



INDEPENDENT REVIEW OF RESOLUTION PATHWAYS

Final Report January 2024

Independent Reviewer
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Acronyms and terminology

ACCC	Australian Consumer Complaints Commission
APRA	The Australian Performing Right Association (APRA)
DR	'Dispute Resolution', also known as Alternative Dispute Resolution (ADR)
Music creator	Has works registered with APRA
Licensee/music user	Licenses music from APRA
PPCA	Phonographic Performance Company of Australia
SOCAP	Society of Consumer Affairs Professionals
'the Determination'	ACCC Determination Authorisation number: AA1000433, July 2020.
'the Scheme'	Resolution Pathways
'the Reviewer'	The current Independent Reviewer

Acknowledgements

The Independent Reviewer recognises and respects the intimate custodial relationships all First Nations peoples maintain with the lands, the waterways and the oceans. I respect the significant role of Elders in First Nations communities, both in the past and in the present. In particular, I acknowledge the traditional custodians of the beautiful, but unceded, Ngarigo lands on which this report was written.

The Independent Reviewer thanks everyone who has contributed information to this review, and to those who have provided various assistance throughout the review process.

Executive Summary

Purpose of report

This report describes the Independent Review of Resolution Pathways, conducted in accordance with the Condition C6.13 of the ACCC, *Determination, Authorisation AA 1000433* (13 July 2020). The Independent Reviewer's terms of reference derive from Condition C6.13. The Review has focused on the Scheme's provision of alternative dispute resolution (ADR) processes for the resolution of disputes. The Reviewer has also given limited consideration to the Scheme's broader context.

The report addresses readily quantifiable factors such as the Scheme's timely, efficient and effective handling of referred matters, and it also considers more conceptual issues such as the ACCC's expectations regarding Resolution Pathways' role in mitigating perceptions of APRA's market dominance.

It is important to read this report in the context of the effects of the COVID pandemic which caused major disruption to the music industry in Australia during at least the calendar years of 2020 and 2021. This disruption has affected the operations of the Scheme, and should be taken into account when reading this report.

What was done

During the Independent Review, the Reviewer collected and analysed data and information from a range of sources, including: users of Resolution Pathways; Resolution Pathways Committees and personnel, website, social media accounts; and annual reports; APRA website, annual reports and personnel; and the report of the previous Independent Review (2018).

Outline of the Report

The report is presented in three parts, Part A – Introductory matters; Part B – Independent Review; and Part C – Appendices.

Part A provides an introduction to the Independent Review, including its ACCC provenance. Part A also describes the objectives and methodology of the review, the objectives and functions of the Independent Reviewer, and the structure of the Report.

Part B covers the review activities and findings with a focus on Resolution Pathways and its operations; usage of the Scheme; the previous Independent Review (2018); and the relationship between Resolution Pathways and APRA. Part B includes a range of findings that inform the Suggestions included in this Executive Summary.

Part C includes four Appendices: a bibliography; relevant extracts from ACCC *Determination Authorisation number: AA1000433*, July 2020; electronic media – Resolution Pathways’ social media accounts, and relevant website links for APRA; and the Report of the previous Independent Review (2018).

Key findings

This Independent Review has four key findings.

1. The Independent Review has found that Resolution Pathways is meeting its objectives, and there is a high rate of user satisfaction with the Scheme. There is also a high level of satisfaction with the performance of the Facilitator and her team.
2. This Review has found that the Scheme now operates under a strong and transparent governance framework, with an independently Chaired Governance Committee, Stakeholder Group (providing a forum for industry consultation) and an APRA and Resolution Pathways Interface Committee. Roles and responsibilities are clearly delineated, as are performance measures. This framework supports the operation of the Scheme and seeks to safeguard its independence. The Scheme’s annual reports are readily available on its own website, and its operations are underpinned by appropriate and secure technology-based handling of referred matters.
3. A small number of concerns were raised with the Reviewer about the relationship between Resolution Pathways and APRA. The concerns include dissatisfaction with the relationship, and ongoing perceptions that APRA either does or could exert unacceptable levels of influence over the Scheme and its operation, affecting the Scheme’s perceived independence from APRA. The previous Independent Review (2018) found similar concerns. It is important to note that these concerns appear to be based on individual perceptions, and the reviewer has not found anything to substantiate them. Many of the suggestions in the next section are designed specifically to increase transparency with a view to reducing the perceptions of unacceptable levels of influence.

4. In a finding related to 3., above, this Review has found that Resolution Pathways and any future Independent Review would benefit from there being greater clarity around the ACCC's expectations regarding the Scheme's role in mitigating perceptions of APRA's market dominance.

Most of the recommendations from the previous Independent Review (2018) have been implemented.

In unsolicited commentary, it has been made clear to the Independent Reviewer that the independence of the review process is key to safeguarding the independence of Resolution Pathways, in particular through the review's capacity to assess APRA's ongoing role in the operations of the Scheme and in the functions of the Facilitator Team.

Suggestions

This is a summary of suggestions made at various points within the report. The page numbers in square brackets refer to the relevant pages of the Report where there is more detailed information.

ACCC

- *It would be useful for future Independent Reviews of the Scheme if, in any future authorisations, the ACCC were to describe its expectations for the Scheme more clearly, including the Scheme's scope, purpose, objectives, and independence. It would also be helpful to describe more fully what the ACCC intends in terms of the Scheme as mitigator (and, perhaps, give some examples). This would give future Independent Reviewers clear "measures" for their activities. It might also provide guidance for the Scheme's own explanations of its purpose and objectives. [pages 19 – 21]*

General

- *It is suggested that an alternative set of complementary effectiveness measures be devised for future Independent Reviews, although there should continue to be monitoring of the numbers of disputes that are resolved and the timeframes within*

which referred matters remain "active".
[Page 34]

The Scheme's governance and structure

It is suggested that:

- *In future, the Governance Committee formally endorse the current version of its Charter. [page 22]*
- *Information about the Stakeholder Group be made more readily accessible, and include a clear statement about the role and responsibility of the group, as well as its relation to the Governance Committee, and to the Scheme. [page 22-23]*
- *The Scheme and Facilitator goals include reference to the users of the Scheme as well as to its operation. [page 34]*

Transparency

During the Review, it became clear that broad perceptions about the relationship between the Scheme and APRA may derive, at least in part, from a lack of transparency. Although many of the suggestions in this section could be seen to relate to transparency, the below four are quite specifically about its improvement.

Resolution Pathways

It is suggested that:

- *The Scheme website and its annual reports include a statement of transparency to the*

following effect: “Block funding is provided by APRA on an annual basis to enable the basic operation of the Scheme. In addition, when requested by the Scheme Facilitator, APRA provides specific funding for dispute resolution professionals on a case-by-case basis. These arrangements do not interfere with the Scheme or with its operations, and, within the Scheme itself, a range of governance provisions have been established to protect the Scheme’s independence of APRA.” The statement should be readily and publicly accessible. [pages 18, 36]

- The Scheme’s annual reports include a summary statement of accounts for the block funding it receives and a similar summary of how those funds are spent (and that this be limited to the block funding). For example:

“Total block funding received:	\$XXX
Total expenditure (Facilitator annual stipend; staff salaries; computers and technology; administration; committee expenses):	\$XXX
Balance as at 30 June XXXX	\$000”

[page 37]

APRA

It is suggested that:

- APRA include in its annual reporting documents a summary of the material

resources it provides to the Scheme, ensuring it protects the confidentiality of its own commercial activities while providing relevant accountability to stakeholders, and to its licensees. [page 41]

- It would be useful for APRA to provide to the Scheme Governance Committee redacted and confidentialised data and information about its internal handling of licensee complaints, including the numbers of licensee complaints it handles internally, and how many of those are ultimately referred to Resolution Pathways. [page 44]

The relationship: the Scheme & APRA

It is suggested that:

- The Scheme and APRA together devise opportunities for the Scheme to provide feedback to APRA about systemic issues that arise during the handling of referred matters, and that are relevant to APRA and affect the Scheme; it is important this information is handled in ways that protect the integrity of Scheme users. [page 31]
- When APRA becomes aware of licensees’ non/delayed payment of annual license fees, and these appear to be a form of complaint about licensing arrangements, initial consideration is given to referring them to the Scheme. [page 44]

Publicity

It is suggested that:

- *The APRA website continue to include on each of its web pages readily accessible information about lodging complaints, and about the Scheme. It could also include a specific item in the FAQs page. [Page 31]*
- *All APRA communications with licensees continue to include information about the Scheme. [page 41]*
- *APRA and Resolution Pathways could regularly review the various forms of publicity that APRA provides. [page 31]*

Part A Introductory matters

Background to the 2023 Independent Review

Resolution Pathways was established in 2015, in accordance with Authorisation numbers A91367 – A91375 that were published by the ACCC in June 2014. The same ACCC authorisations included a requirement for conducting an Independent Review of that scheme, and the review was finalised in 2018 with a written report submitted to the ACCC.

In 2020, the ACCC issued a new authorisation (Authorisation number AA1000433) which included that a second Independent Review be conducted of Resolution Pathways, and that a written report be submitted to the ACCC. This is that written report.

Report objectives, structure and methodology

This section provides an overview of the report, outlining its structure and methodology.

Report objective

The key objective of this report is to present the findings of the Independent Review of Resolution Pathways. The report also demonstrates the Reviewer's compliance with the objectives and functions that are specified in the Determination.

Objectives and functions of the Independent Reviewer

The Determination specifies the objectives and functions of the Independent Reviewer as follows:

SCHEDULE D – Independent Reviewer (Condition C6.13)

The objective of the Independent Reviewer is to monitor and report on the operation of the Scheme (including whether the Scheme is resolving Disputes in a timely, efficient and effective manner).

The functions of the Independent Reviewer must include:

- (iii) reviewing:
 - iii.61. the operation and performance of the Scheme (including without limitation the processes and procedures established under the Scheme, and the extent to which any concerns expressed by Members and or Licensees have been addressed by APRA and / or the Facilitator), and

- iii.62. the performance of the Facilitator,
- in accordance with the requirements of condition C3 and the Scheme's objective of resolving Disputes in a timely, efficient and effective manner.
- (iv) as part of item (i) above, obtaining feedback from APRA, the Committee, Members, Licensees and Independent Mediators/Independent Experts about the operation and performance of the Scheme, and the performance of the Facilitator
- (v) no later than six months before this authorisation expires, preparing a report, and providing the report to the ACCC and publishing a public version of the report, on the matters reviewed under items (i) and (ii) above in respect of the period between the commencement of the Scheme and that date that is twelve months before this authorisation expires.

Report structure

The written report includes three sections, Parts A, B., and C.

Part A – Introductory matters

Part B – Independent Review

- Reviews the Scheme's objectives
- Reviews the Scheme's governance, structure, and operation (including its committees, and DR services)
- Reviews the Scheme's results using quantitative data and qualitative information
- Reviews the funding of the Scheme
- Reviews the recommendations from the previous Independent Review (2018)¹
- Reviews the Scheme's relationship with APRA
- Reviews the role of the Scheme Facilitator
- Reviews the Scheme's disputes handling processes, and
- Outlines suggestions to improve the operation of the Scheme and perceptions of its relationship with APRA

Part C – Appendices

The report of previous Independent Review (2018) is included in full at Appendix D.

¹ Boyle, A., *Report of the Independent Review of Resolution Pathways* (Report to ACCC, November 2018).

Review methodology

Quantitative data collection

The Independent Reviewer collected quantitative data from annual reports and, to a more limited extent, from an online survey.

- (i) Annual Reports are publicly available on the Resolution Pathways website
 - a. The review includes analysis of annual reports for the years 2019; 2020; 2021; and 2022
- (ii) The online survey was conducted during October 2023

The online survey was available during a three week period in October 2023. All survey responses were confidential and available only to the Reviewer. The Reviewer downloaded the survey responses, stored them in a secure online facility, and subsequently analysed data and information from them. Interested people were able to contact the Reviewer outside the survey period.

Qualitative information collection

The Independent Reviewer collected qualitative information from annual reports; from the online survey; from interviews and written communications; from the Scheme's website and social media accounts; and from the APRA website.

All interviews were conducted on a confidential basis and all interviewees were assured that:

- No interviews were recorded;
- The reviewer's notes would be stored in a secure online facility; and
- All interview material would be de-identified, analysed, and consolidated into common themes for inclusion in this report.

Social media:

- The Scheme's social media sites were accessed, and screen shots were retained of each:²
 - Facebook
 - LinkedIn
 - Instagram

² These are available at Appendix D.

- The Scheme’s social media accounts were used to publicise the Independent Review, and to invite contributions to it.

Analysis of annual reports

Within each annual report, in addition to numbers of referred matters, key data relevant to the Independent Review includes:

- The number of new matters referred to the Scheme;
- The pathway to which each matter was referred;
- The timeframe within which each matter was resolved (or otherwise became “inactive”);
- The number of complaints about the Scheme and/or the Facilitator;
- The ways in which those complaints were handled; and
- Other information relevant to the operation and performance of the Scheme, and to the performance of the Facilitator.

The annual reports are publicly available, and necessarily include analysis of each year’s activities. This report does not replicate them, and includes analysis that is limited to an overview of the Scheme’s activities since 2018. Part B includes this analysis.

Online survey

Online surveys are a widely used method for collecting data, in particular data that relates to user/consumer satisfaction with specific services. The use of online surveys is now so wide-spread that they could be deemed ubiquitous. The overwhelming majority of online purchases are routinely followed by a satisfaction survey, and, in many cases, face-to-face purchases have similar online survey follow-ups.

There are obvious benefits to online surveys. The internet provides researcher access to large numbers of potential participants; online surveys are relatively easy to design and to distribute; they are also relatively easy to complete and submit; they are seen to be very cost-effective; and their electronic nature makes them relatively easy to analyse. On the other hand, it is well-known that online surveys have quite a low response rate (ie, not many people complete and submit them). Other disadvantages include: it is impossible to know if the nominated participant completed the survey themselves or if people jointly prepared responses; the surveys rely on people having ready access to the internet; they rely on people having a clear recollection of the event they are being asked to report

on (ie, how their matter was handled by Resolution Pathways); and it is difficult to track whether any participant submits more than one response.

Despite the disadvantages, the Independent Review has used an online survey as one method of data collection about people's perceptions of the Scheme. The reasons for this choice include that it is a widely recognised and expected data collection method, and it was used in the previous Independent Review, enabling comparative data analysis. More reliable data collection methods could be used in the future.

*Previous Independent Review*³

This report includes a review of the recommendations made in the previous Independent Review in 2018.⁴

Limitations and anomalies

A key limitation in the data and information collection is the small number of responses to the online survey and to invitations to participate in the review. Overall, only five usable responses were submitted to the online survey, of whom four consented to being interviewed.

The Facilitator Team at Resolution Pathways arranged for an email invitation to be forwarded to an electronic and automatically randomised selection of people who had accessed Resolution Pathways between 2019 and early 2023. The Reviewer agreed that people could be excluded from the selection if they were identified as being at risk in some way if they were to participate. "At risk" included mental health issues as well as other concerns about an individual's well-being if they were to participate.⁵ Some matters that are handled by Resolution Pathways concern license fees and necessarily involve the attendance of APRA and/or OneMusic employees. The Reviewer chose to include these employees in the email invitation because, although they might have some form of bias in their employer's favour, they might also be able to provide valuable information to inform this Review.

Five useable completed surveys were submitted, a response rate of around 10%, which is quite acceptable for an online survey. However, because the numbers of people who have accessed

³ The report of the previous Independent Review is available in full at Appendix D.

⁴ See below, Part B Independent Review, Previous Independent Review (2018).

⁵ These assessments were made by the Facilitator Team.

Resolution Pathways are relatively small, and the number of survey responses is even smaller, there is little validity in conducting extensive analysis of them. A limited analysis is provided below in Part B.

In particular, with such small numbers, extra care has been taken to ensure that the limited analysis does not enable ready identification of any survey participants.

Part B Independent Review

This part of the report describes the various activities undertaken by the Reviewer as well as well as providing analysis findings and outcomes. At various points, sections in italics predict the suggestions that are collated above.⁶ This Report does not include analysis that is already publicly available in the Scheme’s annual reports of 2018, 2019, 2020, 2021, and 2022.⁷ This part of the report uses the Scheme’s annual report data to inform a broader perspective on the operation of the Scheme and the performance of the Facilitator and her team.

Some of the suggestions included in this part of report rely on a cooperative approach on the part of both the Scheme and APRA, which is not likely to affect the Scheme’s independence.

Overview of Resolution Pathways

This section reviews the objectives, structure and operations of the Scheme, with a focus on how those contribute to the Scheme’s effectiveness as a dispute resolution system. It includes the Scheme’s committees and operational bodies, as well as a summary of the processes available for handling referred matters (ie, the resolution pathways).

There are five bodies that contribute to the operations of the Scheme, of which two oversee the Scheme, two are key operational components, and one is a forum for consultation between APRA and the Scheme.

Objectives of the Scheme⁸

As outlined below, the objectives, purpose and expectations of Resolution Pathways derive from the ACCC as well as from the Scheme itself, and they include readily measurable factors, as well as more conceptual expectations that are less easily quantifiable.

In its Authorisation of 2018, the ACCC includes ‘... the Scheme’s objective of resolving Disputes in a timely, efficient and effective manner.’⁹ In its Authorisation of 2014, the ACC also provides this

⁶ See Executive Summary, Recommendations.

⁷ To access the annual reports, see <https://resolutionpathways.com.au/annual-reports/>.

⁸ This issue is also considered later in the report; see below, Review of previous recommendations.

⁹ ACCC Determination Authorisation number: AA1000433 (July 2020), Schedule D – Condition C6.13, (iii).

purpose for the Scheme: ‘mitigate against [anti-competitive] detriments inherent to APRA AMCOS’ licensing arrangements.’¹⁰

The Scheme itself describes the following objectives on its website and in its Annual Report (2020):

‘The resolution pathways are designed to assist parties to resolve disputes or to ensure an external determination of issues where appropriate.’¹¹

‘The resolution pathways are designed to assist parties to resolve disputes or to ensure an independent determination of issues where appropriate. The pathways are available for disputes involving music creators, APRA AMCOS, OneMusic Australia, and/or music users.

- An independent, trained resolution facilitator to match the pathway and the problem.
- A pool of skilled, trained resolvers.
- Peer Assist for music creators to access advice and assistance from their peers.’¹²

‘A primary aim is to have an external scheme that is accessible and that provides safeguards for independent dispute resolution while remaining external to, but funded by, APRA AMCOS.’¹³

The objectives outlined by the Scheme relate to the timeliness, efficiency and effectiveness of its dispute resolution processes, as well as its independence; however, they could be seen to relate indirectly to the ACCC’s expectation about its capacity to mitigate against perceptions of APRA’s industry dominance.

Although the Reviewer has been able to readily assess the first objectives (ie, timeliness, efficiency and effectiveness), there has been some difficulty in assessing the latter two objectives (independence and capacity to mitigate against perceptions). To some extent, the limited feedback

¹⁰ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), 53.

¹¹ <https://resolutionpathways.com.au/>.

¹² Available on <https://resolutionpathways.com.au/about-us/>.

¹³ Resolution Pathways, *Annual Report 2020*, Part 2, 2.

provided by users of the Scheme suggests that, in terms of perceptions, the objective of independence has not been fully met.¹⁴

If one purpose of the Scheme is to stop or limit all detrimental conduct that may arise from APRA's market power, then matters that fall within that category need to be specified or relevant guidelines need to be provided. It would be appropriate for the ACCC to develop these specifications/guidelines, perhaps in consultation with all stakeholders, including the Scheme itself, APRA, and users of the Scheme, and to include them in the next authorisation. If the ACCC considers that this intention is no longer applicable, and sees the Scheme's independent existence (and regular Independent Reviews) as providing sufficient mitigation, that should be made clear.

It would be useful for future Independent Reviews of the Scheme if, in any future authorisations, the ACCC were to describe its expectations for the Scheme more clearly, including the Scheme's scope, purpose, objectives, and independence. It would also be helpful to describe more fully what the ACCC intends in terms of the Scheme as mitigator (and, perhaps, give some examples). This would give future Independent Reviewers clear "measures" for their activities. It might also provide guidance for the Scheme's own explanations of its purpose and objectives.

Committees overseeing the Scheme

Two committees oversee the Scheme, one in terms of accountability, and the other in terms of industry credibility. The summary information included below derives from the Scheme's annual reports, its website and its social media pages.

Governance Committee

The Governance Committee's stated responsibilities are to ensure that the Scheme is meeting the requirements of the ACCC Authorisation (2020), and that the Scheme and the Facilitator Team are regularly monitored. The Committee has an Independent Chair (appointed through an open process in 2019) and four other members, two of whom are music users, and two music creators.

The Governance Committee Charter outlines typical governance responsibilities, including objectives, responsibilities, membership, meetings, ethics and probity, as well as review requirements

¹⁴ The Independent Reviewer is aware that no disputes system can meet all user expectations and that there are likely to always be some negative perceptions about APRA's relationship with the Scheme.

of its own performance.¹⁵ The Charter appears to have been finalised in 2020, and it may be worth reviewing its contents should the ACCC issue a further Determination in 2024 or 2025 (for example, the Charter includes references to a Governance Subcommittee and a Consultative Committee). *In future, it would be good governance practice for the Committee to formally endorse the reviewed Charter.*

Soon after her appointment in 2019, the Chair of the Governance Committee became responsible for accepting and handling any complaints about the Scheme Facilitator. In addition, during 2020, the Governance Committee accepted responsibility for setting performance indicators for the Facilitator. Therefore, the Annual Report for 2020 reports on three sets of goals: for the Scheme; for the Facilitator; and for the Scheme's governance.

Funding

APRA is the Scheme's only source of funding. The Governance Committee is responsible for developing and overseeing the Scheme's annual budget, with APRA providing block funding based on that budget.¹⁶ This block funding provides greater flexibility and responsiveness for the Scheme than did the original per-matter funding approach, the latter being a practical necessity while the Scheme's requirements were originally being established and clarified.

Although information about the funding arrangements is available in the FAQ section of the Scheme's website, it might be helpful for transparency if the description of the funding arrangements were more readily accessible; for example, they could be described on the "About Us" web page (<https://resolutionpathways.com.au/about-us/>).

Stakeholder group

According to the Scheme's website, this body is 'a resource for greater connections to the industry'.¹⁷ As at 20 November 2023, there were eight members of this group, including music users and music creators. In the Annual Report (2019), this group was described as enabling consultation and 'information flow' among stakeholders in the 'APRA AMCOS eco-system'.¹⁸ *It would be useful for similar information about the group to be more readily accessible, perhaps through the Scheme*

¹⁵ A copy of the Charter is available at <https://resolutionpathways.com.au/wp-content/uploads/2020/03/Resolution-Pathways-Charter.pdf>.

¹⁶ See <https://resolutionpathways.com.au/faqs/>; see also ACCC Determination Authorisation number: AA1000433 (July 2020), paragraph C6.9.

¹⁷ Available at <https://resolutionpathways.com.au/stakeholder-group>.

¹⁸ Resolution Pathways, *Annual Report 2019*, 4.

website. That information could include a clear statement about the role and responsibility of the group, as well as its relation to the Governance Committee, and to the Scheme.

A key role of the Stakeholder Group is that members of the Governance Committee are drawn from it.

APRA and Resolution Pathways Interface Committee

The Annual Report (2020) mentions this body, describing it as ‘provid[ing] a focal point for feedback and discussion and continuous improvement.’¹⁹ This body is not mentioned in subsequent annual reports (2021, 2022), or on the Scheme’s website; however, oral communication from the Facilitator and written communication from APRA reports that the Committee continues to exist and meets on an ad hoc/as needed basis.²⁰ Information provided to the Reviewer makes clear that this is not part of the Scheme’s governance and is treated as a working group allowing collaborative work on joint projects. This body has potential importance in simultaneously protecting the Scheme’s independence and creating a transparent consultative forum for APRA and the Scheme.

The members of this committee include the Scheme’s Independent Chair and Facilitator, and ‘senior representatives of APRA AMCOS and OneMusic.’²¹

Operational bodies

Resolution consultants

According to the Scheme’s website, there are 13 resolution consultants available to the Scheme.²² As is shown in Table 1, below, these include seven practitioners with more than one area of speciality, four who are mediators only, and two who are not mediators. The range of process expertise provides a broad scope for the Scheme, and the prevalence of mediators ensures that the Scheme maintains a primary focus on informal and self-determined dispute resolution.

