



14 March 2018

Review of the Code of Conduct for Australian Copyright Collecting Societies: ACCC response to the Draft Report

Overview

The ACCC welcomes the opportunity to put forward its views in response to the Draft Report of the Review of the Code of Conduct for Australian Copyright Collecting Societies (the **Code**) undertaken by the Department of Communications and the Arts (the **Department**).

The ACCC was involved in planning the Review, and has been briefed on its progress throughout.

The ACCC supports each of the revisions to the Code specified in the Draft Report. The ACCC believes that it will be particularly important to implement those revisions that:

- provide members and licensees the information that will enable them to understand how the collecting society has applied its various policies and rules to their particular circumstances, and
- enable members and licensees to act on any errors, or instances of unreasonable treatment, that may have occurred.

These complementary reforms may have three positive effects. They may:

- Provide an efficient means to identify, and correct, individual instances of unreasonable treatment;
- Place greater discipline on a collecting society to ensure that its policies and processes are reasonable and kept up to date; and
- Instil greater confidence and trust in the copyright licensing system amongst both members and licensees.

The extent to which collecting societies adopt the revised Code containing the specified revisions, and the spirit with which collecting societies implement the revised Code, will significantly affect whether the concerns of members and licensees are resolved through the current Review.

The ACCC would be happy to provide further detail on any of the issues raised in this submission and would be happy to respond to issues of interest to the Department.

Measures to improve transparency

The ACCC notes the recommendations that the Code should provide for members and licensees to have better access to information concerning their dealings with the Collecting Society, that is, over how distribution payments, or licence fees, have been calculated.

This may require a collecting society to update its general methodology, or policy documents, to ensure that these clearly state the approach that the collecting society takes in its dealings with members and licensees respectively.

However, the ACCC would not see a reasonable implementation of this reform being solely limited to an update of policy documents.

Rather, the ACCC believes that significant benefit can be realised from a collecting society showing how it has calculated the fee or distribution amount on the face of its member statements and licence invoices.

The specific line items included in this explanation could vary depending upon the overall approach that the collecting society takes to setting its licence fees. For example, a collecting society that offers licences based on the size or nature of a business should identify on its invoices the size or type of business on which the licence fee has been based.

On the other hand, where a licence fee is based on an estimate of the licensee's use of copyright material, the licence invoice would need to identify the underlying data or assumptions relied upon, and calculations made, in estimating this usage, including the allowances made for materials that do not require a licence.

The distribution statements issued to members should additionally include specific line items that identify the amount of the collecting society's management fee, and any undistributed monies, that is, licence fees received but not paid to members, that are attributable to that member.

Both member statements and licence invoices should contain prominent contact details for in house and external dispute resolution processes should the recipient be dissatisfied with the licence fee or distribution payment after reviewing the information on the face of the statement or invoice.

Follow on measures to allow action on errors and unreasonable decisions

The ACCC also supports complementary reforms that would provide members and licensees with better access to dispute resolution processes of their choosing.

The Code already provides for a collecting society to specify an alternative dispute resolution process. However, providing more flexibility to a party that is concerned with how the collecting society has dealt with it can provide greater confidence in and acceptance of the outcome of that dispute resolution process, as well as allow the dispute to be resolved more quickly and effectively.

One way this can be achieved would be for the Code to be revised to place an obligation on the collecting society to inform its members and licensees that they can choose a different form of dispute resolution instead of the dispute resolution process that the collecting society has developed.

Alternatively, the Code could be revised to specify minimum requirements for a low cost, and suitably flexible, alternative dispute resolution process. The current scheme that is operated by APRA AMCOS could potentially be adapted for more general application.

The ACCC also sees merit in the Code specifying governance arrangements that provide members with more effective oversight of collecting societies' dealings with undistributed monies.

In this regard, the ACCC agrees with the Draft Report's characterisation of these funds as being held by the society on behalf of rights holders that cannot currently be identified. The ACCC also agrees with the finding that the board of a collecting society should report on how it proposes for the collecting society to deal with such monies.

However, members will also need to have an opportunity to vote on this plan to ensure that the board could consider the views of the membership when finalising the expenditure of these monies.

There would potentially be a number of approaches that could be adopted in this regard. However, the principal intent would be for the board to inform the membership of the proposed course of action in sufficient detail for members to reach a considered view as to the overall suitability of the plan, and for the board to be apprised of the views of the membership prior to committing to a course of action. The governance model should also provide for the situation where a significant number of members disapprove of the collecting society's approach to expending undistributed funds.

A benefit of this approach is that it can provide assurance that member's direct interests are at the heart of how unclaimed monies are dealt with, while not ruling out legitimate uses on the basis that they have not been prescribed in the Code.

Alternatively, the Code could provide further assurance as to how funds will be used by providing for only a narrower range of permitted purposes.