

**Report of the Independent Review of
Resolution Pathways**

November 2018

Report of Independent Review

By

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Terminology and Acronyms Used in this Report

ACCC	Australian Consumer Complaints Commission
APRA AMCOS	The Australian Performing Right Association (APRA) and the Australasian Mechanical Copyright Owners Society Ltd (AMCOS)
DR	Dispute Resolution (formerly known as “ADR”, or Alternative Dispute Resolution)
DSD	Dispute System Design (a systematic approach to the development of comprehensive processes for managing disputes in a single organisation [or industry], and the implementation of that system for the purpose of preventing, managing, learning from, and resolving disputes and conflicts ¹)
PPCA	Phonographic Performance Company of Australia
SOCAP	Society of Consumer Affairs Professionals
The Determination	ACCC Determination: <i>Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music</i> (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375)
The Scheme	Resolution Pathways

¹ L. B. Amsler and J. Sherrod, ‘Accountability Forums and Dispute System Design’ (2017) 40(3) *Public Performance and Management Review* 529 – 550.

Part A. Introduction

It should be noted that, during her appointment, the Independent Reviewer (“the Reviewer”) has treated the Independent Review (“the Review”) as a consultative and developmental process, during which Resolution Pathways (“the Scheme”) and its operation, as well as the role of the Facilitator, have been discussed with APRA AMCOS, the Facilitator, and members of the Consultative Committee. Although the ACCC’s 2014 Determination (“the Determination”) includes specified dates and functions for the Review, it does not preclude the Reviewer taking a pro-active approach to the Review process. A consultative and open approach is especially effective in relatively small complaints programs, such as the Scheme currently is.

In this, as in other reviews which she has conducted, the subjects of the review have welcomed interim observations, and have discussed options for adjustment and improvement while the review was under way. These discussions have not been used to assert influence over the Reviewer or her activities. Nor have the discussions been used to influence, or affect, the Review’s findings.

There is little doubt that this Scheme, and its overall approach, has the potential to be of significant value and benefit to Australia’s music industry. The primary purpose of this Report has been to address the requirements specified in the Determination; however, the Scheme’s additional potential has been a secondary consideration.

According to information, data, and feedback provided to the Reviewer, there is widespread in principle support for the Scheme, and for its continued operation. Concerns were raised with the Reviewer about some aspects of the Scheme, and these are considered within this report.

Overall, the Scheme is viewed positively by all people involved with it, whether they be users of the Scheme, members of the Scheme’s panel of third-party neutrals, members of the Scheme’s committees, or APRA AMCOS. It was mentioned to the Reviewer more than once that the Scheme has exposed an existing need for dispute resolution among musicians in Australia.

1. Background to the Independent Review

In the Determination through which the Scheme was established, the ACCC included a requirement that 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 APRA AMCOS authorisation that was the subject of the Determination. The Determination specified that an Independent Review (“the Review”) was to be completed after three years’ of the Scheme’s operation, and in time for the ACCC’s consideration of re-authorisation of APRA AMCOS. The Determination also specified that the Independent Reviewer (“the Reviewer”) be appointed by APRA AMCOS, and that the ACCC approve that appointment.

According to Condition C3, the Reviewer was required to

- Monitor and report on the operation of the Scheme, including whether disputes were being resolved in a timely, efficient, and effective manner;
- Review the operation and performance of the Scheme;
- Review the operation and performance of the Facilitator of the Scheme;
- Provide to the ACCC a written report (“the Report”) in terms of Condition C3 of the Determination; and

- Publish a ‘public version’² of that Report.

As part of the Review, the Reviewer was required to: ‘... obtain 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.’³

The written report of the Review was to be based on the period between the commencement of the Scheme and twelve months prior to the expiry of the authorisation to which the Determination refers (i.e., 24 June 2018).

As is discussed in some detail below, in its first two years of operation, the Scheme did not enjoy a high uptake of use (a total of only 28 matters was handled by the Scheme between 1 January 2016 and 31 December 2017). In the eleven months since the appointment of the Reviewer, there has been a noticeable increase in use of the Scheme, and the Facilitator has introduced notable innovations during 2018. The additional data from 2018 is not included in the data analysis of this Report that relates to the specific reporting requirements set out in the Determination; however, the additional data has been taken into account in the broader observations about the Scheme.

The Reviewer has obtained input to the Review from APRA AMCOS, members of the Consultative Committee, Licensees, and independent mediators and experts from the Scheme’s panel of third-party neutrals; however, some of that consultation was conducted after June 2018. Although these stakeholders were aware that their input would contribute to the Review, the Reviewer is satisfied that their input was provided out of genuine interest in the current and future operation and performance of the Scheme and of the Facilitator, and the potential value of the Scheme.

2. Report Structure and Methodology

(i) Report structure

The structure of this Report covers:

- A summary of the functions of the Independent Reviewer (as outlined in Condition C3 of the Determination);
- An outline of the Review process;
- Analysis of data gathered by the Reviewer, as per Condition C3 of the Determination, and relating to the operation and performance of the Scheme, and of the Facilitator;
- The presentation of an analytical framework to guide the future operation of the Scheme, and any further reviews of it; and
- An Executive Summary.

The Report also includes two Appendices (A – B).

(ii) Objectives and functions of the Independent Reviewer

Schedule D of the Determination specifies the objectives and functions of the Reviewer:

² ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.11(i) b(ii).

³ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), P 101.

'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 C3⁴ 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.'⁵

The Review has been conducted in accordance with these functions, with additions that are noted elsewhere in this Report.

(iii) Review methodology

(a) Overview

The Reviewer was appointed by the ACCC in December 2017, and the Terms of Reference for the Review were finalised with APRA AMCOS in January 2018.

As part of the Review process, the Reviewer attended Committee meetings, spoke with APRA AMCOS, with the Facilitator, with key stakeholders of the Scheme, and with members of the Scheme's panel of third-party neutrals. The Reviewer collected various quantitative data from the Scheme's records. To gain information from Scheme users, the Reviewer designed an online survey for users of the Scheme, the results of which have contributed to the Review.

Following completion of the Review Report, copies were made available to APRA AMCOS, to the Facilitator, to the Consultative Committee, and to the Chair of the Governance Committee for their information. This being the Report of an Independent Review, their comments about the substance of the Report were not sought.

⁴ Condition C3 is listed in full at Appendix E.

⁵ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), P 101.

The Reviewer noted the requirements for the Review that were included by the ACCC in the Determination, and designed the Review accordingly; Part C of this Report addresses those requirements.⁶ However, there have been some unexpected side-effects of the Scheme and, although they do not fall within the specifications of Condition C3, this Report does include some consideration of them. These extra factors include:

- Use of the Scheme by non-licensee disputants
- Unanticipated types of dispute accessing the Scheme, and
- Organisational ramifications for APRA AMCOS

These side-effects have been discussed with APRA AMCOS, and it is suggested in this Report that pro-active steps be taken to protect the ongoing operation of the Scheme, and the Scheme's valuable service in providing assistance when writer-members of APRA AMCOS have disputes with each other.

Without prejudicing the substance of the Report, the Reviewer also discussed with APRA AMCOS a range of pro-active options through which the organisation could work with some of its key stakeholders to develop and maintain productive working relationships.

(b) Data Collection

As noted elsewhere in this Report, the Scheme has not enjoyed extensive usage, and it should be noted that, in such a context, available data has not been "over-analysed" by the Reviewer.

The Reviewer gained information and data about the Scheme to enable reporting according to the requirements of Condition C3. Data sources included:

- Reviewer attendance at meetings of the Consultative and the Governance Committees
- Input/feedback from:
 - Users of the Scheme;⁷
 - Committee members;⁸
 - Licensees;⁹
 - Independent mediators/experts/mappers/peers;¹⁰
 - APRA AMCOS;¹¹ and
 - The Facilitator.¹²

⁶ Those requirements are provided in full at Appendix C.

⁷ Users of the Scheme had the opportunity to participate in an on-line survey, and to speak individually with the Reviewer.

⁸ For example, in discussions with the Reviewer, providing views on the operation of the Scheme, the role of the Facilitator, and the role and function of the Committees.

⁹ For example, in discussions with the Reviewer, providing views on the operation of the Scheme and licensees' use of it.

¹⁰ For example, in discussions with the Reviewer, providing views on the operation of the Scheme, the role and function of the Facilitator, and perceptions of their own role within the Scheme.

¹¹ For example, in discussions with the Reviewer, providing information about the operation of the Scheme, and the role of the Facilitator, as well as funding arrangements for the Scheme, and the procedures for anyone who wanted to lodge a complaint about the Scheme.

¹² For example, in discussions and email exchanges with the Reviewer, providing her perspective on the operation of the Scheme, on her role within it, and the contributions of Committee members.

○ Written records, reports, and data from:

- APRA AMCOS;
- The Scheme;¹³ and
- The Facilitator.

All these inputs have contributed to the Review, including analysis and observations included in this Report.

Suggestions and observations arising from the Review are included in relevant Sections, and are summarised below, in Part B Executive Summary.

Quantitative Data Collection

In the Determination, the ACCC required the inclusion of specific quantitative data in the Scheme's Annual Reports.¹⁴ This Report has based its quantitative analysis on that same data, which were obtained from the Scheme, and are presented within the report under the following categories:

- Summary of time taken for resolution and referral to each option;
- Summary of subjects of dispute;
- Where matters were not resolved, the reasons for non-resolution; and
- Summary of fees and charges incurred by Applicants, and proportion of fees/charges as "disbursements" of mediators/experts paid by APRA AMCOS.