¹⁹ Resolution Pathways, *Annual Report 2020*, 3.

²⁰ Written communication from APRA, dated 19 January 2024; this communication clarifies that APRA participants include APRA’s COO < ‘and other APRA employees as required.’ Communication from Resolution Pathways confirms that its own participants are the Independent Chair and the Facilitator.

²¹ Resolution Pathways, *Annual Report 2020*, Part 2, 4.

²² Available at <https://resolutionpathways.com.au/resolution-consultants/>

Name	Mediator	Group conference	Expert opinion	Expert decision	Coach	Mapper	Peer Pathways management
Alan Limbury	√		√				
Angela Brown SC	√		√	√			
Delwyn Everard	√					√	
Dr David Moore	√	√					
Franca Petrone	√						
Keith Welsh	√					√	√
Lynora Brooke					√		
Margaret Halsmith	√				√		
Michael McMartin	√					√	√
Nina Harding	√						
Peter Singer	√						
Steve Lancken			√				
Tim McFarlane	√						

Figure 1 showing the dispute resolution specialisations of the Scheme's panel of Resolution Consultants.

Facilitator team

In 2019, an additional staff member was appointed to be the primary contact within the Scheme for stakeholders, and for broader administrative purposes. The Facilitator Team administers the Scheme and triages referred matters. In many matters, the Facilitator provides brief and early interventions with a view to achieving prompt resolution, or to otherwise close the matter. In a smaller number of matters, the Facilitator arranges referral to a Resolution Consultant (see above, *Figure 1*).

Technology

The Scheme uses an online case management system that triages and tracks every referral. This facilitates the management and reporting of case records.²³ The online system's security (and confidentiality) is protected by encryption and the use of secure online storage.

The Facilitator is currently establishing additional cyber-security to safeguard the Scheme's administrative functions, including email exchanges and filing.

The resolution pathways (or processes)

The Scheme's website includes separate pages on which there is clear information about how the Scheme itself works (for music users and for music creators), and about the various processes (or resolution pathways) that are available for both groups.

Music users

Four resolution pathways are described for music users:²⁴

- (i) Expert opinion (uses a subject matter expert who provides a non-binding opinion to the parties to the dispute)
- (ii) Negotiation (can be direct negotiation between the parties to the dispute and with the assistance of a member of the Facilitator Team, or a member of the Facilitator Team can negotiate themselves on behalf of either/both parties)
- (iii) Mediation
- (iv) Expert decision (uses a subject matter expert who provides a binding opinion to the parties to the dispute).

Music creators

Five resolution pathways are described for music creators who are members of APRA:²⁵

- (i) Negotiation (can be direct negotiation between the parties to the dispute and with the assistance of a member of the Facilitator Team, or a member of the Facilitator Team can negotiate themselves on behalf of either/both parties)
- (ii) Mediation

²³ See <https://resolutionpathways.com.au/faqs/>

²⁴ Available at <https://resolutionpathways.com.au/pathways-for-music-users/>

²⁵ Available at <https://resolutionpathways.com.au/pathways-for-music-creators/>

- (iii) Mapping (industry and mediation experts guide an informed conversation to reach a non-binding decision)
 - a. Mapping is described as a being similar to mediation with the mapper working with the parties to “map” the dispute and possible paths to resolution; however, the “mapper” has a much more active role than a traditional mediator: drawing on their own industry expertise, the mapper is able to contribute suggestions for resolving the dispute, draft any agreement, and suggest useful resources
- (iv) Expert opinion (uses a subject matter expert who provides a non-binding opinion to the parties to the dispute)
- (v) Expert decision (uses a subject matter expert who provides a binding opinion to the parties to the dispute)

Usage of the Scheme

Overview

A key observation of data available in the previous Independent Review and in the Scheme’s annual reports (2019 – 2020) is that, although usage of the Scheme has declined slightly, average annual rates of usage have plateaued at around 14 new referrals each year.

This review has also found that, although usage of the Scheme appears to have plateaued, and usage rates are relatively low, referrals appear to have declined during the reporting period (August 2019 – August 2022) from 18 new referrals in 2019 to 13 new referrals in 2022. It should be noted that the intervening period includes the interruptions of COVID-19. Based on pre-COVID levels, it seems likely that referrals will continue to rise.

Of key interest to the ACCC in the context of its Determination in 2020, the number of licensee referrals has varied slightly between 2019 and 2022. There were 9 new licensee referrals in 2019, 5 in each of 2020 and 2021, and 8 in 2022. In addition, the number of matters concerning music creators (ie, writers/musicians) in dispute with APRA has also varied: 9 in 2019, 4 in 2020, 5 in 2021, and 3 in 2022. If the referral figures for 2019 and 2022 are compared, the similarities between the new referrals for licensees suggest that 2022 might signal a possible resurgence of activity to pre-COVID-19 levels; however, this is not yet clearly ascertainable. These figures are summarised below, in Figure 2.

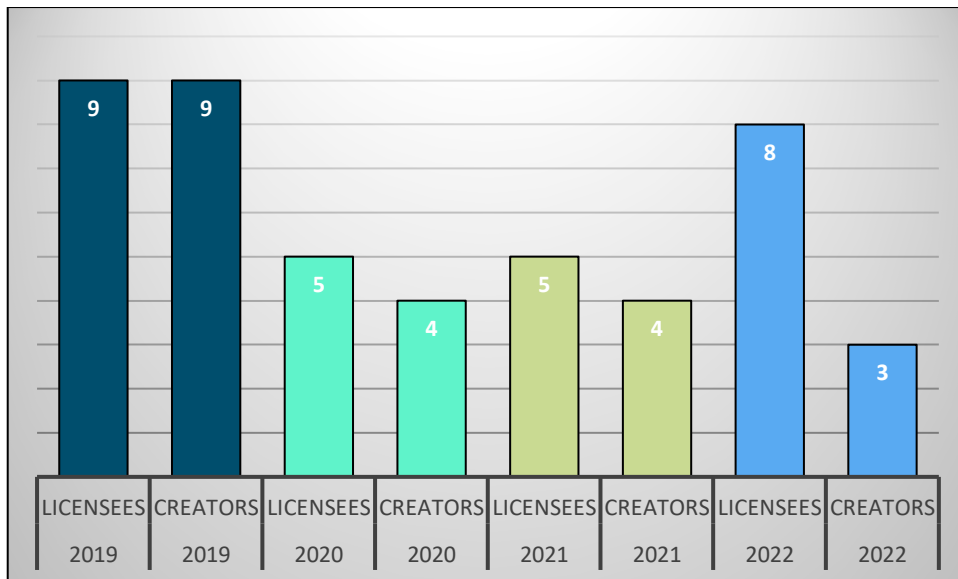


Figure 2 showing new referral figures for 2019, 2020, 2021, 2023 (from Resolution Pathways Annual Reports).

Satisfaction with the Scheme

In accordance with the ACCC Authorisation, the Reviewer obtained feedback from APRA, the Scheme Governance Committee, APRA members and licensees, independent dispute resolvers, and from staff of Resolution Pathways.²⁶

The limited input this Review has received from Scheme users and from others is unanimous in its reported satisfaction with the Scheme itself and the way in which the Scheme and its Facilitation team handle matters referred to it. Some concerns have been expressed to the Reviewer about the Scheme’s perceived lack of independence from APRA, and the perceived lack of transparency regarding the relationship between the two. The previous Independent Review reported similar concerns.

In its current structure, the Scheme is closely tied to APRA, necessarily limiting its scope. There is no way of reliably ascertaining the number of licensee disputes that are not referred either to APRA or to the Scheme;²⁷ this issue was noted in the previous Independent Review and feedback to the Reviewer suggests this may continue to be an untapped area.

²⁶ ACCC Determination Authorisation number: AA1000433, July 2020, Condition C6.13, (iv).

²⁷ For example, rather than raise a disputed issue, some licensee may choose not to pursue it with APRA, or may choose to delay payment of their annual fees.

Feedback to the Reviewer – online survey

The online survey was made available through the online platform, Elker.²⁸ Elker maintains a high level of online security – including confidentiality – and is based in Australia (the latter reducing the potential for security breaches). Online security and confidentiality are recognised key factors in enlisting responses to online surveys. Although the Facilitator of Resolution Pathways is a co-founder of Elker, the Independent Reviewer was satisfied that any online survey conducted through that platform would enjoy higher security protections than many other services and provide stronger online protection and confidentiality.

Hyperlinks to the survey were included in an email invitation prepared by the Independent Reviewer and distributed by the Facilitator Team to a random selection of previous users of Resolution Pathways. The Reviewer was listed as the key point of contact for any queries. The online survey remained available to invitees for three week period.

Ultimately, five useable completed surveys were retrieved by the Reviewer.²⁹ These included three from self-described licensees; one from a self-described writer member; and one from an APRA/One Music employee. This represents a cross-section of the Scheme’s users, and is almost 10% of the number of matters referred to Resolution Pathways during 2018 – 2022, which is an acceptable proportion. However, it is a very small number of responses for analysis purposes, and a key concern is that analysis of this small number risks exposure of participant identity. For this and other reasons, the survey data is subjected to only cursory analysis. Of the three licensees who completed the online survey, two consented to being interviewed for this review, and both expressed concerns about the influence they perceive that APRA exerts over Resolution Pathways.

In the Independent Review of 2018, it was reported that, during the two years prior to the review, only six licensee matters were referred to the Scheme. In the online survey for that same review, only two responses related to matters concerning licensees. Both those numbers were too small to warrant analysis.

Feedback to the Reviewer – interviews

A small number of Scheme users, including licensees, sought interviews with the Independent Reviewer. Not all interviewees were survey responders. Although, as a proportion of user numbers,

²⁸ Available at <https://elker.com/>.

²⁹ Additional unusable responses included incomplete surveys, and test responses.

the number of interviewees was larger than in the previous review, the numbers are still too low to warrant reliable analysis.

Very generally, the interviewees were satisfied with the operation of the Scheme and the Facilitator Team; however, only one did not express some concerns about the perceived relationship between APRA and the Scheme and the likely amount of influence APRA might exert over the Scheme. It is likely that such concerns cannot ever be completely eradicated; however, elsewhere in this report are suggestions for improving transparency which might influence perceptions of the relationship between the Scheme and APRA.

As has been stated elsewhere in this report, this review has not found any instances of APRA inappropriately influencing the Scheme and its operations, and the Scheme itself has taken steps to safeguard its own independence and operational transparency.

The perceptions of APRA's levels of influence may arise from perceptions of that organisation's own operations.

APRA publicity

It has been widely recognised for some time that people's lack of awareness about dispute resolution services necessarily limits their access to them.³⁰ So, it can be expected that, to a large extent, APRA's publicity of the Scheme would affect people's awareness of the Scheme's existence and thus influence the Scheme's usage rates. In the online survey included in this Independent Review, more responders claimed having heard about the Scheme on the APRA website than from any other information source. The ACCC recognised this and, in its Authorisation (2020), included the following condition:

'The APRA website (www.apraamcos.com.au) and OneMusic website (www.onemusic.com.au) must have a prominently displayed link to information about available dispute resolution processes on all pages of the websites, including the Scheme, which must be visible on landing on all pages of these websites.'³¹

The ACCC Determination refers specifically to APRA and OneMusic, and the Reviewer has taken both websites into account in terms of the publicity they provide for Resolution Pathways. Information made available to the Reviewer suggests that the majority of licensees of APRA are more likely to use

³⁰ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Productivity Commission, 2014).

³¹ ACCC *Determination Authorisation number: AA1000433* (July 2020), 112, para C6.22.

the One Music website, and the latter includes more readily accessible information about Resolution Pathways than does the former. Perusal of both websites confirms this.

At the time of writing this report, the APRA website does include information about Resolution Pathways; however, the information could be more readily accessible. For example, on APRA's homepage (<https://www.apraamcos.com.au/>), the footer includes 'Alternative Dispute Resolution', though without any clear link to Resolution Pathways or clear indication of what the topic is about. At the top of the homepage is a drop-down menu "About APRA AMCOS". This includes "Governance and Policy", which, if selected, reveals "Policies and Procedures", which, in turn, if selected, reveals "APRA AMCOS Complaints procedure", and "APRA AMCOS Disputes procedures" (<https://www.apraamcos.com.au/about/governance-policy/policies-procedures>). Embedded in each is a hyperlink to Resolution Pathways own website.

On the homepage of the OneMusic website, the footer includes "Complaints and dispute resolution" (<https://onemusic.com.au/about/complaints-and-dispute-resolution/>) which, if selected, includes hyperlinks to the Resolution Pathways website.

Certainly, the OneMusic website provides more accessible information about the Scheme than does the APRA website, confirming its focus on matters relevant to licensees. The Reviewer is aware that the *Code of Conduct for Copyright Collecting Societies* clearly differentiates between complaints and disputes;³² however, the APRA AMCOS and OneMusic websites include the Scheme as a point of reference when complaints are not resolved (almost as a point of review), and as a direct reference point for raising disputes.

Information made available to the Reviewer by APRA about publicity of the Scheme makes clear:

'In addition to the information available via a visible link on every page of its website and of the OneMusic website, APRA also provides information regarding the Scheme as follows:

- scheduled licensee communications as required by the authorisation
- scheduled member communications
- OneMusic correspondence that is directed to particular music users, including licensees
- OneMusic information guides
- OneMusic licence agreements

³² See below, Relationship between Resolution Pathways and APRA.

- In-house legal correspondence
- External legal correspondence.³³

On the other hand, other feedback provided to the Reviewer claims that APRA and OneMusic could do more to publicise the Resolution Pathways service, and it is possible that usage of the Scheme could increase if the relevant licensees were more aware of its existence. *To this end, the APRA website could include on each of its web pages more readily accessible information about lodging complaints and disputes, and about the Scheme. It could also include a specific item in the FAQs. APRA and Resolution Pathways could regularly review the various forms of publicity that APRA provides.*

Other observations

Additional feedback provided to the Reviewer suggests that the Scheme’s operations in handling disputes and complaints between APRA licensees and APRA sometimes provide valuable insights into systemic issues within the latter body; however, there are very few, if any, opportunities for providing relevant feedback to APRA. This issue was raised briefly in the previous Independent Review (2018), but not considered in any detail because, at the time, the Reviewer’s interpretation was that it was ‘outside this Review’s scope.’³⁴ In the context of the current Independent Review, the Reviewer’s interpretation is that there are likely to be systemic factors that influence the effectiveness of the Scheme and are therefore within the scope of the Review.

It may be that, in discussions between the Scheme and APRA, opportunities could be identified that enable feedback from the Scheme about systemic issues relevant to APRA, while also protecting the integrity of Scheme users. *The APRA and Resolution Pathways Interface Committee could provide a useful conduit for such information.*³⁵

Assessing the Scheme’s effectiveness

According to its annual reports, for Resolution Pathways, the Scheme’s effectiveness is regularly assessed against its stated goals. The annual report for 2022 describes achievements against the goals for the Scheme (relating to accountability, transparency, and independence) and for the Facilitator

³³ Written communication from APRA, dated 19 January 2024.

³⁴ Boyle, A., *Report of the Independent Review of Resolution Pathways* (Report to ACCC, November 2018), 28-29 (this Report, page 88).

³⁵ For information about this Committee, see above, Overview of Resolution Pathways, Committees overseeing the Scheme.

(including ‘successful resolutions’³⁶). In keeping with most service providers in this and other industries, the Scheme’s users are periodically surveyed to obtain their views about their experience with the service and their levels of satisfaction.

In the realm of dispute resolution, ascertaining effectiveness is complex.

The terms “timeliness”, “efficiency”, and “effectiveness” appear frequently in the dispute resolution literature, in evaluations of various dispute resolution programs, and in reports about court-connected dispute resolution and mediation programs. Despite being widely used, they are rarely explained, and not always well understood, even by dispute resolution practitioners.

It is likely that the terms gained their prominence from the Australian Law Reform Commission (ALRC) which mentioned them in its 1998 Report, specifically in relation to dispute resolution processes.³⁷ For example in its report, the ALRC said that a timely process minimised delay, minimised the duration of the process, and minimised the time people needed to devote to their participation. An efficient process avoided waste of public funds, reduced broader costs, and considered the needs of others waiting to access the same resources.

Similarly influential was the work of the then National Dispute Resolution Advisory Council (NADRAC) which, in 2000, proposed three objectives for dispute resolution that are similar to those defined by the ALRC, including that disputes should be resolved (or at least limited) effectively and efficiently (NADRAC included compliance with the agreement as part of efficiency).³⁸

Although the terms set out by the ALRC and by NADRAC remain readily measurable in a court or tribunal context, they can mean many things to many people and are now acknowledged as being largely unmeasurable in the less definitive context of dispute resolution, making them problematic benchmarks in that context.³⁹ In terms of timeliness, in non-determinative processes, such as mediation, it can be difficult to formally determine when the process starts and ends: pre-process activities can be quite drawn-out as the parties and practitioner prepare to engage in the process itself; after the formal process has ended and there is an agreement, there can be a range of actions required of each side and a significant amount of time can pass before anyone can truly say that the agreement has been implemented and the process has ended.⁴⁰ Similarly, efficiency is difficult to clarify in the context of the non-public sector. For example, the cost of the process is extremely variable according

³⁶ Resolution Pathways *Annual Report 2022*, 16.

³⁷ Australian Law Reform Commission, *Rethinking the Federal Litigation System* (Issues Paper 20, ALRC, 1998).

³⁸ NADRAC, *The Development of Standards for ADR* (Discussion Paper, Commonwealth of Australia, March 2000).

³⁹ Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

⁴⁰ Sourdin, T., *The Timeliness Project* (Background Report, ACJ, October 2013).

to the range of fees payable to private dispute resolution practitioners. The annual reports of Resolution Pathways demonstrate the variability of both costs and timeliness.

Effectiveness may be the most problematic of the three standard measures. For the ALRC in 1998, effectiveness encompassed participants' compliance with the process outcome, finalisation of the dispute, and 'certainty in the law'.⁴¹ The first two are difficult to ascertain or to measure in the context of dispute resolution, while the confidentiality of most DR processes precludes assessment of 'certainty in the law'. Many court-connected mediation programs measure effectiveness in concrete terms: reaching a resolution, which can be confirmed from their statistical records on whether or not an agreement is reached as part of the process, or whether the matter has been withdrawn from the court lists (for some courts/tribunals this is a valid measure of process effectiveness). Hence, so-called simple effectiveness refers to such concrete outcomes where the process achieves some form of agreement/settlement.⁴² On the other hand, so-called complex effectiveness refers to outcomes that are less definitive and can include participant satisfaction, an improvement in participants' communication or their relationship, levels of compliance with the terms of agreement, the level of personalised detail in the terms of their agreement/settlement, perceptions of fairness, narrowing the issues in dispute (or limiting the dispute), and the levels of compliance with the terms of agreement. The dispute resolution and mediation literature is steadfast in its promulgation of various combinations of the latter cluster of measures as defining factors for the effectiveness of processes such as mediation and conciliation.⁴³ All of these factors are inherently difficult to measure, and despite their apparent importance, most are rarely included in evaluations of dispute resolution programs and services.

Although user satisfaction is widely considered in the dispute resolution industry to be a key effectiveness indicator, there is limited understanding about what it might include, or the complexity of its assessment, with the result that it is rarely well assessed, and its key components are largely unclarified.⁴⁴

⁴¹ Australian Law Reform Commission, *Rethinking the Federal Litigation System* (Issues Paper 20, ALRC, 1998), 3.16.

⁴² For explanations of simple and complex effectiveness, see Boyle, A., 'Effectiveness in Mediation: A New Approach' (2017) 12 *Newcastle Law Review* 148.

⁴³ There are many descriptions of these in the dispute resolution literature; for example, see Boule, L., *Mediation: Principles, Process, Practice* (3rd Edition, LexisNexis, Australia, 2011); Mack, K., *Court Referral to ADR: Criteria and Research* (Report to National Alternative Dispute Resolution Advisory Council and the Australian Institute of Judicial Administration, 2003); Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

⁴⁴ For more information about assessing user satisfaction, see Bekkers, R., and P. Wiepking, 'Accuracy of Self-reports on Donations to Charitable Organisations' (2011) 45(6) *Quality and Quantity* 1369; Bush, M., and A. C. Gordon, 'Client Choice and Bureaucratic Accountability: Possibilities for Responsiveness in a Social Welfare Bureaucracy' (1978) 34(4) *Journal of Social Issues* 22; McCord, J., 'A Thirty-Year Follow-up of Treatment Effects' (1978) 33(3) *American Psychologist* 284; Willis, R.,

The upshot of the complex issues relating to effectiveness in dispute resolution is that programs and services fall back on the relatively easy task of measuring their own rates of achieving settlement, and it is rarely acknowledged that the focus on settlement can detract from any focus on the needs of the disputants themselves and their roles in the achievement of the settlement. This can lead to the apparent contradiction of a process that reaches an agreement while leaving the disputants dissatisfied.⁴⁵

In the absence of clear industry-wide benchmarks, many programs and services choose to measure their effectiveness in their own context, and Resolution Pathways does this by maintaining a valuable focus on providing an independent service, and achieving measurable outcomes in a reasonable time after referral, all of which are clear indicators of its effectiveness. This is well demonstrated in the annual report for 2022, mentioned above. However, that annual report does not include any goals relating directly to ensuring that the measurable outcomes meet the needs of the Scheme's users, or the relevant disputants. *Feedback to the Reviewer suggests a high level of satisfaction with how the Scheme and the Facilitator operate; however, it would reflect well on both if there were goals that included reference to the users of the Scheme as well as to its operation.*

In future, where the terms timeliness, effectiveness and efficiency are used in relation to the Scheme, their intended meaning should be at least briefly explained. It may be that the Scheme itself, in consultation with its users and with APRA, could devise its own effectiveness measures

It would be more realistic and respectful of the Scheme's work if an alternative set of complementary effectiveness measures were to be devised, although there should continue to be monitoring of the numbers of disputes that are resolved as well as of the timeframes within which referred matters remain active. For example, online survey responses in the previous Independent Review and in this one, show that people access the Scheme either through word-of-mouth or via the APRA website. This suggests that, as long as people keep using the Scheme at a similar rate (or increase its rate of usage), it is likely that the Scheme is satisfying their needs. The lack of complaints about the Scheme is also indicative of satisfaction with the Scheme. It is possible to include a timeliness measure; however, it must have inherent flexibility that accommodates the variability of dispute resolution processes. For example, within the Scheme's records, a number of matters is always carried over from

M. Evandrou, P. Pathak, and P. Khambhaita, 'Problems with Measuring Satisfaction with Social Care' (2016) 24(5) *Health and Social Care in the Community* 587.

⁴⁵ Imperati, S., and S. Maser, 'Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs and Manipulation?' (2014) 29(2) *Ohio State Journal of Dispute Resolution* 223; Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

one year to the next; this does not imply “inefficiency”, but a capacity to accommodate the complexities of each matter. Another useful effectiveness measure would be to compare the Scheme’s data with data from other similar schemes.

Previous Independent Review (2018)

This section includes a comparative analysis based on the recommendations included in the report of the previous review. The information included in the analysis has been drawn largely from Resolution Pathways annual reports (2019, 2020, 2021, and 2022), with some additional material from the Scheme’s website. The recommendations from the previous report have been clustered under four subheadings: Perceptions of the independence of the Scheme; The Scheme’s administration (including record-keeping) and structure (including Committees); Information, documentation, and public image; and APRA.

Review of previous recommendations

Perceptions of the independence of the Scheme

- *A broader source of funding, and a wider market focus would reduce the Scheme’s dependence on APRA AMCOS, and would go some way towards addressing existing perceptions of APRA AMCOS influence over the Scheme. To ensure the Scheme’s future viability, it would be appropriate for alternative funding options to be canvassed, including industry funding options.*

This recommendation was aimed at reducing the Scheme’s dependence on APRA. However, it has since become clear that it would be impracticable for the Scheme to source alternative funding options (For example, during the current Independent Review, it has been suggested that any form of industry funding would be strongly resisted by the industry itself)

The current Independent Review has given further consideration to perceptions of the Scheme’s independence, and suggests an alternative approach, based on increased transparency.⁴⁶

- *It would be appropriate to ensure all Scheme documentation bear the Scheme’s own name and logo.*

This recommendation has been implemented.

⁴⁶ See below, Relationship between Resolution Pathways and APRA.

