

AMPAL submission to the Bureau of Communications and Arts Research's review into the efficacy of the Code of Conduct for Australian Copyright Collecting Societies

AMPAL

The Australasian Music Publishers' Association Limited (AMPAL) welcomes the opportunity to respond to the Bureau of Communications and Arts Research's review into the efficacy of the Code of Conduct for Australian Copyright Collecting Societies (the Code).

AMPAL is the trade association for music publishers in Australia and New Zealand. Our members include large multi-national companies as well as many small businesses. AMPAL's members represent the overwhelming majority of economically significant musical works enjoyed by Australians.

Music publishers invest in songwriters across all genres of music. They play a critical role in nurturing and commercially exploiting their writers' musical works and providing returns to songwriters. AMPAL and our members also recognise the immense cultural and artistic significance of the works that music publishers represent.

We note that the review will examine the extent to which the Code promotes fair and efficient outcomes for both members and licensees of collecting societies. The Department of Communications and the Arts has invited stakeholder submissions on issues raised in the Discussion Paper and other issues relevant to the Terms of Reference. We set out our comments below.

AMPAL members are also members of the Australasian Performing Right Association (APRA) and the Australasian Mechanical Copyright Owners Society (AMCOS) and we endorse their joint submission. AMPAL is a member of the Australian Copyright Council and we endorse its submission.

Comments on the Discussion Paper

In respect of the Terms of Reference of the review, AMPAL's position is that:

- the Code meets its rationale and objectives, including promoting confidence and participation in the system, and mitigating any potential market power issues where these occur in relation to collecting societies;
- the Code promotes transparency, accountability and good governance, and the Code contains sufficient monitoring and review mechanisms to achieve this, and
- the Code represents best practice compared to other domestic and international codes and guidelines.

AMPAL submits that copyright collecting agencies such as APRA AMCOS play a central role in reducing transaction costs, and that APRA AMCOS operates transparently, efficiently and at best practice.

This submission does not seek to address all questions in the Discussion Paper. Rather it seeks to affirm AMPAL's satisfaction with the current Code and its confidence in APRA AMCOS' operations. AMPAL endorses the responses of APRA AMCOS to specific questions raised in the Discussion Paper.

AMPAL notes that the review implements the Government's response to Recommendation 5.4 of the Productivity Commission's 2016 Inquiry Report on Intellectual Property Arrangements. This recommendation was not in the Productivity Commission's Draft Report, and so the basis for the Productivity Commission making this recommendation is not

evident, and collecting societies did not have the opportunity to make detailed submissions on the recommendation. AMPAL welcomes any opportunity to improve the practices of APRA AMCOS, however it is submitted that APRA AMCOS already operates at best practice in respect of its governance and transparency arrangements. AMPAL also highlights that APRA AMCOS is already subject to rightfully significant independent scrutiny from the Australian Competition and Consumer Commission and the Copyright Tribunal. As noted by the Department in the Discussion Paper, APRA AMCOS, above and beyond its regulatory obligations, voluntarily submits its arrangements to the ACCC for review every five years, and the ACCC in its last review in 2014 authorised APRA's membership, licensing, distribution and international arrangements for a further five years, noting 'APRA's willingness to discuss issues and engage with interested parties during the re-authorisation process'¹ and stating that the term was appropriate 'in light of the amount of work undertaken to develop a new ADR scheme, the progress already made to address interested party concerns, and to allow time for the ADR scheme to become fully operational'.²

AMPAL is aware that APRA AMCOS has a demonstrated record of willingly participating in the annual review of its compliance with the Code by the independent Code Reviewer, which to date has been a former Federal Court judge, and is currently Hon Dr Kevin Lindgren AM QC. AMPAL is also aware that there has been a significant decrease in general licensing complaints made against collecting societies during the years since the Code came into operation in 2002, despite growing numbers of members and licensees. Most recently in 2016, the lowest level of complaints was recorded against societies since the Code came into operation. The Code Reviewer determined that each complaint had been resolved satisfactorily. Furthermore, as the Department notes in the Discussion Paper, '[t]o date, the independent Code Reviewer has found all participating collecting societies to be generally compliant with their Code obligations, with no reports of major breaches over the past 15 years'.³ Of course the Code itself is also subject to regular review, and was reviewed most recently in 2017, which is publicly advertised and with submissions invited from all members of the public. The Code prescribes these independent and transparent reviews, which ensures ongoing suitability of the Code. In his 2017 review of the Code, the Code Reviewer concluded that '[i]n my assessment, the Code serves a useful purpose. As I noted at [67] of my last Triennial Review report, one cannot fail to be impressed with the detailed annual compliance reports that the collecting societies provide'.⁴

AMPAL notes the comprehensive consultation process that was undertaken to develop the Code, with input from all stakeholders. The principles and considerations that informed the development of the Code are still applicable today. The changes in technology that have occurred in the intervening period since 2002 have not, in and of themselves, impacted the governance or transparency of collecting societies.