The Reviewer is aware of the various confidentiality and privacy restrictions that apply to DR processes, and has taken these into account in the analysis of "subjects of dispute" and "reasons for non-resolution". The Reviewer is also aware that Annual Reports submitted by the Facilitator have included detailed reports of costs and fees; this Report does not replicate those details.¹⁵

Qualitative Data Collection

The Reviewer sought and obtained qualitative data in the form of interviews with Scheme stakeholders, as listed above (and as required in Condition C3). Based on that feedback, there is little doubt that people who have been involved in the Scheme have welcomed its establishment, are generally pleased with its operation, and with its potential as a dispute resolution scheme and consultative mechanism for the wider music industry. For example: *'Would certainly recommend this service to other writers. Thank you APRA for providing the service.'*^{16 17}

¹³ Although the Reviewer had access to the Scheme's Quarterly Reports for each year (including 2018), she relied only on the Annual Reports that were relevant to the reporting period specified in Condition C3.

¹⁴ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), P 95.

¹⁵ Copies of the Scheme's Annual Reports for January – December 2016, and January – December 2017 are included at Appendix B.

¹⁶ Feedback provided in the on-line survey of Scheme users.

¹⁷ This Report includes only limited data from the online survey for reasons of the protection of confidentiality of those who did complete the survey; so few people completed the survey that the provision of even minor information about them might be identifiable.

Part B. Executive Summary

In summary, the Scheme has resolved disputes in a timely, efficient, and effective manner. Similarly, the performance of the Facilitator is equally effective, and is a major contributor to the overall effectiveness of the Scheme. In all discussions with the Reviewer, people expressed satisfaction with the Scheme's existence, and commended the commitment, the skills, and hard work of the Facilitator.

This Independent Review has shown that not only is Resolution Pathways producing efficient, timely and effective results, the nature of matters with which it is dealing suggest that it is also filling a long-standing gap in the music industry. The Scheme is highly likely to be even more effective once the below-listed issues have been addressed.

The Scheme is supported by Committees whose volunteer members work wholeheartedly for the Scheme's success.

The Scheme's success is heavily reliant on the obvious skills and commitment of its Facilitator. In particular, thanks to the Facilitator's enthusiasm, the Scheme includes innovative approaches designed specifically for its own unique context (e.g., the dispute resolution processes called "Mapping" and "Peer Assist").

The below-listed observations and suggestions are drawn from Parts C and D of this Report; in the interests of conciseness, some suggestions from Part C are combined into a single suggestion for this Executive Summary.

This review has found three general areas in which further improvements would benefit the operation of the Scheme and the Reviewer's suggestions and observations are set out accordingly.

1. Perceptions of the independence of the Scheme

- *A broader source of funding, and a wider market focus would reduce the Scheme's dependence on APRA AMCOS, and would go some way towards addressing existing perceptions of APRA AMCOS influence over the Scheme. To ensure the Scheme's future viability, it would be appropriate for alternative funding options to be canvassed, including industry funding options.*
- *It would be appropriate to ensure all Scheme documentation bear the Scheme's own name and logo.*

2. The Scheme's administration (including record-keeping), and structure (including Committees)

Administration – funding

- *A broader source of funding, and a wider industry focus would reduce the Scheme's dependence on APRA AMCOS, and would go some way towards addressing existing perceptions of APRA AMCOS' influence over the Scheme. It would be useful for alternative funding options to be canvassed, including industry funding options. For example, if APRA AMCOS is seen to be the controller of song royalties, and PPCA as the controller of recording royalties, it might be appropriate to consult industry bodies such as PPCA and invite their input to options for the Scheme's future.*
- *It may improve the transparency of the Scheme and its operation if each Annual Report included a section for reporting on the Scheme's funding arrangements. The section could include separate reports for Operational Funding, and for the Funding of Dispute Resolution Services.*

Administration – record-keeping

- *The Facilitator is to be commended for her pursuit of suitable computer software that enables the automatic registration, monitoring, and tracking of each matter; this will enable an inherently consistent record-keeping and reporting regime, as well as enabling the tracking of timeliness.*

Structure – Committees

- *Now that the Scheme is beyond its development stages, it would be appropriate to review the purpose of the Governance Committee, the Steering Committee, and other Sub-Committees, and to clarify and document their roles in the operation of the Scheme.*
- *The advisory role of the Steering Committee would be reinforced if the Facilitator were to attend meetings only as a non-member, and if her role in Committee meetings were to be as a reporter on the Scheme, including its finances and Annual Reports; the Committee members should elect a Chair from among themselves; and, the affiliations and representative status of each Committee Member be clearly described on the Scheme's website.*

Structure – operation

- *Internal management of the Scheme: It is suggested that two roles be established to manage the Scheme. One role would administer the Scheme, including the administrative side of referrals to the panel of third-party neutrals (a Scheme Co-ordinator role); and one role would be a first point of contact for the Scheme, including responsibility for attempting early and quick resolution of matters, as well as assessment of referral to other processes within the Scheme (a Case Manager).*
- *Panel of Third-Party Neutrals: It is suggested that the panel be reviewed with a view to: increasing the number of industry peers and Experts, and improving the panel’s gender balance.*
- *Analytical Framework: It is suggested that the Scheme adopt the Analytical Framework outlined in this Report, and that it include clear descriptions of the Scheme’s various accountability responsibilities.*

3. Information, documentation, and public image

Purpose, objectives, and goals

- *If the Scheme continues operating after June 2019, it would be useful to review its stated purpose, objectives, and goals, and to include them on a dedicated part of the Scheme website.*

Website and information

- *The Scheme website would benefit from a review that rectifies the “glitches” listed in Part C [3 (ii)]; it may also be appropriate to seek stakeholder input to the future design and focus of the website.*
- *In future, it may be helpful for potential users of the Scheme if the website were to include a single, clear, plain English description of how the Scheme operates, as well as some simple explanations of the DR processes that the Scheme provides. The explanatory page should be designed for use by stakeholders as well as users of the Scheme. The document could emphasise that the Scheme’s aim is to help disputants/complainants finalise their matter in ways that each side can accept, and to do so as promptly and informally as is possible. The document could include an explanation of the sequence of processes available within the Scheme, noting that any of them can be accessed if people prefer, if resolution has not otherwise been achieved, or if the Facilitator considers that any process is more appropriate for their particular matter. The processes could be presented as cascading logically from least interventionist (e.g., the Facilitator attempting early and informal intervention and resolution), through consensual processes (such as mediation, mapping, and peer assist), and ultimately leading to the Scheme’s determinative processes. This information should include a brief description of the procedure for appointing Experts.*

APRA AMCOS

- *APRA AMCOS could adopt a more pro-active role in developing and cultivating jointly productive working relationships with its many stakeholders. Such an approach is likely to increase the loyalty of stakeholders such as licensees, as well as leading to a reduction in the levels of dissatisfaction with APRA AMCOS services.*

Acknowledgements

The Reviewer would like to thank everyone who has contributed information for the Review, and to express appreciation for the ready assistance that a range of stakeholders have provided throughout the Review process.

Part C. Independent Review of Resolution Pathways (“the Scheme”)

1. Background

Prior to the establishment of Resolution Pathways, APRA AMCOS had a complaints system centred on the provision of expert opinions and decisions. That system was perceived to lack the independence necessary for an effective complaints handling system. Resolution Pathways was established as a Scheme that would operate independently of APRA AMCOS, and would comply with Conditions of Authorisation included in the Determination. Expert processes were retained in the Scheme.

The ADR scheme required under Condition C3 must include the following:

- four options for resolving disputes (informal resolution, mediation, expert opinion, binding determination)
- an independent dispute resolution facilitator appointed by APRA and approved by the ACCC to manage the ADR scheme. While noting APRA’s submission, since the ACCC will be approving the facilitator, the ACCC has not required a long term contract between APRA and the facilitator or remuneration that is not tied to the number or results of resolutions as part of the condition
- a pool of independent mediators and independent experts, including barristers and/or former judges and persons with relevant industry and/or commercial experience, established by the facilitator. The ACCC expects the facilitator to consult stakeholders about appropriate members of the pool
- the option for an applicant to request that a matter be managed by an independent expert rather than the facilitator
- broad coverage, including both disputes and complaints lodged by current/potential licensees and members
- applicant contribution to costs of a matter in most cases:
 - tiered filing fees payable for disputes
 - mediator/expert charges shared between parties for disputed amounts of \$10,000 or more and for non-monetary disputes where the applicant pays license fees to APRA or receives payments from APRA of \$10,000 or more
 - the facilitator, mediator/expert or the parties decide that APRA will pay all fees/charges
 - fees and charges are not payable for complaints (the facilitator has discretion to decide if a matter is a dispute or a complaint)
- a consultative committee (comprised of small and large licensees and members, associations and APRA nominated by the facilitator) to provide feedback and other advisory input to APRA and to the facilitator in relation to the operation of the ADR scheme
- publication of binding determinations
- annual reporting about the ADR scheme prepared by the facilitator and provided to the ACCC by APRA
- an independent review of the ADR scheme (in time for the authorisation expiring) by an independent reviewer appointed by APRA and approved by the ACCC
- a plain English guide to the ADR scheme
- a public website for the ADR scheme that is separate from APRA’s own website

- implementation of the ADR scheme for both APRA members and APRA licensees by 31 March 2015. While the ACCC would encourage APRA to implement the scheme prior to this date if possible, this deadline allows the facilitator and the committee to take more time in preparing the schemes if necessary.¹⁸

The Scheme’s name, “Resolution Pathways”, is intended to indicate the different DR processes, or “pathways” that the Scheme offers disputants.

