



# Determination

Application for revocation of A91367 - A91375 and the substitution of  
authorisation AA1000433

lodged by

**Australasian Performing Right Association Ltd**

in respect of

arrangements for the acquisition and licensing of performing rights and  
communication rights in musical works

Authorisation number: AA1000433

Date 13 July 2020

Commissioners: Sims  
Keogh  
Rickard  
Court  
Ridgeway

## Summary

**The ACCC has decided to grant conditional authorisation to enable the Australasian Performing Right Association (APRA) to continue its arrangements for the acquisition and licensing of performing rights in musical works. This conduct has been previously authorised since 1999.**

**The ACCC grants authorisation for a further four years, until 4 August 2024.**

APRA is a copyright collecting society that provides a centralised means for granting copyright licences to those wishing to broadcast or perform its members' 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 to APRA. APRA offers licences to end users (referred to here as "licensees" or "users") which permit those licensees to use APRA member's musical works. The fees (royalties) from these licences is one way in which APRA members earn an income from the music they have created.

APRA seeks re-authorisation of its arrangements that, in broad terms, cover its:

- 'input arrangements'
  - the assignment of performing and communication rights by members to APRA and the terms on which membership of APRA is granted, and
  - APRA's reciprocal arrangements with overseas collecting societies by which, for the most part, the collecting societies grant each other the exclusive right to license works they respectively control
- 'output arrangements' – the licensing arrangements between APRA and the users of musical works – APRA generally offers users a 'blanket licence' that covers its entire repertoire, and
- 'distribution arrangements' – by which APRA distributes to relevant members the fees it has collected from licensees/users

(collectively, the **proposed conduct**)

The proposed conduct, in earlier forms, has been authorised by the ACCC on a number of occasions, most recently in 2014.

APRA is a near monopoly with exclusive rights to its members' works and those of its equivalent overseas collecting societies, which covers a large proportion of the worldwide repertoire of musical works including almost all commercially popular works. As the exclusive licensor of rights to what is an essential input to many users' businesses, APRA has substantial market power in relation to its dealings with users in terms of licensing arrangements.

Many of the concerns raised by interested parties about the proposed conduct are about the level of licence fees that APRA charges.

The legislative framework under which collection societies such as APRA operate, the *Copyright Act 1968 (Cth)* (the Copyright Act), makes provision for disputes about the level of APRA's licence fees, and other aspects of APRA's arrangements, to be heard and dealt with by the Copyright Tribunal of Australia (the Copyright Tribunal). The Copyright Tribunal is intended to act as a constraint on the exercise of market power by collecting societies, by

making decisions with respect to the reasonable terms and conditions of copyright licences, including licence fees.

The ACCC does not have a role in approving or regulating APRA's arrangements as a whole, or in approving or regulating APRA's licence fees. However, concerns about the level of APRA's licence fees are relevant to the ACCC's assessment about whether APRA's collective licensing arrangements are likely to result in overall public benefits.

### *Likely future with and without the conduct*

The ACCC has assessed the benefits to the public from the proposed conduct and the likely impact on competition for the acquisition and supply of performing rights in relation to musical works in Australia, having regard to the likely future with and without the conduct for which authorisation is sought.

The ACCC considers that the most likely future without the proposed conduct is that APRA would hold its members' rights on a non-exclusive basis, instead of the exclusive basis on which APRA currently obtains them. That is, the original rights holder would retain the capacity to deal with their works.

The ACCC considers that whether or not APRA held these rights on an exclusive or non-exclusive basis, APRA would remain the only major collecting society in Australia for performing rights. The ACCC considers that APRA's dominant position in the market would be maintained, as barriers to entry would remain high due to sunk costs, economies of scale and scope, and network effects.

For some APRA members, APRA holding their rights on a non-exclusive basis would open up opportunities to negotiate directly with users seeking a licence for their works beyond the limited opportunity available under APRA's opt-out and licence back conditions.

However, for many users, for the period of authorisation contemplated (up to five years), direct dealing with rights holders is unlikely to be desirable or feasible.

Accordingly, whether APRA or not takes exclusive assignment of its members' rights, or holds these rights on a non-exclusive basis (which would not require ACCC authorisation), many users would continue to have no feasible alternative other than to acquire their performing rights licence from APRA. This means that, whether or not APRA held its members, and other rights holders, right on an exclusive or non-exclusive basis, APRA would likely still have significant market power in acquiring and supplying performing rights in relation to musical works in Australia.

### *Public benefits*

The ACCC considers that APRA taking exclusive assignment of its members' works is likely to result in significant public benefits from efficiencies in rights enforcement, compliance monitoring of the use of licenced works, and the preservation of incentives for the future creation of musical works.

The ACCC considers that APRA's arrangements are also likely to result in some public benefits in the form of transaction cost savings. These savings primarily relate to avoiding the increased complexity of case by case negotiations between APRA and users in situations where users source licences for some works directly from APRA members but seek an APRA blanket licence for the remainder of the musical works they use.

The ACCC also considers that APRA's arrangements are likely to result in a public benefit in avoiding the additional administrative and legal costs that would be incurred in APRA moving

from its current arrangements to a system where it obtains rights from its members on a non-exclusive basis.

### *Public detriments*

However, the ACCC considers that the arrangements for which APRA has sought authorisation are also likely to result in significant public detriment. Exclusivity removes the competitive constraint that otherwise would arise from the potential for direct dealing between APRA members and some classes of users.

This can translate into higher fees for businesses that want to play music, inefficient under-utilisation of APRA's repertoire and increased problems for users in their commercial dealings between users with APRA.

This can also create inefficiencies for APRA 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. If so, the proposed conduct may reduce pressure on APRA to reduce cost inefficiency. As a result, there may be less of the revenue pool available for distribution to members.

Further, the proposed conduct is likely to create inefficiencies in the production of musical works and stifle innovation and adoption of new technologies and business models.

As noted above, the ACCC considers that even if APRA did not take exclusive assignment of members' rights, APRA would have significant market power, and as a consequence of this market power significant public detriments are likely to arise from APRA's arrangements. However, the magnitude of these public detriments is likely to be greater with APRA taking exclusive assignment of its members' rights.

The ACCC has received a large number of submissions from interested parties on a wide range of issues associated with APRA's arrangements. Concerns about APRA's arrangements are clearly reflected in these submissions.

Licensees and relevant industry associations in particular have raised concerns about the level and structure of fees, the lack of transparency around licensing arrangements and the way in which APRA administers and enforces licences.

Concerns have also been raised, in particular by some smaller APRA members, that there is a lack of transparency around how licence fees are distributed and the system used to ensure that performers receive their rightful royalties.

### *Conditions of authorisation*

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 reduce the public detriment arising from its substantial market power, while still allowing for the clear efficiencies available from the proposed conduct to be realised, to the benefit of APRA's members and licence holders.

When APRA's arrangements were last authorised in 2014, the ACCC imposed conditions which focused on requiring APRA to provide more information to licensees and members about, and better publicise, its licence schemes and the situations in which APRA members could take reassignment of their rights to deal directly with users. The ACCC also required

APRA to develop a new alternative dispute resolution scheme (ADR scheme) to provide an affordable and practical way for both members and licensees to resolve disputes with APRA.

The ACCC considers that these initiatives, particularly the ADR scheme, have been largely effective in reducing public detriment arising from the proposed conduct. Accordingly, they are retained as conditions of authorisation in this decision. The ACCC has formulated new conditions to enhance the effectiveness of previous initiatives in reducing public detriment.

First, while feedback about APRA's ADR scheme from those who have used it has been generally positive, some interested parties have raised concerns that take up of the scheme by licensees has not been as high as anticipated due to a lack of awareness among licensees about the scheme. To address this issue, the ACCC has imposed a condition requiring APRA to take steps to better publicise the availability of the scheme. The ACCC has also imposed conditions to strengthen the independence of the ADR scheme.

Second, the ACCC has taken steps to further improve the transparency of APRA's licensing and distribution arrangements. Greater transparency about licence fees is intended to assist users in negotiations with APRA and allow users to make informed decisions about acquiring licences from APRA. Greater transparency about distribution arrangements is intended to assist in making APRA accountable to its members, making it more likely that APRA members are remunerated in proportion to the value of actual performance of their works.

The conditions imposed by the ACCC require APRA to publish its methodology for calculating its licence rates for each licence category, including descriptions of the data used, any analyses or evaluations undertaken, and the matters taken into consideration in determining each licence rate. The conditions also require APRA to publish an explanation of the matters it has taken into account any time it increases a licence rate by more than rate of growth in CPI.

The conditions also provide that if the ACCC is not satisfied that information published by APRA about how it sets its licence rates is sufficiently clear and detailed to provide licensees with a reasonable understanding of the methodologies APRA adopts, the ACCC can require APRA to appoint an independent person, to be approved by the ACCC and funded by APRA, to prepare an independent report explaining the methodologies adopted by APRA in determining licence rates.

In relation to APRA's distribution of royalties to its members, the ACCC has imposed conditions of authorisation requiring APRA to:

- publish details of accounting and distribution of licence revenue and, if requested by a licensee, provide detailed information about particular rights payments made pursuant to a licence
- report on how it monitors music played and how APRA uses this data for the purpose of determining royalty distributions, and the extent to which APRA is improving its collection mechanisms in light of the possibilities opened up by the growth in music recognition and other technology, and
- report on the distribution of royalties among its members. Specifically the proportion of licence revenue collected which is distributed to international affiliate societies and the top ten percent, twenty five percent and fifty percent of APRA members in terms of revenue received.

Finally, the ACCC has imposed a condition of authorisation requiring APRA to publish an annual transparency report which includes information on rights revenue, APRA's operating costs, distributions to members and amounts received from and paid to overseas collecting societies.

The ACCC considers that these conditions will reduce the public detriments likely to result from the conduct for which APRA has sought authorisation.

The ACCC considers overall that, with these conditions, the conduct for which APRA has sought authorisation is likely to result in public benefits that would outweigh the likely public detriments, including any public detriments in respect of any lessening of competition.

### *Length of authorisation*

The ACCC considers that it will take some time for APRA to implement the significant changes required by the conditions of authorisation and for any impact of these changes on the public benefits and detriment resulting from APRA's arrangements to be observed. However, given the significance of the concerns that the conditions are intended to mitigate, the ACCC considers that an earlier review of the authorisation, and the public benefits and detriments that have resulted, than the five years for which APRA sought authorisation is appropriate.

Accordingly, the ACCC has decided to grant conditional authorisation for a further four years.

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## 1. The application for revocation and substitution

- 1.1. On 24 December 2018, Australasian Performing Right Association Ltd (**APRA**) lodged an application to revoke authorisations A91367-A91375 and substitute authorisation AA1000433 for the ones revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). APRA is seeking re-authorisation to continue its arrangements for the acquisition and licensing of performing and communication rights in music for five years. This application for re-authorisation AA1000433 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).<sup>1</sup>
- 1.2. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the competition law but do not substantially lessen competition and/or are likely to result in overall public benefits.<sup>2</sup>
- 1.3. On 15 May 2019, APRA also requested interim authorisation to enable it to continue to engage in the arrangements the subject of the application while the ACCC is considering the application for re-authorisation, as the existing authorisations were due to expire on 28 June 2019. On 27 June 2019, the ACCC granted interim authorisation under subsection 91(2) of the Act, which suspended the operation of the expiring authorisations and granted interim authorisation in substitution. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.

### Scope of the ACCC's assessment

- 1.4. The power of collecting societies to impose fees and charges on businesses that play music in a commercial setting is established under the *Copyright Act 1968* (Cth) (**Copyright Act**). Businesses that play music must have the permission of the creators of that music to do so, and the creators are entitled to charge for the use of their music.
- 1.5. In APRA's case, the creators of musical works (songwriters) assign their rights to APRA to issue licences for the use of their works, and collect royalties on their behalf. This enables royalties to be collected jointly, rather than requiring every songwriter to individually collect their own royalties.
- 1.6. The ACCC has a limited role in relation to collecting societies. Because APRA acts on behalf of songwriters who may be considered to be each other's competitors, their arrangements may risk breaching competition laws. The ACCC can grant 'authorisation', which gives legal protection that addresses this competition law risk.
- 1.7. Many of the concerns raised by interested parties regarding APRA's arrangements are about the licence fees APRA charges. These concerns are relevant context to the ACCC's assessment about whether APRA's collective licensing arrangements are likely to result in overall public benefits. Like other businesses, creators of music are entitled to set fees for use of the music they create. This application for re-authorisation, and the ACCC's assessment of it, focuses on APRA's arrangements through which those fees are set, rather than the level of any particular fee (which will vary according to the type of use and other factors).

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<sup>1</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 6, available: [ACCC public register](#).

<sup>2</sup> Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at <https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger>

- 1.8. In this respect, the ACCC does not have a role in approving or regulating APRA's arrangements as a whole or in approving APRA's licence fees. The ACCC's role through the authorisation process is limited to considering whether those aspects of APRA's arrangements that may breach competition law are likely to result in a net public benefit such that they should be authorised.
- 1.9. As discussed further at paragraphs 2.18 to 2.23, the legislative framework under which collection societies such as APRA operate (the Copyright Act) provides a process for disputes about APRA's licence schemes to be determined by the Copyright Tribunal of Australia (the Copyright Tribunal).

## APRA

- 1.10. 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.
- 1.11. APRA provides a centralised means of:
- granting licences to those wishing to perform in public or communicate its members musical works and associated literary works, and
  - distributing royalties received pursuant to such licences to composers, songwriters and music publishers.
- 1.12. APRA has approximately 103,000 members and over 145,000 licensees (businesses which pay APRA a licence fee to perform in public or communicate musical works).<sup>3</sup>
- 1.13. Under the 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 '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. As such, for the purposes of the Copyright Act, APRA is a 'voluntary' collecting society.
- 1.14. APRA is the only collecting society in Australia that provides public performance licences covering the copyright in the musical works (e.g. lyrics, composition etc.). A public performance licence from APRA is a blanket licence that covers APRA's entire repertoire.
- 1.15. The 'repertoire' APRA administers includes works by Australian composers/songwriters and, through agreements with largely similar institutions overseas, works from overseas composers/songwriters. 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.<sup>4</sup>

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<sup>3</sup> APRA AMCOS, 2019 Year in Review, p.1-6, available: [https://apraamcos.com.au/media/YIR/2019/APRA\\_AMCOS\\_Year\\_in\\_Review\\_2019.pdf](https://apraamcos.com.au/media/YIR/2019/APRA_AMCOS_Year_in_Review_2019.pdf)

<sup>4</sup> APRA AMCOS, APRA Distribution Practices, March 2019, p. 4, available: <http://apraamcos.com.au/media/Distribution-Rules-and-Practices/APRADistributionPractices.pdf>

- 1.16. APRA also administers the day-to-day business of the Australasian Mechanical Copyright Owners Society (**AMCOS**). In the 2018/19 financial year, APRA had:
- group revenue, inclusive of AMCOS, of \$471.8 million
  - total royalties payable to songwriters, publishers and affiliated societies (net distributable revenue) of \$410.9 million, again, inclusive of AMCOS, including
    - digital revenue \$175.4 million
    - public performance \$92.4 million
    - television \$81.1 million
    - international \$47.3 million
    - Streaming 105 million.<sup>5</sup>
- 1.17. Of APRA's 103,637 members in the 2018/19 financial year, 44,892 earned royalties.<sup>6</sup>

## The Proposed Conduct

- 1.18. APRA is seeking authorisation for five years to continue its arrangements for the acquisition and licensing of performing and communication rights in music. The arrangements cover:
- (a) 'input arrangements'
    - the assignment of performing and communication rights by members to APRA and the terms on which membership of APRA is granted, and
    - APRA's reciprocal arrangements with overseas collecting societies by which, for the most part, the collecting societies grant each other the exclusive right to license works they respectively control
  - (b) 'output arrangements' – the licensing arrangements between APRA and the users of musical works, and
  - (c) 'distribution arrangements' – by which APRA distributes to relevant members the fees it has collected from licensees/users.<sup>7</sup>

## Previous authorisations

- 1.19. APRA's arrangements were first authorised (conditionally) by the Australian Competition Tribunal (the **Tribunal**) in 1999, following the ACCC's determination denying authorisation to APRA's applications, other than for its overseas arrangements. The 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**) scheme.

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<sup>5</sup> APRA AMCOS, 2019 Year in Review, p.3-5, available: [https://apraamcos.com.au/media/YIR/2019/APRA\\_AMCOS\\_Year\\_in\\_Review\\_2019.pdf](https://apraamcos.com.au/media/YIR/2019/APRA_AMCOS_Year_in_Review_2019.pdf)

<sup>6</sup> APRA AMCOS, 2019 Year in Review, p.6, available: [https://apraamcos.com.au/media/YIR/2019/APRA\\_AMCOS\\_Year\\_in\\_Review\\_2019.pdf](https://apraamcos.com.au/media/YIR/2019/APRA_AMCOS_Year_in_Review_2019.pdf)

<sup>7</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 6, available: [ACCC public register](#).

- 1.20. In 2006, the ACCC re-authorised APRA's arrangements for a further four years and in 2010, conditionally re-authorised APRA's arrangements for another three and a half years.
- 1.21. 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 2.31 to 2.33). The ACCC did not object to this notification.
- 1.22. In 2014, the ACCC conditionally re-authorised APRA's arrangements, subject to conditions requiring APRA to revise its ADR scheme and publish plain English guides relating to its licensing regime, and members' ability to opt out and obtain licences back.

## 2. Background

### Copyright

- 2.1. 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.
- 2.2. 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).
- 2.3. 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.
- 2.4. 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.
- 2.5. 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 reproduce or copy a musical work onto, for example, a record, cassette or compact disc and
  - synchronisation rights – the right to use music on a soundtrack of a film or video.
- 2.6. 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.
- 2.7. 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

- 2.8. APRA deals in two distinct parts of the copyright bundle, being the right to perform a work in public and the right to communicate a work to the public. This determination refers to these two copyrights together as performing rights, consistent with APRA's approach.
- 2.9. 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.
- 2.10. 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. This can be either directly, for example by playing a musical recording containing the work; or indirectly, for example where works are embedded in television or radio broadcasts shown or heard in these establishments.
- 2.11. 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.

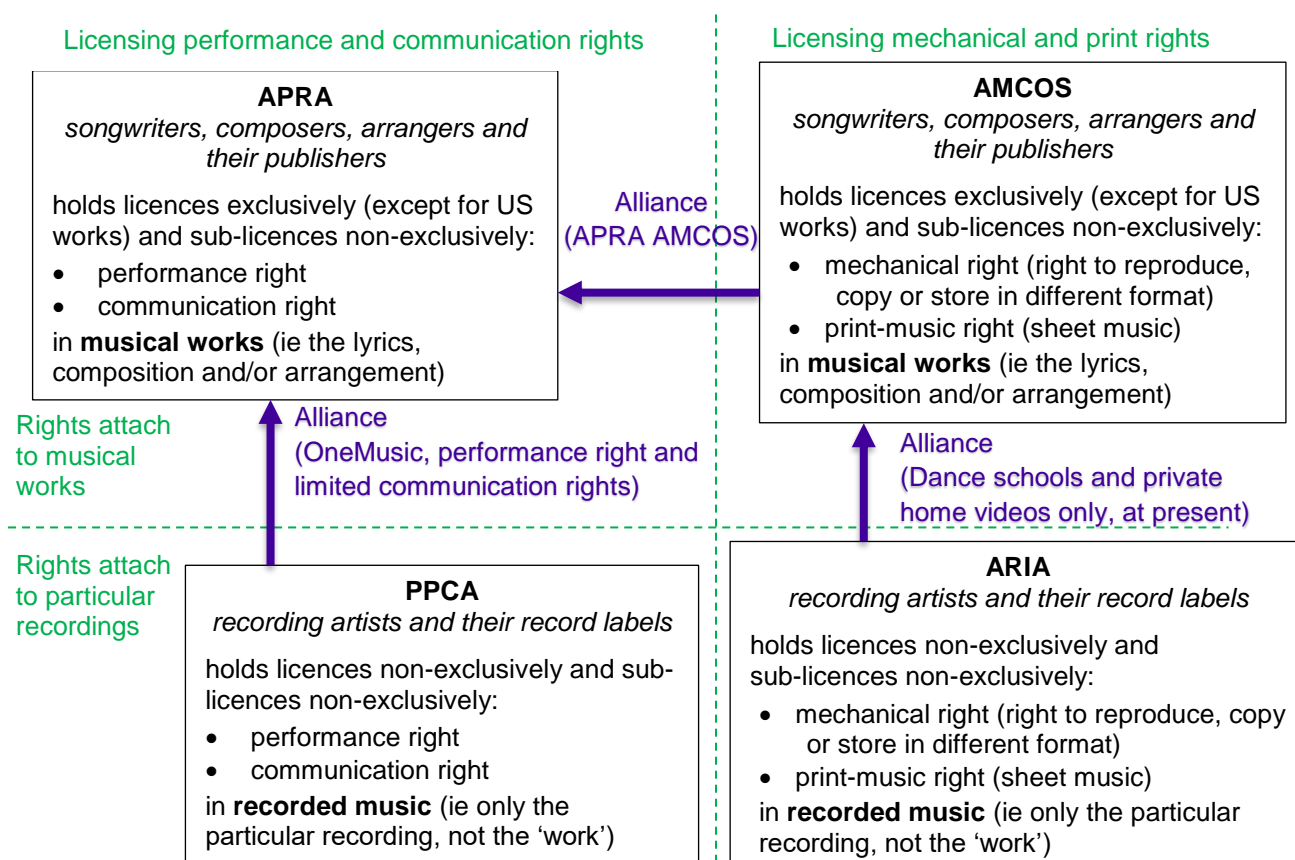
- 2.12. For particular types of use, some licensees may require a licence from APRA and another collecting society. For example, the Phonographic Performance Company of Australia Limited (the **PPCA**) represents the interests of recording artists and record labels and is the collecting society for the 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 for the musical work and one from the PPCA for the sound recording.
- 2.13. 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 2.31 to 2.33) 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.

## Other copyright collecting societies

- 2.14. APRA has negotiated alliances with other music licence fee collection entities. Its initial alliance was with AMCOS in 1997. More recently APRA is implementing a tripartite alliance between it, AMCOS and the PPCA. This will also incorporate AMCOS' very limited alliance with the Australian Recording Industry Association (**ARIA**). See the diagram below for an explanation of the role of each of the music licence fee collecting entities.



## Diagram of Australian music collecting societies, their roles and alliances



- 2.15. Of most relevance in the current context is the PPCA. The PPCA manages sound recording rights in a similar manner to APRA's management of performing rights. As noted, most commercial music users require both licences. Examples of businesses that do not require sound recording rights include venues that only perform live music and fitness centres that perform rerecorded APRA works (that is, they do not use sound recordings by the original recording artist, instead they use sound alike recordings not represented by PPCA). The PPCA also offers blanket licences covering its entire repertoire, acting as a one stop shop for sound recording rights.
- 2.16. However, unlike APRA, the PPCA only holds its members' rights on a non-exclusive basis. This means PPCA members (individually or, more commonly, a record company acting collectively on behalf of PPCA members signed to the record company) and music users are free to directly negotiate licences for use of the members works outside of the PPCA system.
- 2.17. As discussed below, APRA and the PPCA have recently formed a joint licensing initiative to deliver both performing rights and sound recording licences from a single point. This new operation, known as 'OneMusic', launched in July 2019. APRA operates OneMusic. The OneMusic licences also includes the relevant licences from AMCOS and, in some cases, ARIA for a segment of users including eisteddfod competitions and dance or music schools and teachers.

## The Copyright Tribunal

- 2.18. 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.<sup>8</sup>
- 2.19. The *Copyright Act* provides for proposed and existing licence schemes<sup>9</sup> to be referred to the Copyright Tribunal by a licensor, a licensee or their representatives.<sup>10</sup> In addition, the Copyright Tribunal has the function of determining remuneration payable under the statutory licence schemes established by the *Copyright Act*.
- 2.20. 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.<sup>11</sup> 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.<sup>12</sup>
- 2.21. The Copyright Tribunal is required to have regard to relevant guidelines made by the ACCC in proceedings concerning certain copyright licences and licence schemes, if requested by a party.<sup>13</sup> The ACCC may also seek to become a party to such proceedings.<sup>14</sup>
- 2.22. In April 2019, the ACCC published revised guidelines to assist the Copyright Tribunal in the determination of copyright remuneration.<sup>15</sup> The guidelines are designed to assist in the determination of reasonable copyright remuneration in proceedings relating to voluntary licences and licence schemes before the Copyright Tribunal. The guidelines may also assist collecting societies and copyright users when negotiating reasonable copyright remuneration by providing insight into the economic framework that the ACCC considers could reasonably be adopted, and the approaches that can be used in applying that framework.
- 2.23. The guidelines detail matters the ACCC considers to be relevant to the Copyright Tribunal's determinations. In doing so, the range of principles in the guidelines may also assist licence negotiations and minimise resort to Copyright Tribunal proceedings.

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<sup>8</sup> Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited [2009] ACopyT 2, [30].

<sup>9</sup> Licence schemes are defined in s 136 of the *Copyright Act 1968* (Cth).

<sup>10</sup> See *Copyright Act 1968* (Cth) sections 154–156.

<sup>11</sup> See *Copyright Act 1968* (Cth) sections 154–156.

<sup>12</sup> Copyright Tribunal of Australia, *About the Tribunal*, viewed 4 April 2018, <<http://www.copyrighttribunal.gov.au/about>>

<sup>13</sup> *Copyright Act 1968* (Cth) s 157A

<sup>14</sup> *Copyright Act 1968* (Cth) s 157B

<sup>15</sup> Available at: <https://www.accc.gov.au/regulated-infrastructure/communications/intellectual-property/copyright-guidelines-2019>



## APRA's processes

### Input arrangements

- 2.24. Broadly, APRA's domestic input arrangements involve the exclusive 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, subject to APRA's opt out and licence back provisions discussed below.
- 2.25. APRA's international input arrangements are reciprocal arrangements with equivalent overseas copyright collection societies. The International Confederation of Societies of Authors and Composers (CISAC), of which APRA is a member, has established an international licensing system under which each affiliate society will grant to each other affiliate society an exclusive right to license the works in its repertoire in the society's respective territory. An exception to this is in respect of the arrangements with the affiliated societies operating in the USA. 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.
- 2.26. 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).
- 2.27. By virtue of its input arrangements, APRA repertoire includes a large proportion of the worldwide repertoire of musical works, including almost all commercially popular works.

### Output arrangements

- 2.28. APRA's output arrangements deal with the process by which it licenses music users to use the musical works in its repertoire. As noted above, 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. Users are categorised into licensee groups, with each group being the subject of an individual licence scheme (with different terms and conditions and fees) based on the category of use.
- 2.29. Where APRA and a licensee cannot agree on the price or terms of a licence, a licensee may request that the dispute be dealt with through APRA's alternative dispute resolution process established under the terms of the ACCC's previous authorisation (Resolution Pathways, discussed further below). Parties dissatisfied with licence terms offered by APRA may also seek review by the Copyright Tribunal, as discussed above.

- 2.30. 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.

### Opt out and licence back

- 2.31. APRA members, as a condition of joining APRA, agree to exclusively assign to APRA the performing rights in any current and future musical works in which they own copyright during the continuation of membership. However, this assignment is subject to two processes that can be used by members to manage their own rights (and thereby enter into licensing arrangements directly with users of their musical works):
- **Opt Out** allows a member to require APRA to reassign the performing rights in all, but only all, of the member's works in relation to a category of use (for example, live performance or broadcasting). APRA will not license any users of the works in the relevant category but will continue to exclusively manage the works in all other categories of use.
  - **Licence Back** allows a member to require APRA to grant to the member a non-exclusive licence in relation to any of the member's works, so that the member can enter into direct licensing arrangements with particular copyright users. APRA will continue to manage those rights for all other users in all categories of use.
- 2.32. Members seeking to opt out in respect of a category of use must give APRA at least three months' notice, to take effect either on 1 January or 1 July in any year, and may be required to pay a fee of up to \$200. For a licence back application, members must give APRA at least two weeks' notice of the specific use and user and may be required to pay a fee of up to \$200.<sup>16</sup>
- 2.33. In 2008, APRA introduced a "non-commercial licence back" option as part of its broader licence back arrangements. This permits members to license back particular work in relation to "the right to communicate to the public online" for non-commercial purposes.<sup>17</sup> As with other licence back arrangements, consent of all interested parties in the work is required. APRA defines "non-commercial purposes" to mean:<sup>18</sup>
- (i) *That there is no consideration or financial incentive whether directly or indirectly received by any party for the communication or any subsequent use of the work under any sub-licence; and*
  - (ii) *Any sub-licensee is a not for profit entity whose activities are not directed towards commercial advantage and that does not receive public or institutional funding.*

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<sup>16</sup> Note: APRA requires written notice of only one week in the case of an artist licensing the live performance of their own music, performance in a cinema movie, or the communication (broadcast or online) of their own songs. Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p 823, available: [ACCC public register](http://apraamcos.com.au/media/5908/managing-your-rights_optout.pdf); APRA AMCOS, Managing your APRA rights, August 2014 available: [http://apraamcos.com.au/media/5908/managing-your-rights\\_optout.pdf](http://apraamcos.com.au/media/5908/managing-your-rights_optout.pdf)

<sup>17</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 3, article 17(k)(i), available: [ACCC public register](https://apraamcos.com.au/media/3526/17i_request-for-licence-back-for-non-commercial-purposes-online_distributed.pdf); APRA AMCOS 2019, *Request for licence back for non-commercial purposes online*, available: [https://apraamcos.com.au/media/3526/17i\\_request-for-licence-back-for-non-commercial-purposes-online\\_distributed.pdf](https://apraamcos.com.au/media/3526/17i_request-for-licence-back-for-non-commercial-purposes-online_distributed.pdf)

<sup>18</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 3, article 17(j), available: [ACCC public register](https://apraamcos.com.au/media/3526/17j_request-for-licence-back-for-non-commercial-purposes-online_distributed.pdf)

## Distribution rules

### APRA's constitution

- 2.34. APRA's constitution requires APRA, after payment of all expenses incidental to its operations, to allocate and distribute all moneys it receives 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.<sup>19</sup> APRA's Board of Directors has the legal power and responsibility for determining the distribution rules by which APRA's revenue is allocated and distributed.<sup>20</sup>
- 2.35. APRA submits that its expense to revenue ratio in 2018, as a standalone entity, is 14.45 per cent.<sup>21</sup> APRA submits that this is compared to an average expense to revenue ratio for overseas societies of 15.4 per cent.<sup>22</sup> APRA states this second figure is calculated in accordance with the CISAC-approved method, which requires foreign revenue to be excluded.<sup>23</sup>
- 2.36. APRA's distribution rules include the '50 per cent rule', under which at least 50 per cent of any distribution must be paid to the relevant writer(s).<sup>24</sup> This rule is consistent with the rules of the CISAC.<sup>25</sup>

### Distributions process

- 2.37. After the deductions for management costs noted above and its outreach work, APRA distributes the licence fees it collects to its members according to its distribution arrangements.
- 2.38. APRA distributes revenue arising out of the licensing of music in accordance with its distribution rules. Generally, APRA distributes money collected under specific licence schemes in accordance with information collected about music use under those schemes. For example, revenue from radio is distributed according to detailed logs provided by radio stations. Digital download revenue is distributed to the owners of tracks actually sold, and Spotify revenue is distributed to the owners of tracks.<sup>26</sup>
- 2.39. Many of APRA's licence agreements require music users to report to APRA usage details of the musical works which they have publicly performed or transmitted.<sup>27</sup> For example, free-to-air television broadcasters provide APRA with monthly

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<sup>19</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 3, article 93, available: [ACCC public register](#).

