

## Resolution Pathways - Annotated notes on the submission for the ACCC

This document annotates the Resolution pathways submission of 5 July 2019.

- I. I have annotated the public submission to highlight the provisions of the Independent Review to which it responds and provide further transparency on the thinking behind the submissions. The annotation is in orange.
- II. The extracts from the Independent Review are in purple.
- III. The original submission sent to you on 5 July 2019 remains in black.

In this document Resolution Pathways responds to some of the key provisions in the ACCC Draft Determination in respect of the application for revocation and substitution lodged by APRA.

### 1. Committees

I have edited the ACCC's background information on the Resolution Pathways committees (see below under **Background** and the suggested edits in **Attachment 1**).

This background provides an explanation on the formation of the committees in the context of discussions between the Resolution Facilitator and the ACCC during the establishment of the Scheme at the time of the original authorisation. It is also to identify the rationale for the changes sought in the current submissions as a result of the feedback from the Independent Review and the experience of establishing and working with the various Resolution Pathways committees over 5 years.

The importance of clearly defining committees is referred to in the Independent Review:

Reference from the Independent Review	Independent Review Topic	Extract from the Independent Review
Part B-2 [p.11]  Part C-5(ii)(b) [p.25-26]	Structure - Committees	<i>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. (emphasis added)</i>

The refinements suggested by Resolution Pathways: making the Governance Committee akin to a governance board and formalising the broader group as a stakeholder group, answer this suggestion although the structure itself is not included in the Reviewer's recommendation.



## 1.1 Background

In 2014 the ACCC provided a framework for a consultative committee to act as an independent check on Resolution Pathways.

The Resolution Facilitator requested the ability to have a large stakeholder presence on the consultative committee with the ability to work in smaller sub-committees. This was essential in starting a Scheme where none previously existed.

The first 3 years of the Scheme involved building the dispute resolution framework, building upon pilot projects to identify what worked and to refine it.

## 1.2 Future Committees

The next 2-3 years are crucial in finalising the Scheme's structure, building momentum, and ensuring its independence and quality.

It is important that the committee and review structure support this next phase.

The Resolution Facilitator suggests that the larger committee (now renamed and known as the **Stakeholder Group**) be maintained as a useful interface between stakeholders and the Scheme.

It is large and it makes it both time consuming and difficult for this to be a management or governance committee.

The members are all volunteers, geographically dispersed and some have little experience (or interest) in decision making or governance. The cost and time associated with arranging meetings of this diverse and geographically spread group is significant.

To pivot the larger group into a governance committee would require all of the members to be available to attend meetings more frequently than the 2-3 times a year presently needed to keep this group informed and to design a decision framework for this group.



## 1.3 Governance Committee

It is crucial at this time to have a governance committee (with a Charter) to ensure compliance, transparency, independence and feedback. To be clear, this is a refinement of the structure suggested by the ACCC. It focusses the obligations on a governance committee and confirms the larger group as a stakeholder group.

This suggested structure makes the obligations clearer, enhances accountability and keeps the committee smaller ensuring it is able to govern effectively. In addition to the roles, structure and responsibilities suggested by the ACCC, the Resolution Facilitator suggests that the governance committee:

- has an independent chair;
- is given a budget to meet face-to-face annually (the remaining meetings to take place online by video);
- has the role of reviewing any complaints about the Scheme or Resolution Facilitator; and
- sets key performance indicators together with the Resolution Facilitator and APRA.

The roles suggested for the Governance Committee is a refinement of, and extension to, the recommendations of the Independent Review. It adopts the Review's guiding intention with a refined mechanism (emphasis added below):

Reference from the Independent Review	Independent Review Topic	Extract from the Independent Review
Part B-2 [p.11]  Part C-5(ii)(b) [p.26]	<i>Structure – Committees</i>	<i>the Committee members should elect a Chair from among themselves;</i>  ... <i>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. 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.</i>



Electing a chair from within the Governance Committee as proposed, is difficult with the balance between members/licensees and larger and smaller royalty/licence fee categories. Members for the Governance Committee are already challenging to find given the commitment and the criteria.

