Response to Draft Report: Review into the efficacy of the Code of Conduct for Australian Collecting Societies

March 2018
INTRODUCTION
Thank you for the opportunity to participate in this review. We appreciate the public interest in the operations of collective management organisations (CMOs). We welcome the review’s overall finding that CMOs are compliant with the existing code. There always areas for improvement. We therefore welcome suggestions about improving the code framework and governance arrangements as well as those aimed at enhancing our transparency (including around undistributed funds) to enhance confidence in the role and operations of CMOs.

Our operations are complex in some respects, and we recognise that we need to tailor our communications for different groups of stakeholders in accordance with their relationship with us, and their familiarity with collective management and copyright more generally.

SUMMARY OF RESPONSE
We agree with the findings in the draft report and we support, in principle, all of the recommendations. We will work with the other CMOs to implement the recommendations. Some recommendations can be implemented quickly, and some will require transitional processes.

RESPONSE TO DRAFT RECOMMENDATIONS

Clarifying the Code’s role and purpose

*Draft recommendation 1: Explanatory text on original objectives*

*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.*

We support the addition of explanatory text to the Code to clarify its objectives.

As noted in our response to the Discussion Paper, and as recognised by Draft recommendation 3, the Code is part of a broader regulatory framework, which includes the Copyright Tribunal, requirements for declared collecting societies, and members’ entitlements under Corporations law. It is the role of that broader framework, not the Code on its own, to ensure collecting societies operate efficiently, effectively and equitably.

*Draft recommendation 2: Additional objective*

*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.*

We support this recommendation.

*Draft recommendation 3: Explanatory text on broader regulatory environment*

*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.*

We support this recommendation.
Encouraging greater transparency

**Draft recommendation 4: Amend Code to require information on basis of licence fees**

*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.*

We agree that both CMOs and licensees should have sufficient information to support negotiations about licence fees, in the interests of fair and efficient outcomes. That applies to information held by licensees and their peak bodies as much as it does to information held by CMOs. An example is information about the extent to which the licensable use is occurring, where that has an impact on licence fees.

Licensees and licensee peak bodies are not currently subject to their own codes of conduct regarding how they conduct licence negotiations (even those that are government departments and agencies). So while we are supportive, in principle, of transparency regarding how licence fees are calculated, the Code should not impose requirements on CMOs, in relation to negotiations, that do not apply to licensees or to other bodies with which licensees may be negotiating for content access.

It is also important that the relative roles of the Code and the Tribunal are clear in this context. Any licensee can ask the Tribunal to determine aspects of licence arrangements, including the fee. In addition, the ACCC can be a party to Tribunal proceedings.

We agree that members should have sufficient information about the basis of licence fees to provide them with confidence that the CMO is managing their rights in a fair and efficient way.

**Discussion question: benefit to licensees from information on fee calculation**

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

We look forward to seeing licensees’ view about information that would benefit them, and looking at options for accommodating reasonable information requirements.

As outlined above, the Code should not require disclosure of information that would compromise CMOs’ ability to negotiate fair outcomes for their members, particularly where the other party to the negotiation is not subject to similar disclosure requirements.

**Discussion question: Options for better communication about licence fees**

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

As noted in the introduction, communications need to be tailored in accordance with a stakeholder’s relationship with a CMO, and the stakeholder’s familiarity with CMO operations. The objective in all cases, though, is to foster confidence in collective management.

**Draft recommendation 5: Amendment to require distribution information in annual reports**

*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.*

We already provide this information, in accordance with clause 2.9.
**Draft recommendation 6: Amendment to require information to licensees on distribution**

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.

See response to discussion question below.

**Discussion question: Licensee benefit from distribution information**

*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?*

We look forward to seeing information from licensees about information they would like, in addition to that already provided, and how they would benefit from it. As a general matter, our preference is to provide information about distribution of funds in our annual report, so that it is available to everyone. We are not sure what sorts of information licensees are seeking that would not be suitable for publication in that way.

The information we currently provide in our annual reports includes:

- classes of recipients for licence fees distributed from different sectors;
- relative proportions of payments to Australian and foreign recipient, for different licence fee sources;
- distribution by state and territory;
- list of all distributions, with deduction for each;
- money held in trust as at 30 June, by category; and
- unpaid allocations ‘rolled over’ during the reporting period, and why they were unpaid.