<sup>20</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 3, article 93, available: [ACCC public register](#).

<sup>21</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 18, available: [ACCC public register](#).

<sup>22</sup> APRA AMCOS, *2018 Affiliate Society Expense Ratios*, available: [http://apraamcos.com.au/media/financials/comparative\\_international\\_expense\\_to\\_revenue\\_ratios.pdf](http://apraamcos.com.au/media/financials/comparative_international_expense_to_revenue_ratios.pdf)

<sup>23</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 22, available: [ACCC public register](#).

<sup>24</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 11, rules 9 & 10, available: [ACCC public register](#).

<sup>25</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 23, available: [ACCC public register](#).

<sup>26</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2, p. 22, available: [ACCC public register](#).

<sup>27</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2, page 3, available: [ACCC public register](#).

broadcast logs detailing what programs went to air, along with cue sheets listing the individual works used in a programme.<sup>28</sup>

- 2.40. Similarly, commercial radio broadcasters provide APRA with a quarterly file listing the works they broadcast (identified by title, composer and performer) and the number of times each work was put to air. APRA also obtains information for non-playlist music, for example music used in advertisements and episodic material. For community radio broadcasters, APRA employs a simplified sample-based data collection process to take account of their relative size and funding. However, because many community radio stations do not use computerised music scheduling software, returns are often hand-written which significantly increases the manual administrative workload required for APRA to process them.<sup>29</sup>
- 2.41. APRA also conducts a full census analysis of music synchronised on film and publicly performed in cinemas and maintains a database of film cue sheets.<sup>30</sup>
- 2.42. APRA also uses additional reporting methods such as data from background music suppliers, DJ Monitor units and other music recognition technology (**MRT**) to collect play data in venues such as nightclubs. MRT uses audio fingerprinting algorithms to automatically identify audio tracks.<sup>31</sup>
- 2.43. APRA states that it uses the information provided by its licensees, together with information from members, affiliate societies and third parties where appropriate, to identify the copyright owner(s) of each work that has been performed or transmitted, and to calculate their royalty entitlements.<sup>32</sup>
- 2.44. Separate distribution revenue “pools” are created from the licence fees received from individual licensees (for example: each commercial radio station) or from groups of similar licensees (for example: network TV stations, cinemas, or airlines).<sup>33</sup>
- 2.45. APRA states that it endeavours to ensure that licence fees received from each music user are paid directly to the musical works performed or broadcasted by that user, providing it is economically feasible to do so.<sup>34</sup> To ensure the costs of collecting and processing data from licensees is commensurate with the value of the licence fees received, APRA uses a combination of distribution techniques, in accordance with its distribution rules:
- Direct distributions, where licence fees from a client are distributed directly to usage data collected from that client (for example, commercial TV).
  - Sample distributions, where a sample set of data is processed from a representative source or group of sources, and licence fees are pooled together to be distributed against that data set (for example, community radio).

<sup>28</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 11, rule 20, available: [ACCC public register](#).

<sup>29</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2, page 23, available: [ACCC public register](#).

<sup>30</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2, page 23, available: [ACCC public register](#).

<sup>31</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, p. 32 & 35, available: [ACCC public register](#).

<sup>32</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, page 3, available: [ACCC public register](#).

<sup>33</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, p. 4, available: [ACCC public register](#).

<sup>34</sup>

- Analogous distributions, where data cannot be provided by a client and so licence fees are distributed against proxy data collected from a different source (for example, smaller online services).
- 2.46. APRA distributes royalties on a quarterly, six monthly or annual basis depending on the distribution category.<sup>35</sup> Where works are unidentifiable, relevant distribution credits are retained by APRA for three years, after which unidentified performances are deleted and unidentified account balances are returned to the distribution pool.<sup>36</sup>
- 2.47. APRA's distribution rules provide processes for complaints handling and dispute resolution processes, as well as processes for members and affiliate societies to seek an adjustment to an incorrect distribution.<sup>37</sup>

## OneMusic

- 2.48. OneMusic Australia is a joint licensing initiative between APRA, AMCOS and PPCA, the aim of which is to provide a single source of music licences for businesses.<sup>38</sup>
- 2.49. As noted above, PPCA is the non-exclusive licensee of owners of copyright in certain sound recordings, which it licenses for public performance in a similar manner to the APRA blanket licensing system. Most users of recorded music (in the context of public performance) require licences from both the musical work and the sound recording.
- 2.50. APRA submits that this can cause a degree of confusion in the market, where a business that has obtained a licence from APRA is resistant to a claim from the PPCA (and vice versa) because it is difficult for the lay person to understand that there are two sets of rights involved in the public performance of recorded music.<sup>39</sup>
- 2.51. APRA, trading as OneMusic Australia, acts as agent for PPCA in licensing PPCA's public performance rights. OneMusic Australia manages licensing, customer service, invoicing, payment collection, enforcement, the OneMusic website and eCommerce.<sup>40</sup>
- 2.52. The PPCA and APRA continue to distribute licence revenue (in the case of PPCA after the deduction of a fixed agreed commission by APRA) to their respective members, licensors and affiliates. There is no change to the membership arrangements of either society as a result of the introduction of OneMusic.<sup>41</sup>

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<sup>35</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, p. 4, available: [ACCC public register](#).

<sup>36</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, p. 5, available: [ACCC public register](#).

<sup>37</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 11, rules 8, 12 & 13, available: [ACCC public register](#).

<sup>38</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 24, available: [ACCC public register](#).

<sup>39</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 24, available: [ACCC public register](#).

<sup>40</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 24, available: [ACCC public register](#).

<sup>41</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 26, available: [ACCC public register](#).

- 2.53. APRA has stated that while the licences previously administered by APRA and the PPCA will in the future only be available through OneMusic, users who do not require both licences, for example because they do not require a sound recording licence or have sourced a sound recording licence directly, will be able to obtain a licence for only the APRA rights, or only the PPCA rights, through OneMusic.<sup>42</sup> In most cases, the licence fee will be 51.75 per cent of the fee charged if both sets of licences are required.<sup>43</sup>
- 2.54. OneMusic has been operating in New Zealand since 2014 and launched in Australia in July 2019.<sup>44</sup>
- 2.55. The House of Representatives Standing Committee released a report into the Australian music industry in March 2019. The Committee noted that:
- OneMusic Australia is a significant change in the licensing of the public performance of music and the way in which licenses are administered and license fees are calculated. As such, it is essential that the ACCC has access to the finalised OneMusic Australia scheme in order to properly assess and consider the conditions under which to grant re-authorisation of APRA.*<sup>45</sup>
- 2.56. Accordingly, one of the Committee's recommendations was that:
- the Australian Competition and Consumer Commission incorporate an assessment of the finalised OneMusic Australia licensing scheme when considering the re-authorisation of the Australian Performing Rights Association.*<sup>46</sup>

## CLEF

- 2.57. Since 2014, APRA has been developing a Copyright Licensing Enterprise Facility (CLEF) system. CLEF is designed as a whole of business platform to manage membership and licensing transactions.<sup>47</sup>
- 2.58. APRA submits that CLEF will be implemented incrementally from the fourth quarter of 2019 to the second quarter of 2020.<sup>48</sup> The initial phase will be a subset of APRA's public performance licensing business aligned with the OneMusic Australia initiative (discussed at paragraphs 2.48 to 2.56). Subsequent phases will support licences aligned with different business sectors.

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<sup>42</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 1, available: [ACCC public register](#).

<sup>43</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 2, available: [ACCC public register](#).

<sup>44</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 29, available: [ACCC public register](#).

<sup>45</sup> House of Representatives Standing Committee on Communications and the Arts *Report on the inquiry into the Australian music industry*, March 2019, p. 22, available: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Communications/Australianmusicindustry/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Communications/Australianmusicindustry/Report)

<sup>46</sup> House of Representatives Standing Committee on Communications and the Arts *Report on the inquiry into the Australian music industry*, March 2019, p. 22, available: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Communications/Australianmusicindustry/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Communications/Australianmusicindustry/Report)

<sup>47</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 8 & 28, available: [ACCC public register](#).

<sup>48</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 22, available: [ACCC public register](#).



- 2.59. APRA submits that CLEF will provide a more automated and integrated technical solution to facilitate the withdrawal of rights from APRA's repertoire (discussed at paragraph 4.302). APRA also submits that the CLEF system will improve distribution processing by allocating and distributing to an increased number of multiple sharers in individual works, and by processing significantly more data much more quickly.<sup>49</sup>
- 2.60. APRA submits that other parts of CLEF will continue to be incrementally implemented with an anticipated ultimate completion of the staged go live over the course of the 2020 calendar year.<sup>50</sup>

## APRA's Alternative Dispute Resolution Scheme

- 2.61. Under the conditions of the ACCC's 2014 authorisation, APRA was required to implement a revised ADR scheme managed by an independent facilitator approved by the ACCC. In April 2015, APRA launched 'Resolution Pathways', a new ADR facility administered by an independent provider, Resolve Advisors, and managed by resolution facilitator, Shirli Kirschner (**the Resolution Facilitator**).
- 2.62. As required by the conditions of authorisation, the scheme provides access to four resolution processes:
- 1) **Informal resolution:** informal resolution of the dispute in a manner facilitated by the Resolution Facilitator. After an initial discussion, subsequent involvement by the Resolution Facilitator may involve the Resolution Facilitator assisting the complainant with direct negotiations with APRA or another party, or the Resolution Facilitator team negotiating on the complainant's behalf.
  - 2) **Mediation:** an informal process utilising a mediator trained in assisting participants to resolve disputes, without the mediator providing a view.
  - 3) **Expert view:** a non-binding evaluation given to those in a dispute jointly, by a person who is an expert in the area(s) in dispute.
  - 4) **Expert decision:** a binding decision on the issues in dispute provided by a person who is an expert in the area(s) in dispute. The expert decision is binding by virtue of a contract between the parties in dispute agreeing to be bound.<sup>51</sup>

## The cost of resolving a dispute through Resolution Pathways

- 2.63. The process of dispute resolution may involve more than one of these dispute resolution process and the complainant/s choose the most appropriate pathway in consultation with the Resolution Facilitator. As required by the ACCC's conditions, APRA is the sole funder of the scheme's general management and operations, including the cost of the Resolution Facilitator. Resolution Pathways is also able to charge fees for use of the scheme. As per the conditions of authorisation, for an informal resolution of the dispute, an initial phone discussion with the facilitator is free of charge. Subsequent involvement of the facilitator attracts a fee of up to \$150 depending on the amount in dispute. The fee is payable by each party to the dispute.

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<sup>49</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 23, available: [ACCC public register](#).

<sup>50</sup> Australasian Performing Right Association Limited further submission, dated 5 July 2019, p. 1, available: [ACCC public register](#).

<sup>51</sup> Resolution Pathways, *Pathways*, available: <http://www.resolutionpathways.com.au/Resolution-Pathways>

- 2.64. For the mediation, expert view, and expert decision processes (the formal resolution options), the cost to resolve the dispute is split between APRA and the Applicants. Applicants are not required to contribute to the cost of resolving a dispute (i.e. APRA must pay all costs involved in resolving the dispute) where:
- the amount disputed is less than \$10,000 or
  - the dispute does not involve money but:
    - in the case of a licensee, the amount payable by the licensee for an APRA licence is less than \$10,000, and
    - in the case of a member, the amount paid by APRA to the member in the previous twelve months is less than \$10,000.
- 2.65. The fees and costs payable under any of the four resolution processes may be waived or reduced by the Resolution Facilitator, the Independent Mediator or the Independent Expert (as relevant) or with the agreement of APRA. Participation in all of the four resolution processes is voluntary for all parties.

### **Resolution Pathway's governance structure**

- 2.66. The 2014 conditions of authorisation required the establishment of a 'consultative committee' (the **Committee**) to provide advice and support to the Resolution Facilitator in relation to the design, implementation and ongoing management of the Scheme. The Resolution Facilitator is required, by the ACCC's 2014 conditions, to consult the Committee on matters such as monitoring the operation of the scheme, including its cost, receipt of feedback on the scheme, and the making of a recommendation about the budget for the operation of the scheme.
- 2.67. The 2014 conditions require APRA to ensure that there are at least four members of the Committee, consisting of an equal number of representatives of:
- Licensees whose annual licence fees are:
    - \$3,000 or less and
    - over \$3,000, as well as
  - Members whose annual royalty payments are:
    - \$3,000 or less (other than members who have not received any royalties from APRA in the previous 24 months) and
    - over \$3,000.
- 2.68. The ACCC's 2014 conditions also provide the Resolution Facilitator with the discretion to create additional further governing committees, as required. The scheme is currently governed by two committees:
- The '**stakeholder group**' (formally called the consultative committee), established originally to comply with the ACCC's 2014 condition to establish a Committee. The group has since evolved into larger stakeholder group, to better represent APRA's stakeholders, and is currently made up of 12 licensees and members. Members are appointed on a volunteer basis.
  - The '**governance committee**', established by the Resolution Facilitator in 2016 to provide the scheme with greater independence from APRA. As currently structured, the four members of the governance committee represent a different segment of APRA's stakeholders, and therefore also satisfy the criteria of the Committee, as required by the conditions of authorisation.



Membership of the governance committee is drawn from the stakeholder group. The governance committee has an independent chair, who has experience in chairing and the music industry, but does not represent a stakeholder group. The Resolution Facilitator does not sit on the governance committee.

## Reporting Obligations

- 2.69. The ACCC 2014's authorisation also imposed a number of reporting obligations, including that:
- APRA submit to the ACCC an annual report regarding the use of the scheme and
  - the scheme be subjected to an independent review, the report of which was to be made available to the ACCC six months prior to the expiry of the authorisation.<sup>52</sup>
- 2.70. In compliance with this condition, independent reviewer Alysoun Boyle conducted a review of Resolution Pathways in late 2018.<sup>53</sup> The findings of this review are discussed further at paragraph 4.204. Broadly the review found that feedback about the scheme from participants had been generally positive but that some improvements could be made to increase the usefulness of the scheme, including by improving awareness of the scheme.

## Review of the Code of Conduct for Copyright Collecting Societies

- 2.71. A voluntary Code of Conduct for Australian Copyright Collecting Societies (**the Code**) was introduced in July 2002. The Code sets out the standards of service that members and licensees can expect from collecting societies and aims to promote awareness and confidence in collecting societies.<sup>54</sup> It addresses issues such as governance, transparency and dispute resolution. APRA is a signatory to the Code.
- 2.72. The Code also 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 every three years.
- 2.73. The most recent report of the review of copyright collecting societies' compliance with the Code produced by the independent code reviewer was published in November 2019, for the 2018/19 financial year. The Code reviewer report found that APRA's reports indicated general compliance with the Code.<sup>55</sup>
- 2.74. A significantly revised version of the Code was adopted with effect from 1 July 2019, implementing recommendations of the review of the Code carried out in 2017 by the Bureau of Communications and Arts Research in the Department of Communications and the Arts (*the Review of Code of Conduct for Australian*

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<sup>52</sup> Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 82, available: [ACCC public register](#).

<sup>53</sup> Report of the Independent Review of Resolution Pathways, dated November 2018, Available at: [ACCC public register](#).

<sup>54</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 19, section 1.3, available: [ACCC public register](#).

<sup>55</sup> Code of Conduct for Copyright Collecting Societies Code Reviewer, *Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2018 to 30 June 2019*, 20 November 2019, p. 5, available: [https://apraamcos.com.au/media/corporate/2019/Code\\_Reviewers\\_Compliance\\_Report\\_2019.pdf](https://apraamcos.com.au/media/corporate/2019/Code_Reviewers_Compliance_Report_2019.pdf).

*Copyright Collection Societies (the Code Review)).*<sup>56</sup> The final report of the Code review made a number of recommendations aimed at increasing transparency around how collecting societies operate, clarifying the Code's role and objectives, and strengthening the Code's governance arrangements.<sup>57</sup> The first period that will be the subject of reporting under the amended Code will be the period 1 July 2019-30 June 2020.<sup>58</sup>

- 2.75. The ACCC considers 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 Code reviewer reports act as an incentive for member societies to perform well based on the criteria reported. However, the Code does not address issues around the terms on which licences are granted (i.e. licence fees).

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including industry associations, member organisations, government organisations, music users, members and licensees.<sup>59</sup> Public submissions by APRA and interested parties are on the ACCC's [Public Register](#).

#### Submissions prior to the draft determination

- 3.3. The ACCC received 47 (public and confidential) submissions from interested parties in relation to the application.
- 3.4. In summary, interested parties generally supported a system of collective rights licensing and acknowledge that APRA's arrangements create efficiencies for members and licensees. However many interested parties considered that APRA has market power which is reflected in the terms and conditions of licences offered.
- 3.5. A number of licensees considered the lack of competitive constraint on APRA has resulted in it setting unfair licence fees and terms. Some licensees claimed that APRA's licence fees are higher than comparable fees charged by overseas collecting societies, and argue that APRA is unable to justify these discrepancies.
- 3.6. Many interested parties also raised concerns that the introduction of APRA-AMCOS', PPCA's and ARIA's joint initiative "OneMusic" will lead to significant increases in their licence fees. Some submissions also claimed that APRA has not engaged in meaningful consultation with industry regarding their licensing arrangements under OneMusic. While many interested parties wanted APRA's arrangements to continue, they wanted to see some form of independent regulation

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<sup>56</sup> Code of Conduct for Copyright Collecting Societies Code Reviewer, *Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2018 to 30 June 2019*, 20 November 2019, p. 5, available: [https://apraamcos.com.au/media/corporate/2019/Code\\_Reviewers\\_Compliance\\_Report\\_2019.pdf](https://apraamcos.com.au/media/corporate/2019/Code_Reviewers_Compliance_Report_2019.pdf).

<sup>57</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 12-15, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

<sup>58</sup> Code of Conduct for Copyright Collecting Societies Code Reviewer, *Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2018 to 30 June 2019*, 20 November 2019, p. 4, available: [https://apraamcos.com.au/media/corporate/2019/Code\\_Reviewers\\_Compliance\\_Report\\_2019.pdf](https://apraamcos.com.au/media/corporate/2019/Code_Reviewers_Compliance_Report_2019.pdf).

<sup>59</sup> A list of the parties consulted and the public submissions received is available from the [ACCC public register](#).

of the fees set by APRA. Interested parties also considered there needs to be greater transparency around the methodology used by APRA in setting licence fees.

- 3.7. Interested parties, in particular some smaller APRA members, further submitted that there is a lack of transparency around how licence fees are distributed and the system used to ensure that performers receive their rightful royalties. Some smaller members raised concerns that licence fee royalties are distributed disproportionately to larger APRA members, including the three major publishing companies (Sony, Universal and Warner). Some interested parties claimed that the distribution of royalties is largely determined by commercial radio airplay, and as a consequence, artists whose airplay is beyond commercial radio do not receive their due royalties. Interested parties called upon APRA to improve its data collection mechanisms in light of developments in technology, so that royalty payments better reflect music played.
- 3.8. Some interested parties queried whether it is necessary for APRA to require rights to be assigned on an exclusive basis and consider a change to non-exclusivity to be the only effective way to introduce competition to APRA's arrangements. Many interested parties considered the current licence back and opt out mechanisms offered by APRA to be unsatisfactory and do not consider the provisions effectively facilitate direct dealings between APRA members and licensees.
- 3.9. Interested parties generally considered the introduction of APRA's dispute resolution scheme "Resolution Pathways" to be positive and considered the scheme has the potential to be an efficient and effective method of resolving disputes for members and licensees. However, interested parties identified a number of factors that they submitted undermine the usefulness of the scheme, including the scheme's cost, a lack of awareness about the resolution processes available under the scheme and the scheme more generally, and a perception that the scheme is not sufficiently independent of APRA (particularly as it is primarily funded by APRA).
- 3.10. Some interested parties continued to raise concerns that APRA's voting system for appointing Board members disproportionately favours its large publisher members at the expense of smaller independent members. This also feeds into concerns from some smaller members about the way licence fee royalties are distributed. Some have claimed the 2018 change to the way members' votes are weighted (as discussed at paragraphs 4.270-4.282) has disenfranchised low earning members and has further entrenched the dominant position of publishers on APRA's board. A number of interested parties would like to see APRA's voting system changed to "one member, one vote".
- 3.11. In addition to the general issues raised by a range of stakeholders across a range of industries, some interested parties raised industry specific concerns.
- 3.12. Suppliers of background music raised concerns that licence fees will increase substantially following the introduction of OneMusic. These suppliers contended that APRA/AMCOS has failed to conduct effective consultation with background music providers and other stakeholders as part of the development of the new licence fee structure under OneMusic, despite their claims that they have undertaken widespread industry consultation.
- 3.13. A number of background music suppliers had also expressed concerns regarding the fact that APRA licenses businesses that use consumer streaming services, such as Spotify, in their commercial premises. These suppliers want APRA to make

it clear to licensees that it does not represent all artists that may be streamed through such services, and that those licensees using personal streaming services in a commercial setting are in breach of the terms of use of these services.

- 3.14. The ACCC also received multiple submissions from operators of dance schools and eisteddfods that claim that changes to the licence scheme arrangements for dance schools and eisteddfods under OneMusic will make licence fees unaffordable for many small businesses. Some dance schools submitted that the increase in fees is so significant that it will affect the ongoing viability of their businesses. Parties also argued that the consultation process for OneMusic was inadequate and that APRA did not consult with all appropriate industry associations about its introduction. Submissions further contended that APRA's licensing arrangements are too complex, and that licensees often pay duplicate fees covering the same subject matter or activities.
- 3.15. Nightclub licensees submitted that APRA's licence fees for nightclubs are much higher than comparable licence fees charged by overseas collecting societies. Nightclub licensees also argued that OneMusic's change to a capacity based scheme for venues (where licence fees are based on a venue's maximum capacity, not actual attendance) is based on the erroneous assumption that nightclubs trade to, or close to, capacity on each night they operate. Nightclubs also questioned the distinction between the higher licence fees they are required to pay, and the lower fees that apply to other venues that also have dance floors, for example hotels and pubs/bars.

## Submissions in response to the draft determination

- 3.16. On 5 June 2019, the ACCC released a draft determination proposing to re-authorise APRA's arrangements, subject to conditions, for five years.
- 3.17. Post-draft determination, the ACCC received 23 public submissions and also held a pre-decision conference at the request of the Council of Small Business Organisations of Australia (**COSBOA**).
- 3.18. Many submissions were supportive of the conditions of authorisation proposed in the draft determination. However, some interested parties argued that the proposed conditions did not go far enough in addressing their concerns about APRA exercising market power and suggested changes to the conditions and/or that additional conditions be imposed.
- 3.19. Suggested changes to the conditions or additional conditions related to further transparency of licence fees and APRA's fee setting methodologies and changes to and greater transparency about APRA's distribution arrangements. Some submissions, including submissions from the Resolution Facilitator, suggested changes to the operation of APRA's ADR scheme.
- 3.20. Post-draft determination submissions also continued to reiterate concerns expressed in pre-draft determination submissions. In essence, that the lack of competitive constraint on APRA has resulted in it setting unfair licence fees and terms. This includes claims that APRA's licence fees are higher than comparable fees charged by overseas collecting societies without justification and that the introduction of OneMusic has further increased fees. Submissions also raised concerns about what they considered to be a lack of consultation regarding the introduction of OneMusic.

- 3.21. Some background music providers continued to express particular concern regarding use of consumer streaming services by some businesses licensed by APRA and that APRA's licensing arrangements were encouraging this practice.
- 3.22. Further, some submissions argued that authorisation should be granted for less than the five years proposed in the draft determination.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. APRA has sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.<sup>60</sup> Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the Conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

### Relevant areas of competition

- 4.3. To assess the likely effect of the Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. APRA submits that the relevant area of competition is that adopted by the ACCC in 2014. That is, competition for the acquisition and supply of performing rights (in relation to musical works).<sup>61</sup>
- 4.5. The ACCC considers that areas of competition which are likely to be affected by the arrangements for which APRA has sought re-authorisation are:
- the acquisition of performing rights (in relation to Australian and overseas musical works) in Australia, and
  - the supply of performing rights in relation to musical works in Australia. This includes supply by APRA under its output arrangements and supply by 'direct licensing' between composers/other rights holders and music users.

### Future with and without the Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.
- 4.7. APRA submits that the most likely situation without the Conduct in the short to medium term continues to be that found by the ACCC in the 2014 Determination: "that there is one major collecting society that obtains rights from composers or

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<sup>60</sup> See subsection 91C(7).

<sup>61</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 12, available: [ACCC public register](#).

other rights holders on a non-exclusive basis, instead of the exclusive basis on which APRA obtains them now.”<sup>62</sup>

- 4.8. The ACCC considers that the most likely future without the conduct is that APRA would hold its members’ rights 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 works.
- 4.9. The ACCC also considers that without the Conduct, APRA would take rights in the works of the repertoires of its affiliated overseas societies and administer these rights in Australia on a non-exclusive basis, as it currently does with respect to works of its affiliated societies operating in the US.
- 4.10. The ACCC further considers that even if APRA was to take non-exclusive assignment of its members’ works, entry of a second collecting society would be unlikely in the near future. The ACCC considers that APRA’s dominant position is a significant deterrent to new entry. The ACCC also considers that barriers to entry for a second collection society are high due to:
  - sunk costs in specialised knowledge and systems required to operate a collecting society
  - the economies of scale and scope of APRA’s operations in simultaneously monitoring the use of and enforcing the rights to its entire repertoire of musical works and
  - network economies or effects that mean users derive more value from (and therefore prefer) a collecting society as the range of musical works in its repertoire increases, and rights holders derive more value from (and therefore prefer) a collecting society as the number of users it attracts increases.
- 4.11. APRA holding exclusive rights to its members’ works prevents direct dealing between rights holders and users, other than by utilising APRA’s licence back and opt out systems. In the future without the proposed conduct - where rights would be held on a non-exclusive basis - members and users would be able to make alternative licensing arrangements rather than relying entirely, or in some cases, at all, on APRA’s system.
- 4.12. If APRA obtained members’ rights on a non-exclusive basis, rights holders could bundle their rights outside of the APRA system without each rights holder having to opt out or license back. The process would not be reliant on negotiations with APRA and thus is likely to be quicker and cheaper. This would particularly be the case where a user requires access to a range of works from different APRA members. Under APRA’s system, each member needs to separately opt out or license back from APRA to directly license the user.
- 4.13. Accordingly, the ACCC considers that without the proposed conduct there would be greater opportunities for rights holders, be they composers, or other rights holders such as publishers aggregating rights, to make alternative licensing arrangements to APRA with users through direct dealing. Significantly more direct dealing than currently takes place utilising APRA’s opt out and licence back provisions would be possible. The extent to which direct dealing would be likely to occur if this possibility was available is discussed at paragraphs 4.68 to 4.70.

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<sup>62</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 12, available: [ACCC public register](#).



- 4.14. However, with the exception of US works, the ACCC considers that APRA taking rights in the works of the repertoires of its affiliated overseas societies on a non-exclusive basis, would be unlikely to promote meaningful direct dealing in respect of overseas works. This is because generally members of these overseas collection societies assign their rights exclusively to the collection society in their jurisdiction. This means that users in Australia would not be able to deal directly with *members* of these societies irrespective of any changes made to arrangements between APRA and these societies.
- 4.15. If APRA took non-exclusive assignment of these rights, the only additional option this would provide for users in Australia would be to deal with the overseas society directly. However, as discussed at paragraph 2.26, under the international licensing system APRA and its affiliate overseas societies are a party to, each society grants each other society an exclusive right to license its repertoire within its jurisdiction. These exclusive reciprocal arrangements would be likely to remain in place for the global licensing environment irrespective of any change to APRA's arrangements with affiliate societies. In this environment, APRA's affiliate overseas societies are unlikely to seek to compete with APRA to license works in their repertoire to Australian users even if their agreements with APRA allowed them to do so.
- 4.16. 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 license back any of their works unless they comply with certain conditions (see paragraph 1.21). 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.

## Public benefits

- 4.17. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>63</sup>

- 4.18. The ACCC has considered the following public benefits:

- transaction cost savings in negotiation of rights
- avoiding the costs of having to make changes to APRA's systems, and
- efficiencies in enforcement and compliance monitoring

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63 Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

## Transaction cost savings in negotiation of licences

- 4.19. As noted above, the ACCC considers that if authorisation is not granted APRA would hold its members' rights on a non-exclusive basis, instead of the exclusive basis on which APRA obtains them now. Accordingly, the ACCC must assess the transaction cost savings likely to be realised if APRA takes exclusive assignment of its members' rights, compared to if it did not.
- 4.20. The ACCC considers that realisation of the transaction cost savings resulting from the proposed conduct depends largely on whether it enhances APRA's ability to offer blanket licences covering a large proportion of the worldwide repertoire of musical works including almost all commercially popular works.
- 4.21. For users, APRA's blanket licence arrangements provide transaction cost savings as licensees need only enter into a single transaction with APRA for all their music needs, rather than negotiate with a large number of individual rights owners. This reduces the number of negotiations between the parties and/or the burden of negotiations in terms of administrative, legal or IT costs and time.
- 4.22. Similarly for APRA's members, by assigning their rights to APRA upon membership, they are not required to deal directly with each individual user, which saves members both time and money.
- 4.23. However, the ACCC considers that APRA would continue to be able to offer blanket licences covering almost all commercially popular musical works, and therefore, that these transaction costs savings would continue to be realised, if authorisation was not granted and APRA held its members' rights on a non-exclusive basis.
- 4.24. APRA submits that if it did not take an exclusive assignment of rights from its members, and instead was only granted a non-exclusive licence by its members, it would be required to reassign all of its rights back to members, and members would then have to grant a non-exclusive licence of the rights back to APRA. APRA argues that a number of rights would fall out of its repertoire during the process, inadvertently and/or because some members on having their rights reassigned to them would choose not to grant a non-exclusive licence back to APRA. This would create holes in APRA's repertoire which would in turn increase transaction costs because any user wanting to be licensed to cover all the works APRA is currently able to offer a licence for would, in the future, have to negotiate with a range of stakeholders rather than just with APRA.<sup>64</sup>
- 4.25. However, the ACCC does not consider that APRA holding non-exclusive rights to its members' works, in and of itself, would create holes in APRA's repertoire. Rather, it would create opportunities for direct dealing in addition to, not instead of, licensing works through APRA. A member could enter into particular direct arrangements and still have APRA collect royalties from any other users of the member's entire repertoire.
- 4.26. While some members may value the opportunity to deal directly with some users, in almost all cases there is no reason that, in order to do so, they would give up the benefits of APRA licensing the use of their works by any and all other users. In this respect, the ACCC notes that if members wish to remove their musical works from APRA's repertoire in order to hold the rights exclusively themselves, they are

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<sup>64</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 9, available: [ACCC public register](#).



already able to do so by utilising APRA's existing opt out provisions or by reassigning from APRA. In this respect, there would be little point in being a member of APRA if the member wished to hold their rights exclusively themselves.