2. Objectives of the Scheme

(i) Objective specified in the Determination

Condition C3 specifies the objective of the Scheme:

‘The objective of the Scheme is to resolve disputes in a timely, efficient and effective manner.’¹⁹

(ii) Objectives in the Scheme’s reports and website

The Quarterly Reports and Annual Reports produced by the Facilitator contain the data against which the Scheme’s compliance with the above objective can be assessed. These are reported in detail later in this Report.

The Scheme’s website includes a section about the Scheme’s ‘Core Purposes’ and ‘Values’. The listed Core Purposes are:

- To give voice to music creators and music users
- To streamline resolutions
- Business continuity without disputes as a roadblock.²⁰

If the Scheme continues operating after June 2019, it would be useful to review its stated purpose, objectives, and goals.

3. Scheme Structure and Operation

(i) Available dispute resolution processes

(a) Processes outlined in Condition C3.

Condition C3 specifies that the Scheme provide access to four separate dispute resolution processes:

‘... informal resolution by the Facilitator ... external mediation by an independent mediator ... non-binding expert opinion (including reasons) delivered by an appropriately

¹⁸ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375); P 81 – 82.

¹⁹ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), P 101.

²⁰ <http://www.resolutionpathways.com.au/About-Us#consultative-committee>

*qualified or experienced independent expert ... binding written determination (including reasons) written by an Independent Expert ...*²¹

(b) Processes provided in the Scheme

The Scheme provides access to the four processes listed in Condition C3. The Facilitator's role includes assessing the nature of each matter, and recommending to the disputants the most appropriate of those four processes. In practice, many matters have been resolved by the Facilitator at the informal stage. For example, sometimes the Facilitator has acted as an intermediary between the disputants, or she has sought additional information from APRA AMCOS, or she has encouraged APRA AMCOS to review the conditions/terms of a specific license.

It is clear that the Facilitator is making effective use of her skills in resolving matters early. Responding to the context and environment of APRA AMCOS members, and licensees, the Facilitator has initiated some innovative process approaches that are still in trial, or pilot, stages. These include the implementation of two processes that the Scheme calls Mapping, and Peer Assist.

Mapping – according to the description provided on the Scheme's website, and to information provided to the Reviewer by members of the panel of third-party neutrals, this process is similar to the process of "conciliation" that is practiced widely in statutory dispute resolution schemes in Australia. Mappers have expertise in the subject of the dispute to which they are appointed, and use that expertise to pinpoint the key issues in dispute, to guide the disputants' discussions of those key issues, and to suggest feasible areas of agreement. The process itself is not determinative, and the Mapper's role does not include making any decisions on behalf of the disputants.

Peer Assist – this appears to include processes that the Scheme and its proponents call "Peer Review", "Peer Mentoring", and "Peer Group". The process is available to music creators, 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. The process itself is not determinative, and the Peer's role does not include making any decisions on behalf of the disputants. The Scheme's reports and website do not clearly differentiate the various permutations of the key process of "Peer Assist".

The Annual Report for January 2017 – December 2017 lists two matters referred to "Peers": one matter was referred for 'peer assist' and one for 'peer mentoring'. Unfortunately, this Report cannot include the outcome for either matter because they were carried over into the 2018 reporting period for the Scheme.

There needs to be greater clarity about the Peer Assist, Peer Mentoring, Peer Review, and Peer Group processes. This applies to the DR practitioners providing the services, as well as to the disputants referred to them.

The two Annual Reports on which the Reviewer has relied show that determinative processes (non-binding Expert Views, and binding Expert Decisions) were not used in 2016 or 2017.

²¹ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.2 (i) – (iv).

Within Australia’s music industry, there are said to be many disputes that do not involve large sums of money, but do involve personal costs where, say, a song’s provenance is disputed. Although there can be significant constructive ramifications when such disputes are resolved – and opportunities for APRA AMCOS to release monies it has been holding for years – the funding of DR processes for such cases should not be left to disputants whose financial situation may not be sufficient to pay the fees of professional DR practitioners.

The approach applied in the Peer Assist process in particular has strong potential for wider application in the music industry. Feedback to the Reviewer included suggestions that the process could be a valuable technique for industry-wide consultations.

No part of the Scheme’s operations prevents any applicant from seeking intervention by the Copyright Tribunal, or any other court or tribunal.

It would be useful if the Scheme’s descriptions of its offerings could be revised to ensure that stakeholders and Scheme users could readily understand the nature of, and differences between, the various dispute resolution processes available within the Scheme.

(ii) Website and Scheme materials, including documentation

Schedule C of Condition C3 specifies that the Facilitator establish and maintain a Scheme website, separate from the AAPRA AMCOS website.

(a) Scheme website [<http://www.resolutionpathways.com.au/>]

The Facilitator has established a Scheme website that is separate from the website of APRA AMCOS.

It is to be expected that there would be “glitches” on the website of a new scheme, especially a scheme that is still in its pilot stages.

In her own perusal of the website, the Reviewer noted:

- Parts of the website are significantly out of date; for example, in November 2018, the webpage for the Peer Assist process contained only this information: ‘COMING SOON This service is due to be finalised and available in December 2015’;²² the webpage providing information about Alternative Dispute Resolution also contains significantly out-of-date material, and should be amended accordingly; ²³];
- The list of Consultative Committee Members is published on the letterhead of an organisation other than Resolution Pathways;²⁴
- Website information about the “Mapping” process includes a sample agreement to participate in a Mapping Session; part of the sample agreement (presumably a document with legal standing) refers to the confidentiality that applies to a mapping session, and, in

²² <http://www.resolutionpathways.com.au/Peer-Assist>

²³ <http://www.resolutionpathways.com.au/Information-Resources#alternative>

²⁴ http://www.resolutionpathways.com.au/Dispute_Resolution_Committee_2014.pdf

particular, refers to a Clause 24 which is likely to place limitations on the confidentiality – the sample agreement does not contain a clause 24;

- Website information about the Expert Opinion process uses terminology that is not familiar in the DR sector; for example, in the ACCC Determination, the process is called Expert Opinion (in which a non-binding written opinion is provided by a suitably qualified independent expert); on the Resolution Pathways website, this process is called ‘Expert View’;²⁵ similarly, what the ACCC’s Determination calls a binding determination, the Resolution Pathways website calls an Expert Decision (the DR sector calls this process Expert Determination²⁶); it might be clearer for potential Scheme users and their supporters if the Scheme were to describe its processes in terms that reflect those commonly used in the DR sector;
- Within the “Contacts” section of the website, at the bottom of a scroll-down page, is a sub-heading: ‘Comments, complaints and confidentiality’; within the sub-section is the following statement: ‘*Lovely compliments will be used without attribution on our site, please let us know if you would like to keep your compliments to ourselves, or if you’re happy to include your name. All contact is confidential and will be recorded without attribution for our reporting.*’²⁷ Apart from the inconsistency between these two statements, there is no mention of complaints, of how to lodge one, or of any procedures for handling complaints. There is no clarification of how client confidentiality is treated in the Scheme, apart from this unclear reference to confidentiality in the context of compliments.

The Reviewer was told that, for some people, the website does not present well, that it is unprofessional, “clunky and messy”.

The Scheme website would benefit from a review that rectifies the above-listed “glitches”; it may also be appropriate to seek stakeholder input to the future design and focus of the website.

(b) Documentation

Condition C3.19 requires the Scheme to have a ‘plain English guide’ available on the Scheme’s website. The website does include information about the Scheme, its key personnel, and about alternative dispute resolution (now known as “dispute resolution”, or DR); however, it is not easy to navigate, or to readily understand.²⁸ The Reviewer understands that the Facilitator is currently revising the information on the Scheme website, including the feasibility of using graphic formats.

²⁵ http://www.resolutionpathways.com.au/Expert_View_Agreement_Nutshell.pdf

²⁶ For example, see National ADR Advisory Council, *Dispute Resolution Terms* (2003); available at: <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>; T. Sourdin, *Alternative Dispute Resolution* (5th Edition, Thomson Reuters, Australia, 2016).

²⁷ <http://www.resolutionpathways.com.au/Contact-Us>

²⁸ <http://www.resolutionpathways.com.au/Information-Resources#alternative>

In future, it may be helpful for potential users of the Scheme if the website were to include a single, clear, plain English description of how the Scheme operates, as well as some simple explanations of the DR processes that are available for complainants and disputants. The explanatory page should be designed for use by stakeholders as well as users of the Scheme. The document could emphasise that the Scheme's aim is to help disputants/complainants finalise their matter in ways that each side can accept, and to do so as promptly and informally as is possible. The document could include an explanation of the sequence of processes available within the Scheme, noting that any of them can be accessed if people prefer, if resolution has not otherwise been achieved, or if the Facilitator considers that any process is more appropriate for their particular matter. The processes could be presented as cascading logically from least interventionist (e.g., the Facilitator attempting early and informal intervention and resolution), through consensual processes (such as mediation, mapping, and peer assist), and ultimately leading to the Scheme's determinative processes. This information should include a brief description of the process for appointing Experts to any particular matter.

