

14 March 2018

Copyright Code Review  
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### **Submission to the Draft Report Review of Code of Conduct for Australian Collecting Societies**

This submission is made by the Copyright Advisory Group to the Standing Council for Education (CAG). CAG is pleased to have this opportunity to comment on the draft report of the Review of Code of Conduct for Australian Copyright Collecting Societies (Draft Report).

The Draft Report includes a number of important recommendations that would - if enacted - go some way towards addressing concerns that CAG has raised regarding a lack of transparency in the operations of declared collecting societies, and we encourage the Bureau to make these recommendations in the review's Final Report. CAG believes these changes would be an important first step in improving the governance arrangements applying to collecting societies.

As CAG highlighted in its previous submission to the review, however, a lack of transparency in collecting society operations, distribution and reporting, is only part of the problem. CAG also highlighted a number of other governance concerns which will not be addressed by these draft recommendations. CAG appreciates that some of these issues may be outside the scope of the current review process. However CAG believes there would be great benefit in the Bureau recommending further government consideration of these issues as a priority.

#### **Improved transparency**

CAG maintains that it would be preferable for obligations of transparency to be contained in mandatory guidelines rather than a voluntary Code of Conduct. However we nevertheless welcome the Draft Report's finding that there is a need to ensure that collecting societies operate more transparently.

#### *Calculating licence fees*

CAG supports draft recommendation 4 to require collecting societies to make available to licensees (as well as members) the methodology for calculating licence fees, including any modelling. This is an important recommendation that would, if enacted, greatly enhance the level of information available to licensees about the operation of the licences. For example, in CAG's licence arrangements with Copyright Agency, it is not currently possible to identify the amount of licence revenues collected and distributed for particular categories of works such as website materials, or categories of activities such as works displayed on interactive whiteboards.

### *Transparency as to who benefits from the money paid by the education sector*

We welcome the finding that there is a need for an effective mechanism to ensure that collecting societies are obliged to provide licensees with information on who benefits from the payments made under the educational statutory licences. CAG has for many years sought unsuccessfully to obtain information from Copyright Agency on the breakdown of payments to various classes of recipient. We support draft recommendations 5 and 6 which would require collecting societies to provide this detail in their annual reports.

As noted in our earlier submission, collecting societies recently undertook to provide some of the information that CAG had asked for. While this was a step in the right direction, this still highlights two key problems with the current arrangements:

- this was achieved via an amendment to the voluntary Code of Conduct that was made without consultation with education sector stakeholders; and
- the Code still does not oblige declared collecting societies to provide the level of detail that CAG has for many years requested.

For example, the new obligation in clause 2.9 (b) of the Code of Conduct contains a qualified entitlement for CAG to request information on the amount paid by Copyright Agency and Screenrights to “classes of recipients”, but leaves it to the collecting society to decide which “classes of recipients” are to be included in this this breakdown, and would allow a collecting society to deny the request for information if it could not provide the information “at a reasonable cost”. This is a significant shortcoming.

The Draft Report seeks feedback on what information should be provided and in what format the information should be provided. CAG submits that the Code Review should recommend that declared collecting societies be required to provide, in their annual report, the information that CAG requested in its submission to the 2014 Triennial Code Review, which was set out at Annexure C to the Supplementary Report of the Code Reviewer.<sup>1</sup>

### *Transparency regarding undistributed funds*

The Draft Report has highlighted the concerns that CAG and others have raised regarding the current paucity of information on how declared collecting societies accumulate monies that they are unable to distribute, and the uses to which these funds are ultimately put.

While we welcome the acknowledgement in draft recommendation 8 that collecting societies should be required to provide detailed information on the reasons why funds remain undistributed, the steps taken to locate rightsholders, and the uses to which such funds are to be put, CAG wishes to stress that its concerns regarding undistributed funds are not simply confined to concerns regarding transparency. The draft recommendations would do nothing, for example, to address CAG’s concern that declared collecting societies currently appear to have complete discretion as to how they will use undistributed funds. Nor would they address our concerns that Australian schools are required to pay for uses - such as use of freely available internet content

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<sup>1</sup> [https://www.screenrights.org/sites/default/files/uploads/Triennial\\_Supplementary\\_Report\\_-\\_Oct\\_15.pdf](https://www.screenrights.org/sites/default/files/uploads/Triennial_Supplementary_Report_-_Oct_15.pdf)

and orphan works - that by their very nature will almost invariably result in collecting societies accumulating monies that they are unable to distribute to the relevant rightsholders. We acknowledge that the Department has taken the view that these matters are outside the scope of the current review, however we urge the Department to recommend in its final report that the Government undertake a further consultation process that would enable a holistic consideration of these matters.