- 4.27. The ACCC accepts that it is possible that some musical works could "fall out of APRA's repertoire" as a result of the divestment process outlined by APRA. That is, some members, on having their rights reassigned to them, may not bother to go through the administrative process of granting a non-exclusive licence of the rights back to APRA. However, this is most likely occur in respect of members whose works are of such low value, because they are rarely used, that it is not worthwhile for the member to go through the administrative process that would be necessary to allow APRA to collect royalties for them in the future.
- 4.28. The ACCC considers that if APRA held its members' rights on a non-exclusive basis most, if not all, members whose works generate royalty revenue would likely continue to have APRA manage their rights on their behalf, even if, in some cases, they also elected to seek to deal directly with some users in competition with APRA.
- 4.29. Therefore, APRA would be likely to continue to be able to offer blanket licences covering almost all commercially popular musical works, and the transaction costs savings resulting from it doing so would likely continue to be realised. That is, the ACCC does not consider that it is necessary for APRA to take exclusive assignment of its members' rights in order for these transaction cost savings to be realised.
- 4.30. However, the ACCC does consider that APRA holding its members' rights on a non-exclusive basis would likely result in some, limited, increase in transaction costs.
- 4.31. First, if some APRA members did license directly with some users, and the user sought a blanket licence from APRA for the balance of the works they wished to use, to the extent that APRA and the user sought to negotiate discounts on the blanket licence to reflect the rights the user held through direct dealing, these case by case negotiations would likely be more complex than would otherwise be the case.
- 4.32. Second, direct dealing between users and APRA members, in and of itself, may involve higher transaction costs than obtaining a blanket licence from APRA if the user required licences over a range of works that required it to negotiated licence agreements with a range of parties. However, users would only seek a licensing arrangement involving a degree of direct dealing if the net benefits of direct dealing exceeded the net benefit of obtaining only a blanket licence from APRA. Accordingly, the ACCC does not consider that there is a public benefit in the avoidance of these transaction costs.
- 4.33. The ACCC also considers there would be significant administrative, legal and IT costs involved for APRA, and for members, if APRA was required to reassign rights back to members, and members then granted a non-exclusive licence of the rights back to APRA, in order to establish a non-exclusive licensing system.
- 4.34. APRA would need to establish the systems to facilitate this and then engage in, largely pro-forma, transactions with each of its 103,000 members so it could license their works on a non-exclusive basis. These costs would be avoided if APRA maintained its near monopoly over acquiring and supplying performing rights in musical works.

- 4.35. The ACCC notes that while these costs would be significant, they would be largely initial, one off, costs necessary to change the system by which APRA acquires rights to license its members' works. This change would be unlikely to create material additional ongoing costs in acquiring rights to licence members as new members joined or existing members create new works.

### **Efficiencies in enforcement and compliance monitoring**

- 4.36. APRA submits that the exclusivity of APRA's rights is essential for the effective and efficient enforcement of copyright.<sup>65</sup> 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.<sup>66</sup> In APRA's view, it is not possible for a non-exclusive licensee to bring infringement action without joining the copyright owner (i.e. the APRA member if rights were assigned to APRA only on a non-exclusive basis) and even in these circumstances, APRA submits it is not clear that this action would be permissible.<sup>67</sup>
- 4.37. 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.<sup>68</sup>
- 4.38. APRA submits that the exclusive assignment of its members' rights to it facilitates this in the following ways:
- only one body incurs the costs of the monitoring necessary for detecting infringements (and this also serves the purpose of monitoring the use of licensed works for the purpose of determining the various members' shares of distributions) and as a result these costs are not needlessly duplicated
  - only one body incurs the costs of bringing the infringement proceedings and as a result, a consistent approach to enforcement is adopted and the enforcement costs are not needlessly duplicated
  - the costs can be spread over a very large number of works so that the maximum benefit of those infringement proceedings which are instituted can be extracted in the interests of all members of APRA and
  - the costs of the enforcement proceedings are reduced because APRA, as the owner of the relevant rights, has title to sue and no other party needs to be joined.<sup>69</sup>
- 4.39. APRA submits that if it held non-exclusive licences from copyright owners, 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

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<sup>65</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 9, available: [ACCC public register](#).

<sup>66</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 16, available: [ACCC public register](#).

<sup>67</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 17, available: [ACCC public register](#).

<sup>68</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 17, available: [ACCC public register](#).

<sup>69</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 17, available: [ACCC public register](#).

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.<sup>70</sup>

- 4.40. 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.<sup>71</sup>
- 4.41. The ACCC considers that APRA would still be able to take copyright infringement action if it was not the exclusive owner of the relevant copyrights. The rights administered by PPCA are granted on a non-exclusive basis and the ACCC is aware that when PPCA has enforced its members' rights, those members (the affected record labels) have been parties to the proceedings. More generally, section 115 of the *Copyright Act* provides that the "owner" of a copyright may bring an action for an infringement of the copyright. In this respect, APRA members could be joined to proceedings, as APRA contemplates above, and as PPCA has done.
- 4.42. The ACCC also notes the concerns expressed by APRA at paragraph 4.39 above. However, it is not apparent to the ACCC how or why APRA holding its members' rights on a non-exclusive basis would mean it could not continue to undertake the monitoring necessary to detect infringement, bring proceedings and spread the costs of doing so over a very large number of works.
- 4.43. However, the ACCC does consider that APRA holding non-exclusive rights over its members' works would likely increase the costs of monitoring and enforcing copyright over those works, potentially significantly.
- 4.44. Monitoring costs would increase due to uncertainty about whether users performing or communicating musical works had obtained a licence to do so from an alternative source. Under the current system, APRA is directly aware of each instance of opt out and licence back. If members retained or obtained the right to deal directly, without having to opt out and license back, APRA would not be automatically aware of each instance of direct dealing that occurs.
- 4.45. Enforcement costs would also increase. If APRA held its members' rights on a non-exclusive basis, 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.
- 4.46. In this respect, APRA submits that of the top 100 singles for 2017, as recorded by ARIA, only two had a single writer, and eight had a single publisher. Four works had more than 10 writers, and 30 works had three or more publishers.<sup>72</sup>

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<sup>70</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 17, available: [ACCC public register](#).

<sup>71</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 13, available: [ACCC public register](#).

- 4.47. 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.
- 4.48. In addition, non-exclusive licensing may, in the short term, create uncertainty about ownership and doubt about the ability of APRA to take copyright infringement action, which some users may take advantage of to avoid paying licence fees. In the ACCC's view, it is 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 any ambiguity created by non-exclusive licensing. However, APRA submits that it also receives significant revenue from a large number of smaller businesses that are not high profile or easily monitored.<sup>73</sup>
- 4.49. The ACCC also considers that monitoring and enforcement costs may be reduced by developing technology. The ACCC notes APRA's submission which states that it has the ability through technology to adjust fees for repertoire that has been directly licensed or that is not controlled by APRA. However, APRA notes that in order to make such adjustments, licensees must provide accurate and detailed play data, which many licensees are unable to provide at this point in time.<sup>74</sup> 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.
- 4.50. 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.
- 4.51. In summary, the ACCC considers that APRA taking exclusive assignment of its members' rights is likely to result in a significant public benefit in the form of efficiencies in enforcement and compliance.
- 4.52. The ACCC also considers that there is a public benefit in preserving the incentives for the future creation of musical works and that the enforcement and compliance efficiencies generated by APRA's arrangements achieve this outcome. This is not to say that such incentives would be eliminated if APRA held its members' rights on a non-exclusive basis. However, 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 benefit**

- 4.53. The ACCC considers that APRA's taking exclusive assignment of its members' works is likely to result in some public benefits from transaction cost savings. They primarily relate to avoiding the increased complexity of case by case negotiating with users who may source licences for some works directly if APRA only held its

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<sup>72</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 29, available: [ACCC public register](#).

<sup>73</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 2a, p. 21, available: [ACCC public register](#).

<sup>74</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 33, available: [ACCC public register](#).

members' rights on a non-exclusive basis, but still require an APRA blanket licence for the remainder of the musical works they use.

- 4.54. The ACCC also considers that APRA's arrangements are likely to result in a public benefit in avoiding the additional administrative and legal costs that would be incurred in APRA moving from its current arrangements to a system where it obtain rights from its members on a non-exclusive basis.
- 4.55. The ACCC considers that APRA's arrangements are likely to result in significant public benefits from efficiencies in enforcement and compliance. 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 detriments

- 4.56. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...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.<sup>75</sup>*

- 4.57. In assessing detriments, the ACCC has had regard to how APRA taking exclusive assignment of its members' rights is likely to impact its degree of market power and the inefficiencies that this may cause.
- 4.58. In a future in which APRA holds its members' rights on a non-exclusive basis, the ACCC considers that APRA likely would have significant market power in acquiring and supplying performing rights in relation to musical works in Australia as a result of:
- Its strong position of incumbency as the only major collecting society in Australia.
  - No credible threat of entry by rival major collecting societies in the near to medium term due to high entry barriers in the form of sunk costs in specialised knowledge and systems; economies of scale and scope, and network effects.
  - Direct dealing is unlikely to be desirable or feasible for many users due to unpredictable requirements, preference for access to a large repertoire of music, and significant transaction costs to obtain multiple licences.
- 4.59. The ACCC considers that exclusive assignment of members' rights increases APRA's market power in acquiring and supplying performing rights in relation to musical works in Australia. It provides APRA with a near monopoly in both acquiring and supplying the rights to almost all commercially popular musical works:
- Virtually all owners of commercially popular musical works in Australia are APRA members and as a condition of APRA membership, they are required to assign the rights in all their current and future works to APRA.
  - APRA's opt out and licence back provisions offer only very limited opportunities for users to source performance rights to Australian works directly at source (from the APRA member)

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<sup>75</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- Even if APRA's input 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.
  - APRA is able to profitably exercise its increased market power under the exclusive arrangement due to the absence of a credible threat of entry by another major collecting society as a result of APRA's dominant position and high barriers to entry discussed above.
- 4.60. The proposed conduct stifles efficient direct dealing between users and copyright owners.
- 4.61. Direct dealing is likely to be desirable and feasible for a small subset of users that have predictable requirements (either in part or in total) for access to musical works, require access to a small repertoire of music, and value greater flexibility to negotiate terms and conditions that are not available under APRA's one-size-fits all blanket licensing. APRA's taking exclusive assignment of its members' rights currently prevent this direct dealing occurring, other than in a restricted way through APRA's opt out and licence back provisions.
- 4.62. The ACCC notes that APRA's opt out and licence back provisions are rarely used – only 73 times in total between January 2014 and December 2018.<sup>76</sup> APRA provided the ACCC with confidential details about these opt outs and license backs. In summary, APRA's opt out and licence back provisions are only generally being used for APRA members to deal directly with a limited number of users, who require access to narrow repertoires, and only very irregularly.
- 4.63. The lack of direct dealing between APRA members and users through opt out and licence back provisions likely reflects, at least in part, that while there is a level of dissatisfaction with the licence fees that APRA charges, many users require access to large repertoires of musical works which, as noted above, only APRA, with blanket licences covering almost all commercially popular musical works, is able to provide. Direct dealing will generally be most attractive where the users require a limited range of works, to which they can acquire rights from a single, or limited number of alternative sources to APRA.
- 4.64. It also may reflect the limited form of direct dealing permitted under opt out and licence back provisions and the fees APRA charges to use them.
- 4.65. For example, the existing opt out provisions require the user to take reassignment of all their works in a particular category of use (for example, live performance) meaning they would have to deal directly with every user wanting to use any of their works in that category of use. The member loses all the benefits of being an APRA member, with respect to that category of use. This means the opt out provisions are of very limited utility unless (a) there is only a very limited range of users of the member's works in the relevant category, and (b) those users are using the member's works extensively.
- 4.66. The licence back provisions are structured such that they generally apply only in respect of narrow, specific, usually one off instances of direct dealing.

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<sup>76</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 22, available: [ACCC public register](#)



- 4.67. The ACCC does not consider that APRA's current opt out and licence back provisions are likely to facilitate direct dealing at a level that would impose a material competitive constraint on APRA in respect of many categories of users.
- 4.68. The ACCC considers that there is likely to be unmet demand for direct dealing that would likely be accommodated if APRA held its members' rights on a non-exclusive basis.
- 4.69. For those types of use where APRA's licence back provisions are currently used on occasion – such as live tours where the touring artist is a singer/songwriter performing their own works, individual events where the APRA member wishes to directly license the public performance of their works, background music and music on hold – direct dealing could occur without the administrative burden, or financial cost of using APRA's opt out or licence back provisions.
- 4.70. Performing rights for films, television programs and advertisements (for television, radio and cinema) are well suited to direct negotiation at source (along with synchronisation rights) and often at the same time as commissioning the works. Other possibilities for direct or source licensing include pre-packaged music in, for example, cinema foyers, restaurants, retail outlets or fitness classes. In many cases, these types of users will use curated (pre-packaged) playlists, developed by them or supplied by background music suppliers and do not require the blanket licence that APRA offers.
- 4.71. The ACCC also notes that direct dealing does occur in relation to the sound recording rights administered by the PPCA.

#### **Direct dealing in relation to sound recording licences**

As discussed at paragraph 2.15, PPCA is the non-exclusive licensee of owners of copyright in sound recordings, which it licenses for public performance in a similar manner to the APRA blanket licensing system. Because PPCA holds these rights on a non-exclusive basis, PPCA members and users can choose to negotiate licences directly rather than the user obtaining a blanket licence through PPCA. Error! Bookmark not defined.

The ACCC understands that for users who have predictable requirements and do not require access to the entire repertoire offered through PPCA and APRA's blanket licences, such as some of the examples outlined above, material direct dealing does occur.

The ACCC has been provided with confidential examples of music users who negotiate sound recording rights at source, instead of or as well as a PPCA blanket licence, and who, they submit, would value the opportunity to do the same in respect of the performing rights held by APRA.

The ACCC does note, however, that direct analogy cannot necessarily be drawn between the level of direct dealing in relation to sound recording rights, where PPCA is a non-exclusive licensee, and likely demand for direct dealing in relation to performing rights if APRA operated in the same manner. This is because the performing rights held by APRA members are more fragmented than the sound recording rights held by PPCA members. Reasons for this include that a song may have several writers and, for any given work, there is generally likely to be more parties with an interest in the performing right than the sound recording.

As noted at paragraph 4.46, APRA submits that of the top 100 singles for 2017, as recorded by ARIA, only two had a single writer, and eight had a single publisher. Four works had more than 10 writers, and 30 works had three or more publishers. In contrast, the ACCC understands that sound recording rights are more concentrated with a greater proportion held by the three large record companies and that rights being held by a single rights holder (such as a single record company) is far more common.

Therefore, the transaction costs involved in obtaining a suite of performing rights licences directly from APRA members will, in many cases, be greater than those in obtaining the sound recording rights licences to a similar repertoire directly from PPCA members.

- 4.72. Accordingly, while APRA holding performing rights on a non-exclusive basis would provide members and users with the opportunity to make alternative licensing arrangements rather than relying entirely, or in some cases, at all, on APRA's system, the extent to which this would result in greater direct dealing is unclear. However, the ACCC considers that under a non-exclusive arrangement there is a real chance that meaningful direct dealing, that is, significantly more direct dealings than currently takes place utilising APRA's opt out and licence back provisions, would occur.
- 4.73. The public detriment resulting from the foreclosure of opportunity for greater direct dealing manifests in a number of ways:
- inefficient under-utilisation of APRA's repertoire
  - inefficiency in the production of musical works
  - stifling innovation and adoption of new technologies and business models and
  - insulating APRA from the need to reduce cost inefficiencies.
- 4.74. These public detriments are considered below. This is followed by a discussion of three further issues raised by interested parties as potential public detriments:
- potential detriment from the introduction of OneMusic
  - potential detriment from APRA licensing of businesses that use consumer music services, and
  - potential detriment from APRA/OneMusic representations about its licences
- and, lastly, a discussion of the factors that may help mitigate the public detriment of APRA's Proposed Conduct.

### **Inefficient under-utilisation of APRA's repertoire**

- 4.75. A number of APRA's licensees submit that the lack of competitive constraint on APRA results in it setting unfair licence fees and terms.<sup>77</sup>

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<sup>77</sup> For example: Academy Ballet submission, dated 5 February 2019; Ascendance Academy submission, dated 22 February 2019; The Association of Australian Musicians submission, dated 15 February 2019, p. 6; Australian Small Business Family Enterprise Ombudsman, dated 15 February 2019; Australian Venues Association, dated 1 March 2019, p. 2; Background Providers of Music submission, dated 22 February 2019, p. 8; Carlo Colosimo submission, dated 20 February 2019, p. 1-2; Council of Small Business Organisations Australia, dated, p. 2; Eisteddfod Organisers Australia, dated 8 February 2019, p. 2-3; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 13; Marketing Melodies submission, dated 20 February 2019, p. 1; Mood Media submission, dated 8



- 4.76. 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.
- 4.77. 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 an effective opt out or licence back arrangement, be able to set prices for access to its repertoire free from competitive constraints, thus earning monopoly rents. As discussed at paragraphs 4.299 to 3.304, the ACCC does not consider that APRA's opt out and licence back provisions facilitate direct dealing at a level that would impose a significant competitive constraint on APRA in respect of many categories of users.
- 4.78. As a near monopolist supplier and acquirer of rights to commercially popular musical works in Australia, APRA is able to maximise its profit by engaging in price discrimination across user groups. Different groups are offered different licensing terms and conditions according to their 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 sales.<sup>78</sup>
- 4.79. While APRA does not restrict output in the sense that it does not refuse access to its works as a bundled product, the conduct of only supplying an 'all or nothing' bundle is itself a restriction on the form of supply and therefore output. This is particularly the case for those users who are not willing to pay for access to APRA's entire 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, which is allocatively inefficient.
- 4.80. It is also the case for users who would be willing to pay at least the marginal cost of an APRA blanket licence but are not prepared to pay a price reflecting the monopoly rent that APRA is able to charge. To the extent that this arises there will be some allocative inefficiency in the form of under-utilisation (that is, under consumption) of APRA's repertoire.

### **Inefficiency in the production of musical works**

- 4.81. 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

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March 2019, p. 2; Nightlife submission, dated 6 March 2019, p. 11; WA Nightclubs Association submission, dated 26 February 2019, s 1.4, 2.5-2.13. Submissions available at: [ACCC public register](#).

78 The ACCC recognises that perfect price discrimination can result in an efficient allocation of resources and utilisation of APRA's repertoire in the short run. Blanket licensing can also encourage users to maximise their usage of the repertoire. However, APRA is unlikely to be able to perfectly price discriminate.

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 overall and over time than would be the case if creators had better price signals.

- 4.82. This situation of general over-production may also co-exist with pockets of under-production owing to mismatches between the level of use of particular musical works and the distribution of payments under APRA's distribution rules. APRA attempts, where possible and, in its view, it is cost effective to do so, to distribute royalties directly based on usage data collected. That is, based exactly, or almost exactly, on the songs played. However, in many cases this is not possible and in these cases APRA distributes licence fee revenues in a pool based upon sampling of usage or by analogy (proxy data collected from other sources). Where this is the case it is likely that some APRA members will receive a level of royalty payment which is lower than what they would be entitled to if all fees were distributed based on actual usage, while others would receive higher royalty payments than if fees were distributed based on usage of their works.
- 4.83. 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 (inefficient over or under production of works) 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.
- 4.84. Improving the correspondence between music usage and royalty payments depends upon gaining access to higher quality data, which in turn increases APRA's costs. APRA must assess the benefits to its members of investing in improved data quality to increase the correspondence between usage and royalty payouts, be it by investing in new technologies or engaging in more extensive monitoring using existing technologies, compared to the costs of doing so. Some licence fee pools are not large enough to support any significant investment in data gathering. For some others, while such investment could be supported, the cost relative to the licence fees collected for those pools would significantly erode the royalty payments to members.
- 4.85. In its 2014 determination the ACCC noted that MRT is rapidly evolving and will become increasingly affordable. The ACCC stated that it was concerned to ensure that, during the period of the 2014 authorisation, APRA adopts new technology as appropriate to monitor and record performances as this would lead to improvements in the way royalties are distributed to members (a greater proportion of distributions would reflect the actual value of works performed).<sup>79</sup>
- 4.86. APRA submits that it has now utilised MRT for almost seven years and was the first collecting society to do so worldwide. APRA states that MRT utilises audio fingerprinting algorithms (similar to consumer products Shazam, SoundHound and Music ID) to automatically identify audio tracks. APRA estimates that it has spent \$1.3 million to date on MRT and related matters, including an annual expenditure of around \$250,000 on technology to enable more accurate distribution of royalties to members whose works are used in advertising jingles. APRA states that it has

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<sup>79</sup> Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. iii, available: [ACCC public register](#).

plans to expand its MRT related work in nightclubs and dance/electronic music festivals and has recently employed a dedicated MRT coordinator to facilitate this.<sup>80</sup>

- 4.87. APRA submits that on the whole, its experience with MRT has been mixed. Each platform has its own advantages and disadvantages, and there has not yet emerged a single platform that provides an effective identification solution across a wide variety of music uses. However, APRA states that as an organisation at the nexus of music, technology and data, exploring opportunities and relationships that assist in obtaining empirical data relevant to licensed public performances is a key strategic imperative.<sup>81</sup>
- 4.88. APRA submits that improvements in reporting and distribution technology over recent years have allowed and will continue to allow APRA to be more efficient and effective in collection and distribution of royalties.<sup>82</sup>
- 4.89. The ACCC welcomes the increased adoption of MRT by APRA aimed at improving the accuracy of music usage data available to APRA for the purpose of distributing licence fees. Any improvements in the matching of licence fees distributed to the value of actual performances of members' works reduces any dynamic inefficiencies, through inefficient over or under production of works, arising from the APRA system.
- 4.90. However, as it did in 2014, the ACCC considers that 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.
- 4.91. Reflecting this, the ACCC has imposed conditions of authorisation requiring APRA to report annually about the proportion of licence revenue collected which is distributed using direct distribution (based on actual play data) and by a range of other techniques including census analysis, sample analysis, MRT and distribution by analogy. The conditions also require APRA to report annually about the reasons for changes in the proportion of licence revenue distributed using each technique each year (**conditions C2.3 and C2.4**).
- 4.92. The ACCC considers that these conditions will provide increased transparency and accountability about how APRA monitors music played, how APRA uses this data for the purpose of determining royalty distributions and the extent to which APRA is improving its collection mechanisms in light of the possibilities opened up by the growth in music recognition and other technology,
- 4.93. In this respect, the ACCC also notes the trade-off between the costs and benefits of improving the accuracy of monitoring use of music. Each dollar spent on monitoring use of music for the purpose of determining how royalties are distributed to APRA members, is a dollar less that is available for distribution to members. In this respect, the ACCC considers that the appropriate level of expenditure on these functions is a judgement call, which APRA and its members are best placed to make. The conditions the ACCC has imposed will provide APRA members with more information about these issues to inform these decisions.

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<sup>80</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 32, available: [ACCC public register](#).

<sup>81</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 32, available: [ACCC public register](#).

<sup>82</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 33, available: [ACCC public register](#).

## **Stifling innovation and adoption of new technologies and business models**

- 4.94. APRA taking exclusive rights to its members' works is likely to be stifling to the development and adoption of new technologies and business models.
- 4.95. Over time, the emergence of new technologies and business models has the potential to challenge the necessity of APRA's role as a clearing house between music users and music creators and undermine its dominant market position. For example, increasingly technology is allowing businesses to offer online services which bundle a large repertoire of works with the licence fees required to utilise them, as well as a variety of value-added services. An example of such businesses are background music suppliers, which may bundle the supply of curated playlists with the supply of sound equipment and the administration of their customers' licensing fees.
- 4.96. Technological solutions are also developing which would facilitate the tracking of the ownership of rights in musical works and monitoring of usage of works. The extent to which such technological developments may make widespread direct dealing between APRA members and music users, particularly those requiring a large repertoire of works, feasible is uncertain, as is how quickly such technology may evolve.
- 4.97. However, APRA's exclusive acquisition of rights from members and blanket licences for music users are likely to act as a significant impediment to the development and adoption of innovative technologies and business models in Australia, by foreclosing in most cases the possibility of direct dealing, eliminating any significant demand from parties other than APRA for such services.
- 4.98. Some types of innovation, for example, in relation to monitoring usage of works, would likely improve the efficiency of APRA's operations. Accordingly, there will be some demand for these services even if APRA exclusively holds the rights to its members' works. In this respect, APRA has provided evidence which suggests that it has invested heavily in music monitoring recognition technology in recent years.
- 4.99. The ACCC considers that the conditions of authorisation requiring APRA to report annually on the proportion of royalty distributions that are calculated using various techniques, including MRT, while not directly addressing this issue, will provide greater transparency about the extent to which APRA is embracing new technologies.
- 4.100. However, unconstrained by competition from alternative licensing sources, APRA does not face the same commercial incentives to promote and encourage such technological developments as would other potential licensors. And furthermore, it has no incentive to invest in technology that would promote competition to its position as a near monopolist in the supply of performing rights in Australia.
- 4.101. Further, unlike the other public detriments identified by the ACCC, where APRA taking exclusive assignment of its members' rights is likely to exacerbate an existing public detriment that would be realised whether or not APRA took exclusive assignment of its members' rights, the public detriment likely to result from inhibiting of the development and adoption of new technologies and business models is almost entirely as a consequence of APRA taking exclusive assignment of its members' rights.

## Insulating APRA from pressures to reduce cost inefficiencies

- 4.102. A number of interested parties question the level of APRA's management expenses.<sup>83</sup> For example, the Association of Australian Musicians questioned APRA's staffing costs. In this context, the Association of Australian Musicians expressed concern that APRA does not release a detailed breakdown of its expenses in any of its reporting and that 'APRA spends too much on awards, ambassadors, grants, seminars and sponsorship of other organisations; and that it prioritises funding social engineering projects that benefit publishers.'<sup>84</sup>
- 4.103. APRA's submission in support of its application indicates that, since 2014, it has invested in infrastructure and technology in order to reduce the cost of its operations with the aim of increasing the distribution of royalties to its members. These investments largely consist of heavy technology-based investment in many areas of its business including: music monitoring, data processing and matching, its online licensing system, and upgrades to its internal database systems required to support this increased technology.<sup>85</sup> OneMusic, which is discussed further below, is one such example.
- 4.104. APRA submits that its expense to revenue ratio in 2018, as a standalone entity, is 14.45 per cent.<sup>86</sup> APRA submits that this is compared to an average expense to revenue ratio for overseas societies of 15.4 per cent.<sup>87</sup>
- 4.105. The ACCC considers that in the absence of any significant competitive constraint, APRA may not have a strong incentive to minimise its expenses, control its costs or implement changes to improve its cost efficiency, which in turn results in a reduction in the royalties available for distribution to its members, or may redirect funds away from programs valued by its members.
- 4.106. However, the ACCC notes that APRA's operations are managed by its Board, which includes members representing the interests of different member groups. These members have an incentive to ensure that APRA is as effective as possible as this maximises the revenue that is available for distribution. 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 and that this would lead to changes led by the board.
- 4.107. In this respect, the ACCC has not received submissions which indicate widespread concern from APRA members about APRA's cost efficiency.
- 4.108. However, as discussed at paragraphs 4.291 to 4.292 the ACCC considers that APRA members and stakeholders would benefit from greater transparency about the costs it incurs relative to revenues. The ACCC has imposed a condition of authorisation that APRA must publish an annual transparency report which includes

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<sup>83</sup> For example: Association of Australian Musicians, dated 15 February 2019, p. 12-13; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 3-5; Trudy Newell submission, dated 6 February 2019. Submissions available on the [ACCC public register](#).

<sup>84</sup> Association of Australian Musicians submission, dated 15 February 2019, p. 13, available: [ACCC public register](#).

<sup>85</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 25 & 32-33, available: [ACCC public register](#).

<sup>86</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 18, available: [ACCC public register](#).

<sup>87</sup> APRA AMCOS, 2018 Affiliate Society Expense Ratios, available: [http://apraamcos.com.au/media/financials/comparative\\_international\\_expense\\_to\\_revenue\\_ratios.pdf](http://apraamcos.com.au/media/financials/comparative_international_expense_to_revenue_ratios.pdf)

information on rights revenue, APRA's operating costs, distributions to members and amounts received from and paid to overseas collecting societies.

- 4.109. This condition is framed specifically to address concerns about the efficiency of APRA's operations. The ACCC considers that it will improve stakeholder confidence in APRA's system for both members and licensees and provide greater transparency about APRA's operating costs and make APRA more accountable for its expenditure.
- 4.110. This reporting should allow interested parties to form more informed views about the cost efficiency of particular aspects of APRA's operations. The ACCC will review this information, and consider interested parties views informed by this information, when assessing any future applications for re-authorisation.

### **Potential for public detriment from OneMusic**

- 4.111. In addition to the public detriments discussed above, some interested parties argue that the introduction of OneMusic will result in further, significant, public detriments.
- 4.112. As discussed at paragraphs 2.48-2.56, OneMusic is a joint licensing initiative between APRA, AMCOS and PPCA, the aim of which is to provide a single source of music licences for businesses.
- 4.113. APRA submits that OneMusic has arisen in response to consumer feedback and efficiency imperatives, and is in the interests of providing a licensing solution that is administratively and conceptually simpler for consumers. The solution is administratively simpler because licensees will have to deal only with one licensor, will have to sign only one agreement, will have to provide information only once, and will only have to pay a single invoice. APRA believes that this will be of particular benefit to small businesses. It is also in the public interest that licensees are comprehensively licensed, rather than inadvertently infringing by obtaining only one set of rights.<sup>88</sup>
- 4.114. APRA submits that it has consulted widely regarding the formulation and implementation of its OneMusic Australia licence schemes.<sup>89</sup> APRA also submits that OneMusic New Zealand has been operating successfully since 2014.
- 4.115. The introduction of OneMusic has raised significant concern amongst interested parties, in particular that their licence fees for music use will increase.<sup>90</sup> For example:

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<sup>88</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 26, available: [ACCC public register](#).

<sup>89</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 26, available: [ACCC public register](#).

<sup>90</sup> For example: Academy Ballet submission, dated 5 February 2019; Association of Australian Musicians, dated 15 February 2019, p. 6; Australian Local Government Association submission, dated 21 January 2019, p. 1; Australian Music Industry Network submission, dated 15 February 2019, p. 3; Australian Venues Association, dated 1 March 2019, p. 2; Cecchetti Ballet submission, dated 13 February 2019, p. 1-2; Clubs Australia submission, dated 22 February 2019, p. 1-2; Helen Skuse submission, dated 8 February 2019; Independent Cinemas Australia submission, dated 7 February 2019, p. 1; Nadia's Performance Studio & Sydney Stars on Show Eisteddfod submission, dated 19 March 2019; Nightlife submission, dated 6 March 2019, p. 9; NSW Small Business Commissioner submission, dated 15 February 2019, p. 2; Odette's School of Dance submission, dated 28 February 2019; Shopping Centre Council of Australia submission, dated 8 February 2019, p. 1-2; WA Nightclubs Association submission, dated 26 February 2019, s 3.2. Submissions available: [ACCC public register](#).



