

Review of the Code of Conduct for Australian Copyright Collecting Societies

Response to Draft Report



screenrights

Submission by Screenrights

14 March 2018

INTRODUCTION

Screenrights appreciates the opportunity to comment on the findings and recommendations in the Draft Report. We acknowledge the extensive consultation of the Bureau in conducting the review.

Screenrights recognises that the Code of Conduct can be improved, and we largely support the recommendations in the Draft Report subject to the comments below.

We note that the changes may take some time to implement, particularly as we will need to consult with stakeholders prior to amending the Code. To that end and given the time of year, it is likely that a revised Code would come into effect 1 July 2019.

Finally, Screenrights notes that while it supports the recommendations, for other, smaller collecting societies compliance with the stricter Code may be more difficult.

RESPONSES TO DRAFT FINDINGS AND RECOMMENDATIONS

Clarifying the Code's role and purpose

Draft finding 1: The rationale and objectives of the Code should be clarified to better reflect the importance of achieving efficient and equitable outcomes.

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.

Screenrights supports the recommendation.

Draft finding 2: The role of the Code in the broader regulatory framework needs to be clarified given the range of instruments that regulate copyright collecting societies.

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.

Screenrights supports the recommendation.

Encouraging greater transparency

Draft finding 3: The Code should require sufficient transparency around licences and fee calculations to support negotiations between collecting societies and licensees.

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.

Discussion question: What information would licensees benefit from around how their licences are calculated? What limitations are there in providing more information?

Screenrights supports the recommendation, in principle, but we note that very often the information available may be of little assistance by virtue of the nature of our licence agreements.

For example, where a rate is set by the Copyright Tribunal, then it is the result of a lengthy arbitration process which has taken into account a range of factors to reach a determination. As the Tribunal has readily acknowledged, it is rarely the case that a mathematical formula can be applied to determine an amount, and rather it requires judicial estimation of value. Similarly, the majority of our licence agreements are based on licence fees which are agreed between licensee representative peak bodies and Screenrights. Again these negotiations take into a range of factors which don't readily reduce to a model.

Finally, we note that while the Code applies to collecting societies, there is no equivalent governance structure for our licensees. We submit that the Code should not impose a one-sided degree of transparency on collecting societies which would impede their ability to be effective. This would undermine the objective of the Code as set out in Draft Recommendation 1.

Screenrights submits that the requirement to make information available should not extend to commercially sensitive information which may compromise a negotiation.

Draft finding 4: Collecting Societies could more clearly communicate how their licence fee schemes and arrangements operate.

Discussion question: What options are available to collecting societies to achieve effective communication of licence fee determination processes?

The commentary before this finding appears to relate to a particular licence and licensee. It is not clear to Screenrights how this relates to our licences.

However, we note that in terms of the general administration of the licences, the recent amendments to the Copyright Act were aimed to simplify the educational statutory licences. These amendments which were developed by licensees and

collecting societies. This simplification process allows for less administration for licensees who choose to participate in the services.

Draft finding 5: Increased transparency is required around collecting societies' distribution of funds, having regard to issues around commercially-sensitive information and compliance costs. To support this, the Code should:

- Provide incentives to distribute royalties fairly and efficiently, and
- Support the availability of a level of information rights holders and licensees require to have confidence in the fairness and efficiency of the system.

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.

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.

Discussion question:

What information would licensees benefit from in relation to the distribution of funds and in what format? What constraints do collecting societies face in providing information to licensees?

There are two critical limitations on the information that Screenrights is able to provide. Firstly, it is important to preserve the confidentiality of payments to individual members. Providing details of distributions may distort the primary licence markets.

Secondly, in regard to aggregated, anonymised data, in Screenrights' case it is difficult to categorise members in the manner sought by some licensee representatives. Some reporting is possible, but it is not clear to Screenrights how this would assist licensees, or exactly what their requirement is for this information. To the extent possible, we would seek to provide the information, but it may not always be available.

Draft finding 6: Stakeholders should be able to access information about the distribution of funds by collecting societies to their members in a form that is digestible to them.

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.

Discussion question:

What information would stakeholders benefit from in relation to the distribution of funds and in what format?

Screenrights supports the recommendation.

Screenrights notes that our Distribution Policy has been re-drafted several times to make the relatively complex process as straightforward as possible, and to present the information in plain language accompanied by examples.

This is an ongoing task to which we remain committed.

Draft finding 7: Transparency should be increased around the management of funds that cannot be distributed to members or rightsholders.

Draft recommendation 8: Amend clauses 2.6 and 2.9 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, and
- c. the uses for which expired, undistributed funds are to be applied.

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.

On recommendation 8(a), Screenrights notes that the existing clause 2.9 in the Code creates some additional reporting obligations upon request from licensees for declared collecting societies relating to undistributed funds.

Screenrights notes that there is potentially a significant cost in identifying the reasons for each individual payment. Screenrights proposes that the requirement should only apply where the undistributed funds represent a substantial proportion of the pool such as greater than 5%.

Screenrights supports recommendations 8(b) and 8(c) and recommendation 9.

Discussion question:

What specific resources and information would it be most useful for collecting societies to make available on a consolidated online portal?

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.

Screenrights supports the recommendation.

Information which could be made available include the current Code and archive of amendments to the Code, review reports and triennial review reports.

Strengthening governance arrangements

Draft finding 8: Increased clarity around the Code Reviewer's role in addressing complaints and disputes is required.

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.

Screenrights supports the recommendation.

Draft finding 9: ADR processes may not be sufficiently available for disputes about licence fee pricing.

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.

Screenrights supports the recommendation.

Draft finding 10: Communicating outcomes from the annual review of the collecting societies' compliance with the Code needs to be improved.

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.

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.

Screenrights supports the recommendations.

Draft finding 11: There should be improved communication around non-compliance with the Code.

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.

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.

Screenrights supports the recommendations.

Draft finding 12: The processes for implementing amendments to the Code need to be improved.

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.

Screenrights supports the recommendation.

Draft finding 13: Collecting societies should consult with affected stakeholders when considering amendments to the Code, to ensure confidence in the review system.

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.

Screenrights supports the recommendation.

Draft finding 14:

The annual review of collecting societies' compliance with the Code and the triennial review of the operation of the Code itself should be conducted by separate parties.

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.

Screenrights supports the recommendation. However, Screenrights does not support the proposal for an advisory body as part of the review process. This will add significantly to the cost and burden of the review, and given that the stakeholders have an opportunity to make submissions to the review seems like an unnecessary duplication.

In supporting the recommendation for an independent triennial review, Screenrights reiterates its confidence in the Code Reviewer and the triennial review processes to date.

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.

Screenrights supports the recommendation.

Other matters

Screenrights notes the proposal from APRA AMCOS for a requirement for collecting societies to have appropriate policies to regulate workplace behaviour. Screenrights has such policies in place and endorses the proposal.

MORE INFORMATION

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