



9 August 2019

Gavin Jones
Director, Adjudication
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2600

Via email: adjudication@accc.gov.au

Dear Mr Jones,

APRA application for reauthorisation (A91367-A91375 and A1000433)

Please see below a further submission in regard to the proposed ACCC re-authorisation of APRA. This submission is in two parts.

1 AHA PROPOSAL

Issue

This submission arises from conversations with Shirli Kirschener of Resolution Pathways, the facilitator of the APRA ADR scheme after the recent ACCC public hearing. There seems to be a difference of opinion as to the operation of the scheme as it relates to the fees and charges payable by a licensee.

Schedule A "Options 2, 3 & 4"

1. *Subject to paragraphs 2 and 3 below, each Applicant who is a party to a Dispute must 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, each divided equally amongst all Applicants who are parties to the Dispute and who have agreed to that particular Option for resolution of the Dispute.*
2. *Subject to paragraph 3 below, fees and costs are only payable by an Applicant where the Dispute is about:*
 - (i) *the terms and conditions of a grant, or potential grant, of a licence of copyright by a Member to APRA, or by APRA to a Licensee*
 - (ii) *the implementation of the terms and conditions of a grant, or potential grant, of a licence of copyright by a Member to APRA, or by APRA to a 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 in respect of a Dispute where:*
 - (i) *the amount disputed by a Member or Licensee is less than \$10,000*
 - (ii) *the Dispute does not involve a disputed amount, but:*

(a) in the case of a Licensee, the annual amount payable by the Licensee for the licensing (or potential licensing) of copyright by APRA to the Licensee is less than \$10,000

(b) in the case of a Member, the amount paid by APRA for the licensing of copyright by the Member to APRA in the previous twelve months is less than \$10,000; or

(iii) the Facilitator determines that the Dispute consists of a complaint.

AHA interpretation

The AHA interprets this section to mean that where the amount in dispute is less than \$10,000, then the fees and costs for the independent mediators or experts are not payable. Ms Kirschener says that is not the case and that fees and costs are payable in all instances where any of options 2, 3 and 4 are in play.

However, the AHA agrees with Ms Kirschener that the layout of the wording in the Schedule could be simplified. This was raised in the initial AHA submission to the ACCC and in prior communications by the AHA to APRA.

Solution

The AHA suggests a couple of working examples be incorporated into the authorisation to clarify the matter.

Working Example One

A small pub lodges a dispute with the ADR in regards to the amount of their dining licence. APRA (or OneMusic) insists the amount payable is \$950.00, but the pub believes the amount payable is \$550.00. Therefore the amount in dispute is \$400.00. The matter proceeds to be determined via Option Two – Independent Mediator.

In this case, the pub would pay \$50.00 to lodge the dispute. Then if the pub lost the case, it would pay no further fees or costs for the Independent Mediator because the amount in dispute is less than \$10,000.00.

Working Example Two

A large nightclub lodges a dispute with the ADR in regards to their Recorded Music for Dance Use Licence. APRA (or OneMusic) insists the amount payable is \$50,000.00, but the night club believes the amount payable is \$37,000.00. Therefore the amount in dispute is \$13,000.00. The matter proceeds to be determined via Option Four – Binding Determination by an Independent Expert.

In this case, the nightclub would pay \$150.00 to lodge the dispute. Then if the night club lost the case, it would pay 50% of all other fees and costs incurred by the Independent Expert.

I note that in late July, I provided the proposal above to the ADR for input.

2 ADR/APRA SUBMISSION

Late yesterday, the ADR facilitator Shirli Kirschener sent me a proposal for a completely new method of establishing costs for licensees to use the ADR process. Apparently APRA has been involved in this process. The proposal is based on certain assumptions or metrics for which I have been provided no real data – although that has been promised.

I appreciate Ms Kirschener, having sought my opinion at this very late stage (i.e. submissions close today). However, my understanding is that none of the other affected parties have been consulted

who have made submissions or given evidence in the recent public hearings in this ACCC process. Therefore, I respectfully suggest that if the ACCC is minded to consider this new ADR/APRA proposal that the affected parties be given opportunity to comment.

Conclusion

Thank you for the opportunity to have made this submission.

A handwritten signature in blue ink, appearing to read 'Stephen Ferguson', is positioned above the typed name.

STEPHEN FERGUSON
AHA NATIONAL CEO