The Scheme's administration (including record-keeping), and structure (including Committees)

Administration – funding

- *A broader source of funding, and a wider industry focus would reduce the Scheme's dependence on APRA AMCOS, and would go some way towards addressing existing perceptions of APRA AMCOS' influence over the Scheme. It would be useful for alternative funding options to be canvassed, including industry funding options. For example, if APRA AMCOS is seen to be the controller of song royalties, and PPCA as the controller of recording royalties, it might be appropriate to consult industry bodies such as PPCA and invite their input to options for the Scheme's future.*

As noted above, the Scheme has maintained its funding arrangements with APRA due to the impracticality of alternative approaches.

- *It may improve the transparency of the Scheme and its operation if each Annual Report included a section for reporting on the Scheme's funding arrangements. The section could include separate reports for Operational Funding, and for the Funding of Dispute Resolution Services.*

The Scheme's annual reports for 2019, 2020, 2021, and 2022 do not include any budget report, or Statement of Accounts (or similar financial statement/report). This would be a valuable contribution to the Scheme's transparency and accountability, as well as being a public acknowledgement of the role of APRA in funding the Scheme. As is suggested elsewhere in this report, transparent acknowledgement of APRA's funding role may go some way towards addressing the persistent perceptions of APRA's influence over the Scheme.

Although the Scheme's website clearly describes the funding arrangement with APRA,⁴⁷ it would be beneficial to include a similar description in the Scheme's annual reports. According to the Scheme's annual reports, only 2019 includes a description of the Scheme's funding arrangements that specifies the role of APRA as funder. The annual reports of 2020, 2021, and 2022 describe the Scheme's funding arrangements in some detail though without clearly naming APRA as the source of funding.

Although it may seem to be counter-intuitive, transparency in this regard would be a likely benefit to the Scheme. In the absence of clear information about APRA being the source of Scheme funding, there is room for much uninformed conjecture which can be readily disarmed by a simple statement such as: "Block funding is provided by APRA on an annual basis to enable the basic operation of the Scheme. In addition, when requested by the Scheme Facilitator, APRA provides specific funding for dispute resolution professionals on a case-by-case basis. These arrangements do

⁴⁷ The Governance Committee works with the Resolution Facilitator to establish a budget for the year. This is then provided by APRA AMCOS after consultation. Having block funding (rather than funding per incident or matter) means that Resolution Pathways can operate externally and independently', see <https://resolutionpathways.com.au/faqs/>.

not interfere with the Scheme or with its operations, and, within the Scheme itself, a range of governance provisions have been established to protect the Scheme’s independence of APRA.”

It might be helpful for the purposes of transparency if the Scheme’s annual reports were to include a summary statement of accounts, or financial statement, outlining a summary of the block funding it receives from APRA and a similar summary of how those funds are spent. For example:

“Block monies received:	\$XXX
Total expenditure (Facilitator annual stipend; staff salaries; computers and technology; administration; committee expenses):	\$XXX
Balance as at 30 June XXXX	\$000”

Administration – record-keeping

- *The Facilitator is to be commended for her pursuit of suitable computer software that enables the automatic registration, monitoring, and tracking of each matter; this will enable an inherently consistent record-keeping and reporting regime, as well as enabling the tracking of timeliness.*

This approach is now a routine part of the Scheme’s operation.

The Facilitator is also currently establishing cyber-security protections of broader administrative records including emails and Committee records.

Structure – Committees

- *Now that the Scheme is beyond its development stages, it would be appropriate to review the purpose of the Governance Committee, the Steering Committee, and other Sub-Committees, and to clarify and document their roles in the operation of the Scheme.*

The Scheme is now supported by three bodies:

- Governance Committee, with an Independent Chair appointed through a formal selection process;
- Stakeholder Group; and
- APRA and Resolution Pathways Interface Committee (it is not clear if this body continues to meet).

The Resolution Pathways website and annual reports include clear information about the Governance Committee in particular (including its membership). Similar information about the other two bodies could also be provided.

- *The advisory role of the Steering Committee would be reinforced if the Facilitator were to attend meetings only as a non-member, and if her role in Committee meetings were to be as a reporter on the Scheme, including its finances and Annual Reports; the Committee members should elect a Chair from among themselves; and the affiliations and representative status of each Committee Member be clearly described on the Scheme’s website.*

This recommendation has been implemented. As has been noted elsewhere in this report, there is a Governance Committee with an Independent Chair and the Facilitator reports to this committee on the Scheme’s operations. The current Independent Chair was appointed in 2019 following a formal selection process.

Structure – operation

- *Internal management of the Scheme: It is suggested that two roles be established to manage the Scheme. One role would administer the Scheme, including the administrative side of referrals to the panel of third-party neutrals (a Scheme Co-ordinator role); and one role would be a first point of contact for the Scheme, including responsibility for attempting early and quick resolution of matters, as well as assessment of referral to other processes within the Scheme (a Case Manager).*

This recommendation has been implemented. There is currently a Facilitator Team that includes the Facilitator plus two other staff members. This team oversees the operation of the Scheme, including maintenance of the online intake and triage process, and also provides a first point of contact for users of the Scheme. The Facilitator’s role includes providing informal early intervention and opportunities for prompt resolution of less complex matters.

- *Panel of Third-Party Neutrals: It is suggested that the panel be reviewed with a view to: increasing the number of industry peers and Experts, and improving the panel’s gender balance.*

This recommendation has been implemented,

As noted elsewhere in this report, the current Panel of Resolution Consultants includes gender balance and practitioners with a valuable cross-section of skills and backgrounds. The recent appointment to the Governance Committee of a person from a First Nations organisation signals the Scheme’s move towards more cultural diversity.

- *Analytical Framework: It is suggested that the Scheme adopt the Analytical Framework outlined in this Report, and that it include clear descriptions of the Scheme’s various accountability responsibilities.*

This is no longer relevant. The Scheme has established its own accountability framework which is readily accessible through its website, social media accounts, and its annual reports.

Information, documentation, and public image

Purpose, objectives, and goals

- *If the Scheme continues operating after June 2019, it would be useful to review its stated purpose, objectives, and goals, and to include them on a dedicated part of the Scheme website.*

This recommendation has been implemented.⁴⁸ The Scheme’s website includes the following objectives and purpose/aims:

Website homepage: ‘The resolution pathways are designed to assist parties to resolve disputes or to ensure an external determination of issues where appropriate.’

Website ‘About us’:⁴⁹

‘The resolution pathways are designed to assist parties to resolve disputes or to ensure an independent determination of issues where appropriate. The pathways are available for disputes involving music creators, APRA AMCOS, OneMusic Australia, and/or music users.

- An independent, trained resolution facilitator to match the pathway and the problem.
- A pool of skilled, trained resolvers.
- Peer Assist for music creators to access advice and assistance from their peers.’

Annual Report 2020: ‘A primary aim is to have an external scheme that is accessible and that provides safeguards for independent dispute resolution while remaining external to, but funded by, APRA AMCOS.’⁵⁰

Annual Report 2021 includes a ‘Governance and Risk Matrix’ that outlines goals for the Scheme and for its Governance Committee.⁵¹

Annual Report 2022 reiterates the goals from the previous year’s report.⁵²

Website and information

- *The Scheme website would benefit from a review that rectifies the “glitches” listed in Part C [3 (ii)]; it may also be appropriate to seek stakeholder input to the future design and focus of the website.*

These issues have been fixed.

⁴⁸ The complexities inherent to the Scheme’s objectives are also discussed earlier in Part B of this report.

⁴⁹ Available on <https://resolutionpathways.com.au/about-us/>.

⁵⁰ Resolution Pathways, *Annual Report 2020*, Part 2, 2.

⁵¹ Resolution Pathways, *Annual Report 2021, Annexure A: Resolution Pathways Governance Committee Governance and Risk Matrix*.

⁵² Resolution Pathways, *Annual Report 2022*, 16.

- In future, it may be helpful for potential users of the Scheme if the website were to include a single, clear, plain English description of how the Scheme operates, as well as some simple explanations of the DR processes that the Scheme provides. The explanatory page should be designed for use by stakeholders as well as users of the Scheme. The document could emphasise that the Scheme’s aim is to help disputants/complainants finalise their matter in ways that each side can accept, and to do so as promptly and informally as is possible. The document could include an explanation of the sequence of processes available within the Scheme, noting that any of them can be accessed if people prefer, if resolution has not otherwise been achieved, or if the Facilitator considers that any process is more appropriate for their particular matter. The processes could be presented as cascading logically from least interventionist (e.g., the Facilitator attempting early and informal intervention and resolution), through consensual processes (such as mediation, mapping, and peer assist), and ultimately leading to the Scheme’s determinative processes. This information should include a brief description of the procedure for appointing Experts.*

This recommendation has been implemented. There is a wealth of information available on the Scheme website. This is augmented by less comprehensive information on the Scheme’s various social media accounts.

Relationship between Resolution Pathways and APRA

The relationship between Resolution Pathways and APRA is complex in that, on the one hand, it is intended to provide a level of accountability to balance the latter organisation’s position of dominance in its sector,⁵³ while, on the other, the Scheme is dependent on APRA which is both the Scheme’s sole funding source and the Scheme’s main source of referrals. As the ACCC itself has acknowledged, it is impracticable to change the funding arrangements. At the same time, it is important to safeguard the Scheme’s independence – and perceived independence – and ensure the funding arrangements do not interfere with or impede the Scheme’s overall activity, nor the specific operations and functions of the Facilitator Team. To this end, the Scheme has established Governance structures designed to oversee its operations and safeguard its independence. Feedback provided to the Reviewer suggests there remain some ongoing and persistent concerns about the levels of influence which APRA is able to exert over Resolution Pathways.

Although APRA’s internal operations and relationships with its stakeholders may influence these perceptions, and most of those operations and relationships are not relevant to the terms of reference for this Review, it appears that some APRA activities might influence the operation of the Scheme, and these are considered in this section.

⁵³ See below, Feedback from Scheme users.

In the previous Independent Review (2018), it was suggested that APRA should be accountable (for the provision of material and human resources) to their own stakeholders, such as Company Boards, as well as to the Scheme's stakeholders and users.⁵⁴ This suggestion about APRA accountabilities was intended to enhance both the organisation's credibility within its industry as well as its transparency regarding its role in the operations of the Scheme. The original recommendation could also be extended to include APRA's licensee members. The suggestion is repeated in this Report, though in the context of transparency.⁵⁵ Providing such accountability for the Scheme is not intended to affect the confidentiality of APRA's commercial activities.

Below are sections that consider feedback to the Reviewer from Scheme users; funding arrangements; the potential for additional information to be provided by APRA to the Scheme; APRA's influence on referrals to the Scheme; and the Scheme's potential contributions to APRA's operations.

Feedback from Scheme users

In the history of APRA's appearances before the then Competition Tribunal (1999) and the ACCC, it is clear that the requirement for APRA to provide ADR services and, subsequently, an ADR scheme, has had the objective to 'mitigate against [anti-competitive] detriments' inherent to APRA AMCOS' licensing arrangements.⁵⁶

Information available to both the previous and current Independent Reviews, suggests that a small number of users perceive that the Scheme's operations are strongly influenced by APRA. Although the numbers are small, it is not clear how many others share the perceptions, but chose not to participate in either Independent Review. The Reviewer has noted that the people who participated in the previous Independent Review were not the same as those who participated in the current review, suggesting some persistence in the perceptions.

In their responses to the online survey for the current review, and in their discussions with the Reviewer, a small number of Scheme users expressed concerns that APRA was able to exert high levels of influence over the Scheme. These concerns appeared to be based largely on perceptions of APRA itself, and the Reviewer did not find any information to substantiate these concerns.

⁵⁴ Boyle, A., *Report of the Independent Review of Resolution Pathways* (Report to ACCC, November 2018), 36 (page 93 of this Report).

⁵⁵ See above, Executive summary, Recommendations.

⁵⁶ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), 53.

The feedback from Scheme users suggests that, for some people, the Scheme’s operation may not be meeting the original mitigation objective. Although it is unlikely that such perceptions can ever be completely assuaged, the following discussion is intended to address perceptions of the relationship between the Scheme and APRA.

Funding arrangements

APRA is the sole source of funding for the Scheme. According to the Scheme’s annual reports (and as specified in the Determination⁵⁷), the Governance Committee prepares an annual budget which is submitted to APRA and, on that basis, APRA provides the annual block funding for the operation of the Scheme. The block funding covers the costs of the Scheme’s operations, including the Facilitator’s annual stipend. Where additional funding is required, the Scheme’s Governance Committee makes an appropriate application to APRA for further funds. Within the Scheme, the use of external dispute resolution professionals is funded separately by APRA on a case-by-case basis.

These arrangements make the Scheme very reliant on its relationship with APRA, and it is easy to see how they might affect Scheme users’ perceptions. Earlier in this Report, suggestions are made to influence those perceptions increasing transparency around APRA’s provision of block funding.⁵⁸

Additional information

In the context of Resolution Pathways and APRA, there is some additional information that might contribute to the Scheme’s planning and operations, and perhaps lead to an increase in its effectiveness. This includes basic information about the broad “population” of licensees; about the number of licensee complaints that APRA handles internally; and the numbers of delayed or non-payment of annual licenses.

Number of licensees

It is unclear from the APRA website, or from its annual reports, how many licensees pay annual fees, although there are at least 115,000 music creators to whom license fees are apportioned.⁵⁹ This is an important figure that provides a contextual setting for the operations of Resolution Pathways, and could inform predictions of Scheme usage that are based on proportional and comparative data.

⁵⁷ ACCC Determination Authorisation number: AA1000433 (July 2020), paragraph C6.9.

⁵⁸ See above, Overview of Resolution Pathways, Funding; and Previous Independent Review (2018).

⁵⁹ See <https://www.apraamcos.com.au/music-creators/membership-explained>.

It seems likely that, with a reported total license income of around \$454,000,000 per year,⁶⁰ there is a significant number of licensees paying fees to APRA, and it has been reported to the Reviewer that 'APRA (trading under the business name APRA AMCOS or OneMusic Australia) licensed over 120,000 separate businesses and events during the 12 month period ended 30 June 2023.'⁶¹ The APRA AMCOS Transparency Report 2022-2023 lists a wide range of areas in which licensees operate: public, community, and private/commercial broadcasting; cinemas; digital media (including streaming, downloads, and websites); general (includes educational settings, churches, airlines, childcare, funeral directors, restaurants, gyms, sporting events); live performances (includes concerts, drama performances); nightclubs (includes karaoke bars); cruise ships; and workplace music.⁶²

Number of licensee complaints handled internally

In its 2018 Determination, the ACCC quoted an earlier decision by the then Competition Tribunal:

We [the Competition Tribunal] consider that the introduction of [an ADR] process would encourage APRA to be more receptive to the complaints of its users and lessen the types of complaints [relating to] APRA's inflexibility and resistance to modifying licenses.⁶³

In the *Code of Conduct for Copyright Collecting Societies* ('the Code'), as amended May 2022, "complaints" and "disputes" are carefully differentiated.⁶⁴ Briefly, a complaint refers to the Collecting Society's behaviour towards a licensee (ie, 'has fallen short of a standard of conduct required of it'⁶⁵), while a dispute concerns 'the taking of rival positions ... as to ... legal rights and obligations'.⁶⁶ However, the definition of a complaint includes where there is an allegation that the Collecting Society 'has been rude in dealing with the licensee over the Dispute'.⁶⁷ The OneMusic website reflects this differentiation.⁶⁸

APRA refers licensee *disputes* to Resolution Pathways, and is not required to refer any licensee *complaints*. The APRA and OneMusic websites make clear that the Scheme is available for complainant

⁶⁰ 'License fee revenue from Digital service providers ... General businesses ... Broadcasters ... International affiliates ... Education providers', APRA AMCOS, *Annual Financial Report 2022-2023*, 37; available on https://assets.apraamcos.com.au/images/PDFs/About/2023-APRA-Statutory-Accounts_Final-200923.pdf, 25.

⁶¹ Written communication to the Reviewer, dated 19 January 2024.

⁶² APRA AMCOS, *Annual Transparency Report 2022 – 2023*, available on https://assets.apraamcos.com.au/images/PDFs/About/Transparency-Report_FY2023.pdf.

⁶³ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211*, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), 58.

⁶⁴ *Code of Conduct for Copyright Collecting Societies*, as amended May 2022.

⁶⁵ *Code of Conduct for Copyright Collecting Societies*, as amended May 2022, 6.1.

⁶⁶ *Code of Conduct for Copyright Collecting Societies*, as amended May 2022, 6.1.

⁶⁷ *Code of Conduct for Copyright Collecting Societies*, as amended May 2022, 6.1.

⁶⁸ <https://onemusic.com.au/about/complaints-and-dispute-resolution/>.

licensees at least as a point of review if they are dissatisfied with how their complaint has been handled by APRA; however, feedback to the Reviewer suggests that it would be valuable for analysis of the Scheme's operations if the latter knew how many licensee complaints about APRA are handled internally, and, of those, how many end up being handled by the Scheme.

It would be useful for APRA to provide to the Scheme Governance Committee redacted and confidentialised data and information about its internal handling of licensee complaints, including the numbers of licensee complaints it handles internally, and how many of those are ultimately handled by Resolution Pathways.

Number of licensee non-payments or delayed payments

It has been recognised generally for some time that, in a broader context than APRA's, license fee non-payment (or delayed payment) can be a form of complaint about the standard of services, or an indicator of licensee dissatisfaction.⁶⁹ Although, as noted above, the Code clearly differentiates between disputes and complaints, there might be scope for APRA to make some use of the Scheme for these matters in the future, if the ACCC were to include a relevant clarification. APRA is aware of there being a problem with non/delayed license payments: according to its annual report 2022-2023, 'The Audit, Risk and Culture Committee has established a credit policy under which defaulting licensees are pursued rigorously with the assistance of a collection agency.'⁷⁰

When APRA becomes aware of license members' non/delayed payment of annual license fees, and these appear to be a form of complaint about licensing arrangements, it might be more conducive to being seen to be a receptive complaints handler, and less confrontational, if APRA were to consider referring them to the Scheme.

APRA influence on referrals to the Scheme

The issue of APRA's influence has been considered in some detail elsewhere in this Report,⁷¹ and it is clear that the Scheme relies on APRA for the referral of matters for resolution. The number of those referrals may be influenced by each of the above factors (ie, the number of licensee complaints handled internally by APRA; the number of non/delayed payment of annual license fees; and APRA's own publicity of the Scheme), in addition to any specific referral criteria that APRA may

⁶⁹ For example, see Berkson, J., 'Excuses for Non-payment and How to Deal With Them' (1997) 18(6) *Credit Control* 9.

⁷⁰ APRA AMCOS, *Annual Financial Report 2022-2023*, 37; available on https://assets.apraamcos.com.au/images/PDFs/About/2023-APRA-Statutory-Accounts_Final-200923.pdf.

⁷¹ See, Usage of the Scheme, User satisfaction; Usage of the Scheme, User feedback – interviews; Previous Independent Review, Perceptions of the independence of the Scheme; and Relationship between Resolution Pathways and APRA.

apply. APRA's use of a debt collection agency may also affect its level of referrals to the Scheme. For example, the reference to the debt collection agency in APRA's most recent Annual Financial Report does not make clear if this option is seen as a last resort for dealing with fee defaulters, and that APRA might seek the Scheme's assistance with outstanding licensee debts before resorting to debt collection.⁷²

It could be said that the Scheme has "referral dependency" on APRA. Although not considered to be a detriment, this could contribute to perceptions about the influence APRA might exert over the Scheme and its operation.

Scheme's potential contributions to APRA operations

These issues may not fall within the strict scope of the Review; however, they may have flow-on influence on the Scheme's operations and effectiveness.

The operations of the Scheme have the potential to positively influence APRA's own operations. For example, total costs for handling of disputes and complaints includes funding the Scheme, funding internal complaints handling, and funding the retention of debt collection agencies; greater use of the Scheme could reduce those costs. In addition, there is operational value for APRA in the Scheme's provision of information about systemic issues relevant to APRA.

Above all, when the Scheme operates well and is seen to be independent of APRA, that is likely to have a positive effect on members' perceptions of both the Scheme and APRA.

⁷² APRA, *Annual Financial Report* 30 June 2023; available at <https://www.apraamcos.com.au/about/governance-policy/annual-reports>.

Part C Appendices

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Codes of conduct

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(relevant extracts)

Conditions of authorisation

First, while feedback about APRA's ADR scheme [Resolution Pathways] from those who have used it has been generally positive, some interested parties have raised concerns that take up of the scheme by licensees has not been as high as anticipated due to a lack of awareness among licensees about the scheme. To address this issue, the ACCC has imposed a condition requiring APRA to take steps to better publicise the availability of the scheme. The ACCC has also imposed conditions to strengthen the independence of the ADR scheme. [page 4]

APRA's Alternative Dispute Resolution Scheme

- 2.61. Under the conditions of the ACCC's 2014 authorisation, APRA was required to implement a revised ADR scheme managed by an independent facilitator approved by the ACCC. In April 2015, APRA launched 'Resolution Pathways', a new ADR facility administered by an independent provider, Resolve Advisors, and managed by resolution facilitator, Shirli Kirschner (**the Resolution Facilitator**).
- 2.62. As required by the conditions of authorisation, the scheme provides access to four resolution processes:
- 1) **Informal resolution:** informal resolution of the dispute in a manner facilitated by the Resolution Facilitator. After an initial discussion, subsequent involvement by the Resolution Facilitator may involve the Resolution Facilitator assisting the complainant with direct negotiations with APRA or another party, or the Resolution Facilitator team negotiating on the complainant's behalf.
 - 2) **Mediation:** an informal process utilising a mediator trained in assisting participants to resolve disputes, without the mediator providing a view.
 - 3) **Expert view:** a non-binding evaluation given to those in a dispute jointly, by a person who is an expert in the area(s) in dispute.
 - 4) **Expert decision:** a binding decision on the issues in dispute provided by a person who is an expert in the area(s) in dispute. The expert decision is binding by virtue of a contract between the parties in dispute agreeing to be bound.

The cost of resolving a dispute through Resolution Pathways

- 2.63. The process of dispute resolution may involve more than one of these dispute resolution process and the complainant/s choose the most appropriate pathway in consultation with the Resolution Facilitator. As required by the ACCC's conditions, APRA is the sole funder of the scheme's general management and operations, including the cost of the Resolution Facilitator. Resolution Pathways is also able to charge fees for use of the scheme. As per the conditions of authorisation, for an informal resolution of the dispute, an initial phone discussion with the facilitator is free of charge. Subsequent involvement of the facilitator attracts a fee of up to \$150 depending on the amount in dispute. The fee is payable by each party to the dispute.
- 2.64. For the mediation, expert view, and expert decision processes (the formal resolution options), the cost to resolve the dispute is split between APRA and the Applicants. Applicants are not required to contribute to the cost of resolving a dispute (i.e. APRA must pay all costs involved in resolving the dispute) where:

- the amount disputed is less than \$10,000 or
- the dispute does not involve money but:
 - in the case of a licensee, the amount payable by the licensee for an APRA licence is less than \$10,000, and
 - in the case of a member, the amount paid by APRA to the member in the previous twelve months is less than \$10,000.

2.65. The fees and costs payable under any of the four resolution processes may be waived or reduced by the Resolution Facilitator, the Independent Mediator or the Independent Expert (as relevant) or with the agreement of APRA. Participation in all of the four resolution processes is voluntary for all parties.

Resolution Pathway's governance structure

2.66. The 2014 conditions of authorisation required the establishment of a 'consultative committee' (the **Committee**) to provide advice and support to the Resolution Facilitator in relation to the design, implementation and ongoing management of the Scheme. The Resolution Facilitator is required, by the ACCC's 2014 conditions, to consult the Committee on matters such as monitoring the operation of the scheme, including its cost, receipt of feedback on the scheme, and the making of a recommendation about the budget for the operation of the scheme.

2.67. The 2014 conditions require APRA to ensure that there are at least four members of the Committee, consisting of an equal number of representatives of:

- Licensees whose annual licence fees are:
 - \$3,000 or less and
 - over \$3,000, as well as
- Members whose annual royalty payments are:
 - \$3,000 or less (other than members who have not received any royalties from APRA in the previous 24 months) and
 - over \$3,000.