4. Scheme Timeliness, Efficiency, and Effectiveness

(i) Quantitative Data Collection and Analysis²⁹

(a) Data limitations

The Reviewer recommends that the following quantitative data be treated with caution because only a small number of matters have been included in the Scheme. It is understood that, since the Review commenced, the number of matters has increased. Due to the specifications of Condition C3, those reported increases cannot be included in this analysis; however, the Reviewer understands that the additional data does not compromise the current findings and suggestions of this Review.

The Reviewer is aware that, during 2018, the Facilitator herself has been reviewing the administration of the Scheme, including the feasibility of introducing an automated electronic process for the registration, management, and tracking of matters.

An automated system would facilitate the development of consistent terminology for reports, including the descriptions of disputes, the recording of relevant dates for each matter, the descriptions of referrals, and the recording of results/outcomes.

(b) Timeliness

According to its Annual Reports, the Scheme generally deals with matters in a timely manner. Additional time is required where matters are referred to a third-party neutral, or where a matter requires APRA AMCOS to review and recalculate licensing conditions and/or fees. The time it takes

²⁹ The data reported in this section has been collected from the Scheme's two Annual Reports, for the 2016, and 2017 reporting years.

to deal with any individual matter can be influenced by the responsiveness of the disputants, which itself can be influenced by the pre-existing duration of the dispute.

Feedback to the Reviewer is less consistently positive about timeliness than are the Scheme's Annual Reports. It is likely that improved tracking and reporting systems will make visibility and assessment of timeliness much easier.

(c) Costs

Schedule A of Condition C3 includes specifications for the calculation of fees and charges for dispute resolution.

The rates of fees and charges vary according to the amount in dispute, the dispute resolution process chosen, and the fees charged by the third-party neutral (when the matter is so referred). Scheme data shows that fees and charges have been apportioned according to the formula specified in Schedule A of Condition C3.

A costs estimate is provided to the disputants by the Facilitator when she recommends a particular resolution process, or "pathway".

The Reviewer is 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.

(d) Subjects of disputes

The majority of matters that have been raised with the Scheme concern disputes between writer members of APRA AMCOS,³⁰ despite the ACCC Determination having a strong focus on the concerns of licensees. Out of 28 matters raised with the Scheme in the two reporting years of January 2016 – December 2017, only six matters concerned licenses. None of the licensing matters remains outstanding.

(e) Resolution

Scheme data shows that the majority of disputes are resolved, and that the majority of the resolutions are obtained promptly through early intervention by the Facilitator.

Data from the Scheme shows that, for those who accessed it, the outcomes in terms of resolution, or finalisation, were good: In 2016, 79% of matters referred to the Scheme were finalised, and, in 2017, 50% were finalised. However, the reach of the Scheme appears to be of some concern. Of those who did access it, the majority involved inter-member disputes, rather than the disputes with APRA AMCOS that were predicted by the ACCC.

Feedback to the Reviewer confirms that the lack of licensee uptake is a concern to Scheme stakeholders.

Resolution rates is a traditional, and widely used, measure of effectiveness in any dispute resolution service, or program, or scheme. It can be a misleading figure because it necessarily includes only those matters that are referred into a scheme and does not include all the

³⁰ This is confirmed by the Scheme's Annual and Quarterly Reports, as well as by responses to the Review's online user survey.

disputes/complaints that are not so referred. Hence, it is not a reliable indicator of the potential reach, or the influence, of any program, or scheme.

The rate of resolution in this Scheme is a proportion of the referred matters only; it cannot include the matters that were not referred, and there is no way of ascertaining the number of non-referred disputes or complaints, nor how many of those were resolved. As with all such programs and schemes, there is likely to be a significant number of non-referred matters; and information provided to this Review suggests that likelihood is quite high for licensees. For example, the reach of this Scheme should include the total number of licensees of APRA AMCOS, as well as the total number of APRA AMCOS members, the numbers of musicians who are members of industry organisations other than APRA AMCOS, and the numbers of musicians who are not members of any organisation. Analysis of Scheme matters in isolation provides artificial data that masks the potential effectiveness of this Scheme across Australia's music industry.

It has been reported elsewhere that a dissatisfied customer's willingness to lodge a complaint is linked to perceptions of their own power (i.e., if they do not feel powerful, they will not lodge a complaint),³¹ and that dissatisfied male customers are more likely to lodge complaints than are dissatisfied female customers.³² Accordingly, this Scheme should have a high rate of usage because of the high proportion of males in APRA AMCOS' membership. Yet the usage rate remains quite low. The questions remains: what is happening to the disputes and complaints that would ordinarily be expected to be lodged with the Scheme?

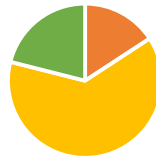
(f) Non-Resolution – Reasons

Scheme data suggests that, for the few matters that were not resolved, in most cases, it was because the disputants agreed that no further action was necessary.

³¹ N. Stephens and K. P. Gwinner, 'Why Don't Some People Complain? A Cognitive-Emotive Process Model of Consumer Complaint Behaviour' (1998) 26(3) *Journal of the Academy of Marketing Science* 185 – 189.

³² N. Stephens and K. P. Gwinner, 'Why Don't Some People Complain? A Cognitive-Emotive Process Model of Consumer Complaint Behaviour' (1998) 26(3) *Journal of the Academy of Marketing Science* 185 – 189.

Figure 1. 2016 - Relative proportion of referrals



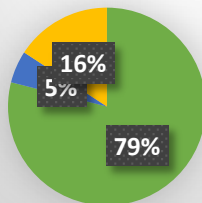
No consent Facilitator 3rd Party Neutrals

Figure 2. 2017 - Relative proportion of referrals



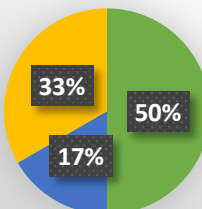
No consent Facilitator 3rd Party Neutrals

Figure 3. 2016 - Relative proportion of finalised matters



Finalised
Not resolved
No consent

Figure 4. 2017 - Relative proportion of finalised matters



Finalised
Not resolved
No consent

Notes to Figures 1 – 4: data for 2017 includes: a matter not referred for reasons other than non-consent, and the addition of Peer Assist/Peer Review/Peer Mentoring as Scheme processes for finalising matters. In 2016, two matters were transferred to 2017, and in 2017, five matters were referred to 2018.

(ii) Panel of Third-Party Neutrals

(a) Specifications in the Determination

Schedule B specifies that the Scheme include ‘... suitably qualified or experienced Independent Mediators and Independent Experts ... 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 ...’³³

(b) The Scheme’s panel of third-party neutrals

The Scheme website includes a page dedicated to information about the panel of the third-party neutrals (which the website calls “Resolution Panels”) available to provide dispute management and resolution services.³⁴ The total number of practitioners included on the list is twelve, all of whom are listed as mediators, and two of which are also listed as Mappers. None of the panel members is listed as a Peer for the purposes of Peer Assist, or as an Independent Expert. The list includes practitioners with varying industry, and/or commercial experience and expertise. The list includes at least one barrister.

The panel includes third-party neutrals in various geographic locations, including at least one in most States and Territories. Five neutrals are listed for NSW, three for Victoria, and one each for South Australia, Queensland, Western Australia, and the NT. There are no neutrals listed for the ACT or for Tasmania.

The twelve neutrals are well-known, well-qualified, experienced DR practitioners.

The website does not make clear which of the neutrals provide Independent Expert services, and does not include the credentials by which the facilitator might choose to appoint an Independent Expert to a particular matter.

(c) Gender

Of the twelve neutrals, three are women (one in South Australia, one in Western Australia, and one in New South Wales), and nine are men.

During the Review, APRA AMCOS reported to the Reviewer that their membership is similarly male-dominant: as at 30 June 2019, 77.89% of their members were male, and 22.11% were female. APRA AMCOS noted that they are actively seeking to redress this current imbalance.

There are two potential effects of the Scheme’s gender imbalance. Mediation research has suggested that perceptions of mediation’s fairness and satisfaction with the process might be influenced by the gender of the neutral third party being matched with the gender of at least one of the disputants.³⁵ In addition, the predominance of male dispute resolvers on the Scheme’s website might influence potential complainants’ decisions about whether to contact the Scheme.

³³ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375); Condition C3.9, Schedule C.

³⁴ <http://www.resolutionpathways.com.au/Resolution-Panels>

³⁵ L. Charkoudian and E. K. Wayne, ‘Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants’ Perception of Mediation’ (2010) 28(1) *Conflict Resolution Quarterly* 23 – 52.

It is suggested that the Scheme's panel of third-party neutrals be reviewed with a view to: increasing the number of industry peers and experts, and improving the panel's gender balance.

5. Scheme Committees

(i) Overview

According to the Scheme's Annual Report for January – December 2016, there are four Committees: a Steering Committee,³⁶ with three Sub-Committees (a Governance Sub-Committee, a Peer Sub-Committee, and a Succession and Nominations Sub-Committee).

