia work in an overseas country through other means such as direct and source licensing.
317. This means that the potential use of direct and source licensing that would otherwise be efficient (for example, source licensing in conjunction with the licensing of synchronisation rights for movies, or direct licensing by a user from the copyright holder) is therefore limited.⁴⁴
318. The ACCC remains of the view that APRA's reciprocal agreements with other national-monopoly collecting societies (whereby overseas collecting societies grant exclusive rights to overseas societies to licence their domestic members' copyright in that overseas country) generates public detriments in Australia.

⁴⁴ 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. The US regime particularly encourages source licensing for cinematograph films (see paragraph 62). 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.

319. The ACCC recognises that APRA's overseas arrangements may reduce competition with APRA by:
- having the effect of preventing or discouraging overseas societies from competing in Australia by providing access to their repertoire directly to Australian users. 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; and
 - otherwise limiting the ability of domestic Australian users to obtain rights for the performance of overseas works in Australia from parties other than APRA.
320. However, even in the absence of APRA's exclusive overseas arrangements, it seems unlikely that – except perhaps in the case of very valuable works - overseas collecting societies would be willing to offer performing rights licences to persons other than APRA for performance in Australia. As noted, in paragraph 166, barriers to entry are high as a result of sunk costs, economies of scale and scope and network economies or effects. Thus entry of a rival collecting society is unlikely. In addition, making special arrangements specifically for Australian performances is likely to be costly compared to the existing reciprocal arrangements.
321. The ACCC also recognises that there are public benefits arising from APRA's arrangements with overseas collecting societies.
322. In particular, the ACCC considers that effecting the exclusive arrangement with (most) other collecting societies gives rise to a public benefit through increased enforcement efficiencies (see **Monitoring and enforcement efficiencies** above). In the absence of APRA's overseas arrangements, APRA would only be able to grant non-exclusive performing rights to overseas societies and would in turn only be able to obtain non-exclusive rights in respect of the performance of overseas works in Australia. This would make enforcement of copyright in Australian works performed overseas, and in foreign works performed in Australia, much more difficult.
323. Given that the overseas arrangements relate to collective administration for overseas works used in Australia and Australian works used overseas and that it would be even more difficult for the relevant members (of the overseas collecting society or APRA, respectively) to administer and enforce the rights in their works overseas than in their own countries (albeit that the majority of their performing rights are likely to be exercised in their own country), the public benefit arising from the overseas arrangements may be greater than arising from the application of the input and output arrangements in Australia alone.

Factors that may mitigate against detriments

324. 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.⁴⁵
325. 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.
326. 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 2010 conditions of authorisation 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

327. 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.
328. 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.
329. 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.
330. 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.

⁴⁵ 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.

331. The QHA submits that the Copyright Tribunal lacks efficacy.
332. 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.
333. 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.⁴⁶ 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.⁴⁷
334. The ACCC remains of the same view about the role of the Copyright Tribunal in mitigating the public detriment of the arrangements 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 and setting licence schemes in the first instance.
335. 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.
336. 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.
337. The ACCC also notes that the ACCC's Copyright Guidelines, once finalised, are designed to assist the Copyright Tribunal in its determination of reasonable remuneration and other licence conditions. The Copyright Guidelines will detail matters the ACCC considers to be relevant to the Copyright Tribunal's determinations; in doing so, the range of principles in the Copyright Guidelines may also assist licence negotiations and minimise the resort to Copyright Tribunal proceedings.

⁴⁶ Australasian Performing Right Association Limited, Authorisations A30186-A30193, 14 January 1998 at paragraph 8.1.13.

⁴⁷ Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited [2009] ACopyT 2, paragraph 34.

Dispute resolution

338. 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.
339. 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 considers 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.
340. 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.
341. 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.
342. 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.
343. 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.
344. 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 concerns that ADR is inappropriate and unhelpful to the average APRA composer/performer.
345. 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.
346. 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.
347. 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.

348. The AHA submits that groups of small businesses should be able to utilise ADR, however they would require a collective bargaining notification.
349. In a submission following the draft determination, Mr Hardie submits that APRA uses its monopoly position to the detriment of licensees and that the current dispute resolution options are weighted heavily in favour of APRA, noting APRA's financial power and legal resources relative to small licensees.
350. 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.
351. 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.
352. 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.
353. APRA submits that since 2008, the majority of disputes with licensees relate to the classification of premises as 'nightclubs'.
354. 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.

355. In response to interested party concerns, APRA advised that it would engage a third party expert in dispute resolution to advise APRA in the design of a bespoke ADR system which would:
- take account of the need to manage members' complaints under the Code, relatively small licensee complaints, and major industry disputes.
 - incorporate a 'small claims' tier of resolution for licensee disputes over factual matters and asked the expert to advise APRA in relation to the appropriate licence fee level or other criteria having regard to APRA's operations.
 - incorporate timelines for the resolution of disputes, particularly so that small disputes can be resolved quickly and with minimum administrative burden to all parties.
 - be as independent of APRA as reasonably possible.
356. 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.
357. 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.⁴⁸
358. APRA's outline of its current dispute resolution procedure was endorsed by the Competition Tribunal and included as Annexure B to its 2000 decision.
359. The ACCC is of the view that the current expert determination process potentially provides a relatively inexpensive and straight forward alternative to resolving disputes by way of proceedings in the Copyright Tribunal.
360. 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 2013/14, with four matters unresolved and nine 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

⁴⁸ Re Australasian Performing Right Association Ltd [1999] ACompT 3 (16 June 1999) at paragraph 318.

determination process will satisfactorily resolve their disputes and/or that disputes will not be escalated to the Copyright Tribunal.

361. 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 appropriate and required APRA to report to the ACCC on matters considered in ADR.
362. 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.
363. While noting that benefits have arisen from the existing ADR system, in the draft determination the ACCC considered that it is time to review APRA's dispute resolution process to ensure that it is effective and accessible to parties wanting to use it (both APRA members and licensees). Hence, in the draft determination, the ACCC proposed a condition of authorisation relating to the ADR scheme. The ACCC is therefore encouraged that APRA is taking appropriate steps.
364. As indicated prior to the draft determination, APRA has now made information about ADR more prominent on its website and has engaged Resolve Advisors to design an ADR system suited to addressing different types of disputes and complaints (APRA will also offer the new ADR options to existing disputants). APRA had expected that a design would be able to be prepared before 31 October 2013 with a view to implementation by 1 January 2014. As a result of the timing for Resolve Advisors releasing its findings and the ACCC reconvening the pre-decision conference, this timing was revised to 30 June 2014. APRA has now requested that it be extended to the later of 30 June 2014 or 10 weeks after the ACCC's determination and a more realistic timeline for implementation of the members' scheme is 31 December 2014.
365. Prior to the draft determination, interested parties suggested the ACCC impose conditions to encourage an improved dispute resolution process.
366. The ACCC considered that APRA's proposed changes were likely to address a substantial portion of the concerns of licensees in relation to the current dispute resolution system, and were therefore likely to improve the effectiveness of the ADR system.
367. The ACCC proposed imposing a condition of authorisation 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 included internal and external mechanisms to resolve disputes/complaints that would be available to both members and licensees/potential licensees and a requirement for an education program including a plain English guide.
368. The ACCC has decided to impose a revised condition requiring APRA to implement a new ADR scheme (as well as retaining the condition requiring APRA to produce a plain English guide to licensing). Further discussion of the development of the ADR scheme and the related condition of authorisation, including submissions received following the draft determination, is provided under **Proposed alternative dispute resolution scheme** at paragraphs 468 to 507 below.

369. In short, the objective of the scheme is to resolve disputes (involving current or prospective members or licensees) in a timely, efficient and effective manner. Its features include: four options for resolving disputes; an independent dispute resolution facilitator; a pool of independent mediators and independent experts; a consultative committee; and public reporting.

Opt out and licence back

370. 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.
371. 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. 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.
372. 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.
373. The ALLM also suggests requiring APRA to ensure the search function of its repertoire database is accurate, submitting that this would reduce the number of disputes. In response, APRA submits that publication of an incomplete and ever changing database of more than 10 million works would be inefficient and not useful. However licensees can provide APRA with a list of works to check if they are in APRA's repertoire.
374. 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.
375. 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.
376. 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.