2.68. The ACCC's 2014 conditions also provide the Resolution Facilitator with the discretion to create additional further governing committees, as required. The scheme is currently governed by two committees:

- The '**stakeholder group**' (formally called the consultative committee), established originally to comply with the ACCC's 2014 condition to establish a Committee. The group has since evolved into larger stakeholder group, to better represent APRA's stakeholders, and is currently made up of 12 licensees and members. Members are appointed on a volunteer basis.
- The '**governance committee**', established by the Resolution Facilitator in 2016 to provide the scheme with greater independence from APRA. As currently structured, the four members of the governance committee represent a different segment of APRA's stakeholders, and therefore also satisfy the criteria of the Committee, as required by the conditions of authorisation.

Membership of the governance committee is drawn from the stakeholder group. The governance committee has an independent chair, who has experience in chairing and the music industry, but does not represent a stakeholder group. The Resolution Facilitator does not sit on the governance committee.

Reporting Obligations

2.69. The ACCC 2014's authorisation also imposed a number of reporting obligations, including that:

- APRA submit to the ACCC an annual report regarding the use of the scheme and
- the scheme be subjected to an independent review, the report of which was to be made available to the ACCC six months prior to the expiry of the authorisation.

2.70. In compliance with this condition, independent reviewer Alysoun Boyle conducted a review of Resolution Pathways in late 2018. The findings of this review are discussed further at paragraph 4.204. Broadly the review found that feedback about the scheme from participants had been generally positive but that some improvements could be made to increase the usefulness of the scheme, including by improving awareness of the scheme.

...

Alternative Dispute Resolution

- 4.202. As noted above, APRA launched Resolution Pathways in 2015, in compliance with the ACCC's 2014 conditions of authorisation which required APRA to implement a revised ADR scheme managed by an independent facilitator. In imposing this condition, the ACCC considered that the ADR scheme would provide an affordable and practical way for both members and licensees to resolve disputes with APRA. The ACCC considered that recourse to an effective ADR process may reduce the public detriment generated by APRA's market power by helping redress imbalances in bargaining power between APRA and licensees.
- 4.203. Resolution Pathways is managed by resolution facilitator, Shirli Kirschner (the **Resolution Facilitator**). APRA submits its market power is constrained by Resolution Pathways, which, it submits, is a low cost, independent mechanism available to members and licensees to resolve disputes with APRA.
- 4.204. In accordance with the conditions of authorisation imposed by the ACCC, in 2018, an independent scheme reviewer conducted a review of Resolution Pathways (the **Independent Review**). The independent reviewer concluded that, in summary, "the scheme resolved disputes in a timely, efficient and effective manner" and commented that "people expressed satisfaction with the scheme's existence, and commended the commitment, the skills and the hard work of the facilitator."¹²⁴ The Independent Review also identified some issues with the operation of the scheme and made a number of recommendations for further improvements. These issues are explored in more detail below.
- 4.205. The ACCC notes that the number of referrals to Resolution Pathways has increased over time, which the ACCC considers to be an indication that stakeholder awareness of and confidence in the scheme is increasing:
- In its first two years of operation, the scheme did not enjoy a high uptake of use. Between 1 January 2016 and 31 December 2017, the scheme handled six of these matters concerned licences.
 - However, there was a marked increase in the number of disputes handled by the scheme, including disputes involving licences in 2018. For the period of 1 January 2018 to 31 December 2018, the scheme handled 24 matters, nine of which concerned licences.
 - Between 1 January 2019 and 31 December 2019, the scheme handled 18 new matters, nine of which involved licensees.
- 4.206. The Independent Review found that Resolution Pathway's data for the period of 1 January 2016 to 31 December 2017 showed that the majority of disputes were resolved

through the scheme, and that the Resolution Facilitator obtained the majority of resolutions promptly through early intervention.

- 4.207. Overall, the ACCC's views about the effectiveness of the Resolution Pathways scheme are broadly consistent with those expressed by the Independent Review. The ACCC generally considers Resolution Pathways provides licensees and members with an accessible and practical option for resolving disputes with APRA. Resolution Pathways is also a more affordable option for many, but not all, classes of users.
- 4.208. However while there is generally a high degree of satisfaction among many participants who use Resolution Pathways, some interested parties have identified a number of factors that they submit undermine the usefulness of the scheme:
- a lack of awareness among licensees about the existence of the scheme
 - a lack of transparency around how the scheme operates, particularly around the fees involved with the scheme, and
 - a perception that APRA is able to exert influence over the scheme.
- 4.209. Accordingly, the ACCC is imposing a condition requiring APRA to maintain the Resolution Pathways scheme for the duration of the authorisation period (**condition C6**). The ACCC is also requiring a number of changes to the scheme to improve the effectiveness of the scheme in mitigating APRA's market power.

Increasing awareness of the scheme

- 4.210. The ACCC considers that the area where the ADR scheme is likely to be of most utility, but where it is currently being underutilised, is in respect of disputes small licensees have with APRA. The ACCC considers that one of the most likely reasons for this is a lack of awareness of the scheme.
- 4.211. In compliance with the ACCC's 2014 conditions, APRA published a plain English guide to the ADR scheme in a prominent position on its website, and created a public website for the scheme separate from its own. However, some interested parties submit that APRA does not publicise the availability of Resolution Pathways as an independent method of dispute resolution or include information about available dispute resolution processes in its correspondence with licensees.
- 4.212. APRA submits that it offers information about ADR to all licensees with whom it is in dispute, and publishes information about the system on its website and in numerous other ways, including expressly in every licence agreement.¹³³ APRA further submits that letters of demand sent to licensees using APRA's music without a licence refer to the ability of licensees to have disputes determined under Resolution Pathways or the Copyright Tribunal.
- 4.213. Notwithstanding this, the ACCC considers that more could, and should, be done to make licensees aware of the scheme. In this respect, the ACCC notes that the reference to dispute resolution in APRA licences is in fine print towards the bottom of the licence terms and conditions. Further, the information provided by APRA in its licences is a general reference to the availability of an alternative dispute resolution mechanism, along with an invitation to contact APRA if the licensee requires more information. There is no reference to Resolution Pathways or details about how to contact them included.
- 4.214. The ACCC considers that, at a minimum, the information provided by APRA should directly reference, and direct licensees to, Resolution Pathways, rather than to APRA itself in a similar manner to APRA's plain English guides to its licences. The ACCC also considers that this information should be more prominently displayed. The ACCC is therefore amending the condition imposed in 2014 to require APRA to display contact details for, and information about, available dispute resolution processes, including the ADR scheme,

prominently on licence forms, member statements, licence invoices and licence agreements, as well as on any initial legal correspondence with licensees, prospective licensees and members (**condition C6.23**).

- 4.215. The ACCC also considers that information about ADR scheme, including the link to access the ADR scheme website, should be displayed more prominently on APRA's website. Currently, details on Resolution Pathways can only be accessed in the "Feedback Centre" section on APRA's website. The ACCC is imposing a condition requiring that both the APRA and OneMusic websites prominently display a link to information about available dispute resolution processes on all pages of their websites, which must be visible on landing on all pages of these websites (**condition C6.22**).
- 4.216. The ACCC also considers that the potential cost of a dispute and uncertainty about costs that will be incurred, are likely to be reasons why the scheme is being underutilised by licensees.¹³⁶ The Independent Review stated that it was not aware of any instance in which the disputants were concerned about the fees and charges associated with their matter, nor that any matter has been withdrawn due to concerns about fees and charges.¹³⁷ However, some submissions made to the ACCC claim that a lack of certainty around how much it will cost to resolve the dispute through the scheme, and therefore how much they will be required to contribute, is a deterrent to pursuing the dispute
- 4.217. In its draft determination, the ACCC expressed the view that there needs to be more transparency for licensees and members around which dispute resolution processes are available at no cost (for example, informal conversations with the independent facilitator), and at which point fees may apply. The ACCC noted that some interested parties who have provided submissions also appear to be unaware that fees will only apply if the amount in dispute is above a certain threshold (or for non-monetary disputes, where the applicant pays licence fees to APRA or receives payments from APRA above a certain threshold). The ACCC also stated the Resolution Pathways website should be updated to include further information about how the scheme operates and better explanations of the processes available within the scheme.
- 4.218. Since the release of the draft determination, Resolution Pathways has substantially redesigned its website to include additional information about how Resolution Pathways operates, including the scheme's cost structure. The ACCC considers that the updated Resolution Pathways website broadly addresses most of the concerns outlined in the draft determination about the transparency of fees for using the scheme. However, there is still a level of uncertainty around the costs that may be incurred by the parties to a dispute.
- 4.219. When introduced as a condition of the 2014 authorisation, the ACCC intended for the independent ADR scheme to be a low cost way for licensees and members, and in particular small business licensees, to resolve disputes with APRA. Consequently, under the condition imposed in 2014, an applicant is only required to contribute to the cost of resolving a dispute if either:
- a) the amount in dispute is above \$10,000, or
 - b) if the dispute is not about money, in the case of a licensee, the amount payable by the licensee for an APRA licence is more than \$10,000, and in the case of a member, the amount paid by APRA to the member in the previous twelve months is less than \$10,000.
- 4.220. The Resolution Facilitator submits the amount in dispute threshold adds unnecessary uncertainty and complexity to the scheme's operations because of ambiguity around how the amount in dispute is to be calculated. The Resolution Facilitator further submits that it is

often not possible to definitively determine the amount in dispute before the dispute resolution process commences, which means she is unable to provide upfront certainty to a disputant as to the costs involved to use the scheme. For example, a license may not be disputing the entire licence fee, but only arguing it should be lower, or that they are entitled to a different category of licence.

- 4.221. To simplify the current process, the Resolution Facilitator suggests that the threshold should be set by reference to the value of the disputant's licence fee or the member's annual royalty payment, and not the amount in dispute.
- 4.222. The ACCC agrees that the amount in dispute threshold is ambiguous, and considers it would be difficult to clarify how this threshold should be applied in a manner that would eliminate all ambiguity. However, the ACCC recognises that determining access to free dispute resolution based only on the cost of the disputants licence may risk restricting the ability of some small businesses to access the scheme. For example, a nightclub that would otherwise be categorised as a small businesses, but for whom the cost of its APRA licence is one of its most significant expenses, may not qualify.
- 4.223. Nonetheless, the ACCC is of the view that removing the amount in dispute threshold will have the overall effect of simplifying the scheme for potential disputants, which will likely encourage greater uptake. Accordingly, the ACCC has amended the condition of authorisation imposed in 2014 to provide the threshold that must be met before an applicant is required to contribute to the cost of resolving a dispute is set only by reference to the value of the disputant's licence fee or member's annual royalty payment (**condition C6 – schedule A, option 2, 3 and 4, paragraph 3**).
- 4.224. The ACCC has also increased the value of the licence fee licensees must pay before the licensee is required to contribute to the cost of resolving a dispute from \$10,000 to \$20,000. This reflects the introduction of OneMusic whereby, in many cases, APRA now licenses public performance of musical works on behalf of its members and sound recordings on behalf of PPCA members, and charges licence fees that reflect this.
- 4.225. The ACCC has similarly amended the conditions of authorisation relating to charges that apply for informal resolution of a dispute by the Resolution Facilitator so that charges are set by reference to the value of disputant's licence fee or the member's annual royalty payment rather than the amount in dispute (**condition C6 – schedule A, option 1**).
- 4.226. Separately, the ACCC is aware that there are differing opinions amongst stakeholders about in what circumstances a licensee or member is required to make a co-payment to the cost of resolving a dispute. The AHA interprets the ACCC's 2014 conditions to mean that where the dispute is less than \$10,000 then fees for the independent mediators and experts are not payable. The Resolution Facilitator also notes there is some difference of view on the operation of the formula for co-payments.
- 4.227. For the avoidance of doubt, the ACCC provides the following clarification of its condition: if the value of the disputants' licence, or annual royalty payment from APRA, is below the cost threshold, APRA is required to fund the entire cost to resolve their dispute, regardless of how much it ultimately costs to resolve the dispute. This is consistent with the intention of the fee structure established in the 2014 conditions of authorisation, which was to provide dispute resolution to smaller businesses without them having to contribute to the cost of resolving the dispute.
- 4.228. In this respect, the ACCC's considers that the extent to which recourse to the scheme may mitigate any exercise of market power by APRA, and the associated public

detriment, is likely to be greater if small businesses have access to the scheme at no cost. This is the intention of the scheme, as established by the ACCC's 2014 condition of authorisation.

- 4.229. The ACCC also recognises that not having to contribute to the cost of resolving a dispute could incentivise some licensees to pursue disputes with APRA without sufficient regard to the merit of the matter in dispute, and reduce incentives to engage in the process in a manner that resolves disputes at least cost. To address this issue, the ACCC has imposed a condition which provides the independent mediator or independent expert (as relevant) with the ability to determine that a dispute under options 2, 3 or 4 (mediation, binding or non-binding determination) be discontinued if, in the view of the independent mediator or independent expert, the disputant is not making a reasonable effort to engage in the dispute resolution process (**condition C6.3(viii)**). Condition C6.3 provides that before determining that a dispute be discontinued the independent mediator or independent expert must provide the applicant with a written warning:
- setting out why they consider that the applicant is not making a reasonable effort to engage in the resolution of the dispute
 - explaining that unless the applicant does make a reasonable effort to engage in the resolution of the dispute the dispute will be discontinued, and
 - explaining that if the dispute is discontinued the applicant cannot seek to have the same dispute resolved through Resolution Pathways unless APRA agrees to do so.
- 4.230. The condition also prohibits APRA from making any representation about, or expressing a view to, the independent mediator or independent expert about these matters unless asked to do so by the independent mediator or independent expert (**condition C6.4**).
- 4.231. The ACCC has also clarified that in respect of disputes where applicants are required to contribute to the cost of resolving the dispute, split 50/50 with APRA, if there is more than one applicant that is party to the dispute, 50 percent of the cost of resolving the dispute must be divided equally amongst all applicants, with APRA also paying 50 percent of the costs (**condition C6 – schedule A, option 2, 3 and 4, paragraph 1**).

Independence of the ADR scheme from APRA

- 4.232. Some interested parties have raised concerns that because APRA funds Resolution Pathways' operations (including the cost of the Resolution Facilitator), other than in respect of escalated disputes where, as discussed above, in some cases the disputant contributes to the cost of resolving the dispute, Resolution Pathways is not sufficiently independent of APRA.
- 4.233. The Resolution Facilitator acknowledges that the perception of independence and autonomy is particularly important for Resolution Pathways in circumstances where APRA is a party to a dispute and that Resolution Pathways' funding arrangement presents a challenge to true independence.¹⁴³ The Resolution Facilitator also notes the mechanisms for ensuring independence suggested by the Independent Review, which include alternative funding options such as opening the scheme up for use by the broader music industry and industry funding. In response, the Resolution Facilitator submits that a major barrier to implementing this option is the increased expense and difficulty of integrating with other wider stakeholder groups, in the absence of any legislative or administrative power to compel such participation or seed funding to organise such an alliance.
- 4.234. The Resolution Facilitator submits the scheme has addressed the challenge of independence by working towards implementing practical safeguards to protect the

system.¹⁴⁵ The Resolution Facilitator submits she has implemented a number of measures, beyond those required by the ACCC's condition, to assist with protections centred around robust reporting and governance, including:

- A governance committee made up of members and licensees, with an independent chair who does not represent a stakeholder group. The Resolution Facilitator considers the benefit of an independent chair is that the governance committee has the capacity to meet in the absence of the Resolution Facilitator or APRA and discuss/make decisions on issues where the presence of either may challenge its effectiveness.
- A pathway for parties to make complaints about the Resolution Facilitator, APRA or the Resolution Pathways scheme generally. A participant can lodge complaints or concerns to the governance committee through the independent chair or directly to the committee.
- A pilot program for a system which allows confidential reporting to the Resolution Facilitator or the governance committee about issues with APRA, where a reporter does not want to be identified for fear of retribution.

- 4.235. In addition, the Resolution Facilitator is investigating introducing an automated electronic process for the registration, management, and tracking of matters. The Resolution Facilitator submits this will ensure that all matters lodged with the system are reported, and that the time it takes for matters to be resolved are properly tracked in a way that is independent of the Resolution Facilitator and APRA.
- 4.236. The ACCC accepts that APRA funding Resolution Pathways is likely to create a perception, at least amongst some licensees and members, that Resolution Pathways is not sufficiently independent. This in turn is likely to compromise the accessibility of the scheme to these members and licensees. Conversely, other than charging members and other licensees directly, APRA is the only practical source of funding for the scheme. Accordingly, APRA not funding the scheme is also likely to compromise the accessibility of the scheme for many members and licensees.
- 4.237. The ACCC considers that the steps taken by Resolution Pathways broadly address concerns around the independence of the scheme. As long as APRA continues to fund the scheme, some perceptions of APRA exerting influence over the operation of the scheme are likely to remain. In this respect, while APRA funding the scheme is not ideal, the only way to remove any concerns about independence would be for APRA to have no role whatsoever in financing the scheme, which is not practical without undermining the usefulness of the scheme as a low cost way to resolve disputes with APRA.
- 4.238. The Resolution Facilitator also recommends that the ACCC impose a condition which changes the way Resolution Pathways is funded. In accordance with the ACCC's 2014 conditions of authorisation, APRA is currently required to fund (either entirely or in part) every dispute in which it is a party. The current funding model provides a retainer to cover five days a quarter for establishment costs and administration. Additional funding for other types of disputes or projects (e.g. member-to-member disputes (discussed further at paragraphs 4.251 to 4.258) and the peer review project¹⁴⁹) depends on APRA agreeing to a request from the Resolution Pathways Facilitator after a discussion with the Governance Committee.¹⁵⁰ The Resolution Facilitator advises APRA has funded all requests so far.
- 4.239. The Resolution Facilitator recommends that APRA be required to provide block funding to fund the entire operations of the scheme, including resolution of disputes. The Resolution Facilitator submits that under a block funding arrangement, APRA would be required to commit to a fixed amount each year with the amount to be determined by APRA in consultation with the Governance Committee and a stipulation that a portion of the funds be set aside to allow capital works and discretionary matters.¹⁵² The Resolution Facilitator

considers that a block funding model would create further separation between APRA and the scheme's operations, which will enhance the independence of the scheme.

- 4.240. The ACCC sought submissions on this proposal in the draft determination and received one response, from the Australian Hotels Association (the **AHA**). The AHA submits that the block funding model paid for by APRA (or any other steps to further remove any perceptions of conflict) may be appropriate.
- 4.241. The ACCC accepts that APRA funding disputes on a case by case basis is more likely to lead to perceptions that the process is not independent of APRA than if APRA provided block funding. However, the ACCC's view is that block funding is impractical for the resolution of disputes that APRA is required to fund by the conditions of authorisation, given uncertainty about year to year variation in the number, and nature, of disputes. The ACCC also expects an increase in the number of disputes due to the change in licensing arrangements recently introduced (the launch of OneMusic) and the new proposed conditions of authorisation which require the ADR scheme to be better publicised with the aim to increase awareness of the scheme. The number of disputes, including how many more may be handled by the scheme in the future, is difficult to forecast, making an appropriate level of block funding also difficult to forecast. The ACCC therefore considers that the cost of resolving disputes should continue to be funded on a case by case basis.
- 4.242. However, the ACCC does consider it appropriate to require APRA to provide block funding for the administrative functions necessary to support the consideration of disputes with APRA (for example, website development and overheads such as funding meetings). Accordingly, the ACCC has amended the condition of authorisation imposed in 2014 in relation to funding of the ADR scheme to require that APRA provide a fixed amount of funding for the administration of the scheme (including the costs of the Resolution Facilitator and an honorarium for the independent chair of the consultative committee, but otherwise excluding costs incurred by APRA in connection with individual disputes) each year which is adequate for the operation of the scheme (taking into account the level of funding recommended by the consultative committee each year) (**condition C6.9**).
- 4.243. Condition C6.9 also requires APRA to ensure that if the fixed amount of funding is exhausted prior to the end of the year, bridging funding is provided for the remainder of the year to support those aspects of the administration of the scheme support the consideration of disputes.

The ADR scheme's governance structure

- 4.244. The ACCC's 2014 conditions of authorisation required the establishment of a 'consultative committee' to provide advice and support to the Resolution Facilitator in relation to the design, implementation and ongoing management of the scheme. The 2014 conditions required that the consultative committee be a mixture of large and small APRA members and licensee representatives.
- 4.245. As outlined in paragraphs 2.66 to 2.68, Resolution Pathway is currently governed by two committees, the stakeholder group, established in 2014 and made up of 12 licensees and members selected by an independent panel, and the governance committee, established in 2016 and made up of four licensees and members taken from the larger stakeholder group. The Governance Committee also has an intended chair who is not an APRA licensee or member.
- 4.246. Both committees satisfy the criteria for the establishment of a consultative committee as required by the ACCC's 2014 conditions. The ACCC understands the governance

committee currently performs the functions of the committee required by the 2014 conditions of authorisation.

- 4.247. To ensure the independence and quality of the ADR scheme, the Resolution Facilitator recommends that the conditions of authorisation formally recognise both the governance committee and the stakeholder group, in replacement of the single Committee. The Resolution Facilitator requests the ACCC formalise in its conditions a transfer of the roles and responsibilities assigned to the Committee by the 2014 conditions to the governance committee. In addition to these advisory roles, the Resolution Facilitator recommends that the governance committee be given the power to make decisions about the following matters (all of which the Resolution Facilitator is currently responsible for):
- a) setting annual key performance indicators for the Resolution Facilitator and the scheme
 - b) reviewing any complaints about the Resolution Facilitator or the scheme (including APRA's engagement with the Scheme) and
 - c) planning for succession of the Resolution Facilitator.
- 4.248. The Resolution Facilitator further requests that the larger stakeholder group be maintained as an interface between stakeholders and the scheme. The Resolution Facilitator also recommends the ACCC formalise as a condition of authorisation the requirement that the Governance Committee have an independent chair.
- 4.249. The ACCC sees the value in having a body, which is independent of the Resolution Facilitator and APRA, to make decisions about the matters identified by the Resolution Facilitator in paragraph 2.247 to support the independence of the scheme. The ACCC also considers that the appointment an independent chair to head that committee (rather than the Resolution Facilitator acting as chair) supports the independence of the scheme. Accordingly, the ACCC has amended the condition imposed in 2014 to assign responsibility for the three matters outlined in paragraph 2.247 above to the Committee and to require the Committee to have an independent chair (**condition C6.8 and condition C6 – schedule B**).
- 4.250. However, the ACCC does consider that it is necessary to formalise in its conditions of authorisation a multi-committee structure with prescribed responsibilities for each specific committees. Subject to complying with the conditions imposed by the ACCC about the committee structure and roles and functions, the ACCC considers that there should be flexibility about how the governance arrangements operate, including whether to continue with a larger stakeholder group to support the governance committee. In this respect, the Resolution Facilitator, and the governance committee, can choose to maintain, and utilise, the larger stakeholder committee if they find value in the additional stakeholder input without the need for the ACCC to impose a condition of authorisation requiring that they do so.

The scope of the ADR Scheme

- 4.251. The ACCC notes that in its 2014 determination, it was envisaged the ADR facility would assist in the resolution of disputes between APRA and its licensees or potential licensees, as well as disputes between APRA and its members. The ACCC considered the ADR scheme would be of most utility to small licensees who may have been deterred from using the Copyright Tribunal to challenge APRA's licensing decisions. However, in practice, as illustrated by the data at paragraph 4.205, Resolution Pathways has primarily been used to resolve member-to-member disputes, usually about royalty distributions. Where these

issues are in dispute, then amounts collected by APRA with respect to the work are held in suspense until the dispute is resolved.