- in relation to dance schools, charging by venue when many dance schools work out of multiple venues because of the inability and expense of being able to have their own studio space<sup>91</sup> and
  - in relation to music venues, charging based on capacity, not actual attendance.<sup>92</sup>
- 4.116. Other music users expressed concern that the lack of transparency and complications caused by the process of introducing OneMusic. For example, the AHA submits that '[a]s a result of the pending implementation of OneMusic Australia, there are various complexities relating to this reauthorisation. Unfortunately, the licence agreements, terms, conditions, definitions and plain English guides for OneMusic are still to be finalised.'<sup>93</sup>
- 4.117. The Australian Local Government Association submits that they are generally supportive of OneMusic. However, they also submit that some councils have expressed concern regarding the fee development process, which they believe has been characterised by minimal sector consultation, a lack of transparency regarding payments to artists, and untenable timelines. This is particularly so as the fee increases were presented largely as a 'fait accompli' by APRA AMCOS and there are no alternative avenues open to councils to pay artists for the use of their music.<sup>94</sup>
- 4.118. However, notwithstanding concerns about licence fees and consultation about OneMusic, interested parties were generally supportive of the concept of OneMusic. That is, a single source of licensing for both the rights administered by APRA and PPCA.<sup>95</sup>
- 4.119. In response to interested party concerns, APRA submits that in the lead up to the introduction of OneMusic Australia, APRA has conducted what it considered to be a comprehensive consultation process, releasing around 40 consultation papers, meeting with representatives of licensees, and with individual licensees, in relation to each licence scheme or group of licence schemes.<sup>96</sup>
- 4.120. APRA submits that as it has around 147,000 licensees, it is impractical and inefficient to consult individually with them all. Accordingly, APRA has focussed on consultations with industry representative groups, except in circumstances where the group is clearly not in fact representative of all interests.<sup>97</sup>
- 4.121. With respect to licence fees, APRA submits that the harmonised tariffs under OneMusic Australia have been designed to be revenue neutral to APRA AMCOS and PPCA, across the project as a whole and across the vast majority of particular licence schemes. However, it is inevitable as a result of that process that some individual licensees will see a fee increase, and others a decrease, as a result of

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<sup>91</sup> Helen Skuse submission, dated 8 February 2019, p. 1, available: [ACCC public register](#).

<sup>92</sup> Australian Music Industry Network submission, dated 15 February 2019, p. 3, available: [ACCC public register](#).

<sup>93</sup> Australian Hotels Association submission, dated 22 February 2019, p. 3, available: [ACCC public register](#).

<sup>94</sup> Australian Local Government Association submission, dated 15 February 2019, p. 3, available: [ACCC public register](#).

<sup>95</sup> For example: Australian Hotels Association submission, dated 22 February 2019, p. 4; NSW Small Business Commissioner submission, dated 15 February 2019, p. 1; Clubs Australia submission, dated 22 February 2019, p. 1. Submissions available: [ACCC public register](#).

<sup>96</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 3, available: [ACCC public register](#).

<sup>97</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 3, available: [ACCC public register](#).



the different variables being used to calculate licence fees under the new licence schemes.<sup>98</sup>

- 4.122. The ACCC notes that the concerns raised by interested parties primarily relate to the imposition of a licensing fee and/or the quantum of such fees. In this respect, the right to collect royalty fees from businesses who use music is established under the Copyright Act. Accordingly, the rights for APRA and PPCA to collect royalties on behalf of their members exists under copyright law.
- 4.123. The ACCC considers, as most interested parties who commented on OneMusic accept notwithstanding their concerns, that OneMusic will simplify the administration of these rights and likely lead to transaction cost savings for APRA and music users. OneMusic is also likely to reduce the incidence of inadvertent, and deliberate, infringement of copyright by users who require both sets of licences but only currently acquire one or the other.
- 4.124. The ACCC considers that it is likely that following the introduction of OneMusic, licence fees will increase for some music users. As part of the process of introducing OneMusic, APRA has reviewed the methodologies used to calculate some of its licence fees, resulting in changes to some of these fees. Some music users will be disadvantaged by the changes in the collecting societies' fee calculation methods (while others may be advantaged).
- 4.125. To the extent that changes in methodologies used by APRA to determine licence fees result in higher licence fees overall for some categories of users, the ACCC considers that having decided to adopt these methodologies for setting licence fees, APRA will do so whether or not OneMusic is introduced.
- 4.126. The ACCC considers that the introduction of OneMusic may increase the already high barriers to a rival collection society being established, or direct dealing as an alternative to APRA's blanket licences. Performing rights licences and sound recording rights licences are complements and offering them as a bundle increases the attractiveness of sourcing these rights from APRA compared to any alternative supplier that might emerge. A new entrant might be able to supply a performing rights licence if APRA did not take exclusive assignment of its members' rights, but any user acquiring a performing rights licence from a source other than APRA would still have to acquire a sound recording licence elsewhere.
- 4.127. OneMusic may facilitate higher licence fees if it allows APRA to gain access to the other collecting societies' licensing data. This is likely to increase its knowledge of the market and improve its ability to price discriminate and thus raise the fees for some users. However, it is not clear that OneMusic will enhance APRA's ability to price discriminate. The ACCC notes APRA already has extensive knowledge of its users' commercial requirements and willingness to pay, based on the information currently available.
- 4.128. Another way that licence fees may increase under OneMusic is if some music users who require both sets of licences but have historically not paid for both now will. However, the ACCC considers that this is one of the benefits of OneMusic, these users will in the future be more likely to pay the royalties that the owners of the works they are using are entitled to.

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<sup>98</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 3, available: [ACCC public register](#).

- 4.129. The ACCC also considers that the introduction of OneMusic may increase PPCA's market power. As discussed at paragraphs 4.71, direct dealing is more viable and prevalent in respect of sound recording rights than in relation to performing rights and more direct dealing, does occur. Absent OneMusic, some users would source a performing rights licence from APRA and a sound recording rights licence from a competitor of PPCA. With OneMusic APRA offers a sound recording licence, on behalf of PPCA, bundled with its performing rights licence. This may reduce the ability of existing alternatives to PPCA to compete with it and raise barriers for new entrants.
- 4.130. However, the ACCC notes that APRA, and PPCA's choice of the means by which they collect licence fees are not likely to be affected by the ACCC's decision to authorise or not authorise its conduct. Accordingly, OneMusic would likely have been introduced in its current form, and will likely continue to operate, whether or not the ACCC authorises APRA's conduct. In this respect, APRA has not sought authorisation for any agreement between it and PPCA relating to OneMusic.<sup>99</sup>
- 4.131. Accordingly, the ACCC considers that any resultant increase in market power for APRA or PPCA, and the public benefits and public detriments resulting from the introduction of OneMusic, will likely be realised whether or not the conduct the subject of APRA's application for authorisation takes place.
- 4.132. A further concern that has been raised in a confidential submission and in a submission by the Australian Small Business and Family Enterprise Ombudsman (**ASBFE**O)<sup>100</sup> relates to differences in the repertoire for which the PPCA is a non-exclusive licensee for the public performance of sound recordings and the repertoire for which APRA is the licensee for the broadcasting or performing of musical works.<sup>101</sup>
- 4.133. In particular, the ACCC understands that the PPCA repertoire is not as extensive as APRA's. This means that in relation to recorded music where the user requires licences for the broadcasting or performing of the musical work as well as the public performance of sound recordings, in some cases the musical work will be covered by the APRA blanket licence, but the sound recording will not be covered by the PPCA blanket licence.<sup>102</sup>
- 4.134. This has led to concerns that APRA, through OneMusic, offering a single licence covering both sound recordings and musical works may lead licensees to assume that the repertoire of sound recordings covered is the same as the repertoire of musical works covered, when this is not the case.<sup>103</sup>
- 4.135. This may have two related consequences. Users may inadvertently use recorded music when they do not hold a licence for the public performance of the sound recording because they believe that they are licensed by OneMusic, and the right

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<sup>99</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 3, available: [ACCC public register](#).

<sup>100</sup> Australian Small Business and Family Enterprise Ombudsman, dated 10 May 2019, p. 2, available: [ACCC public register](#).

<sup>101</sup> Australian Small Business and Family Enterprise Ombudsman, dated 10 May 2019, p. 2, available: [ACCC public register](#).

<sup>102</sup> Australian Small Business and Family Enterprise Ombudsman, dated 10 May 2019, p. 2, available: [ACCC public register](#).

<sup>103</sup> Australian Small Business and Family Enterprise Ombudsman, dated 10 May 2019, p. 2, available: [ACCC public register](#).

holder may be denied the royalties to which they are entitled for the public performance of the sound recording.

- 4.136. The ASBFEO submits that this is particularly likely to be in an issue for users using digital streaming services as not all artists on these platforms have granted rights to license use of their works to APRA and/or the PPCA.<sup>104</sup>
- 4.137. In its draft determination the ACCC explained that it considers that there is a risk that by bundling blanket licences over APRA and the PPCA's repertoires into a single licence through OneMusic, some licensees will assume that they are being granted a licence over equivalent repertoires in respect of the rights APRA holds and the rights the PPCA licenses on a non-exclusive basis. The ACCC noted that APRA's description of OneMusic as a 'single source of music licences'<sup>105</sup> while correct in respect of APRA's and the PPCA's repertoires could, due to differences in their respective repertoires, reinforce this perception. The ACCC invited further information from APRA about this issue.
- 4.138. In response to the draft determination APRA submits that it is true that the PPCA repertoire of licensed sound recordings is not as extensive as the APRA repertoire of musical works. APRA submits that the qualification of this discrepancy is very complex. APRA submits that it is confident that it and the PPCA provide a near comprehensive licence for all musical works and sound recordings likely to be performed by Australian businesses. APRA states that there is nothing to suggest that the repertoire available from streaming services is notably greater than the repertoire licensed by APRA and PPCA and to date APRA has not encountered a claim that a work has been streamed on such a service and was not appropriately licensed.<sup>106</sup>
- 4.139. APRA has also published information about sound recording covered by the PPCA on the OneMusic website and a list of the 55,000 labels registered with the PPCA.
- 4.140. While discrepancies between the APRA and PPCA repertoires are unavoidable, the ACCC remains of the view that such discrepancies do create a greater risk of inadvertent infringement where businesses are licensed by OneMusic than would be the case if the PPCA and APRA each issued licences separately. However, the extent of any such greater risk is unclear as, even where APRA and the PPCA licence use of their member's works and sound recording separately, the general perception amongst businesses is that both repertoires cover almost all commercially popular music.
- 4.141. More generally, the ACCC considers that overall, by dealing more effectively with users who require both sets of licences but only currently acquire one or the other, OneMusic is likely to reduce the incidence of inadvertent, and deliberate, infringement of copyright.
- 4.142. Further, as noted above, the ACCC considers that OneMusic is likely to continue to operate irrespective of the conduct the subject of the application for reauthorisation.

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<sup>104</sup> Australian Small Business and Family Enterprise Ombudsman, dated 10 May 2019, p. 2, available: [ACCC public register](#).

<sup>105</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 24, available: [ACCC public register](#).

<sup>106</sup> Australasian Performing Right Association Limited further submission, dated 5 July 2019, p. 4, available: [ACCC public register](#).

## Potential detriment from APRA's licensing of businesses that use 'consumer' music services

- 4.143. Some background music providers (**BMPs**) have raised concerns about APRA granting licences to businesses that source the music they play from what the BMPs describe as "consumer music services", such as digital music streaming services, where the terms and conditions of use of the service stipulates that it is for personal, non-commercial use only.
- 4.144. BMPs provide curated music content to businesses that play music, such as, bars, hotels, clubs, gyms, restaurants, retail outlets and other venues. BMPs deliver music to businesses via various platforms including physical delivery (such as CDs), digital downloads and streaming.
- 4.145. The ACCC understands that BMPs are concerned about some businesses using consumer music services, whose subscriptions fees and terms and conditions of use reflect that they are for personal use only, in commercial settings as an alternative to engaging a BMP.
- 4.146. When a business supplies music content to other businesses, for example a BMP providing curated music content to a bar, both the BMP and the bar require separate licences from APRA if the music being played is within APRA's repertoire and the BMP and/or bar has not obtained a licence or licences directly from the APRA member(s) whose musical work(s) are being played. The licence APRA provides to the BMP recognises that the BMP is supplying music to commercial users.
- 4.147. In comparison, a digital streaming service supplying music content to users for personal use only requires an APRA licence,<sup>107</sup> but the end user, if they are paying music only for personal use, does not. The licence APRA provides to the personal use only digital streaming service does not provide for the streaming service to supply music to commercial users.
- 4.148. The ACCC understands that the licence fees charged by APRA to businesses supplying music reflect, amongst other things, whether the business is supplying music to other businesses for commercial use or to consumers for personal use (or both).
- 4.149. For the end user business playing music, in addition to the general licence fee that the business pays for a licence from APRA, APRA levies an additional 'digital copy/delivery charge' on some business which APRA defines as:
- the additional cover you need from us if for example you have copied a CD onto a hard drive or made a copy of a digital download. You will also need this additional cover if you are using an existing recording for a purpose for which it has never been licensed for such as in the case of personal digital music streaming services like Spotify or Apple Music.*<sup>108</sup>
- 4.150. A business playing music, for example a bar, that is provided by a BMP licenced by APRA does not incur this charge but a business playing music from a personal streaming service does. The ACCC understands that the rationale for this fee

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<sup>107</sup> If the music being played/supplied is within APRA's repertoire and the streaming service has not obtained a licence or licences directly from the APRA member(s) whose musical work(s) are being played

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structure is that the licence fee APRA charges the BMP reflects that it supplies music to other businesses, but the licence fee APRA charges the streaming service that is for personal use only does not.

- 4.151. In effect, a BMP that supplies musical content to business pays APRA a premium for doing so. A streaming service that supplies content for personal use only does not. If a business chooses to source music from a streaming service that is not licensed to supply content for commercial use, APRA charges that business an additional fee directly.
- 4.152. Some BMPs argue that, where a business sources music from a personal streaming service APRA is not entitled to charge a digital copy/delivery fee because it is not the venue playing music via a streaming service that is reproducing (communicating) the music. Rather, it is the streaming service that is doing the copying and communication. Further BMPs have expressed concerns that APRA licensing businesses that use personal use streaming services and/or charging a separate fee to businesses that do use these services legitimises the use of these services, in breach of the terms and conditions of use of the service.<sup>109</sup>
- 4.153. APRA submits that it is apparent that some businesses are using digital streaming services as a source of background music and the BMPs wish to prevent them doing so to drive them to use BMPs instead. APRA submits that it is not appropriate for it to refuse to grant a licence to a business because it is using a digital streaming service as a background music source.<sup>110</sup>
- 4.154. APRA states that if it did so it would first need to refuse to licence the businesses for music use, then commence proceedings against the businesses for copyright infringement. As a result, those businesses may well approach the Copyright Tribunal on the basis that APRA was refusing to grant them licenses.<sup>111</sup>
- 4.155. The ACCC notes that APRA's digital copy/delivery fee covers a number of uses including, in the context of businesses using personal digital streaming services, direct streaming or downloading songs onto the users' device so they can be played offline.
- 4.156. In this respect, as discussed at paragraph 1.7 concerns about APRA's licence fees are relevant context to the ACCC's assessment about whether APRA's collective licensing arrangements are likely to result in overall public benefits. However, like other businesses, creators of music are entitled to set fees for use of the music they create.
- 4.157. The ACCC does note that, when a business sources music content from a personal streaming service, the licence fee that APRA charges that supplier does not reflect that the music they are supplying may be used in commercial settings. When a business sources music content from, for example, a BMP, the BMPs licence fee does reflect that it is supplying music content for commercial use. In cases where the supplier of the music content is not licenced to supply music for commercial use, APRA appears to be charging a fee directly to the end user of that service instead.

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<sup>109</sup> Background Providers of Music Association submission dated 28 June 2019, p. 5, available: [ACCC public register](#).

<sup>110</sup> Australasian Performing Right Association Limited further submission, dated 9 August 2019, p. 9, available: [ACCC public register](#).

<sup>111</sup> Australasian Performing Right Association Limited further submission, dated 9 August 2019, p. 9, available: [ACCC public register](#).

- 4.158. In this respect APRA's position appears to be that it does not consider that it can control whether businesses use consumer streaming services to source music content, but if they do, its members are entitled to be remunerated accordingly.
- 4.159. The ACCC considers that the issue in relation to use of personal use streaming services for commercial purposes is primarily one of lack of enforcement by these streaming services of their terms and conditions of use.
- 4.160. Further, in and of itself, APRA abolishing its digital copy/delivery charge as it applies to businesses using consumer streaming services, would likely make the use of these services a more attractive, rather than less attractive, option.
- 4.161. However, the ACCC considers that it is arguable that charging a fee to businesses specifically tied to their use of personal digital music streaming services could potentially be interpreted by businesses as legitimising the use of such services.
- 4.162. Various APRA publications contain warnings about this. For example, APRA's licence guidelines state that: "even with our licence, the use of these services by you in your business may be in breach of the terms and conditions of your end user agreement with that service."<sup>112</sup> Similarly, some of APRA's/OneMusic's information sheets, such as its Hotels, Pubs, Taverns, Bars and Casinos information sheet, state that:

*Digital Copy/Delivery is required if you download or access our music for your business from a personal/ non-commercial digital music service, such as Spotify. You should be aware that, just because you hold a licence to use our music in a commercial setting, doesn't mean that your digital music service provider allows you to use your personal account for your business. You should check with your service provider.*

- 4.163. Further, the "Background music suppliers - making the right music choice for your business" section of APRA's website contains information about the benefits of using a BMP, warnings that personal digital streaming service terms of use prohibit commercial use and states that "While we cannot legally compel you to do so, we suggest you contact your streaming service provider to discuss with them the use of the service in your business."<sup>113</sup> The section on digital stream services also states that using a BMP instead can save the business time and effort.<sup>114</sup>
- 4.164. However, the ACCC considers that many businesses are unlikely to access this information. Therefore, there is a risk that APRA charging a fee to businesses specifically tied to their use of personal digital music streaming services could contribute to a lack of understanding amongst some businesses that in many cases use of these services for commercial purposes will be a breach of the services terms and conditions of use.
- 4.165. In July 2019, APRA launched a new OneMusic online licensing portal. Most businesses are in future likely to use this portal to obtain APRA/PPCA licences. The "Get a Quote" function of this portal does ask the business if they are using a streaming service, and adds the digital delivery/copying charge if they answer yes. But the same warnings that doing so may be in breach of the streaming service

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<sup>114</sup> <https://apraamcos.com.au/music-customers/background-music-suppliers/>

terms of use that APRA gives in its licence guidelines and on its website is not provided.

- 4.166. The ACCC considers that many businesses are likely to use this online service, and pay fees based on this quote, and therefore may not be provided with information about the possible limits on the terms of use of their personal streaming service at the point where APRA is charging them an additional fee based on their use of these services.
- 4.167. Accordingly, the ACCC has imposed a condition of authorisation (**condition C1.8**) requiring that any time a person using the Get a Quote function on the OneMusic website answers yes to a question about the use of a digital music service or device to play music in their business APRA must ensure that the following statement is prominently displayed before the next question appears:

*Even with our licence, the use of digital music streaming services by you in your business may be in breach of the terms and conditions of your end user agreement with that service. You should check with your service provider.*

- 4.168. The ACCC has also imposed a condition of authorisation (**condition C1.1(ix)**) requiring APRA to include this statement in the Information Guides to each of its licence categories.

### **Potential detriment from representations made by APRA/OneMusic about its licences**

- 4.169. Some interested parties have raised concerns confidentially with the ACCC about the manner in which APRA represents to businesses that play music the need for an APRA or OneMusic licence. In particular, that APRA has represented that an APRA/OneMusic licence is needed if a business wishes to play music when this is not always the case.
- 4.170. Concerns have been raised about such representations being made in conversations between APRA staff and businesses playing music and in written correspondence from APRA/OneMusic to businesses.
- 4.171. The ACCC has been provided with examples of this correspondence, from a third party and, on request, from APRA. The ACCC considers that this correspondence raises concerns. For example, pro-forma correspondence from OneMusic included the following statements:

*...if you use music at [venue name], you'll need permission (that is, a licence) from the copyright owners through a new organisation OneMusic Australia.<sup>115</sup>*

*...if you want to continue to play and enjoy music at [venue name], you should immediately enter into a OneMusic Australia licence because using music without a licence can constitute an infringement of copyright which, if not rectified, may ultimately lead to legal action.<sup>116</sup>*

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4.172. The ACCC considers that these types of statements may cause some businesses to believe that they require an APRA/OneMusic licence in order to play music when this is not always the case.

4.173. One example of where a business playing music would not require an APRA/OneMusic licence is provided in the APRA AMCOS Guide to Directly-Licensed Music:

*The use of directly-licensed music (also known as royalty-free music) does not require a licence from PPCA and sometimes does not require a licence from APRA AMCOS. This may be because the recordings and/or the songs are not part of the PPCA or APRA AMCOS repertoire, or a licence has been sought and obtained directly from the copyright owner (e.g. a record label or songwriter).<sup>117</sup>*

4.174. The ACCC is aware that some businesses choose to play royalty free music, either sourced directly or through a BMP that provides music content that does not require an APRA or OneMusic licence. One of the benefits of doing so is avoiding the need for an APRA or OneMusic licence.

4.175. There are a number of BMPs that provide music to businesses, for example through apps, whose repertoires consist of music that is not licensed by APRA. This means that so long as the business using the BMPs service only plays music provided by the BMP, there should be no risk that they will play any music works that falls within the APRA or PPCA repertoires.

4.176. There are also various royalty free music radio streaming sites that a business could use to play music without the need for a OneMusic licence (some of which offer corporate/business packages).

4.177. The repertoires available through these sources are generally far more limited than the repertoire covered by APRA's blanket licence and do not include most commercially popular music. Therefore, there is only limited classes of businesses for which this is a commercially viable option. For example, businesses who only require background music, and do not require popular music that most customers would recognise. However, the number of businesses for which this is a viable alternative is likely to grow over time as more music is created that sits outside of the APRA repertoire.

4.178. In this respect, the ACCC notes that an APRA licence is only needed if the business is playing music that is within APRA's repertoire and the business has not obtained a licence or licences directly from the APRA member(s) whose musical work(s) are being played. The ACCC considers that any statements that APRA/OneMusic makes about businesses playing music needing a licence from them to do so should be qualified accordingly.

4.179. Representations that an APRA/OneMusic licence is required in order to play music when this is not always the case may cause loss to the businesses that choose to pay for an APRA/OneMusic licence when they may not need to.

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<sup>117</sup> APRA AMCOS, Plain English Guide to Directly-Licensed Music (Royalty- Free), updated April 2019, p.1, available: [https://apraamcos.com.au/media/Customers/PEG\\_Directly-Licensed-Music\\_Royalty-Free.pdf](https://apraamcos.com.au/media/Customers/PEG_Directly-Licensed-Music_Royalty-Free.pdf)

- 4.180. Such representations are also likely to impinge on the ability of other businesses such as the BMPs noted above to compete to supply music that is outside of APRA's repertoire to businesses as an alternative to an APRA/OneMusic licence.
- 4.181. Representations that an APRA/OneMusic licence is required in order to play music when this is not always the case are likely to inhibit the emergence of such competition to APRA. Particularly as APRA is a large, well-resourced organisation, often dealing with businesses (music users) that are much smaller, less well-resourced and not well informed about music copyright licensing. This may mean that some businesses, faced with such representations, may choose to take out an APRA licence either due to a lack of understanding of what their alternatives are or to avoid having to deal with APRA further on this issue, notwithstanding a preference to avail themselves of alternatives to an APRA/OneMusic licence.
- 4.182. Such representations could also lead to inadvertent infringement of copyright by businesses that do hold an APRA/OneMusic licence. Businesses may assume that they are licensed to play any music they wish rather than only music that is within APRA's repertoire.
- 4.183. In response to concerns raised by the ACCC, APRA has addressed some of these concerns, particularly those in relation to APRA/OneMusic written correspondence. For example, APRA/OneMusic has redrafted its pro-forma correspondence to businesses about obtaining an OneMusic licence.
- 4.184. The ACCC has also advised APRA that should statements or representations that cause a business to believe it requires an APRA/OneMusic licence when this is not the case be made in the future by APRA or OneMusic, the ACCC may take appropriate enforcement action in respect of such statements under the misleading or deceptive conduct provisions of the Australian Consumer Law without further notice.
- 4.185. Concerns have also been raised with the ACCC that when APRA has contacted businesses about obtaining a licence and the business has stated that it does require such a licence APRA has been asking the business for verification, by requesting the business supply APRA with its play data to prove that it is not playing music within APRA's repertoire. The ACCC also notes that some of the APRA/OneMusic correspondence noted above also included statements such as if the business does not think its use of music requires a licence it should 'please contact our office to discuss.'
- 4.186. Such representations may suggest that APRA plays a role in regulating music use by businesses beyond granting licences for businesses to use its member's works and enforcing its member's rights in this respect when this is not the case.
- 4.187. The ACCC notes that APRA does not have any authority to require that businesses provide it with details of the music the business is playing or to place any onus on the business to establish that it does not need an APRA/OneMusic licence. If APRA is concerned that a business is playing music within its repertoire without a licence, the onus is on APRA to establish that copyright infringement has occurred.

## Factors that may mitigate against detriment

- 4.188. 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, transparent and readily available to users, and
  - provide for effective alternative dispute resolution processes where appropriate.
- 4.189. The ACCC notes that there are certain mechanisms which may help to mitigate against the public detriment of APRA's exclusive licensing arrangements. In part these were introduced as conditions of authorisation by the Tribunal in 1999, and subsequent authorisation by the ACCC. These are:
- availability of recourse to the Copyright Tribunal
  - APRA's alternative dispute resolution scheme
  - APRA's board and governance arrangements
  - opt out, licence back and resignation arrangements, and
  - transparency in licensing and distribution arrangements.

## Copyright Tribunal

- 4.190. APRA submits that the constraint exercised by the Copyright Tribunal of Australia over APRA's pricing and licensing conduct is a significant factor mitigating any public detriment generated by its arrangements.<sup>118</sup> This view is supported by the Australasian Music Publishers' Association Limited (**AMPAL**). AMPAL considers APRA is subject to independent scrutiny by the Copyright Tribunal which prevents APRA from imposing unreasonable licence terms.<sup>119</sup>
- 4.191. In response, the WA Nightclubs Association (**WANA**) submits the Copyright Tribunal does not moderate APRA's market power because of the cost of presenting a dispute to the Copyright Tribunal and the information asymmetry that exists between APRA and licensees. WANA submits that parties giving evidence need to have access to expert legal representation and be able to generate sophisticated economic analysis to respond to APRA, and licensees often do not have access to key information needed for such analysis.<sup>120</sup>
- 4.192. APRA submits that the constraint exercised by the Copyright Tribunal upon APRA's pricing and licensing conduct must be viewed in combination with its alternative dispute resolution processes (as discussed below). APRA argues that while having recourse to the Copyright Tribunal might involve costs that a user does not wish to

<sup>118</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 20, available: [ACCC public register](#).

<sup>119</sup> Australasian Music Publishers' Association Limited submission, dated 7 February 2019, p.1-2, available: [ACCC public register](#).

<sup>120</sup> W.A. Nightclubs Association submission, dated 26 February 2019, p. 4, available: [ACCC public register](#).

bear, its ADR processes are a lower cost option available to licensees and members who want to challenge APRA's decisions.<sup>121</sup>

- 4.193. The ACCC considers a user's right to seek recourse to the Copyright Tribunal constrains, to some extent, APRA's ability to exercise its market power in two ways. Where agreement cannot be reached between APRA and a user, the user has the right to have the Copyright Tribunal determine the reasonable terms on which APRA must grant it access to its repertoire. In addition, the availability of recourse to the Copyright Tribunal is likely to constrain APRA in negotiating licences in the first instance.
- 4.194. However the ACCC considers that while the Copyright Tribunal constrains APRA to some extent, it is 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.
- 4.195. The ACCC considers that some businesses are likely to be deterred from using the Copyright Tribunal to resolve a dispute with APRA because of the cost and time involved. In particular, the ACCC considers the Copyright Tribunal constrains APRA's ability to exercise its market 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. For many users, this means that the Copyright Tribunal is unlikely to impose any constraint at all on the exercise of market power by APRA.
- 4.196. As discussed below, information asymmetry between APRA and music users due to lack of transparency about APRA's licensing arrangements also impacts the extent to which users are able to advocate their cases in the Copyright Tribunal as a constraint on APRA's exercise of market power.
- 4.197. The ACCC considers that reducing this information asymmetry, through the conditions of authorisation the ACCC proposes to impose, also discussed below, will go some way to addressing this issue and may result, for some classes of users, in the Copyright Tribunal being a more effective constraint on the exercise of market power by APRA.
- 4.198. The ACCC also notes that under section 157A of the *Copyright Act*, in making a decision on a reference or application concerning a voluntary licence or licence scheme, the Copyright Tribunal is required to have regard to (among other relevant matters) any relevant guidelines made by the ACCC. In April 2019, the ACCC released guidelines to assist the Tribunal in making such determinations.<sup>122</sup> These guidelines detail matters the ACCC considers relevant to the Copyright Tribunal's determination, specifically in relation to prices (licence fees). The guidelines may also assist collecting societies and copyright users when negotiating reasonable copyright remuneration outside of Copyright Tribunal proceedings, by providing insight into the economic framework that the ACCC considers could reasonably be adopted, and the approaches that can be used, in applying that framework. This may in turn assist to minimise resort to the Copyright Tribunal.

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<sup>121</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 20, available: [ACCC public register](#).

<sup>122</sup> Available: <https://www.accc.gov.au/regulated-infrastructure/communications/intellectual-property/copyright-guidelines-2019/final-copyright-guidelines>

- 4.199. The ACCC considers that APRA should have regard to these guidelines as appropriate in its commercial negotiations with licensees.
- 4.200. Notwithstanding these developments, the ACCC considers that the Copyright Tribunal imposes only a limited constraint on the exercise of market power by APRA, and only in respect of those customers whose licence fees are large enough to justify the expense of seeking recourse to the Copyright Tribunal.
- 4.201. In this respect, as discussed at paragraphs 4.333 to 4.350, the ACCC has imposed a condition of authorisation which requires, amongst other things, that APRA publish details about whether, and if so how, APRA had regard to the economic framework and pricing principles set out in these guidelines in setting its licence rates.

## Alternative Dispute Resolution

- 4.202. As noted above, APRA launched Resolution Pathways in 2015, in compliance with the ACCC's 2014 conditions of authorisation which required APRA to implement a revised ADR scheme managed by an independent facilitator. In imposing this condition, the ACCC considered that the ADR scheme would provide an affordable and practical way for both members and licensees to resolve disputes with APRA. The ACCC considered that recourse to an effective ADR process may reduce the public detriment generated by APRA's market power by helping redress imbalances in bargaining power between APRA and licensees.
- 4.203. Resolution Pathways is managed by resolution facilitator, Shirli Kirschner (the **Resolution Facilitator**). APRA submits its market power is constrained by Resolution Pathways, which, it submits, is a low cost, independent mechanism available to members and licensees to resolve disputes with APRA.<sup>123</sup>
- 4.204. In accordance with the conditions of authorisation imposed by the ACCC, in 2018, an independent scheme reviewer conducted a review of Resolution Pathways (the **Independent Review**). The independent reviewer concluded that, in summary, "the scheme resolved disputes in a timely, efficient and effective manner" and commented that "people expressed satisfaction with the scheme's existence, and commended the commitment, the skills and the hard work of the facilitator."<sup>124</sup> The Independent Review also identified some issues with the operation of the scheme and made a number of recommendations for further improvements. These issues are explored in more detail below.
- 4.205. The ACCC notes that the number of referrals to Resolution Pathways has increased over time, which the ACCC considers to be an indication that stakeholder awareness of and confidence in the scheme is increasing:
- In its first two years of operation, the scheme did not enjoy a high uptake of use. Between 1 January 2016 and 31 December 2017, the scheme handled 28 matters and only six of these matters concerned licences.<sup>125</sup>

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<sup>123</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 20, available [ACCC public register](#).