377. 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.
378. 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 suggest requiring APRA to progressively publish its repertoire.
379. 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 has taken immediate steps to make existing information more obviously available to licensees on its existing website.
380. 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.
381. 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. In the case of a licence for the performance of works by means of cinematograph film, APRA requires only the title of the film in which the work appears.
382. The ACCC considers that further incentives to encourage the use of opt out and licence back may be required.
383. 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.
384. 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 direct licensing provides an alternative to licensing through APRA which could constrain at least some of the anti-competitive effects of APRA's arrangements.

385. 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.
386. 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 (see examples at paragraph 170).
387. 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.
388. 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.
389. 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.
390. 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.
391. 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.⁴⁹

392. 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.
393. 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 or source licensed. The ACCC considers that this should be made clear to parties who might utilise a licence back. To the extent that such misconceptions exist, this limits the perceived utility of APRA's licence back provisions.
394. 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 and has taken steps to make the existing information more obviously available to licensees on its existing website. In its draft determination, the ACCC proposed a condition to promote the efficient use of the opt-out and licence back provisions and to therefore increase the extent to which those provisions will mitigate the detriment that arises from the absence of any competitor to APRA.
395. 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 proposed to require APRA to make this plain English information available on its website. The ACCC also proposed to require APRA to further increase awareness of these facilities and ensure that it offered appropriate discounts off blanket licences that reflect the value of direct dealing, noting the opportunities that evolving technology will present.
396. 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.
397. Since the draft determination, APRA has not completed the plain English guide to opting-out/licence back. The ACCC accepts that this has mainly been the result of APRA focusing its resources on the review of its ADR system. The ACCC has therefore retained the condition of authorisation in this determination and requires APRA to publish the guide within three months of the ACCC's final

⁴⁹ *Re Australasian Performing Right Association* [1999] ACompT 3 (16 June 1999) Summary Statement.

determination. The ACCC has included in this condition a requirement that the guide include guidance about the minimum information an applicant must provide APRA in order to licence back or opt out.

398. A discussion of the development of the conditions of authorisation, including submissions received following the draft determination, is provided under 'Conditions' below.
399. 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

400. 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.
401. The WA Nightclub Association suggests that the Code Reviewer should perhaps be paid out of licence fees to facilitate independence.
402. 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.
403. Entertainment Enterprises considers that the Government should implement a mandatory code.
404. The Code sets out the standards of service that members and licensees can expect from collecting societies. An independent Code Reviewer reports on compliance.
405. As noted 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.
406. 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.
407. 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.

408. 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

409. 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.
410. An anonymous submission agrees that the APRA Board is heavily weighted towards major publishers.
411. Entertainment Enterprises submits that APRA's Board composition does not reflect all the parties to licensing agreements (and in particular licensees).
412. In a submission following the draft determination Wrokdawn submits that APRA's Board is dominated by the major overseas publishers. Mr Crain submits that the Board voting process is biased and the Board is dominated by major record labels and companies.
413. The Association of Australian Musicians submits that the current voting arrangements for Board members where votes are weighted by royalties earned results in major international publishing companies and writers affiliated with large labels dominating APRA's Board. In turn, this leads to enforcement, monitoring, accounting, distribution, communication and ADR inequalities and inefficiencies for Australian musicians. The Association recommends a maximum of three publishers or musicians signed to publishers on the board, directorships limited to a maximum of three one-year terms and no proxies for votes.
414. APRA disputes the Association of Australian Musicians' claim, submitting that no individual member can exercise more than 15% of the available votes and that each director is a member of the Board in a personal capacity and for a maximum of three years. APRA submits that voting is conducted electronically. APRA submits that the weighted voting system ensures that APRA represents those members whose works are actually performed. APRA notes that changes to the make-up of the Board would require changes to the APRA Constitution.
415. 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.
416. 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).

417. 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. APRA should review the structure of the Board and voting rights (including the weighting of votes) to ensure that it has appropriate incentives to represent its members. APRA should report its findings to the ACCC with any application for re-authorisation. APRA should also consider ways in which to encourage more of its members to vote for the members of the APRA Board. The ACCC will take account of any improvements in this area in any future application for re-authorisation.

Other changes requested by interested parties

418. In addition to the concerns and suggested conditions of authorisation noted above, interested parties have also asked the ACCC to require other changes.
419. 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.
420. In general, the ACCC considers that the above changes fall outside of the scope of the ACCC's role and powers in assessing an application for re-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

421. 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.

422. 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.
423. 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 conditions of authorisation).
424. 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

425. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
426. In the context of applying the net public benefit test in subsection 90(8)⁵⁰ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁵¹
427. For the reasons outlined in this determination the ACCC is satisfied, subject to the 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.

⁵⁰ 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.

⁵¹ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

428. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.
429. The Act allows the ACCC to grant authorisation subject to conditions. Generally, the ACCC may impose conditions to ensure that the net public benefit test is met or continues to be met over the period of authorisation.

Length of authorisation

430. The Act allows the ACCC to grant authorisation for a limited period of time.⁵² 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.
431. In this instance, APRA seeks authorisation for six years.
432. In submissions prior to the draft determination, some interested parties submit that the re-authorisation should not be granted or should only be granted for a shorter time.
433. 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 arrangements. Palace Theatre submits that APRA is a monopoly that is causing APRA licensees hardship. The AHA submits that the arrangements breach the Act
 - NACO notes the international environment, particularly developments in Europe
 - The ALCC/ADA note the Australian Law Reform Commission 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.

⁵² Subsection 91(1).

434. 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.
435. 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.
436. Palace Theatre objects to a six year authorisation.
437. 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.
438. In its draft determination, the ACCC proposed granting conditional re-authorisation to the arrangements for a period of three years.
439. The ACCC noted the level of concern raised by interested parties in relation to APRA's arrangements and the potential for the arrangements to generate significant public detriment.
440. The ACCC also noted 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 arrangements.
441. The ACCC also sought 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.
442. Following the draft determination the ACCC sought comments regarding the period of authorisation, including the possibility of increasing the period of authorisation from three years to four or five years:
- the NSW Small Business Commissioner remains of the view that authorisation should be granted for 6-12 months
 - Nightlife continues to support conditional re-authorisation for three years
 - the ALLM submits that re-authorisation should be for no greater than three years
 - the AHA submits that the period of re-authorisation should remain at three years, noting that: the plain English guides are not yet approved; a single application form is not yet complete; the ADR scheme may need fine-tuning during the period of authorisation; the changes are not yet bedded down; and APRA's improved behaviour is still to be proved over the longer term. The AHA considers that a longer period of authorisation may be appropriate at re-authorisation in 2017

- LPA initially submitted that authorisation should be for one year but submits that in any event a period of not more than three years is appropriate, noting that new conditions of authorisation are being introduced. LPA considers there is a continued potential for the arrangements to result in public detriment, noting that previous periods of re-authorisation have not exceeded four years, and the currently changing nature of the industry and APRA's operations.
443. APRA supports a five year period of authorisation, noting the costs of the new ADR system and the expense of making the applications for re-authorisation. APRA submits that after the five year period, APRA will have also negotiated and implemented a comprehensively simplified licence for the use of music in premises such as hotels, restaurants and retail outlets. If authorisation was granted for three years, this revised licence scheme will have been in operation for a maximum of 12 months and the ADR scheme at most for 18 months.
444. APRA submits that the re-authorisation process, while important, is destabilising for its relationship with its stakeholders. Further, APRA submits that there is ample ability for the ACCC to reconsider APRA's authorisation in the intervening period should circumstances change.
445. The ACCC continues to consider that the concerns raised by interested parties are relevant to deciding on an appropriate period of authorisation. However the ACCC also notes that there have been a number of significant developments since the draft determination. For example, APRA has responded to concerns raised by interested parties in submissions and at the pre-decision conference (held over two days). APRA has also made arrangements to address the proposed conditions of authorisation, employing a plain English expert to assist with producing the plain English guides and engaging Resolve Advisors to review its ADR system and engage with APRA's members and licensees. Resolve Advisors has now proposed a revised ADR scheme applicable to licensees and is in the process of reviewing a process for APRA members.
446. The ACCC also acknowledges APRA's willingness to discuss issues and engage with interested parties during the re-authorisation process. Submissions following the draft determination, including at the pre-decision conference, indicate that interested parties are generally encouraged by the conditions proposed in the draft determination and APRA's progress to date.
447. In light of the amount of work undertaken to develop a new ADR scheme, the progress already made to address interested party concerns, and to allow time for the new ADR scheme to become fully operational, the ACCC considers that it is appropriate to grant authorisation for a longer period. In particular, the ACCC would like to be able to review the operation of the ADR scheme over a reasonable period of time when considering any application for re-authorisation. The ACCC therefore grants conditional authorisation for five years.
448. In respect of interested party concerns about the timeliness of APRA implementing the changes discussed during the re-authorisation process, the ACCC notes that the conditions of authorisation require APRA to implement the plain English guide to licensing, the plain English guide to opt out/licence back and the revised ADR scheme within prescribed timeframes. If APRA does not comply with these conditions, the ACCC can consider whether to revoke the

authorisation. The ACCC notes that APRA has already made arrangements for some of the changes discussed, such as abolishing commissions paid to its staff and improvements to the accessibility of information on APRA's website. In respect of other matters, such as APRA's tariff simplification process and an apparent shift in APRA's attitude towards its stakeholders, the ACCC notes the anticipated improvements and will consider their progress upon any application for re-authorisation.

