

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED

AUTHORISATION NOS A91187 – A91194 and A91211

REPORT UNDER CONDITION C2

1 MAY 2011

PERIOD 16 April 2010 – 31 March 2011

Under condition C2 of its authorisations A91187 – A91194 and A91211 (**Authorisation**), on an annual basis for the duration of the Authorisation, APRA is required to provide the ACCC with a report about disputes notified to APRA under its alternative dispute resolution process for the previous calendar year (**Report**).

This is the first Report since APRA's Authorisation, and concerns disputes for the period commencing 16 April 2010 and ending 31 March 2011.

APRA has prepared two versions of the Report – one containing confidential information and one for publication on the public register.

APRA offers its ADR facility to all licensees and potential licensees. Information about the facility is contained on the APRA website, and a reference to the facility is included in APRA's standard legal correspondence.

For the purposes of this Report, APRA has categorised disputes as being "compliance disputes" or "commercial disputes".

"Compliance disputes" are disputes with general performance licensees or potential licensees – these are matters where users of music in APRA's repertoire have declined to enter into licence agreements with APRA after requests from APRA that they do so, and have been referred to APRA's lawyers for action. APRA does not consider that these disputes are of the kind intended to be included in the Report, but has included statistical information regarding the number of such "disputes" for completeness. This is consistent with APRA's treatment of these matters in relation to its Code of Conduct compliance, where each matter might also be considered to be a "complaint". APRA is happy to provide details of the matters referred to if requested.

Generally, "compliance disputes" are resolved without legal proceedings being commenced. Correspondence from APRA and its lawyers in such cases invites licensees/potential licensees to refer disputes to alternative dispute resolution. Of the licensees referred to in the attached report, only one has requested information about the ADR procedure, which has been provided.

"Commercial disputes" are disputes that have arisen with groups of similar licensees, or with larger licensees during the course of existing business relationships, regarding the terms of APRA's various licence schemes. APRA has included in the Report the information set out in C2 paragraph 2, in respect of each of these disputes.

Attachment A is the version of the Report for publication. Attachment B, marked confidential, is the version of the Report that is confidential to members of the ACCC and is not for publication. It contains information that is confidential to APRA and its licensees.



ATTACHMENT A

ADR REPORT

Compliance Disputes:

The number of disputes reported below should be viewed in light of the fact that APRA typically has in excess of 70,000 current licensees at any given point in time.

During the period 16 April 2010 to 31 March 2011, APRA itself resolved approximately 102 compliance disputes by way of correspondence, telephone conversations and personal meetings. As at 31 March 2011, APRA was managing approximately 160 ongoing compliance disputes, attempting to resolve such disputes internally, without referral to APRA's external solicitors.

During the period 16 April 2010 to 31 March 2011, APRA referred 28 new compliance disputes to its external solicitors. During the same period, APRA's external solicitors successfully resolved 47 compliance disputes on APRA's behalf, without having to resort to commencing proceedings in any instance. As at 31 March 2011, APRA's external solicitors still had 111 current files open relating to compliance disputes.

For the purposes of this Report, APRA has not included disputes with licensees in relation to late or non-payment of invoiced licence fees in the above statistics. APRA has a standard debt collection procedure that it applies in relation to such disputes, including the referral of such debtors to its external debt collection agent. In addition, in certain circumstances, particularly where a licensee can demonstrate that it is under financial duress or suffering from cash flow difficulties, APRA has exercised its discretion to offer licensees periodic payment plans such that APRA's annual licence fees are instead paid in advance on a quarterly or monthly basis. Further information regarding APRA's debt collection procedures can be provided upon request.

Commercial Disputes:

During the period 16 April 2010 to 31 March 2011, APRA was involved in 7 commercial disputes.

Of these commercial disputes:

- 1 dispute was resolved by mediation;
- 4 disputes were resolved by way of commercial negotiation;
- 2 disputes are unresolved and are the subject of continuing commercial negotiations.

The information required under C2 paragraph 2 of APRA's Authorisation for each of these commercial disputes follows:

DISPUTE REPORT 1

Company name	CONFIDENTIAL
Category	Digital Music Services
State	NSW
Dispute notified to APRA	September 2010
Dispute resolved	March 2011

(i) Description of the issue the subject of the dispute

APRA|AMCOS and the licensee are parties to the Copyright Tribunal approved Digital Music Service licence scheme (DMS). Prior to the introduction of the DMS, APRA|AMCOS and the licensee were parties to an industry agreed interim licence scheme. Under both licence schemes, licence fees are calculated on a percentage of the total GST exclusive revenue derived from the sale of each individual Download. The licence schemes both require sales reports to be submitted exclusive of GST. The current licence scheme has comprehensive dispute resolution provisions that include a reference to APRA's ADR facility.