(ii) Steering Committee

(a) Specifications in the Determination

Condition C3 of the Determination includes requirements for the establishment of a Consultative Committee. 'The objective of the [Consultative] Committee is to provide feedback and other advisory input to APRA and to the facilitator in relation to the operation of the ADR scheme.'³⁷

The functions of the Committee are specified as including:

*'... monitoring the operation of the Scheme, including actual costs of the Scheme ... receiving feedback on the Scheme and communicating that feedback to the Facilitator and APRA (where appropriate) ... 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 ... and making recommendations to the Facilitator and to APRA about the operation of the Scheme.'*³⁸

Condition C3 includes the representation requirements of Committee members:

*'... an equal number of representatives of ... licensees whose annual license fees payable to APRA are \$3,000 or less ... licensees whose annual license fees payable to APRA are over \$3,000 ... 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 ... members whose annual royalty receipts from APRA are over \$3,000 ... and a representative of APRA.'*³⁹

³⁶ The Determination refers to this body as a Consultative Committee, and the Scheme itself refers to a Steering Committee.

³⁷ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.7 Schedule B.

³⁸ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.7 Schedule B.

³⁹ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of* *Final Report* *Independent Review of Resolution Pathways 2018* 24

(b) Steering Committee in the Scheme

The Steering Committee provides advice and support to the Facilitator in relation to the design, implementation, and on-going management of the Scheme.

Committee function and purpose

The purpose of the Steering Committee was devised as part of establishing the Scheme. On the Scheme's website, the purpose is described as being to: '... support [the Facilitator] in design, implementing and managing ...'⁴⁰ the Scheme.

Now that the Scheme is beyond its developmental stage, it would be appropriate to review the purpose of the Steering Committee, and to clarify its role in the operation of the Scheme.

Committee Members

Committee members are appointed on a volunteer basis. They work and reside in various parts of Australia and ordinarily meet using internet-based video-call technology. The Independent Reviewer attended two meetings of this Committee, and was impressed by the level of commitment on the part of Committee Members despite their diverse interests and roles in Australia's music industry. At those meetings, the Facilitator discussed with the Committee various aspects of the Scheme, including proposed Scheme innovations for improving the nature of Scheme services for APRA AMCOS members in particular. She also consulted with the Committee about the appointment of new Committee members.

Sixteen Committee Members are listed on the website, although the affiliation/representation requirements are not made clear. For example, three members appear to represent large licensees, and one appears to represent small (or casual) licensees; it is unclear which of the six writer representatives are above or below the Determination's delineation of \$3000pa royalty payments. Two of the writer members are APRA AMCOS Ambassadors which could affect perceptions of their independence when making Committee decisions. Three Committee Members are neither licensees nor writers; for two, their affiliation is unclear. The Scheme Facilitator is the final member of the Steering Committee. APRA AMCOS internal counsel is an observer at meetings of the Steering Committee.

The list of Committee Members is publicly available on the website; however, it is on a pdf document bearing letterhead and logo of a company other than Resolution Pathways.

The Scheme Facilitator chairs the Steering Committee, assuming a dual role: while she chairs the meetings, she is also reporting on the Scheme. Although this arrangement has been an important one during the initial development of the Scheme, it could be perceived as a potential conflict of interest. It is important for the future perceived integrity of the Scheme that the Committee itself elect a Chair from its members, and that the Facilitator step aside from being a Committee Member.

performing rights in music (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.6.

⁴⁰ <http://www.resolutionpathways.com.au/About-Us>

Such an approach would enable the Committee to maintain its independence of the Scheme, and more readily fulfil the advisory role foreseen by the ACCC.

The advisory role of the Steering Committee would be reinforced if the Facilitator were to attend meetings of the Consultative Committee only as a non-member, and if her role in Committee meetings were to be as a reporter on the Scheme, including its finances and Annual Reports; the Chair of the Consultative Committee should be elected from the Committee's members; and, the affiliations and representative status of each Committee Member be clearly described on the Scheme's website.

The purpose and role of the various Sub-Committees needs to be clarified and documented.

It would be appropriate to ensure that all Scheme documentation bear the Scheme's own name and logo.

(iii) Governance Committee

According to the Annual Report January – December 2016, the Governance Sub-Committee was established during the 2016 calendar year. The Governance Sub-Committee is intended to be quite independent of the Scheme's relationship with APRA AMCOS.

During the first half of 2018, it became clear that the Independent Reviewer could not be seen to retain her independence while APRA AMCOS was her point of contact for the review. It was agreed that the existing Governance Sub-Committee would provide an independent point of contact for the Independent Reviewer.

Membership of the Governance Committee is drawn from the Steering Committee; the internal counsel from APRA AMCAOS attends the meetings as an observer. The Reviewer attended meetings of the Governance Committee and maintained email contact with its members outside meetings.

(iv) Succession and Nominations Sub-Committee

This Sub-committee is mentioned in the Annual Report (January 2017 – December 2017). Information about this Sub-Committee is limited; however, it appears to be responsible for recommending replacement Committee Members when vacancies arise.

(v) Peer Review Sub-Committee

This Sub-Committee appears to have been established to oversee the trial of an innovative Dispute Resolution process within the Scheme: Peer Review. Within this process, a panel of potential Peer Reviewers would be established, and, when a dispute between writers was registered with Resolution Pathways, the writer-disputants would be provided with the names of three potential Peer Reviewers from the panel. The writer-disputants would agree on one Peer Reviewer, who would be appointed by the Facilitator to consider their matter and provide advice on how the matter could be resolved.

Feedback to the Reviewer suggests a lack of common understanding among Committee Members about the roles and purposes of the various Sub-Committees, as well as a lack of shared confidence in

their capacities to undertake their roles, and to maintain a perception of independence, within the Scheme's current structure.

6. Funding of the Scheme

(i) Operational funding

APRA AMCOS reported to the Reviewer that it is the sole funder of the Scheme's general management and operation, and that the Scheme has a specific budget item in the organisation's management accounts. APRA AMCOS' annual legal expense budget includes a forecast amount for the funding of the Scheme.

Funding includes an annual retainer that is paid to Resolve Advisors Ltd, in quarterly instalments, upon receipt of an invoice for each relevant quarter. APRA AMCOS also pays Resolve Advisors Ltd for the incurred costs related to additional items as required (e.g., costs related to the establishment and maintenance of IT resources, travel, and other incidental costs). These payments also occur quarterly, upon receipt of relevant invoices from Resolve Advisors Ltd.

According to feedback to the Reviewer, not all members of the Steering Committee are aware of these funding arrangements.

(ii) Funding of Dispute Resolution Services

All payments for dispute resolution services are made in accordance with Condition C3 in the Determination.

APRA AMCOS reported that all disputes referred to the Scheme are dealt with initially by the Facilitator and initial incurred costs are included under the annual retainer fee. Where matters are referred to independent mediators/experts/mappers/peers, these costs are funded on a case-by-case basis; this has included instances where APRA AMCOS has covered all costs, the parties have apportioned costs among themselves, or the relevant independent third party (i.e., party mapper/mediator/expert/peer) has determined apportionment of costs.

In such cases, the independent third party submits an invoice to APRA AMCOS, and, where appropriate, to other parties for payment of their agreed portion.

Comments were made to the Reviewer about the capacity for the Scheme to provide dispute resolution services more broadly across the music industry; given the nature of disputes being handled by the Scheme, this proposal is worthy of consideration. It was also suggested that some of the processes currently used in the Scheme could be applied to facilitate consultations across the music industry. Obviously, such developments would require significant change in the Scheme and its operation. For example, an alternative funding arrangement would be needed, perhaps using other industry schemes as a guide. Devising a method of industry funding for the Scheme is likely to be a complex undertaking; however, it is likely to increase the Scheme's resources and enable the infrastructure improvements that the Scheme is needing, both of which would improve the Scheme's effectiveness. Such changes might also positively affect perceptions of the Scheme's independence of APRA AMCOS.

A broader source of funding, and a wider industry focus would reduce the Scheme's dependence on APRA AMCOS, and would go some way towards addressing existing perceptions of APRA AMCOS influence over the Scheme. It would be useful for alternative funding options to be canvassed, including industry funding options. For example, if APRA AMCOS is seen to be the controller of song royalties, and PPCA as the controller of recording royalties, it might be appropriate to consult industry bodies such as PPCA and invite their input to options for the Scheme's future.

It may improve the transparency of the Scheme and its operation if each Annual Report included a section for reporting on the Scheme's funding arrangements. The section could include separate reports for Operational Funding, and for the Funding of Dispute Resolution Services.

7. Relationship between the Scheme and APRA AMCOS, and Stakeholders

(i) The Scheme and APRA AMCOS

The Scheme arose out of perceptions that APRA AMCOS' monopoly status prevented it from running an internal process for handling concerns raised by licensees. In the Determination, the ACCC noted the necessity for a scheme that operated independently of APRA AMCOS; at the same time, the ACCC required APRA AMCOS to fund the Scheme. This dual role on the part of APRA AMCOS has affected perceptions of the Scheme's independence, according to feedback provided to the Reviewer.

It has been difficult for the Scheme to maintain any perception of independence from APRA AMCOS while such perceived duality continues. At least during the period of this Review, it has appeared that APRA AMCOS has deliberately avoided any involvement in the Scheme, or the Committees, that could be perceived as interference – and has not demonstrated any overt degree of control over the operation of the Scheme or the role of the Facilitator. In addition to being the sole funder of the Scheme, APRA AMCOS also provides rooms and electronic facilities for meetings of the Committees, and questions have been raised with the Reviewer about the independence of all Committee members. Although APRA AMCOS' support and assistance has made it easier for the Committees to meet, it could be perceived as active involvement on the part of APRA AMCOS.