Conditions

Conditions proposed in the draft determination

449. In its draft determination, the ACCC proposed three new conditions of authorisation, in addition to maintaining the two conditions imposed by the ACCC in 2010.
450. The ACCC acknowledged the progress APRA had 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 ADR.
451. The ACCC proposed conditions to address the outstanding concerns of interested parties relating to the identified detriment and to ensure that the measures proposed by APRA would be effective, so that the public benefits would continue to outweigh the detriments to the public.
452. In summary, the proposed conditions would have:
- continued 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
 - continued 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
 - required 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
 - required 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
 - required APRA to implement a revised ADR scheme. The ACCC proposed certain features of the scheme.
453. The proposed conditions in full are described in the ACCC's draft determination available from the ACCC's website www.accc.gov.au/authorisationsregister.

Submissions following the draft determination

454. Interested parties commented on the timing for implementing the conditions of authorisation in the context of granting interim authorisation to APRA. The AHA submits that prior to the ACCC granting final authorisation: APRA should comply with the proposed conditions of authorisation relating to the licensing guide and the ADR scheme and publish a plain English licence assessment form; the ACCC should release the Copyright Guidelines; and a pre-decision conference should be held to discuss these matters if requested. The AHA submits that this would enable interested parties and the ACCC to consider the appropriateness of the plain English guides and APRA's revised ADR system. The ARA, the QHA, ALH Group, LPA, the AHA (Victoria), Clubs Australia and the NSW Small Business Commissioner made submissions supporting the AHA's view.
455. LPA asks that APRA also implement the plain English guide to opt out and licence back prior to final authorisation.
456. APRA objected to the AHA's proposal as it would effectively amount to a six-month authorisation that would require APRA to undertake a renewal process immediately, rather than having the full three years proposed to observe APRA's changed arrangements.
457. In a further submission and at the PDC, the AHA repeated its views on the plain English guides/application forms and submits that the cessation of commission payments to APRA employees or agents should be formalised in a condition of authorisation.
458. LPA is supportive of the proposed conditions of authorisation. LPA particularly supports a plain English guide to clarify the licence categories and a guide to opt-out and licence back. However the guides and any revisions should be developed in consultation with licensees/industry associations, and should be provided electronically. LPA also recommends that the opt-out and licence back education campaigns be offered via a format such as webinar.
459. LPA supports the ACCC's proposed changes to APRA's existing ADR system, including requirements for a low-cost, accessible and tiered process. LPA is strongly supportive of APRA educating parties about the revised ADR including by publishing a guide. LPA considers a further transparency condition should be implemented requiring APRA to declare to licensees whether commissions are paid and disclosing the amount of licence fees collected under each licence category.
460. Nightlife supports the proposed plain English guides but suggests utilising an independent expert and stakeholder consultation to ensure the guide is plain English. Nightlife also considers that the application forms should be plain English. Nightlife supports the proposed ADR condition but suggests clarification on some points.
461. The NSW Small Business Commissioner submits that the ACCC should require APRA to consult stakeholders about the plain English guide to licensing. The Commissioner submits that the guide should provide transparency on the pricing structure for licences, guidance around the best licence option where multiple licences are required, and a plain English application form. The Commissioner

has advised Resolve Advisors that the ADR scheme should be adequately resourced, accessible and affordable.

462. The Association of Australian Musicians submits that instead of the proposed ADR system, disputes involving members should be heard by a five-member panel of musical peers who are not APRA Board members, subject to the applicant paying a set fee.
463. APRA does not object to the proposed conditions. In respect of the conditions relating to the plain English guides APRA submits that it has made relevant information more accessible on its website including its general public performance licence schemes, a link to its ADR procedures, information about opt out/licence back and benchmarking information. APRA has also clarified that its licence fees are not negotiable.
464. APRA submits that the timeframe for implementing the plain English guides should be six months from the date of authorisation. Noting that APRA does not send renewal correspondence to members, APRA has asked that it communicate with members annually in Antenna and Aprap.
465. APRA has engaged a communications specialist with plain English expertise to prepare the plain English guides. APRA proposes having separate guides for different industries (APRA has identified 29 different categories of guide), rather than a single guide covering all licences and has provided an early draft of the Guide for Hotels. APRA submits that it is not appropriate to require it to consult on the content or form of the guides; however APRA is publishing the draft guides on its website and inviting comments from interested parties, including advising the relevant representative bodies. APRA submits that the guides will be finalised by 30 June 2014.
466. APRA rejects the proposal to require plain English application forms, submitting that redrafting of the numerous licence schemes is a significant task and would require industry consultation. APRA submits that it is in the process of tariff simplification and review. APRA notes that the Copyright Tribunal has jurisdiction over the terms of all of APRA's licences and APRA is concerned that the conditions of authorisation should not seek to impede the exercise of that jurisdiction.
467. As discussed previously, APRA has engaged Resolve Advisors to design an improved ADR system for disputes between APRA and its members and licensees (discussed in the following section).

Proposed alternative dispute resolution scheme

468. APRA engaged Resolve Advisors to design an independent ADR system to assist with the resolution of disputes between APRA and licensees, APRA and members and between APRA members.
469. Resolve Advisors conducted a series of stakeholder consultations and has designed a scheme for licensee disputes. APRA and Resolve Advisors decided that it was appropriate to design the scheme for members separately, submitting that a member scheme would cover different disputants and warrants different experts and a different cost structure.

Consultation on proposed ADR scheme

470. Prior to the pre-decision conference, the ACCC sought submissions from interested parties regarding the ADR scheme proposed by Resolve Advisors.
471. Overall the AHA, Lounge, Mr Crain and LPA support the ADR scheme. Arts Law is supportive of the scheme in concept, noting issues with APRA's existing ADR process. The Australian Small Business Commissioner supports the scheme, particularly the options for negotiation and mediation and the use of a resolution facilitator.
472. The Victorian Small Business Commissioner submits that Resolve Advisors' proposed scheme is unnecessarily complex, and the Commissioner does not support the role of facilitator or the inclusion of non-binding decisions. The Commissioner suggests that parties could use Small Business Commissioners or other mediators to resolve disputes.
473. Nightlife queries whether the proposed ADR scheme makes it easier to access a fair, independent, transparent and cost effective resolution for all parties relative to the current system.
474. APRA supports the ADR scheme proposed by Resolve Advisors and asks that the condition of authorisation be modified to reflect the proposed scheme and allow minor modifications to the system (APRA provided possible amendments to the drafting of the condition).
475. APRA submits that it is not appropriate to instruct Resolve Advisors to proceed with implementation of the ADR scheme until the ACCC has published its conditions relating to ADR. APRA submits that it is therefore not possible to implement the new ADR system by 30 June 2014. APRA proposes that the condition of authorisation require APRA to implement the scheme by the later of 30 June 2014 or 10 weeks after the ACCC's determination, and submits that a more realistic timeline for implementation of the members' scheme is 31 December 2014.
476. Interested parties also provided comments on the following specific issues:
- Fees and costs***
477. The AHA submits that the cost of ADR matters should be met by APRA, other than a modest filing fee. Nightlife similarly supports charging a filing fee only for applications to the ADR scheme. Clubs Australia objects to the proposed fee structure, submitting that all fees should be covered by APRA noting that most clubs are time-poor unsophisticated licensees, in contrast to APRA. Clubs Australia submits that the fees will act as a disincentive for small licensees to use the system.
478. Mr Crain and Arts Law submit that APRA members should not have to pay a fee to use the scheme.
479. LPA submits that the circumstances where fees will be waived could be better explained.
480. The Australian Small Business Commissioner submits that the cost of mediation for small businesses should be kept as low as possible.