Volunteer committees such as this can have issues with governance due to turnover, availability and challenges finding experienced volunteer.

To ensure that the Governance Committee operates effectively we have suggested an INDEPENDENT and EXPERIENCED chair provided with an honorarium.

An experienced, independent chair can enhance the Scheme to ensure both effectiveness and oversight of succession and performance of the Resolution Facilitator. It can also enable the Governance Committee to take on the tasks of a) budget, b) succession planning c) complaint handling d) ensure feedback categories of tasks suggested by the reviewer.

If the ACCC is not minded to consider an independent chair the Resolution Facilitator can continue to act as a chair notwithstanding the reservations of the reviewer.

(These extracted provisions are not all in one place in the Independent Review. Please let me know if you require further references or extracts).

## Complaints/Review

C-10 [p.32]	<i>Handling Complaints about the Scheme</i>	<i>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.]</i>
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Note while additional personnel have been engaged for the scheme a strict separation of roles is difficult in a scheme of this size that does not have full-time personnel. The suggestion of an independent chair for the governance committee will allow there to be a credible method for handling complaints without a strict separation of role within the Resolution Facilitators team.

## 2. Review

The ACCC required a full independent review prior to the next authorisation of the Scheme. This was useful for a start-up scheme, and also relevant for the current authorisation.



The next review will now take place after 4 years. This will be useful for any future authorisation process. However, it is less useful for the ongoing regulation of the Scheme.

The Resolution Facilitator suggests that the Governance Committee annually reviews:

- the key performance indicators and metrics;
  - the Resolution Facilitator's performance; and
  - the governance/funding arrangements;
- the annual review to be signed off by the Independent Chair.

The review foreshadowed in year 4 (for the end of the authorisation) could use this interim material as a launching pad, making the review process less expensive, and together with the Governance Committee's annual review, more comprehensive.

### 3. Suggested amendments to the Draft Determination

**Attachment 1** to this document contains extracts of key provisions from the Draft Determination that relate to the structure and obligations of the Resolution Pathways committee. The Resolution Facilitator has made suggested amendments to these extracts (indicated by red mark-up) to reflect the proposed refinements to structure and process described above.

We have sent some indicative wording in Attachment 1. I would be happy to work on this more extensively if there are areas where assistance would be useful.

#### Summary

- Resolution Pathways has made detailed submissions regarding the challenges with independence and the mechanisms in place to try and maximise the perception of independence.
- This submission suggests clear separation between a stakeholder group and governance committee.
- The stakeholder group would continue as a guiding reference group and the place from which members are drawn for projects and governance.
- The governance committee would be smaller and more formal which would enable it to be more proactive and nimbler.
- An independent chair for the governance group would provide a mechanism for complaints and an additional external resource to check the system.