In September 2010 the licensee notified APRA|AMCOS that it had become aware of the fact that it had been reporting GST inclusive pricing over an extended period and that overpayments had been made as a result. Upon conducting the necessary investigations APRA|AMCOS were able to verify the substance of the claim but neither APRA nor the licensee could verify the exact quantum of the overpayment.

(ii) Outcome sought by the parties to the dispute

The licensee sought repayment of the amount that had been overpaid. APRA|AMCOS immediately made the corrections to the then current reporting quarter which had not yet been invoiced. However, APRA|AMCOS sought not to repay amounts that had been received and already distributed to members, on the basis that APRA|AMCOS had relied on the licensee's representations in relation to their detriment. APRA|AMCOS could not simply deduct the overpaid amount from then current invoices, as the members for whom that money had been collected were different from those to whom the incorrect amounts had been distributed.

The licensee disputed the fact that a refund or credit should not be applied as a result of its earlier overpayments resulting from past reporting errors.

(iii) Whether the dispute has been resolved or not

In accordance with APRA|AMCOS procedures and the terms of the DMS, APRA|AMCOS provided formal notification of the dispute between the parties and offered the licensee the opportunity to refer the matter to APRA's ADR process (including either expert determination or mediation). The licensee declined to do so. In March 2011 the parties reached a confidential commercial settlement for an agreed amount based on an undertaking that licensee would make sufficient efforts to ensure that future reporting contained GST exclusive pricing in order to avoid recurrences of the same problem. The dispute is now resolved.

Items (iv), (v) and (vi):

N/A

DISPUTE REPORT 2

Company name	CONFIDENTIAL
Category	Digital Music Services
State	NSW
Dispute notified to APRA	January 2011
Dispute resolved	Ongoing

(i) Description of the issue the subject of the dispute

A licensee disputed APRA|AMCOS' interpretation of a provision of the Digital Music Service licence scheme (DMS).

(ii) Outcome sought by the parties to the dispute

Because of different interpretations of a clause of the agreement, the licensee believes that it is being marginally overcharged under the agreement.

(iii) Whether the dispute has been resolved or not

APRA|AMCOS have sought to resolve the dispute by way of correspondence and have also offered to meet to discuss the issue. The licensee has also been invited to refer the matter to APRA's ADR process, as provided for under the DMS, however the licensee has declined to do so.

The licensee has agreed to continue to pay licence fees to APRA|AMCOS on the basis of the current practice, on the understanding that the portion of licence fees impacted by differing interpretations of the agreement will be quarantined pending the outcome of further discussions.

As at 31 March 2011 the dispute remained unresolved.

Items (iv), (v) and (vi):

N/A

DISPUTE REPORT 3

Company name	Australian Hotels Association
Category	General Licensing – Nightclub licence
State	National
Dispute notified to APRA	8 October 2010
Dispute resolved	November 2010

(i) Description of the issue the subject of the dispute

On behalf of its members, the Association disputed the amount of licence fees payable to APRA under its Recorded Music for Dance Use in Nightclubs (GFN) licence. The GFN licence was introduced in late 2008, following a Copyright Tribunal decision regarding PPCA's Nightclub tariff, and subsequent consultation with the Association. APRA was to phase in the new tariff over 5 years.

The Association also raised concerns at the prospect of APRA increasing its tariffs under various other APRA licence schemes in the near future.

(ii) Outcome sought by the parties to the dispute

The Association sought a reduction in the licence fees payable to APRA under the GFN licence on the basis of:

- the impact of the economic downturn generally on its members' businesses;
- recent significant increases to its members' operating costs, particularly as a result of increases to PPCA and APRA licence fees relating to recorded music for dance use in nightclubs; and
- the negative impact these combined issues have had on its members' total entertainment expenditure, in particular on live music expenditure.

(iii) Whether the dispute has been resolved or not

Senior APRA staff met with representatives of the Association on a number of occasions to attempt to resolve the dispute by management. During the course of the meetings, APRA agreed to postpone the introduction of the next phase of its GFN tariff for a period of 12 months such that the Year 3 increase to GFN licence fees that was due to occur on 1 November 2010 would now not occur until 1 November 2011. The 12 month pause in APRA's phase-in of its full GFN tariff was applied to all GFN licensees irrespective of membership of the Association. In pausing the phase in of its GFN tariff, APRA acknowledged the concerns of the Association, however, APRA maintained that its licence fees under the GFN licence scheme were fair and reasonable.