The current APRA AMCOS representative and the Facilitator have worked closely together in developing the Scheme, and their joint commitment to its effective operation is a cornerstone in the Scheme's success.

Feedback to the Reviewer suggests there is some concern about what is perceived to be a controlling position held by APRA AMCOS in relation to the Scheme, to its operation, and to the role of the Facilitator.

This would be addressed at least in part, if alternative sources of additional funding and support were to be obtained for the Scheme. The involvement of other industry organisations and stakeholders may also enable broader access to the Scheme by Australia's musicians.

During the period of the Review it became clear that there are some systemic issues involving APRA AMCOS which contribute indirectly to the operation and function of the Scheme, but which lie

outside this Review's scope. Feedback to the Reviewer suggested that it might be beneficial for the music industry if APRA AMCOS itself were to be the subject of a review.

(ii) APRA AMCOS and the Stakeholders

In the past, APRA AMCOS has been the subject of criticism from some of its stakeholders who have perceived the organisation as a collection agency more interested in compliance enforcement than in taking account of the views of its "customers". Development and operation of Resolution Pathways has provided opportunities for APRA AMCOS to become better acquainted with its key stakeholders, and equally for those stakeholders to become better informed about APRA AMCOS. Now that the Scheme is establishing its place in the Australian music sector, there is an opportunity for APRA AMCOS to review its traditional approach, and to make constructive use of the relationships that have been established through the Scheme.

Research in the areas of marketing and customer relations suggests that dissatisfied customers resort to "bad-mouthing" an organisation rather than submitting a complaint.⁴¹ It has even been estimated that 96% of dissatisfied customers do not complain, but *are likely to bad-mouth* the organisation.⁴²

On the other hand, organisations that cultivate productive relations with their customers, and actively rely on customer input, build a strong cohort of customer loyalty. It has been reported that, the better any relationship between an organisation and its customers, and the more frequent their interactions, the fewer complaints and bad-mouthing will occur. This is because customers know that their views are taken into account by, and can influence the organisation.⁴³

APRA AMCOS could adopt a more pro-active role in developing and cultivating jointly productive working relationships with its many stakeholders. Such an approach is likely to increase the loyalty of stakeholders such as licensees, as well as leading to a reduction in the levels of dissatisfaction with APRA AMCOS services.

8. The Scheme Facilitator

(i) Appointment of the Facilitator

APRA AMCOS reported to the Independent Reviewer that the Facilitator was appointed following a selection process conducted by APRA AMCOS' external counsel and internal counsel, and that the ACCC approved the appointment of Shirli Kirschner of Resolve Advisors Ltd. This approval is recorded in the Determination.

(ii) Role and function of the Facilitator

(a) Specifications in the Determination

⁴¹ D. Crié, 'Consumers' Complaint Behaviour. Taxonomy, typology and determinants: Towards a unified ontology' (2003) 11(1) *Database Marketing and Customer Strategy Management* 60 – 79.

⁴² N. Stephens and K. P. Gwinner, 'Why Don't Some People Complain? A Cognitive-Emotive process Model of Consumer Complaint Behavior' 26(3) *Journal of the Academy of Marketing Services* 172 – 189.

⁴³ D. Crié, 'Consumers' Complaint Behaviour. Taxonomy, typology and determinants: Towards a unified ontology' (2003) 11(1) *Database Marketing and Customer Strategy Management* 60 – 79.

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

The functions of the Facilitator must include:

- (i) ensuring the effective set-up (in the case of the initial Facilitator) and the effective operation of the Scheme*
 - (ii) appointing, reappointing, replacing and terminating the appointment of members of the Committee from time to time*
 - (iii) informing Members and Licensees about the Scheme (including informing individual Members or Licensees (as relevant) about the costs that those Members or Licensees are likely to incur under the Scheme in relation to a particular dispute) and being available to answer queries 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 quickly and efficiently*
 - (vii) collecting and distributing the Fees and Charges*
 - (viii) assisting the Independent Mediator or Independent Expert in the making of timetabling and other administrative arrangements for resolving each Dispute under options 2, 3, and 4, including:*
 - (a) arranging meetings or conferences*
 - (b) receiving submissions from the parties*
 - (c) distributing submissions and other relevant materials to the parties and to the Independent Mediator or Independent Expert (as relevant)*
- With the objective of ensuring that the resolution of each Dispute progresses in a timely and efficient manner (including the objective of ensuring that all preliminary steps in relation to a dispute be completed without the need for travel)*
- (ix) preparing the annual ADR report ...*
 - (x) establishing and maintaining a public website for the Scheme that is separate from APRA's own website, and publishing on that website information and documents relating to the Scheme, including:*
 - (a) the plain English guide to the operation of the Scheme ...*
 - (b) each public ADR report, which the Facilitator must publish no later than 1 business day after receiving it from the relevant Independent Expert, and the public version of the report of the Independent Reviewer ...*
 - (c) the curriculum vitae of each Independent Mediator and Independent Expert in the DR Pool*

*(d) the public version of each binding written determination under option 4 ...'*⁴⁴

(b) Role and function in the Scheme

The current Facilitator is the original Facilitator, and she is widely respected and commended for the work she has done on the design of the Scheme, its continual development, and on the resolution of matters that are referred to the Scheme. The Scheme's funding is in the form of a retainer that is calculated on the basis of the Facilitator working on the Scheme for only a couple of days per month. It has been reported to the Reviewer that the Facilitator is currently working at least one day per week on the Scheme, and sometimes more.

The Scheme's operation – and its success – rely on the undoubted skills and expertise of the current Facilitator: she deals with all enquiries to the Scheme, takes initial action to resolve matters quickly, and is the point from which referrals are made to the external panel of third-party neutrals. She was also instrumental in the appointment of the highly skilled panel of third-party neutrals.

There is no doubt that the Scheme and its operation are heavily reliant on the skills and commitment of the current Facilitator. There are some indications that she is subject to work pressure in her role, and does not have access to suitable support resources.

It is unclear what succession-planning is in place in the event that the current Facilitator becomes unavailable to run the Scheme. It is likely that many of the concerns mentioned in this Report can be traced back to the levels of funding and resourcing for the Scheme, as well as the single source of that funding. It is possible that devising alternative funding and resource arrangements might produce opportunities to increase the funds and resources available to the Scheme.

A reduction in the amount of work pressure on the Facilitator role is likely to result from the combined effects of: the introduction of suitable computer-based options for case monitoring, tracking, and record-keeping; alternative funding for, and resourcing of, the Scheme; and a separation of administrative and case management roles within the Scheme.

It is suggested that two roles be established to manage the Scheme. One role would administer the Scheme, including the administrative side of referrals to the panel of third-party neutrals (a Scheme Co-ordinator role); and one role would be a first point of contact for the Scheme, including responsibility for attempting early and quick resolution of matters, as well as assessment of referral to other processes within the Scheme (a Case Manager).

9. Innovations developed and trialled by the Facilitator

The Determination acknowledges that unforeseen requirements may necessitate the Facilitator making operational adjustments to the Scheme, and so enables that to occur: '... the ADR scheme may need fine-tuning during the period of authorisation ...'⁴⁵

⁴⁴ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.7, Schedule C.

⁴⁵ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), P 69.

The Facilitator has taken a practical approach to ensuring the effectiveness of the Scheme. For example, feedback and reports to the Reviewer confirm that, during the life of the Scheme, she has been making additional refinements to the Scheme's operation. This has also been occurring during the Review. These include the development of two new dispute resolution processes, as well as consideration of a computer-based system for registering, tracking, and monitoring Scheme matters, as well as automated preparation of data for reporting purposes.

10. Handling Complaints about the Scheme

The Reviewer is not aware of any formal complaints about either the Scheme or the Facilitator.

APRA AMCOS reported that the Scheme has its own feedback process whereby every user of the Scheme provides feedback on their experience of it. APRA AMCOS itself has a dedicated section of their website through which complaints and compliments can be submitted;⁴⁶ however, the relevant point on the APRA AMCOS website links directly to the Scheme itself. As noted earlier in this Report, the Scheme's own website includes a page titled "Contacts" within which is one section: "Comments, complaints and confidentiality". Unfortunately, the page includes nothing about how, or where, to lodge a complaint about the Scheme, nor the procedures by which such complaints will be handled.

It is not clear how a complainant would access an independent point of contact if they wish to complain about the Scheme itself.

The Scheme itself obtains evaluations from its users immediately following the completion of a matter.⁴⁷ The role of the Scheme in soliciting these evaluations could be problematic: any program's self-solicitation of user feedback can place pressure on users to be reticent about any concerns or dissatisfaction they may have. It would be better for the evaluations to be distributed, collated, and analysed by a third party.

It is important that the Scheme establish a credible mechanism for handling complaints about itself. In addition, should the Scheme choose to appoint separate personnel for administration and service provision, it may be appropriate for the administration to manage the distribution, collection, and analysis of service evaluations from Scheme users.

11. Report on the online survey for users of the Scheme

The data obtained from the online survey must be treated with caution because of the small number of survey respondents.

