



19 March 2018

Copyright Code Review
Director, Economic Research
Bureau of Communications and Arts Research
Department of Communications and the Arts
GPO Box 2154
CANBERRA, ACT 2601

By email: codereview@communications.gov.au

Dear Director,

Review of Code of Conduct for Australian Collecting Societies

PPCA appreciates the opportunity to respond to the Bureau's Draft Report (February 2018) and participate in this important review. We do not believe that the review process has identified any substantive deficiencies in either the operation of the Code of Conduct for Copyright Collecting Societies (the **Code**) or PPCA's compliance with it. However, it was always intended that the Code would increase understanding and confidence in the activities of the participating societies, and we welcome practical suggestions for improvement. We note that each of the societies that are a party to the Code differ markedly in size, scale, structure and range of operations and that, to continue to be effective, the Code must remain broad and flexible enough to accommodate those key differences.

We would be pleased to discuss any of the matters set out below with the Bureau at any stage, or provide additional information or clarification, if required.

Response to Draft recommendations

Clarifying the Code's role and purpose

Draft recommendation 1:

Add explanatory text to the Code to clarify that it was established to provide greater protections for both members and licensees, and to ensure that collecting societies operate efficiently, effectively and equitably.

Draft recommendation 2:

As a consequence of draft recommendation 1, the Code should be amended to incorporate an additional objective which states that the Code should support efficient and equitable outcomes.

PPCA generally supports recommendations 1 and 2, but questions whether 'equitable' is the best nomenclature given the particular use of the term 'equitable remuneration' in relation to statutory licences under the Copyright Act (Cth) 1968.

Draft recommendation 3:

Add explanatory text to the Code to clarify how it fits into the broader regulatory environment—particularly with respect to matters that can only be resolved by the Copyright Tribunal of Australia.

PPCA supports this recommendation.

Encouraging greater transparency

Draft recommendation 4:

Amend clause 2.3 to require collecting societies to make available to members, licensees and potential licensees the methodology for calculating licence fees, including any modelling.

PPCA both supports and meets the transparency obligations currently set out under the Code. In recent history (at least the last twenty years) no changes to public performance tariff schemes have been introduced without extensive sector consultation and at least three months' notice, with nearly all tariff changes only occurring after some years of discussion. The current process to develop new joint tariffs for OneMusic Australia (the proposed joint licensing initiative for PPCA and APRA public performance licences)¹ clearly demonstrates the depth and type of information made generally available. There has, in fact, been criticism that the materials are too lengthy and detailed. We reject any suggestion that such processes do not meet a high standard of transparency.

It is not clear to us whether recommendation 4 relates to the calculation of licence fees, or the original development and formulation of the scheme under which an individual licence fee will subsequently be calculated. We wholeheartedly support any recommendation that the methodology for calculating licence fees under our various schemes should be transparent. Our tariff sheets currently provide worked examples to assist licensees in this regard, and these are reviewed and updated periodically to ensure that they cover real world, practical situations. We welcome input from licensees or their peak bodies as to how these examples could be improved or better targeted. Further, our licensing team is at all times available to respond to queries and provide assistance.

We are concerned, however, that this recommendation may be intended to address the process by which licence schemes are developed. If that is the case we cannot support the draft recommendation as proposed.

¹ See: <http://www.onemusic.com.au>

Whilst we agree that societies and users should have appropriate information to inform effective licence scheme negotiations, and always intend to be as open and transparent as possible in regard to the basis of licence schemes, there are a number of reasons that such a recommendation would not have our support:

- where a rate has been set by the Copyright Tribunal, it is the outcome of what has generally been an extensive and lengthy independent review process, taking into account a broad range of factors based on evidence provided by all participants. It is rare in our experience for the resulting licence scheme to be based on a particular formula arising from the evidence, but rather is the result – to varying degrees – of judicial estimation. It is also common for much of the material to be designated as ‘confidential’ and thus not directly available to one or more of the parties. PPCA has certainly participated in Copyright Tribunal matters where PPCA representatives have been unable to view much of the financial material proffered by the other party. The Code cannot require transparency in relation to such confidential material.
- In regard to individual businesses PPCA (or other societies) may acquire information about the operations of those businesses that is commercially sensitive. In fact, it is our experience that most of our clients consider all of the business information they provide to us to be confidential. It would be inappropriate for us to share (particularly with that business sector) modelling that contains information on individual businesses – in effect, making the commercially sensitive data of one client available to another competitor.
- When modelling is undertaken in the consideration of proposed licence schemes the instructions and resulting output may attract legal professional privilege. The Code should not attempt to oblige any party to publish or otherwise make available privileged material.
- The requirement for a society to provide such detailed information would significantly disadvantage its negotiating position, as there is no similar governance obligation for our individual licensees or their peak bodies. Information on business activity and sound recording usage² is already completely in the hands of the licensees, and to require a society to hand over its data modelling or other material absent any countervailing obligation on the rights user further exaggerates the degree of asymmetric information, and places the society at significant commercial disadvantage, impeding its capacity to effectively represent its stakeholders.
- As set out in our previous submission, PPCA differs from other parties to the Code in respect of its structure. It is neither a declared society in respect of particular uses of copyright material, nor does it obtain an assignment of any rights. Consequently, PPCA offers licences only on a non-exclusive basis and is, in effect and practice, a *competitor* to its rights holder stakeholders. As a result of this unique situation PPCA has long established internal protocols and practices in place, designed to minimise any risk of anti-competitive behaviour by PPCA or its licensors. Key to those protocols is a requirement that PPCA neither shares nor discusses any pricing information with its

² We note the reference in the report to the comments made by Free TV (sub13). Free TV provides virtually no reporting of sound recording usage and, despite numerous requests since August 2016 has failed to respond to a proposal which would enable PPCA to obtain sound recording usage data via a third party.

stakeholders. An obligation to share any modelling with those stakeholders would expose both PPCA and relevant licensors to a significant risk of cartel, concerted practices or other anti-competitive behaviour.

- PPCA notes that its competitor licensor stakeholders and other sub licensees of those stakeholders, like potential licensee groups, have no obligation to share their data modelling or licence fee setting methodology with content users. Imposing such an obligation on PPCA, and placing it at a commercial disadvantage in relation to content user groups and other sub licensees, may make PPCA a less attractive sub licensing option for rights holders. The potential withdrawal of rights by PPCA's licensors and subsequent impact on the scope of blanket licences offered could easily result in a less efficient licensing process for music users who would have to seek individual licences to perform sound recordings from a range of licensors.

We also note that the Draft Report refers in a number of places to statements made by Live Performance Australia (**LPA**) in its submission (LPA, sub 17). We cannot recall any circumstance in which LPA has contacted PPCA to raise any issues in respect of licensing arrangements for LPA members. We can certainly confirm that PPCA has not, at any stage, acted in conflict with any 'deed of arrangement', and we encourage LPA to contact us directly if it has concerns it wishes to clarify. We also note that, as a matter of law, venues can be held liable in certain circumstances for copyright infringement occurring on their premises. In situations where the necessary sound recording licences are not established, PPCA will, as a matter of general practice, contact the venue in regard to the potential infringement – we would be failing both our stakeholders and the venues to do otherwise.

We can see no benefit in the suggestion that a dedicated 'contact officer' be made available to explain licences and licence schemes. PPCA currently has a team of dedicated licensing officers available at all times for precisely this purpose, and it is our understanding that the other societies have similar arrangements in place. In addition, PPCA also ensures that it includes information on its website in plain English to further assist licensees with their enquiries.

For all of these reasons PPCA does not support draft recommendation 4 as currently drafted.

Draft recommendation 5:

Amend clause 2.6 to insert new subclause (e)(iv) to require collecting societies to detail in their Annual Report, at an anonymised or aggregate level where appropriate, the accounting and distribution of licence revenue.

PPCA provides detailed, confidential distribution information to its individual licensors and registered artists, at track (ie sound recording) level. Distribution team members are also available to respond to any questions and discuss any issues which arise from time to time. The distribution policy is readily available on our website, or by hard copy on request, and is written in a simple and straightforward style. We do not believe that previous Code compliance reviews, or this current separate review process, have identified any substantive issues around the transparency of our distribution processes.