The constraints are those identified in the Draft Report:

- we do not always have the information that a licensee may be seeking;
- we may be able to get the information, but it is expensive to do so (disproportionately to the benefit to the licensee); and
- privacy and confidentiality concerns.

We also note that licensees’ interest in additional information is sometimes related to advocacy for copyright reform rather than licence negotiations. For example, information about the relative proportion of payments to Australian and foreign recipients has no bearing on licence negotiations, given there is no difference in the value of content or use based on the origin of the content or the nationality of the copyright owner. Similarly, the proportion of payments that reaches individual creators has no bearing on licence negotiations, but is used by advocates for copyright reform directed at reducing licence fees.

**Draft recommendation 7: Consultation on distribution policy changes; distribution policy in plain English**

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.

We support this recommendation. We note that ‘affected stakeholders’ principally means members. The Minister responsible for declared collecting societies is also an affected stakeholder insofar as a development relates to the guidelines for declared collecting societies.
Licensees are not relevant stakeholders for consultation on development of distribution policies. Our distribution policy is, however, available on our website for anyone who is interested, as is information about matters such as our distribution schedule and summary information about each of our distributions.

**Discussion question: Stakeholder benefit from distribution information**

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

Members would benefit from more tailored communications for different members that take into account the types, amounts and frequency of payments from us to them, and members’ different levels of familiarity with our distribution practices.

Stakeholders often find information presented graphically easier to digest, and we are working on ways to do that. We need to ensure, however, that any information is available in accessible formats for people with disabilities, which may mean we need to present information in more than one way.

**Draft recommendation 8: Annual reporting of undistributed funds**

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.

We accept this recommendation. We currently provide this information.

**Draft recommendation 9: Guidelines for members on undistributed funds**

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.

We accept this recommendation.

**Discussion question: Resources and information for portal**

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

We envisage that the portal would include:

- the Code, with explanatory notes annexed
- information about the history of the Code, including the reasons for its establishment
- information about how to participate in annual reviews of compliance, and triennial reviews of the Code
- notices regarding annual and triennial reviews
- future CMO reports to the Code Reviewer (with confidential information omitted)
- all past and future Code Reviewer reports
- information about non-compliance with the Code and steps taken to address the non-compliance
- links to collecting societies’ information regarding:
  - distribution policies, practices and outcomes
  - licences
- link to information about this review
Draft recommendation 10: Establish an online portal

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.

We support this recommendation.

Strengthening governance arrangements

Draft recommendation 11: Clarify Code Reviewer’s role for complaints and disputes

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.

We do not agree, however, that there are ‘substantive barriers’ to using the Tribunal, as claimed by some licensees. The costs are proportional to the licence fees at stake, and each party bears its own costs. Other avenues of alternative dispute resolution are not necessarily cheaper for the parties.

We note that the Copyright Tribunal’s draft practice direction involves compulsory mediation following filing of position papers, and that the process in the draft practice direction was recently adopted by the Tribunal. The draft practice direction seeks to facilitate early resolution and contain costs.

Draft recommendation 13: Report to Code Reviewer on compliance with cl 2.1–2.9 of Code

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 it reflects our past practice).

Draft recommendation 14: Publish report to Code Reviewer on compliance

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: Notify members and licensees of Code breaches
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

We support this recommendation.

Draft recommendation 16: Publish contraventions register
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.

Draft recommendation 17: consider and implement amendment recommendations within timeframe
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: Consult with stakeholders on Code amendments
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: Separate reviewer for triennial review
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.

We support this recommendation.

Our firm view is that the person who conducts the triennial review should have similar qualifications and experience as the Code Reviewer for the annual reviews. In addition to the
qualifications and experience listed in the draft report, the current Code Reviewer is also an experienced mediator.

Our experience with the 2014 triennial review was that the Code Reviewer applied his extensive knowledge and experience of all areas of law in his consideration of the issues raised by stakeholders seeking amendments to the Code. He was thus able to have regard to relevant matters other than those raised in submissions by stakeholders. This resulted in a carefully considered and expert report on the implications of the issues raised.

**Draft recommendation 20: Improve capture and use of data**

*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 support this recommendation.

**OTHER MATTERS**

**Workplace behaviour policy**

We support the proposal by APRA AMCOS for an amendment to the Code to add a requirement that each society implement and enforce an appropriate policy to regulate workplace behaviour. Copyright Agency has a policy in place regarding equal opportunity, discrimination, harassment and bullying.

**Timeframe for implementation**

We also support APRA AMCOS’s proposal regarding an implementation timeframe.