481. APRA submits that if the ADR scheme is to be partially external, as proposed, then costs should be partially shared between the parties in dispute in order to increase independence and stakeholder engagement in the scheme. Following the pre-decision conference, the AHA and APRA agreed that the ADR filing fees should be adjusted and that APRA should cover costs for the expert/mediator for amounts in dispute of \$10,000 or less. APRA submits that this fee structure will be trialled for 12 months.

Coverage of the scheme

482. APRA submits that the dispute process should primarily focus on disputes of fact between APRA and individual licensees, rather than the reasonableness of licence schemes.
483. The AHA submits that coverage of the scheme should include disputes about reasonableness of licence schemes.
484. Arts Law is concerned that the scheme to date does not address member disputes. Arts Law submits that licensor disputes are fundamentally different and the ADR model would need substantial adjustment to deal effectively with licensor disputes. The ACCC has since clarified for Arts Law that a members' scheme is being developed separately from the licensee scheme.

Selection of dispute facilitator and experts

485. The AHA submits that interested parties should be involved in selection of the panel of experts.
486. Mr Crain has some suggestions about the composition of the panel of experts/mediators, including the addition of an independent musician/writer member. Nightlife is also concerned that the dispute resolvers may not be equipped to understand the licensing environment. Nightlife notes that the Small Business Commissioners have put themselves forward as an alternative to the ADR scheme, however Nightlife submits that it is not clear that this is a viable alternative.
487. LPA has several suggestions to assist with maintaining the independence of the dispute facilitator and experts. LPA asks that the role of the facilitator should be clarified in the ADR documentation.
488. APRA has some reservations about stakeholders using the Small Business Commissioners to resolve licensee disputes, when compared to using a panel of experts as proposed under the ADR scheme.

Other matters

489. LPA submits that the options for progressing through the proposed scheme could be better explained in the documentation because if APRA can escalate a matter to a more costly option it could act as a disincentive for applicants.
490. The ALLM submits that APRA licences and ancillary documents should be written in plain English because clear agreement between the parties about rights and obligations would prevent disputes and litigation. Nightlife likewise submits that pending tariff simplification and publication of the plain English guides, there would be much less need for dispute resolution.

491. Mr Hardie submits that some areas of discussion were excluded from Resolve Advisors' consultation on the ADR scheme. Mr Hardie submits that the scheme should be applied in a way that reflects the principals in the Code.
492. The Australian Small Business Commissioner submits that face-to-face meetings are important in ADR.
493. The parties who provided submissions about the ADR scheme supported public reporting about the scheme. The AHA submits that ADR decisions should be published on the APRA website within two days of release.

Appointment of facilitator

494. Under Resolve Advisors' proposed ADR scheme, a facilitator would be appointed by APRA to run the scheme. APRA recommends that Resolve Advisors be appointed as the dispute facilitator.
495. APRA submits that Resolve Advisors is best placed to act as facilitator, including because of its role in designing the system and its consultation with stakeholders.
496. APRA submits that Resolve Advisors is independent of APRA. APRA considers that there are several factors that would contribute to the independence of the facilitator, including:
- stakeholders nominate experts and mediators to the panel
 - the ability of an applicant to bypass the facilitator direct to mediation or determination
 - reporting by the facilitator to APRA and other parties, including KPIs
 - publication of binding determinations
 - a relatively long term contract between APRA and the facilitator and remuneration that is not tied to the number or results of resolutions.
497. The ACCC and APRA sought submissions from interested parties about the proposed appointment.
498. Ms Slingo, Casinos and Resorts Australasia, the AHA and LPA indicated that they did not have a concern with the appointment of Resolve Advisors.
499. An interested party, Mr Crain, Mr Hardie and Boomtick submit that Resolve Advisors is not sufficiently independent to run the scheme. Mr Hardie submits that the independence of the facilitator is imperative and could be achieved by the relevant Government body appointing an independent facilitator paid for by a levy on APRA.

ADR Committee

500. At the pre-decision conference, the ACCC suggested requiring APRA to form an ADR committee, comprised of APRA members and licensees, to inform the decisions of the facilitator. Proposed responsibilities included appointing the facilitator and committee members, seeking feedback on and reviewing the

scheme, and monitoring the scheme's budget. The ACCC sought submissions from interested parties about the proposed ADR committee.

501. Mr Crain, the AHA, the ALLM, LPA, Arts Law and Mr Hardie (supported by the WA Nightclub Association, Boomtick and an anonymous APRA licensee) support the introduction of a committee funded by APRA and with a range of responsibilities. Nightlife considers that the committee could mostly be run remotely with members covering their own costs. Mr Hardie (and others), as well as LPA, Nightlife and the ALLM see the committee as a way of progressing a more independent, transparent or representative ADR scheme.
502. LPA considers that additional responsibilities of the committee should include approving a code of ethics/code of conduct for the facilitator. Arts Law submits that the committee should administer guidelines for access to low cost or pro bono ADR legal support for financially disadvantaged members. Mr Hardie (and others) support the committee conducting research of overseas licensing schemes, and introducing a process to ensure transparency and consistency of the ADR process for all licensees. Mr Crain submits that the committee should have the power to make binding decisions. The ALLM submits that the committee should take guidance from a Small Business Commissioner or a Law Institute about best practice.
503. Mr Crain submits that the committee should be comprised of two unsigned writer members, a signed/fully employed member, a representative of the APRA Board and the facilitator, initially appointed by the ACCC or APRA members and reappointed by the committee. The AHA submits that the committee should at least be comprised of representatives of APRA, the AHA, Nightlife and other interested parties. LPA submits that the size of the committee should be manageable; for example, it may not be necessary to include APRA members as APRA can represent the interests of members. Arts Law suggests a structure that allows for two sub-committees – one for licensees and one for members. Arts Law submits that there needs to be transparent guidelines established around appointment and tenure (which should be for a fixed period) to ensure independence. Nightlife would be willing to join the ADR committee and suggests that a representative from the ACCC act as the independent Chair.
504. Resolve Advisors notes the distinction between a governance committee and an advisory committee and the relevant considerations for each. For example, Resolve Advisors submits that a governance committee requires a formal governance structure while an advisory committee will not provide independence. Resolve Advisors suggests that possible alternatives to ensure independence include having the facilitator report to the ACCC, or requiring specific tasks (such as selecting the pool of experts or setting KPIs) to be conducted with consultation.
505. Resolve Advisors suggests it may be necessary to have separate committees for member and licensee schemes (or the member scheme could be considered by the APRA Board to avoid overlapping roles).
506. APRA has reservations about the proposed ADR committee, submitting that there is no demonstrated need for an additional layer of bureaucracy, expense and formality in a system designed to deal with relatively few disputes. APRA submits that expenses would include fees paid to the members, remuneration of

the Chair and costs of meetings, in addition to the costs of the facilitator and the ADR scheme, all of which would effectively be paid by APRA's members. APRA does not consider that a committee funded by APRA will assist with the actual and perceived independence of the ADR scheme.

507. APRA also anticipates considerable difficulty in the appointment and management of such a committee. For example, it would be difficult to appoint two members that are representative of members, noting the divergence of views. Further, APRA asks who should be responsible for making the appointments.