As previously submitted, we note that, should any user wish to identify exactly to whom and in what amount licence fees are paid, it is completely within their prerogative to settle arrangements directly with the relevant rights holder(s) due to the non-exclusive nature of PPCA's licensing mandate. PPCA is strongly opposed to any amendment that would result in the publication of information pertaining to distribution payments made to individual licensors or registered artists. Given the annual financial reports, made publicly available on our website, detail aggregated annual distributions we are unclear what the Bureau would expect to see published as a consequence of draft recommendation 5.

If the intention is that each society would publish the aggregated amount distributed in respect of different categories of use (eg 'broadcast licence fees'), PPCA could support an appropriately drafted recommendation to that effect.

We are concerned that no data should be published in a form that provides insight into commercially confidential information of a licensee or a licensor. Given licence fees in some schemes are based on such metrics as revenue, subscriber numbers, or product format there is a risk that in a sector that has few licensees, or a particularly major licensee, the publication of such information would amount to the dissemination of a licensee's commercially sensitive information. It is our view, based on our licensing experience that such an outcome would be in complete conflict with a licensee's reasonable expectations of confidentiality.

Draft recommendation 6:

Amend clause 2.4 to insert new subclause (d) obliging collecting societies to provide more detailed information on particular rights payments on an anonymised basis at the request of a licensee or their representative.

As indicated in regard to draft recommendation 5, we do not understand what the Bureau anticipates would be made available as a result of this recommendation.

We are interested to better understand what additional information licensees would like, and its intended purpose. We also note that, if the data is to be used for licence scheme negotiations, any data available and held by PPCA has been provided in the first instance by the individual licensees and thus could be made directly available to their representative bodies, should they actually wish to. Further, it must be noted that we do not generally have any data that is categorised by reference to an industry representative body, unless that body undertakes its collection, collation and submission on behalf of its members, in which case it will already have the relevant data.

We do not understand how information on the amounts distributed to particular licensors or artists can assist licensees or their representatives for relevant purposes, as that does not impact the value of the overall content used. If the data is intended to assist users to determine whether or not they may wish to contract directly with rights holders, we note that the best detail regarding the content actually used by a licensee is within the licensee's own control.

Draft recommendation 7:

Amend clause 2.4 to insert new subclause (c) to require that collecting societies consult on the development of distribution policies in a process that includes affected stakeholders, and that each society publish 'plain English' information on its distribution policy.

PPCA had not been able to identify, nor are we aware, of any concerns raised by PPCA licensors or registered artists throughout this review process. Our distribution policy was developed, and subject to subsequent amendments, under a process of management input and Board resolution. The Board is comprised of elected representatives of each relevant stakeholder group (including record companies and registered artists), and we note that any amendments to the distribution policy particularly requires the endorsement of a majority of the elected representatives of those particular groups. Further, our standard input agreement (the means by which PPCA obtains the relevant rights from its licensors) includes an obligation on PPCA to undertake consultation with licensors in respect of any proposed amendments to the distribution policy that, in the Board's reasonable opinion, would have a material adverse effect on any of the licensors.

Our Distribution team interacts with our licensors and registered artists on a daily basis, and we believe we are open and responsive to any issues or concerns raised. Our policy is drafted in plain English, and we are currently working on an updated version which we trust will further improve clarity.

Given that we believe that we already have processes and practices in place that accord with this draft recommendation we have no concerns about its implementation provided that, in this context, 'stakeholders' refers to relevant PPCA licensors and registered artists. We do not believe that licensee groups are relevant stakeholders in the process of developing or updating PPCA's distribution arrangements.

Draft recommendation 8:

Amend clause 2.6 to require detailed additional annual reporting of undistributed funds, including:

- a. reasons why funds remain undistributed***
- b. steps taken to locate and distribute funds to rightsholders,***
- c. the uses for which expired, undistributed funds are to be applied.***

As PPCA has previously submitted, under its annual distribution processes and the PPCA distribution policy, there are only two circumstances under which funds may be 'undistributed'. These are:

- (i) where the current contact or payment information for a licensor or registered artist has not been provided or updated, and PPCA cannot make the relevant payment; and
- (ii) where funds have been allocated against particular recordings, but the control of those recordings for a period within the distribution year is in dispute between two or more licensors.