- 4.252. While the ACCC considers the ability of Resolution Pathways to effectively resolve member-to-member disputes to be an unforeseen benefit of the scheme, it notes that inter-member disputes fall outside the scope of the scheme mandated by the ACCC's 2014 authorisation. In practice, this means that currently services provided to resolve member-to-member disputes are funded at the discretion of APRA. As noted above, APRA has funded all requests (including for member-to-member disputes) to date.
- 4.253. The Resolution Facilitator recommends that the scope of Resolution Pathways be extended to cover all disputes arising under the eco-system created by the structure of authorising APRA, including member-to-member disputes.¹⁵⁷ The Resolution Facilitator considers that this will encourage the keeping of data on disputes for all issues within the APRA-AMCOS eco-system allowing for a better allocation of resources overall.
- 4.254. The ACCC sought submissions on this proposal in the draft determination and received one response, from APRA. APRA submits that it is not necessary for the conditions of authorisation to be amended to formally recognise disputes between members. APRA submits that this is a service it offers to its members and disputes between members are not a consequence of the conduct the subject of the application for authorisation.
- 4.255. In reauthorising APRA's performing rights acquisition and licensing arrangements in 2014 the ACCC imposed conditions of authorisation requiring APRA to establish an amended ADR scheme as a way to mitigate, to some extent, APRA's market power. Accordingly, the scheme was purposively designed to be an affordable and practical way for both members and licensees to resolve disputes *with APRA*.
- 4.256. Member-to-member disputes are primarily private disagreements about who owns the copyright in co-written works and in what proportion. These disputes evolve independently of APRA and would exist irrespective of APRA's performing rights acquisition and licensing arrangements the subject of the application for reauthorisation. The ACCC considers that while member-to-member disputes may involve APRA, these disputes are not a consequence of APRA's conduct the subject of the application for authorisation.
- 4.257. Accordingly, while the ACCC considers that the ADR scheme being used to resolve member-to-member disputes is a positive development, the ACCC does not consider it appropriate to impose a condition of authorisation explicitly requiring APRA to extend the scope of the ADR scheme to include member to member disputes. To do so would impose requirements on APRA that go beyond addressing public detriment resulting from the conduct for which APRA seeks reauthorisation.
- 4.258. The Resolution Facilitator also submits that the stakeholder group and the governance committee suggest that because Resolution Pathways is funded with member money (that is, collected licence fees that would otherwise be distributed to APRA's members) the scheme should be available for use to as a service to members to resolve member-to-member disputes.¹⁶⁰ The ACCC notes there is nothing in the conditions of authorisation which precludes APRA from expanding the scheme to include member-to-member disputes, if its members value the service. In this respect, the ACCC considers whether to do so is a matter for APRA and its members, and that if APRA and its members decide to do so, it should be funded separately to the funding for the ADR scheme required to be provided under condition C6.9

- 4.259. As noted, the 2014 authorisation imposed a condition requiring an independent review of the ADR scheme be completed before reauthorisation was sought. The ACCC is imposing a condition requiring another independent review of the operation and management of the ADR scheme to be conducted before any future application for re-authorisation, on the same terms as its 2014 condition (**condition C6.13**). The findings of this review will inform the ACCC's consideration of any future application for reauthorisation.
- 4.260. In compliance with the ACCC's 2014 condition, APRA must also provide the ACCC with an annual public report, which must include certain information about the disputes handled by the scheme, including (broken down into licensee disputes and member disputes):
- the number of disputes considered by the scheme and the number of disputes resolved, under each dispute resolution process
 - the time taken to refer and resolve disputes, and
 - a summary of the subject matter of the disputes and the fees and charges incurred by APRA and/or the applicants.
- 4.261. The Resolution Facilitator has requested the ACCC allow for flexibility in any reporting requirements imposed on Resolution Pathways by a condition of the current authorisation. Specifically, the Resolution Facilitator requests that ACCC impose a condition permitting the format of reporting to be decided by the Committee, with the ACCC having the right to request additional information or additions on an annual basis.¹⁶¹ The Resolution Facilitator considers it appropriate for the ACCC to provide a base of matters to be included (for example, the type of matters, the number of matters and details of any evaluations received) and reserve a right to request changes to any reporting format if required.
- 4.262. The ACCC recognises that the current reporting condition, which is prescriptive and requires Resolution Pathways to report by classes of process, may make reporting difficult in instances where a dispute involves multiple processes. The ACCC also considers that allowing for flexibility will facilitate more accurate reporting, as Resolution Pathways will be able to adapt reports to account for future changes to the scheme.
- 4.263. The ACCC has amended the condition of authorisation imposed in 2014 to provide greater flexibility about the reporting requirements (**condition C6.18**). The information requirements remain as per the condition imposed in 2014, but the format in which the required information is provided will be decided by the governance committee. Given this change, the ACCC has also amended this condition to provide that the ACCC is able to request additional information from Resolution Pathways and/or request Resolution Pathways to make changes to the report format (**condition C6.20**).
- 4.264. The Resolution Facilitator further requests that the governance committee also be required to perform an annual review of the scheme's operations and performance. The Resolution Facilitator submits that while the future independent review of the scheme's operations will be useful for any future authorisation process, given it will occur in around three years' time, it will be less useful for the ongoing regulation of the scheme.
- 4.265. The ACCC notes there is nothing in the conditions which precludes the governance committee from conducting such a review. However the ACCC considers more frequent reviews could improve the efficiency and efficacy of the scheme's operations.
- 4.266. The ACCC is therefore amending the condition of authorisation imposed in 2014 that requires an annual ADR report to be prepared to require that the report is by the governance committee (**condition 6.18**) and to require reporting on the following additional matters:

- the number and nature of all complaints received about the Resolution Facilitator or the scheme (including APRA's engagement with the scheme)
- an evaluation of the scheme's operations, by reference to any key performance indicators and metrics set for the scheme
- an evaluation of the scheme's performance, by reference to any key performance indicators and metrics set for the Resolution Facilitator
- an evaluation of the governance and funding arrangements for the scheme (**condition 6.21**).

ACCC conclusions about the ADR scheme

- 4.267. The ACCC considers that APRA's ADR scheme does provide some, limited, constraint on APRA's market power in respect of some users. The ACCC considers that the changes to the scheme the ACCC is requiring as conditions of authorisation are likely to increase the scheme's effectiveness in this regard.
- 4.268. However, like the Copyright Tribunal, the ADR scheme constrains APRA's ability to exercise its market power only beyond the point where the cost to the user of seeking recourse to the ADR scheme would be less than the difference between the price which the user could negotiate with APRA directly and that which it considers would likely be determined under the ADR scheme. Further, binding determinations can only be made under the ADR scheme if both parties agree to participate.
- 4.269. Accordingly, the ACCC considers that the ADR scheme provides only a limited constraint on APRA's market power.

...

Condition C6 – Alternative Dispute Resolution Scheme Requirements

- C6.1 APRA must maintain an alternative dispute resolution ('**ADR**') scheme (the '**Scheme**') that is managed by an independent dispute resolution facilitator (the '**Facilitator**') for the resolution of any disputes between APRA and a licensee, or potential licensee of copyright held by APRA ('**Licensee**') or a member or potential member of APRA ('**Member**'), including complaints made to APRA by or on behalf of a Member or Licensee. The objective of the Scheme is to resolve disputes in a timely, efficient and effective manner.
- C6.2 The Scheme must include four options for resolving a dispute or complaint, or an aspect of a dispute or complaint ('**Dispute**') notified by a Member or Licensee, or by an authorised representative of one or more Members or Licensees ('**Applicant**'), as follows:
- Option 1 - informal resolution: informal resolution of the Dispute in a manner facilitated by the Facilitator, with an indicative timeframe of 20 business days for resolution of the Dispute or referral of the Dispute to Options 2, 3 or 4
 - Option 2 - mediation: external mediation by an independent mediator ('**Independent Mediator**'), with an indicative timeframe of 20 business days for the resolution of the Dispute (from the date on which the Dispute is referred to Option 2)

- (iii) Option 3 - expert opinion: a non-binding written expert opinion (including reasons) delivered by an appropriately qualified or experienced independent expert ('**Independent Expert**'), with an indicative timeframe of 20 business days for the resolution of the Dispute, and 30-60 days for preparation of the written opinion from the date on which the Dispute is referred to Option 3
- (iv) Option 4 - binding determination: a binding written determination (including reasons) delivered by an Independent Expert, with an indicative timeframe (from the date on which the Dispute is referred to Option 4) of 30-60 days for resolution of the Dispute, or of 90 days for a Dispute involving more than one Applicant).

C6.3. The Scheme must provide that:

- (i) a Dispute, or an aspect of a Dispute, may be referred to Options 2, 3 or 4 at any time by agreement between APRA and the Applicant, including agreement about the identity of the Independent Mediator or Independent Expert (as relevant). The resolution of each Dispute must commence with Option 1, but APRA may not withhold agreement to progress to another Option merely because the Applicant has not agreed to continue or complete the processes available under Option 1 first. If agreement cannot be reached about the identity of the Independent Mediator or Independent Expert or about progressing a Dispute to another Option, the Facilitator must refer these preliminary matters for determination (at APRA's cost) by an Independent Expert (who must not then be otherwise appointed to hear the Dispute under the Scheme).
- (ii) the resolution of Disputes under Options 2, 3 and 4 must be carried out on terms, and in accordance with processes and procedures, established by the Independent Mediator or Independent Expert (as relevant) in accordance with practices commonly adopted in other ADR schemes for ADR options of that kind
- (iii) the Applicant (or APRA, if a non-binding written opinion has been delivered under Option 3) may also seek resolution of the Dispute by the Copyright Tribunal or by a court, rather than under the Scheme
- (iv) the Facilitator must, if requested by an Applicant, refer a function of the Facilitator set out in Schedule C (in respect of the Applicant's Dispute) to an Independent Expert (at APRA's cost)
- (v) subject to condition C6.3(vii) and conditions C6.17–C6.21, the resolution of Disputes under the Scheme is to be carried out confidentially unless all parties to a particular Dispute agree otherwise in respect of that Dispute.
- (vi) each Independent Expert may obtain such advice (including, but not limited to, economic or financial advice) as the Independent Expert considers reasonably appropriate for the purposes of resolving a Dispute, provided that the estimated costs of obtaining that advice have been approved by APRA and the Applicant, or by the Facilitator, or by another Independent Expert (at APRA's cost) if APRA or the Applicant is dissatisfied with the Facilitator's decision to approve (or not approve) those estimated costs. The actual costs of any such advice are to be included in the costs of the Independent Expert in relation to the Dispute.
- (vii) each Independent Expert who issues a binding written determination under Option 4 is to prepare and issue, to the Facilitator, a public version of that determination (excluding any confidential information of APRA, the Applicant, a Licensee or a Member) within 7 days of the date of the determination.
- (viii) the Independent Mediator or Independent Expert (as relevant) may determine that a Dispute under Options 2, 3 or 4 be discontinued if, in the view of the Independent Mediator or Independent Expert, the Applicant is not making a reasonable effort to engage in the process being undertaken by the Independent Mediator or

Independent Expert for the resolution of the Dispute. Before determining that a Dispute be discontinued the Independent Mediator or Independent Expert must provide the Applicant with a written warning:

- setting out why they consider that the Applicant is not making a reasonable effort to engage in the resolution of the Dispute
 - explaining that unless the Applicant does make a reasonable effort to engage in the resolution of the Dispute the Dispute will be discontinued, and
 - explaining that if the Dispute is discontinued the Applicant cannot seek to have the same dispute resolved through the ADR Scheme unless APRA agrees to do so.
- (ix) If the Independent Mediator or Independent Expert does discontinue a Dispute under this condition 6.3(viii) the Applicant cannot seek to have the same dispute resolved through the ADR Scheme unless APRA agrees to do so.
- C6.4. APRA must not make any representation, or express any view, to the Independent Mediator or Independent Expert about any of the matters referred to in condition 6.3(viii) unless asked to do so by the Independent Mediator or Independent Expert.
- C6.5 APRA must procure that the Facilitator ensures that each Independent Mediator or Independent Expert:
- (i) is suitably qualified, by reason of their training and / or experience, for resolving the kinds of disputes, and for carrying out the kinds of dispute resolution processes, for which they are engaged under the Scheme
 - (ii) has an understanding of copyright or the ability to properly acquire such understanding
 - (iii) takes into account the matters referred to in Schedule E, if requested to do so by the Applicant.

Fees and Charges

- C6.6 The Scheme must also provide that:
- (i) the fees and charges payable by Applicants under the Scheme, including provision for the reduction or waiver of those fees and charges, will be set in accordance with Schedule A (**'Fees and Charges'**)
 - (ii) the relevant Fees and Charges for Option 1 are payable for all Disputes that are then referred to Options 2, 3 or 4, even if the Applicant does not complete the processes that are available under Option 1
 - (iii) the Fees and Charges are payable to the Facilitator (who will then distribute them as appropriate)
 - (iv) other than the Fees and Charges, each party must bear their own costs of resolving the Dispute
 - (v) an Applicant may withdraw a dispute from the Scheme, except after a hearing when awaiting a written expert opinion or a binding determination under Option 3 or 4 above (in which case the Applicant may only withdraw if the withdrawal is the result of APRA and the Applicant having reached an agreed settlement of the Dispute). Unless otherwise agreed as part of the settlement of the Dispute, the Applicant must pay all Fees and Charges incurred up until the date of withdrawal.

The role of the consultative committee

- C6.7 APRA must maintain a consultative committee (the '**Committee**'). APRA must also permit the Facilitator to establish and maintain additional committees where the Facilitator considers it appropriate to do so. APRA must ensure that the members of the Committee (as appointed or reappointed from time to time by the Facilitator) consist of an equal number of representatives of:
- (i) Licensees whose annual licence fees payable to APRA are \$3,000 or less
 - (ii) Licensees whose annual licence fees payable to APRA are over \$3,000
 - (iii) Members whose annual royalty receipts from APRA are \$3,000 or less, other than members who have not received any royalties from APRA in the previous 24 months
 - (iv) Members whose annual royalty receipts from APRA are over \$3,000

Where a representative of a Licensee or a Member is appointed to the Committee, that appointment must be as a representative of one Licensee or Member (as relevant), but a representative of a Licensee may also represent the interests of one or more other Licensees, and a representative of a Member may also represent the interests of one or more other Members.

If an insufficient number of Members or Licensees in a particular category are willing to be members of the Committee, APRA must ensure that the Facilitator appoints another Member or Licensee (as relevant) to fill that position on the Committee.

- C6.8. In addition to the composition of Committee members required by condition C6.7, the Committee must have an Independent Chair, approved by the ACCC. In deciding whether to approve the Independent Chair the ACCC may take into account any matter it considers relevant, including any previous or existing relationships between APRA (or a Licensee or Member) and the proposed Independent Chair.
- C6.9 APRA must also ensure that:
- (i) the Committee operates with the objective set out in Schedule B and performs the functions set out in Schedule B
 - (ii) the Facilitator periodically invites all Members and Licensees to nominate for the Committee, and takes all nominations and other input from Members and Licensees into account in determining the members of the Committee
 - (iii) a fixed amount of funding is provided by APRA for the administration of the Scheme (including the costs of the Facilitator and an honorarium for the Committee Independent Chair but otherwise excluding costs incurred by APRA in connection with individual Disputes) each year which is adequate for the operation of the Scheme (taking into account the level of funding recommended by the Committee each year)
 - (iv) if the fixed amount of funding provided under condition C6.9(iii) is exhausted prior to the end of the year, bridging funding is provided for the remainder of the year to support those aspects of the administration of the Scheme necessary to directly support the consideration of Disputes, and
 - (v) it provides to the Committee all information requested by the Committee that the Committee considers necessary or appropriate for performing its functions under Schedule B (including information about the actual costs of operating the Scheme).

Appointment and role of the Facilitator

- C6.10 APRA must ensure that there is an appointed Facilitator in place to operate and manage the Scheme at all times throughout the term of the authorisation. The Facilitator (including any replacement Facilitator) must:
- (i) have specialist training in ADR and have a detailed understanding and experience of dispute resolution practice and procedures which do not involve litigation
 - (ii) have the capacity to determine the most appropriate alternative dispute resolution procedures in particular circumstances
 - (iii) have an understanding of copyright or the capacity to quickly acquire such an understanding.
- C6.11 Any replacement Facilitator must be approved by the ACCC, within 20 business days, in accordance with condition C6.15 and for a specified period of time, prior to the appointment taking effect for the purposes of these Conditions:
- C6.12 APRA must ensure that each Facilitator:
- (i) operates with the objective set out in Schedule C, and performs the functions set out in Schedule C
 - (ii) complies with conditions C6.3(i) and (iv)
 - (iii) does not perform any work for APRA other than work relating to the Scheme or to any extensions of the Scheme
 - (iv) can be, and is, removed by APRA from the position of Facilitator if the ACCC considers, having regard to the performance of the Facilitator in that role, that the Facilitator is likely to fail to adequately perform the functions set out in Schedule C.

Appointment and role of the Independent Reviewer

- C6.13 No later than 18 months before the date on which this authorisation expires, APRA must appoint an independent reviewer (**'Independent Reviewer'**), to review and report on the operation and management of the Scheme. The Independent Reviewer must:
- (i) be approved by the ACCC, within 20 business days and in accordance with condition C6.15, prior to the appointment taking effect for the purposes of these conditions
 - (ii) have substantial experience in reviewing the operation and performance of alternative dispute resolution schemes.
- C6.14 APRA must ensure that the Independent Reviewer operates with the objective set out in Schedule D, and performs the functions set out in Schedule D.

ACCC approval of the Facilitator and Independent Reviewer

- C6.15 In considering whether to approve a proposed Facilitator or a proposed Independent Reviewer, the ACCC may take into account any matter it considers relevant, including:
- (i) any previous or existing relationships between APRA (or a Member or Licensee) and the proposed Facilitator or proposed Independent Reviewer (as relevant)
 - (ii) the proposed remuneration arrangements for the proposed Facilitator or proposed Independent Reviewer (as relevant).

- C6.16 Prior to the ACCC making a decision about whether to approve a proposed Facilitator, APRA must provide to the ACCC:
- (i) the agreement, or proposed agreement, setting out the terms and conditions on which the proposed Facilitator or proposed Independent Reviewer (as relevant) will be engaged in connection with the Scheme
 - (ii) any other information requested by the ACCC that the ACCC considers relevant.

Annual Reporting

- C6.17 APRA must provide the ACCC with an annual public report, for publication on the public register of authorisations maintained in accordance with Section 89 of the *Competition and Consumer Act*, about Disputes notified to APRA under the Scheme for the previous calendar year (the '**ADR Report**'), in accordance with condition C6.19 and C6.21.
- C6.18 The Committee must decide the format of the ADR Report and must prepare the ADR Report (in consultation with and with the assistance of the Facilitator, where appropriate) .
- C6.19 Each ADR Report must be submitted to the ACCC prior to 1 March of each year and must concern disputes which commenced in a 12 month period ending 31 December of each year.
- C6.20 Upon receipt of each ADR Report, the ACCC has the right to request additional information from Resolution Pathways and/or request Resolution Pathways to make changes to the ADR Report format.
- C6.21 Each ADR Report must include:
- (i) the number of Disputes considered, and the number of Disputes resolved
 - (ii) a summary of each Dispute resolved, including:
 - i. the type of dispute
 - ii. the subject matter of the dispute
 - iii. time taken to resolve the dispute
 - iv. fees incurred by Applicants and the fees borne by APRA
 - v. any outcomes, including details of any evaluations received
 - (iii) for Disputes considered but not resolved, a summary of the:
 - i. reasons why those Disputes were not resolved
 - ii. the fees incurred by Applicants and the fees borne by APRA
 - (iv) a summary of feedback received by APRA, and by the Facilitator, in relation to the operation of the Scheme, including the feedback and recommendations provided by the Committee (see Schedule B)
 - (v) the number and nature of all complaints received about the Facilitator or the Scheme (including APRA's engagement with the Scheme)
 - (vi) an evaluation of the Scheme's operations, by reference to any key performance indicators and metrics set for the scheme
 - (vii) an evaluation of the Scheme's performance, by reference to any key performance indicators and metrics set for the Facilitator
 - (viii) an evaluation of the governance and funding arrangements for the Scheme.

Other matters

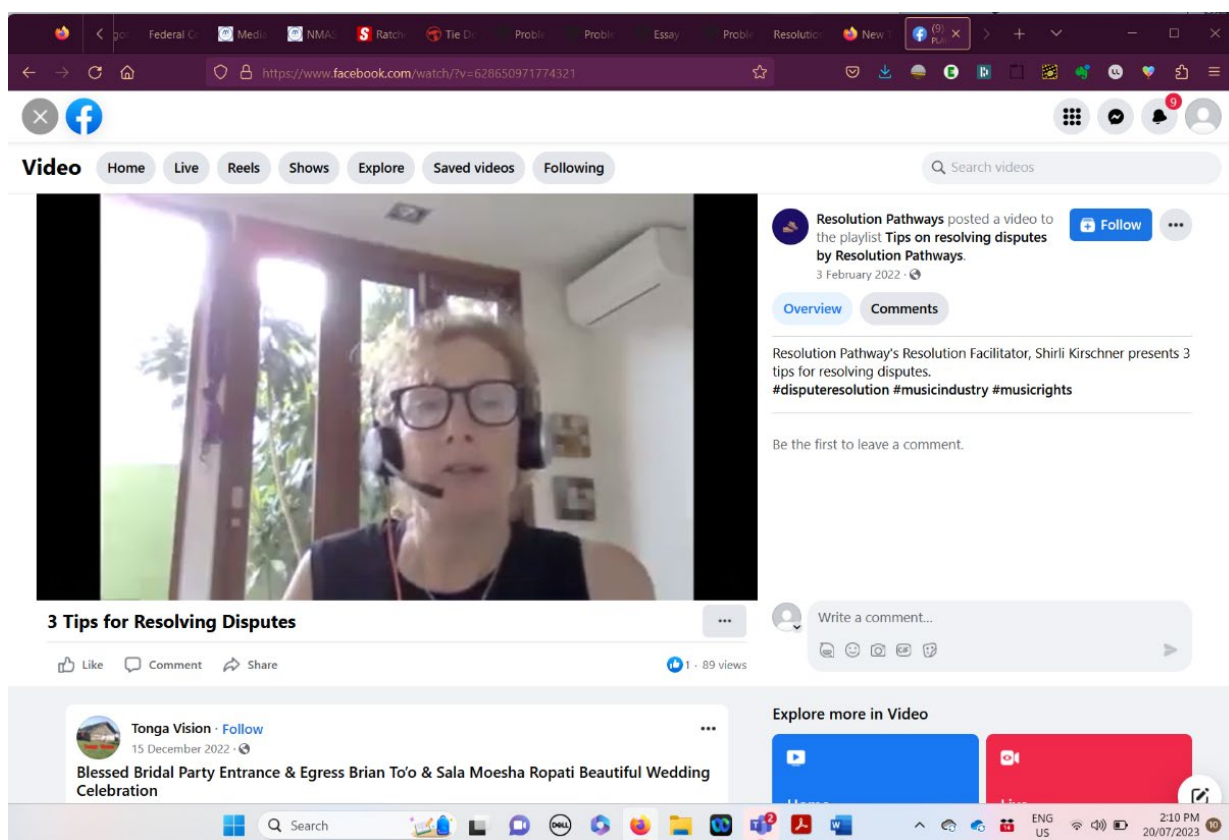
- C6.22 The APRA website (www.apraamcos.com.au) and OneMusic website (www.onemusic.com.au) must have a prominently displayed link to information about available dispute resolution processes on all pages of the websites, including the Scheme, which must be visible on landing on all pages of these websites.
- C6.23 APRA must display contact details for, and information about, available dispute resolution processes, including the Scheme, prominently on the following APRA documents:
- (i) licence forms
 - (ii) member statements
 - (iii) licence invoices
 - (iv) licence agreements, and
 - (v) all initial legal correspondence with licensees, prospective licensees and members. This requirement does not extend to legal correspondence where: APRA has advised the licensee, prospective licensee or member about the Scheme in previous legal correspondence about the matter in dispute, the matter in dispute is being considered by the Copyright Tribunal or has already been referred to the ADR process.