<sup>124</sup> Report of the Independent Review of Resolution Pathways, dated November 2018, p.10, available at: [ACCC public register](#).

<sup>125</sup> Report of the Independent Review of Resolution Pathways, dated November 2018, p.16, available at: [ACCC public register](#).



- However, there was a marked increase in the number of disputes handled by the scheme, including disputes involving licences in 2018. For the period of 1 January 2018 to 31 December 2018, the scheme handled 24 matters, nine of which concerned licences.<sup>126</sup>
  - Between 1 January 2019 and 31 December 2019, the scheme handled 18 new matters, nine of which involved licensees.<sup>127</sup>
- 4.206. The Independent Review found that Resolution Pathway's data for the period of 1 January 2016 to 31 December 2017 showed that the majority of disputes were resolved through the scheme, and that the Resolution Facilitator obtained the majority of resolutions promptly through early intervention.<sup>128</sup>
- 4.207. Overall, the ACCC's views about the effectiveness of the Resolution Pathways scheme are broadly consistent with those expressed by the Independent Review. The ACCC generally considers Resolution Pathways provides licensees and members with an accessible and practical option for resolving disputes with APRA. Resolution Pathways is also a more affordable option for many, but not all, classes of users.
- 4.208. However while there is generally a high degree of satisfaction among many participants who use Resolution Pathways, some interested parties have identified a number of factors that they submit undermine the usefulness of the scheme:
- a lack of awareness among licensees about the existence of the scheme<sup>129</sup>
  - a lack of transparency around how the scheme operates, particularly around the fees involved with the scheme,<sup>130</sup> and
  - a perception that APRA is able to exert influence over the scheme.<sup>131</sup>
- 4.209. Accordingly, the ACCC is imposing a condition requiring APRA to maintain the Resolution Pathways scheme for the duration of the authorisation period (**condition C6**). The ACCC is also requiring a number of changes to the scheme to improve the effectiveness of the scheme in mitigating APRA's market power.

### *Increasing awareness of the scheme*

- 4.210. The ACCC considers that the area where the ADR scheme is likely to be of most utility, but where it is currently being underutilised, is in respect of disputes small licensees have with APRA. The ACCC considers that one of the most likely reasons for this is a lack of awareness of the scheme.
- 4.211. In compliance with the ACCC's 2014 conditions, APRA published a plain English guide to the ADR scheme in a prominent position on its website, and created a public website for the scheme separate from its own. However, some interested

<sup>126</sup> Resolution Pathways submission, dated 14 May 2019, p. 9, available: [ACCC public register](#).

<sup>127</sup> Annual Report of Resolution Pathways, dated 30 May 2020, p.10, available at: [ACCC public register](#).

<sup>128</sup> Report of the Independent Review of Resolution Pathways, dated November 2018, p.20, available at: [ACCC public register](#).

<sup>129</sup> Association of Australian Musicians submission, dated 15 February 2019, p. 17-18, available: [ACCC public register](#).

<sup>130</sup> For example: Ascendance Academy submission, dated 8 March 2019, p. 1–2; Association of Australian Musicians submission, dated 15 February 2019, p. 18. Both available: [ACCC public register](#).

<sup>131</sup> For example: Association of Australian Musicians submission, dated 15 February 2019, p. 14; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 29; Eisteddfod Organisers Australia submission, dated 8 February 2019, p. 2. Submissions available: [ACCC public register](#). Report of the Independent Review of Resolution Pathways, dated November 2018, p.28, available at: [ACCC public register](#).

parties submit that APRA does not publicise the availability of Resolution Pathways as an independent method of dispute resolution or include information about available dispute resolution processes in its correspondence with licensees.<sup>132</sup>

- 4.212. APRA submits that it offers information about ADR to all licensees with whom it is in dispute, and publishes information about the system on its website and in numerous other ways, including expressly in every licence agreement.<sup>133</sup> APRA further submits that letters of demand sent to licensees using APRA's music without a licence refer to the ability of licensees to have disputes determined under Resolution Pathways or the Copyright Tribunal.<sup>134</sup>
- 4.213. Notwithstanding this, the ACCC considers that more could, and should, be done to make licensees aware of the scheme. In this respect, the ACCC notes that the reference to dispute resolution in APRA licences is in fine print towards the bottom of the licence terms and conditions. Further, the information provided by APRA in its licences is a general reference to the availability of an alternative dispute resolution mechanism, along with an invitation to contact APRA if the licensee requires more information. There is no reference to Resolution Pathways or details about how to contact them included.
- 4.214. The ACCC considers that, at a minimum, the information provided by APRA should directly reference, and direct licensees to, Resolution Pathways, rather than to APRA itself in a similar manner to APRA's plain English guides to its licences. The ACCC also considers that this information should be more prominently displayed. The ACCC is therefore amending the condition imposed in 2014 to require APRA to display contact details for, and information about, available dispute resolution processes, including the ADR scheme, prominently on licence forms, member statements, licence invoices and licence agreements, as well as on any initial legal correspondence with licensees, prospective licensees and members (**condition C6.23**).<sup>135</sup>
- 4.215. The ACCC also considers that information about ADR scheme, including the link to access the ADR scheme website, should be displayed more prominently on APRA's website. Currently, details on Resolution Pathways can only be accessed in the "Feedback Centre" section on APRA's website. The ACCC is imposing a condition requiring that both the APRA and OneMusic websites prominently display a link to information about available dispute resolution processes on all pages of their websites, which must be visible on landing on all pages of these websites (**condition C6.22**).

*Increasing transparency about the dispute resolution options available through the scheme and the costs involved*

- 4.216. The ACCC also considers that the potential cost of a dispute and uncertainty about costs that will be incurred, are likely to be reasons why the scheme is being

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<sup>132</sup> For example: Association of Australian Musicians submission, dated 15 February 2019 p. 17-18; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 28; Eisteddfod Organisations Australia submission, dated 8 February 2019, p. 1. Submissions available: [ACCC public register](#).

<sup>133</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 22, available: [ACCC public register](#).

<sup>134</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Attachment 2, available: [ACCC public register](#).

<sup>135</sup> This requirement would not extend to legal correspondence where the matter in dispute is being considered by the Copyright Tribunal or has already been referred to the ADR process.



underutilised by licensees.<sup>136</sup> The Independent Review stated that it was not aware of any instance in which the disputants were concerned about the fees and charges associated with their matter, nor that any matter has been withdrawn due to concerns about fees and charges.<sup>137</sup> However, some submissions made to the ACCC claim that a lack of certainty around how much it will cost to resolve the dispute through the scheme, and therefore how much they will be required to contribute, is a deterrent to pursuing the dispute.<sup>138</sup>

- 4.217. In its draft determination, the ACCC expressed the view that there needs to be more transparency for licensees and members around which dispute resolution processes are available at no cost (for example, informal conversations with the independent facilitator), and at which point fees may apply. The ACCC noted that some interested parties who have provided submissions also appear to be unaware that fees will only apply if the amount in dispute is above a certain threshold (or for non-monetary disputes, where the applicant pays licence fees to APRA or receives payments from APRA above a certain threshold). The ACCC also stated the Resolution Pathways website should be updated to include further information about how the scheme operates and better explanations of the processes available within the scheme.
- 4.218. Since the release of the draft determination, Resolution Pathways has substantially redesigned its website to include additional information about how Resolution Pathways operates, including the scheme's cost structure. The ACCC considers that the updated Resolution Pathways website broadly addresses most of the concerns outlined in the draft determination about the transparency of fees for using the scheme. However, there is still a level of uncertainty around the costs that may be incurred by the parties to a dispute.
- 4.219. When introduced as a condition of the 2014 authorisation, the ACCC intended for the independent ADR scheme to be a low cost way for licensees and members, and in particular small business licensees, to resolve disputes with APRA. Consequently, under the condition imposed in 2014, an applicant is only required to contribute to the cost of resolving a dispute if either:
- (a) the amount in dispute is above \$10,000, or
  - (b) if the dispute is not about money, in the case of a licensee, the amount payable by the licensee for an APRA licence is more than \$10,000, and in the case of a member, the amount paid by APRA to the member in the previous twelve months is less than \$10,000.
- 4.220. The Resolution Facilitator submits the amount in dispute threshold adds unnecessary uncertainty and complexity to the scheme's operations because of ambiguity around how the amount in dispute is to be calculated. The Resolution Facilitator further submits that it is often not possible to definitively determine the amount in dispute before the dispute resolution process commences, which means she is unable to provide upfront certainty to a disputant as to the costs involved to use the scheme.<sup>139</sup> For example, a licence may not be disputing the entire licence

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<sup>136</sup> Resolution Pathways 2019, *Costs*, available: <http://www.resolutionpathways.com.au/Resolution-Pathways>

<sup>137</sup> Report of the Independent Review of Resolution Pathways, dated November 2018, p.20, available: [ACCC public register](#).

<sup>138</sup> For example: Ascendancy Academy submission, dated 21 February 2019, p. 2; Association of Australian Musicians submission, dated 15 February 2019, p. 18; Eisteddfod Organisers of Australia submission, dated 8 March 2019, p. 1–2. Submissions available on the [ACCC public register](#).

<sup>139</sup> Resolution Pathways submission, dated 31 October 2019, p. 1, available: [ACCC public register](#).

fee, but only arguing it should be lower, or that they are entitled to a different category of licence.

- 4.221. To simplify the current process, the Resolution Facilitator suggests that the threshold should be set by reference to the value of the disputant's licence fee or the member's annual royalty payment, and not the amount in dispute.<sup>140</sup>
- 4.222. The ACCC agrees that the amount in dispute threshold is ambiguous, and considers it would be difficult to clarify how this threshold should be applied in a manner that would eliminate all ambiguity. However, the ACCC recognises that determining access to free dispute resolution based only on the cost of the disputants licence may risk restricting the ability of some small businesses to access the scheme. For example, a nightclub that would otherwise be categorised as a small businesses, but for whom the cost of its APRA licence is one of its most significant expenses, may not qualify.
- 4.223. Nonetheless, the ACCC is of the view that removing the amount in dispute threshold will have the overall effect of simplifying the scheme for potential disputants, which will likely encourage greater uptake. Accordingly, the ACCC has amended the condition of authorisation imposed in 2014 to provide the threshold that must be met before an applicant is required to contribute to the cost of resolving a dispute is set only by reference to the value of the disputant's licence fee or member's annual royalty payment (**condition C6 – schedule A, option 2, 3 and 4, paragraph 3**).
- 4.224. The ACCC has also increased the value of the licence fee licensees must pay before the licensee is required to contribute to the cost of resolving a dispute from \$10,000 to \$20,000. This reflects the introduction of OneMusic whereby, in many cases, APRA now licenses public performance of musical works on behalf of its members and sound recordings on behalf of PPCA members, and charges licence fees that reflect this.
- 4.225. The ACCC has similarly amended the conditions of authorisation relating to charges that apply for informal resolution of a dispute by the Resolution Facilitator so that charges are set by reference to the value of disputant's licence fee or the member's annual royalty payment rather than the amount in dispute (**condition C6 – schedule A, option 1**).
- 4.226. Separately, the ACCC is aware that there are differing opinions amongst stakeholders about in what circumstances a licensee or member is required to make a co-payment to the cost of resolving a dispute. The AHA interprets the ACCC's 2014 conditions to mean that where the dispute is less than \$10,000 then fees for the independent mediators and experts are not payable. The Resolution Facilitator also notes there is some difference of view on the operation of the formula for co-payments.<sup>141</sup>
- 4.227. For the avoidance of doubt, the ACCC provides the following clarification of its condition: if the value of the disputants' licence, or annual royalty payment from APRA, is below the cost threshold, APRA is required to fund the entire cost to resolve their dispute, regardless of how much it ultimately costs to resolve the dispute. This is consistent with the intention of the fee structure established in the

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<sup>140</sup> Resolution Pathways submission, dated 31 October 2019, p. 1, available: [ACCC public register](#).

<sup>141</sup> Resolution Pathways submission, dated 9 August 2019, p. 1, available: [ACCC public register](#).

2014 conditions of authorisation, which was to provide dispute resolution to smaller businesses without them having to contribute to the cost of resolving the dispute.

- 4.228. In this respect, the ACCC considers that the extent to which recourse to the scheme may mitigate any exercise of market power by APRA, and the associated public detriment, is likely to be greater if small businesses have access to the scheme at no cost. This is the intention of the scheme, as established by the ACCC's 2014 condition of authorisation.
- 4.229. The ACCC also recognises that not having to contribute to the cost of resolving a dispute could incentivise some licensees to pursue disputes with APRA without sufficient regard to the merit of the matter in dispute, and reduce incentives to engage in the process in a manner that resolves disputes at least cost. To address this issue, the ACCC has imposed a condition which provides the independent mediator or independent expert (as relevant) with the ability to determine that a dispute under options 2, 3 or 4 (mediation, binding or non-binding determination) be discontinued if, in the view of the independent mediator or independent expert, the disputant is not making a reasonable effort to engage in the dispute resolution process (**condition C6.3(viii)**). Condition C6.3 provides that before determining that a dispute be discontinued the independent mediator or independent expert must provide the applicant with a written warning:
- setting out why they consider that the applicant is not making a reasonable effort to engage in the resolution of the dispute
  - explaining that unless the applicant does make a reasonable effort to engage in the resolution of the dispute the dispute will be discontinued, and
  - explaining that if the dispute is discontinued the applicant cannot seek to have the same dispute resolved through Resolution Pathways unless APRA agrees to do so.
- 4.230. The condition also prohibits APRA from making any representation about, or expressing a view to, the independent mediator or independent expert about these matters unless asked to do so by the independent mediator or independent expert (**condition C6.4**).
- 4.231. The ACCC has also clarified that in respect of disputes where applicants are required to contribute to the cost of resolving the dispute, split 50/50 with APRA, if there is more than one applicant that is party to the dispute, 50 percent of the cost of resolving the dispute must be divided equally amongst all applicants, with APRA also paying 50 percent of the costs (**condition C6 – schedule A, option 2, 3 and 4, paragraph 1**).

#### *Independence of the ADR scheme from APRA*

#### Funding arrangements

- 4.232. Some interested parties have raised concerns that because APRA funds Resolution Pathways' operations (including the cost of the Resolution Facilitator), other than in respect of escalated disputes where, as discussed above, in some cases the disputant contributes to the cost of resolving the dispute, Resolution Pathways is not sufficiently independent of APRA.<sup>142</sup>

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<sup>142</sup> For example: Association of Australian Musicians submission, dated 15 February 2019, p. 14; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 29; Eisteddfod Organisers

- 4.233. The Resolution Facilitator acknowledges that the perception of independence and autonomy is particularly important for Resolution Pathways in circumstances where APRA is a party to a dispute and that Resolution Pathways' funding arrangement presents a challenge to true independence.<sup>143</sup> The Resolution Facilitator also notes the mechanisms for ensuring independence suggested by the Independent Review, which include alternative funding options such as opening the scheme up for use by the broader music industry and industry funding. In response, the Resolution Facilitator submits that a major barrier to implementing this option is the increased expense and difficulty of integrating with other wider stakeholder groups, in the absence of any legislative or administrative power to compel such participation or seed funding to organise such an alliance.<sup>144</sup>
- 4.234. The Resolution Facilitator submits the scheme has addressed the challenge of independence by working towards implementing practical safeguards to protect the system.<sup>145</sup> The Resolution Facilitator submits she has implemented a number of measures, beyond those required by the ACCC's condition, to assist with protections centred around robust reporting and governance, including:
- A governance committee made up of members and licensees, with an independent chair who does not represent a stakeholder group. The Resolution Facilitator considers the benefit of an independent chair is that the governance committee has the capacity to meet in the absence of the Resolution Facilitator or APRA and discuss/make decisions on issues where the presence of either may challenge its effectiveness.<sup>146</sup>
  - A pathway for parties to make complaints about the Resolution Facilitator, APRA or the Resolution Pathways scheme generally. A participant can lodge complaints or concerns to the governance committee through the independent chair or directly to the committee.
  - A pilot program for a system which allows confidential reporting to the Resolution Facilitator or the governance committee about issues with APRA, where a reporter does not want to be identified for fear of retribution.<sup>147</sup>
- 4.235. In addition, the Resolution Facilitator is investigating introducing an automated electronic process for the registration, management, and tracking of matters. The Resolution Facilitator submits this will ensure that all matters lodged with the system are reported, and that the time it takes for matters to be resolved are properly tracked in a way that is independent of the Resolution Facilitator and APRA.<sup>148</sup>
- 4.236. The ACCC accepts that APRA funding Resolution Pathways is likely to create a perception, at least amongst some licensees and members, that Resolution Pathways is not sufficiently independent. This in turn is likely to compromise the accessibility of the scheme to these members and licensees. Conversely, other than charging members and licensees directly, APRA is the only practical source of

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Australia submission, dated 8 February 2019, p. 2. Submissions available: [ACCC public register](#). Report of the Independent Review of Resolution Pathways, dated November 2018, p.28, available at: [ACCC public register](#).

<sup>143</sup> Resolution Pathways submission, dated 14 May 2019, p. 3, available: [ACCC public register](#).

<sup>144</sup> Resolution Pathways submission, dated 14 May 2019, p. 3, available: [ACCC public register](#).

<sup>145</sup> Resolution Pathways submission, dated 14 May 2019, p. 3, available: [ACCC public register](#).

<sup>146</sup> Resolution Pathways submission, dated 14 May 2019, p. 2-3, available: [ACCC public register](#).

<sup>147</sup> Resolution Pathways submission, dated 14 May 2019, p. 4-5, available: [ACCC public register](#).

<sup>148</sup> Resolution Pathways submission, dated 14 May 2019, p. 5, available: [ACCC public register](#).

funding for the scheme. Accordingly, APRA not funding the scheme is also likely to compromise the accessibility of the scheme for many members and licensees.

- 4.237. The ACCC considers that the steps taken by Resolution Pathways broadly address concerns around the independence of the scheme. As long as APRA continues to fund the scheme, some perceptions of APRA exerting influence over the operation of the scheme are likely to remain. In this respect, while APRA funding the scheme is not ideal, the only way to remove any concerns about independence would be for APRA to have no role whatsoever in financing the scheme, which is not practical without undermining the usefulness of the scheme as a low cost way to resolve disputes with APRA.
- 4.238. The Resolution Facilitator also recommends that the ACCC impose a condition which changes the way Resolution Pathways is funded. In accordance with the ACCC's 2014 conditions of authorisation, APRA is currently required to fund (either entirely or in part) every dispute in which it is a party. The current funding model provides a retainer to cover five days a quarter for establishment costs and administration. Additional funding for other types of disputes or projects (e.g. member-to-member disputes (discussed further at paragraphs 4.251 to 4.258) and the peer review project<sup>149</sup>) depends on APRA agreeing to a request from the Resolution Pathways Facilitator after a discussion with the Governance Committee.<sup>150</sup> The Resolution Facilitator advises APRA has funded all requests so far.<sup>151</sup>
- 4.239. The Resolution Facilitator recommends that APRA be required to provide block funding to fund the entire operations of the scheme, including resolution of disputes. The Resolution Facilitator submits that under a block funding arrangement, APRA would be required to commit to a fixed amount each year with the amount to be determined by APRA in consultation with the Governance Committee and a stipulation that a portion of the funds be set aside to allow capital works and discretionary matters.<sup>152</sup> The Resolution Facilitator considers that a block funding model would create further separation between APRA and the scheme's operations, which will enhance the independence of the scheme.
- 4.240. The ACCC sought submissions on this proposal in the draft determination and received one response, from the Australian Hotels Association (the **AHA**). The AHA submits that the block funding model paid for by APRA (or any other steps to further remove any perceptions of conflict) may be appropriate.<sup>153</sup>
- 4.241. The ACCC accepts that APRA funding disputes on a case by case basis is more likely to lead to perceptions that the process is not independent of APRA than if APRA provided block funding. However, the ACCC's view is that block funding is impractical for the resolution of disputes that APRA is required to fund by the conditions of authorisation, given uncertainty about year to year variation in the number, and nature, of disputes. The ACCC also expects an increase in the number of disputes due to the change in licensing arrangements recently introduced (the launch of OneMusic) and the new proposed conditions of authorisation which

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<sup>149</sup> Peer review is a pilot program which the Resolution Facilitator has introduced. The process is currently available to music creators (for example members disputing who will own copyright in the co-written work), and involves the appointment of an industry "peer" whose role includes considering information provided by the disputants, providing an assessment of the likely provenance of the disputed music item, and facilitating collaborative negotiations between the disputants.

<sup>150</sup> Resolutions Pathways submission, dated 24 May 2019, p. 1, available: [ACCC public register](#).

<sup>151</sup> Resolution Pathways submission, dated 24 May 2019, p. 1, available: [ACCC public register](#).

<sup>152</sup> Resolution Pathways submission, dated 16 May 2019, p.1, available: [ACCC public register](#).

<sup>153</sup> Australian Hotels Association submission, dated 5 July 2019, p.1, available: [ACCC public register](#).

require the ADR scheme to be better publicised with the aim to increase awareness of the scheme. The number of disputes, including how many more may be handled by the scheme in the future, is difficult to forecast, making an appropriate level of block funding also difficult to forecast. The ACCC therefore considers that the cost of resolving disputes should continue to be funded on a case by case basis.

- 4.242. However, the ACCC does consider it appropriate to require APRA to provide block funding for the administrative functions necessary to support the consideration of disputes with APRA (for example, website development and overheads such as funding meetings). Accordingly, the ACCC has amended the condition of authorisation imposed in 2014 in relation to funding of the ADR scheme to require that APRA provide a fixed amount of funding for the administration of the scheme (including the costs of the Resolution Facilitator and an honorarium for the independent chair of the consultative committee, but otherwise excluding costs incurred by APRA in connection with individual disputes) each year which is adequate for the operation of the scheme (taking into account the level of funding recommended by the consultative committee each year) (**condition C6.9**).
- 4.243. Condition C6.9 also requires APRA to ensure that if the fixed amount of funding is exhausted prior to the end of the year, bridging funding is provided for the remainder of the year to support those aspects of the administration of the scheme necessary to directly support the consideration of disputes.

#### The ADR scheme's governance structure

- 4.244. The ACCC's 2014 conditions of authorisation required the establishment of a 'consultative committee' to provide advice and support to the Resolution Facilitator in relation to the design, implementation and ongoing management of the scheme. The 2014 conditions required that the consultative committee be a mixture of large and small APRA members and licensee representatives.
- 4.245. As outlined in paragraphs 2.66 to 2.68, Resolution Pathway is currently governed by two committees, the stakeholder group, established in 2014 and made up of 12 licensees and members selected by an independent panel, and the governance committee, established in 2016 and made up of four licensees and members taken from the larger stakeholder group. The Governance Committee also has an independent chair who is not an APRA licensee or member.
- 4.246. Both committees satisfy the criteria for the establishment of a consultative committee as required by the ACCC's 2014 conditions. The ACCC understands the governance committee currently performs the functions of the committee required by the 2014 conditions of authorisation.
- 4.247. To ensure the independence and quality of the ADR scheme, the Resolution Facilitator recommends that the conditions of authorisation formally recognise both the governance committee and the stakeholder group, in replacement of the single Committee. The Resolution Facilitator requests the ACCC formalise in its conditions a transfer of the roles and responsibilities assigned to the Committee by the 2014 conditions to the governance committee. In addition to these advisory roles, the Resolution Facilitator recommends that the governance committee be given the power to make decisions about the following matters (all of which the Resolution Facilitator is currently responsible for):
- a) setting annual key performance indicators for the Resolution Facilitator and the scheme



- b) reviewing any complaints about the Resolution Facilitator or the scheme (including APRA's engagement with the Scheme) and
  - c) planning for succession of the Resolution Facilitator.<sup>154</sup>
- 4.248. The Resolution Facilitator further requests that the larger stakeholder group be maintained as an interface between stakeholders and the scheme. The Resolution Facilitator also recommends the ACCC formalise as a condition of authorisation the requirement that the Governance Committee have an independent chair.<sup>155</sup>
- 4.249. The ACCC sees the value in having a body, which is independent of the Resolution Facilitator and APRA, to make decisions about the matters identified by the Resolution Facilitator in paragraph 2.247 to support the independence of the scheme. The ACCC also considers that the appointment an independent chair to head that committee (rather than the Resolution Facilitator acting as chair) supports the independence of the scheme. Accordingly, the ACCC has amended the condition imposed in 2014 to assign responsibility for the three matters outlined in paragraph 2.247 above to the Committee and to require the Committee to have an independent chair (**condition C6.8 and condition C6 – schedule B**).
- 4.250. However, the ACCC does consider that it is necessary to formalise in its conditions of authorisation a multi-committee structure with prescribed responsibilities for each specific committees. Subject to complying with the conditions imposed by the ACCC about the committee structure and roles and functions, the ACCC considers that there should be flexibility about how the governance arrangements operate, including whether to continue with a larger stakeholder group to support the governance committee. In this respect, the Resolution Facilitator, and the governance committee, can choose to maintain, and utilise, the larger stakeholder committee if they find value in the additional stakeholder input without the need for the ACCC to impose a condition of authorisation requiring that they do so.

### *The scope of the ADR Scheme*

- 4.251. The ACCC notes that in its 2014 determination, it was envisaged the ADR facility would assist in the resolution of disputes between APRA and its licensees or potential licensees, as well as disputes between APRA and its members. The ACCC considered the ADR scheme would be of most utility to small licensees who may have been deterred from using the Copyright Tribunal to challenge APRA's licensing decisions. However, in practice, as illustrated by the data at paragraph 4.205, Resolution Pathways has primarily been used to resolve member-to-member disputes, usually about royalty distributions. Where these issues are in dispute, then amounts collected by APRA with respect to the work are held in suspense until the dispute is resolved.
- 4.252. While the ACCC considers the ability of Resolution Pathways to effectively resolve member-to-member disputes to be an unforeseen benefit of the scheme, it notes that inter-member disputes fall outside the scope of the scheme mandated by the ACCC's 2014 authorisation. In practice, this means that currently services provided to resolve member-to-member disputes are funded at the discretion of APRA. As

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<sup>154</sup> Resolution Pathways submission, dated 5 July 2019, p.1-2, available: [ACCC public register](#).

<sup>155</sup> Resolution Pathways submission, dated 5 July 2019, p.1-2, available: [ACCC public register](#).



noted above, APRA has funded all requests (including for member-to-member disputes) to date.<sup>156</sup>

- 4.253. The Resolution Facilitator recommends that the scope of Resolution Pathways be extended to cover all disputes arising under the eco-system created by the structure of authorising APRA, including member-to-member disputes.<sup>157</sup> The Resolution Facilitator considers that this will encourage the keeping of data on disputes for all issues within the APRA-AMCOS eco-system allowing for a better allocation of resources overall.<sup>158</sup>
- 4.254. The ACCC sought submissions on this proposal in the draft determination and received one response, from APRA. APRA submits that it is not necessary for the conditions of authorisation to be amended to formally recognise disputes between members. APRA submits that this is a service it offers to its members and disputes between members are not a consequence of the conduct the subject of the application for authorisation.<sup>159</sup>
- 4.255. In reauthorising APRA's performing rights acquisition and licensing arrangements in 2014 the ACCC imposed conditions of authorisation requiring APRA to establish an amended ADR scheme as a way to mitigate, to some extent, APRA's market power. Accordingly, the scheme was purposively designed to be an affordable and practical way for both members and licensees to resolve disputes *with APRA*.
- 4.256. Member-to-member disputes are primarily private disagreements about who owns the copyright in co-written works and in what proportion. These disputes evolve independently of APRA and would exist irrespective of APRA's performing rights acquisition and licensing arrangements the subject of the application for reauthorisation. The ACCC considers that while member-to-member disputes may involve APRA, these disputes are not a consequence of APRA's conduct the subject of the application for authorisation.
- 4.257. Accordingly, while the ACCC considers that the ADR scheme being used to resolve member-to-member disputes is a positive development, the ACCC does not consider it appropriate to impose a condition of authorisation explicitly requiring APRA to extend the scope of the ADR scheme to include member to member disputes. To do so would impose requirements on APRA that go beyond addressing public detriment resulting from the conduct for which APRA seeks reauthorisation.
- 4.258. The Resolution Facilitator also submits that the stakeholder group and the governance committee suggest that because Resolution Pathways is funded with member money (that is, collected licence fees that would otherwise be distributed to APRA's members) the scheme should be available for use to as a service to members to resolve member-to-member disputes.<sup>160</sup> The ACCC notes there is nothing in the conditions of authorisation which precludes APRA from expanding the scheme to include member-to-member disputes, if its members value the service. In this respect, the ACCC considers whether to do so is a matter for APRA and its members, and that if APRA and its members decide to do so, it should be funded separately to the funding for the ADR scheme required to be provided under condition C6.9

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<sup>156</sup> Resolution Pathways submission, dated 24 May 2019, p.1, available: [ACCC public register](#).

<sup>157</sup> Resolution Pathways submission, dated 16 May 2019, p.2, available: [ACCC public register](#).

<sup>158</sup> Resolution Pathways submission, dated 16 May 2019, p.2, available: [ACCC public register](#).

<sup>159</sup> Australasian Performing Right Association Limited submission, dated 5 July 2019, p. 6, available: [ACCC public register](#).

<sup>160</sup> Resolution Pathways submission, dated 14 May 2019, p.2, available: [ACCC public register](#).

