Australian Government

Department of Infrastructure, Transport,
Regional Development, Communications, Sport and the Arts

Freedom of Information Request

FOI 26-048

September 2025

Data relating to the number of complaints received by the Office for the Arts concerning:

	1 July 2016 – 1July 2025
'Audio-visual copyright society limited', also trading as 'Screenrights' and 'Enhance TV'	1
the number of complaints received by the agency concerning 'Enhance TV Pty Ltd'	0

Australian Government

Department of Communications and the Arts

Bureau of Communications and Arts Research

Review of Code of Conduct for Australian Copyright Collecting Societies

August 2018

Final report

communications.gov.au/BCAR

#CommsAuBCAR

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Glossary

This glossary provides a general guide to terms used in the report.

ACCC—Australian Competition and Consumer Commission

ADA—Australian Digital Alliance

ADR—alternative dispute resolution

ALRC—Australian Law Reform Commission

AMCOS—Australasian Mechanical Copyright Owners' Society Limited

APA—Australian Publishers Association

APRA—Australasian Performing Right Association Limited

ASA—Australian Society of Authors

ASDACS—Australian Screen Directors Authorship Collecting Society Limited

AWGACS—Australian Writers' Guild Authorship Collecting Society Limited

CAG—Copyright Advisory Group to the COAG Education Council

CAUL—Council of Australian University Librarians

Collecting society—An organisation that issues copyright licences, collects funds, and distributes royalty payments on behalf of its members. See also: CMO.

CMO—Collective management organisation. See also: collecting society

Copyright Agency—Copyright Agency Limited

Copyright Tribunal—Copyright Tribunal of Australia

Declared collecting society—A collecting society that has been declared under the *Copyright Act 1968* for the purposes of Part VA, Part VB, Part VC, Part VD or Division 2 of Part VII of the Act

DP—Discussion Paper

Federal Court—Federal Court of Australia

Guidelines for Declaration of Collecting Societies —Australian Government Guidelines for Declaration of Collecting Societies (as revised in 2001)

Isentia—Isentia Pty Ltd

Licensees—Copyright users that obtain a licence from a collecting society

LPA—Live Performance Australia (Australian Entertainment Industry Association)

Members—Rightsholders that belong to a collecting society

NAVA—National Association for the Visual Arts

OECD—Organisation for Economic Co-operation and Development

OSBC—The Office of the New South Wales Small Business Commissioner

PC—Productivity Commission

PPCA—Phonographic Performance Company of Australia Limited

Rightsholders—Owners of copyright

Screenrights—Audio-Visual Copyright Society Limited

TAG of Excellence—A former initiative of WIPO to improve the transparency, accountability and governance of CMOs through international standards of good practice

the Code—Code of Conduct for Copyright Collecting Societies (amended 20 March 2017)

the Department—Department of Communications and the Arts

the Government—Australian Government (or Commonwealth)

the Minister—Minister for Communications

UA—Universities Australia

Users—Users of copyright materials

Viscopy—Viscopy Limited

WIPO—World Intellectual Property Organization

Overview

Australia's copyright system supports the production and availability of a diversity of resources and materials that benefit Australians. The system facilitates access to and use of copyright materials by ensuring these are made available in such a way that their creators and producers are rewarded for their works. Copyright collecting societies play an important role in the administration of copyright and can support the integrity of the copyright regime in Australia by facilitating access to, and payment for, copyright material.

The Code of Conduct for Copyright Collecting Societies (the Code) was introduced in 2002 to regulate the behaviour of Australia's copyright collecting societies and provide protections for both members and licensees. The objectives of the Code are to:

- promote awareness of and access to information about copyright and the role and function of collecting societies in administering copyright on behalf of members
- promote confidence in collecting societies and the effective administration of copyright in Australia
- set out the standards of service that members and licensees can expect from collecting societies, and
- ensure that members and licensees have access to efficient, fair and low-cost procedures for the handling of complaints and the resolution of disputes involving collecting societies.

The Code was introduced more than 15 years ago and since then the landscape for the production and dissemination of copyright material has changed substantially due to advances in technology including the digitisation of content. Technology has also enabled new ways to monitor the use of copyright materials, and for collecting societies to distribute information to their members, licensees and the public.

In the report of its wide-ranging inquiry into Australia's intellectual property arrangements the Productivity Commission (PC) noted that concerns had been raised about the governance of copyright collecting societies in Australia, but that the PC was unable to investigate these concerns in detail as part of that inquiry. This review represents an opportunity for a targeted exploration of specific issues relating to the Code.

The review is also timely, as the Code first came into force more than 15 years ago and since that time new technologies have emerged that impact how copyright materials are made, distributed, used and licensed. The review considered how collecting societies have evolved to respond to changes in the copyright landscape, given the increasing extent to which copyright materials are produced and made available in digital form, and the ease which with these materials are shared.

Collecting societies are already subject to substantial scrutiny. Their compliance with the Code is reviewed annually and triennially, and collecting societies are required to adhere to a range of other laws and guidelines which also provide oversight in respect of their activities. However, this review provides the opportunity to identify systemic issues that may be undermining confidence in the Code and the outcomes achieved under it.

Overall the Code has had a positive effect on the conduct and operation of collecting societies.

Collecting societies have indicated the Code has helped to discipline and to improve their conduct towards stakeholders. By requiring collecting societies to provide their members and licensees with access to efficient, fair and low cost procedures for complaints handling and dispute resolution, the Code has introduced incentives for collecting societies to provide avenues for their licensees and members to seek redress for issues and concerns.

There is also a strong track record of compliance with the Code. The independent Code Reviewer, who conducts annual and triennial reviews of compliance with the Code, has to date found all participating collecting societies are generally complying with their obligations, with no major breaches over the past 15 years.

Nonetheless, a range of incremental changes—many relatively minor—would respond to issues identified in this review.

Clear objectives, transparency and sound governance are generally considered essential to promote confidence in any system. The review makes a number of recommendations across these three areas, supported by findings based on information provided during the course of the review including from those whose operations are governed by the Code and are part of its governance arrangements. These recommendations seek to improve the Code with the aim of achieving efficient and equitable outcomes.

The first set of recommendations seeks to increase clarity around the Code's role and objectives.

The review found that the plethora of instruments regulating collecting societies, licensees and members gives rise to confusion as to the Code's role. It also contributes to a lack of awareness of the Code and its functions, particularly its role relative to that of the Copyright Tribunal. Adding explanatory text to the Code would clarify its objectives and its place within the broader regulatory environment.

The second set of recommendations seeks to increase transparency. The review found that substantial improvements in outcomes for members and licensees could be achieved where the collecting societies improved and consolidated the information provided to them.

To minimise the potential for additional compliance costs, the review recommends making existing information more accessible where possible. While collecting societies publish a significant amount of material, this is sometimes more complex or harder to locate than it could be. Providing plain English guides and making existing information available on a centrally-accessible portal would go some way to addressing stakeholder concerns.

A consistent theme raised by members and licensees was that confidence in the system would be improved where they better understood how licence fees were calculated, and how funds were distributed.

The review proposes more standardised reporting on both of these, in an anonymised form where necessary to alleviate privacy concerns. The review acknowledges that this may lead to some transitional costs for collecting societies in formulating these new reporting arrangements, although there are also benefits, including that it would assist with the annual and triennial Code review processes.

The third set of recommendations relates to strengthening the Code's governance arrangements.

Confidence in voluntary or self-regulated systems requires the right incentives in place to encourage compliance. The review found that greater scrutiny and timeliness in respect of some aspects of the Code's compliance arrangements would help achieve this.

The review proposes some changes to standardise annual reporting arrangements and to increase public awareness of Code compliance. This would provide for better scrutiny of contraventions of the Code. Collecting societies would also be required to notify members and licensees when a breach of the Code occurs. These notifications would be published in annual reports of the collecting societies and at the proposed centralised portal of information for members, licensees and the public.

To provide certainty to all stakeholders in the copyright management system, changes to the Code should be actioned in a timely manner. Any changes should also incorporate the views of licensees and members where these changes have not already been subject to consultation through the Code review process, and recommended by the Code Reviewer.

To enhance the integrity of the review processes, the annual and triennial reviews should be conducted by different parties. At present, the triennial review is conducted by the Code Reviewer who also undertakes the annual review, which could be perceived as not providing a sufficiently independent assessment of the annual review processes. A separate independent expert or expert body should conduct the triennial review process. The annual review would remain with Code Reviewer.

As with most industries and sectors in the economy, the copyright system has adapted, and is continuing to adapt, to new digital processes and products. Data can provide for better monitoring, streamlined transactions and administration. The review proposes that assessing how data is used to improve business practices form part of the annual code review.

The review has sought to make recommendations that are practical, workable, and readily implementable, and that achieve meaningful change. The recommendations are also designed to provide some degree of flexibility and adaptability in the Code. They aim to support a self-sustaining system, with in-built review processes, that is flexible and can adapt over time.

The review anticipates that collecting societies will finalise amendments to the Code by 30 June 2019, and that compliance with the updated Code will be measured from 1 July 2019. The next triennial review of the Code is scheduled to occur in 2020, and affords a timely opportunity to assess the operation of the new Code provisions and compliance with them.

These recommendations aim to balance the interests of copyright collecting societies and licensees, although it needs to be acknowledged that the Code is not able to address all the issues that have arisen in the course of this review. This would have required broadening the Code's purpose and this could have unintended consequences, such as potentially blurring the role of the Code and that of the Tribunal. The recommendations have also been developed with regard to the differences between collecting societies. Australia's major collecting societies are different in their size, scale and scope of operations, and it is important to ensure recommendations have regard to this to avoid imposing requirements that are unduly burdensome or unworkable in relation to some organisations.

Significant stakeholder consultation was undertaken to inform the review's findings and recommendations. This helped achieve broad stakeholder support for the review's approach and the recommendations outlined in this report, with most recommendations agreed by most participants, including collecting societies.

The review did not find sufficient evidence of non-compliance with the Code to justify making the Code mandatory at this stage. This would unnecessarily increase regulatory costs to Government and compliance costs in the copyright system. Instead the review considers that the changes to improve transparency and strengthen governance arrangements proposed in this review should be allowed to be implemented and assessed for their effectiveness prior to any consideration of the need for mandatory arrangements. This could be done as part of the next triennial review, due in 2020.

Stakeholders raised a number of issues relating to the operations of the declared collecting societies including their administration as well as their management of undistributed funds. These are outside the scope of this review, and relate to the objectives of the statutory licence schemes and the role of the declared collecting societies in administering these.

That said, implementing the recommendations of this review would enable greater scrutiny of the activities of collecting societies that could support any further consideration of these issues. There may be merit in considering the role of the Guidelines for the Declaration of Collecting Societies in addressing these issues. The Guidelines have remained largely unchanged since their introduction in 1990.

In seeking to identify such issues and develop potential options to address them, significant consultation has been undertaken as part of the review. Extensive research including examination of international best practice has also helped inform the review's analysis. An overview of the conduct of this review is provided at Appendix A.

Background

In August 2017 the Australian Government asked the Department of Communications and the Arts to review the efficacy of the voluntary Code of Conduct for Copyright Collecting Societies (the Code), in consultation with the Australian Competition and Consumer Commission (ACCC). The Bureau of Communications and Arts Research (the Bureau) within the Department, undertook the review.

The review implements the Government's response to Recommendation 5.4 of the Productivity Commission's (PC) 2016 inquiry report on Australia's intellectual property arrangements:[1]

Box 1: Recommendation 5.4

The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:

- The Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees.
- The review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.

The Bureau undertook the review with a view to ensuring that the Code remains the best mechanism to promote efficient, effective and transparent administration of copyright licences. An overview of the conduct of the review is provided at Appendix A.

The review benefitted from substantial public consultation. On 25 August 2017 the Bureau released a Discussion Paper to seek feedback on the extent to which the Code promotes fair and efficient outcomes for members and licensees of copyright collecting societies in Australia, eliciting submissions from a range of different stakeholders. Submissions were published on the Department's website.

An External Reference Group (ERG) was also formed to provide industry expertise and guidance for the review. The ERG comprised representatives of collecting societies, licensee groups, rights holder groups and other interested parties (further details of the ERG are provided at Appendix A).

The Bureau also conducted extensive research and analysis in developing its recommendations, including examination of international best practice (see Appendix E). This included examination of the findings of the independent Code Reviewer (a role established under the Code to monitor compliance by collecting societies and review the operation of the Code). The scope of the current review is wider than the existing triennial Code review process, and includes assessing the strength of the triennial Code review process itself.

In February 2018 the Bureau released a draft report of its review. The draft report identified that a range of incremental changes – many of them relatively minor – would respond to issues identified during the review process.

Recommendations and findings

Clarifying the Code's role and purpose

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

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 facilitate collecting societies' operating efficiently, effectively and fairly.

Recommendation 2: As a consequence of recommendation 1, the Code should be amended to incorporate an additional objective which states that the Code should facilitate efficient and fair outcomes.

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.

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.

Encouraging greater transparency

Finding 3: Collecting Societies could more clearly communicate how their licence fee schemes and arrangements operate.

Finding 4: The Code should require sufficient transparency around licences and fee calculations to support negotiations between collecting societies and licensees.

Recommendation 4: **Amend clause 2.3** to require collecting societies in response to a reasonable request, to make available to licensees and potential licensees:

a. the methodology for calculating the licence fee applicable to that licensee or potential licensee, and
b. matters taken into consideration in determining the licence fee to the extent that such information is not commercial-in-confidence and does not otherwise directly affect a commercial negotiation between the collecting society and the licensee or potential licensee.

The Code Reviewer is able to consider whether a request or a collecting society's response to it has been reasonable.

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.

Recommendation 5: Amend clause 2.6 to require collecting societies to detail in annual publications, at an anonymised or aggregate level where appropriate, the accounting and distribution of licence revenue. This information is to be reported in a consistent format year on year. Categories for reporting should include, but are not limited to:

a. classes of licensees from whom licence revenue is received,
b. classes of members to whom licence revenue is paid,
c. categories of copyright material copied / licensed in respect of which licence revenue is received, and
d. domestic vs international payments of licence revenue.

Recommendation 6: Amend clause 2.4 to require collecting societies, in response to a reasonable request by a licensee or their representative, to provide detailed information about particular rights payments made pursuant to a licence. Such information should only be provided to the extent that it is not commercial-in-confidence and does not otherwise directly affect a commercial negotiation between the collecting society and the licensee or potential licensee. Such information is to be provided:

a. on an anonymised basis, and
b. where the collecting society can do so at a reasonable cost.

The Code Reviewer is able to consider whether a request or the collecting society's response to it has been reasonable.

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.

Recommendation 7: Amend clause 2.4 to require that collecting societies:

a. consult with members prior to making any substantive changes to their distribution policies, and
b. publish 'plain English' guidelines on their distribution policy and make them available to members and licensees.

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

Recommendation 8: Amend clause 2.6 to require detailed additional annual reporting of expired undistributed funds, including:

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

Recommendation 9: Amend the Code to require collecting societies to make available plain-English guidelines stating how expired undistributed funds will be allocated and spent by the collecting society, and how such expenditure will serve the interests of members.

Recommendation 10: Amend the Code to require the collecting societies to establish and maintain a consolidated online portal for the public dissemination of governance, financial and data information, including all documents relating to the collecting societies' compliance with the Code.

Strengthening governance arrangements

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

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.

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

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 of a licensing dispute. Whether a collecting society has acted reasonably in response to a request made pursuant to this clause is a matter for consideration by the Code Reviewer in their annual report on the collecting societies' compliance with the Code.

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

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.

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. Individual complaints should not be published; however, appropriate summary information relating to all complaints received in the reporting year should be reported.

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

Recommendation 15: Amend Code to require collecting societies to notify members / licensees when the Code Reviewer finds that they have contravened the Code, options include:

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

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.

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

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.

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

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.

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.

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.

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.

Clarifying the Code's role and purpose

While the introduction of the Code has resulted in positive outcomes for licensees and members, this review has identified that the role of the Code is not well understood by all stakeholders. There is also a diversity of views as to what its purpose is, and what its objectives should be.

The preamble to the Code provides the background to the Code's introduction, recognising the role of collecting societies in facilitating the production and use of creative works and resources. It sets out the criteria the collecting societies should aspire to, including that they should be responsive to the needs of members and licensees, be transparent in their operations and achieve efficiency in distribution. In turn it also sets out the expectations of the collecting societies themselves, that users of copyright materials will respect the rights of creators.

Since the Code's introduction in 2002, the Australian Competition and Consumer Commission (ACCC) has introduced guidelines for developing effective voluntary industry codes. The ACCC's guidelines state that the purpose of a voluntary code should be clear, with objectives that explain to stakeholders and any interested party why the voluntary code was established and what it intends to achieve.[2]

This guidance is important because the voluntary nature of such industry codes means that they need to provide sufficient clarity as to the outcomes sought. This review has provided the opportunity to assess the extent to which the Code meets the expectations set out in the ACCC guidelines.

As it stands the Code does not reference the reason for its introduction. It became evident during the course of the review that the outcomes to be achieved under the Code could also be stated more clearly. This would provide a clearer benchmark to assess the collecting societies for the annual and triennial Code reviews.

In order to meet the standards in the ACCC guidelines, the review's draft report recommended that explanatory text be added to the Code to explain the instrument's rationale and objectives, which include that the Code was established to provide greater protections for both members and licensees, and to ensure that collecting societies operate efficiently, effectively and equitably. The draft report also recommended that as a consequence of draft recommendation 1, the Code incorporate an additional objective to state that a key purpose is to support efficient and equitable outcomes.

Feedback provided through the review's ERG process suggested that amendments to draft recommendations 1 and 2, and to associated findings, could be made for the purposes of clarifying certain aspects of them.

Amendments that it was proposed would enhance clarity for stakeholders included that the explanatory text and an additional objective in the Code should 'facilitate' positive outcomes rather than 'ensure' or 'support' them.

By contrast the Office of the New South Wales Small Business Commissioner (OSBC) (sub. 18) stated that to give full regard to 'inequity and inefficiency faced by many small business licensees,' draft recommendation 2 would be strengthened through a revision that stated the Code 'must support equity and efficiency.' The NSW OSBC viewed that making this revision would provide a trigger for future revisions to the Code where the instrument was not being adhered to in respect of this objective.[3]

Participants also stated that the term 'equitable' could be considered further. In particular, APRA AMCOS (sub. 1) and the Phonographic Performance Company of Australia (PPCA) (sub. 19) stated that the term 'equitable' has a specific meaning in the context of the *Copyright Act 1968* (Copyright Act) and that the draft recommendation could be revised to improve consistency with broader language used by the Copyright Tribunal in its jurisdiction.

The review finds that the voluntary, self-regulatory Code is one instrument in a range of others that govern collecting societies' operations and that support efficient and fair outcomes. The aim of adding explanatory text and an additional objective as described in recommendations 1 and 2 is to improve clarity and understanding for stakeholders rather than to introduce more rigid aspirations. As such the review finds that these recommendations should state that the Code should facilitate positive outcomes, as this appropriately reflects the intended outcome. The review also finds that use of the term 'fair' rather than 'equitable' across its recommendations will support clarity for stakeholders.

Otherwise, feedback to the review indicated there is broad support for these recommendations to clarify that the Code was established to support efficient and fair outcomes, and to incorporate a new objective that supporting these outcomes is a key purpose of the Code.

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

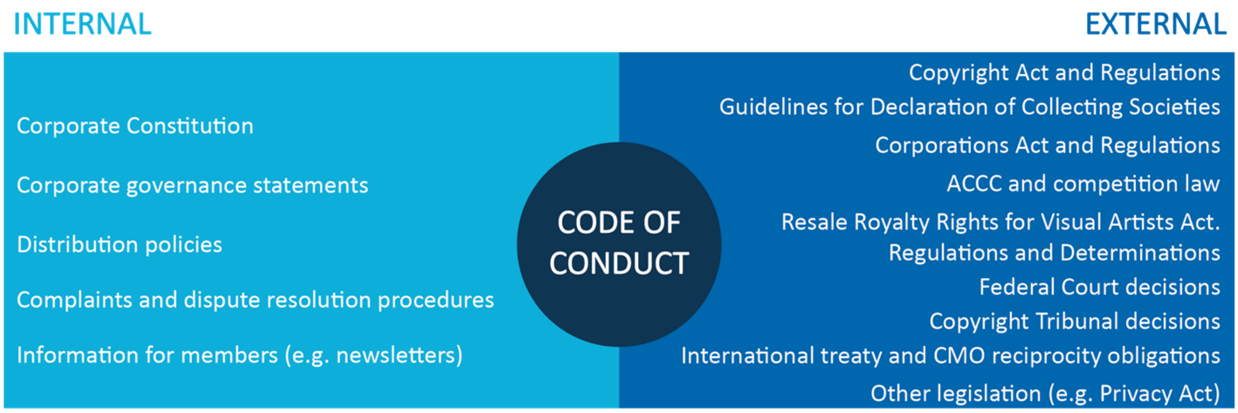
Recommendation 1: Add explanatory text to the Code to clarify that it was established to provide greater protections for both members and licensees, and to facilitate collecting societies' operating efficiently, effectively and fairly.