### **Governance arrangements for declared collecting societies**

The Draft Report contains a number of recommendations that would, if enacted, address many of the concerns raised by licensees who deal with collecting societies under voluntary licences. CAG does not intend to comment on those recommendations, but will instead leave it to these licensees to do so. The reason for this is that CAG remains strongly of the view that the majority of the problems identified in our first submission are simply not capable of being fixed solely by making changes to the Code or to the process by which the Code is reviewed. We also remain strongly of the view that governance arrangements applying to declared collecting societies (or at least to the statutory functions of those collecting societies) should be mandatory and subject to Ministerial and/or ACCC oversight.

### **Where to next?**

The Draft Report refers to concerns raised by CAG and other stakeholders regarding the operations of declared collecting societies, but suggests that these are outside the scope of the current review process. This review process has highlighted the fact that there are significant differences between the operation of declared and non-declared collecting societies that warrant different governance arrangements. The same can be said for the differences between the statutory and non-statutory functions of declared collecting societies.

In our original submission to the Code of Conduct review CAG set out what we consider to be the elements of a fit-for-purpose regulatory framework for declared collecting societies. This included:

- Legislative provisions which impose obligations on declared collecting societies with respect to licensees as well as to their members. Sections 113W (1)(d), 113X (1)(b) and 113Z (5) of the Copyright Act 1968, as amended by the Copyright Amendment (Disability and Other Measures) Act 2017, should be amended to include obligations towards statutory licensees.
- Power for the relevant Minister to review and make determinations regarding the formal structure and conduct of declared collecting societies, including powers to review and require changes to a society's Constitution, distribution arrangements or reporting obligations.
- Mandatory guidelines that set out the information that must be provided in a declared collecting society's annual report. As already discussed above, this should include, at a minimum, the information that CAG requested in its submission to the 2014 Triennial Code Review.<sup>2</sup>

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<sup>2</sup> [https://www.screenrights.org/sites/default/files/uploads/Triennial\\_Supplementary\\_Report\\_-\\_Oct\\_15.pdf](https://www.screenrights.org/sites/default/files/uploads/Triennial_Supplementary_Report_-_Oct_15.pdf)

- Mandatory guidelines that prescribe the purposes for which a declared collecting society is permitted to use funds paid under the relevant statutory licence (statutory funds). Those purposes should be limited to matters directly related to the administration of the statutory licence; ie proper and reasonable administrative and legal expenses associated with:
  - The conduct of surveys
  - The collection of and distribution of equitable remuneration
  - Negotiations with licensees
  - Copyright Tribunal proceedings related to the statutory licence

It would follow from this that declared collecting societies would no longer be permitted to use statutory funds for law reform and/or advocacy purposes, nor for marketing and communications.

- Mandatory guidelines that set out clear rules for the disposition of trust funds that remain unallocated at the expiration of the trust period (“roll over funds”), together with interest earned on trust funds. We note that clause 18 of the Guidelines for Declared Collecting societies currently states that roll over funds “would fall into general revenue for distribution in respect of the then accounting period...” Copyright Agency appears to have formed the view that its Board is free to determine how roll over funds will be used.
- A requirement that there be a very clear separation between a declared collecting society's statutory functions and any commercial functions that the society may also exercise with respect to non-statutory licences. Further consideration should be given as to whether a form of operational separation is required in order to fully achieve this.
- Independent oversight of a declared collecting society's compliance with its statutory obligations, preferably by the ACCC. This should include oversight with a view to ensuring that the society is not using its monopoly position in a way that is contrary to the public interest.

Following the enactment of Copyright Amendment (Disability and Other Measures) Act 2017, the Declaration of Collecting Society Guidelines will need to be updated to reflect the new statutory licensing arrangements. This, in our submission, would be an appropriate opportunity to consider the broader issues that CAG and other declared collecting society stakeholders have raised.

We look forward to engaging further with the Department and other stakeholders on the matters outlined in this submission.

Yours sincerely



Delia Browne  
**NATIONAL COPYRIGHT DIRECTOR**