



**Ref: A91367-A91375**  
**Australasian Performing Rights Association Ltd**  
**Further Submission to ACCC**  
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## Introduction

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AHA and APRA had fruitful discussions yesterday as to the AHA submissions below. We think that common ground has been reached on many issues. AHA hopes to be in a position to expand upon the common ground issues at the Conference today.

A summary of key AHA submissions is respectfully set out below:

How decisions should be made	<ul style="list-style-type: none"><li>• In making decisions, ACCC should offer the greatest protection or benefit of the doubt to licensees and members</li></ul>
C2: ADR Reporting	<ul style="list-style-type: none"><li>• Reasons for decision from each ADR matter should be published on the APRA website within 2 business days of the written decision</li></ul>
C3: Transparency of licence fees	<ul style="list-style-type: none"><li>• The guide should be provided to the satisfaction of ACCC prior to the final authorisation (not 6 months after determination)</li><li>• In addition to the guide, the licence application and the renewal applications need to be in Plain English and should be approved by ACCC</li><li>• In particular, the fee structure needs to be set out in plain English. This is not clearly stated yet by the ACCC and a clear statement from the ACCC in regard to plain English fees needs to be made</li><li>• The AHA submits that prior to final authorisation APRA publish, to ACCC satisfaction the following:<ul style="list-style-type: none"><li>○ Plain English licence application form</li><li>○ Guide: Background Music Hospitality</li><li>○ Guide: Recorded Music for Dance Use</li><li>○ Guide: Featured Recorded Music</li><li>○ Guide: Live Performances</li></ul></li><li>• AHA understands that APRA has ceased payment of commissions to its employees or agents and request that this be included in the conditions</li></ul>
C5: Alternative Dispute Resolution	<ul style="list-style-type: none"><li>• confirm a modest filing fee for licensees as per the proposal by Resolve</li><li>• require all costs of the ADR administration, and all facilitations, mediations and adjudications to be met by APRA, except in the case of vexatious proceedings</li><li>• provide that APRA should bear the reasonable cost of travel and accommodation of the other party where the forum is not near the place of business of the other party</li><li>• ensure that there is no limit or restriction on the type of dispute or basis upon which a dispute is being brought forward. In particular, disputes about the “reasonableness” should not be excluded</li><li>• AHA and other interested parties should be given opportunity to be involved in the initial selection of the panel of mediators and experts. This should be done by Resolve presenting the interested parties with a short list of candidates. Given that APRA has effectively appointed Resolve, APRA should play no part in this process</li></ul>
Repertoire	<ul style="list-style-type: none"><li>• Should be published by APRA</li></ul>

## **Basis upon which decisions should be made**

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The Draft Determination notes that interested parties have raised a number of concerns about how APRA and its employees conduct their business with licensees. Such concerns include:

- Coercive and bullying behaviour
- Lack of assistance when applying for a licence leading to confusion and disputes
- APRA staff issue aggressive letters of demand
- Aggression towards licensees during the licensing process
- Misleading contract negotiations and aggressive and intimidating customer service interactions
- Created an environment where licensees fear that the information they provide will be used against them
- Incentivising employees to act in ways that are not consistent with APRA's interests
- Tactics devised to sell more or more expensive licences
- Not matching licensees with the most appropriate licence
- Providing "deals" to one party, but not others

### **Pattern of behaviour**

AHA notes the remarks of the Competition Tribunal 14 years ago in 1999-2000, where it said to the effect "The Tribunal consider(s) some form of ADR process would lessen one potential anti-competitive consequence (and) would encourage APRA to be more receptive to the complaints of its users and lessen the types of complaints that we heard about APRA's inflexibility and resistance to modifying licences to meet changing circumstances". AHA notes that:

- Concerns similar to the above have been raised by licensees in previous re-authorisations, but the behaviour has continued during that re-authorisation period.<sup>1</sup>
- The ACCC acknowledges the undertakings and progress APRA has made to address the above concerns this time
- The ACCC has advised the success of these changes by APRA will be relevant to future applications by APRA (in 3 years' time)

### **AHA Submission as to how decisions should be made**

APRA is effectively seeking approval to act as a monopoly cartel, to which AHA does not object, but requests certain protections. APRA has exhibited poor behaviours in the past, and the capability of APRA to make its intended changes in this coming 3 year period is not yet proved. Therefore, AHA submits that:

- if the ACCC is to decide a benefit of the doubt to APRA on the one hand,
- or a benefit of the doubt to the members and licensees on the other hand,
- and given the fact that APRA already has monopoly cartel market power that it or its agents have exercised inappropriately in the past
- then it is submitted that the ACCC should follow the most cautious path and make determinations that give greatest protection or benefit of the doubt to the members and licensees

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<sup>1</sup> Draft Determination, para 294

## Condition C2 – ADR Reporting

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### Background

- The draft determination states to the effect that APRA must provide the ACCC with a report about disputes on an annual basis for the previous calendar year
- If reports are not published on a frequent basis, this has the effect of APRA having a library of information that is not available to its licensees and members raising questions as to transparency and level playing field
- We understand that APRA and Resolve support the publication of decisions

### AHA Submission

- AHA respectfully submits that reasons for decision from each ADR matter should be published on the APRA website within 2 business days of the written decision

### Reasons

- The release of dispute decisions is common. For example, please see:  
<http://www.racingsw.com.au/default.aspx?s=reasons-for-decisions>

### Benefit

- This will assist prospective appellants by providing a library of decisions whereby they can examine cases with similar facts and make better informed decisions as to whether to lodge a dispute
- All parties will have equal access to the library of decisions

### Cost

- Negligible

## Condition C3 – Transparency of licence fees

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### Background

- The current condition provides that within 6 months of the ACCC's final determination, APRA must publish, as a single document, a comprehensive plain English guide that outlines all of the licence categories individually
- However, the condition does not provide for the licence application itself to be in plain English
- The transparency (or lack thereof) of licence fees is a key driver of current disputes

### AHA Submission

- The guide should be provided to the satisfaction of ACCC prior to the final authorisation (not 6 months after determination)
- In addition to the guide, the licence application and the renewal applications also need to be in Plain English and should be approved by ACCC
- In particular, the tariff structure needs to be set out in plain English. This is not clearly stated yet by the ACCC and a clear statement from the ACCC in regard to plain English fees needs to be made
- The AHA submits that prior to final authorisation APRA publish, to ACCC satisfaction the following:
  - Plain English licence application form
  - Guide: Background Music Hospitality
  - Guide: Recorded Music for Dance Use
  - Guide: Featured Recorded Music
  - Guide: Live Performances
- AHA understands that APRA has ceased payment of commissions to its employees or agents and request that this be included in the conditions

### Benefit

- Eliminates uncertainty as to the extent APRA must use plain English
- Will minimise disputes

## Condition C5 – Alternative Dispute Resolution

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### Background

- AHA supports the overall ADR regime proposed by the APRA consultant
- However, AHA believes that the entire ADR process should be funded by APRA (except for modest filing fees)
- AHA has no concerns about the perceived or actual impartiality of Resolve or panel members where all the costs are paid for by APRA (this is the case in other consensual domestic tribunals)

### Market power

AHA respectfully submits that:

- APRA has a disproportionate amount of market power compared to the average licensee, and
- This has caused licensees to lose faith and disengage from the system
- The volume and scale of disputes is largely within APRA's control

Observations by licensees on the ADR previous system include:<sup>2</sup>

- Venues do not have the legal resources to mount a challenge
- Low number of reported disputes reflects reluctance by licensees to make complaints
- Licensees are fearful that APRA will close down their venue/event
- Small businesses are not aware of ADR or are scared to use it
- Process is complex, costly and enables APRA to bully individual venues
- More likely to be bound by legal precedent than the licensees industry
- Legal costs are substantial
- Users not confident that the process will satisfactorily resolve their disputes

It is highly desirable that licensees re-engage and have faith in the system

### The playing field – “David and Goliath”

AHA submits that it is not a level playing field between APRA and the average licensee, and notes:

- In comparison to individual licensees, APRA has significantly greater market power
- APRA has over 200 staff with high levels of focus and skills in the business of copyright (basically that is all they do)
- Licensees on the other hand have fleeting contact and subject matter expertise with the business of copyright
- APRA has net distributable income of \$243M with which to “take on” licensees versus about 98% of licensees having a licence worth \$10,000 or less.
- Many hotels are family enterprises with no scope to fund significant legal matters
- Many licensees are “afraid” to take on APRA

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<sup>2</sup> Draft determination, pp 47-50