Recommendation 2: As a consequence of recommendation 1, the Code should be amended to incorporate an additional objective which states that the Code should facilitate efficient and fair outcomes.

While the Code is the primary self-regulatory instrument for collecting societies in Australia, it forms just one part of a broader legal and regulatory framework which regulates the behaviour of these organisations.

In addition to the Code, collecting societies are subject to a range of oversight including those under federal laws and international obligations (Figure 1).

Figure 1: Regulatory framework for copyright collecting societies



Appendix C summarises the key regulatory instruments that apply to collecting societies in Australia.

The collecting societies bound by the Code (with the exception of PPCA[4]) are companies limited by guarantee and must comply with applicable provisions of the *Corporations Act 2001* (Cth), and a range of broader legal obligations set out in other legislation. These include privacy, fair trading and competition obligations.[5] Collecting societies must also adhere to obligations set out in numerous international treaties, and reciprocal agreements between international collective management organisations (CMOs) and their affiliates.

The two declared collecting societies, Copyright Agency and Screenrights, must also comply with legislative provisions in the Copyright Act and the *Copyright Regulations 1969* that establish their role as administrators of statutory licensing schemes, as clarified by the *Guidelines for Declaration of Collecting Societies* (2001). These legislative provisions require declared collecting societies to meet higher standards in their operations, such as ensuring their administrative costs are reasonable and their trust funds are handled appropriately.

Beyond these regulatory obligations, some collecting societies subject themselves to additional oversight. APRA AMCOS, for example, submits its operational arrangements to the ACCC to obtain authorisation to offer exclusive licences that may otherwise give rise to competition issues under the *Competition and Consumer Act 2010*.

A number of submissions observed a degree of confusion as to the role the Code plays in the administration of copyright, and the extent to which it overlaps with other regulatory instruments in doing so.[6] For example, it is not the role of the Code or Code Reviewer to hear disputes regarding the setting of licence fees. This is the role of the Copyright Tribunal, an independent body empowered under the Copyright Act to hear disputes and make binding decisions relating to licence fees, licence schemes, distribution arrangements or conditions imposed by collecting societies.

Participants indicated that they would like a clear understanding of the scope of the Code, with a particular focus on clarifying the role of the Code in assessing disputes that fall within the Copyright Tribunal's jurisdiction.

The Code is a self-regulatory tool which seeks to promote confidence in the collective administration of copyright in Australia by providing minimum standards of transparency, accountability, good governance and effective stakeholder communications for collecting societies. While the Code should provide incentives for fair and efficient outcomes, it is not the role of the Code to comprehensively prescribe all rules and obligations governing copyright collecting societies as other regulatory instruments provide specific guidance and detail on various aspects of the collective management system. Copyright Agency (sub. 11) submitted that 'It is the role of that broader framework, not the Code on its own, to ensure collecting societies operate efficiently, effectively and equitably.'

In this context, the review considers that amendments to the Code are not the appropriate means of addressing some issues raised by some participants, such as the development of policies to address specific issues that may not be closely related to the conduct and operations of collecting societies in collecting licence fees and distributing royalty payments. For instance Nightlife Music (sub. 19) proposed that collecting societies develop policies that 'address and assign responsibilities on stakeholders to create infringement policies similar to those in foreign markets.'[7] This matter is discussed in more detail later in this report (see 'Use of private services in commercial settings).

APRA AMCOS noted that it has become standard for organisations to have in place appropriate policies regarding respectful workplace behaviours, including anti-bullying and anti-harassment policies. APRA AMCOS submitted that the Code should be amended to insert a requirement that each collecting society implements an appropriate policy to regulate workplace behaviours, consistent with what APRA AMCOS stated has become standard for organisations to have in place in terms of having appropriate policies regarding respectful workplace behaviours, including anti-bullying and anti-harassment policies.

While the review endorses collecting societies implementing appropriate policies to address unauthorised or illegal behaviour, and to support appropriate workplace conduct, such policies are firmly within scope of the societies' respective internal governance arrangements, rather than relating to the efficiency of the organisations and their related dealings with members, licensees, potential licensees and other primary stakeholders. Each society will also be subject to its own particular conditions and operational arrangements, and may choose to implement policies of this nature in different ways.

However the Code could benefit from explanatory text to explain its role versus other regulatory instruments. Participants agreed that a recommendation to add explanatory text of this nature to the Code would have value to them.

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.

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.

Encouraging greater transparency

Members and licensees of collecting societies raised a range of concerns about the amount of information available to them regarding the calculation of licence fees and the distribution of funds. In some cases, the information existed but was not readily accessible.

A lack of transparency can undermine the confidence in a voluntary system as it can be perceived as an attempt to mislead or to hide information. The review found that there were some relatively simple measures that could be implemented by collecting societies and the Code Reviewer that would increase confidence in the system by releasing existing information, making it more accessible, and using standardised reporting. There was broad support by all review participants for achieving greater transparency in the system. For instance the National Film and Sound Archive (sub. 17) supported all the draft report's recommendations, but 'particularly those proposals to increase the efficiency and transparency arrangements of collecting societies.'[8]

Providing more information about licence fees

One of the core functions of collecting societies is to collect fees and issue licences for the use of copyright materials. Licence fees are generally set following a negotiation process between a collecting society and a licensee or an association representing licensees within a particular industry or sector.

Some licensee participants raised concerns about licence fee negotiations and indicated that increased transparency around how their fees are calculated and who they are being distributed to would help them better determine whether fees are fair and reasonable. These participants also sought improved information about the operation and effect of licences and licensing arrangements more broadly, and more effective communication of this information.[9]

The Code establishes some obligations in respect of licence fee negotiations.

Clause 2.3 of the Code specifies obligations relating to collecting societies' engagement with licensees, including in relation to the setting of licence fees. These obligations include for collecting societies to treat licensees fairly and impartially, to ensure their dealings are transparent, and to ensure that clear information is made available to licensees regarding the terms of licences or licence schemes.

The Code also requires that each collecting society's 'policies, procedures and conduct in connection with the setting of licence fees for the use of copyright material will be fair and reasonable.'[10]

Despite these provisions, there are ongoing stakeholder concerns around these processes and the outcomes under them.[11] In particular, the current provisions in the Code appear to be overly broad—while the Code requires collecting societies to ensure their dealings are transparent it does not provide detail of what transparency means in these circumstances, or how it could be achieved.

Making information about licences and fees available

Stakeholders' difficulties in understanding how licensing schemes and arrangements work can have adverse impacts on the perceived fairness of the fees they pay, and on their ability to make informed decisions.

The Code requires licences to be drafted such that they can be plainly understood and to be accompanied by practical explanatory guides.[12]

Despite this, licensing processes and arrangements are viewed by some as difficult to understand, with the statutory licences described as complex and prolix.[13] Navigating these arrangements can be particularly burdensome for small businesses.[14] Providing increased clarity in licence classifications and fee calculations will minimise unnecessary administrative burdens for licensees. In turn, this could reduce inquiries and disputes for collecting societies, easing their administrative burden.

Having regard to the existing Code requirements for collecting societies to provide plainly understandable information on licences and licence schemes, stakeholder views were sought on what options might be available to achieve effective and improved communications.

Feedback on the draft recommendations has reflected a recognition by collecting societies that they could provide greater transparency in relation to licences, how licence schemes are established and how the pricing for licence schemes is set. The review considers that information that would increase transparency in this area and that would benefit licensees includes detail on the standard terms used within a licence scheme, as this would assist licensees to quickly ascertain which licence type was applicable to their needs. Other information could be made available to improve transparency and understanding of licensing arrangements more broadly, such as detail on the origins of licence schemes, for example where a scheme was the result of a negotiated outcome between the collecting society and a licensee association.

LPA (sub. 14) considered that collecting societies should make available information on the standard procedure for processing licence applications, and each of the licence types they administer as opposed to guides on these. LPA also considered that licensees should have access to information about the procedural steps for processing and assessing licence applications (e.g. who is responsible for attaining a licence, information to be included when submitting applications and associated timeframes).[15]

Participants have stated through the review's ERG process that while some of this information is already available to licensees it can often be dispersed across multiple documents or contained in fine print, and that a table summarising key licence types and schemes could be a useful way of addressing this.

This additional information would complement and consolidate existing information collecting societies already provide, such as the information on licences and licensing arrangements in the 'licence info guides' that APRA AMCOS publishes on its website.[16] These guides provide accessible information on licensing arrangements and include information on why licences are needed along with cost and contact information. The guides also provide hypothetical worked examples of licence fees to assist licensees and potential licensees in understanding how arrangements work and how they would apply to the licensee or potential licensee's individual circumstances.

Feedback to the review indicates there are various options for achieving improved and effective communication of the types of information about licences and licence schemes described above. These should improve accessibility of information but also support licensees and potential licensees in understanding how the information applies to them. The ACCC (sub. 3) submitted that it was important that the Code provide members and licensees with 'the information that will enable them to understand how the collecting society has applied its various policies and rules to their particular circumstances.'

One option could be for the range of collecting societies to publish such information online at a central location—a consolidated online portal. Aside from consolidating information and enhancing its accessibility, licensees could be alerted to new, relevant licensing information through email alerts or updates facilitated by the portal. A stand-alone, consolidated online portal that provides a 'one-stop shop' for information on the Code would benefit stakeholders more broadly but would be of use to licensees and potential licensees through improving the accessibility of information about licensing. The benefits and approach to establishing a consolidated online portal are discussed in more detail later in this report in the context of Recommendation 10.

Other options could include collecting societies convening or participating in annual information sessions, and developing options for interested parties to receive updates and to be advised of current events that may affect licence fee determination processes, for example consultation undertaken by the societies on aspects of a licence scheme, or efforts to improve data.

Licensees and potential licensees in particular will benefit from a better understanding of how licences and licence schemes operate. This understanding will be improved where collecting societies more clearly communicate relevant information.

Finding 3: Collecting Societies could more clearly communicate how their licence fee schemes and arrangements operate.

Calculating licence fees

Some participants sought greater transparency around the different methodologies used by collecting societies in determining licence fees.

Different approaches are used to calculate licence fees for copyright materials. These vary between societies and across licence types. Some rates are fixed while others are negotiated between parties, and negotiations take into account a number of factors including how much copyright material is being used by the licensee and estimates of its value.

Collecting societies submitted that sufficient transparency is already provided through licence scheme formulation processes involving consultation with the public or relevant industry bodies.[17] Consistent with provisions at clause 2.3 of the Code, collecting societies have policies to consult, where appropriate, with relevant industry bodies when developing and implementing new or revised licence schemes: APRA AMCOS and PPCA, for instance, have undertaken wide-ranging consultation in developing new schemes for the use of music.[18] Collecting societies also noted the existence of the Copyright Tribunal as an avenue for licensees to pursue concerns about their fees.[19] In addition, some participants view that transparency obligations more broadly could be applied more evenly. The Australian Publishers Association (sub. 7) submitted that the Code 'applies to collecting societies, but the same requirements of transparency, accountability and good governance do not apply to licensees and the organisations that represent them at the negotiation table.'[20]

However, submissions from some licensees indicated that not all processes used by collecting societies to determine fees are easily understood, and that there is insufficient information made available regarding licences and licence fee calculations.[21] Copyright Advisory Group to the COAG Educational Council (CAG) (sub. 10) submitted that under existing arrangements 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.'

Live Performance Australia (LPA) (sub. 14) stated that 'our membership has often raised the concern that there is a lack of transparent detail on the categorisation of events and calculation of licence fees that is easily accessible.' Similarly, the Australian Hotels Association (AHA) (sub. 6) submitted they have concerns about the level of information made available to date regarding licence fees that will apply under APRA AMCOS' and PPCA's joint 'One Music Australia' initiative. AHA state they are seeking access to data and other information that has informed development of the initiative's proposed licence arrangements 'so that the AHA is as well informed as OneMusic Australia to conduct analysis and make decisions and we are able to proceed…'[22] The review notes that the proposed OneMusic initiative, which seeks to simplify the process of acquiring a public performance music licence, is under development and subject to consultation outcomes.[23]

A general lack of information reduces the potential for parties to be informed during licence fee negotiations, and therefore their ability to assess the merits of any given licence scheme imposed. This view was supported by Free TV Australia (DP sub. 13) which stated that clause 2.3 of the Code is crafted in general terms and that in practice a lack of information results in licence fee calculations being unclear, in turn making it difficult to assess the reasonableness of the terms of agreement.[24]

This lack of information also raised questions about the suitability of methodologies used in licence fee calculations.

The capture of accurate and comprehensive usage data is inherently difficult. Collecting societies often rely on sampling systems, such as usage surveys, to gather this information. Surveys provide an approximation of an organisation's copying activities, while freeing licensees from administrative burden associated with keeping comprehensive and accurate records.

On the other hand, copying patterns have changed significantly over the past decade, with digital copying and communication taking over print copying. Traditional approaches to calculating licence fees may potentially be less suitable or representative of actual usage.

Some statutory licensees argued sampling methodologies overestimate usage, and that they capture non-remunerable materials such as orphaned materials or materials that are in the public domain and freely available online (such as fact sheets or general information pages).[25]

Participants including the Australian Society of Authors (ASA) (DP sub. 8) have stated that the methodologies collecting societies use are not well understood by some stakeholders.[26] While not in itself intended to resolve which methodology is most appropriate, more information about how licence fees are calculated would improve licensee and member confidence in the copyright system.

One participant stated that a lack of transparency around licence fee calculations impedes licensees' ability to assess the reasonableness of licence fees applied to them. According to the NSW OSBC (sub. 18) under existing conditions it is 'not possible to determine whether this fee might not be lower but for inefficiencies in APRA-AMCOS and PPCA operations, or whether this represents price gouging...Making fee methodologies and details of payments to creators available would expose such practices to public and regulatory scrutiny. Exposure would serve as a clear disincentive against this behaviour.'[27]

Transparency would be improved where the Code provisions are strengthened to require greater transparency around licence fee calculations. More information about how licence fees are calculated would also improve licensee and member confidence in the copyright system.

The review sought details from participants regarding the specific information that would be useful for licensees and potential licensees to have access to.

LPA submitted it would be useful to have available details of whether licensees were consulted on the development of a licence and fee. Similarly, Free TV Australia (sub. 12) provided detail on the type of information that licensees would benefit from having access to, including:

- the basis on which licence fees have been calculated and proposed (e.g. previous Tribunal decisions, economic analyses etc) such that a reasonable person in the licensee's position can understand the calculation and assess its reasonableness, and
- such additional information and documentation as is reasonably requested by the licensee to enable it to understand and undertake its own evaluation of the reasonableness of the proposed fee.

Other feedback provided to the review indicated licensees want more granular information to be provided, for instance details of how calculations take into account differences in the types of copyright materials used (e.g. digital vs hard copy materials) or the different licence components (e.g. statutory vs voluntary licence components).

Licensees also sought information about any modelling collecting societies draw on to inform the fees they charge. However it became clear in the course of the review that there were competing viewpoints on whether collecting societies could do more to provide modelling information, and that there was potentially some confusion and differing views as to what exactly comprises 'modelling' information. Participants have indicated that the disclosure of modelling data used by a collecting society may be problematic, particularly where it requires that organisation to disclose confidential or privileged material, or material that may introduce inefficiencies into a commercial negotiation.

The review sought further information regarding these constraints and their implications. In response collecting societies submitted that they face limitations in the extent to which they are able to capture comprehensive data to inform fee setting processes. APRA AMCOS (sub 1) stated that:

> *We aim to be as transparent as reasonably possible regarding the basis for licence fees. However, the formulation of a new licence scheme is a matter that is ultimately subject to the jurisdiction of the Copyright Tribunal, and may involve reference to a large amount of highly confidential material (such as licence fees paid by particular licensees, confidential industry revenue material, and confidential subscription numbers). The Code should not require transparency of such confidential information.*

Other collecting societies shared this view. PPCA (sub. 19) stated that collecting societies having to make such information available would disadvantage them in negotiations. PPCA submitted that owing to its unique structure, the organisation directly competes with its own licensors for the provision of non-exclusive licences to play protected musical recordings. According to PPCA as a result of its structure:

> *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 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.*[28]

The draft report recommended the Code require collecting societies to provide information including any modelling. However following further feedback the review finds that the information required by licensees and other stakeholders is in two parts: first, the methodology that shows how the licence fee is calculated, and second, the underlying basis or rationale applied in that methodology.

Further, the review found there are constraints on the information that collecting societies can provide arising from privacy or commercial-in-confidence concerns, or where the provision of information could undermine a commercial negotiation. For instance APRA AMCOS (sub. 1) stated that during the formulation of a new licence scheme a range of confidential information can come under consideration by the Copyright Tribunal, including licence fees paid by particular licensees, confidential industry revenue material, and confidential subscription numbers. APRA AMCOS further stated that: 'To the extent that APRA AMCOS conducts modelling exercises in the formulation of new licence schemes, the instructions and the materials produced may be the subject of legal professional privilege, and may contain the confidential information referred to above.'[29] Screenrights (sub. 20) submitted that 'the requirement to make information available should not extend to commercially sensitive information which may compromise a negotiation.[30]

The review considers that amendments to the Code should not compel the provision of information in these circumstances. The review also considered that requests and responses should be reasonable – that is, that they should genuinely respond to the request and not impose burdensome compliance costs. This would appropriately be determined by the Code Reviewer.

A further request for caution was raised by the Australian Society of Authors (ASA) (sub. 8). ASA indicated support for the draft recommendation, but noted that this support was 'provided that Copyright Agency's ability to represent, and negotiate for, its creator members is not compromised.'[31]

Collecting societies also questioned whether there would be significant value in providing information on the calculation of licence fees. Screenrights (sub. 20) submitted that whether a rate or licence fee was set by the Copyright Tribunal, or agreed between the collecting society and licensee or their representative, the ultimate value was the result of a process that has taken into account a range of factors that can't readily be reduced to a simple model.'[32]

In relation to providing details of the methodology a collecting society has used to calculate licence fees, however, it was identified that this would not pose a problem for collecting societies. Further, a substantial amount of the additional information licensees would like to see made available is, in fact, this 'methodology' information or high-level information that has informed the basis for a fee or licence, such as a Copyright Tribunal decision.

The review finds that the Code could be amended to improve the amount and quality of information that collecting societies make available to licensees and potential licensees regarding the calculation of licence fees. However collecting societies face some constraints in providing information. Amendments to the Code to require collecting societies to make additional information available on licence fees should balance the needs of licensees and the constraints faced by collecting societies. Amendments should also provide a mechanism for independent assessment (by the Code Reviewer) of whether a collecting society has acted reasonably, notably in cases where a collecting society has declined to provide information or has provided limited information.

The need for an approach that balances the needs of licensees with the constraints of collecting societies was also recognised by licensees, with a submission by Free TV Australia noting some of the key information that is needed, and also stating that requests for it should be reasonable:

> *In Free TV's view, collecting societies should be obliged, when proposing licence terms (either to an individual licensee or to an industry sector):*
>
> - *to clearly outline the basis upon which the licence fees have been calculated and proposed (e.g. previous Tribunal decisions, economic analyses etc) such that a reasonable person in the licensee's position can understand the calculation and assess its reasonableness; and*
> - *to provide such additional information and documentation as is reasonably requested by the licensee to enable it to understand and undertake its own evaluation of the reasonableness of the proposed fee.*[33]

The review acknowledges that implementing this recommendation may lead to some transitional costs for collecting societies in formulating these new reporting arrangements. There are also benefits to collecting societies, including that it would assist with the annual and triennial Code review processes.

Finding 4: The Code should require sufficient transparency around licences and fee calculations to support negotiations between collecting societies and licensees.

Recommendation 4: Amend clause 2.3 to require collecting societies in response to a reasonable request, to make available to licensees and potential licensees:

a. the methodology for calculating the licence fee applicable to that licensee or potential licensee, and
b. matters taken into consideration in determining the licence fee to the extent that such information is not commercial-in-confidence and does not otherwise directly affect a commercial negotiation between the collecting society and the licensee or potential licensee.

The Code Reviewer is able to consider whether a request or the collecting society's response to it has been reasonable.

Providing more information about how funds are distributed

Rightsholders should have sufficient information to understand the remuneration they receive for use of their materials and the processes associated with its determination. Licensees should also receive adequate information about how the licence fees they pay are divided up and distributed so they have a better understanding of the extent to which their fees are determined on a reasonable and fair basis.