Therefore in response to Question 1 in the Discussion Paper, AMPAL submits that the Code is meeting its original purpose to ensure collecting societies operate efficiently, effectively and equitably. In respect of APRA AMCOS, we note the Productivity Commission's finding that collecting societies' payments-expense ratio is not significantly different to that of collecting societies overseas.⁵ AMPAL submits in response to Question 2 that the Code therefore has been effective in regulating the behaviour of collecting societies, and remains fit-for-purpose.

AMPAL also recognises the immense and clear information that APRA AMCOS makes available to licensees on available licences and how fees are determined. APRA AMCOS

¹ ACCC Determination dated 6 June 2014 Authorisation numbers: A91367 - A91375, page 70.

² ACCC Determination dated 6 June 2014 Authorisation numbers: A91367 - A91375, page 70.

³ Discussion Paper, page 11.

⁴ K. Lindgren, 2017, *Report of the Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia*, page 9.

⁵ Productivity Commission 2016, *Intellectual Property Arrangements*, Inquiry Report No. 78, page 156.

has comprehensively demonstrated a willingness to enter into fair and flexible music licensing arrangements. The Department would also be aware of the joint venture of APRA and PPCA called One Music Australia, due to launch in 2018, which aims to further simplify the process of acquiring a public performance music licence.⁶ In relation to Question 7, AMPAL submits that licensees are provided with sufficient information as to how their licence fees are calculated, and no additional measures are currently needed.

The essential role that the Copyright Tribunal holds should also be noted, whereby any licensee or potential licensee may request a determination by the Copyright Tribunal on the terms of any licence. The Copyright Tribunal must take into consideration any competition issues, and also has the power to make the ACCC a party to any proceedings. Therefore collecting societies are prevented from unreasonably refusing or imposing terms of a licence. In response to Question 11, AMPAL is satisfied with the role of the Copyright Tribunal and the alternative dispute resolution service known as 'Resolution Pathways' that is open to APRA AMCOS members. This provides efficient, fair and low-cost dispute resolution for members and licensees and no alternative models are required. The Department has recognised that this service has been 'widely praised'.⁷

Regarding transparency, AMPAL notes that distribution rules of APRA and AMCOS are determined by its boards of directors and are publicly available. It is not appropriate, contrary to what the Productivity Commission in its review seemed to suggest,⁸ for licensees to receive details of the APRA AMCOS member to whom licence fees are distributed, nor the amounts of distributions made to individual copyright holders including music publishers. This clearly is the subject of contract, and is confidential commercially sensitive information between APRA AMCOS and its individual members. It should be noted that the Code Reviewer in 2015 agreed with this position in his triennial review.⁹ Therefore it is submitted that in response to Question 8, no additional measures are needed to achieve greater transparency in the distribution of funds.

Finally, AMPAL submits that the above comments demonstrate that the Code does adequately balance the interests of members and licensees, in response to Question 13. In relation to Question 14, as the Code reviewer has noted,¹⁰ directors of collecting societies have a legal duty to act in the best interests of their respective members, and so the Code does not need amendment to require collecting societies to act in the best interests of their members.

Conclusion

AMPAL thanks the Department for the opportunity to make this submission to its review. AMPAL supports APRA AMCOS' submission and reiterates its confidence in the governance, transparency and accountability of APRA AMCOS' operations. AMPAL submits that the Code remains fit for purpose in balancing the interests of copyright collecting societies and licensees. Please contact me if we can be of any further assistance.

Matthew O'Sullivan
General Manager

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⁶ <http://www.onemusic.com.au> (last accessed 13 September 2017).

⁷ Discussion Paper, page 20.

⁸ Productivity Commission, 2016, Intellectual Property Arrangements, Inquiry Report No. 78, page 160.

⁹ K. Lindgren, 2015, *Supplementary Report of the Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia*, page 17.

¹⁰ K. Lindgren, 2015, *Supplementary Report of the Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia*, page 38.