Appendix C Electronic media – Resolution Pathways’ social media accounts; and APRA AMCOS website links

Resolution Pathways

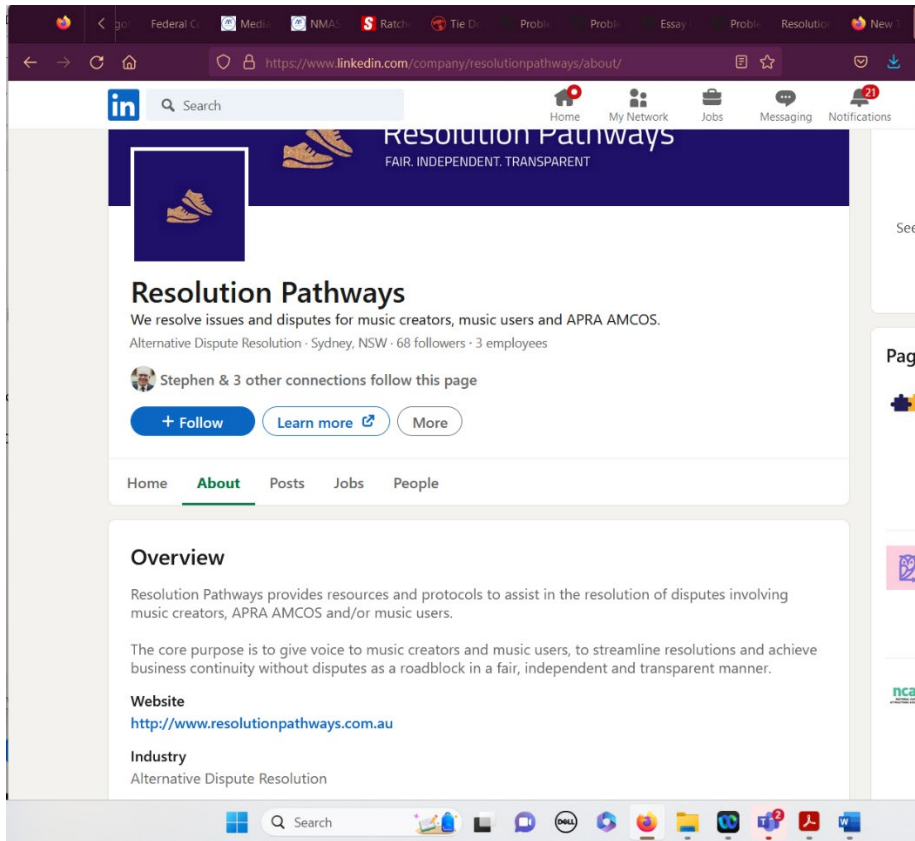
(i) Facebook

<https://www.facebook.com/watch/104139722045883/3234652493435126/>



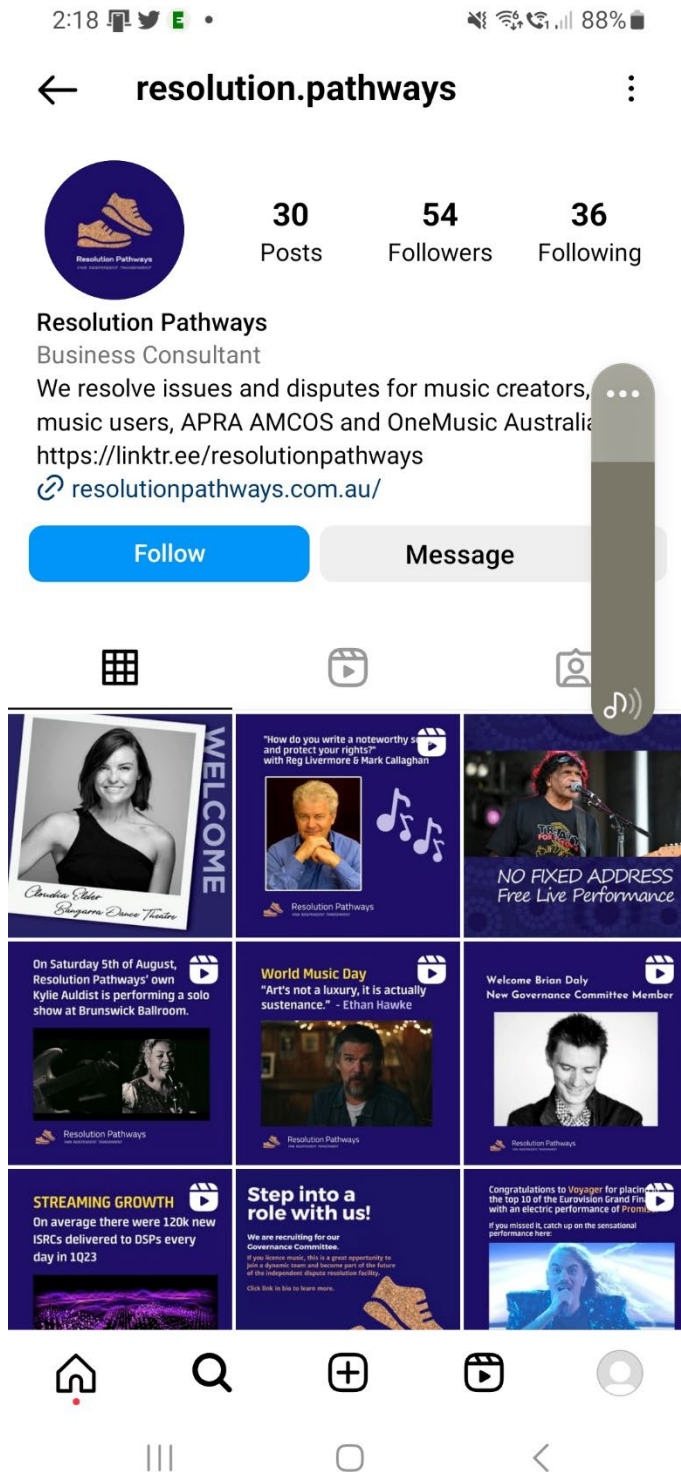
(ii) **Linked In**

<https://www.linkedin.com/company/resolutionpathways/>



(iii) Instagram

<https://instagram.com/resolution.pathways?igshid=NTc4MTIwNjQ2YQ==>



APRA AMCOS website links

[supplied by APRA AMCOS]

APRA AMCOS Content Links

APRA AMCOS Footer on every page

[Licensing disputes procedure](#) – 4x links to Resolution Pathways website

APRA AMCOS also has links in the Feedback Centre

<https://www.apraamcos.com.au/about/help/feedback-centre>

<https://www.apraamcos.com.au/about/what-we-do/alternative-dispute-resolution>

<https://www.apraamcos.com.au/about/governance-policy/policies-procedures/member-disputes-procedure>

<https://www.apraamcos.com.au/about/governance-policy/policies-procedures/licensing-disputes-procedure>

<https://www.apraamcos.com.au/about/governance-policy/policies-procedures/complaints-procedure>

Appendix D Report of Independent Review of Resolution Pathways (November 2018)

**Report of the Independent Review of
Resolution Pathways**

November 2018

Report of Independent Review

By

Alysoun Boyle

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Terminology and Acronyms Used in this Report

ACCC	Australian Consumer Complaints Commission
APRA AMCOS	The Australian Performing Right Association (APRA) and the Australasian Mechanical Copyright Owners Society Ltd (AMCOS)
DR	Dispute Resolution (formerly known as “ADR”, or Alternative Dispute Resolution)
DSD	Dispute System Design (a systematic approach to the development of comprehensive processes for managing disputes in a single organisation [or industry], and the implementation of that system for the purpose of preventing, managing, learning from, and resolving disputes and conflicts ⁷³)
PPCA	Phonographic Performance Company of Australia
SOCAP	Society of Consumer Affairs Professionals
The Determination	ACCC Determination: <i>Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music</i> (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375)
The Scheme	Resolution Pathways

⁷³ L. B. Amsler and J. Sherrod, ‘Accountability Forums and Dispute System Design’ (2017) 40(3) *Public Performance and Management Review* 529 – 550.

Part A. Introduction

It should be noted that, during her appointment, the Independent Reviewer (“the Reviewer”) has treated the Independent Review (“the Review”) as a consultative and developmental process, during which Resolution Pathways (“the Scheme”) and its operation, as well as the role of the Facilitator, have been discussed with APRA AMCOS, the Facilitator, and members of the Consultative Committee. Although the ACCC’s 2014 Determination (“the Determination”) includes specified dates and functions for the Review, it does not preclude the Reviewer taking a pro-active approach to the Review process. A consultative and open approach is especially effective in relatively small complaints programs, such as the Scheme currently is.

In this, as in other reviews which she has conducted, the subjects of the review have welcomed interim observations, and have discussed options for adjustment and improvement while the review was under way. These discussions have not been used to assert influence over the Reviewer or her activities. Nor have the discussions been used to influence, or affect, the Review’s findings.

There is little doubt that this Scheme, and its overall approach, has the potential to be of significant value and benefit to Australia’s music industry. The primary purpose of this Report has been to address the requirements specified in the Determination; however, the Scheme’s additional potential has been a secondary consideration.

According to information, data, and feedback provided to the Reviewer, there is widespread in principle support for the Scheme, and for its continued operation. Concerns were raised with the Reviewer about some aspects of the Scheme, and these are considered within this report.

Overall, the Scheme is viewed positively by all people involved with it, whether they be users of the Scheme, members of the Scheme’s panel of third-party neutrals, members of the Scheme’s committees, or APRA AMCOS. It was mentioned to the Reviewer more than once that the Scheme has exposed an existing need for dispute resolution among musicians in Australia.

1. Background to the Independent Review

In the Determination through which the Scheme was established, the ACCC included a requirement that the Scheme be subjected to an Independent Review, the Report of which was to be made available to the ACCC six months prior to the expiry of the APRA AMCOS authorisation that was the subject of the Determination. The Determination specified that an Independent Review (“the Review”) was to be completed after three years’ of the Scheme’s operation, and in time for the ACCC’s consideration of re-authorisation of APRA AMCOS. The Determination also specified that the Independent Reviewer (“the Reviewer”) be appointed by APRA AMCOS, and that the ACCC approve that appointment.

According to Condition C3, the Reviewer was required to

- Monitor and report on the operation of the Scheme, including whether disputes were being resolved in a timely, efficient, and effective manner;
- Review the operation and performance of the Scheme;
- Review the operation and performance of the Facilitator of the Scheme;
- Provide to the ACCC a written report (“the Report”) in terms of Condition C3 of the Determination; and

- Publish a ‘public version’⁷⁴ of that Report.

As part of the Review, the Reviewer was required to: ‘... obtain feedback from APRA, the Committee members, Licensees and Independent Mediators/Independent Experts about the operation and performance of the Scheme, and the performance of the Facilitator.’⁷⁵

The written report of the Review was to be based on the period between the commencement of the Scheme and twelve months prior to the expiry of the authorisation to which the Determination refers (i.e., 24 June 2018).

As is discussed in some detail below, in its first two years of operation, the Scheme did not enjoy a high uptake of use (a total of only 28 matters was handled by the Scheme between 1 January 2016 and 31 December 2017). In the eleven months since the appointment of the Reviewer, there has been a noticeable increase in use of the Scheme, and the Facilitator has introduced notable innovations during 2018. The additional data from 2018 is not included in the data analysis of this Report that relates to the specific reporting requirements set out in the Determination; however, the additional data has been taken into account in the broader observations about the Scheme.

The Reviewer has obtained input to the Review from APRA AMCOS, members of the Consultative Committee, Licensees, and independent mediators and experts from the Scheme’s panel of third-party neutrals; however, some of that consultation was conducted after June 2018. Although these stakeholders were aware that their input would contribute to the Review, the Reviewer is satisfied that their input was provided out of genuine interest in the current and future operation and performance of the Scheme and of the Facilitator, and the potential value of the Scheme.

2. Report Structure and Methodology

(i) Report structure

The structure of this Report covers:

- A summary of the functions of the Independent Reviewer (as outlined in Condition C3 of the Determination);
- An outline of the Review process;
- Analysis of data gathered by the Reviewer, as per Condition C3 of the Determination, and relating to the operation and performance of the Scheme, and of the Facilitator;
- The presentation of an analytical framework to guide the future operation of the Scheme, and any further reviews of it; and
- An Executive Summary.

The Report also includes two Appendices (A – B).

(ii) Objectives and functions of the Independent Reviewer

Schedule D of the Determination specifies the objectives and functions of the Reviewer:

⁷⁴ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.11(i) b(ii).

⁷⁵ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), P 101.

‘The objective of the Independent Reviewer is to monitor and report on the operation of the Scheme (including whether the Scheme is resolving Disputes in a timely, efficient and effective manner).

The functions of the Independent Reviewer must include:

(i) reviewing:

- a) The operation and performance of the Scheme (including without limitation the processes and procedures established under the Scheme, and the extent to which any concerns expressed by Members and or Licensees have been addressed by APRA and/or the Facilitator), and*
- b) The performance of the Facilitator,*
in accordance with the requirements of condition C3⁷⁶ and the Scheme’s objective of resolving Disputes in a timely, efficient and effective manner.

(ii) as part of item (i) above, obtaining feedback from APRA, the Committee Members, Licensees and Independent Mediators/Independent Experts about the operation and performance of the Scheme, and the performance of the Facilitator

(iii) no later than six months before this authorisation expires, preparing a report, and providing the report to the ACCC and publishing a public version of the report, on the matters reviewed under items (i) and (ii) above in respect of the period between the commencement of the Scheme and that date that is twelve months before this authorisation expires.’⁷⁷

The Review has been conducted in accordance with these functions, with additions that are noted elsewhere in this Report.

(iii) Review methodology

(a) Overview

The Reviewer was appointed by the ACCC in December 2017, and the Terms of Reference for the Review were finalised with APRA AMCOS in January 2018.

As part of the Review process, the Reviewer attended Committee meetings, spoke with APRA AMCOS, with the Facilitator, with key stakeholders of the Scheme, and with members of the Scheme’s panel of third-party neutrals. The Reviewer collected various quantitative data from the Scheme’s records. To gain information from Scheme users, the Reviewer designed an online survey for users of the Scheme, the results of which have contributed to the Review.

Following completion of the Review Report, copies were made available to APRA AMCOS, to the Facilitator, to the Consultative Committee, and to the Chair of the Governance Committee for their information. This being the Report of an Independent Review, their comments about the substance of the Report were not sought.

⁷⁶ Condition C3 is listed in full at Appendix E.

⁷⁷ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), P 101.

The Reviewer noted the requirements for the Review that were included by the ACCC in the Determination, and designed the Review accordingly; Part C of this Report addresses those requirements.⁷⁸ However, there have been some unexpected side-effects of the Scheme and, although they do not fall within the specifications of Condition C3, this Report does include some consideration of them. These extra factors include:

- Use of the Scheme by non-licensee disputants
- Unanticipated types of dispute accessing the Scheme, and
- Organisational ramifications for APRA AMCOS

These side-effects have been discussed with APRA AMCOS, and it is suggested in this Report that pro-active steps be taken to protect the ongoing operation of the Scheme, and the Scheme's valuable service in providing assistance when writer-members of APRA AMCOS have disputes with each other.

Without prejudicing the substance of the Report, the Reviewer also discussed with APRA AMCOS a range of pro-active options through which the organisation could work with some of its key stakeholders to develop and maintain productive working relationships.

(b) Data Collection

As noted elsewhere in this Report, the Scheme has not enjoyed extensive usage, and it should be noted that, in such a context, available data has not been "over-analysed" by the Reviewer.

The Reviewer gained information and data about the Scheme to enable reporting according to the requirements of Condition C3. Data sources included:

- Reviewer attendance at meetings of the Consultative and the Governance Committees
- Input/feedback from:
 - Users of the Scheme;⁷⁹
 - Committee members;⁸⁰
 - Licensees;⁸¹
 - Independent mediators/experts/mappers/peers;⁸²
 - APRA AMCOS;⁸³ and
 - The Facilitator.⁸⁴
- Written records, reports, and data from:

⁷⁸ Those requirements are provided in full at Appendix C.

⁷⁹ Users of the Scheme had the opportunity to participate in an on-line survey, and to speak individually with the Reviewer.

⁸⁰ For example, in discussions with the Reviewer, providing views on the operation of the Scheme, the role of the Facilitator, and the role and function of the Committees.

⁸¹ For example, in discussions with the Reviewer, providing views on the operation of the Scheme and licensees' use of it.

⁸² For example, in discussions with the Reviewer, providing views on the operation of the Scheme, the role and function of the Facilitator, and perceptions of their own role within the Scheme.

⁸³ For example, in discussions with the Reviewer, providing information about the operation of the Scheme, and the role of the Facilitator, as well as funding arrangements for the Scheme, and the procedures for anyone who wanted to lodge a complaint about the Scheme.

⁸⁴ For example, in discussions and email exchanges with the Reviewer, providing her perspective on the operation of the Scheme, on her role within it, and the contributions of Committee members.

- APRA AMCOS;
- The Scheme;⁸⁵ and
- The Facilitator.

All these inputs have contributed to the Review, including analysis and observations included in this Report.

Suggestions and observations arising from the Review are included in relevant Sections, and are summarised below, in Part B Executive Summary.

Quantitative Data Collection

In the Determination, the ACCC required the inclusion of specific quantitative data in the Scheme’s Annual Reports.⁸⁶ This Report has based its quantitative analysis on that same data, which were obtained from the Scheme, and are presented within the report under the following categories:

- Summary of time taken for resolution and referral to each option;
- Summary of subjects of dispute;
- Where matters were not resolved, the reasons for non-resolution; and
- Summary of fees and charges incurred by Applicants, and proportion of fees/charges as “disbursements” of mediators/experts paid by APRA AMCOS.

The Reviewer is aware of the various confidentiality and privacy restrictions that apply to DR processes, and has taken these into account in the analysis of “subjects of dispute” and “reasons for non-resolution”. The Reviewer is also aware that Annual Reports submitted by the Facilitator have included detailed reports of costs and fees; this Report does not replicate those details.⁸⁷

Qualitative Data Collection

The Reviewer sought and obtained qualitative data in the form of interviews with Scheme stakeholders, as listed above (and as required in Condition C3). Based on that feedback, there is little doubt that people who have been involved in the Scheme have welcomed its establishment, are generally pleased with its operation, and with its potential as a dispute resolution scheme and consultative mechanism for the wider music industry. For example: *‘Would certainly recommend this service to other writers. Thank you APRA for providing the service.’*^{88 89}

⁸⁵ Although the Reviewer had access to the Scheme’s Quarterly Reports for each year (including 2018), she relied only on the Annual Reports that were relevant to the reporting period specified in Condition C3.

⁸⁶ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), P 95.

⁸⁷ Copies of the Scheme’s Annual Reports for January – December 2016, and January – December 2017 are included at Appendix B.

⁸⁸ Feedback provided in the on-line survey of Scheme users.

⁸⁹ This Report includes only limited data from the online survey for reasons of the protection of confidentiality of those who did complete the survey; so few people completed the survey that the provision of even minor information about them might be identifiable.

Part B. Executive Summary

In summary, the Scheme has resolved disputes in a timely, efficient, and effective manner. Similarly, the performance of the Facilitator is equally effective, and is a major contributor to the overall effectiveness of the Scheme. In all discussions with the Reviewer, people expressed satisfaction with the Scheme's existence, and commended the commitment, the skills, and hard work of the Facilitator.

This Independent Review has shown that not only is Resolution Pathways producing efficient, timely and effective results, the nature of matters with which it is dealing suggest that it is also filling a long-standing gap in the music industry. The Scheme is highly likely to be even more effective once the below-listed issues have been addressed.

The Scheme is supported by Committees whose volunteer members work wholeheartedly for the Scheme's success.

The Scheme's success is heavily reliant on the obvious skills and commitment of its Facilitator. In particular, thanks to the Facilitator's enthusiasm, the Scheme includes innovative approaches designed specifically for its own unique context (e.g., the dispute resolution processes called "Mapping" and "Peer Assist").

The below-listed observations and suggestions are drawn from Parts C and D of this Report; in the interests of conciseness, some suggestions from Part C are combined into a single suggestion for this Executive Summary.

This review has found three general areas in which further improvements would benefit the operation of the Scheme and the Reviewer's suggestions and observations are set out accordingly.

1. Perceptions of the independence of the Scheme

- *A broader source of funding, and a wider market focus would reduce the Scheme's dependence on APRA AMCOS, and would go some way towards addressing existing perceptions of APRA AMCOS influence over the Scheme. To ensure the Scheme's future viability, it would be appropriate for alternative funding options to be canvassed, including industry funding options.*
- *It would be appropriate to ensure all Scheme documentation bear the Scheme's own name and logo.*

2. The Scheme's administration (including record-keeping), and structure (including Committees)

Administration – funding

- *A broader source of funding, and a wider industry focus would reduce the Scheme's dependence on APRA AMCOS, and would go some way towards addressing existing perceptions of APRA AMCOS' influence over the Scheme. It would be useful for alternative funding options to be canvassed, including industry funding options. For example, if APRA AMCOS is seen to be the controller of song royalties, and PPCA as the controller of recording royalties, it might be appropriate to consult industry bodies such as PPCA and invite their input to options for the Scheme's future.*
- *It may improve the transparency of the Scheme and its operation if each Annual Report included a section for reporting on the Scheme's funding arrangements. The section could include separate reports for Operational Funding, and for the Funding of Dispute Resolution Services.*

Administration – record-keeping

- *The Facilitator is to be commended for her pursuit of suitable computer software that enables the automatic registration, monitoring, and tracking of each matter; this will enable an inherently consistent record-keeping and reporting regime, as well as enabling the tracking of timeliness.*

Structure – Committees

- *Now that the Scheme is beyond its development stages, it would be appropriate to review the purpose of the Governance Committee, the Steering Committee, and other Sub-Committees, and to clarify and document their roles in the operation of the Scheme.*
- *The advisory role of the Steering Committee would be reinforced if the Facilitator were to attend meetings only as a non-member, and if her role in Committee meetings were to be as a reporter on the Scheme, including its finances and Annual Reports; the Committee members should elect a Chair from among themselves; and, the affiliations and representative status of each Committee Member be clearly described on the Scheme's website.*

Structure – operation

- *Internal management of the Scheme: It is suggested that two roles be established to manage the Scheme. One role would administer the Scheme, including the administrative side of referrals to the panel of third-party neutrals (a Scheme Co-ordinator role); and one role would be a first point of contact for the Scheme, including responsibility for attempting early and quick resolution of matters, as well as assessment of referral to other processes within the Scheme (a Case Manager).*
- *Panel of Third-Party Neutrals: It is suggested that the panel be reviewed with a view to: increasing the number of industry peers and Experts, and improving the panel’s gender balance.*
- *Analytical Framework: It is suggested that the Scheme adopt the Analytical Framework outlined in this Report, and that it include clear descriptions of the Scheme’s various accountability responsibilities.*

3. Information, documentation, and public image

Purpose, objectives, and goals

- *If the Scheme continues operating after June 2019, it would be useful to review its stated purpose, objectives, and goals, and to include them on a dedicated part of the Scheme website.*

Website and information

- *The Scheme website would benefit from a review that rectifies the “glitches” listed in Part C [3 (ii)]; it may also be appropriate to seek stakeholder input to the future design and focus of the website.*
- *In future, it may be helpful for potential users of the Scheme if the website were to include a single, clear, plain English description of how the Scheme operates, as well as some simple explanations of the DR processes that the Scheme provides. The explanatory page should be designed for use by stakeholders as well as users of the Scheme. The document could emphasise that the Scheme’s aim is to help disputants/complainants finalise their matter in ways that each side can accept, and to do so as promptly and informally as is possible. The document could include an explanation of the sequence of processes available within the Scheme, noting that any of them can be accessed if people prefer, if resolution has not otherwise been achieved, or if the Facilitator considers that any process is more appropriate for their particular matter. The processes could be presented as cascading logically from least interventionist (e.g., the Facilitator attempting early and informal intervention and resolution), through consensual processes (such as mediation, mapping, and peer assist), and ultimately leading to the Scheme’s determinative processes. This information should include a brief description of the procedure for appointing Experts.*

APRA AMCOS

- *APRA AMCOS could adopt a more pro-active role in developing and cultivating jointly productive working relationships with its many stakeholders. Such an approach is likely to increase the loyalty of stakeholders such as licensees, as well as leading to a reduction in the levels of dissatisfaction with APRA AMCOS services.*

Acknowledgements

The Reviewer would like to thank everyone who has contributed information for the Review, and to express appreciation for the ready assistance that a range of stakeholders have provided throughout the Review process.

Part C. Independent Review of Resolution Pathways (“the Scheme”)

1. Background

Prior to the establishment of Resolution Pathways, APRA AMCOS had a complaints system centred on the provision of expert opinions and decisions. That system was perceived to lack the independence necessary for an effective complaints handling system. Resolution Pathways was established as a Scheme that would operate independently of APRA AMCOS, and would comply with Conditions of Authorisation included in the Determination. Expert processes were retained in the Scheme.

