

From: Clarke, Nicole [REDACTED] on behalf of Brennan, Mark
[REDACTED]

Sent: Friday, 14 March 2014 12:19 PM

To: Adjudication

Cc: Latham, Craig

Subject: A91367-A91375 - Australasian Performing Right Association Ltd - submission
[SEC=UNCLASSIFIED]

Dear Dr Chadwick

Thank you for the opportunity to make a submission on the proposed approach to alternative dispute resolution by the Australasian Performing Right Association Limited (APRA).

General comments

We commend the proposed approach to ensure good practices around alternative dispute resolution, particularly clear and efficient processes that support mediation.

In a small business context, coupling a good mediator with the parties who retain control of the outcome is in our view the best approach for business flexibility and for focusing on the key issues. This tends to be an effective method to address small business issues and generally better than determination, arbitration, adjudication and other more legal-based approaches.

Approach to mediation

As already noted, the choice of a system that leaves greater control with the parties (as is the option recommended here) is preferable for small business. In this context, we would stress that negotiation and mediation is favourable (compared to non-binding and binding expert processes that may not provide sufficient focus on an agreed outcome and may strip the parties of accountability in reaching a good outcome). However, we would also agree that access to expert referral on specific issues that are "sticking points" could provide good support for a mediation process.

We would also assert that early involvement of a resolution facilitator is a good approach and, in many cases, will either provide for early resolution or at least act to identify key issues that may then be focused on in a mediation.

For the system to be effective for small business, the cost of mediation to small business needs to be kept as low as possible to avoid cost acting as a barrier to mediation. This could be done through the creation of a panel of mediators who agree up front to low-cost mediation. For example, in setting up the mediation panel for the Victorian Small Business Commissioner, mediators were invited to apply for inclusion on the panel only if they agreed to the stipulated cost.

We would also encourage consideration of whether a free pre-mediation process could be made available (although we also note the point that costs assists in creating "buy-in" by disputing parties).

Other issues

Benefit of face-to-face meetings

We agree that face-to-face meetings should be preferred in the design of the alternative dispute resolution system. Such meetings are more likely to lead to resolution at both the pre-mediation and mediation phases. There are also likely to be ancillary benefits for APRA in engaging personally with business (such as in getting a deeper understanding of business issues etc.). Although there is significant effort in doing this at the pre-mediation phase, face-to-face contact should not be underestimated in its ability to resolve issues quickly and avoid the time and costs of a more structured and longer mediation process.

Compulsion

There is a question whether participation in pre-mediation and/or mediation should be able to be compelled by APRA and/or a private party (although we recognise that there is a financial cost for parties). Although we raise this as an issue, there are good reasons both for and against compulsion and this could be considered as decisions are made about the detail of the alternative dispute resolution system in this case.

Outcome transparency

In a business setting, confidentiality of mediation outcome is normally maintained in order to provide parties with the flexibility to reach an outcome that then does not form a precedent for either party. However, we would argue that a government body should normally be aiming at consistency and transparency of administrative outcomes and precedent-setting for the private party may not be of the same level of concern as in private commercial disputes. Consideration could then be given to greater transparency in disputes involving APRA (possibly without specifically identifying particular parties) in a way that is similar to the Australian Taxation Office's approach to its determinations and interpretive decisions.

Reporting and learning from results

Closely recording and reporting (at a gross level) on the success of mediation outcomes is an important part of the process. This may be done both at/near the immediate conclusion of a mediation and at a period a month or more afterwards to ensure greater accuracy of results. This sort of data could then be used by APRA in looking at the types of issue and their resolution. This may then be used by APRA to further improve its regulation and avoid future disputes.

If there is anything that you would like us to clarify or expand on, please do not hesitate to let us know. For this purpose please contact Dr Craig Latham, Deputy Commissioner on 6102 9388.

Yours sincerely

Mark Brennan

Australian Small Business Commissioner

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