In relation to the Association's concerns at the prospect of APRA increasing its tariffs under various other APRA licence schemes in the near future, APRA also committed to entering into a formal Memorandum of Understanding with the Association setting out the consultative process APRA agrees to undertake prior to the introduction of any new licence scheme or any significant variation to an existing licence scheme that relates to the Association's members.

APRA considers the dispute to be resolved.

Items (iv), (v) and (vi):

N/A

DISPUTE REPORT 4

Company name	CONFIDENTIAL
Category	General Licensing – Nightclub licence
State	CONFIDENTIAL
Dispute notified to APRA	June 2010
Dispute resolved	November 2010

(i) Description of the issue the subject of the dispute

A group of nightclub proprietors, represented by an industry association, disputed the terms of APRA's Recorded Music for Dance Use in Nightclubs (GFN) licence and in particular the amount of licence fees payable under the GFN licence given the financial hardship the Association's members were presently suffering.

(ii) Outcome sought by the parties to the dispute

The main outcomes sought by the association were:

- (a) A general reduction in the tariff payable under APRA's GFN licence.
- (b) The introduction of a form of modified blanket licence whereby nightclub operators would obtain a blanket licence for the whole of APRA's repertoire and then after the performance report music usage, at which time APRA would verify which of the works performed were within its repertoire. The licence fee would be calculated by pro-rating APRA's existing blanket licence fee by reference to the works represented.
- (c) The ability for nightclubs to obtain public performance licences directly from APRA members.

(iii) Whether the dispute has been resolved or not

APRA engaged in extended correspondence with the association over the second half of 2010. On 8 October 2010 senior APRA staff met with 15 members of the association to attempt to resolve the dispute. In response to each of the issues identified above:

- (a) APRA agreed to postpone the introduction of the next phase of its GFN tariff for a period of 12 months such that the Year 3 increase to GFN licence fees that was due to occur on 1 November 2010 would now not occur until 1 November 2011 (this concession has been granted to all GFN licensees, as described above).
- (b) APRA advised that it was not opposed in principle to the introduction of a modified blanket licence along the lines of that proposed. Such a licence would require accurate reporting of every work performed at the relevant venue and would be complex and expensive to administer, and accordingly the base for the licence fee (to be pro-rated) would be likely to be higher than the existing licence fee for the blanket licence with no mandatory music use reporting that is currently in place. Before APRA invested the time and resources required to develop a modified blanket licence for nightclubs, APRA proposed a trial be conducted to determine the amount of APRA repertoire actually in use at members' nightclubs. As at the date of this Report the association has not accepted APRA's invitation to participate in such a trial.
- (c) APRA advised that it is already possible for nightclubs to obtain public performance licences directly from APRA members and explained its licence back process. APRA confirmed that if a nightclub entered into direct licensing arrangements with APRA members, APRA would negotiate reasonable alternative licence terms to take account of those direct licences.

Items (iv), (v) and (vi):

N/A

DISPUTE REPORT 5

Company name	CONFIDENTIAL
Category	General Licensing – Cinema licence
State	CONFIDENTIAL
Dispute notified to APRA	July 2009
Dispute resolved	March 2011

(i) Description of the issue the subject of the dispute

In July 2009 a cinema licensee disputed the terms of APRA's new cinema licence scheme for New Zealand that was brought into operation on 1 January 2008 after extensive industry consultation, which consultation process the cinema chose not to participate in. The cinema raised 3 issues in particular:

- (a) An alleged lack of transparency in APRA's licensing practices.
- (b) A concern to ensure that APRA does not charge it for use of works not controlled by APRA.
- (c) A desire to have disputes with APRA referred to independent dispute resolution.

(ii) Outcome sought by the parties to the dispute

The cinema sought the following outcomes in relation to the 3 issues in dispute:

- (a) A contractual obligation for APRA to keep accurate records in sufficient detail to ensure that all rights licensed by APRA can be properly ascertained and an entitlement for the cinema to audit those records;
- (b) A reduction in APRA licence fees on a pro rata basis to the extent that any musical works contained in a film performed by the cinema are not works within APRA's repertoire or not otherwise covered by the APRA licence;
- (c) Clarification of and contractual commitment to an independent dispute resolution process.