Submissions in relation to the revised proposed conditions

508. After the completion of the pre-decision conference, the ACCC revised the draft conditions of authorisation in light of Resolve Advisors' proposed ADR scheme and the issues raised at the pre-decision conference and in submissions (summarised above). The ACCC consulted on these revised conditions.
509. In respect of the ADR condition, the AHA considers that representative bodies should be able to nominate for the ADR committee (a point which is supported by LPA and APRA) and that the committee should have the capacity to apply to the ACCC for a formal variation to the authorisation, if required. In relation to the pool of experts, the AHA would prefer that equal weight be given to persons experienced in the commercial arena rather than just singling out the legal profession. The AHA also submits that APRA should be required to produce a single licence application form.
510. LPA supports the conditions relating to the plain English guides to licensing and opt out/licence back and would like an opportunity to comment on the draft guides for live performance licence schemes. LPA supports the condition relating to the ADR scheme but is concerned that applicants with disputes above \$10,000 may be deterred from utilising the scheme because of the costs (including any costs for advice sought by the expert). LPA suggests that a cap on the amount payable under Options 2-4 be capped and that the facilitator should make applicants aware of the likely potential costs involved for referring the dispute to any of the ADR Options.
511. APRA provided minor comments on the drafting of conditions C1 and C2.
512. In respect of condition C3, APRA suggests that:
- the indicative timeframe for expert opinions should be increased from 20 days to 30-60 days
 - APRA (and not just the applicant) should be able to seek resolution of a dispute by the Copyright Tribunal
 - the clause that allows an expert to obtain any advice the expert deems necessary should be deleted or qualified, noting the potential cost to APRA
 - the facilitator, rather than APRA, should be responsible for ensuring the qualifications of experts and mediators

- the date for establishment of the Committee should be increased from 31 August 2014 to three months after the date of authorisation. Further, the threshold royalties to distinguish the two categories of members should be increased from \$1000 to \$3000 and members who have not earned royalties for two consecutive distribution periods should not be eligible
 - the appointment of an auditor is not necessary and adds significant cost. APRA considers that it is instead for the ACCC to assess compliance on receipt of APRA's reports
 - it is inappropriate to adopt the same cost structure for disputes between APRA and its members as for disputes between APRA and licensees. References to members in Schedule A should be deleted and member fees should instead be decided during the design of the member scheme.
513. LPA does not object to APRA's request for the removal of the requirement to appoint an auditor on the condition that re-authorised is granted for a maximum period of three years, such that any need for an auditor can be reviewed at that time. LPA also agrees that increasing the timeframe for expert opinions to 30-60 days is more realistic. LPA submits that APRA should be required to attempt to resolve disputes before seeking resolution of a dispute by the Copyright Tribunal.
514. The ACCC has considered these submissions from interested parties and has decided that it is appropriate to incorporate these suggestions to some degree. In particular:
- the conditions incorporate APRA's minor comments on the drafting of conditions C1 and C2
 - the indicative timeframe for expert opinions remains at 20 days but the time to prepare the written opinion has been increased to 30-60 days
 - APRA can seek resolution of a dispute by the Copyright Tribunal or by a court if a non-binding written opinion has been delivered under Option 3
 - APRA must procure that the facilitator ensures the qualifications of experts and mediators
 - the date for establishment of the committee has been changed to within three months after the date of authorisation
 - membership of the committee is open to both members/licensees and their representatives, such as associations
 - the threshold amount of royalties to distinguish the two categories of members on the committee has been increased from \$1000 to \$3000. In making this change, the ACCC took account of further confidential information provided by APRA that supports this being a more appropriate split of active members. APRA submits that the \$3,000 threshold will produce two pools of members, each of which is more

representative of the members in the category, and is consistent with the threshold for licensee representation

- the pool of experts must include persons with relevant industry and/or commercial experience as well as barristers and/or former judges
- while the condition does not impose a cap on the costs payable for large disputes under Options 2-4, the facilitator is now required to inform applicants about the costs likely to be incurred for the particular dispute.

515. The condition now requires APRA to commission one independent review of the scheme, rather than requiring two audits, during the period of authorisation. The ACCC is conscious of the additional cost that an audit would impose on APRA, noting that APRA will also be liable for most of the costs of the ADR scheme and the facilitator. However the ACCC considers that it is important to have a review of the ADR scheme in its initial years of operation. In order to reduce the cost to APRA, the ACCC is requiring one independent review, rather than two formal audits.
516. The ACCC has retained the ability of an expert to obtain any advice they deem necessary (noting that this is a feature of the existing ADR system). The ACCC also considers that it is appropriate for an expert to seek external advice on topics that are not in their area of expertise. However, the ACCC recognises that the cost of this additional advice could be significant. As such, the ACCC has required that the estimated costs of obtaining that advice be approved by APRA and the applicant, or by the facilitator, or by another independent expert at the request of APRA or the applicant. The ACCC considers that this is an appropriate check to ensure the cost of additional advice does not become unreasonable.
517. In respect of fees and charges, the ACCC notes that the filing fees included in the condition are maximum fees only and do not preclude the facilitator setting lower fees for member (or licensee) disputes. Similarly, while the ACCC considers that the default should be that the cost of a mediator/expert is shared between the parties for disputes of \$10,000 or above, the facilitator, the mediator/expert or APRA have the discretion to waive or reduce the fees if it is considered appropriate to do so.
518. The ACCC notes that under the Act, it would not be possible for the ACCC to vary the authorisation on the advice of the committee. However, it would be open to APRA (as the applicant) to seek a variation to the authorisation if required. The ACCC may consider revoking the authorisation if there is a material change in circumstance or if APRA fails to comply with a condition of authorisation, or if it becomes apparent that the authorisation has been granted on the basis of false or misleading information.⁵³
519. The ACCC has decided not to impose a condition requiring APRA to create a single or simplified licence application form. This is discussed at paragraph 230 above.

⁵³ See subsection 91B(3) of the Act.

Conditions of authorisation

520. The ACCC has decided to impose three conditions of authorisation in granting re-authorisation to APRA's arrangements. As discussed in the **Public detriment** and **Conditions** sections of this determination, the conditions relate to APRA publishing a plain English guide to licensing, publishing a plain English guide to opt out/licence back and implementing a revised ADR scheme. The conditions in full are at **Attachment B**.
521. These conditions retain the intent of the conditions set out in the draft determination, but have been restructured and redrafted. Relevant elements of the first two conditions from the draft determination (originally imposed by the ACCC in 2010) have been, in substance, incorporated into the new condition relating to the ADR scheme (new condition C3). Specifically, relevant elements of the existing condition requiring an expert to consider appropriate discounts off blanket licences have been included at new C3.3(vi) and Schedule E while the existing ADR reporting condition has been superseded by the reporting requirements at new C3.14-C3.16.
522. The condition relating to the plain English guide to licensing (condition C1) is largely unchanged from the draft determination. The proposed condition relating to the plain English guide to opt out/licence back (condition C2) has been amended to require that the guide include guidance about the minimum information an applicant must provide APRA in order to opt out/licence back. The guides are required to be published within three months of the ACCC's final determination.
523. The ADR scheme required under condition C3 must include the following:
- four options for resolving disputes (informal resolution, mediation, expert opinion, binding determination)
 - an independent dispute resolution facilitator appointed by APRA and approved by the ACCC to manage the ADR scheme. While noting APRA's submission, since the ACCC will be approving the facilitator, the ACCC has not required a long term contract between APRA and the facilitator or remuneration that is not tied to the number or results of resolutions as part of the condition
 - a pool of independent mediators and independent experts, including barristers and/or former judges and persons with relevant industry and/or commercial experience, established by the facilitator. The ACCC expects the facilitator to consult stakeholders about appropriate members of the pool
 - the option for an applicant to request that a matter be managed by an independent expert rather than the facilitator
 - broad coverage, including both disputes and complaints lodged by current/potential licensees and members

- applicant contribution to costs of a matter in most cases:
 - tiered filing fees payable for disputes
 - mediator/expert charges shared between the parties for disputed amounts of \$10,000 or more and for non-monetary disputes where the applicant pays licence fees to APRA or receives payments from APRA of \$10,000 or more
 - the facilitator, mediator/expert or the parties can decide that APRA will pay all fees/charges
 - fees and charges are not payable for complaints (the facilitator has discretion to decide if a matter is a dispute or a complaint).
- a consultative committee (comprised of small and large licensees and members, associations and APRA nominated by the facilitator) to provide feedback and other advisory input to APRA and to the facilitator in relation to the operation of the ADR scheme
- publication of binding determinations
- annual reporting about the ADR scheme prepared by the facilitator and provided to the ACCC by APRA
- an independent review of the ADR scheme (in time for the authorisation expiring) by an independent reviewer appointed by APRA and approved by the ACCC
- a plain English guide to the ADR scheme
- a public website for the ADR scheme that is separate from APRA's own website
- implementation of the ADR scheme for both APRA members and APRA licensees by 31 March 2015. While the ACCC would encourage APRA to implement the schemes prior to this date if possible, this deadline allows the facilitator and the committee to take more time in preparing the schemes if necessary.

