

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED

AUTHORISATION NOS A91187 – A91194 and A91211

REPORT UNDER CONDITION C2

30 APRIL 2013

PERIOD 1 April 2012 – 31 March 2013

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 third Report since APRA's Authorisation, and concerns disputes for the period commencing 1 April 2012 and ending 31 March 2013.

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.

“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 dispute where a licensee has requested that the matter be referred to alternative dispute resolution during the period.

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 licences in place with in excess of 80,000 businesses and premises at any given point in time.

During the period 1 April 2012 to 31 March 2013, APRA itself resolved approximately 106 compliance disputes by way of correspondence, telephone conversations and personal meetings. As at 31 March 2013, APRA was managing approximately 70 ongoing compliance disputes, attempting to resolve such disputes internally, without referral to APRA's external solicitors.

During the period 1 April 2012 to 31 March 2013, APRA referred 21 new compliance disputes to its external solicitors. During the same period, APRA's external solicitors successfully resolved 42 compliance disputes on APRA's behalf, and in doing so only had to resort to commencing proceedings on 3 occasions, all of which matters ultimately settled prior to hearing. As at 31 March 2013, APRA's external solicitors still had 30 current files open relating to compliance disputes.

APRA also has a standard debt collection procedure that it applies in relation to disputes with licensees in relation to late or non-payment of invoiced licence fees, 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 1 April 2012 to 31 March 2013, APRA has been involved in 4 commercial disputes where a licensee has requested that the matter be referred to alternative dispute resolution during the period. Of these 4 commercial disputes:

- 2 were resolved by expert determination; and
- 2 were settled as a result of commercial negotiations in the lead up to the expert determination hearing.

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

DISPUTE REPORT 1:

Licensee	CONFIDENTIAL
Licence Category	General Licensing – Recorded Music for Dancing in Nightclubs
State	Victoria
Dispute commenced	February 2009
Dispute resolved	6 February 2013

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

In 2008, following consultation with the Australian nightclub industry, APRA formulated a new licence scheme relating to Recorded Music for Dance Use in Nightclubs (**GFN**) to replace the existing Recorded Music for Dancing (**GFD**) licence scheme. APRA's new GFN licence scheme was substantially the same as the one approved for the PCCA by the Copyright Tribunal in 2007 in the PCCA Reference case *Reference by the Phonographic Performance Company of Australia Ltd – CT 2 of 2004*.

In February 2009, APRA wrote to the Licensee regarding the introduction of its GFN licence scheme, explained the basis for the new scheme, gave at least one month's notice that APRA would terminate the existing GFD and offered the Licensee APRA's new GFN licence scheme for the performance of recorded music for dance use in nightclubs.

The Licensee refused to enter into APRA's new GFN licence scheme on the basis that it was not appropriate for the use of music at its premises because it operated as a 'bar' not a 'nightclub'. Information obtained by APRA's compliance officers indicated that the GFN licence scheme was the appropriate licence for the premises. Following a number of attempts to resolve the matter with the client directly, APRA referred the matter to its external solicitors on 18 December 2009.

Over the course of 2010 and 2011 there was an ongoing exchange of correspondence between APRA's solicitors and the Licensee. In January 2012, APRA's solicitors were advised by a solicitor engaged by the Licensee that the Licensee requested the matter to be referred to Expert Determination under APRA's alternative dispute resolution policy but only on the condition that the Expert's determination would not be binding. In February 2012 APRA's solicitors confirmed that APRA would agree to participate in an Expert Determination on that basis.

The Expert Determination hearing did not occur until 30 August 2012 due to further delays in relation to the appointment of an agreed Expert, the availability of the Licensee and his legal representation, and the provision of the Licensee's written submissions and evidence.

(ii) Outcome sought by the parties to the dispute

APRA's position was that the Licensee authorises the performance in public of works within APRA's repertoire by means of recorded music for the purpose of dance use at the Licensee's premises and therefore should be licensed under APRA's GFN licence scheme.

The Licensee's position was that the premises ought to be licensed under either APRA's featured recorded music or background music licence scheme but not APRA's GFN licence scheme.

(iii) Whether the dispute has been resolved or not

The dispute has been resolved.