As soon as these circumstances are resolved (ie the provision of relevant current data in situation (i) and the resolution of the dispute in situation (ii)), the payment is immediately effected. On this basis we believe that our distribution policy already provides the information outlined in points (a) and (c) above. In regard to item (b) we believe that the collation and publication of this information on an individual

recipient basis would be an administratively burdensome task, for little or no real value, particularly when PPCA provides regular reports to all parties to disputes, setting out in each case the particular recording(s) and the disputing parties.

For these reasons we do not support draft recommendation 8 as currently proposed.

Draft recommendation 9:

Amend the Code to require collecting societies to provide their members with plain-English guidelines stating how non-distributable funds will be allocated and spent by the collecting society, and how such expenditure will serve the interests of members.

As outlined above PPCA's distribution policy already clearly advises how any undistributed funds will be treated. On that basis we have no issue with this draft recommendation, which will have no effect on our current practices.

Draft recommendation 10:

Amend the Code to require the collecting societies to establish and maintain a consolidated online portal for the public dissemination of specified governance, financial and data information, including all documents relating to the collecting societies' compliance with the Code.

PPCA's website currently provides a link from each page to a dedicated Code of Conduct section which contains the Code itself, the explanatory memorandum, all of the annual Code compliance reports ever issued, and all reports in regard to any triennial reviews conducted. During any consultation periods (eg during the annual compliance review period or the triennial review period) the page also includes information on the consultation process, and the means by which interested parties can participate.

PPCA supports the draft recommendation, provided the costs of developing and maintaining the proposed portal are reasonable, and anticipates that the resource would replicate the categories of information currently made available by PPCA on its website. PPCA further proposes that visits to the site are monitored over the first and second years of operation, and the initiative discontinued if it appears that the resource is not widely used.

Strengthening governance arrangements

Draft recommendation 11:

Clarify the role of the Code Reviewer with respect to assessing the complaints handling and dispute resolution processes of collecting societies by:

- a. incorporating the 2017 Explanatory Memorandum into the Code itself, and***
- b. adding an explanatory note to the Code to clarify that the complaint and dispute resolution processes established by the collecting societies under the Code do not include a mechanism for the Code Reviewer to review licence fee pricing.***

We support this recommendation.

Draft recommendation 12:

Amend the Code to include a new clause which provides that a collecting society may not unreasonably refuse a request from a licensee to engage in an ADR process in respect to a dispute over licence fee pricing.

We support this recommendation, provided it does not constrain any party's capacity to refer a licensing scheme to the Copyright Tribunal.

We cannot, however, agree with many of the statements submitted by licensee groups in relation to the operation of the Copyright Tribunal. In PPCA's experience references to the Copyright Tribunal involving significant legal fees generally occur only where (a) sophisticated, well represented parties participate, and (b) the potential licence fees are substantial. The costs are, therefore, relative to the magnitude of the licence fees. We note also that the Copyright Tribunal's draft practice direction, recently adopted, involves compulsory mediation following the filing of the parties' position papers.

We further note that, with the launch of the proposed OneMusic Australia initiative planned for 2019, all public performance licensing clients will have access to APRA's bespoke independent ADR facility, developed in line with APRA's authorisation conditions, subject to regular review and overseen by an advisory group which includes licensee representatives.

Draft recommendation 13:

Amend clause 5.2 to require the collecting societies bound by the Code to report on their compliance with each of clauses 2.1—2.8 of the Code (and 2.9 of the Code for declared collecting societies) in their annual compliance report to the Code Reviewer pursuant to clause 5.2(b) of the Code.

We support this recommendation, and note that it reflects PPCA's existing practice.

Draft recommendation 14:

Amend clause 5.2(b) of the Code to require annual compliance reports prepared by the collecting societies for submission to the Code Reviewer to be made public; where such reports include confidential or commercial-in-confidence information, or otherwise includes information which identifies individual members or licensees, such information is to be redacted before publication.

We support this recommendation.

Draft recommendation 15:

Amend Code to require collecting societies to notify members / licensees when they have breached the Code, options include:

- a. Real time notification of contravention of Code published on the collecting societies' websites***
- b. Report of any contraventions in Code itemised in collecting societies' annual reports***
- c. Report on dedicated online portal for Code compliance and governance materials.***

We generally support this recommendation, but would recommend that (i) 'real time' be more carefully defined, and specify a period in which the society is required to make such notifications, and (ii) that the society be required to itemise any contraventions in a regular annual publication, but not specifically the society's annual report.

