



## Resolution Facilitator Supplementary submissions to the ACCC Authorisation

On 9 April 2024 the Resolution Facilitator team submitted to the ACCC on the value and coverage of the Resolution Pathways facility. This is a supplementary submission from the Resolution Facilitator at the request of the ACCC to respond to APRA's proposed changes to the Resolution Pathways facility.

Please note that the views in this submission are those of the Resolution Facilitator and do not necessarily reflect the views of the Resolution Facilitator Team or the Governance Committee.

In summary the submission is:

- a) To maintain the protections that make the ADR scheme accountable to an external framework beyond APRA; and
- b) Not to broaden the scope of matters to be referred to the scheme unless Industry presents a data and or a case for that broadening.

### 1. APRA's proposed amendments to the ADR Scheme

From the ACCC:

*"If appropriate, it would be helpful to get your opinion on APRA's suggested changes to the ADR scheme through their proposed conditions of authorisation (see pg. 62-65 of the Application), including any impact the changes will have on the operation of the Scheme."*

APRA has provided an outline of a system in C1 of the Application that provides for a resolution facilitator, and in C5.3a it proposes that the facilitator 'is independent of APRA AMCOS and One Music'. In an effort to simplify, it pairs back the detail on the infrastructure that is currently included in the 2020 authorisation (**Existing Scheme**) to a more high-level framework. In particular what is deleted is:

- The prescribed list of ADR options available through the Existing Scheme along with a framework for applicants accessing those options (C6.2-C6.4 of Existing Scheme).
- Thresholds for a financial contribution from Music Users and Music Creators to access the Scheme (C6.6 and Schedule A of the Existing Scheme).
- The requirement for a committee and Independent Chair (C6.7-C6.9 and Schedule B of the Existing Scheme) (**Independent oversight**).
- Key performance indicators for the Resolution Facilitator (C6.12 and Schedules B and C of the Existing Scheme) and Scheme (as set by the committee Schedule B)
- The requirement for future Independent Reviews of the Scheme (C6.13-C6.16 and Schedule D of the Existing Scheme) (**independent review**).



## 1.1 The benefits of the proposal

APRA is correct in its assertion that time and money has been spent over the last 2 authorisation periods in building an infrastructure and setting up compliance mechanisms for the scheme. They are also correct there are parts of the detail that are clunky and could be optimised.

On its face the attractiveness of APRA's submission is that it appears simpler, and therefore less expensive, while able to adapt to industry changes.

## 1.2 The challenges of the proposal

To strip away the prescriptive measures is to leave the reporting and the measurement of the function in the hands of APRA and a consultant who is engaged and paid for by APRA.

## 1.3 The accountability of the Facilitator

For a scheme that is not independent (it is paid for by APRA) to be autonomous there needs to be checks on the facilitator and an accountability framework. It is important for that framework to be clear and measurable. The APRA submission has broad reporting provisions for the facilitator to be accountable. It is unclear how such a system will deal with a matter if APRA does not consent to a party using the facility. If the facilitator acts in a way that is not acceptable to parties (including APRA), there is no framework for how issues with the facilitator's decisions (including allocation of costs) can be addressed.

The effect of the APRA mechanism is to have an individual available to assist with triage and referral of matters to alternative dispute resolution. Some protections can apply in individual matters. In practice if the facilitator sends a matter to an expert with determinative powers, that expert can decide issues like jurisdiction and cost. She or he can also make orders to enforce that in a way that binds the parties (if they have agreed as such).

Where the facilitator resolves the matter herself or sends it to an expert with facilitative power (non-binding expert process or mediator) there is no mechanism for resolving issues around scope or payments, or issues with the facilitator beyond the facilitator herself.

The KPIs and performance measures for the facilitator are not defined or monitored outside of APRA.

## 1.4 Independence- other models with similar issues

The ACCC has endeavoured to mandate a safe place function with the protections of independence whilst still funded by APRA. It is not perfect, but the specificity of the framework makes it clear to manage.

Challenges with a model without an accountability framework have been explored in other contexts over recent years due to the changes in workplace frameworks. It shares the tension in setting up any facility seeking to provide support and problem solving to staff and consultants, where that service is embedded in an organisation or sector. Examples include the protections and assistance for whistleblowing, safe place functions to deal with bullying and psychosocial care within Federal Government Departments (such as the AFP and other government departments) and in the University sector and aged care. All of these have been



the subject of reviews and calls for the building of clarity of framework and reporting and independent management.