The Code requires collecting societies to make information on their distribution policy available to members, including how entitlements are calculated, how often they are distributed, and how they adhere to the processes described in their policies.[34]

However the Code does not provide any guidance as to how comprehensive or granular this distribution information must be. While collecting societies make available information on how they manage and distribute funds, including through distribution policies that are generally published on their websites, participants have submitted that this information can be complex and difficult to navigate or understand.

Copyright Agency has stated that the provision of some of the information stakeholders seek would provide licensees with an unfair commercial advantage, undermining rather than promoting confidence in collecting societies.[35] Nevertheless it has provided additional information in annual reports 'from time to time.[36] Further information has been provided on particular occasions in response to specific stakeholder requests and has included additional detail that breaks down primary recipients of licence fees, recipients of licence fees paid by government sources, and funds held in trust by licence fee source.[37]

The report of the 2017 triennial Code review also notes that in response to negotiations involving licensee representatives, collecting societies have amended the Code to incorporate a new clause 2.9 that aims to address the concerns of statutory licensees in particular. The new clause requires declared collecting societies to provide at the request of a statutory licensee certain information including information on 'proportions to classes of recipients from the distribution of licence fees from the Statutory Licensee Class.'[38]

However some concerns remain. CAG (sub. 10) submitted, for instance, that:

> *…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 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.*[39]

The following discussion describes potential improvements based on the participant group that will benefit most from them. For instance, certain improvements to the level of transparency around licence fee distribution processes would benefit licensees in particular. Other measures would be of particular benefit to collecting societies' rightsholder members. Finally, some measures to improve transparency and the availability of information about distribution processes and the management of expired undistributed funds in particular would strengthen the system and stakeholder confidence in it more broadly.

Addressing licensee concerns

Despite recent improvements in transparency around the distribution of funds, there is still a perception that there is a lack of an effective mechanism to ensure such information continues to be available. For instance, there is a concern that there is no specific obligation to ensure more detailed rightsholder payments information be made available.[40]

As well as seeking more information on amounts distributed, some licensees consider that collecting societies' distribution processes are also opaque. These processes involve collecting societies—after recovering operational expenses or retaining commission—distributing to rightsholders the remainder of funds collected from licensees.

Licensees and their representatives are seeking greater clarity around who are the beneficiaries of remuneration under these arrangements, and the quantum of their remuneration. For example, LPA (sub. DP17) argued that there is insufficient information available to discern whether royalty revenue is distributed to the relevant owners of copyright, stating that:

> *There is a lack of clear and detailed disclosure on how the distribution of funds to rights holders correlates to the royalty payments received…Licensees should be able to confirm that fees paid for the use of particular content is fairly distributed to the owner of that content.*[41]

Statutory licensees expressed concerns about the statutory licence schemes' accountability in relation to the use of public funds. Copyright Advisory Group to the COAG Educational Council (CAG) (sub. DP9) stated that:

> *This lack of transparency sits uncomfortably with Education Department obligations in relation to expenditure of public funds, and best-practice administration for non-government school authorities. The current lack of visibility in terms of the distribution by collection agencies of funds paid out of public education budgets does not meet the best practice standards required by public sector organisations.*[42]

CAG considers that insufficient information is provided by collecting societies about the extent to which funds derived from statutory licence fees are distributed to creators of the content (for example, authors) in comparison to others (for example, publishers).[43]

To better understand how their fees are allocated, licensees view that collecting societies should provide more detail regarding the royalty amounts paid to particular members and rightsholders. As noted above licensees have previously sought greater visibility of the distribution of licence revenue between classes of recipient, such as the breakdown between authors and publishers, or between domestic and international royalty recipients. In a submission to this review's Discussion Paper CAG noted that such information is available in clear, accessible formats in international jurisdictions such as in the annual reports of the Canadian and UK collecting societies.[44]

Improving information around the distribution of funds by collecting societies may assist licensees to negotiate directly with rightsholders. In the 2014 review of the Code, the NSW Department of Justice and CAG both argued that having access to information about the individual payments made to members may allow public institutions to negotiate better licensing arrangements directly with rightsholders, in turn saving the taxpayer money.[45] This could also provide greater scrutiny over the societies' administrative expenses and further incentive to keep costs low.[46]

Collecting societies have questioned the value of the distribution information sought by licensees to allow them to negotiate directly with rightsholders. Copyright Agency stated that nothing in the terms of government and education statutory licences inhibits licensees from negotiating directly with rightsholders,[47] and that access to usage data is what is needed to underpin such negotiations.[48]

Any changes in this area also need to balance the needs of licensees and the potential for a compliance burden on collecting societies. The provision of information by collecting societies can be costly, and collecting societies themselves may not have access to all of the information that stakeholders may want or need.[49] In addition, consideration needs to be given to the privacy of members and the sensitivity of particular information. APRA AMCOS (sub. 1) submitted that:

> *… in some instances, the publication of an amount distributed under a particular licence scheme could result in an effective disclosure of confidential information belonging to particular licensees. For example, there are some licence schemes operated by APRA AMCOS where there are a number of licensees but a dominant licensee firm in the market. Disclosure of the amount collected and/or distributed under such a scheme would amount to disclosure of sufficient information for a competitor or other interested third party to determine that licensee's revenue or subscription base, which would be highly irregular.*[50]

Screenrights' submission supported this position, stating that '…it is important to preserve the confidentiality of payments to individual members. Providing details of distributions may distort the primary licence markets.'[51] Some member participants also supported this view, including a submission by the Motion Picture Association and Australian Screen Association in affiliation with the Motion Picture Association (sub. 15) stating that 'we believe it is imperative to ensure confidentiality and anonymity in the area of distribution reporting at the claimant level,'[52] and the Australasian Music Publishers' Association Limited (AMPAL) (sub. 2) stating that:

Regarding transparency, AMPAL notes that distribution rules and practices of APRA and AMCOS are determined by its boards of directors and are publicly available. It is not appropriate…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 private contract, and is confidential, commercial sensitive information between APRA AMCOS and its individual members.[53]

Overall, the persistence of stakeholder concerns in this area, and the importance of fair negotiating processes, suggests that confidence in the system would be improved by strengthening transparency arrangements in the Code around funds distribution.

This could be addressed by adding a new clause to the Code requiring all collecting societies to include more detailed information around payments made to different classes of rightsholders in annual publications. In addition, this should include collecting societies reporting against specified categories of information that it would benefit stakeholders to know, for instance classes of licensees from whom licence revenue is received, and categories of material copied or licensed from which licence revenue has been received. This requirement would provide the added advantage of assisting in any assessment of collecting societies' compliance with their Code obligations.

The relevant provision should not, however, be so detailed and prescriptive as to impose reporting obligations that smaller collecting societies are not able to meet. The provision should also take into account concerns around privacy, and stipulate that information could be provided at an aggregated level. This will avoid compelling disclosure of information that is sensitive, including for example because it is commercial-in-confidence or subject to legal professional privilege. It will also avoid compelling collecting societies to disclose information that would enable the identification of individuals or stakeholders.

The review does not envision the recommendations would compel collecting societies to provide information that would not be considered appropriate to provide in the normal course of business.

In addition to strengthening reporting requirements in this area, the Code should be amended to oblige collecting societies, at the request of licensees or their representatives, to engage with those licensees or representatives regarding the provision of additional, specific information that licensees need. To overcome the privacy and confidentiality issues already outlined, collecting societies could provide this information on an anonymised basis.

The amendment to provide for requests for additional information should reflect that a collecting society's response will depend on the extent to which the request is reasonable, but should also provide a mechanism for independent assessment (by the Code Reviewer) of whether a collecting society has acted reasonably notably in cases where a collecting society has declined to provide information or has provided limited information.

As with recommendation 4, the review acknowledges that implementing this recommendation may lead to some transitional costs for collecting societies in formulating these new reporting arrangements. There are also benefits to collecting societies, including that it would assist with the annual and triennial Code review processes.

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.

Recommendation 5: **Amend clause 2.6** to require collecting societies to detail in annual publications, at an anonymised or aggregate level where appropriate, the accounting and distribution of licence revenue. This information is to be reported in a consistent format year on year. Categories for reporting should include, but are not limited to:

a. classes of licensees from whom licence revenue is received,
b. classes of members to whom licence revenue is paid,
c. categories of copyright material copied / licensed in respect of which licence revenue is received, and
d. domestic vs international payments of licence revenue.

Recommendation 6: Amend clause 2.4 to require collecting societies in response to a reasonable request by a licensee or their representative, to provide detailed information about particular rights payments made pursuant to a licence. Such information should only be provided to the extent that it is not commercial-in-confidence and does not otherwise directly affect a commercial negotiation between the collecting society and the licensee or potential licensee. Such information is to be provided:

a. on an anonymised basis, and
b. where the collecting society can do so at a reasonable cost.

The Code Reviewer is able to consider whether a request or the collecting society's response to it has been reasonable.

Addressing member concerns

Insufficient information about how funds are distributed may undermine members' confidence in collecting societies' ability to provide them with appropriate remuneration for use of their works, particularly for smaller members who are less able to participate effectively in processes that determine the distribution of royalty revenue.

Where members have greater visibility of distribution arrangements and processes it improves their confidence in the system and outcomes under it. There should also be incentives in the system for collecting societies to ensure all members have access to clear information about how funds are managed and distributed by their collecting society.

Some stakeholders have indicated that the information on distribution processes that collecting societies do make available can be hard to navigate and difficult to understand. In their respective submissions to this review's discussion paper LPA submitted that there is a lack of clear information available on fund allocations while the ASA stated that for the benefit of members and to promote greater confidence in collecting societies, distribution policies should be as simple and digestible as possible.[54]

This view was reinforced by rightsholder submissions to the review. A submission by author Dr Richard Stanton (sub. 12) stated that he 'is unable to obtain clear and constructive information about copyright collecting and distribution as it relates to the author.'[55] Dr Stanton's submission states this lack of clear information has implications for stakeholder confidence in the extent to which collecting societies are acting equitably in the way the distribution of funds is managed.

Some collecting society distribution policies are over 30 pages long and contain information spanning a range of topics. Most appear to be written in what may be considered dense or legalistic language.

While collecting societies' existing corporate governance arrangements provide some opportunity for members to scrutinise overall financial performance of the organisation, collecting societies have acknowledged that more can be done to improve the level of information available.

To address the existing deficiencies, a new provision should be inserted into the Code requiring collecting societies to consult on the development of or changes to distribution policies and to publish 'plain English' information (in the form of guides or summaries of distribution policies) on these policies.

Information likely to be of particular value to members could include visual or diagrammatical representations of the percentage of funds allocated to particular stages of the distribution process. This would be useful in providing greater transparency for members and other stakeholders in terms of the status of funds and the stage that different processes are up to. The review notes that collecting societies already provide some of this information, however potentially they could provide more where doing so would provide more granularity, was presented in a consistent format over time, and did not impose undue compliance burden. Information of this nature could be made available on the online portal that recommendation 10 states should be established.

This will help provide members with more information on how distributions are accounted for.

Feedback to the review has informed revisions to this draft recommendation to ensure its effective operation, and that it is appropriately targeted. Participants submitted, for instance, that licensees are not the relevant stakeholders for the purposes of collecting societies developing their distribution policies.[56]

The review finds that a requirement for collecting societies to consult on changes to distribution policies should be restricted to substantive changes, and to consultation with members, given it is only members who are entitled to receive distribution revenue. This requirement should be a distinct element from a complementary requirement that collecting societies publish plain English information on their distribution policies – this information would be for the benefit of both members and licensees, as it may improve overall understanding of how distribution processes work.

This will help provide members with more information on how distributions are accounted for.

A further concern regarding outcomes for members under existing arrangements was raised by the Australian Writers Guild Authorship Collecting Society (AWGACS) (sub. 9). AWGACS submitted that under current arrangements outcomes including distribution outcomes can favour larger members or categories of members, such as large owners and distributors of films, at the expense of smaller members, such as scriptwriters. AWGACS described concerns relating to the governance of declared collecting societies versus voluntary arrangements. The organisation submitted that part of what underpins problems in this area is that existing regulatory mechanisms focus heavily on the balance between the rights and needs of users in comparison to the rights holders the collecting societies represent. AWGACS state that:

> *While this balance is understandable when the rights being negotiated have been voluntarily conferred, in cases where they are compulsorily removed by statute, those whose rights are affected should be afforded greater regulatory protection and oversight.*[57]

In regards to the effects of existing regulatory arrangements on distribution outcomes, the review has sought to improve outcomes for all members through increased transparency and availability of information they need. This will also facilitate better understanding of issues relating to members for future Code review processes. In regards to concerns about the existing regulatory framework more broadly, particularly the regulatory mechanisms and governance that apply to declared collecting societies, these are matters that are outside the scope of a review of the Code. Related issues are discussed later in this report in 'The Operations of the Declared Collecting Societies.'

Finding 6: Stakeholders should be able to access the information they need in a form that is digestible to them.

Recommendation 7: Amend clause 2.4 to require that collecting societies:

a. consult with members prior to making any substantive changes to its distribution policies, and
b. publish 'plain English' guidelines on its distribution policy and make them available to members and licensees.

Improving transparency around the management of expired undistributed funds

A collecting society may not always be able to distribute all the funds it collects, for instance where it was unable to identify a rightsholder, where there was no claim for payment, or where the amount owed falls below the minimum amount at which a collecting society will distribute funds.[58]

Collecting societies will search for the rightsholder and distribute the fee where it identifies them or, where it doesn't, hold the undistributed funds in trust for a specified period. Unlike collecting societies in most other jurisdictions, the declared collecting societies in Australia have a legal obligation to treat members and non-members equally.[59] This requires that all allocated but unclaimed money be held in trust on behalf of the rights holder for a period of at least four years and paid out (without interest) to a person who becomes entitled in this period.[60] Amounts which remain in the trust fund at the expiration of the trust period fall into general revenue for distribution.

While expired trust funds usually represent a small percentage of the original fee collection, these amounts are not inconsequential. In 2015–16, for example, Copyright Agency 'rolled over' $4.21 million, or around 3.2 per cent, of allocated funds that it had originally collected in the 2011–12 financial year,[61] while for the year ended 30 June 2017 Screenrights reported almost $500,000 in expired trust funds representing around 1.2 per cent of funds available for distribution.[62] Cumulated year-on-year, and in addition to interest payments that are earned on trust accounts, these undistributed funds represent a sizeable source of funding for the declared collecting societies.

This large pool of funds raises the question as to whether the current system provides sufficient incentives for collecting societies to exhaust all reasonable avenues to identify and distribute allocated funds to non-members. In the absence of reporting on this, there is little information on how diligent collecting societies are in their searches, or what happens to the funds once they return to general revenue.

Several participants in this review have perceived a lack of transparency around how undistributed funds are managed (CAG sub. DP9, Council of Australian University Librarians (CAUL) sub. DP11, Queensland University of Technology School of Law (QUT School of Law) sub. DP22, Universities Australia (UA) sub. DP24). While, the Code has been amended over recent years to require that collecting societies provide more transparency around undistributed funds, a number of stakeholders have indicated that further information is needed. CAUL have submitted that:

> *…the level of transparency in the distribution of funds collected by the agencies is limited (unacceptably so). It is not currently transparent how funds collected from the education sector are used when those funds cannot be distributed to rights holders.*[63]

Following feedback from licensee groups, CAG and the NSW Government, the declared collecting societies have committed to reporting annually on a range of information, some of which pertains to undistributed funds, such as the amount of funds held in trust and total licence fees for which the trust period expired (clause 2.9 of the Code).[64]

However a number of participants consider that transparency can be improved further.

For instance, there is limited information available regarding the processes undertaken by the declared collecting societies to identify rightsholders, and a submission to this review has indicated concern that particular uses of funds may disincentivise them from undertaking robust searches to locate creators. Associate Professor Rebecca Giblin (sub. DP1) was concerned that as an academic who has published educational books and articles, and despite not having been approached by the relevant collecting society, on joining it was identified that revenues were owed to her despite her 'never having been alerted to its existence'.

The submission further states that it is 'unknown how much revenue attributable to the use of our work, and that of other academics, is being rolled over'—that is, rolled over into other uses that may be to the benefit of collecting societies more than to the benefit of other stakeholders such as licensees.[65]

According to its distribution policy, Copyright Agency uses its 'best endeavours' to identify and locate non-members to whom payments have been allocated.[66] The organisation has also included detail in its annual reporting on funds allocated but not yet paid by reason, including amounts.[67] Screenrights' distribution policy outlines the operation of its trust fund arrangements and states that the organisation continues to seek out rightsholders entitled to claim against it, but does not provide detail as to what this entails.[68]

However the declared collecting societies are currently not bound to any specific diligent search obligations. Internationally, the EU Directive on certain permitted uses of orphan works proposes a harmonised approach to diligence searches to ensure a high level of protection of copyright and related rights.[69] The Directive provides a non-exhaustive list of sources to be searched before a work can qualify as 'orphan.' The UK Government implemented this Directive as part of its 2014 regulations on orphan works,[70] with similar approaches adopted in the Netherlands and Italy.[71]

From licensees' perspective there is also a need for better visibility and communication of the allocation of undistributed funds. A number of participants have raised concerns about expired funds being pooled such that they can be drawn on for advocacy purposes, for instance, without this having been clearly indicated to stakeholders.[72] The National Association for the Visual Arts (sub. 16) stated that 'it is a legitimate and important aspect of a collecting agency's work to devote funds unable to be distributed to rights holders towards priority areas that benefit all rights holders.'[73] This view notwithstanding, where there is some visibility of collecting societies' management of funds that both members and licensees have a stake in, these stakeholders may be expected to have a greater level of confidence in these organisations and will be better placed to understand how effectively and efficiently they are operating.

Implementing measures to improve transparency in the management and allocation of expired undistributed funds would improve confidence in the system. Again international approaches offer some insight. Guidance material has been developed under WIPO initiatives, for instance, with the aim of supporting transparency, accountability and governance in copyright collective management organisations (CMOs), as collecting societies are generally referred to in international jurisdictions, and in their operations.

The *TAG Compendium of Good Practices Concerning the Collective Management of Copyright and Related Rights* (TAG Compendium) developed under the WIPO's TAG of Excellence project[74] set out observations aimed at ensuring the transparency, accountability and governance of copyright CMOs and included provisions that address non-distributable funds. The guidance outlined that 'the provision of certain basic information about CMOs' operations is an essential step towards the positive perception of CMOs amongst the general public,'[75] and it recommended the information CMOs make available include published policies on the use of non-distributable rights revenue.[76] It was announced in December 2017 that the TAG of Excellence project will not continue in its current form, however WIPO is developing a new initiative in the 'Good Practice Toolkit for Collective Management Organizations' and the draft form of this toolkit provides the same advice on non-distributable funds as the TAG Compendium.[77]

In the UK, CMOs are required to ensure that they have processes in place to regularly review and approve general policies on non-distributable funds,[78] and must also publish an audited 'annual transparency report.' These reports must contain a range of financial and operational information, including details of the total amount of funds that remain undistributed for a given period, and an explanation of the use to which those amounts have been put.[79,80] Amending the Code to require similar information would benefit stakeholders and would help improve confidence in the system.

Drawing on a range of evidence including insights from international approaches the draft report recommended additional reporting requirements apply to collecting societies around the management and treatment of undistributed funds. The review found that improving transparency in this area would improve confidence in the system.

Measures that will particularly useful to licensees, members, and the public more broadly include:

- requirements to provide additional transparency around the specific reasons as to why funds remain undistributed (such as an obligation to publish these), and how non-distributable funds are to be treated, including exclusions if appropriate, and
- details of the use to which non-distributable amounts are to be applied.

Draft recommendations 8 and 9 were developed in response to concerns that there is a lack of transparency around how undistributed funds are managed by collecting societies. Participants were receptive to increasing transparency around the management and use of undistributed funds. The ASA (sub. 9) for instance submitted that while Copyright Agency already report on aspects of their management of undistributed funds, 'our members have nonetheless reported uncertainty, suggesting that communication channels could be improved. For example, many of our members were not aware of the existence of the "Future Fund" until it was highlighted by media attention.'[81] However the review finds that the relevant recommendations as contained in the draft report should clarify that new reporting requirements would apply to collecting societies in respect of expired, undistributed funds—that is, funds which at the end of the standard trust period of four years have not been allocated to a rightsholder.

Participants have indicated an expectation there would be some compliance burden associated with implementing this recommendation. In relation to draft recommendation 8a Screenrights (sub. 20) have stated that 'there is a potentially significant cost in identifying the reasons for each individual payment,'[82] while PPCA (sub. 19) submitted that '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.'[83]

The review considers that the availability of additional information in this area would benefit licensees and other stakeholders through its increasing the quality of information available and its increasing the level of transparency in the management of expired undistributed funds. In turn the increase in transparency would both support a higher level of stakeholder understanding and increased confidence in collective rights management more broadly.