524. As noted above, the condition relating to ADR has been drafted in light of the revised ADR scheme proposed by Resolve Advisors and the issues raised at the pre-decision conferences and submissions. The ACCC considers that Resolve Advisors' proposed ADR scheme is an appropriate and practical response to the ADR features outlined by the ACCC in its draft determination. Relevantly, the proposed scheme also appears to have the support of most stakeholders and APRA. As such, condition of authorisation C3 has been designed with the key aspects of Resolve Advisors' ADR scheme in mind. Accordingly, the ACCC considers that condition C3 will not impose an undue burden on APRA having regard to the reduction in relevant public detriment that the adoption of the revised ADR scheme is likely to achieve.

525. In addition to the proposals of Resolve Advisors, the condition requires: a consultative committee, nominated by the independent facilitator; an independent review of the ADR scheme; ACCC approval of the independent facilitator and independent reviewer appointed by APRA; and mediator/expert charges to be covered by APRA for disputed amounts of less than \$10,000.
526. The ACCC has decided to include a consultative committee as part of the ADR scheme in order to provide ongoing stakeholder input into the scheme. While the condition C3 outlines some of the functions of the committee, it will be the facilitator who decides the specific workings of the committee. Relevantly, the ACCC envisages that this would be an advisory committee, rather than a governance committee, which provides feedback to the facilitator in order to maintain the relevance of the scheme. The ACCC does not intend for the committee to have decision making powers.
527. The ADR scheme is intended to supersede APRA's existing expert determination process. In particular, Option 4 under condition C3 will require the Scheme to include a binding determination process, and the pool of independent experts will include barristers/former judges.
528. The ACCC acknowledges the willingness of APRA to make changes, in consultation with various stakeholders, during this re-authorisation process; most notably in relation to the plain English guides and a revised ADR system. Nonetheless, as noted in the draft determination, the ACCC has imposed the conditions of authorisation to address the outstanding concerns of interested parties relating to the identified detriment and to ensure that the measures proposed by APRA are effective, so that the public benefits will continue to outweigh the detriments to the public.

Determination

The application

529. 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.

The net public benefit test

530. For the reasons outlined in this determination, and subject to the attached conditions, the ACCC is satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B), and 90(8) of the Act are met. 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. 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.
531. The ACCC therefore **grants** authorisation to applications A91367-A91375 **on condition that** APRA complies with the attached conditions C1, C2 and C3.

Conduct for which the ACCC grants authorisation

532. The ACCC revokes authorisations A91187-A91194 and A91211 and grants 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 until 28 June 2019. The conditions are set out in **Attachment B**.
533. Further, the re-authorisation is in respect of the arrangements as amended by APRA as it stands at the time authorisation is granted. Any changes to the arrangements during the term of the authorisation would not be covered by the authorisation.
534. This determination is made on 6 June 2014.

Interim authorisation

535. On 15 October 2013, the ACCC sought submissions from interested parties on whether to grant interim authorisation to APRA in light of the fact that the previous authorisation would expire on 31 October 2013.
536. Submissions were generally supportive of the granting of interim authorisation.
537. On 24 October 2013, the ACCC granted conditional interim authorisation under subsection 91(2) of the Act to avoid disruption to APRA, its members and licensees when the previous authorisation expired on 31 October 2013.
538. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

539. This determination is made on 6 June 2014. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 28 June 2014.

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 – Conditions of authorisation

Condition C1 – Transparency of licence fees

- C1.1 Within 3 months of the ACCC's final determination being made, APRA must publish comprehensive plain English guides that outline each of the licence categories individually. The guides, which must also be published as a single document, must also include:
- (i) 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
 - (ii) an introduction that includes an overview of the licence categories and their use
 - (iii) definitions of each of the licence categories - for example, Recorded music for dancing use, Dance party, Featured music event and TV/large screen
 - (iv) 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
 - (v) guidance on whether fees are negotiable and if so in what circumstances
 - (vi) information that encourages licensees to contact APRA if they have any concerns, including the types of assistance available and the numbers to call
 - (vii) the options available to licensees for resolving a dispute about licence fees, or about other licence terms and conditions
 - (viii) links to the application forms for the licences and licence categories.
- C1.2 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.
- C1.3 APRA must provide a copy of the plain English guide to the ACCC, prior to publishing.
- C1.4 APRA must publish a revised, and up to date, version of the guide by 30 June each year (if any aspect of the content of the guide will no longer be current as at that date).

Condition C2 – Comprehensive plain English guide and education campaign for the opt out and licence back provisions

C2.1 Within 3 months of the ACCC's final determination being made, APRA must take the following steps to increase awareness of the licence back and opt out provisions provided by APRA:

- (i) APRA must publish on the APRA website, and via an email distribution to members and licensees, a comprehensive plain English guide explaining:
 - (a) the purpose, scope and content of the opt out and licence back provisions
 - (b) the situations where using those provisions might be of benefit to members and licensees
 - (c) the steps involved in applying to make use of the licence back and opt out provisions (including guidance about the minimum information that an applicant must provide to APRA)
 - (d) 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

- (ii) at least once each calendar year, including a standard plain English paragraph in correspondence sent to licensees and members, 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 C2.1(i) above, as well as information about how to apply
- (iii) launching 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
- (iv) as part of APRA's educational campaign in this regard, APRA must offer to send representatives out to talk to groups of 5 or more members or licensees (as relevant) that could benefit from these facilities, and to otherwise make representatives available to talk to such members or licensees (as relevant).

Condition C3 – Alternative Dispute Resolution

Scheme Requirements

- C3.1 APRA must establish an alternative dispute resolution ('**ADR**') scheme (the '**Scheme**') that is managed by an independent dispute resolution facilitator (the '**Facilitator**') for the resolution of any disputes between APRA and a licensee, or potential licensee of copyright held by APRA ('**Licensee**') or a member or potential member of APRA ('**Member**'), including complaints made to APRA by or on behalf of a Member or Licensee. The objective of the Scheme is to resolve disputes in a timely, efficient and effective manner.
- C3.2 The Scheme must include four options for resolving a dispute or complaint, or an aspect of a dispute or complaint ('**Dispute**') notified by a Member or Licensee, or by an authorised representative of one or more Members or Licensees ('**Applicant**'), as follows:
- (i) Option 1 - informal resolution: informal resolution of the Dispute in a manner facilitated by the Facilitator, with an indicative timeframe of 20 business days for resolution of the Dispute or referral of the Dispute to Options 2, 3 or 4
 - (ii) Option 2 - mediation: external mediation by an independent mediator ('**Independent Mediator**'), with an indicative timeframe of 20 business days for the resolution of the Dispute (from the date on which the Dispute is referred to Option 2)
 - (iii) Option 3 - expert opinion: a non-binding written expert opinion (including reasons) delivered by an appropriately qualified or experienced independent expert ('**Independent Expert**'), with an indicative timeframe of 20 business days for the resolution of the Dispute, and 30-60 days for preparation of the written opinion from the date on which the Dispute is referred to Option 3
 - (iv) Option 4 - binding determination: a binding written determination (including reasons) delivered by an Independent Expert, with an indicative timeframe (from the date on which the Dispute is referred to Option 4) of 30-60 days for resolution of the Dispute, or of 90 days for a Dispute involving more than one Applicant).
- C3.3 The Scheme must provide that:
- (i) a Dispute, or an aspect of a Dispute, may be referred to Options 2, 3 or 4 at any time by agreement between APRA and the Applicant, including agreement about the identity of the Independent Mediator or Independent Expert (as relevant). The resolution of each Dispute must commence with Option 1, but APRA may not withhold agreement to progress to another Option merely because the Applicant has not agreed to continue or complete the processes available under Option 1 first. If agreement cannot be reached about the identity of the Independent Mediator or Independent Expert or about progressing a Dispute to another Option, the Facilitator must refer these preliminary matters for determination (at APRA's cost) by an Independent Expert

(who must not then be otherwise appointed to hear the Dispute under the Scheme).