The Reviewer designed an online survey limited to fourteen questions about Scheme users' perceptions of the Scheme, and their experiences with it. Prior to distribution, the survey was tested by members of the Steering Committee, and adjusted according to their suggestions.

The survey was estimated to take less than ten minutes to complete. Survey respondents were informed that results of the survey would contribute to the Review, they were reassured that their

⁴⁶ <http://apraamcos.com.au/feedback-centre/compliment-and-complaint-details/>

⁴⁷ The Annual Report January – December 2016 includes some examples of these.

responses would be protected by confidentiality, and they were given the opportunity to agree to the Reviewer contacting them to discuss their observations in more detail.

- a. Notifications about the survey were emailed by the Scheme to all people who had used it during its operational period.⁴⁸ Scheme records show that twenty-eight people had accessed the Scheme during the two years January 2016 – December 2017, and more people have accessed the Scheme during 2018. There were seven survey respondents, and the Reviewer is aware that at least one survey respondent accessed the Scheme after June 2018.⁴⁹
- b. Of the seven respondents, five were writer members of APRA AMCOS, and two were licensee members of APRA AMCOS. Three of the survey respondents reported that they had had disputes with fellow writer-members of APRA AMCOS.
- c. Four of the respondents were from NSW, two from Queensland, and one from SA; the majority heard about the Scheme from the APRA AMCOS website, while others heard about the Scheme by word-of-mouth and/or from a friend or colleague.
- d. Respondents' reports on the outcomes achieved in the Scheme and their satisfaction with the Scheme were mixed: a small proportion reported being satisfied with their experience in the Scheme, and a similarly small proportion reported not being satisfied.

Although there can be many reasons for people to have chosen not to access and complete this particular survey – despite email invitations to do so⁵⁰ – it should be remembered that surveys are notoriously unreliable sources of information. In the context of this Scheme, the Reviewer took into account the low usage rate of the Scheme, and considered that an online survey would be the most efficient means of accessing those Scheme users who wished to contribute to the Review. It was made clear to potential respondents that the purpose of the survey was to provide data for the Review, rather than obtain general feedback about the Scheme. It was anticipated that clarifying the purpose of the survey would increase the number of respondents.

Out of a very small number of survey respondents, the Reviewer was able to conduct follow-up interviews.

⁴⁸ The distribution of email notifications included people who had accessed the Scheme during 2018 after the Review's data collection period. These were not differentiated in the survey; however, the survey had so few respondents that the inclusion of one or two after the relevant reporting period is unlikely to have changed the reliability of survey data.

⁴⁹ There is extensive research about the use of self-report surveys for data collection, and the tendency for survey respondents to be either those who were most dissatisfied with the subject of the survey, or those who were most satisfied. In this case, the data suggest that marginally more respondents were satisfied with the Scheme than were dissatisfied, but the difference cannot be considered significant in such a small number of survey responses.

⁵⁰ Email recipients were informed that the survey was part of an Independent Review of the Scheme, and that their responses to the survey would contribute to that review.

Part D. An Analytical Framework for the Scheme

This section provides a framework that might be useful for the Scheme to apply as a structure for its own future operations, and ongoing development, as well as being a useful guide for future reviewers. The framework is widely recognised, and is based on current approaches to Dispute System Design and complaints handling systems.⁵¹

The framework contains six key elements, and is particularly relevant for a scheme such as Resolution Pathways, that is still in its “pilot” phase, because those key elements can be readily applied to realign any newly implemented program. The design of the elements enables their application as guides for evaluating the broader achievements and success of any given program. Thus, the framework can serve a dual purpose: being a framework for the ongoing development and operation of the Scheme, as well as providing a structure for any future reviews.

Analytic Framework

1. The goals of the program, or the Scheme (these need to be stated clearly and to be measurable)
 - a. What do the Scheme’s organisers seek to accomplish through the Scheme?
 - b. Which types of disputes does the Scheme seek to address?
2. The stakeholders of the Scheme⁵²
 - a. Who are the Scheme’s stakeholders (stakeholders include consumers/customers of the Scheme itself)?
 - b. What is their relative power to each other?
 - c. What are their interests, and how are those interests represented in the Scheme?
3. The Scheme’s context and culture
 - a. How does the context of the Scheme affect its viability and success?
 - b. What aspects of the contextual culture (i.e., organisational, and industry) affect how the Scheme works?
 - c. What are the contextual norms and standards for communication and conflict management?
4. The Scheme’s structure and processes
 - a. Which processes are used for the prevention, management, and resolution of disputes and conflicts?
 - b. Are the Scheme’s processes linked and integrated?
 - c. What are the incentives and disincentives for using the Scheme?

⁵¹ L. B. Amsler, J. K. Martinez, and S. E. Smith, ‘Christina Merchant and the State of Dispute System Design’ (2015) 33(Supplement 1) *Conflict Resolution Quarterly* S7 – S26; L. B. Amsler and J. Sherrod, ‘Accountability Forums and Dispute System Design’ (2017) 40(3) *Public Performance and Management Review* 529 – 550; A. J. Schmitz, ‘A Blueprint for Online Dispute Resolution System Design’ (2018) 21(7) *Journal of Internet Law* 3 - 10. S. Smith and J. Martinez, ‘An Analytic Framework for Dispute Systems Design’ (2009) 14(1) *Harvard Negotiation Law Review* 123 – 169; SOCAP and University of Newcastle, *Return on Investment of Effective Complaints Management* (Report to SOCAP, March 2018); available online at: <http://socap.org.au/resources/return-on-investment-of-effective-complaints-management/> [accessed; 25 June 2018].

⁵² The relationship between APRA AMCOS and the Scheme’s stakeholders is not dissimilar from the relationship between a company and its consumers, or customers.

- d. What is the Scheme’s interaction with more formal systems, such as the legal system?
5. The resources made available to the Scheme, and
 - a. What are the financial resources that support the Scheme?
 - b. What are the human resources that support the Scheme?
6. The Scheme’s success and accountability
 - a. How transparent is the Scheme?
 - b. Does the Scheme include monitoring, learning (i.e., opportunities for systemic learning from disputes/conflicts), and evaluation?
 - c. Is the Scheme successful?

Goals and objectives

It has been reported that studies of disputes management and complaints handling systems show that these produce a greater return on investment when they include broader effectiveness indicators than the relatively simple measures of costs and efficiency.⁵³ Effective management and handling of disputes and complaints, and of customer concerns, has been reported to provide opportunities for organisations to gain beneficial insight into their operations, leading to improvements in their services and processes. This effect has been called ‘Extended Benefit’ (or ‘organisational learning’),⁵⁴ and it is reported to derive from the side-effects that comprise improvements in customer relations, increases in positive word-of-mouth by customers, and improvements in how organisations conduct their business. In addition, it has been reported that, where complaints are not well-managed, there is likely to be an *increase* in the numbers of complaints.⁵⁵

Scheme objectives and accountability

It is recognised that accountability is an important component of any program such as the Scheme, but also that it is poorly understood and poorly articulated.⁵⁶ For example, it is not always clear who is accountable to whom, and what is being measured in terms of accountability: is it the value of direct achievements, or is it the value of broader governance expectations – or a combination of these? It is likely the Scheme itself would benefit from a clear delineation of its accountability, and this could provide a professional focus for all people involved in the Scheme (i.e., the users of the Scheme, the Facilitator, the Committees, and APRA AMCOS).

⁵³ SOCAP and University of Newcastle, *Return on Investment of Effective Complaints Management* (Report to SOCAP, March 2018); available online at: <http://socap.org.au/resources/return-on-investment-of-effective-complaints-management/> [accessed; 25 June 2018].

⁵⁴ SOCAP and University of Newcastle, *Return on Investment of Effective Complaints Management* (Report to SOCAP, March 2018); available online at: <http://socap.org.au/resources/return-on-investment-of-effective-complaints-management/> [accessed; 25 June 2018], P 33.

⁵⁵ SOCAP and University of Newcastle, *Return on Investment of Effective Complaints Management* (Report to SOCAP, March 2018); available online at: <http://socap.org.au/resources/return-on-investment-of-effective-complaints-management/> [accessed; 25 June 2018].

⁵⁶ M. J. Dubnick, *Seeking Salvation for Accountability* (presentation to the Annual Meeting of the American Political Science Association, Boston, USA, August-September 2002); M. J. Dubnick and H. G. Frederickson (Eds), *Accountable Governance: Problems and Promises* (Routledge, UK and USA, 2011).

If the Scheme does develop further independence from APRA AMCOS, it will need to reconcile multiple accountabilities, and its revised objectives should reflect this. For example:

- The Scheme itself should be accountable to its users (and potential users) - through transparency and consultation;
- The Scheme should be accountable to the various stakeholders and Committees who oversee its operation – through regular and accessible reporting mechanisms;
- The Facilitator should be contractually accountable – through regular and accessible reporting on contractual requirements (such as key performance indicators, and key outputs, which are available to the Steering Committee); and
- The funder/s of the Scheme should be accountable (for the provision of material and human resources) to their own stakeholders, such as Company Boards, as well as to the Scheme’s stakeholders and users.

It is suggested that the Scheme adopt the Analytical Framework outlined in this Report, and that it include clear descriptions of the Scheme’s various accountability responsibilities.