In respect of participants' concerns about added compliance burden, the review does not envision that this recommendation would require such a level of granularity as would impose significant additional reporting burden on collecting societies. Instead it would require collecting societies to detail in their annual reports general information regarding steps taken to identify stakeholders and reasons why funds have not been distributed. The recommendation seeks to enhance stakeholders' confidence in collecting societies and the actions they are undertaking, not to require the provision of excessively detailed or unnecessary information.

For instance the amendment would require collecting societies to detail what are the key steps taken *in general* to locate and distribute funds to rightsholders, or a list of the primary processes a collecting society uses to locate rightsholders.

Information of the kind Copyright Agency already reports on regarding why funds have not been distributed would go some way to meeting the requirement anticipated by recommendation 8a. This includes a table that breaks down the funds allocated but not yet paid, by reason.[84] It is not anticipated the information provided to comply with recommendation 8a would need to list why funds were not paid in relation to each individual recipient.

There was broad support amongst participants for draft recommendation 9, which set out a requirement for collecting societies to provide their members with plain-English guidelines stating how expired undistributed funds will be allocated and spent, and how such expenditure will serve the interests of members. However the Australian Digital Alliance (ADA) (sub. 5) proposed extending the draft recommendation to make the relevant information publicly available and to licensees.[85] The review considers that the provision of this information to stakeholders more broadly would increase transparency without significantly increasing administrative burden on collecting societies, and the final recommendation seeks to remove limitations on who the relevant information is provided to.

The review considers these measures will improve the quality and level of information available to licensees and other stakeholders while giving appropriate regard to collecting societies' resourcing. The review further considers that given the indicative nature of the information required, the Code reviewer would play a role in assessing whether the provisions are functioning to give stakeholders the information they need.

As with other recommendations, the review does not seek to require the publication of sensitive or confidential information. Instead, information should be provided in aggregate, and by class/category.

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

Recommendation 8: Amend clause 2.6 to require detailed additional annual reporting of expired 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 funds are to be applied.

Recommendation 9: Amend the Code to require collecting societies to make available plain-English guidelines stating how expired undistributed funds will be allocated and spent by the collecting society, and how such expenditure will serve the interests of members.

Consolidating information

The addition of specific measures to address particular requirements for more information would go only part of the way to addressing transparency concerns. Members and licensees will be better placed to make informed decisions where they have access to information about collecting societies' conduct and operations. Key to its accessibility is where that information is located.

The Code already contains general transparency provisions about particular aspects of collecting societies' operations. For instance there are requirements for collecting societies to publish or disclose information about their financial performance (clause 2.6) and policies and procedures that directly impact either members or licensees (e.g. clause 2.3(c)). The distribution rules of the declared collecting societies are also subject to the scrutiny of the Minister and the Copyright Tribunal.[86]

Despite these measures, access to information for stakeholders could be improved. To access information on the Code and its provisions, collecting societies' annual reports, Code Review processes and other relevant material currently requires navigation of multiple websites and numerous different pages and resources within any given website.

Several participants commented that they had become aware of information on the Code and the Code review process only through the discussion paper released as part of this review.

The QUT School of Law (DP sub. 22) said that there is 'great inconsistency' in reporting by collecting societies on a range of matters and that:

> *Some reporting practices have improved over the last few years, but the level of detail is still far below what is necessary for either participants or the general public to be reassured that Australia's collective licensing systems are performing well.*[87]

Other participants have claimed that some information that would benefit stakeholders is not available at all. LPA (DP sub. 17) suggests that access to information about collecting societies' alternative dispute resolution processes would be of value to licensees:

> *Member feedback indicates that APRA is not advising licence applicants that ADR is available, particularly where there is a potential dispute. LPA intends to do more to educate its Members of the ADR scheme but believes APRA needs to be much more upfront in advising potential licensees of this avenue.*[88]

The system would benefit from the availability of the range of information about collecting societies' governance, operations and performance in an accessible, easy-to-navigate form.

In international jurisdictions there are requirements for CMOs to publish key information relating to their operations and governance. Under the EU Directive, CMOs in the European Union are required to publish on their websites an annual 'transparency report,' which should include information on the activities and governance of the CMO, comprehensive financial information and information on the use of amounts deducted for social, cultural and educational services.

Much of what is published in response to these requirements is information that collecting societies in Australia already publish. For instance all of the collecting societies make information on their distribution policies available, while financial information is made available through the annual reports and other financial reports published by the societies. A summary of how Australia's largest collecting societies' reporting practices compare to the reporting categories of the EU transparency report is at Table E2 in Appendix E. While this suggests that Australian collecting societies perform well in terms of making some information available, the review has identified that the accessibility of this information could be improved.

Participants indicated that a consolidated information resource would improve the level, quality and accessibility of information for licensees, members and other stakeholders. A stand-alone, consolidated online portal that provides a 'one-stop shop' for information on the Code represents a useful option for achieving this. The draft report of this review outlined a range of relevant documents that an online portal could include such as:

- an easy-to-understand, accessible description of the purpose and role of the Code
- a current version of the Code and a register of historical amendments to it
- the annual and triennial reports of the Code Reviewer on collecting societies' compliance with the Code and the operation of the Code itself
- key governance documents of the individual collecting societies including annual and other financial reports, and
- resources such as individual societies' distribution policies and 'plain English' guides on processes this review has recommended be made available.

Participants detailed other resources that could potentially be made accessible on the portal. The Office of the NSW Small Business Commissioner (sub. 18) stated that the portal could make available a 'fee calculator' that could combine the fees payable by a business under all applicable licences with reference to its activities.[89] Copyright Agency (sub. 11) stated that it envisioned a 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
- a link to information about this review.

The lists above are indicative of some of the key information that could be made available on a consolidated online portal. Ultimately, it will be up to the collecting societies to make available information that will be of use.

It is anticipated that implementation of this recommendation would bring together the Code and its historic versions, information on policies, annual reports and compliance reviews to a single, accessible location. The new requirement would supplement existing transparency provisions contained in the Code including requirements for collecting societies to publish or disclose information about their financial performance (clause 2.6) and policies and procedures that directly impact either members or licensees (e.g. clause 2.3(c)). The distribution rules of the declared collecting societies are also subject to the scrutiny of the Minister and the Copyright Tribunal.[90]

Feedback to the review indicated participants' endorsement of the recommendation to establish a consolidated online portal. The National Association for the Visual Arts (sub. 16) submitted that additional reporting and transparency arrangements should not add significant burden to collecting societies, and that current reporting should be considered. PPCA (sub. 19) proposed that visits to the portal be monitored over the initial years of its operation and that the initiative be discontinued if it appears the resource is not widely used.

APRA AMCOS' (sub.1) submission indicated support for the draft recommendation and also noted that this support was 'provided the costs of establishing and maintaining such a portal are not unreasonable.' Feedback from other collecting societies indicated support for the proposal,[91] including feedback to the ERG forum indicating a view that it was unlikely that implementing the proposal would generate significant additional administrative burden.

To minimise the potential for additional administrative burden the review considers that consistent with existing arrangements to fund the Code Reviewer role, all collecting societies should contribute to the funding and administration of the portal but that contributions should be proportional to different collecting societies' size, scale and resources.

Establishing a consolidated online portal will consolidate all documents relevant to the governance and accountability of the collecting societies bound by the Code to a single, accessible location. The portal would be administered by the collecting societies.

Recommendation 10: Amend the Code to require the collecting societies to establish and maintain a consolidated online portal for the public dissemination of governance, financial and data information, including all documents relating to the collecting societies' compliance with the Code.

Strengthening governance arrangements

A key measure of effective governance is the ability to access remedies that are fair and for which the cost of access is proportionate to the scope of the dispute. The introduction of the Code has prompted significant improvements in processes to manage complaints and disputes, and in determining compliance with and enforcement of the Code.

Nevertheless, gaps remain which could be addressed through amendments to the Code to strengthen governance arrangements. However, the role of the Code and that of the Copyright Tribunal should be clearly delineated as it is only the Tribunal which has the authority and capacity to determine the quantum of licence fees and the structure of licence schemes where parties are unable reach agreement on these matters themselves.

Regular reviews demonstrate that collecting societies have shown a high level of compliance with the Code since its inception. This suggests that it is an effective regulatory tool in its current voluntary form and at this stage there is not a sufficient basis to make the Code mandatory.

Improving the effectiveness of complaint and disputes handling

The ACCC recognises that a voluntary code will generally be 'more cost effective, time efficient and user friendly in resolving complaints than government bodies'.[92] This is because the signatories to a voluntary code have the capacity to quickly assess and resolve a complaint, whereas government bodies will likely require additional time and resourcing to effectively assess complaints, and may have minimal capacity to offer remedies that will satisfy the complainant. The ACCC also advises that, when developing complaints handling procedures, an effective code will incorporate the following:[93]

- a definition of complaint that includes any expression of dissatisfaction with a product or service offered or provided
- a procedure whereby complaints should first be considered by signatories to the code
- if the signatories cannot resolve a complaint it should be lodged with an independent decision maker[94]
- performance criteria for effective complaints handling, such as the benchmark provided by the relevant Australian Standard.[95]

The Code broadly meets these standards as it requires each of the collecting societies to develop:

- complaints handling and dispute resolution procedures (clause 3(a))
- complaints handling procedures compliant with the relevant Australian Standard (clause 3(c)), and
- appropriate alternative dispute resolution procedures (clause 3(c)(viii)) which in effect facilitates the consideration of complaints by an independent decision maker.

However, the Code only requires that complaint handling procedures be developed to apply to 'any complaint about a matter covered by the Code' (clause 3(b)).

Whilst the Code is broad in scope and relevantly includes provisions governing the relationships between a collecting society and both its members and its licensees, aspects of a collecting society's operations may fall outside the scope of the Code and accordingly may not be dealt with under the complaint handling procedures.

For example some collecting societies do not allow their alternative dispute resolution (ADR) facilities to be accessed for disputes regarding licence fees,[96] and in recent years the Code Reviewer has confirmed that it is not the role of the Code Reviewer to assess licence fee disputes. While the Copyright Tribunal provides an avenue for resolving licence fee disputes, stakeholders have indicated that it is an expensive and time-consuming option for achieving resolution, particularly for relatively minor matters.

Assessing current provisions for dispute resolution

An objective of the Code[97] is 'to ensure that Members and Licensees have access to efficient, fair and low cost procedures for the handling of complaints and the resolution of disputes involving Collecting Societies'.

The Code therefore requires each collecting society to develop and publicise procedures for both dealing with complaints from members and licensees, and resolving disputes between the societies and its members or licensees.[98] These procedures must comply with the relevant Australian Standard for customer satisfaction,[99] and include appropriate avenues for ADR.[100]

Since the Code was introduced, collecting societies have developed complaints handling policies that adhere to the Australian Standard for customer satisfaction, by:

- providing information to members and licensees about the process for making a complaint—in practice, this has been achieved by each of the collecting societies publishing their complaints handling procedures on their respective websites
- appointing a dedicated complaints officer to receive incoming complaints
- providing timeframes for assessing and responding to a complaint
- maintaining a register of all complaints received and responses provided by the collecting society, and
- providing access to an ADR process if the complainant is unhappy with the response provided by the collecting society.

Each collecting society (with the exception of ASDACS) has also developed an ADR process, with the range of dispute resolution options differing according to the requirements of each collecting society's members and licensees.

In its submission to the review's discussion paper APRA AMCOS credited the introduction of the Code for a substantial overhaul of its complaints handling systems, and for the subsequent reduction in complaints received in the years since the Code was introduced, stating:

> *APRA AMCOS comprehensively revised its systems to establish and improve automated systems of complaint recording and monitoring, training and compliance procedures, and communications protocols. Since 2002, due at least in part to the introduction of the Code, the service culture at APRA AMCOS has improved dramatically.*[101]

Similarly, Screenrights submitted to the discussion paper that the Code is:

> *…important in encouraging the development of a culture of positive, polite and helpful behaviour through regular internal examination of conduct. The discipline of annual compliance reporting leads to constant thought being given to the handling of all matters, including matters that do not qualify as 'complaints' per se but which require careful internal management.*[102]

Appendix D summarises each collecting society's ADR processes. These include access to a low-cost external facilitator of dispute resolution, which gives parties the option to avoid costly litigation in the Copyright Tribunal or Federal Court, or at the very least use the ADR processes to reduce the matters in dispute between the parties before litigation is contemplated.

However, some gaps remain. ADR processes are not available for every type of dispute a stakeholder may have with a collecting society. This is particularly so for licensees as some ADR processes cannot be accessed for prospective licensees or for disputes as to the quantum of equitable remuneration payable under a statutory licence.[103] Further, licensee stakeholders including LPA have advised that there is limited awareness of the ADR schemes offered by collecting societies, particularly amongst smaller licensees.[104]

Addressing gaps in complaints and disputes handling

One of the primary benefits of the introduction of the Code is the substantial improvements made by the collecting societies in their complaints handling procedures. The Code requires the collecting societies to establish a robust complaints handling mechanism which includes the maintenance of a complaints register that records all complaints received and the collecting society's handling of that complaint.

That complaints register is submitted to the Code Reviewer, and the collecting society's compliance with its complaints handling obligations is assessed by the Code Reviewer in its annual report on compliance with the Code. This has given the collecting societies a clear incentive to improve their standards of service to members and its licensees to reduce the likelihood of complaints being lodged, and to improve the efficacy and fairness with which complaints are handled.

The comments of the Code Reviewer support the collecting societies' views on the benefits of the Code in addressing complaints. For example, in the 2011 triennial review the Code Reviewer observed:

> *…it is clear that the Code has influenced the conduct of the societies, and that it has been conscientiously applied in their day-to-day activities. The meticulous keeping of Complaints Registers, for instance, under the control of Complaints Officers whose intervention is mandatory, has resulted in a considerable reduction in complaints, despite the growth in the number of members, licensees and transactions.*[105]

However, the Code Reviewer has a limited ability to adjudicate complaints and disputes. In assessing a complaint made against Copyright Agency to the Code Reviewer by a TAFE Institute, the Code Reviewer stated:

> *However, this last complaint does well illustrate the nature and limitations of the Code of Conduct and its review. The Code necessarily focuses, not upon particular issues and disputes, but upon the relevant Society's conduct in relation to them. In reviewing the Society's conduct, the Code Reviewer is not setting himself up as a judge over a particular dispute that may have arisen; his concern is and remains to examine the Society's conduct.*[106]

In the 2014 triennial review of the Code, the Code Reviewer noted that his role was to assess complaints made against a collecting society, rather than resolve a dispute between a collecting society and another person.[107] Accordingly, the Code Reviewer recommended that the collecting societies attach an explanatory document to the Code setting out the distinction between 'complaint' and 'dispute' as per his definition of each term. This amendment was made in March 2017 by way of an explanatory memorandum annexed to the Code.

However, there may be limited awareness of this explanatory memorandum as it is an attachment to the Code and must be accessed separately when viewing the Code online. To improve awareness, the content of the explanatory memorandum should be incorporated into the Code itself.

At present, it is not clear whether disputes as to the quantum of licence fees are able to be determined under the ADR processes of the collecting societies, which become available to members and licensees once they have exhausted the complaints handling procedure available to them under the Code.

In 2014, clause 2.3(d) of the Code, which previously required that the licence fees of the collecting societies be 'fair and reasonable', was amended following the triennial review. The Code Reviewer disputed his capacity to investigate whether fees were 'fair and reasonable', noting that such an investigation would conflict with the *Copyright Act 1968* 'which provides for licence fee disputes to be addressed by the Copyright Tribunal of Australia'[108].

Accordingly, the Code Reviewer recommended that the first sentence of clause 2.3(d) of the Code be deleted and replaced with the following:

> *Each collecting society's policies, procedures and conduct in connection with the setting of licence fees for the use of copyright material will be fair and reasonable.*

Despite this amendment, confusion remains regarding the role of the Code Reviewer in reviewing licence fee pricing. This would be addressed by adding an explanatory note to the Code to clarify that the complaint and dispute resolution processes established under the Code do not include a mechanism for the Code Reviewer to review licence fee pricing.

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

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.

Improving dispute resolution arrangements

Clause 3 of the Code sets out obligations for collecting societies to establish complaints handling and dispute resolution processes. Licensees who wish to complain about the quantum of licence fees set by a collecting society may not appeal to the Code Reviewer to resolve their complaint, and it appears that an application to the Copyright Tribunal is generally the only recourse available.

The Copyright Tribunal is the final arbiter on the pricing of copyright material. The Tribunal can hear licensing disputes and make binding pricing determinations. However as licensees are granted a unique ability to copy or communicate copyright protected works, generally there will be no market rate that the Tribunal can refer to. This is compounded by a lack of information to determine what rate could be agreed to between the parties in a hypothetical (market-based) bargain.[109] Instead, what is 'fair and reasonable' is often a matter of guesswork,[110] with the Tribunal acknowledging that 'it is not usually possible to calculate mathematically the correct licence fee in any particular case'.[111]

Licensee associations have suggested that there are substantive barriers to using the Tribunal, including high costs, uncertain outcomes and time consuming nature of Tribunal proceedings. In a submission to the review's discussion paper UA stated:

> *In theory, it is the role of the Copyright Tribunal to provide a check on the ability of Copyright Agency to use its monopoly position to extract "inequitable" licence fees. The reality is very*

> *different. The Copyright Tribunal has fallen far short of imposing the same discipline on the conduct of declared collecting societies as that which would be imposed by competition. The cost of the Copyright Tribunal proceedings, in Universities Australia's experience, can run into the millions of dollars for education sector licensees and is a significant barrier to seeking the Tribunal's intervention.*[112]

LPA have noted that the Tribunal is 'the only independent body that can determine the fees and conditions for licences in accordance with the market value of content and how it is used' but advise that it is 'significantly costly and onerous' to pursue proceedings through the Tribunal. They state that this 'creates scope for copyright collecting societies to set unchallenged arbitrary fees and conditions that do not accurately reflect the value of content within the context in which it is being used'. [113]

However, collecting societies have suggested that while the Tribunal deals with matters involving significant sums it can also deal with small disputes. PPCA (sub. 21) submits:

> *Whilst the Copyright Tribunal can and does deal with licensing matters involving ongoing commercial relationships and very significant sums, it has also effectively dealt with much more modest matters, including those involving inexperienced self-represented applicants. In contrast to the court system the Copyright Tribunal has the capacity to moderate its processes to suit the particular circumstances of each matter, and determine the best way to resolve any application brought before it.*[114]

APRA AMCOS (sub. 1) submitted that the proceedings where legal expenses are high are also the proceedings where the licence fees at stake are significant and the parties are substantial. Their submission further noted the draft practice note issued by the Copyright Tribunal, which suggests that matters may in future be conducted with increased expediency where appropriate.[115]

From time to time the Tribunal considers potential improvements to its processes. Currently it is liaising with users of the Tribunal and other interested parties on a proposal to adopt new procedures relating to references filed with the Tribunal which, if adopted, may shorten and simplify proceedings and require parties to attend mediation.[116] It is up to the Tribunal to undertake such consideration, including consideration of potential improvements to the accessibility of its processes for considering license disputes.

It is outside the scope of this review to examine the jurisdiction and decisions of the Tribunal given this is beyond the scope of the voluntary Code. As the Code Reviewer points out, it is beyond the capacity of the Code Reviewer to undertake an assessment of the fairness of a licence fee in circumstances where a tribunal has been created under legislation to undertake that very task.[117]

A consequence of this is that it is not clear that licensees can access the dispute resolution procedures created by the Code to dispute the licence fee, but they may be unwilling to incur the cost and delay of an application to the Tribunal. In practice, this could mean that many licensees may make the decision to accept the fee charged by the collecting society to the extent that a commercial negotiation process does not achieve the desired result. This finding was also reached by the ACCC when it noted that the Tribunal only constrained APRA AMCOS's market power 'beyond the point where the cost to the user of seeking recourse to the Copyright Tribunal would be less than the difference between the price which the user could negotiate directly and that which it considers that the Copyright Tribunal would be likely to impose.'[118]

As a step toward addressing this gap, the Code should be amended to include a provision that has the effect of preventing the collecting societies from unreasonably refusing a request from a licensee to participate in an ADR process for a dispute relating to licence fee pricing. This would improve outcomes for licensees and reduce the need to access the more costly, litigious and time-consuming processes of the Copyright Tribunal.

The review's draft report recommended a provision that obliged collecting societies to respond to reasonable requests to engage in ADR processes respecting disputes about licence fee pricing. On further consideration the review finds that the provision should be broadened in scope to encompass other disputes about licensing. This will strengthen licensees' confidence in the availability of avenues in which to pursue concerns they may have, without adding significant compliance burden on collecting societies.

The review further finds that the recommendation could be strengthened by clarifying that the Code Reviewer will have a role in assessing the operation of the provision and collecting societies' compliance with it, and will have a responsibility to report on this in their annual compliance report.