## *ADR scheme reporting and independent review*

- 4.259. As noted, the 2014 authorisation imposed a condition requiring an independent review of the ADR scheme be completed before reauthorisation was sought. The ACCC is imposing a condition requiring another independent review of the operation and management of the ADR scheme to be conducted before any future application for re-authorisation, on the same terms as its 2014 condition (**condition C6.13**). The findings of this review will inform the ACCC's consideration of any future application for reauthorisation.
- 4.260. In compliance with the ACCC's 2014 condition, APRA must also provide the ACCC with an annual public report, which must include certain information about the disputes handled by the scheme, including (broken down into licensee disputes and member disputes):
- the number of disputes considered by the scheme and the number of disputes resolved, under each dispute resolution process
  - the time taken to refer and resolve disputes, and
  - a summary of the subject matter of the disputes and the fees and charges incurred by APRA and/or the applicants.
- 4.261. The Resolution Facilitator has requested the ACCC allow for flexibility in any reporting requirements imposed on Resolution Pathways by a condition of the current authorisation. Specifically, the Resolution Facilitator requests that ACCC impose a condition permitting the format of reporting to be decided by the Committee, with the ACCC having the right to request additional information or additions on an annual basis.<sup>161</sup> The Resolution Facilitator considers it appropriate for the ACCC to provide a base of matters to be included (for example, the type of matters, the number of matters and details of any evaluations received) and reserve a right to request changes to any reporting format if required.<sup>162</sup>
- 4.262. The ACCC recognises that the current reporting condition, which is prescriptive and requires Resolution Pathways to report by classes of process, may make reporting difficult in instances where a dispute involves multiple processes. The ACCC also considers that allowing for flexibility will facilitate more accurate reporting, as Resolution Pathways will be able to adapt reports to account for future changes to the scheme.
- 4.263. The ACCC has amended the condition of authorisation imposed in 2014 to provide greater flexibility about the reporting requirements (**condition C6.18**). The information requirements remain as per the condition imposed in 2014, but the format in which the required information is provided will be decided by the governance committee. Given this change, the ACCC has also amended this condition to provide that the ACCC is able to request additional information from Resolution Pathways and/or request Resolution Pathways to make changes to the report format (**condition C6.20**).
- 4.264. The Resolution Facilitator further requests that the governance committee also be required to perform an annual review of the scheme's operations and performance. The Resolution Facilitator submits that while the future independent review of the

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<sup>161</sup> Resolution Pathways submission, dated 16 May 2019, p.1, available: [ACCC public register](#).

<sup>162</sup> Resolution Pathways submission, dated 16 May 2019, p.3, available: [ACCC public register](#).

scheme's operations will be useful for any future authorisation process, given it will occur in around three years' time, it will be less useful for the ongoing regulation of the scheme.<sup>163</sup>

- 4.265. The ACCC notes there is nothing in the conditions which precludes the governance committee from conducting such a review. However the ACCC considers more frequent reviews could improve the efficiency and efficacy of the scheme's operations.
- 4.266. The ACCC is therefore amending the condition of authorisation imposed in 2014 that requires an annual ADR report to be prepared to require that the report is by the governance committee (**condition 6.18**) and to require reporting on the following additional matters:
- the number and nature of all complaints received about the Resolution Facilitator or the scheme (including APRA's engagement with the scheme)
  - an evaluation of the scheme's operations, by reference to any key performance indicators and metrics set for the scheme
  - an evaluation of the scheme's performance, by reference to any key performance indicators and metrics set for the Resolution Facilitator
  - an evaluation of the governance and funding arrangements for the scheme (**condition 6.21**).

#### *ACCC conclusions about the ADR scheme*

- 4.267. The ACCC considers that APRA's ADR scheme does provide some, limited, constraint on APRA's market power in respect of some users. The ACCC considers that the changes to the scheme the ACCC is requiring as conditions of authorisation are likely to increase the scheme's effectiveness in this regard.
- 4.268. However, like the Copyright Tribunal, the ADR scheme constrains APRA's ability to exercise its market power only beyond the point where the cost to the user of seeking recourse to the ADR scheme would be less than the difference between the price which the user could negotiate with APRA directly and that which it considers would likely be determined under the ADR scheme. Further, binding determinations can only be made under the ADR scheme if both parties agree to participate.
- 4.269. Accordingly, the ACCC considers that the ADR scheme provides only a limited constraint on APRA's market power.

### **APRA's board and governance arrangements**

#### *Composition of the APRA Board and member voting rights*

- 4.270. The APRA board is comprised of twelve directors. Of these, six directors are representatives of writer members, elected by writer members, and six directors are representatives of publisher members, elected by publisher members. One of the six writer directors must be a New Zealand writer member. APRA submits that this

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<sup>163</sup> Resolution Pathways submission, dated 5 July 2019, p.2, available: [ACCC public register](#).

direct system of election by the membership ensures the board is representative and accountable to members.<sup>164</sup>

- 4.271. The ACCC notes that having board representation from all APRA member groups (including small and independent composers) would ensure that the interests of all stakeholders are taken into account in decision making, rather than only a subset of members. This would also assist in reducing the dynamic inefficiencies generated by APRA's system (inefficient over or under production of works) as the more representative of members the APRA board is, the more likely that APRA's distribution arrangements will fully reflect the interests of all members.
- 4.272. The ACCC's 2014 determination noted concerns raised about the composition of APRA's board and the system used to determine members' voting entitlements. In 2014, submissions argued that APRA's voting system, in which votes are weighted by royalties earned, had resulted in major international publishing companies and writers affiliated with large labels dominating APRA's Board.<sup>165</sup>
- 4.273. The ACCC suggested that APRA consider including a board member to represent the interests of independent and niche writers/composers/producers. The ACCC recommended APRA review the structure of its board and voting rights (including the weighting of votes) to ensure that it has appropriate incentives to represent its members. The ACCC also flagged it would take account of any improvements in this area in considering any future application for re-authorisation.<sup>166</sup>
- 4.274. The APRA AMCOS membership voted to change members' voting entitlements in board elections and Annual General Meetings (**AGM**) in 2018. Prior to this change, every APRA or AMCOS member who had received any earnings at all over the previous two financial years was entitled to cast one vote in the relevant company's board elections and AGM. Members were then allocated one additional vote for every \$500 block of earnings they had received over the last financial year. In 2018, the APRA AMCOS membership voted to increase the number of dollars for which members receive an additional vote. Members now receive an additional vote for every \$2,500 block of earnings. It remains the case that no individual member (or related group of members) can receive more than 15 per cent of the available votes.
- 4.275. Some interested parties continue to raise concerns that APRA's voting system disproportionately favours its three large publisher members, Sony, Universal and Warner, at the expense of smaller, independent, APRA members.<sup>167</sup> A number of interested parties also submit that the change to the way members' votes are weighted has disenfranchised low earning members.<sup>168</sup> The Association of Australian Musicians, Phil Bromley and Dr Julie Storer all argue the ACCC should require APRA to change its voting system to "one member, one vote".<sup>169</sup>

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<sup>164</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 32, available: [ACCC public register](#).

<sup>165</sup> Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 65, available: [ACCC public register](#).

<sup>166</sup> Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 65-66, available: [ACCC public register](#).

<sup>167</sup> For example: Jamison Young submission, dated 29 January 2019, p. 3-4; An Interested Party submission, dated 9 February 2019, p. 1. Both submissions are available on the [ACCC public register](#).

<sup>168</sup> Association of Australian Musicians submission, dated 15 February 2019, p. 8, available: [ACCC public register](#).

<sup>169</sup> Association of Australian Musicians submission, dated 15 February 2019 p. 8-9; Dr. Julie Storer submission, dated 8 February 2019, p. 6; Phil Bromley submission, dated 9 February 2019, p. 3; All of the above submissions are available on the [ACCC public register](#).

- 4.276. The ACCC notes that while some smaller APRA members have fewer voting rights under the new system, on the balance, the change has resulted in most smaller APRA members having proportionally more votes compared to larger members than they did under the previous system. For example, a member with \$100,000 in earnings has gone from having 201 votes to having 41 votes, whereas a member with \$500 in earnings has gone from having two votes to one vote, and a member with \$1,000 in earnings from three votes to one vote. However, some smaller members have had a reduction in voting rights comparable to large members, for example, a member earning \$2,000 has gone from five votes to one vote.
- 4.277. The ACCC notes that APRA's membership consists of a relatively small group of members whose works generate much of APRA's licensing revenue, a large group of members whose works each generate relatively less of APRA's licensing revenue and a larger group again who generate almost no licensing revenue at all. For example, of APRA's 103,637 members, 44,892 earned royalties in the 2018/19 financial year.<sup>170</sup>
- 4.278. The ACCC considers it appropriate that those members whose works are performed the most, and therefore generate the bulk of APRA's licensing venue, have a greater say in the running of the company, and accepts that a weighted voting system is an effective way to achieve this outcome. While the ACCC is of the view that APRA's voting arrangements should ensure that the interests of various stakeholders are taken into account in decision making, the ACCC considers that a system of voting where every member receives one vote regardless of earnings would go too far. It would shift voting power to low and no royalty-earning members which may undermine the effectiveness of APRA's arrangements. Collectively, APRA members who received no royalty distributions at all in 2018 would have more voting power than all those members who did.
- 4.279. The ACCC is not in a position to form a view at this time about the extent to which the voting reforms APRA did institute in 2018 address the concerns raised in the 2014 determination as it is too soon to assess the impact of these changes. In this respect, the ACCC is disappointed that it took APRA until late 2018, just before its application for reauthorisation was lodged, to adopt the reforms the ACCC flagged in 2014 that it expected to see. However, the ACCC's preliminary view is that APRA's changes to its voting rights are likely to make its board and AGM elections more representative.
- 4.280. Following board elections held in November 2019, APRA's board included publisher representatives from each Universal Music Publishing, Sony/ATV Music Publishing and Warner/Chappell Music Australia as well as from ABC Music Publishing, Origin Music Group and Mushroom Music.<sup>171</sup>
- 4.281. APRA submits that current elected board member Brandan Gallagher considers himself to be an independent musician.<sup>172</sup> The ACCC considers that this adequately addresses the issue of representing the interests of independent and niche writers/composers/producers on APRA's Board.

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<sup>170</sup> APRA AMCOS, 2019 Year in Review, p.6, available: [https://apraamcos.com.au/media/YIR/2019/APRA\\_AMCOS\\_Year\\_in\\_Review\\_2019.pdf](https://apraamcos.com.au/media/YIR/2019/APRA_AMCOS_Year_in_Review_2019.pdf)

<sup>171</sup> APRA AMCOS, APRA and AMCOS Board Election Results, 13 November 2019, available: <https://apraamcos.com.au/news/2019/november/apra-and-amcos-board-election-results/>

<sup>172</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 31, available: [ACCC public register](#).



- 4.282. However the ACCC will review the composition of APRA's board when assessing any future applications for re-authorisation, particularly once there is a greater opportunity to assess the impact of the changes to APRA's system of weighted voting.

### *Governance and transparency of decision-making*

- 4.283. The ACCC considers it is important that as a member organisation, APRA's arrangements include strong governance mechanisms to ensure that it is acting in the interests of its members, and to enable members to participate in APRA's decision making processes. Transparency is a necessary component of good governance arrangements.
- 4.284. Submissions have argued that APRA is not adequately transparent about how it operates and in particular, how it manages member funds.<sup>173</sup> Australian Libraries Copyright Committee is of the view that collecting societies are given an inappropriate degree of discretion and that there are insufficient measures for effective oversight or sanctions if that discretion is abused.<sup>174</sup> However AMPAL submits APRA AMCOS operates transparently, efficiently and at best practice. AMPAL also notes that APRA's practices are determined by its board of directors and that APRA's directors generally have a legal duty to act in the best interests of their respective members.<sup>175</sup>
- 4.285. On 1 April 2019, the final report of the Department of Communications Collecting Societies Code Review (the **Code Review**) was publicly released. This review related to all copyright collection societies, not just APRA.
- 4.286. The Code Review examined the level of transparency around collecting societies' governance arrangements, and included an examination of how the reporting practices of Australia's collecting societies, including APRA, compare to collecting societies in the European Union. The Code Review states that collecting societies in the European Union are required to publish on their websites an 'annual transparency report,' which should include information on the activities and governance of the collecting society, comprehensive financial information and information on the use of amounts deducted for social, cultural and educational services.<sup>176</sup>
- 4.287. The Code Review found that much of what is published in response to these requirements is information that collecting societies in Australia, including APRA, already publish. The Code Review concluded that while this suggests that Australian collecting societies perform well in terms of making some information available, the accessibility of this information could be improved. The Code Review considered stakeholders would benefit from the availability of the range of information about collecting societies' governance, operations and performance in

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<sup>173</sup> For example: Association of Australian Musicians submission, dated 15 February 2019, p. 12; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 4; Copyright Advisory Group submission, dated 8 February 2019, p. 2; Marketing Melodies submission, dated 20 February 2019, p. 1. Submissions available: [ACCC public register](#).

<sup>174</sup> Australian Libraries Copyright Committee submission, dated 8 February 2019, p. 2, available: [ACCC public register](#).

<sup>175</sup> The Australasian Music Publishers' Association Limited submission, dated 7 February 2019, p. 1-2, available: [ACCC public register](#).

<sup>176</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 75-77, available: <https://www.communications.gov.au/departamental-news/review-code-conduct-copyright-collecting-societies-0>

an accessible, easy-to-navigate form.<sup>177</sup> However, the Code Review did not go as far as to recommend amendments to the code that would require copyright collecting societies to produce an annual transparency report in any form.

- 4.288. In response to interested parties' submissions, APRA submits that it already provides a vast amount of information about its operations on its website, including its distribution policies, financial information, and information about the board. APRA does not agree with any suggestion that it should be required to disclose information regarding staff salaries or other benefits, or any financial information beyond what is already disclosed in its audited financial statements.<sup>178</sup>
- 4.289. To support governance mechanisms, the ACCC considers APRA should make enough information about its operations public to ensure that members can make fully informed decisions when exercising their voting rights.
- 4.290. The ACCC accepts that APRA currently makes the vast majority of information pertaining to its operations available in its various publications, including APRA AMCOS' 'Year in Review'. The ACCC also notes that it is likely that APRA's members have access to more detailed information about APRA's operations, necessitated by APRA's legal disclosure obligations.
- 4.291. However the ACCC is of the view that providing this information in a single, easy to read document will improve stakeholder confidence in APRA's system for both members and licensees. The ACCC also notes that while APRA and AMCOS do produce separate annual reports, much of the information available on APRA AMCOS' website and its 'Year in Review' publications regarding the group's operations is an aggregation of APRA and AMCOS' information. For example, the APRA AMCOS group's cost to revenue ratio for the financial year ending June 2018, available on APRA AMCOS' website, was 13.6 per cent.<sup>179</sup> APRA submits its cost to revenue ratio, as a standalone entity for 2018, was 14.45 per cent.<sup>180</sup> However, this information was only made available in response to a request by the ACCC.
- 4.292. The ACCC has imposed a condition (**condition C.4**) requiring APRA, separately from AMCOS, to publish an annual Transparency Report which includes:
1. A description of APRA's legal and governance structure
  2. Information on rights revenue, including
    - Total rights revenue generated per type of use<sup>181</sup>
    - Total distributable revenue, per type of use
    - Income on investment of rights revenue, and use of such income
  3. Information on APRA's operating costs, including

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<sup>177</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 36-37, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

<sup>178</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 2, available: [ACCC public register](#).

<sup>179</sup> APRA AMCOS 2019, *Cost To Revenue Ratio*, available: <http://apraamcos.com.au/about-us/cost-to-revenue-ratio/>

<sup>180</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 18, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

<sup>181</sup> For example: digital, public performance, radio etc



- Total operating costs
  - Total remuneration paid to APRA's board directors
  - APRA's cost to revenue ratio
4. Amounts due to members, including
    - Total revenue attributed to members
    - Total amount distributed to members
    - Total amount attributed but not yet distributed to members
  5. Information about expired undistributed funds, including:
    - Reasons why funds remain undistributed
    - Steps taken to locate and distribute funds to members
    - The uses for which funds are to be applied
  6. Information about international collecting societies, including
    - Total amount received from other collecting societies
    - Total amount paid to other collecting societies
  7. Details of any social, cultural or educational services provided by APRA which are funded through deductions from rights revenue, including the total amount deducted from rights revenue.

## **Opt out, licence back and resignation**

### *Existing arrangements*

- 4.293. APRA submits that the licence back facility provides members and licensees with freedom to enter into direct licences for all uses within Australia, such that there is no reason to require the arrangements between APRA and its members to be on a non-exclusive basis.<sup>182</sup>
- 4.294. The ACCC considers that direct licensing between copyright owners and licensees may operate as a competitive alternative and constraint on collective licensing in certain circumstances, in particular, where a user has predictable usage requirements and can identify and negotiate with the copyright owners before the copyright material is required for use.
- 4.295. In its 2014 determination, the ACCC noted that the take up of APRA's licence back and opt out facilities by members was relatively low and raised the possibility that there was a lack of awareness among licensees about the processes. The ACCC was concerned to ensure that the licence back and opt out arrangements were as effective as possible so that direct dealing and source licensing could be entered into where it is feasible and efficient to do so.<sup>183</sup>
- 4.296. The ACCC also noted in its 2014 determination that the efficient use of the opt out or licence back provisions needs to be promoted through a reduction in the blanket

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<sup>182</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 19, available: [ACCC public register](#).

<sup>183</sup> Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 53, available: [ACCC public register](#).

price charged by APRA to users of these provisions.<sup>184</sup> This is because APRA's licences for users are generally granted on a blanket basis – that is, they confer upon the licensees an unlimited right to use all of the works in APRA's repertoire (including the works of the affiliated overseas collecting societies). This means that even if direct dealing between APRA members and users was simple and straightforward there would be little incentive to deal directly because, unless the user only required a licence over a limited repertoire of works, they would still have to deal with APRA in order to obtain a licence for the balance of the repertoire they wished to use. Unless APRA offered discounts on its blanket licences to reflect direct dealing, the user would, in effect, be paying twice for the rights to works where they have entered into direct licensing arrangements.

- 4.297. It was a condition of the 2014 Authorisation that APRA take certain steps to increase awareness of the licence back and opt out provisions, including publishing a plain English guide and launching an education campaign.<sup>185</sup> APRA submits that since 2014, it has developed a plain English guide to the licence back and opt out processes and it submits that information about opt out and licence back is regularly included in licensee and member publications. APRA also submits that since 2014, it launched an education campaign on its opt out and licence back provisions which included a news piece outlining the availability of the provisions and a series of information sessions.<sup>186</sup> APRA further submits that it now includes provisions in a large number of agreements that reflect the fact that licence fees may need to be adjusted to take account of direct licences between copyright owners and APRA licensees.<sup>187</sup>
- 4.298. A number of interested parties have submitted that the current licence back and opt out provisions offered by APRA are unsatisfactory and inefficient.<sup>188</sup> Interested parties have also submitted that the provisions do not effectively facilitate direct licensing between APRA members and licensees.<sup>189</sup> Interested parties are also concerned that the fees for requesting a licence back or opt out, as well as the notice period required, act as a disincentive for members to pursue these options.<sup>190</sup>

### *Take up of opt out and licence back opportunities*

- 4.299. As noted at paragraphs 4.62 to 4.67, despite APRA's attempts to simplify the licence back and opt out processes and to improve awareness of these arrangements, there has still been relatively low take up of these provisions in the past four years. During the period January 2014 to December 2018, these facilities were only used on 73 occasions (APRA has over 100,000 members, and

<sup>184</sup> Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 54, available: [ACCC public register](#).

<sup>185</sup> Australasian Performing Right Association application for revocation and substitution of authorisations A91187-A91194 and A91211 final determination, dated 6 June 2014, p. 62, available: [ACCC public register](#).

<sup>186</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 22, available: [ACCC public register](#).

<sup>187</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 8, available: [ACCC public register](#).

<sup>188</sup> For example: Marketing Melodies submission, dated 20 February 2019, p. 2; Mood Media submission, dated 8 March 2019, p. 2; Nightlife submission, dated 6 March 2019, p. 8; WA Nightclubs Association submission, dated 26 February 2019, s 2.21. Submissions available: [ACCC public register](#).

<sup>189</sup> Australian Digital Alliance submission, 8 February 2019, p. 5; Australian Libraries Copyright Committee, dated 8 February 2019, p. 2; Creative Commons Australia submission, dated 8 February 2019, p. 3. Submissions available: [ACCC public register](#).

<sup>190</sup> Australian Small Business Family Enterprise Ombudsman, dated 15 February 2019; Copyright Advisory Group submission, 8 February 2019, p. 4. Both submissions available: [ACCC public register](#).

approximately 147,000 licensees.)<sup>191</sup> It does not appear that the conditions of the 2014 authorisation relating to increasing awareness and understanding of APRA's opt out and licence back provisions have increased the utilisation of these provisions in any material way.

4.300. The main situations in which the licence back provisions have been used are:

- Live tours (35 per cent of all licence backs) – the touring artist licenses back their works on a non-exclusive basis for the purpose of performing the works themselves while on tour.
- Events – for members who wish to directly license the public performance of their works at individual events.
- Background music (11 per cent of all licence backs).
- Music on hold (21 per cent of all licence backs) – again this is viable because the user, for example a call centre, only requires a very limited repertoire which can generally be supplied by a single artist.<sup>192</sup>

4.301. As can be seen from these examples, APRA's licence back provisions are only generally being used for APRA members to deal directly with a narrow range of users, requiring access to narrow repertoires, and even within this narrow range of users and repertoires, only very irregularly.

4.302. APRA submits that its technology platform CLEF (discussed at 2.57-2.60), is intended to streamline and simplify the licence back provisions further.<sup>193</sup> APRA submits CLEF will provide a more automated and integrated technical solution to facilitate the withdrawal of rights from APRA's repertoire. For example, works which are subject to opt out for a particular type of usage will be automatically excluded from receiving allocations from the relevant distribution pool, rather than the manual adjustment which must currently be performed. In addition, APRA intends to improve the user experience of requesting an opt out or licence back through the new membership portals to the new APRA website.<sup>194</sup>

4.303. The ACCC understands that APRA anticipates CLEF will reduce the administrative work involved with processing applications for licence back. The ACCC therefore expects that following the introduction of CLEF, the notice period required and fees associated with members utilising the licence back will also decrease. The ACCC considers that such changes to the processes could encourage greater use. However, the ACCC understands that CLEF may not reduce the amount of administrative work required to process an opt out request, because in this instance APRA is required to notify all affected licensees of the opt out.<sup>195</sup>

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<sup>191</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 22, available: [ACCC public register](#).

<sup>192</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 17-19, available: [ACCC public register](#).

<sup>193</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 7, available: [ACCC public register](#).

<sup>194</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 23, available: [ACCC public register](#).

<sup>195</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 14-15, available: [ACCC public register](#).

- 4.304. In summary, APRA's opt out and licence back provisions are rarely used and, on current information, it does not appear that their availability imposes a meaningful competitive constraint on the exercise of market power by APRA other than in respect of, in some cases, a very narrow class of users such as those discussed at paragraph 4.300 above.
- 4.305. The ACCC considers that this in large part reflects the exclusive assignment APRA takes of its members' rights in the first instance rather than any fundamental problem with the opt out and licence back provisions *per se*. That is, other than in respect of users who only require a very limited repertoire of works, direct dealing is only likely to be feasible if there is a system that facilitates not only opportunities for APRA members to license use of the works directly, but also opportunities for them to easily aggregate their rights into bundles that would be attractive to users, such as for example if APRA held its members' rights on a non-exclusive basis as discussed at paragraphs 4.67 to 4.70.
- 4.306. Accordingly, the ACCC does not consider that APRA's current opt out and licence back provisions are likely to facilitate direct dealing at a level that would impose a significant competitive constraint on APRA in respect of most categories of users. The ACCC also considers that the changes proposed by APRA under CLEF, while welcome because they will make the process easier and less costly as foreshadowed by APRA above, are unlikely to facilitate more direct dealing in a material way that would impose a more significant competitive constraint on APRA other than in respect of the narrow classes of users discussed above.

#### *Non-commercial licence back*

- 4.307. As outlined in paragraph 2.33, in 2018 APRA introduced a "non-commercial licence back" option as part of its broader licence back provisions. This permits members to license back particular work in relation to "the right to communicate to the public online" for non-commercial purposes. APRA defines "non-commercial purposes" to mean that there is no consideration or financial incentive received by any party for use of the work under any sub-licence. APRA also requires that any sub-licensee is a not-for-profit entity whose activities are not directed towards commercial advantage and that does not receive public or institutional funding. The non-commercial licence back provisions differ from APRA's ordinary licence back provisions in that ordinary licence back provisions can be used by members who wish to enter into direct licences with any entity for public performance, broadcast or communication within Australia, while a non-commercial licence enables members to grant a not-for-profit entity a global licence for online use only.
- 4.308. Interested parties have also raised concerns about the usefulness of APRA's licence back for non-commercial use provisions. Submissions claim that APRA's definition of "non-commercial purposes" is too narrow and highly restrictive. Issues raised by parties include:
- The requirement that the entity be "not-for-profit" appears to exclude licensing to individuals.<sup>196</sup>
  - Many not-for-profit entities receive some form of "public or institutional funding", (for example schools, universities and libraries) and as such these

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<sup>196</sup> Australian Digital Alliance submission, dated 8 February 2019, p. 5; Creative Commons submission, dated 8 February, p. 3. Both submissions available: [ACCC public register](#).

organisations are excluded from APRA's definition despite normally being considered non-commercial.<sup>197</sup>

- APRA's definition prohibits any consideration being received for the work in order to be considered a "non-commercial purpose". As such, artists are prevented from licensing works in exchange for a non-monetary benefit, such as a promise to include the work in an online compilation of new music.<sup>198</sup>
- The narrowness of the definition of "non-commercial purposes" excludes artists from licensing works under common licences such as the non-commercial Creative Commons licence.<sup>199</sup>
- The current provision is limited to "purposes online", which does not permit licensing for broadcast or performance.<sup>200</sup>

- 4.309. In response, APRA submits that the non-commercial licence back provisions were introduced to allow licensing of online non-commercial use. APRA states that its reciprocal arrangements with overseas collecting societies mean that ordinary licence back can only be used for online purposes if the online use is confined to Australia. This is because a licence back for global use might conflict with the terms of a licence already granted in an overseas territory.<sup>201</sup>
- 4.310. APRA considers that the risk of conflict between a non-commercial licence back for global use and a licence granted by an overseas society to be low. However APRA submits the definition of non-commercial licence is critical to minimising this risk of conflict, and to ensure that members did not grant non-commercial licences to multinational social media platforms on the misunderstanding that they are non-commercial.<sup>202</sup>
- 4.311. APRA also notes that an APRA member can enter into a direct licence with any party in Australia (including a school, library or other not-for profit entity) under the ordinary licence back provisions, with no need to satisfy the additional conditions of the non-commercial licence back.<sup>203</sup> Similarly, APRA states that an APRA member can also use the ordinary licence back provisions to enter into an arrangement for the broadcast or public performance of the member's works free of charge for any purpose in Australia.<sup>204</sup>
- 4.312. Specifically in relation to education institutions, APRA submits that schools already benefit from significant licensing advantages under the Copyright Act including a

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<sup>197</sup> Australian Digital Alliance submission, dated 8 February 2019, p. 5; Copyright Advisory Group submission, dated 8 February 2019, p. 3; Creative Commons submission, 8 February, p. 3. Submissions available: [ACCC public register](#).

<sup>198</sup> Copyright Advisory Group submission, dated 8 February 2019, p. 3, available: [ACCC public register](#).

<sup>199</sup> Copyright Advisory Group submission, dated 8 February 2019, p. 4 and Australian Digital Alliance submission, dated 8 February 2019, p. 5. Both available: [ACCC public register](#).

<sup>200</sup> Creative Commons submission, dated 8 February, p. 3, available: [ACCC public register](#).

<sup>201</sup> Australasian Performing Right Association Limited further submission, dated 18 April 2019, p. 19; Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 16. Both available: [ACCC public register](#).

<sup>202</sup> Australasian Performing Right Association Limited further submission, dated 18 April 2019, p. 20, available: [ACCC public register](#).

<sup>203</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 16, available: [ACCC public register](#).

<sup>204</sup> Australasian Performing Right Association Limited further submission, dated 18 April 2019, p. 20; Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 16. Both available: [ACCC public register](#).

free licence for public performance in the classroom, and a comprehensive statutory licence for the reproduction and communication of works.<sup>205</sup>

- 4.313. In response to criticisms about the costs of using the non-commercial licence back provisions, APRA submits that its fee on members of \$200 per licence-back transaction is rarely applied except in circumstances where it would be unreasonable for other APRA members to bear the administrative costs. APRA also submits has never been applied to an individual writer member seeking to enter into direct licence with a school or library.<sup>206</sup>
- 4.314. The ACCC considers that APRA's ordinary licence back provisions provide members with the ability to enter into direct licensing arrangements with any party, including educational institutions, libraries and other not-for-profit organisations operating in Australia, without having to satisfy APRA that the use is non-commercial. The ACCC sees no advantage to members, in terms of cost and process, in using non-commercial licence back over standard licence back, provided the use in question occurs in Australia.
- 4.315. However, the ACCC understands that some APRA members would like the ability to use APRA's non-commercial licence back provisions to enter into direct licensing arrangements with not-for-profit entities or educational institutions operating *outside* of Australia.<sup>207</sup> For this group of members, APRA's definition of non-commercial, which the ACCC acknowledges is narrow, may restrict their ability to do so. However, the ACCC accepts APRA's submission that a narrow definition of "non-commercial use" is necessary to minimise the risk of conflict between a non-commercial licence back for global use and a licence granted by an overseas society.

### *Resigning from APRA*

- 4.316. Members can take back their performing and communication rights from APRA by resigning their APRA membership. Article 9 of APRA's Constitution provides that a member may resign by providing no less than six months' notice in writing expiring on 30 June or 31 December or a shorter period accepted by the APRA Board.
- 4.317. However the ACCC notes that APRA's Constitution, which is available on APRA's website, appears to be the only public source of information about the process for resigning from APRA. The ACCC considers this lack of transparency around the ability of a member to cease its membership with APRA, and the process by which to resign, may impede the ability of a member to pursue alternative licencing arrangements, such as assigning its rights to a competing supplier of music or dealing directly with music users.

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<sup>205</sup> Australasian Performing Right Association Limited further submission, dated 18 April 2019, p. 19; Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 16. Both available: [ACCC public register](#).

<sup>206</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 16, available: [ACCC public register](#).

<sup>207</sup> See Australian Digital Alliance submission, dated 8 February 2019, p. 4; Australian Libraries Copyright Committee, dated 8 February 2019, p. 2; Creative Commons submission, dated 8 February 2019, p. 2. Submissions available: [ACCC public register](#).



- 4.318. The ACCC is therefore amending the condition of authorisation imposed in 2014 requiring APRA to maintaining a comprehensive plain English guide to its opt out and licence back provisions (**condition 3**) to require APRA to also include in this guide information about resignation from APRA (cessation of membership), including the:
- purpose scope and contents of the resignations provisions, and
  - steps involved to resigning from APRA.
- 4.319. The ACCC has also amended this condition to require APRA to maintain information about its opt out, licence back and resignation provisions on the 'Managing Your Rights' page on its website.

## **Transparency of APRA's licensing and distribution arrangements**

- 4.320. Transparency about APRA's licence fees and distribution arrangements could serve to mitigate, to some extent, APRA's market power. Transparency about licence fees can assist users in negotiations with APRA and allow users to make informed decisions about acquiring licences from APRA. Transparency about distribution arrangements assist in making APRA accountable to its members, making it more likely that APRA members are remunerated in proportion to the value of actual performance of their works.
- 4.321. Conversely, lack of transparency about these issues could serve to entrench or enhance APRA's market power.