Shirli Kirschner  
Resolution Facilitator  
9 August 2019



## Attachment 1 – Resolution Pathways Submissions in response to ACCC Draft Determination

### Resolution Pathways Suggested Amendments

#### Draft Determination [2.65]

2.65. Resolution Pathways ~~is~~ was governed by four committees (or subcommittees) in its formation:

- (i) **the consultative or steering committee**, established pursuant to the condition imposed by the ACCC in 2014. The Consultative Committee provides advice and support to the Resolution Facilitator in relation to the design, implementation and on-going management of the scheme. The Resolution Facilitator is required to consult the consultative committee on matters such as the monitoring of the operation of the scheme, including its cost, receipt of feedback on the scheme, and the making of a recommendation about the budget for the operation of the scheme. ~~In compliance with the~~ This committee was much larger than requested by the ACCC's in its condition, committee members are a mixture of (large and small) member and licence representatives and other stakeholders. Members were selected by an independent panel and are appointed on a volunteer basis. The Resolution Facilitator requested the ability to have a larger group for the scheme's establishment. This group is now known as (the "Stakeholder Group").
- (ii) **the governance committee**, which was established by the ~~Resolution Facilitator~~ Stakeholder Group in 2016 to provide a nimbler and responsive governance structure, thereby providing the scheme with greater independence from APRA. ~~The ACCC's 2014 condition did not require the establishment of the governance committee. However, the condition provides the Resolution Facilitator with the discretion to create further governing committees, in addition to the consultative committee. committee's make-up is designed to meet the requirements established by the ACCC in its 2014 authorisation.~~ Membership of the governance committee is drawn from the ~~consultative committee~~ Stakeholder Group where possible. The governance committee has an independent chair, who has experience in chairing and the music industry, but does not represent a stakeholder group
- (iii) **the succession and nominations sub-committee**, which is responsible for replacing consultative committee members, and has now finalised its role. The function of succession and renewal has now been passed to the Governance Committee, and
- (iv) **the peer review committee**, which was established to oversee the trial of the Peer Review Process.

**Condition C5****Establishment and role of consultative Governance Committee and Stakeholder Group**

C5.6 APRA must ensure that the Facilitator maintains a consultative committee governance committee which will perform the roles as set out in C5.7 and Schedule B (Governance Committee) and a larger stakeholder group which continues from the establishment of the Scheme and is currently known as the committee (Stakeholder Group) (the 'Committee'). APRA must also permit the Facilitator to establish and maintain sub-committees of the Stakeholder Group 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) Governance Committee consist of an equal number of representatives of:

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

Where a representative of a Licensee or a Member is appointed to the Governance Committee, that appointment must be as a representative of one Licensee or Member category (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 Governance Committee, APRA must ensure that the Facilitator appoints another Member or Licensee (as relevant) to fill that position on the Governance Committee.

C5.7 APRA must also ensure that:

- (i) the Governance 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 Governance Committee, and takes all nominations and other input from ~~Members and Licensees~~ the Stakeholder Group into account in determining the members of the Governance 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 Governance Committee).

- (iv) it provides to the Governance Committee all information requested by the Governance Committee that the Governance Committee considers necessary or appropriate for performing its functions under Schedule B (including information about the actual costs of operating the Scheme).
- (v) That there is funding for the meeting of the Governance Committee and its Independent Chair.

C5.16 The format of the ADR Report must be decided by the Governance Committee.

C5.19 Each ADR Report must include:

...

- (iv) a summary of feedback received by APRA, and by the Facilitator, in relation to the operation of the Scheme, including the feedback and recommendations provided by the Governance Committee (see Schedule B).
- (v)

#### **SCHEDULE B – objective and functions of the Governance Committee (Condition C5.7)**

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

The functions of the Governance Committee must include:

- (i) monitoring the operation of the Scheme, including the actual costs of the Scheme
- (ii) receiving feedback on the Scheme and communicating that feedback to the Facilitator and APRA (where appropriate)
- (iii) in consultation with the Facilitator and for each calendar year, making an annual recommendation to APRA about the budget for the operation of the Scheme
- (iv) making other recommendations to the Facilitator and to APRA about the operation of the Scheme
- (v) setting annual targets for the Scheme
- (vi) Ensure a review of the arrangements for charging stakeholders to be completed once during the period of the authorisation
- (vii) addressing any complaints about the Facilitator or the Scheme
- (viii) preparing an annual report on the effectiveness of the Scheme
- (ix) succession planning for the Facilitator role in conjunction with APRA

but not intervening in individual Disputes.

**SCHEDULE C – objective and functions of the Facilitator (Condition C5.10)**

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

The functions of the Facilitator must include:

...

(ii) appointing, reappointing, replacing and terminating the appointment of members of the Governance Committee from time to time

(iii) appointing, reappointing, replacing and terminating the appointment of members of the Stakeholder Group

...

**SCHEDULE D – Independent Reviewer (Condition C5.12)**

...

(ii) as part of item (i) above, obtaining feedback from APRA, the Governance Committee, Members, Licensees and Independent Mediators/Independent Experts about the operation and performance of the Scheme, and the performance of the Facilitator

...

...