In relation to licence fee pricing disputes specifically, in assessing the collecting societies' compliance with such a provision the Code Reviewer would not be required to assess the whether the disputed licence fee was fair or reasonable, only whether the collecting society acted in an unreasonable fashion in denying a licensee's request to participate in an ADR process.

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

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 of a licensing dispute. Whether a collecting society has acted reasonably in response to a request made pursuant to this clause is a matter for consideration by the Code Reviewer in their annual report on collecting societies' compliance with the Code.

Improving Code compliance and enforcement

An effective self-regulating industry code of conduct 'gives consumers and business faith that there is a framework in place that encourages best practice and offers appropriate redress when needed.'[119] As an alternative to a mandatory industry code regulated by a government body, a voluntary code of conduct administered by industry participants will generally deliver the following benefits:

- industry participants are usually better placed to tailor codes of conduct to their business conditions and to circumstances particular to their industry
- self-regulation may impose lower compliance costs on industry participants than government regulation
- self-regulation is more flexible, as voluntary codes of conduct can be amended by industry participants as required, and are not subject to governmental and parliamentary processes, and
- self-regulation does not impose costs on government in terms of implementation, compliance monitoring and enforcement action.[120]

To ensure there is an effective accountability framework for a voluntary code of conduct, industry participants bound by a code should be required to monitor their compliance with the code, and an independent review of compliance with the code should be conducted on a regular basis. A voluntary industry code should also include sanctions for non-compliance to provide incentives for signatories to comply with the code and provide confidence to stakeholders in the code as an effective regulatory tool.[121]

The Code provides for an independent external review conducted annually by a qualified person with relevant expertise in the regulatory sphere in which collecting societies operate (the current Code Reviewer is a retired Federal Court judge and former president of the Copyright Tribunal).

However, sanctions for non-compliance are very limited and are regarded as insufficient by some stakeholders.

Assessing current processes for determining Code compliance

Part 5 of the Code sets out the mechanisms for monitoring the collecting societies' compliance with the Code, the process by which a review of the Code itself is undertaken, and the manner in which amendments to the Code can be effected (Box 1).

Box 1: Part 5 of the Code

Clause 5.1 establishes the role of the Code Reviewer, being a person 'with specialist expertise in administrative law, copyright law and/or licensing practices to perform the functions conferred by paragraph (c)'. Paragraph (c) relevantly states that the functions of the Code Reviewer are:

- to monitor and prepare annual reports on the level of compliance by Collecting Societies with the obligations imposed on them by this Code;
- as part of the function under sub-paragraph (i), to consider complaints from Members or Licensees in accordance with clause 5.2(c); and
- to conduct a review of the Code in accordance with clause 5.3.

As outlined in clause 5.1(d), the 'costs and expenses' of the Code Reviewer are borne by the Collecting Societies, and the Code Reviewer is to be appointed for a minimum period of three years (clause 5.1(b)).

The first Code Reviewer was the Hon James Burchett QC,[122] who produced nine annual reports assessing compliance with the Code by the collecting societies,[123] and three triennial reports on the operation of the Code itself.[124] He was succeeded in the role by the Hon Kevin Lindgren AM QC,[125] who remains in the role today. Dr Lindgren has delivered five annual compliance reports[126] and conducted two triennial reviews of the Code.[127]

Each collecting society bound by the Code is required to produce a report to the Code Reviewer on an annual basis, which includes information concerning:

- the collecting society's staff training in the Code, including in complaint handling procedures;
- the collecting society's promotion of the importance of copyright and the role and functions of collecting societies, including its own, and including the dissemination of information on these matters; and
- the number of complaints received by the collecting society and how those complaints have been resolved.

In addition to the information produced by the collecting societies themselves, the Code Reviewer invites members and licensees of the collecting societies, as well as industry and trade associations that represent members or licensees in their constituency, to make submissions about the collecting societies' compliance with the Code for consideration by the Code Reviewer.[128] Notification of the annual review of the Code is also advertised in *The Australian* newspaper, and on each of the collecting societies' websites.

The Code Reviewer makes a copy of his annual report available to each collecting society; each individual or group who made a submission to the Code Reviewer; the Commonwealth Department responsible for the administration of the *Copyright Act 1968*;[129] and to the public.[130] The Code Reviewer's reports are published on each of the collecting societies' websites.

For the triennial review of the operation of the Code itself, the Code Reviewer is required to

- invite written submissions 'on the operation of the Code and on any amendments that are necessary or desirable to improve the operation of the Code'[131]
- convene at least one public meeting that members, licensees and the general public may attend to make oral submissions to the review,[132] and
- undertake other consultations as considered appropriate.[133]

Over the fifteen years of annual reporting, the Code Reviewer has almost universally found that all of the collecting societies have substantially complied with the Code.

The first Code Reviewer considered that 'an examination of complaints received by a society, and the way they were handled, is a revealing indication of the state of its compliance with the Code.'[134]

In his third annual report, the Code Reviewer noted that, notwithstanding the voluntary nature of the Code, 'it is pleasing to note the continued adherence to it of all eight of the Societies that adopted it', but also observed that 'adherence has not come without cost'[135]. The Code Reviewer concluded that:

> *the willingness of the Societies to engage annually in this quite arduous process argues a commitment to the objectives of the Code, and the regular recurrence of the task of review may be thought likely to concentrate attention upon the requirements of the Code so as to enhance compliance. Several of those interviewed during the review considered the adoption of the Code itself modified procedures and conduct—as, of course, it was intended and expected to do.*[136]

The Code Reviewer has also surmised that a lack of submissions received in response to the annual compliance review may indicate a general level of satisfaction regarding collecting societies' compliance with the Code.[137]

The single occasion on which a substantial breach of the Code was found to have occurred was in the 2012/2013 annual Code compliance report, in which the Code Reviewer found that APRA AMCOS had failed to comply with the Code in numerous respects following a major change to its distribution policies and processes in respect of performance of music at nightclubs. APRA AMCOS acknowledged a number of failures on its part, including failing to advise members prior to amending its distribution rules and practices, and implementing the changes without amending the relevant documents first, in contravention of clause 2.4 of the Code.[138]

The Code Reviewer outlined the circumstances of APRA AMCOS's breach, and the steps taken to rectify it, in his 2012/2013 report and noted APRA AMCOS's acknowledgement that it had breached the Code, saying only:

> *I need not elaborate on this, beyond noting that the complaint was an important one that affected members generally, as distinct from one that affected a particular member.*

As APRA AMCOS had already taken steps to address and rectify the breach,[139] the Code Reviewer did not offer any further censure of APRA AMCOS or make any other recommendation as to how APRA AMCOS might amend its procedures to avoid a further breach in future. Indeed, beyond noting that a breach had occurred, the Code does not provide the Code Reviewer with any further tools to sanction or discipline a collecting society's behaviour if found to be in contravention of the Code, or to direct that any form of remedy or redress be provided to a member or licensee affected by the contravention.

Free TV Australia (sub. 13) submitted that there is a lack of an effective complaints-based mechanism and that this is a weakness of the current system which creates a risk of inefficient outcomes. Free TV Australia state there is a need to establish a complaints body that is independent of collecting societies, to handle Code-related complaints. By requiring collecting societies to provide their members and licensees with access to efficient, fair and low cost procedures for complaints handling and dispute resolution, the Code has introduced incentives for collecting societies to provide avenues for their licensees and members to seek redress for issues and concerns. The review also recommends improving access to ADR arrangements (see Recommendation 12). Taken together with the high level of compliance with the Code the review considers that the costs of establishing a new complaints body would significantly outweigh the benefits that such a body may confer above existing arrangements in this area.

Whilst the Code only specifies that the collecting societies report their compliance with clause 2.7, clause 2.8(a) and clause 3 of the Code, the current Code Reviewer Dr Lindgren has requested that each of the collecting societies report to him on their compliance with all of the obligations set out in clause 2 of the Code. This clause covers a range of issues including collecting societies' licensing and membership frameworks, the nature of expenses incurred by collecting societies, the governance and accountability framework of the collecting society and additional reporting requirements for declared collecting societies.

As a result of Dr Lindgren's direction, the reports submitted by the collecting societies to the Code Reviewer now provide a more comprehensive insight into the overall activities of the collecting society, particularly in regard to their governance, distribution and licensing policies and procedures. The annual reports of the Code Reviewer reflect this change in reporting by the collecting societies as they are substantially lengthier and more informative than the reports of his predecessor.

Information and documents submitted to the Code Reviewer for consideration in his annual review are assessed as part of overall findings on compliance with the Code. In practice this information is the main source of evidence available to him absent any statutory power to compel parties to produce information and/or documents responsive to the parameters of the review.

To ensure the ongoing improvement in the range and quality of information available to the Code Reviewer, the additional reporting requirements imposed by the current Code Reviewer should be incorporated into the reporting obligations set out in the Code. This will continue to enhance the quality of information contained in the annual report of the Code Reviewer, and thus available to the public.

To increase transparency and accountability in the current annual review process, non-confidential portions of the annual reports that each of the collecting societies submit to the Code Reviewer should be made publicly available, preferably on the central portal recommended above (Recommendation 10). The review finds there is merit in making an amendment to the form of this recommendation outlined in the draft report, to clarify that individual complaints should not be published; however appropriate summary information relating to all complaints received in the reporting year should be reported.

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

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.

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. Individual complaints should not be published; however, appropriate summary information relating to all complaints received in the reporting year should be reported.

Assessing current incentives to comply with the Code

The collecting societies consider the Code Reviewer already has sufficient powers to ensure compliance with the Code. For example, in its submission to the review's discussion paper APRA AMCOS stated that it 'has always found the publication of a report of the operations of the society, with the associated risk of reputational damage following an adverse finding or comment, to be highly motivating' in ensuring it complies with the Code, and accordingly it takes 'the Code process very seriously.'[140]

As the only sanction available to the Code Reviewer for non-compliance with the Code is to make an adverse finding in his annual report, the ability to publicise this is central to the effectiveness of that sanction.

However, collecting societies are not obliged to directly advise their members or licensees if the Code Reviewer has found they contravened the Code; they are only required to make a copy of the Code Reviewer's report available to them. The 2015–16 annual report of the Code Reviewer is 122 pages long and while it is a testament to the rigorous analysis undertaken by Dr Lindgren, its length may discourage many members and licensees from engaging with it. As a result, members and licensees of a collecting society may have limited awareness of any adverse findings made by the Code Reviewer about that collecting society.

In its *Guidelines for developing effective voluntary industry codes of conduct*, the ACCC addresses the topic of sanctions for non-compliance, stating that 'commercially significant sanctions will be necessary to achieve credibility with and compliance by participants, and also engender stakeholder confidence in the industry code' and 'sanctions should reflect the nature, seriousness and frequency of the breach.'[141] The ACCC also provides examples of commercially significant sanctions, including:

- supplying a meaningful remedy to the aggrieved party when a code rule is broken
- censures and warnings
- corrective advertising
- fines
- expulsion as a signatory to the code.[142]

Free TV Australia have concurred with the ACCC's position, stating that 'the fact there are no substantive enforcement mechanisms or sanctions for non-compliance necessarily negates [the Code's] effectiveness and undermines stakeholders' confidence in it.'[143]

APRA AMCOS directly addresses the ACCC's recommendation that voluntary codes contain commercially significant sanctions, and advises that 'APRA AMCOS believes that this would only be appropriate if the Code were to be significantly amended to provide detailed proscriptions as to compliance'.[144]

In this regard, APRA AMCOS submits that the Code in its current form does not contain the level of specificity as to compliance obligations that are seen in other domestic industry codes that do include significant sanctions for breach, such as the Franchising Code of Conduct and the Commercial Radio Codes of Practice. On this basis, they submit that the Code in its current form should not include penalties for non-compliance.[145]

The Code does not impose many specific or detailed obligations upon the collecting societies that are bound by it and substantial amendments would be required to clarify when the actions of a collecting society constitute a breach. Therefore, if the obligations imposed by the Code, and hence the requirements for compliance with it continue to be expressed in general terms, it would not be appropriate to apply fines or other significant financial penalties for non-compliance.

However, even allowing for the strong compliance culture of the collecting societies, the sanctions in the Code are scant. If collecting societies' submissions that the prospect of a negative report from the Code Reviewer is a serious incentive to comply with the Code are accepted, it follows that introducing a mechanism to more widely publicise any findings of non-compliance by the Code Reviewer would further increase the incentive to comply with the Code. On that basis, to address this issue the Code should be amended to require collecting societies to:

- advise members and licensees if the Code Reviewer finds that they have contravened the Code, including details of the nature of the contravention and any remedy provided
- maintain a register which details current and historical contraventions of the Code
- publish the Code contravention register on a publically-accessible online portal, and
- include in their annual report any finding by the Code Reviewer that they contravened the Code during the financial year covered by the report, and the nature of the contravention.

Participant feedback on this recommendation as outlined in the draft report has indicated it is accepted to be a useful and practical option. A minor amendment has been made to the form of the recommendation outlined in the draft report to clarify that collecting societies would be obliged to notify their members and licensees that the collecting society has contravened the Code subsequent to the Code Reviewer finding that the relevant contravention has occurred.

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

Recommendation 15: Amend Code to require collecting societies to notify members / licensees when the Code Reviewer finds that they have contravened the Code, options include:

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

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.

Improving the Code review process

The ACCC recommends that an effective voluntary industry code of conduct include a mechanism for regular review of the operation of the code itself 'to ensure that the standards incorporated are meeting identified objectives and current community expectations and that it is working effectively.'[146] The ACCC further suggest that such a review occur at least triennially, and that it be conducted by a person or panel that can act as an independent auditor, being someone who:

- is not a present or past staff member or director of a signatory to the code
- has not acted or does not act for a signatory to the code
- is not retained by a signatory to the code in any other capacity, either currently or in the past
- has not and does not provide consultancy or other services for any signatory to the code, and
- has no shareholding or other interest in any signatory to the code.[147]

Transparency and accountability of the review process can be increased by seeking input from all stakeholders and other interested parties as to their views on the effectiveness of a voluntary code's operation, and producing a report on the outcome of the review that is frank in its findings and readily available to the public.

In addition to undertaking an annual review of the collecting societies' compliance with the Code, the Code Reviewer is empowered to undertake a triennial review of the operation of the Code itself, and make recommendations for its amendment.[148] However, the Code Reviewer cannot enforce their recommendations for amendment to the Code, which may be considered a weakness in the operation of the Code's review provisions. Options for strengthening the review process are considered in this section.

The current review process

Clause 5.3(a)(ii) requires that the Code be reviewed at least once every three years (Box 1). This review has occurred triennially from April 2005 to April 2017.

The collecting societies bound by the Code are each obliged to inform their respective members and licensees 'in an appropriate manner' that a review of the Code is being conducted and that they may make submissions to the Code Reviewer.[149,150]

Clause 5.3(e) requires the Code Reviewer to prepare a report of the review 'and will make such recommendations as he or she considers appropriate in relation to the operation of the Code, including recommendations for amendments of the Code'. The Code is silent as to whether the collecting societies are required to adopt the Code Reviewer's recommended amendments to the Code, or how amendments are implemented. In practice, the Code may only be amended if all the collecting societies bound by it unanimously agree to do so.

The Code has been amended on a number of occasions since 2002, and the Code itself includes an appendix table summarising all amendments incorporated since its inception.

However, the recommendations are not always actioned in a timely manner. Two recommendations flowing from the 2014 Triennial review were not fully actioned until March 2017, almost three years after the recommendations were made.

The sufficiency of the current Code review process to ensure that the Code is appropriately amended in response to stakeholder concerns has been called into question in the past as the Code Reviewer has previously declined to make amendments to the Code where such amendments are not aligned with the broader regulatory framework.

Issues raised in the 2014 triennial review (from the State of NSW and CAG) were considered of sufficient substance to warrant a supplementary report of the Code Reviewer in 2015 following wide-ranging consultation with affected parties. The State of NSW and CAG sought an amendment to the Code to require declared collecting societies to provide greater transparency and disclosure with regard to the distribution of statutory licence revenue between classes of recipient,[151] and to disclose payments made by a declared collecting society to an individual member upon the request of a statutory licensee.[152] Such information could be used by statutory licensees to determine whether cost savings could be achieved by approaching these individual rights holders to negotiate direct licences,[153] and reduce payments made under the statutory licence.

In considering whether to recommend the amendments being sought by CAG and the State of NSW, the Code Reviewer noted 'there is no express limitation on the nature of amendments that I am at liberty to recommend'[154] when considering the provisions of the Code itself, but recognised that it was inappropriate to consider the Code in isolation of the broader regulatory framework.

Whilst the Code Reviewer did not recommend this amendment, in March 2017 the Code was amended to include a new clause 2.9 which requires the declared collecting societies to include in their annual reports certain information about the receipt and distribution of statutory licence fees, and to provide some more granular detail about the use of statutory licence fees when requested to do so by a statutory licensee class.

This brief overview of recent amendments made to the Code highlights the lack of clarity provided within the Code itself on the procedures to be followed by the collecting societies once the Code Reviewer has recommended an amendment to the Code be made. For this reason, it is recommended that the Code include some procedural steps for implementing amendments to the Code in a timely fashion to increase stakeholder confidence in the Code as a dynamic instrument that can respond to the changing environment in which collecting societies operate.

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

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.

Assessing the triennial Code review process

There is some disagreement between collecting societies and other stakeholders as to whether the triennial Code review process is an effective mechanism for addressing concerns about the operation of the Code. Submissions to the review evidence that the collecting societies generally view the triennial review process as effective and sufficient.[155]

In comparison, in a submission to the review's discussion paper Universities Australia suggested that the triennial review process serves to highlight the 'shortcomings of the Code' noting the unwillingness of the Code Reviewer to recommend the amendments sought by CAG and the State of NSW in their submissions to the 2014 triennial Code review .

CAG stated that the Code has 'proved to be completely ineffective as a means of dealing with statutory licensee concerns' and the Code review process is 'totally inadequate for undertaking a root-and-branch review of the kind that in our view is warranted.'[156] CAG noted that its participation in the 2014 triennial review was a 'failed' attempt to have the Code Reviewer address their concerns about the lack of transparency with regards to the distribution of statutory licensee revenue between classes of recipient.[157] In its view, the fact that the Code Reviewer felt that he was unable to recommend the amendments sought by CAG and the State of NSW 'highlights the lack of sufficient oversight created by the Code framework.'[158]

Although the Code was amended to require the declared collecting societies to include additional information in their annual reports regarding the collection and distribution of licence fees, CAG advised that it was not informed about this amendment to the Code and only learned of it from the Department's discussion paper for this review. CAG is concerned that there is 'nothing to compel the collecting societies to consult with licensees regarding this change' to the Code, or to otherwise inform licensees after the change was made to the Code.[159]

In a submission to the review's discussion paper Free TV Australia also indicated a concern that the Code can be changed by the participating collecting societies 'without consultation or input from members or licensees, or consideration by the Code Reviewer.'[160] Free TV Australia suggests that licensees should be consulted during the Code review process as the Code should 'protect the interests of licensees in circumstances where collecting societies can wield substantial market power in negotiating blanket licences that licensees sometimes have no other choice but to enter into for essential business inputs'.

Those stakeholders who may be impacted by proposed amendments to the Code should have the opportunity to express any reservations about an amendment prior to it being incorporated into the Code. They should also be informed promptly after an amendment has been adopted into the Code and advised on the extent to which such amendment may affect their relationships with the collecting societies bound by the Code.

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

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.

Improving the integrity of the annual and triennial Code review processes

The collecting societies bound by the Code have consistently expressed satisfaction with the function of the Code Reviewer. Screenrights' submission to the review's discussion paper disputed the suggestion that either the current or former Code Reviewer was vulnerable to regulatory capture, noting 'that the very high standing and experience of the Code Reviewers as former Copyright Tribunal Presidents and Judges of the Federal Court of Australia minimises the likelihood of their impartiality being compromised.'[161] Similarly, ASDACS have submitted that it 'is confident that the current Code Reviewer has the qualifications in assuring the compliance of the copyright collecting societies, as well as raising any concerns around the power that he has to implement further change'.[162]

However, the Australian Digital Alliance has submitted that the Code's current review processes do 'not incorporate sufficient measures for effective oversight including… independent mechanisms for external review and amendment.'[163]

Free TV Australia have submitted that the Code Reviewer is 'appointed and paid for by the collecting societies, and reappointment is at their absolute discretion', and whilst Free TV does not suggest there has been 'any lack of independence of Code Reviewers, it would increase confidence in the operation of the Code if stronger guarantees of independence were incorporated in the process in relation to appointment and re-appointment'[164].

Accordingly, there is no evidence to suggest that either the current Code Reviewer or his predecessor lack in qualifications, experience or independence. As retired Federal Court judges and former Presidents of the Copyright Tribunal, the Code Reviewers have demonstrated impeccable records for independence, impartiality and professionalism.