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

No such report was produced because no issues regarding direct dealing were raised.

(v) Time taken to conduct the expert determination

The Expert Determination hearing itself took a half a day and the Expert took 10 days to deliver her Determination.

However, APRA notes that the period from the date on which APRA first wrote to the Licensee in relation to this dispute to the date on which it was resolved was approximately 4 years.

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

The Expert's costs in connection with the Expert Determination amounted to **[CONFIDENTIAL]**. APRA was responsible for 100% of these costs and also hosted the hearing at its office.

Each party was responsible for its own legal costs in connection with the Expert Determination.

APRA's total external legal costs in connection with this matter (excluding the Expert's costs and APRA management time) were in the amount of **[CONFIDENTIAL]**.

APRA is not aware of the Licensee's own legal costs in connection with the Expert Determination.

DISPUTE REPORT 2:

Licensees	CONFIDENTIAL
Licence Category	General Licensing – Recorded Music for Dancing in Nightclubs
State	Western Australia
ADR requested	February 2009
Dispute resolved	14 February 2013

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

In 2008, following consultation with the Australian nightclub industry, APRA formulated a new licence scheme relating to Recorded Music for Dance Use in Nightclubs (**GFN**) to replace the existing GFD licence scheme. APRA's new GFN licence scheme was substantially the same as the one approved for the PCCA by the Copyright Tribunal in 2007 in the PCCA Reference case *Reference by the Phonographic Performance Company of Australia Ltd – CT 2 of 2004*.

In February 2009 APRA met with the Licensees and explained the basis for the new GFN licence scheme. The Licensees accepted the explanation, attendance figures for both the venues were agreed, new GFN licence agreements were entered into and GFN licence fees for the first year were also paid.

In April 2010, the Licensees wrote to APRA and asserted that the GFN licence scheme should not apply to their premises. The Licensees argued that the GFN licence scheme was not appropriate for the use of music at their premises on the basis that they operated as 'bars' not 'nightclubs'. Information obtained by APRA's compliance officers indicated that the GFN licence scheme was the appropriate licence for the premises, or at least part of the premises, to the extent that they were multi-purpose venues.

APRA met and corresponded with the Licensees on an ongoing basis over the course of 2010, 2011 and 2012. During the course of that period, APRA offered the use of its alternative dispute resolution procedure on a number of occasions. Copies of the relevant correspondence can be provided upon request on a confidential basis.

On 8 November 2012 the parties agreed to refer the dispute to Expert Determination.

(ii) Outcome sought by the parties to the dispute

APRA's position was that the Licensee authorised the performance in public of works within APRA's repertoire by means of recorded music for the purpose of dance use at _____ and therefore at least certain parts of the premises should be licensed under APRA's GFN licence scheme.

The Licensee's position was that the premises ought to be licensed under either APRA's featured recorded music or background music licence scheme but not APRA's GFN licence scheme.

(iii) Whether the dispute has been resolved or not

The dispute has been resolved.

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

No such report was produced because no issues regarding direct dealing were raised.

(v) Time taken to conduct the expert determination

The Expert Determination hearing itself took a half a day and the Expert took 5 days to deliver his Determination.

However, APRA notes that the period from the date on which APRA first wrote to the Licensee in relation to this dispute to the date on which it was resolved was approximately 4 years.

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

The Expert's costs in connection with the Expert Determination amounted to [CONFIDENTIAL]. The costs of hiring the venue for the hearing amounted to [CONFIDENTIAL]. APRA was responsible for 100% of these costs.

Each party was responsible for its own legal costs in connection with the Expert Determination.

APRA's total external legal costs in connection with this matter (excluding the Expert's costs, hearing venue hire and APRA management time) were in the amount of [CONFIDENTIAL].

APRA is not aware of the Licensee's own legal costs in connection with the Expert Determination.

DISPUTE REPORT 3:

Licensee	CONFIDENTIAL
Licence Category	General Licensing – Background Music, Live Performances, and Recorded Music for Dancing in Nightclubs
State	Queensland
Dispute commenced	4 January 2012
Dispute resolved	22 February 2013

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

On 4 January 2012 the Licensee wrote to APRA and raised two primary substantive commercial issues:

- (a) whether, in connection with the performance of recorded music at the venue, the premises should correctly and appropriately be licensed under licence scheme GFN (applicable to recorded music used for dance use in nightclubs) or licence scheme GFR (featured recorded music); and
- (b) the basis on which the premises should be licensed for live performances under APRA's GLA scheme and whether certain performances should be excluded.

