

## APRA SUBMISSIONS REGARDING ADR PROPOSALS

1. During the course of its authorisation applications, APRA engaged Resolve Advisors to design an external and independent ADR system for all disputes between APRA and its licensees and potential licensees; and between APRA and its members.
2. Resolve Advisors conducted various consultations with APRA staff members and external stakeholders, with a view to designing an ADR system that would initially serve to assist with the resolution of disputes between APRA and its licensees, and would be able to be extended to assist with the resolution of disputes between APRA and its members.
3. Resolve Advisors has provided a report of its consultations, and the design of a proposed ADR system, to the ACCC, APRA and external stakeholders.
4. APRA has written separately to those stakeholders that participated in the consultation process, and to the ACCC, seeking views on the appointment of Resolve Advisors as the resolution facilitator for the APRA ADR process.
5. APRA supports the modification of proposed Condition C5 (as set out in the Draft Determination) such that the system designed by Resolve Advisors in consultation with APRA and its external stakeholders will satisfy the condition. APRA submits that the condition should be drafted so that minor modifications to the system can be made as necessary, without the need for a varied authorisation. A draft of the revised condition is attached.
6. In relation to the issues raised by Resolve Advisors in its Consultant Report dated 12 February 2014, APRA submits as follows.
  - (a) The scope of the system

APRA considers that the dispute process should be primarily focused on disputes of fact between APRA and individual licensees. APRA accepts that industry bodies may have a role to play in the resolution of these disputes, and does not seek to have them excluded from the process.

APRA envisages that disputes of fact would include disputes regarding APRA's processes, including forms, assessments and protocols as outlined at paragraph 3.2 of the Consultant's Report. APRA does foresee difficulties where it is acting as agent for a third party, such as in the area of dramatic context licensing, but is willing to explore whether disputes of this kind can be resolved using the system. APRA is, of course, unable to bind its members where they are acting as principal or as independent third parties.

However, disputes about the *reasonableness* of licence schemes should be excluded from expert determination whether binding or non-binding. Such disputes are best resolved by commercial negotiation, mediation, or by the Copyright Tribunal of Australia.

- (b) Access

APRA strongly submits that there should be a reasonable cost for licensees using the system, noting that APRA would bear the costs of the facilitator and would also be responsible for half of the capped costs and any costs of the third party expert or mediator over the capped amount.

APRA supports the policy reasons outlined in the Consultant's Report, as to the benefits of having participants share costs.

APRA believes that an external system for which APRA bears the whole cost is susceptible to vexatious referrals, which would cause APRA financial loss and misallocation of resources.

APRA also believes that a shared cost system will assist with the preservation of the independence of the system – both in fact and as a matter of perception.

APRA notes that many other independent dispute resolution processes, such as the mediation service offered by the NSW Small Business Commissioner, and the NCAT, have an administration or filing fee. In the proposed APRA model, the initial contact with the resolution facilitator is free of charge, and for disputes where the licence fee in dispute is under \$3,000 the cost of referral can be waived at the discretion of the facilitator. Approximately 91% of APRA's public performance licensees pay less than \$1,500 in annual licence fees (except for concert and event licensees, where approximately 87% pay annual licence fees of less than \$1,500). Approximately 95% of APRA's public performance licensees (and 91% of concert and event licensees) pay less than \$3,000 in annual licence fees, and 99.9% (95% in the case of concert and event licensees) pay less than \$10,000 in annual licence fees.

In relation to the issues raised at paragraph 3.4 of the Consultant's Report, APRA is sympathetic to the concerns of licensees located in rural and regional Australia. APRA supports the recommendation that preliminary steps be conducted remotely where possible, and that a process be set in place that is mindful of travel and other costs. APRA also supports the appointment of a panel of experts and mediators that is broadly representative of the geographical location of APRA's licensees.

(c) Confidentiality

APRA has no objection to the publication of details of binding expert determinations.

(d) Independence

APRA selected Resolve Advisors to design the dispute system, based on its reputation in the field of alternative dispute resolution and system design. APRA also approached the Australian Commercial Disputes Centre, but was advised by it that it does not design ADR systems.