There are some efficiencies in having one person undertake both the annual review of compliance with the Code and the triennial reviews of the operation of the Code itself. Some of the recommendations made by the Code Reviewer in the triennial review process are the result of his detailed understanding of the practical issues faced by the collecting societies in complying with the Code, particularly in regard to recommendations that deal with those provisions of the Code relating to complaints handling and dispute resolution procedures.

However, the lack of separation between the annual and triennial review process could undermine confidence in the Code. While there has been no observed partiality in how either review is undertaken, the separation of the reviews would minimise the potential for outcomes from the triennial review to be seen to reinforce those from the annual reviews. It could also afford the potential for a fresh perspective on the findings from the annual reviews.

Therefore the Code should be amended to separate the administration of the annual review of collecting societies' compliance with the Code from the triennial review of the operation of the Code itself.

The review considers that the party tasked with undertaking the triennial review need not necessarily be a person – it could potentially be a consulting or auditing firm, which would assist with independence and help avoid losing corporate knowledge between triennial reviews. Furthermore, the party responsible for conducting the triennial review need not necessarily have an extensive background in copyright matters; as a party coming to the role from a non-copyright background may bring a fresh perspective to the review process. However, they would still require appropriate qualifications such as administrative law, and would need to be of similar standing as the current Code Reviewer.

However ultimately it is up to the collecting societies to consider how the update of the review framework and its subsequent operation should be managed and implemented such that it is effective, and seen to be effective by stakeholders. This will include consideration of which party or parties have the appropriate qualifications, independence and experience to take on the role of the triennial review process.

The review considers that by way of guidance, existing clauses in the Code pertaining to the appointment of the Code Reviewer role could form the basis of any amendment to establish new Code review arrangements.

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.

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.

Optimising the use of data

Despite evolving technology and clear improvements in the ability to capture data that would support improved collecting society practices, concerns remain in areas where data should be able to help. This is despite evidence that some collecting societies are making their best endeavours to optimise their use of data to benefit members and licensees. Some concerns raised about the methodologies underpinning the calculation of licence fees and about the distribution of funds would be addressed where collecting societies were encouraged to better expose their use of data. This could also contribute to better data collection and management practices where such reporting fosters best practice.

Some participants have flagged that new technologies are having a significant impact on the consumption and distribution of copyright materials, and on collecting societies and their stakeholders. It is clear from submissions to this review that some aspects to this impact are positive, others are not.

Data can provide for better monitoring, streamlined transactions and administration. In their submission to the review's discussion paper Screenrights noted that digitisation and internet-based delivery has improved the use of online resource centres in schools. In turn, Screenrights submits that this has voided the need for more costly and inconvenient means of collecting data such as through surveys.[165]

Nightlife Australia submitted that data is now available that could be used to significantly improve distributions. As a service provider that provides curated content including music libraries to clients, Nightlife view that data available to industry could be utilised by collecting societies to support improvements to collective administration. In particular, data that organisations such as Nightlife collect better reflect actual usage than existing data sets available to collecting societies, according to Nightlife, and could significantly improve distribution processes where improved data-sharing arrangements are established. Nightlife state that as part of music licences they are required to provide very detailed play data which

> *is highly valuable and could easily be extended…by each service provider to allow APRA and PPCA to match every song played to the venue it was played in, thereby empowering the collection societies to distribute the monies accurately, right down to the specific tariff paid by each venue.*[166]

Nightlife state that the Code could acknowledge that collecting societies need to be empowered to obtain data of this nature and to prioritise its use to achieve transparency for licensees and members. The review notes that existing provisions in the Code seek to ensure collecting societies achieve best practice and efficiency in their operations; these objectives are stated in clause 1.1 of the Code. The review also considers that the Code should be provide for different collecting societies having flexibility to identify datasets and arrangements that will most effectively serve the needs of their stakeholders and that maximise efficiency. However the review acknowledges the important point made by Nightlife that further illuminates how digital and other technologies are significantly improving access to data, and to data that in turn can be exploited to optimise the efficiency and effectiveness of collective administration.

Australia's copyright system continues to adapt to new digital processes and products. As technology and the broader media and communications environment evolves the ways in which copyright materials are produced, distributed, consumed and administered are also changing. These changes present both challenges and opportunities. In relation to potential opportunities, there is an important role for data to play in strengthening administration of copyright materials in Australia, and there is room for the Code to assist in facilitating this.

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.

There is insufficient evidence that the Code should be mandatory

As part of its terms of reference, this review has considered whether the Code should continue to be purely voluntary in nature. Currently, the collecting societies to whom the Code applies are only bound to comply because they have voluntarily agreed to it, and any of them may decide to withdraw that agreement at any time.

The Code does not specify anything regarding this aspect of its application beyond stating that the Code applies 'to those Collecting Societies that have agreed to be bound by the Code'. The Code does not identify which of the collecting societies are currently bound by it, nor does it specify a process for a collecting society to cease its agreement to be bound by the Code. Presumably, a collecting society can withdraw its consent to be bound by the Code, and such a decision would mean the provisions of the Code would immediately cease to apply to them.

Self-regulation of this nature encourages a cooperative resolution to issues of concern to stakeholders, while avoiding the high costs typically associated with making and maintaining legislation.[167] Other potential advantages of self-regulation include flexibility to respond to changes in the environment, and tailoring solutions to specific conditions and challenges of the particular industry.

While voluntary codes of conduct allow industry members to opt-in, mandatory codes, by contrast, provide a minimum standard that all participants in the industry must adhere to.[168] These are prescribed as regulation, for example, under Commonwealth or state and territory fair trading laws, and are able to be enforced by a regulator.[169]

In 2000, the Government left open the prospect of prescribing a mandatory code for collecting societies if, for example, copyright users or members were to become dissatisfied with the Code or its operation.[170] The Productivity Commission has raised the possibility that the Code be made mandatory for all collecting societies.[171]

For a code of conduct to be prescribed under the *Competition and Consumer Act 2010* (Cth), the Government must first be satisfied that there are clearly defined issues that the industry is either unable or unwilling to address.[172] Both voluntary and mandatory codes may be prescribed under section 51AE of the Competition and Consumer Act and therefore become enforceable by the ACCC under that Act.

The ACCC notes that the Government has made it clear that the Minister[173] will only consider initiating a proposal for prescription for a code of conduct if a range of factors are met, including:

- the code would remedy an identified market failure or promote a social policy objective

- there are significant and irremediable deficiencies in any existing self-regulatory regime—for example, the code scheme has inadequate industry coverage or the code itself fails to address industry problems, and
- a systematic enforcement issue exists because there is a history of breaches of any voluntary industry codes.[174]

As outlined above, the Code already substantially addresses these factors. The seven largest collecting societies in Australia, representing the vast majority of collective rights management activity within Australia, are all signatories to the Code so it cannot be argued that the Code has inadequate industry coverage. As noted by the Code Reviewer on many occasions since its inception, the collecting societies have consistently demonstrated a high degree of compliance with the Code.

The ACCC notes the Government 'will only consider prescribing a code of conduct under the CCA if it is not already underpinned in other federal legislation.'[175] Whilst the Code is not specifically referenced in any government legislation or regulation, Screenrights has nevertheless submitted to this review that 'the *Copyright Act 1968*, the regulations made under it, and the jurisdiction created by it, suggest that the Societies' voluntary Code of Conduct is not an obvious candidate for being prescribed'.[176]

In responding to this issue, the collecting societies have submitted that the Code should continue to be voluntary, and suggest that the case for prescribing the Code is not convincing. However, some participants called for the Code to be made mandatory (e.g. see submissions to the review's discussion paper by Australian Publishers Association (APA) and Free TV Australia).

Free TV Australia is of the view the framework regulating collecting societies should be strengthened, and whilst they note that all key collecting societies have agreed to participate in the Code, 'it would be preferable if participation was mandatory rather than voluntary' and accordingly supports the introduction regulatory oversight and 'a requirement to be bound by the Code'.[177]

In its submission to the review's discussion paper CAG considered that the fact the Code is not mandatory is evidence of the failure of governance arrangements for collecting societies in Australia. CAG is supportive of any reform to make the ACCC responsible for the oversight of collecting societies.

Although it did not consider the Code should be mandatory, UA submitted to the review that the declared collecting societies should meet mandated transparency standards and obligations regarding the use of statutory funds, through guidelines issued by the Minister.[178] UA further submitted that the ACCC could be given responsibility for ensuring compliance with the suggested mandatory guidelines.

The APA submitted that whilst there may be 'a value in making the Code mandatory' it should not be legislated as this would make the Code inflexible and difficult to amend which would be 'contrary to the interests of rightsholders and licensees'.[179]

Overall there is insufficient evidence that the current voluntary Code is failing to an extent that intervention is required in the form of prescription under s51AE of the *Competition and Consumer Act 2010*.

However, this review has identified a range of areas in which the Code could be strengthened to increase stakeholder awareness of the Code, improve transparency of governance and access of collecting societies for both members and licensees.

If the Code is amended in accordance with the recommendations of this review, it may be appropriate to revisit the question of the Code's effectiveness once the amendments are implemented and reflected in updates to the practices, policies and procedures of the collecting societies bound by the Code. This process could be undertaken in the first triennial review following this review, due in 2020, and could relevantly consider whether the Code should continue to be voluntary.

The Operations of the Declared Collecting Societies

As declared collecting societies under the Copyright Act, Copyright Agency and Screenrights are responsible for administering statutory licensing schemes under the Act.[180]

These schemes allow employees of specified institutions to communicate and reproduce any copyright protected works without the rightsholder's prior approval. Copyright Agency administers statutory licences for the reproduction and communication of text and images, including digital content such as webpages, under Parts VB (covering employees of educational institutions such as schools, TAFE and universities) and VII Division 2 (covering employees of Commonwealth and state governments).[181] Screenrights administers licences for the copying and communication of copyright material transmitted via broadcast, under Parts VA (education) and VII Division 2 (government).[182]

Some stakeholders have submitted that the role of the declared collecting societies in administering the statutory licence schemes should be reviewed. These issues are outside the scope of this current review process.

A number of submissions also raised concerns regarding the accumulation and use of undistributed funds by the declared collecting societies. Increasing transparency around the reporting of undistributed funds was addressed in the 'distribution of funds' section.

Collecting societies are not always able to distribute all the funds they collect. Some stakeholders have expressed concerns about collecting societies' uses of these undistributed funds where they have expired, such as the use of the unclaimed revenues collected under statutory licensing schemes to fund advocacy.[183]

The Code provides for collecting societies to deduct from their revenues amounts authorised by their constitutions and that these may include for example 'the costs of promotional activities, educational programs, cultural funds…' [184] but it does not specifically outline how expired undistributed funds should be used.

While outside the scope of this review, the use of undistributed funds is covered in the Guidelines for the Declaration of Collecting Societies (the Guidelines). The Guidelines have more detailed requirements regarding the handling of undistributed funds. They state that amounts which remain in the trust fund at the expiration of the trust period should fall into general revenue for distribution in respect of the then accounting period. They also require that where funds go into trust, distribution on the best data which is to hand immediately prior to the expiration of that trust period should be considered as a preferable alternative to allowing the funds to fall back into general revenue. Lastly, the Guidelines state that directors of a declared collecting society should minimise any element of cross-subsidy between the operation of the statutory licence scheme and any other activities of the society.

The Guidelines are to be read in conjunction with the Copyright Act and Copyright Regulations, as they reference and contextualise the obligations set out therein. They state that the fundamental objectives of regulating collecting societies are to ensure:

- that each society diligently collects all money to which it is entitled, and none to which it is not
- that each society manage its operations efficiently and does not incur improper expenses
- that the distribution of royalties relevant to copyright owners is fair, and is seen to be fair, and
- that the society maintains an even hand as between current and future beneficiaries.

The Guidelines were introduced in 1990, and have been updated once, in 2001, to reflect the introduction of Part VC of the Copyright Act (retransmission of free-to-air broadcasts).

Of the two declared collecting societies, Copyright Agency has more substantial holdings of undistributed funds in trust, and more funds that become expired undistributed funds once the relevant trust period has ended. For example, it advises that in June 2016, 3.2% of funds allocated in 2012 (from all sources of licence fees) remained unpaid[185], or a total of $4,532,622.46.[186]

Until recently, Copyright Agency would return expired undistributed funds to the pool for distribution to members to offset the operating expenses deducted from all member revenue. However, following the findings made by the ALRC Report on Copyright and the Digital Economy, which included the possible abandonment of the statutory licensing scheme and the introduction of a fair use exception to copyright infringement, Copyright Agency resolved to take action to protect itself and its members' interests by establishing a Future Fund. In its Directors' Report and Financial Report for the year ended 30 June 2015, it states:

> *In June 2013, the Board considered the issues which would arise in the event of a sudden and material decrease of revenue following a substantial change to the legislative structure or the unremunerated exceptions in the Copyright Act 1968. It was resolved that in order to safeguard and manage the rights of members including but not confined to taking such necessary actions in communications, research and advocacy, it would establish a Future Fund to provide adequate reserves to resource such activity to the extent required consistent with its prudent judgement. In accordance with Art 74(b)(ii) of the company's Constitution, the Board resolved that amounts equal to the following be paid to the Future Fund, in the order as listed, until the Future Fund reached its target balance:*
>
> *a) interest and investment income received after 1 July 2013, after deduction of up to 1.5% for Cultural Fund; and*
> *b) the then balance of the Distributions Rollover and, after 1 July 2013, all unpaid allocations rolled into trust at the end of the relevant trust period; and*
> *c) such other percentage of the company's total revenue as the Board at that time considers appropriate.*[187]

In its 2017 Directors' Report, it states:

> *The Fund was built up over time from interest on licence fees and allocations that were unpaid after four years. In June 2016, only 3.2% of funds allocated in 2012 (from all sources of licence fees) remained unpaid.*
>
> *The Fund is currently capped at $15m, and interest on licence fees and any unpaid allocations are now effectively returned to members as an offset against operating costs*[188]

Numerous submissions to this review, particularly those from groups representing statutory licensees, have questioned whether Copyright Agency has the 'power to use statutory funds—paid by licensees—to pay for advocacy campaigns that oppose positions held by those same licensees.'[189] These submissions have also criticised Copyright Agency for creating the Future Fund, and diverting such a large sum of money to the fund, with limited consultation with or communication to its members.

Looking internationally there are examples of government playing a role in establishing guidance or obligations around the end use of funds that cannot be distributed. The EU Directive, for instance, states that 'Member States may limit or determine the permitted uses of non-distributable amounts, inter alia, by ensuring that such amounts are used in a separate and independent way in order to fund social, cultural and educational activities for the benefit of rightholders.'[190]

Submissions to this review on what might constitute an appropriate approach to the use of such funds are divided. Some view they should be refunded to licensees,[191] while others have submitted that the money belongs to members and they should be used for cultural activities supported by collecting societies.[192] The latter argument reflects recommendations of the Simpson Report, which recommended allocation to the cultural purposes of the wider industry sector.

It is beyond the scope of this review to provide specific direction on what specific uses of declared collecting societies' undistributed funds might be, although there is the potential for efficiency improvements to be made. Non-distributable funds could be used to improve collecting societies' systems for locating rightsholders. This would help reduce both the amount of undistributed funds going into trust, and the overall pool of expired undistributed funds. Another potential use of non-distributable funds could be to offset costs incurred by collecting societies in the improvement of their distribution policies and communication practices, as recommended earlier in this report.

Increased transparency of how undistributed funds are being used (recommendations 8 and 9) will provide greater insight on how these funds are used. Some called for broader review of statutory licensing arrangements. For example, Universities Australia submitted that:

> *…there is a need to review the Guidelines for the purposes of updating them to take account of changes to the educational statutory licences enacted by the Copyright Amendment (Disability and Other Measures) Act 2017. This provides an ideal opportunity to undertake a comprehensive review of the governance arrangements applying to declared collecting societies.*[193]

CAG also stated that a review of the *Copyright Amendment (Disability and Other Measures) Act 2017* will provide an opportunity to consider broader issues with the statutory licensing arrangements in particular.[194]

As the review's Draft Report stated, any future examination of the Guidelines could consider the issues raised around undistributed funds in this review and would be assisted by the transparency measures recommended in this review in respect of monitoring and reporting on funds.

Use of private services in commercial settings

In a submission to this review, Nightlife Music raised concerns about the absence of a policy that outlines the responsibility of parties to uphold copyright laws. Nightlife asserts that the use of consumer services for public performance purposes infringes the terms and conditions of use – that is, used for commercial, not personal purposes.

In a business environment, the most common example is the deliberate or accidental use of a consumer streaming service, licensed only for personal use, in a public place. Where this occurs, no data is provided to the licensor to enable any revenue flow for the public performance which means it is impossible to correctly repatriate any public performance revenues back to the rights owner.

Nightlife states that both APRA and PPCA issue reproduction licences to business which use consumer streaming services, leading to a rights gap creating infringement.

Nightlife points to arrangements between the Société d'Auteurs Belge – Belgische Auteurs Maatschappij (SABAM), a counterpart organisation to APRA in Belgium which sets out that consumer to business use in effect cannot be authorised as SABAM's agreement with streaming services providers limits copyright authorisation to personal and non-commercial use, which is found in the general conditions of use of the streaming services. Collective rights management organisations in NZ and South Africa also provide information on this issue on their websites.

The AHA also raised the scope of these arrangements in its response to the consultation process for the introduction of OneMusic, as appended to its 15 March 2018 submission to this review. The AHA asked if OneMusic would state in licence forms and the plain English guide that it had no right to charge for streaming and that a streaming licence does not form part of any One Music licence to ensure that end users were not breaching licensing agreements.

Nightlife proposed that this rights gap be addressed by an infringement policy, imposed on the collecting societies, to ensure that music is not used for unlicensed purposes.

To the extent that there is non-compliance with the terms of service of streaming music providers, and any associated copyright infringement, this is primarily a matter for rights holders and service providers to address. It is not clear that collecting societies should be obliged by the code of practice to take on a more active role in this regard, particularly were this to significantly increase their operating costs. That said, rights holders and service providers may wish to negotiate commercial terms with collecting societies for them to take on such a role. In 2014, the ACCC granted conditional authorisation for five years to APRA AMCOS to continue their arrangements for the acquisition and licensing of performing rights in music. Authorisation was subject to conditions requiring APRA to revise its alternative dispute resolution (ADR) scheme and publish plain English guides relating to its licensing regime and members' ability to opt out and obtain licences back.

During the authorisation process, the ACCC received a large number of submissions from interested parties covering a wide range of issues. These included submissions from Nightlife suggesting conditions of authorisation to enable more adequate licensing arrangements for commercial suppliers, including greater detail about the royalty distribution model. The ACCC considered this issue but ultimately it was not central to the net public benefit test which must be satisfied for the ACCC to grant authorisation.

The ACCC's authorisation of APRA/AMCOS expires on 30 June 2019. The ACCC will assess any application for re-authorisation from APRA AMCOS in accordance with its usual public process and apply the net public benefit test under the Competition and Consumer Act 2010.

Implementation and other matters

This review has considered participants' concerns and developed recommendations that, where implemented, aim to offer practical and workable improvements to the Code. The recommendations detailed in this report are designed to improve overall confidence in the collective rights management system. The recommendations have also been developed with regard to the differences between collecting societies.

Implementation of this review's recommendations is the responsibility of collecting societies. In practice, the Code may only be amended if all the collecting societies bound by it unanimously agree to do so.

Based on participant feedback to the review, many of the improvements recommended in this report could be implemented in a relatively short time frame. Some changes may take some to implement as they require consultation, but most of the recommended changes to the Code could be actioned within three months.

The review proposes that the recommendations be implemented in full by 30 June 2019, which is the end of the next annual reporting period under the current Code. Compliance with the new provisions could then be assessed from 1 July 2019, and reported on in subsequent annual Code reviews.

The review anticipates that the Code Reviewer will work with collecting societies to support implementation of recommendations in a way that reflects best practice. This includes assessing compliance with the new arrangements.

The Code's effectiveness could be reassessed once the amendments are implemented and reflected in updates to the practices, policies and procedures of the collecting societies bound by the Code. This process could be undertaken in the first triennial review following this review, due in 2020, and could relevantly consider whether the Code should continue to be voluntary.

Australia's major collecting societies differ in size, scale and scope of operations. PPCA (sub. 19) submitted 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.'[195] AWGACS (sub. 9) submitted that differences include that some societies administer licences while others do not, and some societies administer statutory schemes while others administer voluntary arrangements.[196]

The recommendations of this review are designed to be sufficiently broad to avoid imposing unduly burdensome or unworkable requirements on these organisations. In particular, strengthened reporting requirements incorporate flexibility for different collecting societies to comply with them while ensuring additional information that licensees and members need is made available. Further, the differences between collecting societies could be one factor considered in the annual reviews of compliance with the Code, especially in regard to any questions of whether specific collecting societies are responding reasonably to requests.