Draft recommendation 16:

Amend the Code to require collecting societies to establish and maintain a contraventions register to record all historical and future contraventions of the Code.

We support this recommendation, and anticipate that the proposed portal would provide links to this information.

Draft recommendation 17:

Amend Code to provide procedural steps for:

- a. requiring collecting societies to consider recommendations of Triennial Code Reviewer to make certain amendments to the Code within a specified time frame, including voting on whether to adopt recommendations***
- b. updating the Code to reflect the agreed amendments within a specified time frame (for example within 60 days)***
- c. advising affected stakeholders of the amendments to the Code, including plain English explanation of impact of amendments, and***
- d. Reporting to the Triennial Code Reviewer on amendments made to the Code, including advising where any recommendation of the Triennial Code Reviewer as to amendment to the Code was not adopted, and the reason/s why.***

We support this recommendation.

Draft recommendation 18:

Amend the Code to specify that, in circumstances where the collecting societies wish to make an amendment to the Code absent a specific recommendation made pursuant to the triennial review process, such amendments are to be made in a transparent manner and subject to consultation with licensees and members.

We support this recommendation.

Draft recommendation 19:

The Code should be amended to separate the administration of the annual review of compliance by collecting societies with the Code from the triennial review of the operation of the Code itself. The annual review would remain with Code Reviewer, but the triennial review would be conducted by a separate independent body/expert. An advisory body could be set up for the review with representatives from a range of stakeholders.

PPCA notes the comments in the report in regard to the qualifications, experience, independence, impartiality and professionalism of the current and previous Code Reviewers. These comments are consistent with our own experience since the introduction of the Code.

Whilst we generally support the recommendation, we note that in our view the person appointed to conduct the triennial review should have similar qualifications and experience to that of the Reviewer charged with undertaking the annual compliance review process.

We do not support the establishment of an advisory body as part of this process. This will add unnecessary complexity, cost and administration, given that all stakeholders and indeed any interested party may make a submission, attend the public forum, and fully participate in the process.

Draft recommendation 20:

Amend the Code to require collecting societies to provide information to the Code Reviewer on steps taken to improve the capture and exploitation of data to achieve better business practices, to be assessed in the Code Reviewer's annual report on compliance with the Code by the collecting societies.

We do not support this recommendation.

PPCA has over 50,000 licensees. The vast majority (by number) of PPCA's clients are those taking out licences under PPCA's public performance licensing schemes. These licensees include by way of example, cafes, hairdressers, retail outlets and gyms. It is simply not feasible for such businesses to provide detailed, accurate reports on their sound recording use and we must use proxy data in such situations. Of course, where revenues from particular sources are significant, and the cost can thus be justified, with the co-operation of the licensee music recognition technologies can be deployed in order to gather better usage data.

We note that the provision of sound recording usage data is an element in both the negotiation and settlement of licensing arrangements. These discussions and resulting agreements are often, by necessity, conducted under a regime of confidentiality and we may not be able to provide the type of information that may be contemplated under this draft recommendation.

In our view the requirements of the Code, including those contemplated by other draft recommendations, already ensure that sufficient information about the use of data for distribution purposes is readily available.

Other matters

The Draft Report contains recommendations for a number of significant changes to the Code. Some merely reflect current practices, but others may take some time to implement, and each change may impact each society to a different degree. As a result we believe that the societies will require a reasonable time to confer, draft, consult, finalise and implement the changes contemplated.

For these reasons, provided the final report is published by 31 March 2019, we would propose that an updated Code would not come into effect until 1 July 2019. This would allow compliance for the year ending June 2020 to be assessed on a consistent basis for the full period, and their impact to be subsequently reviewed as part of the regular triennial review scheduled for 2020.

Finally, we would like to acknowledge the reasonable, professional and consultative approach that the Bureau has taken in conducting this review.

Thank you for the opportunity to provide feedback on the Draft Report. If you require any additional information, clarification or assistance please do not hesitate to contact me.

Yours sincerely,

Lynne Small
General Manager