(iii) Whether the dispute has been resolved or not

After over 12 months of correspondence and offers to refer the matter to APRA's Expert Determination dispute resolution process, the issues in dispute were eventually resolved by commercial negotiation, as follows:

- (a) APRA agreed to this request.
- (b) APRA developed and offered a modified blanket licence under which APRA agreed to pro rate the licence fee payable to take account of any films for which a cinema had obtained a direct licence to publicly perform the musical works embedded therein, prior to the first screening of the film. The cinema declined to enter into APRA's modified blanket licence, preferring to enter into the existing licence scheme on the basis that its other concerns were addressed.
- (c) APRA agreed to this request, noting that its alternative dispute process that addressed all of the cinema's concerns in this regard already applied.

Items (iv), (v) and (vi):

N/A

DISPUTE REPORT 6

Category	General Licensing – Dance Party Licence
State	CONFIDENTIAL
Dispute notified to APRA	May 2010

(i) Description of the issue the subject of the dispute

A dispute has arisen between APRA and various licensees regarding which APRA licence scheme was appropriate to cover the use of music at various events promoted by the licensees. The licensees' position is that APRA's Featured Music Event licence is the appropriate licence for the events whereas APRA's position is that its Dance Party licence was applicable.

The factor that is most influential to APRA when determining whether to apply its Dance Party licence scheme to a particular event is whether the music at the event is recorded music for dancing. If the primary purpose of music at an event is recorded music for dancing, APRA will determine it to be a Dance Party.

APRA's Dance Party licence involves a higher tariff than its Featured Music Event licence.

(ii) Outcome sought by the parties to the dispute

APRA reviewed the list of artists for the events in question and sought to license the events under its Dance Party licence scheme. The licensees disputed APRA's classification of the events as Dance Parties on the basis that certain featured artists were more appropriately classified as "live performers" rather than "DJs". On that basis the licensees argued that the Featured Music Event licence ought to apply.

(iii) Whether the dispute has been resolved or not

Some licensees are legally represented, others are not.

APRA has written to each of the licensees regarding the specific events, and has invited the licensees to refer to disputes to expert determination. APRA has also made commercial offers to each licensee in relation to the particular event licences.

As at 31 March 2011, some individual disputes have been resolved, and others have not – however the issue of appropriately licensing such events continues to be relevant.

Items (iv), (v) and (vi):

N/A

DISPUTE REPORT 7

Company name	CONFIDENTIAL
Category	General Licensing – Nightclub licence
State	CONFIDENTIAL
Dispute notified to APRA	November 2008
Resolved date	March 2011

(i) Description of the issue the subject of the dispute

Since late 2008, APRA has been in dispute with six nightclub licensees and their state representative body regarding the implementation process and terms of APRA's Recorded Music for Dance Use in Nightclubs (GFN) licence. The primary issues the subject of the dispute were in relation to: (a) the relevant multiplier to be used when calculating the licence fee (admittance versus capacity capped at admittance); (b) the relevant area for which admittance or capacity ought to be calculated (which relates to the definition of Nightclub under the licence scheme); (c) APRA's licensing approach when a venue is being used as both a nightclub and a live music venue on any given night.

(ii) Outcome sought by the parties to the dispute

In relation to issue (a) the nightclubs wanted clarification of how APRA expected admittance to be estimated. In relation to issue (b) the nightclubs wanted the relevant area to be solely that part of the venue where dancing occurred. In relation to issue (c) the nightclubs wanted the venue to only be licensed for the primary purpose for which music used on any given night. APRA's position was that it was obliged to apply the GFN licence to these nightclubs consistently with other nightclub licensees so as not to give the subject nightclubs an advantage over their competitors. In particular, APRA's position was that its definition of Nightclub – being the entire venue, unless the venue can properly be characterised as a multi-purpose venue, was fair and reasonable (APRA's definition was consistent with definition of Nightclub approved by the Copyright Tribunal in the PPCA and Nightclub Tribunal proceeding).

(iii) Whether the dispute has been resolved or not

APRA corresponded and met with the nightclubs on a number of occasions over 2009 and 2010, and invited the nightclubs to refer the matter either to APRA's Expert Determination dispute resolution process or the Copyright Tribunal. In late 2010 the nightclubs agreed to have the dispute referred to mediation. The parties appointed a senior barrister as mediator. The outcome of the mediation was that the dispute has now been resolved and is subject to a confidential settlement agreement.

(iv) A copy of the expert's report to APRA under condition C1 where such a report was produced
N/A

(v) The time taken to conduct the expert determination

The mediation took place over the course of one and a half days.

(vi) The costs associated with conducting the expert determination and the apportionment of the costs to the parties to the dispute.

APRA paid for 50% of the costs of the mediation with the remaining 50% of costs apportioned between the six nightclub licensees. All parties paid their own legal and travel costs in connection with the mediation.