Other recommendations that will require action or implementation by all collecting societies, for example in relation to the funding and administration that underpins new requirements such as a consolidated online portal and new review arrangements, have been drafted in anticipation that collecting societies' contributions would be proportional to their resources. This is consistent with the practical operation of existing arrangements, such as underpin funding for the Code Reviewer role established at Part 5 of the Code. Clause 5 (d) states that 'Each Collecting Society will contribute to the costs and expenses of the Code Reviewer as agreed from time to time.'

The environment in which copyright materials are produced, distributed and consumed is ever-changing; changes in technology also have implications for the operations of collecting societies. The recommendations of this review are designed to modernise the Code and provide flexibility to collecting societies in meeting their obligations to all stakeholders while achieving efficiency and effectiveness in their operations.

Appendix A: Conduct of this review

In August 2017 the Australian Government asked the Department of Communications and the Arts to review the efficacy of the voluntary Code of Conduct for Copyright Collecting Societies (the Code). The Bureau of Communications and Arts Research (the Bureau), the Department's economic and statistical research unit, is leading the review, in consultation with the Australian Competition and Consumer Commission (ACCC).

This review implements the Government's response to Recommendation 5.4 of the Productivity Commission's (PC) 2016 inquiry report on Australia's intellectual property arrangements.[197]

Recommendation 5.4

The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:

- The Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees.
- The review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.

The review is examining the extent to which the Code promotes fair and efficient outcomes for both members and licensees of collecting societies. This includes assessing:

- whether 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 extent to which the Code promotes transparency, accountability and good governance, including whether the Code contains sufficient monitoring and review mechanisms to achieve this, and
- the extent to which the Code represents best practice compared to other domestic and international codes and guidelines.

On 25 August 2017 the Bureau released terms of reference for the review, and a discussion paper. Submissions on the discussion paper were requested by 15 September 2017. Due to stakeholder feedback the submissions period was extended and closed on 29 September 2017.

A total of 26 submissions were received, 2 of which were provided on a confidential basis. Non-confidential submissions were published on the Department's website on 10 October 2017. A list of participants who provided submissions to the review that are published on the Department's website are detailed in Table A1.

Table A1. Public submissions to the Review of the Code of Conduct for Copyright Collecting Societies

List of participants who made public submissions to this review
Associate Professor Rebecca Giblin and Professor Kimberlee Weatherall
Australasian Music Publishers' Association Limited
Australasian Performing Rights Association and Australasian Mechanical Copyright Owners Society
Australian Competition and Consumer Commission

List of participants who made public submissions to this review
Australian Copyright Council
Australian Digital Alliance
Australian Hotels Association
Australian Screen Directors Authorship Collecting Society
Australian Society of Authors
Australian Writers Guild – Australian Writers Guild Authorship Collecting Society
Copyright Advisory Group to COAG Educational Council
Copyright Agency
Council of Australian University Librarians
D'Arcy Partnership
Dr Richard Stanton
Free TV Australia
International Federation of Reproduction Rights Organisations
International Federation of the Phonographic Industry
Isentia
Live Performance Australia
Motion Picture Association and Australian Screen Association
National Association for the Visual Arts
Nightlife Music
Office of the NSW Small Business Commissioner
Open Eye Pty Ltd
Phonographic Performance Company of Australia
Queensland University of Technology School of Law
Screenrights
Universities Australia

In addition to consultation on the discussion paper, the Bureau has undertaken a range of other research and consultation processes to inform its analysis and its development of potential options for improving the Code. This has included extensive desktop research and analysis of collecting societies' operations and governance, past government reviews of copyright matters, and historical reviews of the Code and compliance with it. The Bureau has also analysed trends, developments and approaches to regulation of collective management organisations in international jurisdictions (see Appendix E for an overview of international analysis).

Other forms of consultation the Bureau has undertaken have included individual meetings with a wide range of stakeholders with an interest in copyright matters. Meetings have been held with a cross-section of collecting societies, licensees, government stakeholders and industry bodies. The review team met with the Hon Dr Kevin Lindgren AM, QC, who currently performs the role of Code Reviewer. The meeting provided useful insights on the Code review processes.

The Bureau has also consulted with other government agencies with a particular interest in copyright matters.

The Bureau established an External Reference Group (ERG) to provide industry expertise and guidance to the review, comprising stakeholder representatives from collecting societies, licensee groups, rightsholder groups and other interested parties. Input from the ERG has assisted the Bureau in formulating findings and recommendations as to potential options for improving the Code. The ERG membership is listed at Table A2.

Table A2. Membership of the External Reference Group

Name	Stakeholder type
Bureau of Communications and Arts Research	Reference group lead
Copyright Agency	Declared copyright collecting society
Screenrights	Declared copyright collecting society
Australian Performing Rights Association	Non-declared copyright collecting society
Copyright Advisory Group—COAG Education Council	Statutory licensee association—representing all Commonwealth, State and Territory Departments of Education, all Catholic Education Offices, Independent Schools and majority of TAFE colleges
Universities Australia	Body representing all of Australia’s universities—its members are both statutory licensees and creators of copyright (e.g. academic publishing)
Victorian Government—Department of Treasury and Finance	Statutory licensee—Government
Live Performance Australia	Licensee association—peak body for the live performance industry
Clubs Australia	Licensee association—representing registered sporting/recreational clubs
Australian Society of Authors	Member association—peak national association representing the interests of Australia's authors and illustrators.
Australian Copyright Council	An independent organisation representing the peak bodies for professional artists and content creators working in Australia’s creative industries and Australia’s major copyright collecting societies

The draft report of the review was released in February 2018. The draft report detailed a range of draft findings and recommendations that were designed to support improvements in these areas and to support stakeholder confidence in the system more broadly. A further round of consultation followed to seek feedback on the draft findings and recommendations, which included submissions to the draft report, ERG discussions and meetings with stakeholders. The draft recommendations aimed to improve information and understanding for licensees and members. In improving the operation of the Code and confidence in the system, the draft recommendations also sought to benefit collecting societies themselves by streamlining interactions with stakeholders and reducing disputes.

Consultation identified broad support for the draft findings and recommendations. Based on feedback received, the review considered that some of these required little or no change, and others only minor changes including to clarify wording. However it was identified that some draft recommendations would benefit from more significant revision, including to improve clarity as to what recommendations would require, to ensure recommendations that are workable, and to support recommendations that have regard to the differences between collecting societies.

The Bureau continued to seek stakeholder input as it refined recommendations to improve their function and limit unnecessary compliance costs. The outcomes from this process are the final recommendations outlined in this report.

Appendix B: Terms of Reference

Background

This review responds to recommendation 5.4 of the Productivity Commission's Inquiry Report into Intellectual Property Arrangements, noting the Australian Government's stated preference for the Department of Communications and the Arts to undertake the review, in consultation with the Australian Competition and Consumer Commission (ACCC).

Scope

The Bureau of Communications and Arts Research (BCAR), within the Department of Communications and the Arts, will review and report on the efficacy of the Code of Conduct for Collecting Societies (the Code).

In undertaking this review, the BCAR will assess the extent to which the Code promotes fair and efficient outcomes. This will include assessing:

- whether the Code is meeting 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 extent to which the Code promotes transparency, accountability and good governance including by examining whether the Code contains sufficient monitoring and review mechanisms, and
- the extent to which the Code represents best practice in comparison with other domestic and international codes and guidelines.

Any other matters that are deemed significant and relevant to the scope of the review following stakeholder consultation may also be examined.

The review will then make findings and recommendations on ways to improve overall confidence in the system and how these could be implemented. Recommendations will address whether the Code should be made mandatory and whether objectives or provisions of the Code should be amended, taking into account additional compliance costs for affected parties.

The review will, where appropriate, draw on the work of previous inquiries into copyright, but only insofar as they relate to the operations and governance of collecting societies. This review will not include examination of the jurisdiction and decisions of the Copyright Tribunal, and whether or not specific licence fees or royalty payments are fair and reasonable.

Process and governance

The review team will be informed by subject-matter expertise from within the Department, as well as broader support and technical advice from the ACCC, and other relevant government agencies on the implications for any changes for competition and the general interests of consumers.

The BCAR will consult widely with collecting societies, user groups and other relevant stakeholders about the Code's efficacy and the review's proposed recommendations. Public consultation will be undertaken following the release of a discussion paper in mid-2017, and the publication of a draft report in late-2017. Public submissions will be made available on the Department's website.

An external reference group consisting of key representatives from collecting societies, licensee groups and other interested parties will also be assembled after the publication of the discussion paper to provide input into the process. Membership of this group will be published on the Department's website once finalised.

The review team will report on its findings and recommendations to the Minister for Communications in 2018. The final report will be publicly released.

Appendix C: Legislative and regulatory framework for Australia's copyright collecting societies

Table C1. Regulation relevant to copyright collecting societies

Application to copyright collecting societies	Application to copyright collecting societies
Copyright Act and Regulations	The *Copyright Act 1968* and the *Copyright Regulations 1969* regulate copyright in Australia in relation to original literary, dramatic, musical and artistic works, and subject matter other than works. The Copyright Act and Regulations also contain provisions that govern declared collecting societies specifically, including in relation to their establishment, membership rights and reporting requirements as well as the societies' powers and obligations as a collecting society.[198] The Act and Regulations also set out what must be contained in the societies' rules (memorandum and articles of association) including, in particular, provisions about the collection and distribution of revenue, the holding on trust of amounts for non-members and access to records of the society by its members.
Guidelines for Declaration of Collecting Societies	The *Guidelines for the Declaration of Collecting Societies* (2001) are designed to be read concurrently with the Copyright Act and Copyright Regulations. They provide additional guidance around areas in the legislation such as membership rights, accounting periods and revenue collection and distribution.
ACCC and competition law	The Copyright Act provides that the Copyright Tribunal must, if requested by a party, have regard to any relevant guidelines made by the ACCC, and may make the ACCC a party to tribunal proceedings. In November 2006, the ACCC released draft guidelines to provide general information to users of copyright material to help negotiate licensing arrangements with copyright collecting societies. The ACCC has not released any final guidelines. While copyright collecting societies, like other businesses, are generally subject to Part IV of the *Competition and Consumer Act 2010* which prohibits a range of anti-competitive conduct, section 51(3) of that Act exempts licensing or assignment of intellectual property from certain competition provisions. This is of relevance to collecting societies who administer collective copyright licences.[199] The ACCC may (on an application by a collecting society) grant a collecting society an authorisation to enable it to engage in conduct which is at risk of breaching Part IV of the Competition and Consumer Act[200] where such conduct is likely to confer public benefits that outweigh public detriment [201]. Decisions by the ACCC to grant or dismiss an application for authorisation can be reviewed by the Australian Competition Tribunal.

Application to copyright collecting societies	Application to copyright collecting societies
Corporations Act and Regulations	The *Corporations Act 2001* and the *Corporations Regulations 2001* set out the laws for the establishment and operation of a range of business entities including not-for-profit organisations such as copyright collecting societies. These laws stipulate the collecting societies' obligations as companies limited by guarantee, including governance arrangements, directors' duties, record keeping, financial reporting and auditing.
International obligations	Australia is a party to a number of international copyright treaties and free trade agreements under which Australia has obligations with respect to copyright and which potentially impact on the operations of Australian copyright collecting societies. This includes, in particular, the *Berne Convention for the Protection of Literary and Artistic Works 1886* and the *Agreement on Trade-Related Aspects of Intellectual Property Rights 1994*. These multi-lateral treaties define minimum periods and levels of protection for copyright in member States, and provide for copyright enforcement and limitations and exceptions to copyright in certain circumstances. Collecting societies may also have obligations under reciprocal agreements with overseas copyright management organisations in relation to the collection and/or distribution of royalties.
Resale Royalty Rights for Visual Artists Act, and Determination	The *Resale Royalty Rights for Visual Artists Act 2009* provides for the appointment of Copyright Agency as the collecting society responsible for collecting resale royalty on visual artworks and distributing it to artists. This Act and the Determination made under s. 35(4)(d) of the Act[202] contain provisions in relation to the collecting society's establishment, membership rights and reporting requirements as well as the collecting society's obligations relating to publishing information about commercial resales of artwork on its website, and royalty collection and distribution.[203] The Act and Determination also set out what is required in the society's rules including, in particular, provisions about the collection and distribution of resale royalty amounts, the holding on trust of amounts due to non-members or right holders not yet identified or located, access to records of the society by holders of resale royalty rights and their agents, and a member complaints procedure.
Federal Court/Federal Circuit Court/State or Territory Supreme Court	The Federal Court of Australia and Supreme Courts of the States and Territories generally share jurisdiction to hear and determine civil and criminal copyright matters under the Copyright Act. The Federal Circuit Court also has jurisdiction to hear and determined certain civil copyright matters. All appeals in these cases, including appeals from the Supreme Courts, are to a full Federal Court.

Application to copyright collecting societies	Application to copyright collecting societies
Copyright Tribunal of Australia	The Copyright Tribunal, established under the Copyright Act, has jurisdiction to hear disputes with respect to both statutory and voluntary copyright licences. The Tribunal primarily hears disputes between copyright collecting societies and their licensees over copyright licence fees (equitable remuneration or royalty payable). The Tribunal also has jurisdiction to hear applications seeking the declaration, or revocation of declaration, of collection societies, determine questions relating to a declared collecting society's rules, and other matters arising under the statutory licence schemes and review a declared collecting society's distribution arrangements.
Other legislation, e.g. Privacy Act	The *Privacy Act 1988* regulates the way individuals' personal information is handled by Australian Government agencies and certain business entities. All businesses and not-for-profit organisations with an annual turnover more than $3 million have responsibilities under the Privacy Act, subject to some exceptions. Collecting societies are usually also subject to general consumer laws. This includes, for example, the protections under the Australian Consumer Law relating to misleading or deceptive conduct, unconscionable conduct and unfair contract terms.[204] There may be other legislation that regulates the activities of certain Australian collecting societies, for example under Australia's media or broadcasting laws.

Appendix D: Alternative dispute resolution facilities offered by the collecting societies bound by the Code

APRA AMCOS

Under the terms of its authorisation from the ACCC, APRA AMCOS was required to update its ADR facility to a scheme managed by an independent ADR facilitator and submit to the ACCC an annual report detailing the disputes that have been notified to APRA AMCOS under its ADR processes.[205] The facility covers disputes between APRA AMCOS and a licensee or potential licensee, or a member or potential member of APRA AMCOS, including complaints made to APRA AMCOS by or on behalf of a member or licensee. [206]

APRA AMCOS launched its ADR facility, 'Resolution Pathways' on 31 March 2015.[207] APRA AMCOS's external solicitors 'have standing instructions to make the existence of the facility known to parties before commencing legal proceedings or negotiations'.[208] The facility is provided at low cost to applicants, with fees and costs not payable for most disputes worth less than $10,000. The fees and costs can also be waived or reduced by the facilitator, mediator or expert, or with the agreement of APRA AMCOS. [209]

The Resolution Pathways facility has been well received by members and licensees, and in 2016 it was awarded ADR Corporate Team of the Year by the Australian Dispute Centre. [210]

Copyright Agency and Viscopy

Copyright Agency's dispute resolution procedure is open to all members and licensees and is publicised on its website.[211] The process is voluntary and can only occur when both Copyright Agency and the relevant member or licensee agrees to have the dispute resolved through this procedure.

A dispute resolution decision will be 'from an independent expert, chosen between both parties' who is 'knowledgeable in copyright issues'.[212] Copyright Agency states that 'if you don't agree with the outcome, you have 28 working days to file fresh proceedings in an appropriate court or tribunal', and if the member or licensee in dispute does not do so, then 'the determination of the expert is binding on both parties'.[213] Costs of the dispute are shared between the parties to the dispute.

Copyright Agency has submitted that its disputes with licensees 'are resolved by commercial negotiation' and that 'in rare cases they are resolved by the Copyright Tribunal. These have been disputes involving millions of dollars in licence fees. The Tribunal is empowered to order mediation.'[214]

Screenrights

The majority of Screenrights' dispute resolution processes are directed to resolving 'competing claims'—a situation where Screenrights receives more than one registration for a title from different members asserting a claim for the same royalty[215]. Screenrights' Express Resolution Process[216] operates alongside its existing ADR procedure for competing claims between Screenrights members, and uses a series of presumptions to determine the relevant rightsholder.[217]

Screenrights' ADR procedure [218] for disputes with members provides expert adjudication at the agreement of both parties to the dispute, with Screenrights advising that 'at law certain disputes cannot be dealt with by means of Expert Adjudication' but 'may be resolved by an application to the appropriate Court'.[219] Screenrights has appointed an independent organisation to select an Expert Adjudicator (the cost borne by Screenrights) who will usually make a decision based on written material submitted by the parties, and their decision will be binding on Screenrights and the member.[220]

Their ADR procedure for disputes with licensees [221] is only available to Screenrights licensees, not prospective licensees and 'disputes in relation to or in connection with any negotiations between Screenrights and a prospective licensee are strictly excluded from these mediation procedures'.[222] In addition, 'mediation is not available to resolve disputes on any matters of the quantum of equitable remuneration payable by a licensee', with Screenrights recognising 'the right of licensees to apply to the Copyright Tribunal for the resolution of disputes that involve rates of remuneration, and also in respect of the sampling systems used to monitor copying by licensees'.[223] Instead, Screenrights suggests that this mediation procedure may be used 'where there is a dispute over the terms of an existing license agreement; for example with regard to the manner in which licences are invoiced, or the provisions in respect of enrolment details to be provided by licensees'[224].

PPCA

PPCA's dispute resolution processes are able to be accessed by a 'copyright owner, artist, licensee or potential licensee'. PPCA recognises that court or tribunal proceedings 'can be very expensive and time consuming for all parties involved' so they offer 'a range of independent, low-cost and efficient dispute resolution processes'.[225]

Mediation and conciliation options are provided by PPCA with the assistance of an independent facilitator and administered by the Australian Disputes Centre. Neutral evaluation is also offered where both parties present information to an evaluator who gives their views on the relative strengths and weaknesses of each party's submissions, and 'may also offer an opinion as to how the dispute would be resolved if brought before a court or the Copyright Tribunal'. Whilst the findings of the neutral evaluator are not binding on either party, PPCA advises 'they will obviously inform any further discussion or negotiations we may have in relation to this dispute'.[226]

PPCA advises that it does not impose costs on parties accessing its ADR facilities, and will not seek to recover any of its own costs in participating in an ADR process. However, PPCA requires disputants to cover half of all third party costs incurred, including all costs related to accessing an independent facilitator or neutral evaluator.[227]

AWGACS

AWGACS' ADR facility is provided in the form of an Expert Determination Process. Access to the Expert Determination process is subject to agreement from AWGACS,[228] and occurs via a decision from an agreed independent expert.

Each party to the dispute provides written submissions and evidence to the other, and then to the independent expert, who subsequently holds a hearing during which each party may present their case. The independent expert is required to make a determination within 28 days of the hearing and communicate the decision in writing to the parties.

If either AWGACS or the complainant is unhappy with the decision of the independent expert, they have 28 working days to file proceedings in an appropriate court or tribunal; if such filing does not occur then the decision of the independent expert is binding on the parties.[229] Each party shares the cost of the independent expert, and must meet its own costs of the expert determination process.

Appendix E: Collective management organisations—analysis of international approaches

Australia's collective copyright management system differs from other international jurisdictions and it can therefore be challenging to compare Australia's governance framework with that of international jurisdictions. Despite this, international approaches can still provide insights on areas where Australia's governance framework can be strengthened. Specific mention of some of these areas are mentioned throughout this report. An overview of how Australia's governance framework compares to international approaches is detailed below.

Background on international approaches

The PC considered that the European Union (EU) regulatory framework for collective management organizations (CMOs) (EU Directive[230]), which is mandatory and contains detailed and prescriptive annual reporting requirements, provides a benchmark for how governance and transparency requirements could potentially be strengthened in Australia.[231] Another useful international source to refer to is the *TAG Compendium of Good Practices Concerning the Collective Management of Copyright and Related Rights* (TAG Compendium) developed under the WIPO-initiated TAG of Excellence project.[232] While WIPO announced in December 2017 that this project would be discontinued in its current form,[233] a 'Good Practice Toolkit' for CMOs is currently being developed which similarly aims at supporting improved performance and governance of CMOs around the world, and the TAG Compendium provides guidance to consider in the interim.

While the provisions set out in the EU Directive and the TAG Compendium are more extensive than those in the Australian Code, many of the provisions in the EU Directive and TAG Compendium, whilst not covered by the Code, are found in these other instruments. Notwithstanding, there remain key differences in the way certain areas of CMO activity are addressed in the international instruments compared to the Australian instruments (**Table E1**).