## Legal sophistication

APRA has a far higher degree of “legal sophistication” than the average licensee

Item	APRA	Average Licensee
Staff with legal/copyright expertise <sup>3</sup>	Many	Unlikely
Capacity to fund disputes (approx.).	\$243M	??
Subject matter expertise in the business of copyright	Significant	Minimal

## Scope of the ADR system

APRA has submitted that:

- “the dispute process should be primarily focused on disputes of fact”, and
- “disputes about ‘reasonableness’ should be excluded from expert determination”
- such disputes are “best resolved by commercial negotiation, mediation or by the Copyright Tribunal”

AHA submits that there should be no limit or restriction the type of dispute that can be brought forward and observes that:

- Many of the complaints by licensees about APRA relate to the “unreasonableness” of APRA so seeking to exclude such disputes is getting away from the reason the ADR is being set up in the first place
- Fair “commercial negotiation” is unlikely given APRA is operating a monopoly cartel and it is likely that commercial negotiations have already broken down
- “Mediation” is not possible as APRA is seeking to exclude “non-binding determinations”
- The “Copyright Tribunal” would not be a viable commercial option for the 91% of APRA licensees that pay less than \$1,500 in licence fees
- Licensees should be able to refer any matter to the ADR, irrespective as to whether it is a dispute about “facts” or “reasonableness”

## AHA Submission

AHA respectfully submits that that as a price of the exemption (authorisation), the ACCC should:

- confirm a modest filing fee for licensees as per the proposal by Resolve
- require all costs of the ADR administration, and all facilitations, mediations and adjudications to be met by APRA, except in the case of vexatious proceedings
- provide that APRA should bear the reasonable cost of travel and accommodation of the other party where the forum is not near the place of business of the other party
- ensure that there is no limit or restriction on the type of dispute or basis upon which a dispute is being brought forward. In particular, disputes about the “reasonableness” should not be excluded
- AHA and other interested parties should be given opportunity to be involved in the initial selection of the panel of mediators and experts. This should be done by Resolve presenting the interested parties with a short list of candidates. Given that APRA has effectively appointed Resolve, APRA should play no part in this process

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<sup>3</sup> Includes senior executives with qualifications including LLB, LLM, BA Economics from institutions such as University of Sydney, London Business School and Harvard Business School

## Precedent for zero cost ADR

- AHA respectfully submits that the situation of a monopoly cartel industry body funding all costs for disputes/appeals is common
- The example below compares APRA with the Racing NSW Appeals Panel and Tribunal

Item	APRA	Racing NSW
Consensual Domestic Tribunal	Yes	Yes
Monopoly status	Authorised (ACCC)	Statutory (Racing Act)
Relationship	Licensee	Licensee
Net distributable revenue	\$243M	\$165M
Filing fees	\$50 to \$150	\$200 to \$250
Contact at first instance	Resolution facilitator	Jockey mentor
Minor dispute/appeal <sup>4</sup>	Professional facilitator (Resolve)	Lawyer of at least 7 years standing
Major dispute/appeal <sup>5</sup>	Former judges	Judge or retired judge
Costs of expert process - amount up to \$10,000	\$180 per hour capped at \$1,650	\$0
Costs of expert process – amount over \$10,000	Experts usual rate shared 50/50	\$0

## Benefit

- Unfortunately, there is a tremendous long standing “lack of faith” with the past ADR process
- Despite the best efforts of the ACCC to enforce a fairer process, licensees will need to be encouraged that “this time things are different”
- Providing licensees as low cost an ADR process as possible will help licensees re-engage with the system
- This will have the effect of lessening the key “anti-competitive consequence” mentioned by the Competition Tribunal back in 1999-2000

## Cost

- Low incidence of past referrals
- Similar costs are borne by other consensual domestic tribunals and APRA should aspire to that best practice

## Repertoire

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AHA respectfully submits that the authorisation should require APRA to publish its repertoire and distribution revenue.

## Conclusion

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Without authority from the ACCC, it would be illegal for APRA to act the way it does. AHA is prepared for this otherwise illegal conduct to be authorised. However in return, AHA asks the ACCC that this time the determinations be in favour of the licensees, in an otherwise illegal and anti-competitive playing field.

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<sup>4</sup> RNSW Appeal Panel- fine of up to \$2,000 or suspension of 3 months

<sup>5</sup> NSW Racing Appeals Tribunal – fine of over \$2,000 or suspension over 3 months