The Licensee also complained about the content, manner and tone of APRA's Licensing Services representatives in their communications with him, including that APRA had inappropriately threatened him with litigation.

APRA's CEO personally responded to the Licensee on 19 January 2012, both with regard to the commercial issues and the allegations regarding APRA's conduct. APRA also treated the matter as a complaint for the purposes of the Copyright Collecting Societies' Code of Conduct and referred the issue of APRA's conduct to the Code Reviewer. The Code Reviewer did not find that APRA's conduct amounted to a breach of the Code. The Code Reviewer's summary of APRA's conduct in connection with this dispute and his findings are set out at pages 50 – 52 of the Code Reviewer's Compliance Report for the year ended 30 June 2012, which is available on APRA's website:

<http://www.apra-amcos.com.au/downloads/file/ABOUT/Code-Of-Conduct-Report-2013.pdf>

In relation to the substantive commercial issues, APRA's CEO offered to either meet personally with the Licensee or refer the matter to Expert Determination in accordance with APRA's Alternative Dispute Resolution procedure. The Licensee requested a meeting and APRA's CEO duly flew to Brisbane to meet with the Licensee at the premises on 7 March 2012. Following that meeting, APRA's CEO continued to communicate with the Licensee by telephone and wrote to him again on 23 April outlining APRA's revised position.

The Licensee did not reply to APRA's correspondence and APRA ultimately referred the matter to its external solicitors who wrote to the Licensee on 20 June 2012. On the same day APRA received from the Licensee a response dated 15 June to APRA's correspondence of 23 April. On 12 July APRA also received from the Licensee a set of APRA licence application forms together with a cheque in the amount of **[CONFIDENTIAL]**.

On 12 July 2012, APRA's CEO wrote to the Licensee and explained that APRA accepted his background music licence application but could not accept his licence applications for live performances or featured recorded music as they did not accurately reflect APRA's understanding of the way in which music was used or the amount of expenditure and receipts generated by live music at the premises. APRA offered the Licensee the opportunity to submit revised licence application forms or to refer the matter to either Expert Determination within 14 days. In the meantime, APRA continued to hold the licence fees already received in escrow pending resolution of the dispute.

The Licensee failed to respond to APRA's correspondence so on 28 August 2012 APRA referred the matter back to its external solicitors. APRA's solicitors continued to correspond with the Licensee's solicitor who advised APRA on 11 December that her client wished to refer the matter to Expert Determination. APRA provided the Licensee's solicitor with a draft Expert Determination agreement and a list of proposed Experts to choose from on 21 December. APRA received no response until 12 February 2013 when the Licensee's solicitor advised APRA she was no longer acting for the Licensee.

On 14 February 2013, APRA's General Counsel held a telephone conference with the Licensee's new solicitors. The parties agreed to try again to resolve the matter by commercial negotiation, and if resolution could not be promptly reached, to refer the matter to Expert Determination.

(ii) Outcome sought by the parties to the dispute

In relation to the two primary issues in dispute:

(a) Recorded Music for Dance Use

APRA's position was that the Licensee authorises the performance in public of works within APRA's repertoire by means of recorded music for the purpose of dance use at the Licensee's premises and therefore should be licensed under APRA's GFN licence scheme. The Licensee's position was that the premises ought to be licensed under either APRA's featured recorded music licence scheme but not APRA's GFN licence scheme.

(b) Live Performances

APRA's position was that in the absence of notice to APRA or evidence of any alternative arrangements, the Licensee was responsible for obtaining an APRA licence for all live performances of music at the premises. The Licensee's position was that it should not be responsible for live performances of music at the premises which are organised and promoted by a third party, rather than the Licensee.

(iii) Whether the dispute has been resolved or not

The dispute has been resolved.