### ***APRA's licence fees***

- 4.322. In accordance with a condition imposed by the ACCC in its 2014 authorisation, APRA publishes plain English guides to its licence categories. As required by the condition of authorisation these guides include information about the basis on which fees are determined, and the range of fees payable for each licence and licence category. The ACCC considers these plain English guides have improved clarity and certainty for licensees around how much they will need to pay for an APRA licence.
- 4.323. However, the ACCC notes that while the guides provide transparency about how much licensees will have to pay, the guides do not set out how the tariffs that determine the licence fees are formulated. The condition of authorisation imposed by the ACCC in 2014 did not require APRA to provide this.
- 4.324. A number of interested parties have criticised APRA's licensing fee arrangements for not being sufficiently transparent, and argue that it is difficult for businesses to understand how and on what basis licence fees and tariffs are calculated.<sup>208</sup> For example, the Council of Small Business Organisations Australia submitted it has received complaints that licence agreements are confusing to small business

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<sup>208</sup> For example: Academy Ballet submission, dated 5 February 2019; Ascendance Academy submission, dated 22 February 2019; Australian Lottery and Newsagents Association submission, dated 26 February 2019; Australian Small Business Family Enterprise Ombudsman submission, dated 15 February 2019; Carlo Colosimo submission, dated 20 February 2019, p. 1; Council of Small Business Organisations Australia submission, dated 22 February 2019, p. 1; Creative Commons Australia submission, dated 8 February 2019, p. 3; Eisteddfod Organisers Australia, dated , p. 7, dated 8 February 2019; A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 7; Nadia's Performance Studio & Sydney Stars on Show Eisteddfod submission, dated 19 March 2019; Nightlife submission, dated 6 March 2019, p. 11-12; WA Nightclubs Association submission, dated 26 February 2019, s 2.20. Submissions available: [ACCC public register](#).



owners and that that many small businesses believe APRA AMCOS to be a scam and therefore refuse to pay fees when confronted by them.<sup>209</sup>

- 4.325. The Office of NSW Small Business Commissioner (**OSBC**) submits that a lack of transparency exacerbates the issues caused by APRA's monopoly power. Since licensees have no practical choice but to contract with APRA, it is possible that inefficiencies in APRA's operations are passed on to licensees. Without transparency, the OSBC submits that it is not possible to determine whether a fee might not be lower but for inefficiencies in the operations of the relevant collecting societies, or whether it represents price gouging relative to the proportion of that fee returned to the relevant artist.<sup>210</sup> The OSBC submits that increased transparency would allow licensees to dispute the merit and equity of a fee, and thereby engage more constructively in consultations on licence reforms.<sup>211</sup>
- 4.326. WANA has questioned APRA's change to a capacity-based scheme for nightclubs (where licence fees are based on a venue's maximum capacity, not actual attendance) and the distinction between the (higher cost) licence scheme that they are categorised under and the licence scheme APRA offers to other licensed venues that also have dance floors.<sup>212</sup>
- 4.327. The final report of the Collecting Societies Code Review found that some licensee participants in the review process raised concerns about licence fee negotiations and indicated that increased transparency around how their fees are calculated would help them better determine whether fees are fair and reasonable and their ability to make informed decisions.<sup>213</sup>
- 4.328. In this respect, the Code Review found that the information required by licensees and other stakeholders is in two parts: first, the methodology that shows how the licence fee is calculated, and second, the underlying basis or rationale applied in that methodology.<sup>214</sup>
- 4.329. The Code Review found that the Code should require sufficient transparency around licences and fee calculations to support negotiations between collecting societies and licensees. The Code Review made the following recommendation:

*Recommendation 4: Amend clause 2.3 (of the Code) to require collecting societies in response to a reasonable request, to make available to licensees and potential licensees:*

- a. the methodology for calculating the licence fee applicable to that licensee or potential licensee, and*

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<sup>209</sup> Council of Small Business Organisations Australia submission, dated 22 February 2019, p. 1, available: [ACCC public register](#)

<sup>210</sup> Australian Small Business Family Enterprise Ombudsman submission, dated 15 February 2019, p. 2, available: [ACCC public register](#)

<sup>211</sup> Australian Small Business Family Enterprise Ombudsman submission, dated 15 February 2019 p. 3, available: [ACCC public register](#)

<sup>212</sup> WA Nightclubs Association submission, dated 26 February 2019, p. 4, available: [ACCC public register](#).

<sup>213</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 20, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

<sup>214</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 24, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

*b. matters taken into consideration in determining the licence fee to the extent that such information is not commercial-in-confidence and does not otherwise directly affect a commercial negotiation between the collecting society and the licensee or potential licensee.*

*The Code Reviewer is able to consider whether a request or a collecting society's response to it has been reasonable.*<sup>215</sup>

- 4.330. In response to interested party submissions about the application for re-authorisation, and an information request from the ACCC, APRA submits that:
- Industry negotiation takes place prior to the introduction of a new scheme with industry bodies and individual licensees.<sup>216</sup>
  - The data and economic analysis its uses to set fees is confidential, including because it is confidential information belonging to APRA, its members and licensees. Such information would give a commercial advantage to licensees in circumstances where they could not be compelled outside litigation to share the same information that they had created. Depending on the circumstances of its creation, it is also often the subject of legal professional privilege.<sup>217</sup>
  - In response to the ACCC advising that it was considering adopting a condition requiring APRA to provide information similar to that contained in the Code Review recommendation in its plain English guides, APRA would have no objection to disclosing the basis or rationale for each licence scheme, for example, the schemes that APRA believes to be relevant comparators, the extent of its consultation with industry bodies, alternative bases reasonably considered, etc.<sup>218</sup>
- 4.331. In response to the ACCC advising that it was considering requiring APRA to make available an explanation of all matters taken into account when it increases licence fees by more than CPI, APRA submitted that it does not increase licence fees other than in accordance with CPI without industry consultation or Copyright Tribunal proceedings. Accordingly, APRA would have no objection to disclosing this type of information in connection with any licence fee increase.<sup>219</sup>
- 4.332. With respect to the Code Review, APRA also submits that its implementation of all of the recommendations set out in the review will satisfy the reasonable submissions regarding transparency received during the ACCC's consideration of the application for re-authorisation.<sup>220</sup>
- 4.333. The ACCC considers that there is a lack of transparency about the underlying basis and methodology by which APRA's licence fees are determined. While most businesses are able to determine, by reference to APRA's plain English guides or

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<sup>215</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 26, available: <https://www.communications.gov.au/departamental-news/review-code-conduct-copyright-collecting-societies-0>

<sup>216</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 17, available: [ACCC public register](#).

<sup>217</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 15, available: [ACCC public register](#).

<sup>218</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 15, available: [ACCC public register](#).

<sup>219</sup> Australasian Performing Right Association Limited further submission, dated 16 April 2019, p. 15, available: [ACCC public register](#).

<sup>220</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 2, available: [ACCC public register](#).

the online OneMusic 'Get a Quote' function (discussed below), how much they will have to pay in licence fees, they receive little, if any information about why the fees are set at the levels that they are.

- 4.334. Further, in any attempt to question, or test the rationale for the fees charged by APRA, there is a significant information asymmetry between APRA and the business. APRA has a large store of data about the basis on which licence fees are set on which to draw, including from previous negotiating processes. This is information that is generally not available to the business seeking a licence. Not having this information available is likely to impact the business' ability to make informed, rational decisions about acquiring licences from APRA.
- 4.335. This information asymmetry also has implications for the business' bargaining position in negotiating with APRA. In this respect, the ACCC notes cases in the past where businesses have questioned the level of fees proposed to be charged and APRA has dismissed these concerns on the basis of a lack of supporting evidence. For example, in its consultation paper in relation to licence fees to apply to nightclubs under OneMusic, APRA stated that:

*We acknowledge that some submissions asserted that the existing APRA AMCOS, existing PPCA and/or proposed OneMusic rates are too high. However, these submissions did not include any underlying critical analysis – including relevant data, economic analysis or examination – necessary to give proper consideration or weight to these submissions.*<sup>221</sup>

- 4.336. However, APRA itself had also not provided such information in support of its proposed licence fees. In this respect, the ACCC considers that, in the context where APRA is the near monopoly supplier of an essential input for many businesses, any onus to explain the basis on which fees are arrived at should rest with it.
- 4.337. The ACCC considers that a lack of transparency around how licence fees are formulated also impacts the extent to which recourse to the Copyright Tribunal and APRA's ADR process may act as constraints on APRA's exercise of market power.
- 4.338. The ACCC considers this information asymmetry could impact the ability of licensees to seek recourse to the Copyright Tribunal. Without sufficient information about the basis on which the structure and quantum of the licence fee has been determined, a licensee has significant difficulty determining the 'reasonableness in the circumstances' of the licence scheme on which it would be seeking a ruling from the Copyright Tribunal. This is likely to mean businesses are less likely to challenge APRA licence schemes in the Copyright Tribunal than if more information about the basis for the licence scheme they are concerned about was available.
- 4.339. Second, if a licensee, or a group of licensees, does decide to challenge a licensing scheme to the Copyright Tribunal, it will likely not have access to the same level of licensing information and data that is available to APRA, making it more difficult for a licensee to put on evidence to support its claims or to challenge claims made by APRA. In its submission, WANA referred to a determination made in respect of APRA's licensing scheme where the Copyright Tribunal noted that no one had

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<sup>221</sup> OneMusic, *Our Consultation Process With You*, p. 1, available: <http://www.onemusic.com.au/wp-content/uploads/2017/03/RMFD-181031-1.pdf>.

placed any evidence before the Copyright Tribunal in opposition to APRA's application and to counter the evidence adduced by APRA.<sup>222</sup>

- 4.340. The same is true of businesses who may wish to seek recourse to APRA's ADR process. The more information about the rational for APRA's licence schemes that is available, the better position licensees will be in to assess whether recourse to the ADR process to address any concerns they may have is likely to be a viable option.
- 4.341. The ACCC also notes submissions from licensees which claim that difficulties in understanding how APRA's licensing schemes work have adversely affected their perceptions of fairness about APRA's licence fees and conditions.<sup>223</sup> The ACCC considers that requiring APRA to produce further information about its licence schemes will have the dual effect of promoting understanding of how APRA's licensing policies are applied to a particular licensee's circumstances and will enable licensees to make more informed decisions about their licensing arrangements. In turn, this could reduce the number of disputes and inquiries related to licence fees handled by or directed to APRA.
- 4.342. In the draft determination the ACCC proposed to impose a condition of authorisation requiring APRA to make available, in its plain English guides an explanation of:
- the methodology for calculating the licence fee for each licence category, including description of the data used and summary of any, analyses or evaluations undertaken, and
  - matters taken into consideration in determining each licence fee to the extent that such information is not commercial-in-confidence.
- 4.343. Following the release of the draft determination APRA provided a draft example of the information it considered that it should be required to publish in accordance with the condition proposed in the draft determination confidentially to the ACCC. The ACCC considers that the example APRA provided was so high level that it conveyed little meaningful information and did not satisfy the intent of the condition proposed in the draft determination.
- 4.344. More generally, the ACCC considers that requiring APRA to publish information about its methodologies, without some specificity about the type of information required to be provided, may not necessarily address concerns about the transparency of APRA's licensing arrangements. In this respect, to the extent that great transparency about APRA's licensing arrangements could serve to mitigate, to some extent, APRA's market power, APRA has little incentive to provide such transparency.
- 4.345. Accordingly, the ACCC has imposed conditions of authorisation which:
- strengthen the condition proposed in the draft determination and is more prescriptive about the information APRA must publish (**condition 1.2**), and

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<sup>222</sup> WA Nightclubs Association submission, dated 26 February 2019, s 2.23, available: [ACCC public register](#).

<sup>223</sup> For example: A group of dance teachers, dance schools and Eisteddfod/competition organisers submission, dated 25 February 2019, p. 7; Ascendance Academy submission, dated 21 February 2019, p. 2; Council of Small Business Organisations Australia submission, dated 22 February 2019, p. 1-2; Mood Media submission, dated 8 March 2019, p. 2-3; Office of the NSW Small Business Commissioner submission, dated 15 February 2019, p. 3. Submissions available: [ACCC public register](#).

- allows the ACCC to require an Independent Report to be prepared in respect of one or more licence categories if the ACCC does not consider that the information published by APRA in respect of those licence categories pursuant to condition 1.2 meaningfully explains its methodologies in a way that allows licensees to understand how their licence fees are determined (**condition 5**).
- 4.346. Condition 1.2 requires APRA to publish revised licence guides which include explanations of:
- the processes and methodologies adopted by APRA for calculating licence rates for that licence category, including underlying data used, and economic analysis or examination
  - whether, and if so, how APRA had regard to any decisions of the Copyright Tribunal of Australia in setting license rates for that licence category
  - whether, and if so, how APRA had regard to the economic framework and pricing principles, and the approaches that can be used in applying that framework and pricing principles, set out in the ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration in calculating licence rates
  - whether and, if so, how APRA's blanket licences under the licence schemes are adjusted (including discounted) and/or provide for adjustment, to account for any direct licensing, and
  - any other matters APRA had regard to in setting the licence rates.
- 4.347. The ACCC will review and provide feedback on drafts of the guides APRA produces, including providing a view about whether the information APRA proposes to publish is sufficient so as to not trigger an Independent Report being required. APRA will be provided with the opportunity to make changes to its guides to address any issues the ACCC raises before it publishes the guides. APRA will have 12 months to produce and publish these guides.
- 4.348. Condition 5 provides that if, after 12 months, the ACCC is not satisfied that the licence guides APRA produces are sufficiently clear and detailed to provide licensees with a reasonable understanding of the methodologies APRA adopts in setting its licence fees the ACCC can require APRA to appoint an Independent Reporter to prepare an Independent Report explaining the methodologies adopted by APRA in determining licence fees.
- 4.349. The Independent Reporter must be approved by the ACCC and funded by APRA and the Independent Report must be prepared in accordance with criteria, objectives and terms of reference approved by the ACCC.
- 4.350. The ACCC has also imposed a condition of authorisation requiring APRA to make available, each time there is an increase in a licence fee by more than the rate of growth in CPI, an explanation of the matters taken into consideration in determining the increase in the licence fee (to the extent that such information is not commercial-in-confidence) (**condition C1.7**).
- 4.351. These conditions are in addition to the condition imposed by the ACCC in 2014 requiring APRA to publish comprehensive plain English guides to each of its licence categories. The ACCC has imposed a condition of authorisation that APRA maintain these guides (**condition C1.1**).

- 4.352. The other aspect of the transparency of APRA's licence fees about which interested parties have raised concerns is that getting an APRA licence is unduly complicated due to the number of licence categories and the confusing fee metrics applied by APRA. Businesses are unable to determine how APRA calculates licence fees using the information APRA currently provides.
- 4.353. Interested parties question why, for example, two similarly sized venues, pay different licence fees.<sup>224</sup>
- 4.354. These concerns relate to transparency about which fees apply to which businesses and in what circumstances, as opposed to why fees are set at the level they are.
- 4.355. The ACCC notes that in July 2019, as part of the launch of OneMusic, APRA introduced a "Get a Quote" feature on the OneMusic website, which allows licensees to get an estimate of their total licence fee by responding to a series of questions about the specifics of their business and how the business uses music. The tool applies the same metrics as outlined in APRA's plain English guides and acts as a digital licence form. Should the user require it, the portal also provides an explanation of each question and the information the question is seeking.
- 4.356. The ACCC considers that the "Get a Quote function" is a simple and effective way for licensees to gain a better understanding of how their licence fee is structured, and to ensure that they are only paying for cover they actually need. For example, if a licensee is looking to cut costs, the business can enter different options for how they may use music and see how that effects the licence fee they will be charged.
- 4.357. In respect of licence fees charged to individual businesses, the "Get a Quote" tool is likely to reduce the complexity of APRA's licence schemes. Businesses are able to more simply see what they are being charged, itemised based on the each input that has gone into determining their licence fee and how changes to how they use music in their business will impact their licence fee. Businesses using the "Get a Quote" tool have this information available to them, and are able to make any desired changes based on this information, before they renew their licence each year. This tool also makes direct comparisons with other businesses easier, including making it easier to understand why two, ostensibly similar businesses, may be paying different licence fees.

#### *Distribution of royalties to APRA members*

- 4.358. APRA currently publishes publications explaining both its distribution rules and its distribution practices. These documents explain both the manner in which distributions are determined, and the frequency of distributions, by category.
- 4.359. A number of interested parties raised concerns about APRA's distribution of royalties. In particular, a number of interested parties submit that there is a lack of transparency around how licence fees are calculated and distributed and the system used to ensure that performers receive their rightful royalties.<sup>225</sup>

<sup>224</sup> Pre-decision conference minutes, Authorisation AA1000433, dated 19 July 2019, p.6, available: [ACCC public register](#).

<sup>225</sup> For example: Association of Australian Musicians, dated 15 February 2019, p. 4 & 6; Australian Small Business Family Enterprise Ombudsman, dated 15 February 2019; Australian Venues Association submission, dated 1 March 2019, p. 1; Carlo Colosimo submission, dated 20 February 2019, p. 2; Creative Commons Australia submission, dated 8 February 2019, p. 3; Live Performance Australia submission, dated 22 February 2019, p. 4-5; Nadia's Performance Studio & Sydney Stars on Show Eisteddfod submission, dated 19 March 2019; NSW Small Business Commissioner submission, dated 15



- 4.360. The final report of the Code Review, the recommendations of which were implemented through changes to the Code,<sup>226</sup> concluded that rights holders should have sufficient information to understand the remuneration they receive for use of their materials and the processes associated with its determination. The Code Review also concluded that licensees should also receive adequate information about how the licence fees they pay are divided up and distributed so they have a better understanding of the extent to which their fees are determined on a reasonable and fair basis.<sup>227</sup>
- 4.361. The Code requires collecting societies to make information on their distribution policy available to members, including how entitlements are calculated, how often they are distributed, and how they adhere to the processes described in their policies. However the Code does not provide any guidance as to how comprehensive or granular this distribution information must be. In this respect, the Code Review found that where collecting societies do provide information on the distribution of funds, this information is often written in dense or legalistic language.<sup>228</sup>
- 4.362. The Code Review found that despite recent improvements in transparency around the distribution of funds, there is still a perception that there is a lack of an effective mechanism to ensure such information continues to be available. For instance, there is a concern that there is no specific obligation to ensure more detailed rights holder payments information be made available.<sup>229</sup>
- 4.363. The Code Review also noted that improving information around the distribution of funds by collecting societies may assist licensees to negotiate directly with rights holders.<sup>230</sup>
- 4.364. However, the Code Review expressed the view that any changes in this area also need to balance the needs of licensees and the potential for a compliance burden on collecting societies.<sup>231</sup>
- 4.365. Overall, the Code Review concluded that the persistence of stakeholder concerns in this area, and the importance of fair negotiating processes, suggests that

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February 2019, p. 3; Odette's School of Dance submission, dated 28 February 2019; Phil Bromley submission, dated 9 February 2019, p. 2-3; Trudy Newell submission, dated 6 February 2019. Submissions available: [ACCC public register](#).

<sup>226</sup> Code of Conduct for Copyright Collecting Societies Code Reviewer, *Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2018 to 30 June 2019*, 20 November 2019, p. 5, available: [https://apraamcos.com.au/media/corporate/2019/Code\\_Reviewers\\_Compliance\\_Report\\_2019.pdf](https://apraamcos.com.au/media/corporate/2019/Code_Reviewers_Compliance_Report_2019.pdf).

<sup>227</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 26, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

<sup>228</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 31, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

<sup>229</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 27, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

<sup>230</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 28, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

<sup>231</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 28, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>



confidence in the system would be improved by strengthening transparency arrangements in the Code around funds distribution.<sup>232</sup>

4.366. The Code Review made the following recommendations.

*Recommendation 5: Amend clause 2.6 (of the Code) to require collecting societies to detail in annual publications, at an anonymised or aggregate level where appropriate, the accounting and distribution of licence revenue. This information is to be reported in a consistent format year on year. Categories for reporting should include, but are not limited to:*

- a. classes of licensees from whom licence revenue is received,*
- b. classes of members to whom licence revenue is paid,*
- c. categories of copyright material copied / licensed in respect of which licence revenue is received, and*
- d. domestic vs international payments of licence revenue.*

*Recommendation 6: Amend clause 2.4 (of the Code) to require collecting societies in response to a reasonable request by a licensee or their representative, to provide detailed information about particular rights payments made pursuant to a licence. Such information should only be provided to the extent that it is not commercial-in-confidence and does not otherwise directly affect a commercial negotiation between the collecting society and the licensee or potential licensee. Such information is to be provided:*

- a. on an anonymised basis, and*
- b. where the collecting society can do so at a reasonable cost.*

*The Code Reviewer is able to consider whether a request or the collecting society's response to it has been reasonable.*

*Recommendation 7: Amend clause 2.4 (of the Code) to require that collecting societies:*

- a. consult with members prior to making any substantive changes to its distribution policies, and*
- b. publish 'plain English' guidelines on its distribution policy and make them available to members and licensees.<sup>233</sup>*

4.367. In response to interested party submissions, and the findings of the Code Review, APRA submits that it already provides considerable information regarding distribution, including in each plain English guide. Furthermore, in response to the

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<sup>232</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 29, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

<sup>233</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 13, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

Code Review APRA published a Plain English Guide relating specifically to its Distribution Rules and Practices which is available on its website.<sup>234</sup>

- 4.368. In relation to its distribution arrangements, APRA submits that it distributes in accordance with detailed reporting provided by licensees. Where such data is not available, APRA uses the best proxy data to enhance the distribution of smaller pools.<sup>235</sup>
- 4.369. APRA notes that a number of interested parties have raised the issue of reporting by community radio stations. APRA states that most community radio broadcasters do not have the resources to provide detailed reporting of music use to APRA. If they were to do so, the costs of processing the data would outweigh the amount of the licence fees received from the sector. APRA states that it is working hard to support those of its members whose works are broadcast on community radio, and is acutely aware of the issue faced by songwriters in this category.<sup>236</sup>
- 4.370. As noted, 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 (inefficient over or under production of works) arising from the APRA system.
- 4.371. In this respect, a lack of transparency around distribution arrangements reduces the accountability of collecting societies for royalties paid to their members and would make it less likely that APRA members are remunerated in proportion to the value of actual performance of their works.
- 4.372. Lack of transparency about distribution arrangements is also likely to make a collecting society less accountable for management expenses potentially leading to cost inefficiencies.
- 4.373. Further, as identified by the Code Review, lack of transparency around distribution arrangements makes it more difficult for collecting society members to make informed choices about negotiating directly with music users.<sup>237</sup>
- 4.374. The ACCC notes that APRA currently provides considerable information about its distribution practices to its members. Given the broad range of businesses licensed by APRA and the numerous categories of users, these practices are necessarily detailed and complexed. This complexity is likely a contributing factor to the concerns that some interested parties have expressed about a lack of transparency in APRA's distribution arrangements.
- 4.375. In this respect, the ACCC considers that APRA's existing publications do adequately explain the methodologies it adopts. The ACCC considers that concerns about transparency of APRA's distribution arrangements likely reflect the difficulties in any individual member being able to discern from an examination of these methodologies how much of the around \$362 million APRA collects each year

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<sup>234</sup> APRA AMCOS distribution information guide, available: <https://apraamcos.com.au/media/Distribution-Rules-and-Practices/Distribution-Information-Guide.pdf>

<sup>235</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 17, available: [ACCC public register](#).

<sup>236</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 17, available: [ACCC public register](#).

<sup>237</sup> Department of Communication and the Arts, *Review of the Code of Conduct for Copyright Collecting Societies*, 1 April 2019, p. 20, available: <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

(inclusive of AMCOS) from around 147,000 licences, they, as one of APRA's 100,000 members, are individually entitled to. APRA's radio and television licensees alone broadcast over 5 million hours of content per year.<sup>238</sup>

- 4.376. Even where direct distribution is used (distribution to members based on actual usage of works) this is a complex process. For example, in relation to commercial television, revenue is allocated based on ratings and music content. The value of the music content is further weighted according to type of use (featured, background, theme or promotional) and time of day. The value of the music used in advertisements on commercial television stations is calculated using a different methodology again.
- 4.377. Further, in many cases APRA relies on sample sets of data (sample distribution methodology) or proxy data (analogous distribution methodology) to estimate usage of works by licensees. Accordingly, much of the concern around the transparency of APRA's distribution arrangements relates to the accuracy of the data and information used by APRA to estimate usage where it does not have information from licensees recording actual usage. In this respect, APRA submits that licensees' ability to provide data for distribution purposes vary widely, and in many cases licence fees do not justify the keeping of records of music use, and proxy data are the better basis for allocating payments.<sup>239</sup>
- 4.378. As discussed at paragraphs 4.91 to 4.92, the ACCC has imposed conditions of authorisation requiring APRA to report annually about the proportion of licence revenue collected which is distributed using direct distribution (based on actual play data) and by a range of other techniques including census analysis, sample analysis, MRT and distribution by analogy. The conditions also require APRA to report annually about the reasons for changes in the proportion of licence revenue distributed using each technique each year.
- 4.379. These conditions are intended to provide increased transparency and accountability about how APRA monitors music played and how APRA uses this data for the purpose of determining royalty distributions.
- 4.380. Finally, while APRA has methodologies for determining the proportion of licensing revenue assigned to each member, actual royalties to which each member is entitled depend not just on the licensees' use of their works, but the licence fee they pay.
- 4.381. Accordingly, while it is often difficult for members to determine the value assigned by APRA to a particular musical work, used by a licensee in a particular context, this often reflects the complexities of calculating member distributions rather than the absence of information about the methodologies for calculating distributions.
- 4.382. Notwithstanding this, the ACCC considers that more can be done to improve the transparency of APRA's distribution arrangements and thereby reduce the dynamic inefficiencies resulting from APRA's arrangements.
- 4.383. In this respect, the ACCC considers that adopting recommendations 5, 6 and 7 of the Code Review goes some way to improving the transparency of APRA's

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<sup>238</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, Annexure 12, pages 7 & 8, available: [ACCC public register](#).

<sup>239</sup> Australasian Performing Right Association Limited further submission, dated 24 April 2019, p. 17, available: [ACCC public register](#).

distribution arrangements. For the avoidance of doubt, the ACCC has imposed a condition of authorisation requiring APRA to adopt these recommendations (**conditions C2.1 and C2.2**).

- 4.384. The condition the ACCC has imposed varies slightly from the Code Review recommendation 6. Recommendation 6 is that collecting societies provide details about particular rights payments made pursuant to a licence in response to any reasonable request. To avoid ambiguity about what constitutes a reasonable request, and provide certainty, the ACCC is proposing that APRA be required to provide this information in response to any request.
- 4.385. The ACCC has also imposed a condition of authorisation requiring APRA to report on the spread of distribution of royalties among its members. Specifically APRA must report on the proportion of licence revenue collected which is distributed to international affiliate societies and the top ten percent, 25 percent and 50 percent of APRA members, by royalties earned, who receive a distribution (**condition 2.5**).

### **ACCC conclusion on public detriment**

- 4.386. As noted above, the ACCC considers that APRA would have significant market power, and as a consequence of this market power, significant public detriments are likely to arise, whether or not it took exclusive assignment of its members' rights. However, the magnitude of these public detriments will depend on the extent of competitive pressure placed on APRA absent the proposed conduct.
- 4.387. The ACCC considers that APRA holding its members' rights on a non-exclusive basis would be likely to impose a degree of competitive constraint on APRA, reducing the substantial market power it currently holds in acquiring and supplying performing rights in relation to musical works in Australia. This is likely to result in some reduction in the detriments identified by the ACCC above, namely lack of price competition resulting in inefficient under-utilisation of APRA's repertoire, inefficiency in the production of musical works and stifling innovation and adoption of new technologies and business models.
- 4.388. The ACCC also recognises the factors that mitigate APRA's market power, particularly, to the extent that they are used, effective dispute resolution via ADR or the Copyright Tribunal and, in respect of some classes of users, APRA's opt out and licence back arrangements. The ACCC considers that these measures go some way in reducing the detriments resulting from APRA's arrangements.
- 4.389. In summary, the ACCC considers that APRA's arrangements continue to generate a significant level of public detriment compared to the likely alternative of APRA holding its members' rights on a non-exclusive basis.

## **5. Balance of public benefit and detriment**

- 5.1. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that the public benefit will outweigh any likely public detriment, including any lessening of competition.
- 5.2. The ACCC considers that APRA taking exclusive assignment of its members' rights is likely to result in the following public benefits:

- Significant efficiencies in enforcement and compliance monitoring and preservation of the incentives for the future creation of musical works.
  - Some transaction cost savings. These primarily relate to avoiding the increased complexity of case by case negotiating with users who may source licences for some works directly from APRA members if the opportunity to do so was available, but still require an APRA blanket licence for the remainder of the musical works they use.
  - Avoiding the additional administrative and legal costs that would be incurred in APRA moving from its current arrangements to a system where it obtains rights from its members on a non-exclusive basis.
- 5.3. However, the ACCC considers that APRA's arrangements are also likely to result in significant public detriment. The ability and incentive for users to obtain direct or source licences under competitive conditions is limited, including because APRA takes exclusive assignment of its members' rights.
- 5.4. The public detriment resulting from the foreclosure of opportunities for greater direct dealing can manifest itself in a number of ways including higher prices for businesses that want to play music, inefficient under-utilisation of APRA's repertoire, and significant problems associated with commercial dealing with APRA.
- 5.5. The ACCC also considers that APRA's near monopoly is likely to create inefficiencies for members. 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 and the proposed conduct may insulate them from pressures to reduce cost inefficiency, resulting in less revenue available for distribution to members.
- 5.6. Further, APRA's arrangements are likely to create inefficiencies in the production of musical works and stifle innovation and adoption of new technologies and business models.
- 5.7. Most of the public detriments identified relate to APRA's ability to exercise market power. In this respect, the ACCC considers that APRA's arrangements are likely to generate a significant and greater level of public detriment compared to the likely alternative of APRA holding its members' rights on a non-exclusive basis.
- 5.8. The ACCC therefore proposes to specify conditions in the proposed authorisation, with the objective of reducing this likely public detriment, as discussed below.
- 5.9. For the reasons outlined in this determination, the ACCC is satisfied, subject to the conditions of authorisation, that the conduct the subject of APRA's application for authorisation is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the conduct. Accordingly, the ACCC proposes, subject to the conditions, to grant authorisation.

## 6. Conditions of authorisation

- 6.1. The power conferred upon the ACCC to authorise conduct is discretionary.<sup>240</sup> In exercising that discretion, the ACCC may have regard to considerations relevant to the objectives of the Act.<sup>241</sup>
- 6.2. The ACCC may specify conditions in an authorisation.<sup>242</sup> The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.<sup>243</sup>
- 6.3. In its 2014 determination, the ACCC imposed three conditions. In summary, these conditions required APRA to:
- publish comprehensive plain English guides that outline all of the APRA's licence categories individually and include other specified information
  - 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, and
  - implement a revised ADR scheme 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.
- 6.4. The ACCC has imposed conditions of authorisation requiring APRA to maintain these arrangements.
- 6.5. The ACCC considers that an effective ADR scheme, such as that imposed by the ACCC's 2014 condition of authorisation, can reduce the public detriment generated by APRA's market power by helping redress imbalances in bargaining power between APRA and licensees. However, while feedback about APRA's ADR scheme from those who have used it has been generally positive, some interested parties have raised concerns that take up of the scheme by licensees has not been as high as anticipated due to a lack of awareness about the scheme. To address this issue, the ACCC has imposed a condition requiring APRA to take steps to better publicise the availability of the scheme.
- 6.6. The ACCC has also imposed conditions to further support the independence of the ADR scheme, as suggested by the Resolution Facilitator. This includes the appointment of an independent chair to the Committee that, pursuant to the conditions of authorisation imposed in 2014, provides feedback and other advisory input to APRA and to the Resolution Facilitator in relation to the operation of the scheme (rather than the Resolution Facilitator acting as chair). These conditions also provide for the Committee to be given the power to make decisions about some matters that the Resolution Facilitator is currently responsible for, such as setting annual KPI's for the scheme, reviewing any complaints about the Resolution Facilitator or the scheme (including APRA's engagement with the scheme) and planning for succession of the Resolution Facilitator.