Neither Resolve Advisors nor its principal Ms Kirschner had ever worked with APRA or any of its senior management prior to this engagement.

At all times during the design process, Resolve Advisors has taken steps to ensure that it is independent of APRA, notwithstanding its commercial engagement by APRA, including by meeting privately with stakeholders and the ACCC.

APRA believes that the work done by Resolve Advisors has been exemplary, and APRA has found the process illuminating and helpful. APRA has written separately to the ACCC and to stakeholders asking whether there are any objections to the appointment of Resolve Advisors to be the external facilitator going forward for the system. As at the date of this submission, APRA has not received any objection from any of those stakeholders.

APRA notes that the system website and the facilitator would not be physically located at APRA. APRA also supports the proposal that the fees paid to the facilitator not be approved on a case by case basis, and that the facilitator should have reporting obligations to the ACCC, stakeholders, and also to APRA and be periodically reviewed.

APRA also notes that the proposals relating to shared costs would ensure the independence of the facilitator, both in fact and as a matter of perception.

Sharing the costs of the panel members, even if not equally, will also ensure their independence. There is no reason to believe that trained mediators, and expert professionals, would not retain their independence, particularly in circumstances where their costs are being contributed to by both parties. APRA also notes that panel members would be nominated by stakeholders as well as by APRA, and appointed by the facilitator on the basis of criteria set by the facilitator.

**Condition C5 – Alternative Dispute Resolution:**

1. The amended ADR process must have the following features:

a. A 3 tier mechanism for resolving disputes/complaints as follows:

(i) Tier 1 – first response: An initial response by APRA to the complaint or dispute within 7 days of lodgment, and an informal meeting or discussion between APRA and the complainant, in an attempt to resolve the dispute quickly and efficiently within 28 days of the lodgment of the complaint/dispute.

(ii) Tier 2 – referral to external resolution: an external dispute/complaints process, which involves the handling and resolution of the dispute / complaint, being disputes/complaints about factual matters, by an independent facilitator on a contract to APRA. The independent facilitator is to be responsible for the operation of the ADR scheme, including an initial assessment of the dispute and assisting the parties with selection and management of a process.

(iii) Tier 3 – parties choose mediation, non-binding expert process, or binding expert process.

b. a right for the complainant to refer a dispute / complaint to tier 2 or tier 3 at any time.

c. a right for the complainant (at their discretion but in consultation with the facilitator) to take part in the ADR process in person, or via telephone or videoconference.

d. a requirement that the mediator, decision maker or expert (tier 3) must be a person who in the opinion of the facilitator is qualified to determine the dispute, such as a Nationally accredited mediator, graded arbitrator, lawyer, barrister, accountant, auditor, nominated small business commissioner or other person with industry specific experience, a barrister with expertise in intellectual property matters or a former judge. The facilitator may establish a panel to ensure appropriate accreditation and insurance and other matters as may in his or her expert opinion be necessary.

e. a requirement that the identity of the mediator, decision maker or expert (tier 3) will be as agreed between the parties, or otherwise as nominated by the facilitator.

f. a requirement that the procedures, processes and timeframes for tier 2 and tier 3 complaints / disputes be otherwise as determined by the facilitator (tier 2) or mediator, decision maker or expert (tier 3) in their discretion.

g. a requirement that the facilitator (tier 2) and the mediator, decision maker or expert (tier 3) be wholly independent of APRA and the complainant, and a process be established for checking any conflicts. .

h. That there be reasonable filing fees related to the value of the dispute, as in the attached schedule which may be updated from time to time but in no case may exceed \$200 for the highest value dispute.

i. that each party share the costs of the mediator, decision maker or expert equally, except that where the amount in dispute is \$10,000 or less the licensee will pay no more than \$1,650 or 30% of the value of the dispute, whichever is the lesser.

j. a requirement that APRA must otherwise meet the costs associated with the ADR process (excluding the complainant's own costs).

k. a requirement that APRA educate licensees, potential licensees, industry bodies and members about the operation of the new ADR process by publishing a plain English guide or another appropriate medium to the process, and by making that guide available in a prominent position on its website, and on request.

l. a requirement that APRA make the revised ADR process fully available, on and from 30

June 2014, to all licensees.