This is not to say that the disputes with APRA are akin to workplace bullying or harassment. Rather that the structural issue with maintaining accountability of having a safe space to access support and advice is like the issues in those facilities that are embedded in organisations or industries. There is no simple answer to this challenge. This is exacerbated as numbers where numbers are apparently low for independent dispute functions. As outlined below the other benefits are hard to measure.

There is anecdotal and academic evidence that independent dispute functions have a positive effect on culture and transparency. Their presence is said to have the benefit of giving those making enquiries the benefit of being heard, and encouraging agency in problem solving, which leads to a reduced chance of a long term, angry and damaged person or organisation. It may also act as an unconscious check on behaviour. These psychological benefits from a trauma informed approach are difficult to measure. It is hard to measure things that DON'T happen (lessening of complaints and lessening of stress). Please let me know if you would like the links to relevant references on this topic.

## **1.5 Proposal on the System**

Checks on a system to ensure independence cost time and money.

The benefit of the Existing Scheme is that it has had the input of 2 independent reviews and operation under 2 cycles of ACCC authorisations. According to the 2024 Independent Review, the existing governance of Resolution Pathways is now mature and operating effectively.

While there are always things that can be simplified and improved, given the Scheme is running efficiently in its current form, it is my view that there would be risk (as well as a loss of investment) in making the changes proposed by APRA.

It is also my view that the Governance Committee, the Independent Chair and the Stakeholder Group provide value and goodwill and thought leadership which would not be possible with a facilitator alone.

In summary, if the ACCC are mindful to include an independent dispute resolution mechanism, the current safeguards are fit for purpose.

If they are kept in place, it would be useful for APRA to consider how it can more broadly amplify the goodwill and wisdom of the Governance Committee and Stakeholder Group who are hardworking volunteers, as part of its commitment to being a transparent and service focussed corporate citizen. I am confident that APRA will rise to this challenge.



## 2 Scope of Dispute Resolution

The independent review and therefore our discussion raises the issue of *clarity about whether the following are intended to be captured in the boundaries of the Scheme:*

- a. *ability for licensees to challenge licence fee levels through ADR*
- b. *ability for licensees to challenge licence fee methodologies through ADR*
- c. *ability for licensees or members with similar issues/interests to challenge APRA decisions through ADR as a group.*

*It would be helpful for these views to be included in the Summary Report (e.g. under 'Opportunity for clarity') and, if appropriate, to get your opinion on whether these matters should or should not be within the Scheme's scope.*

Resolution Pathways has triaged and/or managed a range of matters where it has been unclear whether the issues raised are intended to be captured in the boundaries of the Scheme. Examples are provided below:

- **Where a licensee challenges licence fee levels.** An example is a pub or retail business that contends that the fee is too high or excessive **for their type of business**. At present this is not in our scope as their dispute is considered within the framework set up for their business category and a challenge to the category would be a matter for the Copyright Tribunal.
- **Where a licensee wishes to challenge the basis on which the licence fee is calculated because they are outside the mainstream operation in a category.** An example is a multi-location venue in an industry where single location venues are usual. The argument was that the licence structure by location was not fit for purpose and generated greater fees than the same business on a single site..
- **Where licensees or members with similar issues/interests wish to challenge APRA decisions as a group.** An example is where a few licensees in one industry wish to raise the same concerns about a licence fee level or the basis on which it is calculated for their industry.

We have dealt with matters where the presenting issue is the request for a lower amount of payment - through ADR. This doesn't effectively deal with the core issue (whether the scheme itself is unfair). This pragmatic approach to resolution might also feed into APRA's perception that licensees are using the Scheme to reduce fees when they are part of a framework where others are paying the same fees.

This boundary of resolving issues and leaving the more systemic issue to the Copyright Tribunal seems consistent with the current authorisation. I am conscious that the Copyright Tribunal has high barriers to entry due to time and cost. However, in my view, the extension of the scope of the ADR Facility into a capacity to look at more structural issues would require deep thinking on resourcing and frameworks. It would be appropriate only if participants were able to demonstrate there is a problem to solve.

### Executive summary

For an ADR scheme that is funded by APRA to operate in a way that feels independent, there needs to be a framework for the facilitator. Clarity of framework is useful for transparency, simplicity of operation and



ease of understanding by users. The Existing Scheme (including the use of an independent review) provides such a facility.

While it is useful to consider the scope of the facility, such consideration is best done by participants identifying areas where their needs are not being serviced. It is not clear to the Resolution Facilitator on existing data where the need might be.



**Shirli Kirschner**  
**Resolution Facilitator**

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