14 March 2014

Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601
Attention: Tess Macrae

By email: adjudication@accc.gov.au

A91367-A91375 – Australasian Performing Right Association Ltd – submission

The Arts Law Centre of Australia (**Arts Law**) is pleased to comment on the revised alternative dispute resolution (ADR) system proposed by Resolve Advisors for the Australasian Performing Rights Association (APRA).

About the Arts Law Centre of Australia

The Arts Law Centre of Australia (**Arts Law**) is the national community legal centre for the arts. Established in 1983 with the support of the Australia Council for the Arts, Arts Law provides artists and arts organisations with:

- Specialist legal and business advice;
- Referral services;
- Professional development resources; and
- Advocacy.

Does the revised ADR system address any concerns you may have with the existing ADR system?

We are concerned that the proposed Resolve process is designed exclusively for disputes between APRA and licensees and doesn't appear to have considered how it will operate in the disputes that arise between licensors and APRA.

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The ACCC's draft Determination proposes maintaining APRA's authorisation for the acquisition and licensing of music performance rights (the right to perform publicly and the right to communicate) on certain conditions including a revised ADR scheme. The majority of submissions on this issue received and considered by the ACCC appear to have concerned disputes between APRA and licensees. The existing ADR procedure endorsed as part of the 2000 decision commences with the words "From time to time, disputes arise between APRA and its *licensees, or potential licensees*" (emphasis added) and the Resolve report describes its terms of engagement as "design an independent dispute resolution system to resolve issues that *licensees* may have from time to time" (emphasis added). There is a mention of how APRA uses ADR to address disputes between it and licensors – at paragraph 238, the draft Determination notes "An anonymous submission raises that ADR is inappropriate and unhelpful to the average APRA composer/performer."

The APRA website directs music *creators* to the same ADR processes and Expert Determination process to resolve disputes between members. http://www.apra-amcos.com.au/About/Complaints.aspx

Arts Law's clientele are artists and arts organisations – in the music industry this equates to musicians, composers and lyricists – usually members of APRA. We do not act for the majority of music licensees – except where they are themselves engaged in the creative industries: such as a film producer needing a soundtrack, or using footage of musical performers, or dealing with footage where a radio can be heard in the background.

The issues most frequently encountered by us are disputes as to ownership of performance royalties collected by APRA - where co-creators dispute the royalty split, or where one person has registered a song in their name which another claims is his or her composition, or where royalties are flowing to a publisher instead of the creator under a publishing agreement that is alleged to have been terminated or breached and so on. Our experience is that APRA's ADR process rarely offers a useful dispute resolution mechanism in these disputes. This is because it is not accessible (the song must already

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be earning royalties and must have been registered for less than three years), can be costly, has a perceived lack of independence, or there is a lack of understanding about the function of ADR. Where it appears that a dispute about a registered song falls within the scope of APRA's ADR process we have frequently suggested to clients that they contact APRA and utilize the ADR process. The feedback is generally that the process was not capable of finding a resolution. In many cases what usually happens is that royalties are then frozen and often so too is any incentive for the parties to promote or use the song. We note at this point that the three year rule is confusing and ambiguous – if APRA will not take action to pursue reimbursement of royalties incorrectly paid over three years ago (a form of statute of limitations) that is one thing, and should be clearly stated – however the APRA website states, "A work cannot be referred to ADR if it has been registered (insofar as the details of the dispute are concerned) for more than three years (being the last date on which distributions could be altered) ". This is opaque and capable of misinterpretation. We assume that if the ownership details of a song registered with APRA are in dispute dating back say, six or more years, then the issue as to who is entitled to future (and recent) royalties is still suitable for APRA's ADR process? If that is the case, this could be stated more clearly. We are aware that some licensors understand that once three years have elapsed from registration, there is no remedy available from APRA.

In short, the proposal does not address our concerns with APRA's existing ADR process as it applies to licensors. Were it to be so extended, we consider the structure of using an independent dispute facilitator to be a useful and pragmatic approach. It will offer a more transparent and independent process than currently exists; although we note that the proposed approach of three tiers is designed for what are essentially disputes about money and does not reflect an understanding of the complexity of disputes about ownership.

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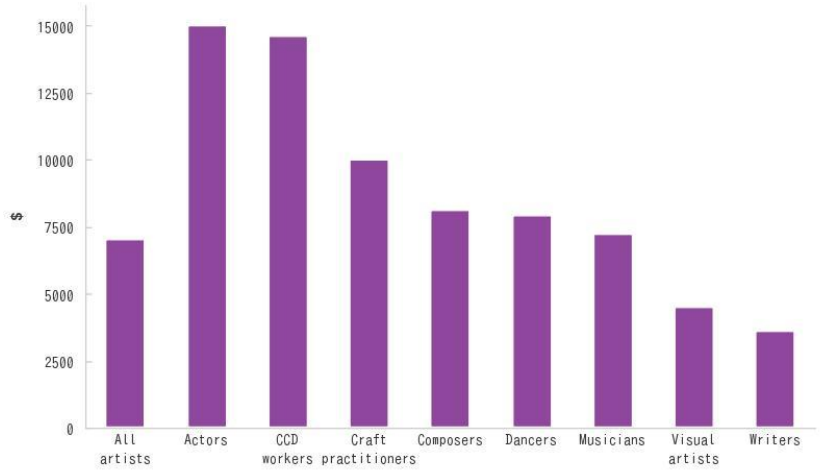
It is proposed that options be made available in the ADR system (i.e. direct negotiation, assisted negotiation in the form of mediation, as well as both binding and non-binding expert processes). Are you supportive of these three options?