The ADR scheme required under Condition C3 must include the following:

- four options for resolving disputes (informal resolution, mediation, expert opinion, binding determination)
- an independent dispute resolution facilitator appointed by APRA and approved by the ACCC to manage the ADR scheme. While noting APRA’s submission, since the ACCC will be approving the facilitator, the ACCC has not required a long term contract between APRA and the facilitator or remuneration that is not tied to the number or results of resolutions as part of the condition
- a pool of independent mediators and independent experts, including barristers and/or former judges and persons with relevant industry and/or commercial experience, established by the facilitator. The ACCC expects the facilitator to consult stakeholders about appropriate members of the pool
- the option for an applicant to request that a matter be managed by an independent expert rather than the facilitator
- broad coverage, including both disputes and complaints lodged by current/potential licensees and members
- applicant contribution to costs of a matter in most cases:
 - tiered filing fees payable for disputes
 - mediator/expert charges shared between parties for disputed amounts of \$10,000 or more and for non-monetary disputes where the applicant pays license fees to APRA or receives payments from APRA of \$10,000 or more
 - the facilitator, mediator/expert or the parties decide that APRA will pay all fees/charges
 - fees and charges are not payable for complaints (the facilitator has discretion to decide if a matter is a dispute or a complaint)
- a consultative committee (comprised of small and large licensees and members, associations and APRA nominated by the facilitator) to provide feedback and other advisory input to APRA and to the facilitator in relation to the operation of the ADR scheme
- publication of binding determinations
- annual reporting about the ADR scheme prepared by the facilitator and provided to the ACCC by APRA
- an independent review of the ADR scheme (in time for the authorisation expiring) by an independent reviewer appointed by APRA and approved by the ACCC

- a plain English guide to the ADR scheme
- a public website for the ADR scheme that is separate from APRA’s own website
- implementation of the ADR scheme for both APRA members and APRA licensees by 31 March 2015. While the ACCC would encourage APRA to implement the scheme prior to this date if possible, this deadline allows the facilitator and the committee to take more time in preparing the schemes if necessary.’⁹⁰

The Scheme’s name, “Resolution Pathways”, is intended to indicate the different DR processes, or “pathways” that the Scheme offers disputants.

2. Objectives of the Scheme

(i) Objective specified in the Determination

Condition C3 specifies the objective of the Scheme:

‘The objective of the Scheme is to resolve disputes in a timely, efficient and effective manner.’⁹¹

(ii) Objectives in the Scheme’s reports and website

The Quarterly Reports and Annual Reports produced by the Facilitator contain the data against which the Scheme’s compliance with the above objective can be assessed. These are reported in detail later in this Report.

The Scheme’s website includes a section about the Scheme’s ‘Core Purposes’ and ‘Values’. The listed Core Purposes are:

- To give voice to music creators and music users
- To streamline resolutions
- Business continuity without disputes as a roadblock.⁹²

If the Scheme continues operating after June 2019, it would be useful to review its stated purpose, objectives, and goals.

3. Scheme Structure and Operation

(i) Available dispute resolution processes

(a) Processes outlined in Condition C3.

Condition C3 specifies that the Scheme provide access to four separate dispute resolution processes:

⁹⁰ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375); P 81 – 82.

⁹¹ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), P 101.

⁹² <http://www.resolutionpathways.com.au/About-Us#consultative-committee>

*'... informal resolution by the Facilitator ... external mediation by an independent mediator ... non-binding expert opinion (including reasons) delivered by an appropriately qualified or experienced independent expert ... binding written determination (including reasons) written by an Independent Expert ...'*⁹³

(b) Processes provided in the Scheme

The Scheme provides access to the four processes listed in Condition C3. The Facilitator's role includes assessing the nature of each matter, and recommending to the disputants the most appropriate of those four processes. In practice, many matters have been resolved by the Facilitator at the informal stage. For example, sometimes the Facilitator has acted as an intermediary between the disputants, or she has sought additional information from APRA AMCOS, or she has encouraged APRA AMCOS to review the conditions/terms of a specific license.

It is clear that the Facilitator is making effective use of her skills in resolving matters early. Responding to the context and environment of APRA AMCOS members, and licensees, the Facilitator has initiated some innovative process approaches that are still in trial, or pilot, stages. These include the implementation of two processes that the Scheme calls Mapping, and Peer Assist.

Mapping – according to the description provided on the Scheme's website, and to information provided to the Reviewer by members of the panel of third-party neutrals, this process is similar to the process of "conciliation" that is practiced widely in statutory dispute resolution schemes in Australia. Mappers have expertise in the subject of the dispute to which they are appointed, and use that expertise to pinpoint the key issues in dispute, to guide the disputants' discussions of those key issues, and to suggest feasible areas of agreement. The process itself is not determinative, and the Mapper's role does not include making any decisions on behalf of the disputants.

Peer Assist – this appears to include processes that the Scheme and its proponents call "Peer Review", "Peer Mentoring", and "Peer Group". The process is available to music creators, and involves the appointment of an industry "Peer" whose role includes considering information provided by the disputants, providing an assessment of the likely provenance of the disputed music item, and facilitating collaborative negotiations between the disputants. The process itself is not determinative, and the Peer's role does not include making any decisions on behalf of the disputants. The Scheme's reports and website do not clearly differentiate the various permutations of the key process of "Peer Assist".

The Annual Report for January 2017 – December 2017 lists two matters referred to "Peers": one matter was referred for 'peer assist' and one for 'peer mentoring'. Unfortunately, this Report cannot include the outcome for either matter because they were carried over into the 2018 reporting period for the Scheme.

There needs to be greater clarity about the Peer Assist, Peer Mentoring, Peer Review, and Peer Group processes. This applies to the DR practitioners providing the services, as well as to the disputants referred to them.

⁹³ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.2 (i) – (iv).

The two Annual Reports on which the Reviewer has relied show that determinative processes (non-binding Expert Views, and binding Expert Decisions) were not used in 2016 or 2017.

Within Australia’s music industry, there are said to be many disputes that do not involve large sums of money, but do involve personal costs where, say, a song’s provenance is disputed. Although there can be significant constructive ramifications when such disputes are resolved – and opportunities for APRA AMCOS to release monies it has been holding for years – the funding of DR processes for such cases should not be left to disputants whose financial situation may not be sufficient to pay the fees of professional DR practitioners.

The approach applied in the Peer Assist process in particular has strong potential for wider application in the music industry. Feedback to the Reviewer included suggestions that the process could be a valuable technique for industry-wide consultations.

No part of the Scheme’s operations prevents any applicant from seeking intervention by the Copyright Tribunal, or any other court or tribunal.

It would be useful if the Scheme’s descriptions of its offerings could be revised to ensure that stakeholders and Scheme users could readily understand the nature of, and differences between, the various dispute resolution processes available within the Scheme.

(ii) Website and Scheme materials, including documentation

Schedule C of Condition C3 specifies that the Facilitator establish and maintain a Scheme website, separate from the AAPRA AMCOS website.

(a) Scheme website [<http://www.resolutionpathways.com.au/>]

The Facilitator has established a Scheme website that is separate from the website of APRA AMCOS.

It is to be expected that there would be “glitches” on the website of a new scheme, especially a scheme that is still in its pilot stages.

In her own perusal of the website, the Reviewer noted:

- Parts of the website are significantly out of date; for example, in November 2018, the webpage for the Peer Assist process contained only this information: ‘COMING SOON This service is due to be finalised and available in December 2015’;⁹⁴ the webpage providing information about Alternative Dispute Resolution also contains significantly out-of-date material, and should be amended accordingly;⁹⁵];
- The list of Consultative Committee Members is published on the letterhead of an organisation other than Resolution Pathways;⁹⁶

⁹⁴ <http://www.resolutionpathways.com.au/Peer-Assist>

⁹⁵ <http://www.resolutionpathways.com.au/Information-Resources#alternative>

⁹⁶ http://www.resolutionpathways.com.au/Dispute_Resolution_Committee_2014.pdf

- Website information about the “Mapping” process includes a sample agreement to participate in a Mapping Session; part of the sample agreement (presumably a document with legal standing) refers to the confidentiality that applies to a mapping session, and, in particular, refers to a Clause 24 which is likely to place limitations on the confidentiality – the sample agreement does not contain a clause 24;
- Website information about the Expert Opinion process uses terminology that is not familiar in the DR sector; for example, in the ACCC Determination, the process is called Expert Opinion (in which a non-binding written opinion is provided by a suitably qualified independent expert); on the Resolution Pathways website, this process is called ‘Expert View’;⁹⁷ similarly, what the ACCC’s Determination calls a binding determination, the Resolution Pathways website calls an Expert Decision (the DR sector calls this process Expert Determination⁹⁸); it might be clearer for potential Scheme users and their supporters if the Scheme were to describe its processes in terms that reflect those commonly used in the DR sector;
- Within the “Contacts” section of the website, at the bottom of a scroll-down page, is a sub-heading: ‘Comments, complaints and confidentiality’; within the sub-section is the following statement: *‘Lovely compliments will be used without attribution on our site, please let us know if you would like to keep your compliments to ourselves, or if you’re happy to include your name. All contact is confidential and will be recorded without attribution for our reporting.’*⁹⁹ Apart from the inconsistency between these two statements, there is no mention of complaints, of how to lodge one, or of any procedures for handling complaints. There is no clarification of how client confidentiality is treated in the Scheme, apart from this unclear reference to confidentiality in the context of compliments.

The Reviewer was told that, for some people, the website does not present well, that it is unprofessional, “clunky and messy”.

The Scheme website would benefit from a review that rectifies the above-listed “glitches”; it may also be appropriate to seek stakeholder input to the future design and focus of the website.

(b) Documentation

Condition C3.19 requires the Scheme to have a ‘plain English guide’ available on the Scheme’s website. The website does include information about the Scheme, its key personnel, and about alternative dispute resolution (now known as “dispute resolution”, or DR); however, it is not easy to navigate, or to readily understand.¹⁰⁰ The Reviewer understands that the Facilitator is currently revising the information on the Scheme website, including the feasibility of using graphic formats.

⁹⁷ http://www.resolutionpathways.com.au/Expert_View_Agreement_Nutshell.pdf

⁹⁸ For example, see National ADR Advisory Council, *Dispute Resolution Terms* (2003); available at: <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>; T. Sourdin, *Alternative Dispute Resolution* (5th Edition, Thomson Reuters, Australia, 2016).

⁹⁹ <http://www.resolutionpathways.com.au/Contact-Us>

¹⁰⁰ <http://www.resolutionpathways.com.au/Information-Resources#alternative>

In future, it may be helpful for potential users of the Scheme if the website were to include a single, clear, plain English description of how the Scheme operates, as well as some simple explanations of the DR processes that are available for complainants and disputants. The explanatory page should be designed for use by stakeholders as well as users of the Scheme. The document could emphasise that the Scheme's aim is to help disputants/complainants finalise their matter in ways that each side can accept, and to do so as promptly and informally as is possible. The document could include an explanation of the sequence of processes available within the Scheme, noting that any of them can be accessed if people prefer, if resolution has not otherwise been achieved, or if the Facilitator considers that any process is more appropriate for their particular matter. The processes could be presented as cascading logically from least interventionist (e.g., the Facilitator attempting early and informal intervention and resolution), through consensual processes (such as mediation, mapping, and peer assist), and ultimately leading to the Scheme's determinative processes. This information should include a brief description of the process for appointing Experts to any particular matter.

4. Scheme Timeliness, Efficiency, and Effectiveness

*(i) Quantitative Data Collection and Analysis*¹⁰¹

(a) Data limitations

The Reviewer recommends that the following quantitative data be treated with caution because only a small number of matters have been included in the Scheme. It is understood that, since the Review commenced, the number of matters has increased. Due to the specifications of Condition C3, those reported increases cannot be included in this analysis; however, the Reviewer understands that the additional data does not compromise the current findings and suggestions of this Review.

The Reviewer is aware that, during 2018, the Facilitator herself has been reviewing the administration of the Scheme, including the feasibility of introducing an automated electronic process for the registration, management, and tracking of matters.

An automated system would facilitate the development of consistent terminology for reports, including the descriptions of disputes, the recording of relevant dates for each matter, the descriptions of referrals, and the recording of results/outcomes.

(b) Timeliness

According to its Annual Reports, the Scheme generally deals with matters in a timely manner. Additional time is required where matters are referred to a third-party neutral, or where a matter requires APRA AMCOS to review and recalculate licensing conditions and/or fees. The time it takes

¹⁰¹ The data reported in this section has been collected from the Scheme's two Annual Reports, for the 2016, and 2017 reporting years.

to deal with any individual matter can be influenced by the responsiveness of the disputants, which itself can be influenced by the pre-existing duration of the dispute.

Feedback to the Reviewer is less consistently positive about timeliness than are the Scheme's Annual Reports. It is likely that improved tracking and reporting systems will make visibility and assessment of timeliness much easier.

(c) Costs

Schedule A of Condition C3 includes specifications for the calculation of fees and charges for dispute resolution.

The rates of fees and charges vary according to the amount in dispute, the dispute resolution process chosen, and the fees charged by the third-party neutral (when the matter is so referred). Scheme data shows that fees and charges have been apportioned according to the formula specified in Schedule A of Condition C3.

A costs estimate is provided to the disputants by the Facilitator when she recommends a particular resolution process, or "pathway".

The Reviewer is not aware of any instance in which the disputants were concerned about the fees and charges associated with their matter, nor that any matter has been withdrawn due to concerns about fees and charges.

(d) Subjects of disputes

The majority of matters that have been raised with the Scheme concern disputes between writer members of APRA AMCOS,¹⁰² despite the ACCC Determination having a strong focus on the concerns of licensees. Out of 28 matters raised with the Scheme in the two reporting years of January 2016 – December 2017, only six matters concerned licenses. None of the licensing matters remains outstanding.

(e) Resolution

Scheme data shows that the majority of disputes are resolved, and that the majority of the resolutions are obtained promptly through early intervention by the Facilitator.

Data from the Scheme shows that, for those who accessed it, the outcomes in terms of resolution, or finalisation, were good: In 2016, 79% of matters referred to the Scheme were finalised, and, in 2017, 50% were finalised. However, the reach of the Scheme appears to be of some concern. Of those who did access it, the majority involved inter-member disputes, rather than the disputes with APRA AMCOS that were predicted by the ACCC.

Feedback to the Reviewer confirms that the lack of licensee uptake is a concern to Scheme stakeholders.

Resolution rates is a traditional, and widely used, measure of effectiveness in any dispute resolution service, or program, or scheme. It can be a misleading figure because it necessarily includes only those matters that are referred into a scheme and does not include all the

¹⁰² This is confirmed by the Scheme's Annual and Quarterly Reports, as well as by responses to the Review's online user survey.

disputes/complaints that are not so referred. Hence, it is not a reliable indicator of the potential reach, or the influence, of any program, or scheme.

The rate of resolution in this Scheme is a proportion of the referred matters only; it cannot include the matters that were not referred, and there is no way of ascertaining the number of non-referred disputes or complaints, nor how many of those were resolved. As with all such programs and schemes, there is likely to be a significant number of non-referred matters; and information provided to this Review suggests that likelihood is quite high for licensees. For example, the reach of this Scheme should include the total number of licensees of APRA AMCOS, as well as the total number of APRA AMCOS members, the numbers of musicians who are members of industry organisations other than APRA AMCOS, and the numbers of musicians who are not members of any organisation. Analysis of Scheme matters in isolation provides artificial data that masks the potential effectiveness of this Scheme across Australia's music industry.

It has been reported elsewhere that a dissatisfied customer's willingness to lodge a complaint is linked to perceptions of their own power (i.e., if they do not feel powerful, they will not lodge a complaint),¹⁰³ and that dissatisfied male customers are more likely to lodge complaints than are dissatisfied female customers.¹⁰⁴ Accordingly, this Scheme should have a high rate of usage because of the high proportion of males in APRA AMCOS' membership. Yet the usage rate remains quite low. The questions remains: what is happening to the disputes and complaints that would ordinarily be expected to be lodged with the Scheme?

(f) Non-Resolution – Reasons

Scheme data suggests that, for the few matters that were not resolved, in most cases, it was because the disputants agreed that no further action was necessary.

¹⁰³ N. Stephens and K. P. Gwinner, 'Why Don't Some People Complain? A Cognitive-Emotive Process Model of Consumer Complaint Behaviour' (1998) 26(3) *Journal of the Academy of Marketing Science* 185 – 189.

¹⁰⁴ N. Stephens and K. P. Gwinner, 'Why Don't Some People Complain? A Cognitive-Emotive Process Model of Consumer Complaint Behaviour' (1998) 26(3) *Journal of the Academy of Marketing Science* 185 – 189.

Figure 1. 2016 - Relative proportion of referrals

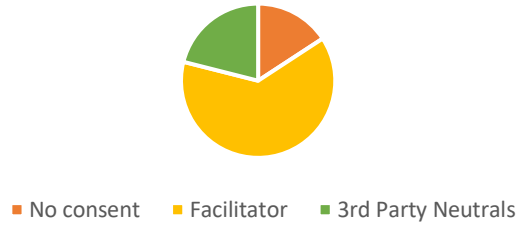


Figure 2. 2017 - Relative proportion of referrals

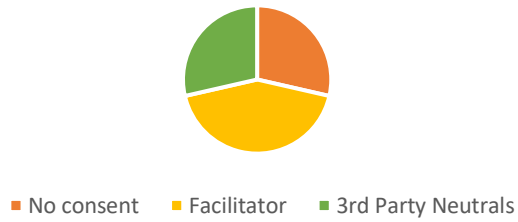


Figure 3. 2016 - Relative proportion of finalised matters



Figure 4. 2017 - Relative proportion of finalised matters



Notes to Figures 1 – 4: data for 2017 includes: a matter not referred for reasons other than non-consent, and the addition of Peer Assist/Peer Review/Peer Mentoring as Scheme processes for

finalising matters. In 2016, two matters were transferred to 2017, and in 2017, five matters were referred to 2018.

(ii) Panel of Third-Party Neutrals

(a) Specifications in the Determination

Schedule B specifies that the Scheme include ‘... suitably qualified or experienced Independent Mediators and Independent Experts ... including barristers and/or former judges, and persons with relevant industry and/or commercial experience, across a range of areas of expertise and geographic locations ...’¹⁰⁵

(b) The Scheme’s panel of third-party neutrals

The Scheme website includes a page dedicated to information about the panel of the third-party neutrals (which the website calls “Resolution Panels”) available to provide dispute management and resolution services.¹⁰⁶ The total number of practitioners included on the list is twelve, all of whom are listed as mediators, and two of which are also listed as Mappers. None of the panel members is listed as a Peer for the purposes of Peer Assist, or as an Independent Expert. The list includes practitioners with varying industry, and/or commercial experience and expertise. The list includes at least one barrister.

The panel includes third-party neutrals in various geographic locations, including at least one in most States and Territories. Five neutrals are listed for NSW, three for Victoria, and one each for South Australia, Queensland, Western Australia, and the NT. There are no neutrals listed for the ACT or for Tasmania.

The twelve neutrals are well-known, well-qualified, experienced DR practitioners.

The website does not make clear which of the neutrals provide Independent Expert services, and does not include the credentials by which the facilitator might choose to appoint an Independent Expert to a particular matter.

(c) Gender

Of the twelve neutrals, three are women (one in South Australia, one in Western Australia, and one in New South Wales), and nine are men.

During the Review, APRA AMCOS reported to the Reviewer that their membership is similarly male-dominant: as at 30 June 2019, 77.89% of their members were male, and 22.11% were female. APRA AMCOS noted that they are actively seeking to redress this current imbalance.

There are two potential effects of the Scheme’s gender imbalance. Mediation research has suggested that perceptions of mediation’s fairness and satisfaction with the process might be influenced by the gender of the neutral third party being matched with the gender of at least one of the disputants.¹⁰⁷ In addition, the predominance of male dispute resolvers on the Scheme’s website might influence potential complainants’ decisions about whether to contact the Scheme.

¹⁰⁵ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375); Condition C3.9, Schedule C.

¹⁰⁶ <http://www.resolutionpathways.com.au/Resolution-Panels>

¹⁰⁷ L. Charkoudian and E. K. Wayne, ‘Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants’ Perception of Mediation’ (2010) 28(1) *Conflict Resolution Quarterly* 23 – 52.

It is suggested that the Scheme's panel of third-party neutrals be reviewed with a view to: increasing the number of industry peers and experts, and improving the panel's gender balance.

5. Scheme Committees

(i) Overview

According to the Scheme's Annual Report for January – December 2016, there are four Committees: a Steering Committee,¹⁰⁸ with three Sub-Committees (a Governance Sub-Committee, a Peer Sub-Committee, and a Succession and Nominations Sub-Committee).

(ii) Steering Committee

(a) Specifications in the Determination

Condition C3 of the Determination includes requirements for the establishment of a Consultative Committee. 'The objective of the [Consultative] Committee is to provide feedback and other advisory input to APRA and to the facilitator in relation to the operation of the ADR scheme.'¹⁰⁹

The functions of the Committee are specified as including:

*'... monitoring the operation of the Scheme, including actual costs of the Scheme ... receiving feedback on the Scheme and communicating that feedback to the Facilitator and APRA (where appropriate) ... in consultation with the Facilitator and for each calendar year, making an annual recommendation to APRA about the budget for the operation of the Scheme ... and making recommendations to the Facilitator and to APRA about the operation of the Scheme.'*¹¹⁰

Condition C3 includes the representation requirements of Committee members:

*'... an equal number of representatives of ... licensees whose annual license fees payable to APRA are \$3,000 or less ... licensees whose annual license fees payable to APRA are over \$3,000 ... members whose annual royalty receipts from APRA are \$3,000 or less, other than members who have not received any royalties from APRA in the previous 24 months ... members whose annual royalty receipts from APRA are over \$3,000 ... and a representative of APRA.'*¹¹¹

¹⁰⁸ The Determination refers to this body as a Consultative Committee, and the Scheme itself refers to a Steering Committee.

¹⁰⁹ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.7 Schedule B.

¹¹⁰ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.7 Schedule B.

¹¹¹ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.6.

(b) Steering Committee in the Scheme

The Steering Committee provides advice and support to the Facilitator in relation to the design, implementation, and on-going management of the Scheme.

Committee function and purpose

The purpose of the Steering Committee was devised as part of establishing the Scheme. On the Scheme's website, the purpose is described as being to: '... support [the Facilitator] in design, implementing and managing ...'¹¹² the Scheme.

Now that the Scheme is beyond its developmental stage, it would be appropriate to review the purpose of the Steering Committee, and to clarify its role in the operation of the Scheme.

Committee Members

Committee members are appointed on a volunteer basis. They work and reside in various parts of Australia and ordinarily meet using internet-based video-call technology. The Independent Reviewer attended two meetings of this Committee, and was impressed by the level of commitment on the part of Committee Members despite their diverse interests and roles in Australia's music industry. At those meetings, the Facilitator discussed with the Committee various aspects of the Scheme, including proposed Scheme innovations for improving the nature of Scheme services for APRA AMCOS members in particular. She also consulted with the Committee about the appointment of new Committee members.

Sixteen Committee Members are listed on the website, although the affiliation/representation requirements are not made clear. For example, three members appear to represent large licensees, and one appears to represent small (or casual) licensees; it is unclear which of the six writer representatives are above or below the Determination's delineation of \$3000pa royalty payments. Two of the writer members are APRA AMCOS Ambassadors which could affect perceptions of their independence when making Committee decisions. Three Committee Members are neither licensees nor writers; for two, their affiliation is unclear. The Scheme Facilitator is the final member of the Steering Committee. APRA AMCOS internal counsel is an observer at meetings of the Steering Committee.

The list of Committee Members is publicly available on the website; however, it is on a pdf document bearing letterhead and logo of a company other than Resolution Pathways.

The Scheme Facilitator chairs the Steering Committee, assuming a dual role: while she chairs the meetings, she is also reporting on the Scheme. Although this arrangement has been an important one during the initial development of the Scheme, it could be perceived as a potential conflict of interest. It is important for the future perceived integrity of the Scheme that the Committee itself elect a Chair from its members, and that the Facilitator step aside from being a Committee Member.

¹¹² <http://www.resolutionpathways.com.au/About-Us>

Such an approach would enable the Committee to maintain its independence of the Scheme, and more readily fulfil the advisory role foreseen by the ACCC.

The advisory role of the Steering Committee would be reinforced if the Facilitator were to attend meetings of the Consultative Committee only as a non-member, and if her role in Committee meetings were to be as a reporter on the Scheme, including its finances and Annual Reports; the Chair of the Consultative Committee should be elected from the Committee's members; and, the affiliations and representative status of each Committee Member be clearly described on the Scheme's website.

The purpose and role of the various Sub-Committees needs to be clarified and documented.

It would be appropriate to ensure that all Scheme documentation bear the Scheme's own name and logo.

(iii) Governance Committee

According to the Annual Report January – December 2016, the Governance Sub-Committee was established during the 2016 calendar year. The Governance Sub-Committee is intended to be quite independent of the Scheme's relationship with APRA AMCOS.