- (ii) the resolution of Disputes under Options 2, 3 and 4 must be carried out on terms, and in accordance with processes and procedures, established by the Independent Mediator or Independent Expert (as relevant) in accordance with practices commonly adopted in other ADR schemes for ADR options of that kind
- (iii) the Applicant (or APRA, if a non-binding written opinion has been delivered under Option 3) may also seek resolution of the Dispute by the Copyright Tribunal or by a court, rather than under the Scheme
- (iv) the Facilitator must, if requested by an Applicant, refer a function of the Facilitator set out in Schedule C (in respect of the Applicant's Dispute) to an Independent Expert (at APRA's cost)
- (v) subject to condition C3.3(vii) and conditions C3.14-C3.16, the resolution of Disputes under the Scheme is to be carried out confidentially unless all parties to a particular Dispute agree otherwise in respect of that Dispute.
- (vi) each Independent Expert may obtain such advice (including, but not limited to, economic or financial advice) as the Independent Expert considers reasonably appropriate for the purposes of resolving a Dispute, provided that the estimated costs of obtaining that advice have been approved by APRA and the Applicant, or by the Facilitator, or by another Independent Expert (at APRA's cost) if APRA or the Applicant is dissatisfied with the Facilitator's decision to approve (or not approve) those estimated costs. The actual costs of any such advice are to be included in the costs of the Independent Expert in relation to the Dispute.
- (vii) each Independent Expert who issues a binding written determination under Option 4 is to prepare and issue, to the Facilitator, a public version of that determination (excluding any confidential information of APRA, the Applicant, a Licensee or a Member) within 7 days of the date of the determination.

C3.4 APRA must procure that the Facilitator ensures that each Independent Mediator or Independent Expert:

- (i) is suitably qualified, by reason of their training and / or experience, for resolving the kinds of disputes, and for carrying out the kinds of dispute resolution processes, for which they are engaged under the Scheme
- (ii) has an understanding of copyright or the ability to properly acquire such understanding
- (iii) takes into account the matters referred to in Schedule E, if requested to do so by the Applicant.

Fees and Charges

C3.5 The Scheme must also provide that:

- (i) the fees and charges payable by Applicants under the Scheme, including provision for the reduction or waiver of those fees and charges, will be set in accordance with Schedule A ('**Fees and Charges**')
- (ii) the relevant Fees and Charges for Option 1 are payable for all Disputes that are then referred to Options 2, 3 or 4, even if the Applicant does not complete the processes that are available under Option 1
- (iii) the Fees and Charges are payable to the Facilitator (who will then distribute them as appropriate)
- (iv) other than the Fees and Charges, each party must bear their own costs of resolving the Dispute
- (v) an Applicant may withdraw a dispute from the Scheme, except after a hearing when awaiting a written expert opinion or a binding determination under Option 3 or 4 above (in which case the Applicant may only withdraw if the withdrawal is the result of APRA and the Applicant having reached an agreed settlement of the Dispute). Unless otherwise agreed as part of the settlement of the Dispute, the Applicant must pay all Fees and Charges incurred up until the date of withdrawal.

Establishment and role of consultative committee

C3.6 Within 3 months of the ACCC's final determination being made, APRA must ensure that the Facilitator establishes, and thereafter maintains, a consultative committee (the '**Committee**'). APRA must also permit the Facilitator to establish and maintain sub-committees of the Committee where the Facilitator considers it appropriate to do so. APRA must ensure that the members of the Committee (as appointed or reappointed from time to time by the Facilitator) consist of an equal number of representatives of:

- (i) Licensees whose annual licence fees payable to APRA are \$3,000 or less
- (ii) Licensees whose annual licence fees payable to APRA are over \$3,000
- (iii) Members whose annual royalty receipts from APRA are \$3,000 or less, other than members who have not received any royalties from APRA in the previous 24 months
- (iv) Members whose annual royalty receipts from APRA are over \$3,000

and a representative of APRA. Where a representative of a Licensee or a Member is appointed to the Committee, that appointment must be as a representative of one Licensee or Member (as relevant), but a representative of a Licensee may also represent the interests of one or more other Licensees, and a representative of a Member may also represent the interests of one or more other Members.

If an insufficient number of Members or Licensees in a particular category are willing to be members of the Committee, APRA must ensure that the Facilitator

appoints another Member or Licensee (as relevant) to fill that position on the Committee.

C3.7 APRA must also ensure that:

- (i) the Committee operates with the objective set out in Schedule B and performs the functions set out in Schedule B
- (ii) the Facilitator periodically invites all Members and Licensees to nominate for the Committee, and takes all nominations and other input from Members and Licensees into account in determining the members of the Committee
- (iii) the annual funding provided by APRA for the operation of the Scheme (including the costs of the Facilitator but otherwise excluding costs incurred by APRA in connection with individual Disputes) are adequate for the operation of the Scheme (taking into account the level of funding recommended by the Committee)
- (iv) it provides to the Committee all information requested by the Committee that the Committee considers necessary or appropriate for performing its functions under Schedule B (including information about the actual costs of operating the Scheme).

Appointment and role of the Facilitator

C3.8 Within 1 month of the ACCC's final determination, APRA must appoint a Facilitator to operate and manage the Scheme, and must then ensure that there is an appointed Facilitator in place at all times throughout the term of the authorisation. The Facilitator (including any replacement Facilitator) must:

- (i) be approved or reapproved by the ACCC, within 20 business days, in accordance with condition C3.12 and for a specified period of time, prior to the appointment or reappointment taking effect for the purposes of these Conditions
- (ii) have specialist training in ADR and have a detailed understanding and experience of dispute resolution practice and procedures which do not involve litigation
- (iii) have the capacity to determine the most appropriate alternative dispute resolution procedures in particular circumstances
- (iv) have an understanding of copyright or the capacity to quickly acquire such an understanding.

C3.9 APRA must ensure that each Facilitator:

- (i) operates with the objective set out in Schedule C, and performs the functions set out in Schedule C
- (ii) complies with conditions C3.3(i) and (iv)
- (iii) does not perform any work for APRA other than work relating to the Scheme or to any extensions of the Scheme

- (iv) can be, and is, removed by APRA from the position of Facilitator if the ACCC considers, having regard to the performance of the Facilitator in that role, that the Facilitator is likely to fail to adequately perform the functions set out in Schedule C.

Appointment and role of the Independent Reviewer

C3.10 No later than 18 months before the date on which this authorisation expires, APRA must appoint an independent reviewer ('**Independent Reviewer**'), to review and report on the operation and management of the Scheme. The Independent Reviewer must:

- (i) be approved by the ACCC, within 20 business days and in accordance with condition C3.12, prior to the appointment taking effect for the purposes of these conditions
- (ii) have substantial experience in reviewing the operation and performance of alternative dispute resolution schemes.

C3.11 APRA must ensure that the Independent Reviewer operates with the objective set out in Schedule D, and performs the functions set out in Schedule D.

ACCC approval of the Facilitator and Independent Reviewer

C3.12 In considering whether to approve a proposed Facilitator or a proposed Independent Reviewer, the ACCC may take into account any matter it considers relevant, including:

- (i) any previous or existing relationships between APRA (or a Member or Licensee) and the proposed Facilitator or proposed Independent Reviewer (as relevant)
- (ii) the proposed remuneration arrangements for the proposed Facilitator or proposed Independent Reviewer (as relevant).

C3.13 Prior to the ACCC making a decision about whether to approve a proposed Facilitator, APRA must provide to the ACCC:

- (i) the agreement, or proposed agreement, setting out the terms and conditions on which the proposed Facilitator or proposed Independent Reviewer (as relevant) will be engaged in connection with the Scheme
- (ii) any other information requested by the ACCC that the ACCC considers relevant.

Annual Reporting

C3.14 APRA must provide the ACCC with an annual public report, for publication on the public register of authorisations maintained in accordance with Section 89 of the *Competition and Consumer Act*, about Disputes notified to APRA under the Scheme for the previous calendar year (the '**ADR Report**'), in accordance with condition C3.15 and C3.16.

C3.15 Each ADR Report must be submitted to the ACCC prior to 1 March of each year and must concern disputes for the 12 months ending 31 December of each year.

C3.16 Each ADR Report must include (broken down into Licensee Disputes and Member Disputes):

- (i) the number of Disputes considered, and the number of Disputes resolved, under each Option
- (ii) a statistical summary, in weeks, of the time taken to refer Disputes from Option 1 to Options 2, 3 and 4, and of the time taken to resolve Disputes under each of Options 2, 3 and 4, measured from the time at which the Dispute was referred to that Option
- (iii) a summary, for Options 2, 3, and 4, of the subject matter of the Disputes considered under that Option
- (iv) for Disputes considered under Options 2, 3, or 4 but not resolved, a summary of the reasons why those Disputes were not resolved
- (v) a summary, for each Option, of the range of Fees and Charges, and of the average Fees and Charges, incurred by Applicants for Disputes considered under that Option, and of the extent to which the fees and disbursements of Independent Mediators or Independent Experts (as relevant) were borne by APRA
- (vi) a summary of feedback received by APRA, and by the Facilitator, in relation to the operation of the Scheme, including the feedback and recommendations provided by the Committee (see Schedule B).