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<sup>240</sup> *Application by Medicines Australia Inc* (2007) ATPR 42-164 at [106].

<sup>241</sup> *Application by Medicines Australia Inc* (2007) ATPR 42-164 at [126].

<sup>242</sup> Section 88(3).

<sup>243</sup> Section 88(3).



- 6.7. The ACCC has also imposed additional conditions on APRA's authorisation which focus on improving the transparency of APRA's licensing and distribution arrangements. The conditions about APRA's licensing schemes require APRA to publish its methodology for calculating its licence fees for each licence category, including a description of the data used, a summary of any economic analyses or evaluations undertaken, and explanation of matters taken into consideration in determining each licence fee. The proposed conditions also require APRA to publish an explanation of the matters it has taken into account any time it increases a licence rate by more than the growth rate in CPI.
- 6.8. The conditions also provide that if the ACCC is not satisfied that the information published by APRA about how it sets its licence fees is sufficiently clear and detailed to provide licensees with a reasonable understanding of the methodologies APRA adopts, the ACCC can require APRA to appoint an independent person, to be approved by the ACCC and funded by APRA, to prepare an independent report explaining the methodologies adopted by APRA in determining licence fees.
- 6.9. In relation to APRA's distribution of royalties to its members, the ACCC has imposed conditions of authorisation requiring APRA to:
- publish details of accounting and distribution of licence revenue and, if requested by a licensee, provide detailed information about particular rights payments made pursuant to a licence
  - report on how it monitors music played and how APRA uses this data for the purpose of determining royalty distributions, and the extent to which APRA is improving its collection mechanisms in light of the possibilities opened up by the growth in music recognition and other technology, and
  - report on the distribution of royalties among its members. Specifically the proportion of licence revenue collected which is distributed to international affiliate societies and the top ten percent, 25 percent and 50 percent of APRA members.
- 6.10. Finally, the ACCC has imposed a condition of authorisation requiring APRA to publish an annual transparency report which includes information on rights revenue, APRA's operating costs, distributions to members and amounts received from and paid to overseas collecting societies.
- 6.11. The ACCC considers that transparency about APRA's licence fees and distribution arrangements can serve to mitigate, to some extent, APRA's exercise of market power. Transparency about licence fees can assist users in negotiations with APRA and allow users to make informed decisions about acquiring licences from APRA. Transparency about distribution arrangements assists in making APRA accountable to its members, making it more likely that APRA members are remunerated in proportion to the value of actual performance of their works.
- 6.12. These conditions are outlined in full at **Attachment A**.

## 7. Length of authorisation

- 7.1. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>244</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits

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<sup>244</sup> Subsection 91(1)



will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

- 7.2. In this instance, APRA seeks re-authorisation for five years. APRA submits that five years is appropriate because:
- applications for authorisation involve considerable costs which are ultimately borne by licensees and consumers and by members of APRA. More frequent applications because of short term authorisations increase those costs, and
  - short term authorisations and authorisation applications that are pending engenders uncertainty both in relation to APRA's ability to participate fully in international developments and its ability to detect and enforce copyright for the benefit of its members and ultimately consumers who seek the availability of music for performance and communication.<sup>245</sup>
- 7.3. In submissions prior to the draft determination some interested parties submitted that the authorisation should only be granted for a shorter time. The NSW Small Business Commissioner recommended that authorisation be granted for three years to allow licensees ample time to properly identify recurring issues arising from the introduction of OneMusic.<sup>246</sup> The AVA similarly submitted that an authorisation period of longer than one year is inappropriate while issues relating to OneMusic remain unresolved.<sup>247</sup> Nightlife contended that authorisation should be limited to a maximum of three years.<sup>248</sup>
- 7.4. In its draft determination the ACCC proposed to grant authorisation for five years.
- 7.5. Following the draft determination ASBFEO<sup>249</sup> and other interested parties including the NSW Small Business Commissioner<sup>250</sup> and COSBOA<sup>251</sup> have argued for a shorter authorisation period. Some have argued for a one year authorisation, or at least a review of the authorisation by the ACCC after one year.
- 7.6. The main argument put forward in favour of a shorter period of authorisation is that it would facilitate more explicit and frequent oversight of APRA's activities, including ensuring that APRA complies with the conditions of authorisation imposed, particularly in the context of significant changes to its arrangements APRA has been undertaking. Specifically, the implementation of OneMusic, the impact of which some interested parties submit, should be subject to an early review. This argument corresponds to the high level concern some interested parties have expressed regarding APRA's activities in general and the introduction of OneMusic in particular.<sup>252</sup>
- 7.7. A second argument for a shorter period of authorisation put forward by the ASBFEO is that technology can evolve rapidly, particularly in areas such as monitoring music

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<sup>245</sup> Australasian Performing Right Association Limited submission in support of application for authorisation, dated 24 December 2018, p. 49, available: [ACCC public register](#).

<sup>246</sup> NSW Small Business Commissioner submission, dated 15 February 2019, p. 2, available from: [ACCC public register](#).

<sup>247</sup> Australian Venues Association submission, dated 1 March 2019, available from: [ACCC public register](#).

<sup>248</sup> Nightlife submission, dated 6 March 2019, p. 4, available from: [ACCC public register](#).

<sup>249</sup> Australian Small Business and Family Enterprise Ombudsman submission, dated 9 August 2019, p. 1, available from: [ACCC public register](#).

<sup>250</sup> NSW Small Business Commissioner submission, dated 5 July 2019, p. 2, available from: [ACCC public register](#).

<sup>251</sup> Small Business Organisations Australia submission, dated 8 August 2019, p. 2, available from: [ACCC public register](#).

<sup>252</sup> NSW Small Business Commissioner submission, dated 5 July 2019, p. 2, available from: [ACCC public register](#), Australian Venues Association submission, dated 1 March 2019, available from: [ACCC public register](#).

use and tracking ownership of works for distribution purposes. The ASBFEO argues that APRA's near monopoly position could stymie such technological developments, or at least their adoption in Australia, and a shorter period of authorisation would mitigate this risk and allow an earlier review that could have regard to any such technological changes.<sup>253</sup>

- 7.8. In response, APRA submits that the authorisation process is extremely time consuming and expensive and that the existing and proposed conditions require a very high level of ongoing reporting to the ACCC. APRA submits that the environment in which it operates is changing quickly in many ways, but in a volatile technological environment a longer period of relative stability as is allowed by the authorisation is more conducive to efficiency. APRA also submits that this would enable it to make more effective use of beneficial technological change and to respond to real changes in the market. APRA submits that the regular reporting on licences back and opt outs, disputes, compliance with the Code of Conduct, and on operations via a transparency report will be a more effective way to monitor APRA's conduct than having to apply for re-authorisation in 12 to 36 months' time.<sup>254</sup>
- 7.9. As noted above, while the ACCC considers that APRA's arrangements are likely to generate significant public detriment, the ACCC considers that overall, with the conditions the ACCC has imposed, the arrangements are likely to result in a net public benefit. However, the ACCC also notes the significant concerns many stakeholders have with APRA's arrangements. In particular, interested parties are concerned that APRA is not held accountable for its licensing arrangements.
- 7.10. The ACCC has imposed significant conditions of authorisation, particularly in relation to increasing the transparency of APRA's licensing arrangements. The ACCC has also imposed a number of other significant new conditions of authorisation such as in relation to improving transparency and accountability about how APRA monitors music played and distributes licence fees collected to its members.
- 7.11. Consideration of any future application for re-authorisation by APRA will have regard to the extent to which the transparency of APRA's licensing and distribution arrangements have improved, and what this improved transparency reveals about these arrangements.
- 7.12. The ACCC considers that while it will take some time for these changes to be implemented and for any impact of these changes on the public benefits and detriment resulting from APRA's arrangements to be observed, the significance of the concerns these conditions are intended to mitigate warrants an early review of the impact of these changes.
- 7.13. Further, as noted above technology can evolve rapidly, particularly in areas such as monitoring music use and tracking ownership of works for distribution purposes. In this respect, as discussed at paragraphs 4.94 to 4.101, the ACCC is concerned that APRA's arrangements are likely to act as a significant impediment to the development and adoption of innovative technologies and business models, or at least their adoption in Australia.

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<sup>253</sup> Australian Small Business and Family Enterprise Ombudsman submission, dated 9 August 2019, p. 1, available from: [ACCC public register](#).

<sup>254</sup> Australasian Performing Right Association Limited further submission, dated 9 August 2019, p. 2, available: [ACCC public register](#).

- 7.14. Having regard to these factors, the ACCC considers that an earlier review of the authorisation, and the public benefits and detriments that have resulted, than the five years proposed in the draft determination is appropriate. Accordingly, the ACCC grants conditional authorisation for four years.
- 7.15. The ACCC notes the submissions of some interested parties that authorisation should only be granted for one year. Some of these submissions appear to be driven, at least in part, by concerns about the extent to which APRA will comply with conditions of authorisation. In this respect, the legal protection provided by this authorisation does not apply if any of the conditions are not complied with.<sup>255</sup>

## 8. Determination

### The application

- 8.1. On 24 December 2018, APRA lodged an application to revoke authorisations A91367-A91375 and substitute authorisation AA1000433 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000433 was made under subsection 91C(1) of the Act.

### The authorisation test

- 8.2. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 8.3. For the reasons outlined in this determination and subject to the conditions in Attachment A, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 8.4. Accordingly, subject to the proposed conditions, the ACCC grants re-authorisation.

### Conduct which the ACCC has authorised

- 8.5. The ACCC revokes authorisations A91367-A91375 and grants conditional authorisation AA1000433 in substitution to enable APRA to continue its arrangements for the acquisition and licensing of performing rights in musical works as described in paragraph 1.18. The authorisation is subject to the conditions in Attachment A.
- 8.6. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 8.7. The ACCC grants authorisation AA1000433 for four years.

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<sup>255</sup> Section 88(3) of the *Competition and Consumer Act 2010*.

## Date authorisation comes into effect

- 8.8. This determination is made on 13 July 2020. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 4 August 2020.

## Attachment A – Conditions of authorisation

### Condition C1 – Transparency of licence fees

C1.1 APRA must continue to maintain and publish comprehensive plain English guides (which APRA now calls ‘Information 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 (e.g. 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 and/or the application process for the licences and licence categories, and
- (ix) the following statement:

*Even with our licence, the use of digital music streaming services by you in your business may be in breach of the terms and conditions of your end user agreement with that service. You should check with your service provider.*

The statement at condition C1.1(ix) must be included in APRA’s comprehensive plain English guides within 12 months of the ACCC’s final determination being made (or such longer period as is agreed with the ACCC).

C1.2 Within 12 months of the ACCC’s final determination being made (or such longer period as is agreed with the ACCC), APRA must revise the comprehensive plain English guide for each licence category required by condition C1.1 (‘Revised Guides’). The Revised Guides must include explanations of the following (the ‘Fee Methodology explanation’):

- (i) the processes and methodologies adopted by APRA for calculating licence fees for that licence category, including a description of the underlying data used, and summary of any analyses or evaluations undertaken
  - (ii) whether, and if so, how APRA had regard to any decisions of the Copyright Tribunal of Australia in setting license rates for that licence category. This should include whether, and if so, how APRA used a Copyright Tribunal decision about a different licence scheme, type of licence, or type of use, as a basis or benchmark for setting fees for that licence category
  - (iii) whether, and if so, how APRA had regard to the economic framework and pricing principles, and the approaches that can be used in applying that framework and pricing principles, set out in the *ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration* in calculating licence rates, including:
    - (a) the hypothetical bargaining approach
    - (b) survey evidence and other supporting information, and
    - (c) appropriate benchmarks, including
      - rates or tariffs paid for the use of the same bundle of musical works in different uses
      - rates or tariffs paid for the same type of licence in other jurisdictions, and/or
      - to the extent that there are comparable, more competitive markets, the rates or tariffs paid in those comparable, more competitive markets
  - (iv) whether and, if so, how APRA's blanket licences under the licence schemes are adjusted (including discounted) and/or provide for adjustment, to account for any direct licensing
  - (v) any other matters APRA had regard to in setting the licence rates.
- C1.3 APRA is not required to disclose any information about a third party in the Revised Guides that was provided to it by that third party or is otherwise in APRA's possession and which that third party claims is confidential, or to disclose any information that is subject to legal professional privilege.
- C1.4 Once updated, the Revised Guides to each license category must be provided to all new or renewing licensees and must be prominently displayed on APRA's website ([www.apraamcos.com.au](http://www.apraamcos.com.au)) and the OneMusic website ([www.onemusic.com.au](http://www.onemusic.com.au)). The APRA website and OneMusic website must have a prominently displayed link to the Revised Guides on all pages of the websites, which must be visible on landing on all pages of these websites. APRA must also provide the Revised Guides, and information about how to obtain additional copies of the Revised Guides, to relevant industry associations (that is, industry associations that have musical work copyright holders, or licensees or potential licensees, as members) on publication.
- C1.5 APRA must provide a copy of the Revised Guides by email to the ACCC at [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au), prior to publishing.
- C1.6 APRA must publish a revised, and up to date, version of each of the Revised Guides by 30 June each year (if any aspect of the content of a guide, including the content



required to be published under condition C1.1 or C1.2, will no longer be current as at that date).

- C1.7 APRA must publish on its website, and make available to any party upon request, each time there is a percentage increase in a licence rate in any licence category that exceed the rate of growth in CPI, an explanation of the matters taken into consideration in determining the increase in the licence rate. APRA is not required to disclose any information about a third party in these explanations that was provided to it by that third party or is otherwise in APRA's possession and which that third party claims is confidential, or to disclose any information that is subject to legal professional privilege.
- C1.8 Any time a person using the 'Get a Quote' function on the OneMusic website answers yes to a question about the use of a digital music service or device to play music in their business APRA must ensure that the following statement is prominently displayed before the next question appears:

*Even with our licence, the use of digital music streaming services by you in your business may be in breach of the terms and conditions of your end user agreement with that service. You should check with your service provider.*

## **Condition C2 – Transparency of distribution arrangements**

- C2.1 APRA must detail in annual publications, at an anonymised or aggregate level where appropriate, the accounting and distribution of licence revenue. Categories for reporting must include, but are not limited to:
- (i) classes of licensees from whom licence revenue is received
  - (ii) classes of members to whom licence revenue is paid, and
  - (iii) categories of copyright material copied / licensed in respect of which licence revenue is received.
- C2.2 APRA must, in response to a request by a licensee or their representative, provide detailed information about particular rights payments (distributions) made pursuant to a licence. The provision of such information is only required to the extent that the information is not commercial-in-confidence and does not otherwise directly affect a commercial negotiation between APRA and the licensee or potential licensee. Such information is to be provided:
- (i) on an anonymised basis, and
  - (ii) where APRA can do so at a reasonable cost.
- C2.3 Commencing 1 July 2021, APRA must detail in its annual publications the proportion of licence revenue collected which is distributed using each of the following techniques as defined in APRA's *Distribution Practices August 2018 version*:
- (i) Direct allocation – blanket
  - (ii) Direct allocation – transactional
  - (iii) Census analysis

- (iv) Sample analysis
- (v) Sample/direct allocation – blanket or transactional
- (vi) Third-party data
- (vii) Music Recognition Technology (MRT), and
- (viii) Distribution by analogy

C2.4 In reporting the information required in condition C2.3 APRA must provide an explanation about the reasons for changes in the proportion of licence revenue distributed using each technique each year. C2.5 APRA must detail in its annual publications, at an anonymised or aggregate level, the proportion of licence revenue collected which is distributed to:

- (i) international affiliate societies, and
- (ii) APRA members in each of the following categories:
  - (a) the top ten percent of members, by royalties earned, who receive a distribution
  - (b) the top twenty five percent of members, by royalties earned, who receive a distribution, and
  - (c) the top fifty percent of members, by royalties earned, who receive a distribution.

C2.6 APRA must consult with members prior to making any substantive changes to its distribution policies.

C2.7 APRA must publish 'plain English' guidelines on its distribution policy and make them available to members and licensees.

**Condition C3 – Comprehensive plain English guide for the resignation (cessation of membership), opt out and licence back provisions**

C3.1 APRA must maintain on the APRA website a plain English guide to the resignation, opt out and licence back provisions, which includes:

- (i) the purpose, scope and content of the resignation, opt out and licence back provisions
- (ii) the situations where using those provisions might be of benefit to members and licensees
- (iii) the steps involved in resigning APRA membership and applying to make use of the opt out and licence back provisions (including guidance about the minimum information that an applicant must provide to APRA)
- (iv) examples of how the opt out and licence back provisions have been used to date

and attaches the APRA application forms for the licence back and opt out provisions

- C3.2 APRA must also maintain information about the matters listed in condition C3.1 on the Managing Your Rights page on its website.
- C3.3 At least once each calendar year, APRA must include 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 C3.1 above, as well as information about how to apply.

#### **Condition C4 – Annual Transparency Report**

- C4.1 Within five months of the end of each financial year, commencing with the 2020/21 financial year, APRA must publish an annual Transparency Report which includes:
- (i) information on rights revenue, including
    - (a) total rights revenue generated per type of use
    - (b) total distributable revenue per type of use
    - (c) income on investment of rights revenue, and use of such income
  - (ii) information on APRA's operating costs, including
    - (a) total operating costs
    - (b) total remuneration paid to APRA's board directors
    - (c) APRA's cost to revenue ratio
  - (iii) amounts due to members, including
    - (a) total revenue attributed to members
    - (b) total amount paid to members
    - (c) total amount attributed but not yet distributed to members
  - (iv) information about expired undistributed funds, including:
    - (a) reasons why funds remain undistributed
    - (b) steps taken to locate and distribute funds to rightsholders
    - (c) the uses for which funds are to be applied
  - (v) information about international collecting societies, including
    - (a) total amount received from other collecting societies
    - (b) total amount paid to other collecting societies
  - (vi) details of any social, cultural or educational services provided by APRA which are funded through deductions from rights revenue, including the total amount deducted from rights revenue. The amount provided to any individual through APRA's music grants program is not required to be reported.

**Condition C5 – Independent Report on the methodologies adopted by APRA in determining licence fees for each license category**

C5.1. Within 60 days of receiving notice under condition C1.5, the ACCC may formally notify APRA in writing that it is not satisfied that the Fee Methodology explanation in one or more of the Revised Guides is sufficiently clear and detailed to provide licensees with a reasonable understanding of the methodologies APRA adopts in setting its licence fees for the relevant licence category or categories. The ACCC will provide reason in its written notification.

C5.2 APRA must, within 120 days of receiving notice from the ACCC under condition C5.1, and in accordance with this condition 5, appoint an independent person or persons ('Independent Reporter') to prepare a report ('Independent Report'). The Independent Report is to:

- (a) explain the methodologies adopted by APRA in determining licence fees for the affected licence category or categories, and
- (b) be prepared in accordance with criteria, objectives and terms of reference approved by the ACCC.

The Independent Report is not to be a review of the individual licence fees that APRA charges or the reasonableness of APRA's licence fees.

C5.3 The Independent Reporter must be approved by the ACCC prior to their appointment by APRA. In deciding whether to approve a proposed Independent Reporter, 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 Independent Reporter (as relevant), and
- (ii) the proposed remuneration arrangements for the Independent Reporter (as relevant).

C5.4 Prior to the ACCC making a decision about whether to approve a proposed Independent Reporter, APRA must provide to the ACCC:

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

C5.5 APRA must:

- (i) fund the Independent Reporter to carry out their functions, including paying for any external expertise, assistance or advice reasonably required by the Independent Reporter to perform their functions as the Independent Reporter
- (ii) enter into an agreement with the Independent Reporter consistent with this Determination, on terms acceptable to the ACCC. The agreement must include terms:
  - (a) requiring the Independent Reporter not to disclose any information that was provided to APRA by a third party and which that third party claims is confidential, or information that is subject to legal professional privilege; and
  - (b) requiring APRA to provide the Independent Reporter with all such third party confidentiality claims that it has received in writing:

- (iii) not interfere with, or otherwise hinder, the Independent Reporter's ability to carry out their functions as the Independent Reporter
  - (iv) provide to the Independent Reporter any information or documents that the Independent Reporter considers necessary for carrying out their functions as the Independent Reporter, and
  - (v) provide the Independent Reporter with a copy of Attachment B of this determination "Background to the independent report process."
- C5.6 APRA must publish a copy of the public version of the Independent Report prominently on its website and on the OneMusic website within 30 days of receiving the final version of that report. The APRA website and OneMusic website homepage must have a prominently displayed link to the Independent Report on their toolbars, which must be visible on landing on all pages of these websites.
- C5.7 If a confidential version of the Independent Report is produced, APRA must provide a copy of the confidential version of the report to the ACCC within 30 days of receiving it.

## Condition C6 – Alternative Dispute Resolution

### Scheme Requirements

- C6.1 APRA must maintain 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.
- C6.2 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).

C6.3 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 C6.3(vii) and conditions C6.17–C6.21, 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.
- (viii) the Independent Mediator or Independent Expert (as relevant) may determine that a Dispute under Options 2, 3 or 4 be discontinued if, in the view of the Independent Mediator or Independent Expert, the Applicant is not making a reasonable effort to engage in the process being undertaken by the Independent Mediator or Independent Expert for the resolution of the



Dispute. Before determining that a Dispute be discontinued the Independent Mediator or Independent Expert must provide the Applicant with a written warning:

- setting out why they consider that the Applicant is not making a reasonable effort to engage in the resolution of the Dispute
- explaining that unless the Applicant does make a reasonable effort to engage in the resolution of the Dispute the Dispute will be discontinued, and
- explaining that if the Dispute is discontinued the Applicant cannot seek to have the same dispute resolved through the ADR Scheme unless APRA agrees to do so.

- (ix) If the Independent Mediator or Independent Expert does discontinue a Dispute under this condition 6.3(viii) the Applicant cannot seek to have the same dispute resolved through the ADR Scheme unless APRA agrees to do so.

C6.4 APRA must not make any representation, or express any view, to the Independent Mediator or Independent Expert about any of the matters referred to in condition 6.3(viii) unless asked to do so by the Independent Mediator or Independent Expert.

C6.5 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**

C6.6 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.

### **The role of the consultative committee**

C6.7 APRA must maintain a consultative committee (the '**Committee**'). APRA must also permit the Facilitator to establish and maintain additional committees 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

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.

C6.8 In addition to the composition of Committee members required by condition C6.7, the Committee must have an Independent Chair, approved by the ACCC. In deciding whether to approve the Independent Chair the ACCC may take into account any matter it considers relevant, including any previous or existing relationships between APRA (or a Licensee or Member) and the proposed Independent Chair.

C6.9 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) a fixed amount of funding is provided by APRA for the administration of the Scheme (including the costs of the Facilitator and an honorarium for the Committee Independent Chair but otherwise excluding costs incurred by APRA in connection with individual Disputes) each year which is adequate for

the operation of the Scheme (taking into account the level of funding recommended by the Committee each year)

- (iv) if the fixed amount of funding provided under condition C6.9(iii) is exhausted prior to the end of the year, bridging funding is provided for the remainder of the year to support those aspects of the administration of the Scheme necessary to directly support the consideration of Disputes, and
- (v) 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**

C6.10 APRA must ensure that there is an appointed Facilitator in place to operate and manage the Scheme at all times throughout the term of the authorisation. The Facilitator (including any replacement Facilitator) must:

- (i) have specialist training in ADR and have a detailed understanding and experience of dispute resolution practice and procedures which do not involve litigation
- (ii) have the capacity to determine the most appropriate alternative dispute resolution procedures in particular circumstances
- (iii) have an understanding of copyright or the capacity to quickly acquire such an understanding.

C6.11 Any replacement Facilitator must be approved by the ACCC, within 20 business days, in accordance with condition C6.15 and for a specified period of time, prior to the appointment taking effect for the purposes of these Conditions:

C6.12 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 C6.3(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

C6.13 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 C6.15, 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.

C6.14 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

C6.15 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).

C6.16 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

C6.17 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 C6.19 and C6.21.

C6.18 The Committee must decide the format of the ADR Report and must prepare the ADR Report (in consultation with and with the assistance of the Facilitator, where appropriate) .

C6.19 Each ADR Report must be submitted to the ACCC prior to 1 March of each year and must concern disputes which commenced in a 12 month period ending 31 December of each year.

C6.20 Upon receipt of each ADR Report, the ACCC has the right to request additional information from Resolution Pathways and/or request Resolution Pathways to make changes to the ADR Report format.

C6.21 Each ADR Report must include:

- (i) the number of Disputes considered, and the number of Disputes resolved
- (ii) a summary of each Dispute resolved, including:
  - i. the type of dispute
  - ii. the subject matter of the dispute
  - iii. time taken to resolve the dispute
  - iv. fees incurred by Applicants and the fees borne by APRA
  - v. any outcomes, including details of any evaluations received
- (iii) for Disputes considered but not resolved, a summary of the:
  - i. reasons why those Disputes were not resolved
  - ii. the fees incurred by Applicants and the fees borne by APRA
- (iv) 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)
- (v) the number and nature of all complaints received about the Facilitator or the Scheme (including APRA's engagement with the Scheme)
- (vi) an evaluation of the Scheme's operations, by reference to any key performance indicators and metrics set for the scheme
- (vii) an evaluation of the Scheme's performance, by reference to any key performance indicators and metrics set for the Facilitator
- (viii) an evaluation of the governance and funding arrangements for the Scheme.

#### **Other matters**

C6.22 The APRA website ([www.apraamcos.com.au](http://www.apraamcos.com.au)) and OneMusic website ([www.onemusic.com.au](http://www.onemusic.com.au)) must have a prominently displayed link to information about available dispute resolution processes on all pages of the websites, including the Scheme, which must be visible on landing on all pages of these websites.

C6.23 APRA must display contact details for, and information about, available dispute resolution processes, including the Scheme, prominently on the following APRA documents:

- (i) licence forms
- (ii) member statements

- (iii) licence invoices
- (iv) licence agreements, and
- (v) all initial legal correspondence with licensees, prospective licensees and members. This requirement does not extend to legal correspondence where: APRA has advised the licensee, prospective licensee or member about the Scheme in previous legal correspondence about the matter in dispute, the matter in dispute is being considered by the Copyright Tribunal or has already been referred to the ADR process.

## SCHEDULE A – Fees and Charges (Condition C6.6)

### Option 1

Action	Maximum fee to Licensee / Member
<b>Initial phone discussion with the Facilitator (up to 45 minutes)</b>	<b>No charge</b>
<b>Subsequent involvement of the Facilitator (Option 1) where:</b> (i) 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 or (ii) 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 \$5,000.	<b>\$50.00 incl. GST</b>
<b>Subsequent involvement of the Facilitator (Option 1) where:</b> (i) 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 \$10,000 to \$15,000, or (ii) 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 \$5,000 to \$7,500.	<b>\$75.00 incl. GST</b>
<b>Subsequent involvement of the Facilitator (Option 1) where:</b> (i) 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 more than \$15,000 or (ii) 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 more than \$7,500.	<b>\$150.00 incl. GST</b>

1. Each Member or Licensee who wishes to become a party to a Dispute must pay this fee (if any) separately.
2. 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, APRA, and the Applicant who is a party to a Dispute must each pay 50 per cent of the fees charged, and 50 per cent of the disbursements or other costs reasonably incurred, by the Independent Mediator or Independent Expert for the resolution of the Dispute. In the event that more than one Applicant is a party to the Dispute, 50 per cent of the fees charged, and 50 per cent of the disbursements or other costs reasonably incurred, by the Independent Mediator or Independent Expert for the resolution of the Dispute must be 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 Licensee

or where the Facilitator determines that fees and costs are to be payable in respect of the Dispute.

3. Fees and costs are not payable by an Applicant in respect of a Dispute where:
  - (i) 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 \$20,000
  - (ii) 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. If fees and costs are not payable by an Applicant in respect of a Dispute, APRA must pay 100 per cent of the fees charged, and 100 per cent of the disbursements or other costs reasonably incurred, by the Independent Mediator or Independent Expert for the resolution of the Dispute.
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 (Conditions C6.7 and 6.8)**

The objectives of the Committee are to provide feedback and other advisory input to APRA and to the Facilitator (where appropriate) 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
- (v) setting annual key performance indicators for the Facilitator and the scheme
- (vi) reviewing any complaints about the Facilitator or the Scheme (including APRA's engagement with the Scheme)
- (vii) where relevant, planning for succession of the Facilitator, in conjunction with APRA
- (viii) preparing the annual ADR Report, in consultation with the Facilitator (where appropriate) (see condition C6.18)

but not intervening in individual Disputes.

## **SCHEDULE C – objective and functions of the Facilitator (Condition C6.10)**

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 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
- (ix) 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)
- (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) 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)
- (b) the curriculum vitae of each Independent Mediator and Independent Expert in the DR Pool
- (c) the public version of each binding written determination under Option 4 (see condition C5.3(vii)).

## **SCHEDULE D – Independent Reviewer (Condition C6.13)**

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 C6.5)**

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.

## Attachment B – Background to the independent report process

The objective of the Independent Report is to explain the methodologies adopted by APRA in determining the licence fees it charges for the relevant licence categories under the licence schemes offered through OneMusic Australia (i.e. how APRA decides, and the matters APRA has regard to in deciding, what licence fees to charge).

The functions of the Independent Reporter will include:

- (i) preparing the Independent Report, which explains the methodologies adopted by APRA in determining the licence fees it charges (including, without limitation, the consultation processes and procedures adopted by APRA in developing licence schemes and how any concerns expressed by licensees are considered).
- (ii) as part of item (i) above, obtaining feedback from licensees about the consultation process APRA engages in, and
- (iii) no later than twelve months after the date of their appointment (or such longer period as is agreed to by the ACCC) , providing the final Independent Report to the ACCC and APRA.

The Independent Report should explain:

- (i) the processes and methodologies adopted by APRA for calculating licence fees for that licence category including underlying data used, and economic analysis or examination
- (ii) whether and, if so, how APRA has regard to any decisions of the Copyright Tribunal of Australia in setting fees for the licence category. This should include whether and, if so, how APRA used a Copyright Tribunal decision about a different licence scheme, type of licence, or type of use, as a basis or benchmark for setting fees for the licence category
- (iii) whether and, if so, how APRA has regard to the economic framework and pricing principles, and the approaches that can be used in applying that framework and pricing principles, set out in the *ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration* in calculating licence fees, including:
  - (a) the hypothetical bargaining approach
  - (b) survey evidence and other supporting information, and
  - (c) appropriate benchmarks, including
    - rates or tariffs paid for the use of the same bundle of musical works in different uses
    - rates or tariffs paid for the same type of licence in other jurisdictions, and/or
    - to the extent that there are comparable, more competitive markets, the rates or tariffs paid in those comparable, more competitive markets
- (iv) whether and, if so, how APRA's blanket licences under its licence schemes are adjusted (including discounted) and/or contain provisions to provide for such adjustment, to account for any direct licensing
- (v) any other matters APRA had regard to in setting the licence fees.