During the first half of 2018, it became clear that the Independent Reviewer could not be seen to retain her independence while APRA AMCOS was her point of contact for the review. It was agreed that the existing Governance Sub-Committee would provide an independent point of contact for the Independent Reviewer.

Membership of the Governance Committee is drawn from the Steering Committee; the internal counsel from APRA AMCAOS attends the meetings as an observer. The Reviewer attended meetings of the Governance Committee and maintained email contact with its members outside meetings.

(iv) Succession and Nominations Sub-Committee

This Sub-committee is mentioned in the Annual Report (January 2017 – December 2017). Information about this Sub-Committee is limited; however, it appears to be responsible for recommending replacement Committee Members when vacancies arise.

(v) Peer Review Sub-Committee

This Sub-Committee appears to have been established to oversee the trial of an innovative Dispute Resolution process within the Scheme: Peer Review. Within this process, a panel of potential Peer Reviewers would be established, and, when a dispute between writers was registered with Resolution Pathways, the writer-disputants would be provided with the names of three potential Peer Reviewers from the panel. The writer-disputants would agree on one Peer Reviewer, who would be appointed by the Facilitator to consider their matter and provide advice on how the matter could be resolved.

Feedback to the Reviewer suggests a lack of common understanding among Committee Members about the roles and purposes of the various Sub-Committees, as well as a lack of shared confidence in

their capacities to undertake their roles, and to maintain a perception of independence, within the Scheme's current structure.

6. Funding of the Scheme

(i) Operational funding

APRA AMCOS reported to the Reviewer that it is the sole funder of the Scheme's general management and operation, and that the Scheme has a specific budget item in the organisation's management accounts. APRA AMCOS' annual legal expense budget includes a forecast amount for the funding of the Scheme.

Funding includes an annual retainer that is paid to Resolve Advisors Ltd, in quarterly instalments, upon receipt of an invoice for each relevant quarter. APRA AMCOS also pays Resolve Advisors Ltd for the incurred costs related to additional items as required (e.g., costs related to the establishment and maintenance of IT resources, travel, and other incidental costs). These payments also occur quarterly, upon receipt of relevant invoices from Resolve Advisors Ltd.

According to feedback to the Reviewer, not all members of the Steering Committee are aware of these funding arrangements.

(ii) Funding of Dispute Resolution Services

All payments for dispute resolution services are made in accordance with Condition C3 in the Determination.

APRA AMCOS reported that all disputes referred to the Scheme are dealt with initially by the Facilitator and initial incurred costs are included under the annual retainer fee. Where matters are referred to independent mediators/experts/mappers/peers, these costs are funded on a case-by-case basis; this has included instances where APRA AMCOS has covered all costs, the parties have apportioned costs among themselves, or the relevant independent third party (i.e., party mapper/mediator/expert/peer) has determined apportionment of costs.

In such cases, the independent third party submits an invoice to APRA AMCOS, and, where appropriate, to other parties for payment of their agreed portion.

Comments were made to the Reviewer about the capacity for the Scheme to provide dispute resolution services more broadly across the music industry; given the nature of disputes being handled by the Scheme, this proposal is worthy of consideration. It was also suggested that some of the processes currently used in the Scheme could be applied to facilitate consultations across the music industry. Obviously, such developments would require significant change in the Scheme and its operation. For example, an alternative funding arrangement would be needed, perhaps using other industry schemes as a guide. Devising a method of industry funding for the Scheme is likely to be a complex undertaking; however, it is likely to increase the Scheme's resources and enable the infrastructure improvements that the Scheme is needing, both of which would improve the Scheme's effectiveness. Such changes might also positively affect perceptions of the Scheme's independence of APRA AMCOS.

A broader source of funding, and a wider industry focus would reduce the Scheme's dependence on APRA AMCOS, and would go some way towards addressing existing perceptions of APRA AMCOS influence over the Scheme. It would be useful for alternative funding options to be canvassed, including industry funding options. For example, if APRA AMCOS is seen to be the controller of song royalties, and PPCA as the controller of recording royalties, it might be appropriate to consult industry bodies such as PPCA and invite their input to options for the Scheme's future.

It may improve the transparency of the Scheme and its operation if each Annual Report included a section for reporting on the Scheme's funding arrangements. The section could include separate reports for Operational Funding, and for the Funding of Dispute Resolution Services.

7. Relationship between the Scheme and APRA AMCOS, and Stakeholders

(i) The Scheme and APRA AMCOS

The Scheme arose out of perceptions that APRA AMCOS' monopoly status prevented it from running an internal process for handling concerns raised by licensees. In the Determination, the ACCC noted the necessity for a scheme that operated independently of APRA AMCOS; at the same time, the ACCC required APRA AMCOS to fund the Scheme. This dual role on the part of APRA AMCOS has affected perceptions of the Scheme's independence, according to feedback provided to the Reviewer.

It has been difficult for the Scheme to maintain any perception of independence from APRA AMCOS while such perceived duality continues. At least during the period of this Review, it has appeared that APRA AMCOS has deliberately avoided any involvement in the Scheme, or the Committees, that could be perceived as interference – and has not demonstrated any overt degree of control over the operation of the Scheme or the role of the Facilitator. In addition to being the sole funder of the Scheme, APRA AMCOS also provides rooms and electronic facilities for meetings of the Committees, and questions have been raised with the Reviewer about the independence of all Committee members. Although APRA AMCOS' support and assistance has made it easier for the Committees to meet, it could be perceived as active involvement on the part of APRA AMCOS.

The current APRA AMCOS representative and the Facilitator have worked closely together in developing the Scheme, and their joint commitment to its effective operation is a cornerstone in the Scheme's success.

Feedback to the Reviewer suggests there is some concern about what is perceived to be a controlling position held by APRA AMCOS in relation to the Scheme, to its operation, and to the role of the Facilitator.

This would be addressed at least in part, if alternative sources of additional funding and support were to be obtained for the Scheme. The involvement of other industry organisations and stakeholders may also enable broader access to the Scheme by Australia's musicians.

During the period of the Review it became clear that there are some systemic issues involving APRA AMCOS which contribute indirectly to the operation and function of the Scheme, but which lie outside this Review's scope. Feedback to the Reviewer suggested that it might be beneficial for the music industry if APRA AMCOS itself were to be the subject of a review.

(ii) APRA AMCOS and the Stakeholders

In the past, APRA AMCOS has been the subject of criticism from some of its stakeholders who have perceived the organisation as a collection agency more interested in compliance enforcement than in taking account of the views of its "customers". Development and operation of Resolution Pathways has provided opportunities for APRA AMCOS to become better acquainted with its key stakeholders, and equally for those stakeholders to become better informed about APRA AMCOS. Now that the Scheme is establishing its place in the Australian music sector, there is an opportunity for APRA AMCOS to review its traditional approach, and to make constructive use of the relationships that have been established through the Scheme.

Research in the areas of marketing and customer relations suggests that dissatisfied customers resort to "bad-mouthing" an organisation rather than submitting a complaint.¹¹³ It has even been estimated that 96% of dissatisfied customers do not complain, but *are likely to bad-mouth* the organisation.¹¹⁴

On the other hand, organisations that cultivate productive relations with their customers, and actively rely on customer input, build a strong cohort of customer loyalty. It has been reported that, the better any relationship between an organisation and its customers, and the more frequent their interactions, the fewer complaints and bad-mouthing will occur. This is because customers know that their views are taken into account by, and can influence the organisation.¹¹⁵

APRA AMCOS could adopt a more pro-active role in developing and cultivating jointly productive working relationships with its many stakeholders. Such an approach is likely to increase the loyalty of stakeholders such as licensees, as well as leading to a reduction in the levels of dissatisfaction with APRA AMCOS services.

8. The Scheme Facilitator

(i) Appointment of the Facilitator

APRA AMCOS reported to the Independent Reviewer that the Facilitator was appointed following a selection process conducted by APRA AMCOS' external counsel and internal counsel, and that the

¹¹³ D. Crié, 'Consumers' Complaint Behaviour. Taxonomy, typology and determinants: Towards a unified ontology' (2003) 11(1) *Database Marketing and Customer Strategy Management* 60 – 79.

¹¹⁴ N. Stephens and K. P. Gwinner, 'Why Don't Some People Complain? A Cognitive-Emotive process Model of Consumer Complaint Behavior' 26(3) *Journal of the Academy of Marketing Services* 172 – 189.

¹¹⁵ D. Crié, 'Consumers' Complaint Behaviour. Taxonomy, typology and determinants: Towards a unified ontology' (2003) 11(1) *Database Marketing and Customer Strategy Management* 60 – 79.

ACCC approved the appointment of Shirli Kirschner of Resolve Advisors Ltd. This approval is recorded in the Determination.

(ii) Role and function of the Facilitator

(a) Specifications in the Determination

'The objective of the Facilitator is to manage the operation of the Scheme, and to participate in the resolution of Disputes, in a way that facilitates the resolution of disputes in a timely, efficient and effective manner.

The functions of the Facilitator must include:

(i) ensuring the effective set-up (in the case of the initial Facilitator) and the effective operation of the Scheme

(ii) appointing, reappointing, replacing and terminating the appointment of members of the Committee from time to time

(iii) informing Members and Licensees about the Scheme (including informing individual Members or Licensees (as relevant) about the costs that those Members or Licensees are likely to incur under the Scheme in relation to a particular dispute) and being available to answer queries and questions about the Scheme

(iv) resolving Disputes under Option 1, including by discussing issues with Applicants on a confidential basis, assisting with communications between APRA and Applicants, and narrowing down issues between APRA and Applicants

(v) establishing a pool of suitably qualified or experienced Independent Mediators and Independent Experts (the 'DR Pool'), including barristers and/or former judges, and persons with relevant industry and/or commercial experience, across a range of areas of expertise and geographic locations, and reviewing the composition of the pool annually

(vi) making recommendations to APRA and to Applicants about the suitability of Options 2, 3 or 4 for resolving a particular Dispute, including recommendations about appropriate Independent Mediators or Independent Experts for resolving that Dispute quickly and efficiently

(vii) collecting and distributing the Fees and Charges

(viii) assisting the Independent Mediator or Independent Expert in the making of timetabling and other administrative arrangements for resolving each Dispute under options 2, 3, and 4, including:

(a) arranging meetings or conferences

(b) receiving submissions from the parties

(c) distributing submissions and other relevant materials to the parties and to the Independent Mediator or Independent Expert (as relevant)

With the objective of ensuring that the resolution of each Dispute progresses in a timely and efficient manner (including the objective of ensuring that all preliminary steps in relation to a dispute be completed without the need for travel)

(ix) preparing the annual ADR report ...

(x) establishing and maintaining a public website for the Scheme that is separate from APRA's own website, and publishing on that website information and documents relating to the Scheme, including:

(a) the plain English guide to the operation of the Scheme ...

(b) each public ADR report, which the Facilitator must publish no later than 1 business day after receiving it from the relevant Independent Expert, and the public version of the report of the Independent Reviewer ...

(c) the curriculum vitae of each Independent Mediator and Independent Expert in the DR Pool

(d) the public version of each binding written determination under option 4 ...'¹¹⁶

(b) Role and function in the Scheme

The current Facilitator is the original Facilitator, and she is widely respected and commended for the work she has done on the design of the Scheme, its continual development, and on the resolution of matters that are referred to the Scheme. The Scheme's funding is in the form of a retainer that is calculated on the basis of the Facilitator working on the Scheme for only a couple of days per month. It has been reported to the Reviewer that the Facilitator is currently working at least one day per week on the Scheme, and sometimes more.

The Scheme's operation – and its success – rely on the undoubted skills and expertise of the current Facilitator: she deals with all enquiries to the Scheme, takes initial action to resolve matters quickly, and is the point from which referrals are made to the external panel of third-party neutrals. She was also instrumental in the appointment of the highly skilled panel of third-party neutrals.

There is no doubt that the Scheme and its operation are heavily reliant on the skills and commitment of the current Facilitator. There are some indications that she is subject to work pressure in her role, and does not have access to suitable support resources.

It is unclear what succession-planning is in place in the event that the current Facilitator becomes unavailable to run the Scheme. It is likely that many of the concerns mentioned in this Report can be traced back to the levels of funding and resourcing for the Scheme, as well as the single source of that funding. It is possible that devising alternative funding and resource arrangements might produce opportunities to increase the funds and resources available to the Scheme.

A reduction in the amount of work pressure on the Facilitator role is likely to result from the combined effects of: the introduction of suitable computer-based options for case monitoring, tracking, and record-keeping; alternative funding for, and resourcing of, the Scheme; and a separation of administrative and case management roles within the Scheme.

It is suggested that two roles be established to manage the Scheme. One role would administer the Scheme, including the administrative side of referrals to the panel of third-party neutrals (a Scheme Co-ordinator role); and one role would be a first point of contact for the Scheme, including responsibility for attempting early and quick resolution of matters, as well as assessment of referral to other processes within the Scheme (a Case Manager).

9. Innovations developed and trialled by the Facilitator

¹¹⁶ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), Condition C3.7, Schedule C.

The Determination acknowledges that unforeseen requirements may necessitate the Facilitator making operational adjustments to the Scheme, and so enables that to occur: ‘... the ADR scheme may need fine-tuning during the period of authorisation ...’¹¹⁷

The Facilitator has taken a practical approach to ensuring the effectiveness of the Scheme. For example, feedback and reports to the Reviewer confirm that, during the life of the Scheme, she has been making additional refinements to the Scheme’s operation. This has also been occurring during the Review. These include the development of two new dispute resolution processes, as well as consideration of a computer-based system for registering, tracking, and monitoring Scheme matters, as well as automated preparation of data for reporting purposes.

10. Handling Complaints about the Scheme

The Reviewer is not aware of any formal complaints about either the Scheme or the Facilitator.

APRA AMCOS reported that the Scheme has its own feedback process whereby every user of the Scheme provides feedback on their experience of it. APRA AMCOS itself has a dedicated section of their website through which complaints and compliments can be submitted;¹¹⁸ however, the relevant point on the APRA AMCOS website links directly to the Scheme itself. As noted earlier in this Report, the Scheme’s own website includes a page titled “Contacts” within which is one section: “Comments, complaints and confidentiality”. Unfortunately, the page includes nothing about how, or where, to lodge a complaint about the Scheme, nor the procedures by which such complaints will be handled.

It is not clear how a complainant would access an independent point of contact if they wish to complain about the Scheme itself.

The Scheme itself obtains evaluations from its users immediately following the completion of a matter.¹¹⁹ The role of the Scheme in soliciting these evaluations could be problematic: any program’s self-solicitation of user feedback can place pressure on users to be reticent about any concerns or dissatisfaction they may have. It would be better for the evaluations to be distributed, collated, and analysed by a third party.

It is important that the Scheme establish a credible mechanism for handling complaints about itself. In addition, should the Scheme choose to appoint separate personnel for administration and service provision, it may be appropriate for the administration to manage the distribution, collection, and analysis of service evaluations from Scheme users.

11. Report on the online survey for users of the Scheme

¹¹⁷ ACCC, *Application for revocation and substitution of authorisations A91187-A91194 and A91211, lodged by the Australian Performing Right Association Ltd, in respect of arrangements for the acquisition and licensing of performing rights in music* (ACCC, ACT, 6 June 2014; Authorisation numbers: A91367 – A91375), P 69.

¹¹⁸ <http://apraamcos.com.au/feedback-centre/compliment-and-complaint-details/>

¹¹⁹ The Annual Report January – December 2016 includes some examples of these.

The data obtained from the online survey must be treated with caution because of the small number of survey respondents.

The Reviewer designed an online survey limited to fourteen questions about Scheme users' perceptions of the Scheme, and their experiences with it. Prior to distribution, the survey was tested by members of the Steering Committee, and adjusted according to their suggestions.

The survey was estimated to take less than ten minutes to complete. Survey respondents were informed that results of the survey would contribute to the Review, they were reassured that their responses would be protected by confidentiality, and they were given the opportunity to agree to the Reviewer contacting them to discuss their observations in more detail.

- a. Notifications about the survey were emailed by the Scheme to all people who had used it during its operational period.¹²⁰ Scheme records show that twenty-eight people had accessed the Scheme during the two years January 2016 – December 2017, and more people have accessed the Scheme during 2018. There were seven survey respondents, and the Reviewer is aware that at least one survey respondent accessed the Scheme after June 2018.¹²¹
- b. Of the seven respondents, five were writer members of APRA AMCOS, and two were licensee members of APRA AMCOS. Three of the survey respondents reported that they had had disputes with fellow writer-members of APRA AMCOS.
- c. Four of the respondents were from NSW, two from Queensland, and one from SA; the majority heard about the Scheme from the APRA AMCOS website, while others heard about the Scheme by word-of-mouth and/or from a friend or colleague.
- d. Respondents' reports on the outcomes achieved in the Scheme and their satisfaction with the Scheme were mixed: a small proportion reported being satisfied with their experience in the Scheme, and a similarly small proportion reported not being satisfied.

Although there can be many reasons for people to have chosen not to access and complete this particular survey – despite email invitations to do so¹²² – it should be remembered that surveys are notoriously unreliable sources of information. In the context of this Scheme, the Reviewer took into account the low usage rate of the Scheme, and considered that an online survey would be the most efficient means of accessing those Scheme users who wished to contribute to the Review. It was made clear to potential respondents that the purpose of the survey was to provide data for the Review, rather than obtain general feedback about the Scheme. It was anticipated that clarifying the purpose of the survey would increase the number of respondents.

Out of a very small number of survey respondents, the Reviewer was able to conduct follow-up interviews.

¹²⁰ The distribution of email notifications included people who had accessed the Scheme during 2018 after the Review's data collection period. These were not differentiated in the survey; however, the survey had so few respondents that the inclusion of one or two after the relevant reporting period is unlikely to have changed the reliability of survey data.

¹²¹ There is extensive research about the use of self-report surveys for data collection, and the tendency for survey respondents to be either those who were most dissatisfied with the subject of the survey, or those who were most satisfied. In this case, the data suggest that marginally more respondents were satisfied with the Scheme than were dissatisfied, but the difference cannot be considered significant in such a small number of survey responses.

¹²² Email recipients were informed that the survey was part of an Independent Review of the Scheme, and that their responses to the survey would contribute to that review.

Part D. An Analytical Framework for the Scheme

This section provides a framework that might be useful for the Scheme to apply as a structure for its own future operations, and ongoing development, as well as being a useful guide for future reviewers. The framework is widely recognised, and is based on current approaches to Dispute System Design and complaints handling systems.¹²³

The framework contains six key elements, and is particularly relevant for a scheme such as Resolution Pathways, that is still in its “pilot” phase, because those key elements can be readily applied to realign any newly implemented program. The design of the elements enables their application as guides for evaluating the broader achievements and success of any given program. Thus, the framework can serve a dual purpose: being a framework for the ongoing development and operation of the Scheme, as well as providing a structure for any future reviews.

Analytic Framework

1. The goals of the program, or the Scheme (these need to be stated clearly and to be measurable)
 - a. What do the Scheme’s organisers seek to accomplish through the Scheme?
 - b. Which types of disputes does the Scheme seek to address?
2. The stakeholders of the Scheme¹²⁴
 - a. Who are the Scheme’s stakeholders (stakeholders include consumers/customers of the Scheme itself)?
 - b. What is their relative power to each other?
 - c. What are their interests, and how are those interests represented in the Scheme?
3. The Scheme’s context and culture
 - a. How does the context of the Scheme affect its viability and success?
 - b. What aspects of the contextual culture (i.e., organisational, and industry) affect how the Scheme works?
 - c. What are the contextual norms and standards for communication and conflict management?
4. The Scheme’s structure and processes
 - a. Which processes are used for the prevention, management, and resolution of disputes and conflicts?
 - b. Are the Scheme’s processes linked and integrated?

¹²³ L. B. Amsler, J. K. Martinez, and S. E. Smith, ‘Christina Merchant and the State of Dispute System Design’ (2015) 33(Supplement 1) *Conflict Resolution Quarterly* 57 – 526; L. B. Amsler and J. Sherrod, ‘Accountability Forums and Dispute System Design’ (2017) 40(3) *Public Performance and Management Review* 529 – 550; A. J. Schmitz, ‘A Blueprint for Online Dispute Resolution System Design’ (2018) 21(7) *Journal of Internet Law* 3 - 10. S. Smith and J. Martinez, ‘An Analytic Framework for Dispute Systems Design’ (2009) 14(1) *Harvard Negotiation Law Review* 123 – 169; SOCAP and University of Newcastle, *Return on Investment of Effective Complaints Management* (Report to SOCAP, March 2018); available online at: <http://socap.org.au/resources/return-on-investment-of-effective-complaints-management/> [accessed; 25 June 2018].

¹²⁴ The relationship between APRA AMCOS and the Scheme’s stakeholders is not dissimilar from the relationship between a company and its consumers, or customers.

- c. What are the incentives and disincentives for using the Scheme?
 - d. What is the Scheme’s interaction with more formal systems, such as the legal system?
5. The resources made available to the Scheme, and
- a. What are the financial resources that support the Scheme?
 - b. What are the human resources that support the Scheme?
6. The Scheme’s success and accountability
- a. How transparent is the Scheme?
 - b. Does the Scheme include monitoring, learning (i.e., opportunities for systemic learning from disputes/conflicts), and evaluation?
 - c. Is the Scheme successful?

Goals and objectives

It has been reported that studies of disputes management and complaints handling systems show that these produce a greater return on investment when they include broader effectiveness indicators than the relatively simple measures of costs and efficiency.¹²⁵ Effective management and handling of disputes and complaints, and of customer concerns, has been reported to provide opportunities for organisations to gain beneficial insight into their operations, leading to improvements in their services and processes. This effect has been called ‘Extended Benefit’ (or ‘organisational learning’),¹²⁶ and it is reported to derive from the side-effects that comprise improvements in customer relations, increases in positive word-of-mouth by customers, and improvements in how organisations conduct their business. In addition, it has been reported that, where complaints are not well-managed, there is likely to be an *increase* in the numbers of complaints.¹²⁷

Scheme objectives and accountability

It is recognised that accountability is an important component of any program such as the Scheme, but also that it is poorly understood and poorly articulated.¹²⁸ For example, it is not always clear who is accountable to whom, and what is being measured in terms of accountability: is it the value of direct achievements, or is it the value of broader governance expectations – or a combination of these? It is likely the Scheme itself would benefit from a clear delineation of its accountability, and this could provide a professional focus for all people involved in the Scheme (i.e., the users of the Scheme, the Facilitator, the Committees, and APRA AMCOS).

¹²⁵ SOCAP and University of Newcastle, *Return on Investment of Effective Complaints Management* (Report to SOCAP, March 2018); available online at: <http://socap.org.au/resources/return-on-investment-of-effective-complaints-management/> [accessed; 25 June 2018].

¹²⁶ SOCAP and University of Newcastle, *Return on Investment of Effective Complaints Management* (Report to SOCAP, March 2018); available online at: <http://socap.org.au/resources/return-on-investment-of-effective-complaints-management/> [accessed; 25 June 2018], P 33.

¹²⁷ SOCAP and University of Newcastle, *Return on Investment of Effective Complaints Management* (Report to SOCAP, March 2018); available online at: <http://socap.org.au/resources/return-on-investment-of-effective-complaints-management/> [accessed; 25 June 2018].

¹²⁸ M. J. Dubnick, *Seeking Salvation for Accountability* (presentation to the Annual Meeting of the American Political Science Association, Boston, USA, August-September 2002); M. J. Dubnick and H. G. Frederickson (Eds), *Accountable Governance: Problems and Promises* (Routledge, UK and USA, 2011).

If the Scheme does develop further independence from APRA AMCOS, it will need to reconcile multiple accountabilities, and its revised objectives should reflect this. For example:

- The Scheme itself should be accountable to its users (and potential users) - through transparency and consultation;
- The Scheme should be accountable to the various stakeholders and Committees who oversee its operation – through regular and accessible reporting mechanisms;
- The Facilitator should be contractually accountable – through regular and accessible reporting on contractual requirements (such as key performance indicators, and key outputs, which are available to the Steering Committee); and
- The funder/s of the Scheme should be accountable (for the provision of material and human resources) to their own stakeholders, such as Company Boards, as well as to the Scheme’s stakeholders and users.

It is suggested that the Scheme adopt the Analytical Framework outlined in this Report, and that it include clear descriptions of the Scheme’s various accountability responsibilities.

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