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Extract from the Determination⁵⁷

‘Condition C3 – Alternative Dispute Resolution Scheme Requirements

C3.1 APRA must establish an alternative dispute resolution (‘ADR’) scheme (the ‘**Scheme**’) that is managed by an independent dispute resolution facilitator (the ‘**Facilitator**’) for the resolution of any disputes between APRA and a licensee, or potential licensee of copyright held by APRA (‘**Licensee**’) or a member or potential member of APRA (‘**Member**’), including complaints made to APRA by or on behalf of a Member or Licensee. The objective of the Scheme is to resolve disputes in a timely, efficient and effective manner.

C3.2 The Scheme must include four options for resolving a dispute or complaint, or an aspect of a dispute or complaint (‘**Dispute**’) notified by a Member or Licensee, or by an authorised representative of one or more Members or Licensees (‘**Applicant**’), as follows:

- (i) Option 1 - informal resolution: informal resolution of the Dispute in a manner facilitated by the Facilitator, with an indicative timeframe of 20 business days for resolution of the Dispute or referral of the Dispute to Options 2, 3 or 4
- (ii) Option 2 - mediation: external mediation by an independent mediator (‘**Independent Mediator**’), with an indicative timeframe of 20 business days for the resolution of the Dispute (from the date on which the Dispute is referred to Option 2)
- (iii) Option 3 - expert opinion: a non-binding written expert opinion (including reasons) delivered by an appropriately qualified or experienced independent expert (‘**Independent Expert**’), with an indicative timeframe of 20 business days for the resolution of the Dispute, and 30-60 days for preparation of the written opinion from the date on which the Dispute is referred to Option 3
- (iv) Option 4 - binding determination: a binding written determination (including reasons) delivered by an Independent Expert, with an indicative timeframe (from the date on which the Dispute is referred to Option 4) of 30-60 days for resolution of the Dispute, or of 90 days for a Dispute involving more than one Applicant).

C3.3 The Scheme must provide that:

- (i) a Dispute, or an aspect of a Dispute, may be referred to Options 2, 3 or 4 at any time by agreement between APRA and the Applicant, including agreement about the identity of the Independent Mediator or Independent Expert (as relevant). The resolution of each Dispute must commence with Option 1, but APRA may not withhold agreement to progress to another Option merely because the Applicant has not agreed to continue or complete the processes available under Option 1 first. If agreement cannot be reached about the identity of the Independent Mediator or Independent Expert or about progressing a Dispute to another Option, the Facilitator must refer these preliminary matters for determination (at APRA’s cost) by an Independent Expert

(who must not then be otherwise appointed to hear the Dispute under the Scheme).
- (ii) the resolution of Disputes under Options 2, 3 and 4 must be carried out on terms, and in accordance with processes and procedures, established by the

⁵⁷ Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Pp 91 – 103.

Independent Mediator or Independent Expert (as relevant) in accordance with practices commonly adopted in other ADR schemes for ADR options of that kind

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

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

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

Fees and Charges

C3.5 The Scheme must also provide that:

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

Dispute). Unless otherwise agreed as part of the settlement of the Dispute, the Applicant must pay all Fees and Charges incurred up until the date of withdrawal.

Establishment and role of consultative committee

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

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

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

If an insufficient number of Members or Licensees in a particular category are willing to be members of the Committee, APRA must ensure that the Facilitator appoints another Member or Licensee (as relevant) to fill that position on the Committee.

C3.7 APRA must also ensure that:

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

Appointment and role of the Facilitator

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

- (i) be approved or reapproved by the ACCC, within 20 business days, in accordance with condition C3.12 and for a specified period of time, prior to the appointment or reappointment taking effect for the purposes of these Conditions

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

C3.9 APRA must ensure that each Facilitator:

- (i) operates with the objective set out in Schedule C, and performs the functions set out in Schedule C
- (ii) complies with conditions C3.3(i) and (iv)
- (iii) does not perform any work for APRA other than work relating to the Scheme or to any extensions of the Scheme
- (iv) can be, and is, removed by APRA from the position of Facilitator if the ACCC considers, having regard to the performance of the Facilitator in that role, that the Facilitator is likely to fail to adequately perform the functions set out in Schedule C.

Appointment and role of the Independent Reviewer

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

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

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

ACCC approval of the Facilitator and Independent Reviewer

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

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

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

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

Annual Reporting

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

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

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

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

Other matters

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

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

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

SCCHEDULE A – Fees and Charges (Condition C3.5) Option 1

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

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

Options 2, 3 and 4

1. Subject to paragraphs 2 and 3 below, each Applicant who is a party to a Dispute must pay 50% of the fees charged, and 50% of the disbursements or other costs reasonably incurred, by the Independent Mediator or Independent Expert for the resolution of the Dispute, each divided equally amongst all Applicants who are parties to the Dispute and who have agreed to that particular Option for resolution of the Dispute.
2. Subject to paragraph 3 below, fees and costs are only payable by an Applicant where the Dispute is about:
 - (i) the terms and conditions of a grant, or potential grant, of a licence of copyright by a Member to APRA, or by APRA to a Licensee
 - (ii) the implementation of the terms and conditions of a grant, or potential grant, of a licence of copyright by a Member to APRA, or by APRA to a 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.
4. Where the Dispute relates to only a part of an amount specified by APRA, the undisputed parts of that amount are not to be taken into account in determining the fees and costs payable by the Applicant.
5. The fees and costs payable by an Applicant may be waived or reduced by the Facilitator, the Independent Mediator or the Independent Expert (as relevant) or with the agreement of APRA.

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

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

The functions of the Committee must include:

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

but not intervening in individual Disputes.

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

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

The functions of the Facilitator must include:

- (i) ensuring the effective set-up (in the case of the initial Facilitator) and the effective operation of the Scheme
- (ii) appointing, reappointing, replacing and terminating the appointment of members of the Committee from time to time
- (iii) informing Members and Licensees about the Scheme (including informing individual Members or Licensees (as relevant) about the costs that those Members or Licensees are likely to incur under the Scheme in relation to a particular dispute) and being available to answer enquiries and questions about the Scheme

- (iv) resolving Disputes under Option 1, including by discussing issues with Applicants on a confidential basis, assisting with communications between APRA and Applicants, and narrowing down issues between APRA and Applicants
- (v) establishing a pool of suitably qualified or experienced Independent Mediators and Independent Experts (the 'DR Pool'), including barristers and / or former judges, and persons with relevant industry and / or commercial experience, across a range of areas of expertise and geographic locations, and reviewing the composition of the pool annually
- (vi) making recommendations to APRA and to Applicants about the suitability of Options 2, 3 or 4 for resolving a particular Dispute, including recommendations about appropriate Independent Mediators or Independent Experts for resolving that Dispute (whether drawn from the DR Pool or otherwise), with the objective of resolving the Dispute quickly and efficiently
- (vii) collecting and distributing the Fees and Charges
- (viii) assisting the Independent Mediator or Independent Expert in the making of timetabling and other administrative arrangements for resolving each Dispute under Options 2, 3 and 4, including:
 - (a) arranging meetings or conferences
 - (b) receiving submissions from the parties
 - (c) distributing submissions and other relevant materials to the parties and to the Independent Mediator or Independent Expert (as relevant)
 with the objective of ensuring that the resolution of each Dispute progresses in a timely and efficient manner (including the objective of ensuring that all preliminary steps in relation to a dispute be completed without the need for travel)
- (ix) preparing the annual ADR Report (see condition C3.14 to C3.16)
- (x) establishing and maintaining a public website for the Scheme that is separate from APRA's own website, and publishing on that website information and documents relating to the Scheme, including:
 - (a) the plain English guide to the operation of the Scheme (see condition C3.19)
 - (b) each public ADR Report, which the Facilitator must publish no later than 1 business day after receiving it from the relevant Independent Expert, and the public version of the report of the Independent Reviewer (see Schedule D)
 - (c) the curriculum vitae of each Independent Mediator and Independent Expert in the DR Pool
 - (d) the public version of each binding written determination under Option 4 (see condition C3.3(vii)).

SCHEDULE D – Independent Reviewer (Condition C3.11)

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

The functions of the Independent Reviewer must include:

- (i) reviewing:
 - (a) the operation and performance of the Scheme (including without limitation the processes and procedures established under the Scheme, and the extent to which any concerns expressed by Members and or Licensees have been addressed by APRA and / or the Facilitator), and
 - (b) the performance of the Facilitator,
 in accordance with the requirements of condition C3 and the Scheme's objective of resolving Disputes in a timely, efficient and effective manner.

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

SCHEDULE E – Relevant Matters (condition C3.4)

1. Consider whether APRA offered the user (being a Licensee) a licence that takes into account any direct dealing or potential future direct dealing between the user and a copyright owner.
2. If so, whether in the Independent Expert's opinion, APRA offered the user (being a Licensee) a licence that reflects a genuine and workable commercial alternative to the user's blanket licence to take into account past, or potential future direct dealing between the user and a copyright owner. In expressing this opinion, the Independent Expert must have regard to whether any increase in administrative costs, charges and expenses contained in the modified blanket licence are reasonable, having regard to the administrative costs to APRA of offering and providing to the user a modified blanket licence.
3. Whether any amendments could be made to the user's licence (or if the user is not a licensee, to the blanket licence offered) so that the licence provides a genuine and workable alternative to the user relying on a blanket licence.