In principle, Arts Law supports these options. The reality for the members of the arts community that we represent is that many will be unable to afford to engage in the process beyond initial discussion with the resolution facilitator. We are disappointed that the report does not consider at all the provision of pro bono support to parties without the means to retain legal assistance, (which is obviously always available to APRA), or even to pay the $180 an hour fee to the mediator or expert. No doubt this reflects a scheme designed to respond to a brief that excluded licensors' disputes and focussed solely on licensees. Cost is still a significant barrier to an effective system for resolving licensor disputes in this model.

See graph below from 2007-8 which shows musicians' income at approximately $7 500 p.a. [1]

Figure 7 - Median annual creative incomes of practising professional artists (2007-08)



The Australia Council for the Arts, *Musicians leverage their skills in other industries to complement their creative incomes,* Figure 9.[2]

[1] <http>://artfacts.australiacouncil.gov.au/creation#post-1268>
[2] <http>://artfacts.australiacouncil.gov.au/creation#post-661>

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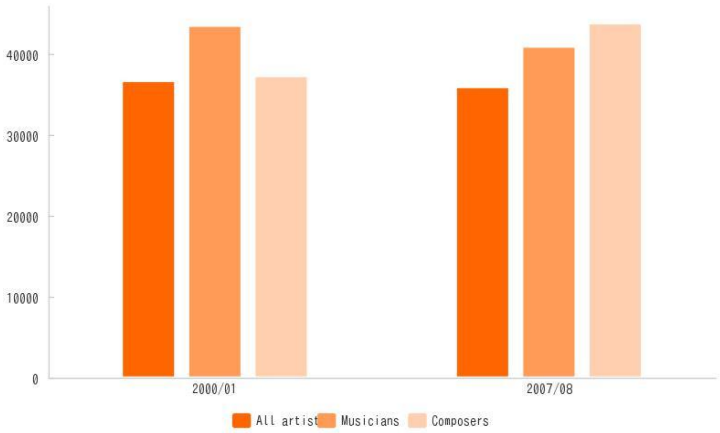
Figure 9 - Median annual incomes (from all sources) in 2000-01 and 2007-08



The mean annual income (from all sources – that is, musicians leveraging their skills in other occupations and industries aside from purely creative sources) in 2007/2008 was $40,900. This is a $2,600 decrease from the 2000/2001 median annual income for musicians.

The failure of licensors to utilize APRA's current system is not only a matter of cost, but can also be attributed to the power imbalance between parties. Often the more powerful party in an ownership dispute will simply refuse to engage in ADR, calculating that the other musician or artist has no means or appetite for litigation and can simply be ignored. The report does not address this – presumably assuming that disputes are invariably between a single licensee and APRA, and assuming that APRA is ethically constrained from simply saying "no" to ADR? The imperative in a licensee dispute to find a solution through ADR is based on a licensee's desire to pay less, (always a powerful incentive,) and APRA's obligation to address disputes. However licensor disputes over ownership or royalty entitlements usually involve at least two parties plus APRA. The Resolve system contains no mechanism to bring the parties in these types of disputes to the table. An APRA member already registered as entitled to 100% of royalties would have no incentive to engage in ADR with a collaborator or co-creator claiming an entitlement to some share. This could be addressed by a scheme in which APRA's membership agreement with licensors contained a contractual obligation to agree to ADR in the event

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of a dispute, thereby removing the ability of a member to refuse to engage in ADR to resolve an ownership dispute.

Resolve Advisors has proposed that applicants pay a filing fee when they bring a matter to ADR and that the parties in dispute share the hourly rate for the mediator/independent expert. Is this fee structure appropriate? Who should be responsible for determining the cost to each party?

As stated above, Arts Law believes the costs proposed for APRA's dispute resolution system will prove a barrier to a number of licensors and copyright owners.

Arts Law agrees, in principle, that there should some form of distinction for smaller claims however it must be noted that a monetary limit may not always be indicative of the complexity of a dispute involving a licensor.

Resolve Advisors proposes that there be a pool of mediators and independent experts available to resolve disputes (see Resolve Advisors' 'Summary of recommendations'). Do you think there should be involvement of interested parties in the initial selection of the panel of mediators and independent experts and if so what form should this involvement take?

Arts Law believes it important that the pool is independent and reflects appropriate expertise within the music industry. Independence is more clearly demonstrated if the members are not chosen solely by APRA and there are clear guidelines for selection and inclusion overseen by an independent committee of advisors.

How should the independence of the dispute facilitator and the independent experts and mediators appointed to the pool be assured?

Arts Law believes that the independence of the facilitator and mediators are of paramount importance to this model's successful operation and repeats the comments above.

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What mechanism, if any, should be put in place for addressing any concerns about the way in which the dispute facilitator is managing the dispute resolution process once it is up and running?

Arts Law supports a framework with a clear process for dealing with complaints about the process.

Resolve Advisors has recommended that any binding decisions be published (without including the confidential information of the parties). Do you support this proposal?

Yes, hopefully this may create some confidence in the process and may operate as a precedent leading to swifter resolution of similar disputes arising subsequently.

Resolve Advisors has recommended that there be reporting on the ADR system, what types of information about the ADR system should be reported to the market and how (for example, the number of matter that were considered under each option, the time taken and the outcome?) Who should compile the reports? (e.g. an independent marketing firm)?

Arts Law generally supports the collection of data on the operation of the ADR system for the purpose of assessing its efficacy, identifying strengths and weaknesses and designing improvements.

Further consultation with Arts Law and its stakeholders

Please contact Robyn Ayres or Delwyn Everard if you would like us to expand on any aspect of this submission, verbally or in writing. We are also pleased to be of any assistance in meeting with you prior to, or during the preparation of the final report.

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We can be contacted at rayres@artslaw.com.au or deverard@artslaw.com.au.

Yours faithfully

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