Other matters

C3.17 APRA must establish and maintain a link to the Scheme website in a prominent location on its own website.

C3.18 APRA must make the Scheme fully available for Disputes involving Licensees by 31 March 2015 and for Disputes involving Members by 31 March 2015.

C3.19 APRA must educate licensees, potential licensees, industry bodies and members about the operation of the new Scheme by publishing a plain English guide to the process within 6 months of the ACCC's final determination, and by making that guide available in a prominent position on its website, and on request.

SCHEDULE A – Fees and Charges (Condition C3.5)

Option 1

| Action | Maximum fee to Licensee / Member |
|---|----------------------------------|
| Initial phone discussion with the Facilitator (up to 45 minutes) | No charge |
| Subsequent involvement of the Facilitator (Option 1) where the amount in dispute is less than \$1,500.00 or there is a Dispute on matters that are not monetary. | \$50.00 incl. GST |
| Subsequent involvement of the Facilitator (Option 1) where the amount in dispute is \$1,500.00 to \$3,000.00 | \$75.00 incl. GST |
| Subsequent involvement of the Facilitator (Option 1) where the amount in dispute is over \$3,000.00 | \$150.00 incl. GST |

1. Each Member or Licensee who wishes to become a party to a Dispute must pay this fee (if any) separately.
2. Where the Dispute relates to only a part of an amount specified by APRA, the undisputed parts of that amount are not to be taken into account in determining the fee payable by the Applicant.
3. The fee payable by an Applicant may be waived or reduced by the Facilitator, or with the agreement of APRA. The Facilitator must waive the fee where the Facilitator determines that the Dispute consists of a complaint.

Options 2, 3 and 4

1. Subject to paragraphs 2 and 3 below, each Applicant who is a party to a Dispute must pay 50% of the fees charged, and 50% of the disbursements or other costs reasonably incurred, by the Independent Mediator or Independent Expert for the resolution of the Dispute, each divided equally amongst all Applicants who are parties to the Dispute and who have agreed to that particular Option for resolution of the Dispute.

2. Subject to paragraph 3 below, fees and costs are only payable by an Applicant where the Dispute is about:
 - (i) the terms and conditions of a grant, or potential grant, of a licence of copyright by a Member to APRA, or by APRA to a Licensee
 - (ii) the implementation of the terms and conditions of a grant, or potential grant, of a licence of copyright by a Member to APRA, or by APRA to a Licenseeor where the Facilitator determines that fees and costs are to be payable in respect of the Dispute.
3. Fees and costs are not payable in respect of a Dispute where:
 - (i) the amount disputed by a Member or Licensee is less than \$10,000
 - (ii) the Dispute does not involve a disputed amount, but:
 - (a) in the case of a Licensee, the annual amount payable by the Licensee for the licensing (or potential licensing) of copyright by APRA to the Licensee is less than \$10,000
 - (b) in the case of a Member, the amount paid by APRA for the licensing of copyright by the Member to APRA in the previous twelve months is less than \$10,000; or
 - (iii) the Facilitator determines that the Dispute consists of a complaint.
4. Where the Dispute relates to only a part of an amount specified by APRA, the undisputed parts of that amount are not to be taken into account in determining the fees and costs payable by the Applicant.
5. The fees and costs payable by an Applicant may be waived or reduced by the Facilitator, the Independent Mediator or the Independent Expert (as relevant) or with the agreement of APRA.

SCHEDULE B – objective and functions of the Committee (Condition C3.7)

The objective of the Committee is to provide feedback and other advisory input to APRA and to the Facilitator in relation to the operation of the Scheme.

The functions of the Committee must include:

- (i) monitoring the operation of the Scheme, including the actual costs of the Scheme
- (ii) receiving feedback on the Scheme and communicating that feedback to the Facilitator and APRA (where appropriate)
- (iii) in consultation with the Facilitator and for each calendar year, making an annual recommendation to APRA about the budget for the operation of the Scheme
- (iv) making other recommendations to the Facilitator and to APRA about the operation of the Scheme.

but not intervening in individual Disputes.

SCHEDULE C – objective and functions of the Facilitator (Condition C3.9)

The objective of the Facilitator is to manage the operation of the Scheme, and to participate in the resolution of Disputes, in a way that facilitates the resolution of Disputes in a timely, efficient and effective manner.

The functions of the Facilitator must include:

- (i) ensuring the effective set-up (in the case of the initial Facilitator) and the effective operation of the Scheme
- (ii) appointing, reappointing, replacing and terminating the appointment of members of the Committee from time to time
- (iii) informing Members and Licensees about the Scheme (including informing individual Members or Licensees (as relevant) about the costs that those Members or Licensees are likely to incur under the Scheme in relation to a particular dispute) and being available to answer enquiries and questions about the Scheme
- (iv) resolving Disputes under Option 1, including by discussing issues with Applicants on a confidential basis, assisting with communications between APRA and Applicants, and narrowing down issues between APRA and Applicants
- (v) establishing a pool of suitably qualified or experienced Independent Mediators and Independent Experts (the '**DR Pool**'), including barristers and / or former judges, and persons with relevant industry and / or commercial experience, across a range of areas of expertise and geographic locations, and reviewing the composition of the pool annually
- (vi) making recommendations to APRA and to Applicants about the suitability of Options 2, 3 or 4 for resolving a particular Dispute, including recommendations about appropriate Independent Mediators or Independent Experts for resolving that Dispute (whether drawn from the DR Pool or otherwise), with the objective of resolving the Dispute quickly and efficiently
- (vii) collecting and distributing the Fees and Charges
- (viii) assisting the Independent Mediator or Independent Expert in the making of timetabling and other administrative arrangements for resolving each Dispute under Options 2, 3 and 4, including:
 - (a) arranging meetings or conferences
 - (b) receiving submissions from the parties
 - (c) distributing submissions and other relevant materials to the parties and to the Independent Mediator or Independent Expert (as relevant)

with the objective of ensuring that the resolution of each Dispute progresses in a timely and efficient manner (including the objective of ensuring that all preliminary steps in relation to a dispute be completed without the need for travel)

- (ix) preparing the annual ADR Report (see condition C3.14 to C3.16)
- (x) establishing and maintaining a public website for the Scheme that is separate from APRA's own website, and publishing on that website information and documents relating to the Scheme, including:
 - (a) the plain English guide to the operation of the Scheme (see condition C3.19)
 - (b) each public ADR Report, which the Facilitator must publish no later than 1 business day after receiving it from the relevant Independent Expert, and the public version of the report of the Independent Reviewer (see Schedule D)
 - (c) the curriculum vitae of each Independent Mediator and Independent Expert in the DR Pool
 - (d) the public version of each binding written determination under Option 4 (see condition C3.3(vii)).

SCHEDULE D – Independent Reviewer (Condition C3.11)

The objective of the Independent Reviewer is to monitor and report on the operation of the Scheme (including whether the Scheme is resolving Disputes in a timely, efficient and effective manner).

The functions of the Independent Reviewer must include:

- (i) reviewing:
 - (a) the operation and performance of the Scheme (including without limitation the processes and procedures established under the Scheme, and the extent to which any concerns expressed by Members and or Licensees have been addressed by APRA and / or the Facilitator), and
 - (b) the performance of the Facilitator,

in accordance with the requirements of condition C3 and the Scheme's objective of resolving Disputes in a timely, efficient and effective manner.
- (ii) as part of item (i) above, obtaining feedback from APRA, the Committee, Members, Licensees and Independent Mediators/Independent Experts about the operation and performance of the Scheme, and the performance of the Facilitator
- (iii) no later than six months before this authorisation expires, preparing a report, and providing the report to the ACCC and publishing a public version of the report, on the matters reviewed under items (i) and (ii) above in respect of the period between the commencement of the Scheme and that date that is twelve months before this authorisation expires.

SCHEDULE E – Relevant Matters (condition C3.4)

1. Consider whether APRA offered the user (being a 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 Independent Expert's opinion, APRA offered the user (being a 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 Independent 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.