Items (iv), (v) and (vi): N/A

DISPUTE REPORT 4:

Licensee	CONFIDENTIAL
Licence Category	General Licensing – Background Music Supplier agreement
State	Queensland
Dispute commenced	June 2012
Dispute resolved	17 April 2013

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

APRA offers a joint licence scheme with AMCOS to clients who provide background music services to music users in the retail, hospitality and fitness industries known as the Background Music Service (BMS) licence scheme. Under the BMS licence scheme, BMS licensees are permitted to offer an APRA licence to their clients for the public performance of music at their premises arising from the use of the background music system. On a quarterly basis, BMS licensees are required to provide premises listings to APRA and remit APRA licence fees arising from the APRA licences offered to their clients, less a 15% rebate on account of the BMS licensees' administrative expenses.

On 20 and 23 May 2012, APRA wrote to its current BMS licensees proposing changes to the current agreement, which had been in existence for over 20 years, and initiated a consultation process with individual licensees to discuss the intended changes. APRA signalled its intention to terminate all current BMS licence agreements and implement the new licence scheme on 1 April 2013. APRA held a series of meetings with its BMS licensees and then circulated a proposed draft of the new BMS licence scheme to its licensees on 16 October 2012.

The Licensee, a prospective BMS client, initiated discussions with APRA on 12 June 2012 regarding the BMS licence scheme. The Licensee specified that it required a 3 year agreement from APRA to suit its arrangements with clients. On 20 June 2012 APRA offered the Licensee its existing BMS licence scheme but was also advised that the current scheme was under review and due to be terminated on 31 March 2013.

On 21 November 2012, the Licensee responded to APRA with its own proposed licence agreement, which it had based on a background music supplier agreement for sound recordings offered by PPCA. On 29 November, APRA telephoned the Licensee to explain why it was not possible to enter into an individual agreement with the Licensee on different terms to the licence scheme APRA offered to other background music suppliers. Following the telephone conversation, APRA re-sent the Licensee its current BMS licence scheme (noting again that the proposed termination date for the scheme was 31 March 2013), together with a copy of the proposed draft licence scheme sent to all existing BMS clients on 16 October. APRA also invited the Licensee's feedback on the proposed draft, as part of its consultation in relation to the licence scheme.

On 21 January 2013, the Licensee met with APRA and sought changes to some of the terms and conditions of the proposed BMS licence scheme, in particular the quantum of the BMS Licensee's rebate on APRA licence fees, as per (ii) below.

After considering the Licensee's comments, and other feedback and recommendations from current BMS clients, on 11 February 2013 APRA sent the Licensee an amended final draft of the proposed new BMS licence scheme (with revised rebate terms), which was also circulated to all current BMS clients on 19 February. The termination date of the current BMS licence scheme was also postponed to 30 June 2013.

On 1 March 2013, the Licensee contacted APRA to request a further meeting to discuss possible changes to the final draft of the new BMS licence scheme. APRA advised that it was not willing to negotiate further changes to the BMS licence scheme but that it was open for the Licensee to refer the scheme to Expert Determination or the Copyright Tribunal.

On 5 March 2013, the Licensee requested the dispute be referred to Expert Determination and indicated that it would be contacting other current BMS clients to form a BMS delegation to participate in the Expert Determination.

(ii) Outcome sought by the parties to the dispute

Under the existing BMS licence scheme, BMS licensees are entitled to a 15% rebate on APRA licence fees they collect on APRA's behalf, on account of the BMS licensees' administrative expenses in doing so.

Under the new BMS licence scheme, APRA originally proposed that the rebate be reduced to 5% for individual clients of BMS licensees and 2.5% for retail chain clients of BMS licensees.

The Licensee proposed that the rebate on APRA licence fees collected by the BMS licensee only be reduced to 10% regardless of the type of client from whom the BMS licensee collects APRA licence fees.

Under the final draft of the new BMS licence scheme, circulated to all BMS licensees in February 2012, APRA has proposed to reduce the rebate to 5% (regardless of the client type of the BMS licensee) and also to phase the new rebate in over a period of 3 years, as follows:
Year 1 – 10%; Year 2 – 7.5%; Year 3 – 5%.

(iii) Whether the dispute has been resolved or not

The dispute has been resolved.

Items (iv), (v) and (vi): N/A