The EU Directive and TAG Compendium are predominantly rightsholder-focused and deal in detail with things such as membership and member participation, internal governance, the collection, management and distribution of rights revenue, and transparency and reporting to members. The EU Directive also requires that a CMO publish an annual transparency report including comprehensive financial information and a special report on the use of amounts deducted for the purposes of social, cultural and educational services.[234] Unlike the Australian Code, the EU Directive contemplates different dispute resolution mechanisms for rightsholders to those for users. Finally, the EU Directive requires member states to nominate a national competent authority to monitor compliance by CMOs with their relevant national law that can impose sanctions or take other appropriate measures for non-compliance.[235]

Beyond the EU framework, there are other international models with varying degrees of government oversight. In some countries, for example Singapore and New Zealand, CMOs are not specifically regulated by the government although in both Singapore[236] and New Zealand[237] Copyright Tribunals have been established for resolving disputes between CMOs and users of copyright materials. Notably, both Singapore and New Zealand are currently conducting major reviews of their copyright regimes, including their copyright collective rights management systems.[238] In other jurisdictions, including Canada, the United States and South Korea, the terms and conditions on which CMOs may license uses of certain copyright materials must be set or approved by government authorities. In addition, the Nordic countries and United Kingdom have 'extended collective licensing' statutory regimes which allow authorised CMOs to license materials within a specific field of use on a mass scale enabling the clearance of rights for multiple copyright materials quickly and efficiently.

Table E1. EU Directive and TAG Compendium—Comparison with Australian Code of Conduct and other governance instruments

EU Directive/TAG Compendium (Key measures)	Australian Code	Constitution (declared/ voluntary)*	Copyright legislation (declared)**
Membership terms (acquisition of rights)			
• Membership open to all relevant rightsholders	⚐	⚐ (declared)	⚐
• Potential members informed of rights and obligations	⚐ (part)	-	-
• Collateral conditions only if objectively justified	-	⚐ (declared)	⚐
• Termination or withdrawal of rights on notice	-	⚐	-
• Entitlement to share of revenue post termination	-	⚐ (declared)	-
Membership participation			
• All members can vote at general meeting	-	⚐ (declared)	-
• General meeting/board to approve distribution, deductions, use of non-distributable monies policies	-	⚐	-
• Member representation on board fair and balanced	-	⚐	-
• Procedures to deal with conflict of interest	-	⚐	⚐
Management of rights revenue			
• Separate accounts for rights revenue	-	⚐ (declared)	-
• Deductions to be reasonable, *specifically* authorised	⚐ (part)	X	⚐
• CMO to maintain a distribution policy	-	⚐	⚐
• Regular, diligent and accurate distribution	-	⚐	⚐
• Amounts not distributed held in separate account	-	⚐	⚐
• Reasonable steps to identify, locate rightsholders	-	⚐ (part)	-
• After three years, amounts deemed non-distributable	-	⚐ (part)	-
• General meeting to decide on use of left over funds	-	X	-
Setting of licence fees			
• Negotiations to be conducted in good faith	-	-	-
• User to be informed of licences and licensing schemes	⚐ (part)	-	-
• Licensing criteria objective, non-discriminatory	⚐	-	-
• Tariffs fair and reasonable	X	-	-
• CMO to consult in good faith with industry association	⚐	-	-
Access to information			
• Members/rightsholders: payment entitlement	⚐ (part)	-	⚐ (part)

EU Directive/TAG Compendium (Key measures)	Australian Code	Constitution (declared/ voluntary)*	Copyright legislation (declared)**
• Members/rightsholders: annual report	⚐ (part)	⚐	⚐
• Users: information about licence terms and policies	⚐ (part)	-	-
• Public: CMO governance, operations, policies, etc.	⚐ (part)	-	-
• Public: transparency report (financial breakdown)	X	-	-
Complaints and dispute resolution			
• Complaints procedure—rightsholders	⚐	⚐	-
• Alternative dispute resolution	⚐	⚐	-
Compliance and enforcement			
• National competent authority—enforceable	X	-	-
Development of staff skills and awareness			
• Awareness of Code, complaints procedure	⚐	-	-

*'Declared' refers to declared collecting societies under the Copyright Act 1968; 'voluntary' refers to other, non-declared collecting societies.
**Copyright Act 1968, Copyright Regulations 1969 and Guidelines for Declared Collecting Societies (as amended 2001).

EU Directive Annual Transparency Report

Under the EU Directive, CMOs in the European Union are required to publish on their websites an 'annual transparency report,' which should include information on the activities and governance of the CMO, comprehensive financial information and information on the use of amounts deducted for social, cultural and educational services.

Table E2 outlines the extent to which Australian collecting societies provide the type of information which CMOs must publish on their website under the EU Directive. Under the EU Directive this information must be provided for each financial year and must remain publicly available on the relevant website for at least five years. Information provided by collecting societies in Australia indicates some collecting societies are providing a lot of the information required of CMOs under the EU Directive. The review has found that consolidating the information collecting societies provide would be beneficial for stakeholders and improve confidence in the system.

Table E2. Annual transparency reporting requirements—international comparison

Annual transparency report (EU Directive, article 22 and annex

Type of information	PPCA	APRA	Copyright agency	Screenrights
General:				
• Financial statements	Y	Y	Y	Y
• Report on activities in financial year	Y	Y	Y	Y
• Refusals to grant a licence	N[239]	N/A[240]	N/A[241]	N/A

Type of information	PPCA	APRA	Copyright agency	Screenrights
• Legal and governance structure	Y	Y	Y	Y
• Entities directly or indirectly owned or controlled wholly or in part	N (N/A)	Y	Y	Y[242]
• Total remuneration paid to directors and managers in the previous year and other benefits granted to them	Y	Y	Y (part)[243]	Y (part)[244]
Rights revenue (per category of rights managed and type of use, e.g. broadcasting, online, public performance):				
• Rights revenue	Y	Y	Y	Y
• Income on investment of rights revenue, and use of such income	Y	Y	Y (part)[245]	Y
The cost of rights management and other services (per category of rights managed):				
• Total operating and financial costs	Y	Y	Y	Y
• Operating and financial costs with regard to the management of rights, including management fees	Y	Y	Y	Y (part)[246]
• Operating and financial costs with regard to the management of rights, including management fees	Y	Y	N	N/A
• Resources used to cover costs	Y	Y	Y	Y
• Deductions from rights revenue, per category of rights managed and type of use, and purpose of the deduction	Y	Y	N[247]	Y (part)[248]
• Percentages of total costs to total rights revenue	Y[249]	Y	Y	Y
Amounts due to rightsholders (per category of rights managed and type of use):				
• Total amount attributed to rightsholders	N	Y	Y	Y
• Total paid to rightsholders, and frequency of payments	Y	Y	Y	Y
• Total amount collected but not yet attributed to rightsholders, and financial year amounts were collected	Y[250]	Y[251]	Y	N/A[252]
• Total amount attributed to but not yet distributed to rightsholders, and financial year amounts were collected		N	Y	Y[253]

Type of information	PPCA	APRA	Copyright agency	Screenrights
• Reasons for any delay in the distribution and payments	N/A	Y[254]	Y	N/A
• Total non-distributable amounts and use of those amounts	N/A	N	Y	Y (part)[255]
Relationships with other CMOs (per category of rights, type of use and organisation):				
• Amounts received from and paid to other CMOs	N[256]	Y[257]	Y (foreign)[258]	Y (part)[259]
• Management fees and other deductions from rights revenue due to other CMOs, and from amounts paid by other CMOs	N[260]	Y[261]	Y (foreign)[262]	Y (part)[263]
• Amounts distributed directly to rightsholders originating from other CMOs	N	Y[264]	N	N[265]
Deductions for the purposes of social, cultural and educational services (per type of purpose, category of rights managed and type of use):				
• Amounts deducted in the financial year	N[266]	Y[267]	Y	N/A[268]
• Explanation of use of such amounts, including management fees	Y[269]	N	Y (part)[270]	N/A

Source: based on information made available by the identified collecting societies, including on their respective websites.

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[1] Australian Government (2017), *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, August 2017; Productivity Commission (2016), Intellectual Property Arrangements, Inquiry Report No. 78, 23 September, p.32 (recommendation 5.4).
[2] Australian Competition and Consumer Commission (2011), Guidelines for developing effective voluntary industry codes of conduct, July, p. 6.
[3] Office of the New South Wales Small Business Commissioner (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, p3.
[4] PPCA is an unlisted public company limited by shares, the shares being held by the remaining three of the six founding members. The three members are ineligible to receive any dividend, and they receive remuneration only on the same basis as other licensors, in line with PPCA's 'Distribution Policy' – see Report of the Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2016 to 30 June 2017 at p 54.
[5] Intellectual property licensing is currently exempt from some of the restrictive trade practices provisions under s. 51(3) of the *Competition and Consumer Act 2010* (Cth). This means that intellectual property rights are not subject to the same competition laws as other property rights. The Productivity Commission has recommended that

s.51(3) be repealed: Productivity Commission (2016), Intellectual Property Arrangements, Inquiry Report No. 78, 23 September, p. 37 (Recommendation 15.1). The Government supports this recommendation: Australian Government (2017), *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, August.

[6] For example see submissions by the Australian Copyright Council, and Copyright Agency.

[7] Nightlife Music (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, May, p5.

[8] National Film and Sound Archive (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, p1.

[9] See for instance submissions by Isentia and Live Performance Australia to the Review of the Code of Conduct for Copyright Collecting Societies.

[10] Code of Conduct for Collecting Societies, Amended 1 July 2011, clause 2.3(d).

[11] See for example Productivity Commission (2016), Intellectual Property Arrangements, Inquiry Report No. 78, 23 September, pp. 154-155.

[12] *Code of Conduct for Copyright Collecting Societies* (2017), clause 2.3(c)(ii).

[13] Australia Law Reform Commission (2014) Copyright and the Digital Economy (122), 14, p202.

[14] Australian Small Business Commissioner (2015), Productivity Commission inquiry into Intellectual Property Arrangements – Submission by the Office of the Small Business Commissioner (Submission 101), December, pp. 13-14.

[15] Live Performance Australia (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, pp 2-3.

[16] For example see http://apraamcos.com.au/media/Customers/PEG_General-Business.pdf

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[18] See http://apraamcos.com.au/media/Customers/State_LG_Consultation_Doc.pdf.

[19] Screenrights (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p. 8.

[20] Australian Publishers Association (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, p2.

[21] Isentia, (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, October, pp. 2-3.

[22] Australian Hotels Association (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, p2.

[23] See http://www.onemusic.com.au//

[24] Free TV Australia (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, p.3.

[25] See, for example, Commonwealth Department of Communications and the Arts (2015), Submission to the Productivity Commission Issues Paper (October 2015) - Intellectual Property Arrangements (Submission DR154), October, p. 2; Productivity Commission (2016); Statement of Ms Delia Browne, National Copyright Director of the COAG Education Council, Inquiry into intellectual property arrangements - transcript of proceedings, Sydney, 27 June, p. 808.

[26] Australian Society of Authors (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, p2.

[27] The Office of the NSW Small Business Commissioner (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, pp4-5.

[28] PPCA (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, pp 3-4.

[29] APRA AMCOS (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, p2.

[30] Screenrights (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, p3.

[31] Australian Society of Authors (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, p2.

[32] Screenrights (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, p1.
[33] Free TV Australia (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, p2.
[34] *Code of Conduct for Copyright Collecting Societies* (2017), clause 2.4.
[35] Copyright Agency (2014), Proposal for amendment to code of conduct regarding reporting, p4.
[36] Copyright Agency (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p14.
[37] Copyright Agency (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p14.
[38] Clause 2.9, see Report of the Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia, p7, April, 2017.
[39] Copyright Advisory Group to COAG Education Council (2018), submission to the Draft Report, review of the Code of Conduct for Copyright Collecting Societies, March, p2.
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[41] Live Performance Australia (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, October, p.5.
[42] Copyright Advisory Group to COAG Education Council (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, p10.
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[45] Lindgren, K. (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, p. 13.
[46] New South Wales Department of Justice (2016), Response to the Productivity Commission's Draft Report—Intellectual Property Arrangements (Submission DR610), p. 3.
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[51] Screenrights (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, p4.
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[59] Reg 23L(g), *Copyright Regulations 1969* (Cth).
[60] Reg 23L(i), *Copyright Regulations 1969* (Cth).
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[70] *The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014*, Statutory Instruments No. 2861 [UK].
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[77] WIPO, (2018), *WIPO Good Practice Toolkit for CMOs (The Toolkit)*, Working Document, January, p10.
[78] See The Collective Management of Copyright (EU Directive) Regulations 2016, 2016 No.221, clause 7(d)(ii) and (v).
[79] See The Collective Management of Copyright (EU Directive) Regulations 2016, 2016 No.221, (4)(j)(vii)
[80] Information available to date indicates that some CMOs intend to allocate non-distributable amounts to members; in its annual transparency report the collecting society for the UK publishing industry stated that 'Non-distributable monies will be re-allocated as being non-title specific monies and distributed accordingly to publishers on a pro rata basis…' See The Publishers Licensing Society (PLS), Publishers Licensing Society Annual Transparency Report, For the year ended 31 March 2017, p. 12.
[81] Australian Society of Authors (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, p4.
[82] Screenrights (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, p5.
[83] Phonographic Performance Company of Australia (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, pp. 6-7.
[84] Copyright Agency (2017), Annual Report 2016-17, pp. 33.
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[86] The *Copyright Act 1968* provides that the Minister and the Copyright Tribunal must not declare a body to be the collecting society unless its rules contain such other provisions as are prescribed including, inter alia, provisions about 'the distribution of amounts collected by it': see ss. 135P(3)(d)(iii), 135ZZB(3)(d)(iii), 135ZZT(3)(d)(iii), 135ZZZO(7)(d)(iii) and 153F(6)(e)(iii). Any alteration by a declared collecting society of its rules so that they no longer comply with these provisions may be cause for revocation of its declaration: see ss. 135Q(1)(c), 135ZZC(1)(c), 135ZZU(1)(c), 135ZZZP(1)(c) and 153G(5)(c).
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[96] For example, Screenrights' ADR facilities are not accessible for disputes relating to the quantum of equitable remuneration (statutory licence).
[97] *Code of Conduct for Copyright Collecting Societies* (2017), clause 1.3(d).
[98] *Code of Conduct for Copyright Collecting Societies* (2017), clause 3(a).
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[103] see Screenrights' ADR policies as an example
[104] Live Performance Australia (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, p. 5.
[105] Report of the Code Reviewer (the Hon JCS Burchett, QC, formerly a Justice of the Federal Court of Australia) upon a review of the operation of the Code of Conduct of the Copyright Collecting Societies of Australia, June 2011, p. 2.
[106] J.C.S. Burchett, QC (2004), Report of the Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2003 to 30 June 2004, p. 4.
[107] The Hon KE Lindgren AM, QC (2014), Report of the Code Reviewer (The Hon KE Lindgren AM, QC, Formerly a Justice of the Federal Court of Australia) upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia, April, p. 8 – as the Code Reviewer cannot resolve such disputes in a way that would bind the disputants unless they appointed the Code Reviewer as an arbitrator for the purpose.
[108] Ibid, p. 5.
[109] *Copyright Agency Ltd v Department of Education (Qld)* [2002] ACopyT 1, [14]-[16].
[110] Ibid.
[111] *Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968 (Cth)* [2007] ACopyT 1, [10].
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[122] A retired judge of the Federal Court of Australia (1985-2000) and former President of the Copyright Tribunal of Australia.
[123] For each of the financial years 2002/03 to 2010/11.
[124] Issued in April 2005, April 2008 and June 2011.
[125] A retired judge of the Federal Court of Australia (1994-2010) and former President of the Copyright Tribunal of Australia (2000-2007).
[126] For each of the financial years 2011/2012 to 2015/2016.
[127] Issued April 2014 (and supplementary report of October 2015) and April 2017.
[128] *Code of Conduct for Copyright Collecting Societies* (2017), clause 5.2(a).
[129] Currently, the Department of Communications and the Arts; prior to this the Attorney-General's Department has administered this legislation.
[130] *Code of Conduct for Copyright Collecting Societies* (2017), clause 5.2(f).
[131] *Code of Conduct for Copyright Collecting Societies* (2017), clause 5.3(b)(i).
[132] *Code of Conduct for Copyright Collecting Societies* (2017), clause 5.3(b)(ii).
[133] *Code of Conduct for Copyright Collecting Societies* (2017), clause 5.3(b)(iii).
[134] J.C.S. Burchett, QC, Report of the Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2003 to 30 June 2004, p. 1.
[135] J.C.S. Burchett, QC, Report of the Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2004 to 30 June 2005, p. 1.
[136] Ibid pp. 1-2.
[137] Ibid at p. 29.
[138] The Hon K E Lindgren AM, QC (2013) Report of the Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2012 to 30 June 2013, November, pp. 45-46.
[139] Including re-doing the distribution process for the affected quarterly distribution period and establishing a consultative group of industry representatives with whom APRA would consult before making any changes to the nightclub music distribution policy: The Hon K E Lindgren AM, QC (2013) Report of the Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2012 to 30 June 2013, November, p. 47.
[140] APRA AMCOS (2017), submission to Discussion Paper, available from Review of the Code of Conduct for Copyright Collecting Societies, para 68.
[141] ACCC (2011), Guidelines for developing effective voluntary industry codes of conduct, July, p. 11.
[142] Ibid.
[143] Free TV Australia (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, October, p. 3.
[144] APRA AMCOS (2017), submission to Discussion Paper, available from Review of the Code of Conduct for Copyright Collecting Societies, para 91.
[145] APRA AMCOS (2017), submission to Discussion Paper, available from Review of the Code of Conduct for Copyright Collecting Societies, para 82-91.
[146] ACCC (2011), Guidelines for developing effective voluntary industry codes of conduct, July, p. 12.
[147] ACCC (2011), Guidelines for developing effective voluntary industry codes of conduct, July, p. 20.
[148] *Code of Conduct for Copyright Collecting Societies* (2017), clause 5.3.
[149] *Code of Conduct for Copyright Collecting Societies* (2017), clause 5.3(c).

[150] The most recent triennial review of the Code reveals that communications to inform members, licensees and the general public of the review included a notice published in *The Australian* newspaper, and email notifications sent to the collecting societies' licensees and relevant industry bodies by the Code Reviewer secretariat. In addition, each of the collecting societies published a notification of the review on their respective websites: The Hon KE Lindgren AM, QC (2014), Report of the Code Reviewer (The Hon KE Lindgren AM, QC, Formerly a Justice of the Federal Court of Australia) upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia, April, page p. 4.
[151] Copyright Advisory Group to COAG Education Council (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, p. 18.
[152] The Hon K E Lindgren AM, QC (2015), Supplementary Report of the Code Reviewer (The Hon KE Lindgren AM, QC, Formerly a Justice of the Federal Court of Australia) upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia, issued 28 October, p. 24.
[153] Universities Australia (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p. 19.
[154] The Hon K E Lindgren AM, QC (2015), Supplementary Report of the Code Reviewer (The Hon KE Lindgren AM, QC, Formerly a Justice of the Federal Court of Australia) upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia, issued 28 October,p. 6.
[155] See for instance submissions to the review's discussion paper by Copyright Agency, Screenrights and PPCA.
[156] Copyright Advisory Group to COAG Education Council (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, p. 18.
[157] Copyright Advisory Group to COAG Education Council (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, p. 18.
[158] Copyright Advisory Group to COAG Education Council (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, p. 19.
[159] Copyright Advisory Group to COAG Education Council (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, p. 19.
[160] Free TV Australia (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, October, p. 3.
[161] Screenrights (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p. 11.
[162] Australian Screen Directors Authorship Collecting Society, submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p4.
[163] Australian Digital Alliance (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, October, p. 2.
[164] Free TV Australia (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, October, p. 3.
[165] Screenrights (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p. 6.
[166] Nightlife Music (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, May, p4.
[167] Australian Government (2000), Government response to the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs: 'Don't stop the music!—A report of the inquiry into copyright, music and small business', November.
[168] The Treasury (2011), Policy guidelines on prescribing industry codes under Part IVB of the *Competition and Consumer Act 2010*, May, p. 3.
[169] Department of Industry, Innovation and Science (2016), Codes of Practice | business.gov.au.
[170] Australian Government (2000), Government response to the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs: 'Don't stop the music!—A report of the inquiry into copyright, music and small business', November.
[171] Productivity Commission (2016), Intellectual Property Arrangements, Inquiry Report No. 78, September, p. 161.
[172] ACCC (2011), Guidelines for developing effective voluntary industry codes of conduct, July, p. 26.
[173] The Parliamentary Secretary to the Treasurer for the purposes of prescribing codes of conduct
[174] ACCC (2011), Guidelines for developing effective voluntary industry codes of conduct, July, p. 26.

[175] ACCC (2011), Guidelines for developing effective voluntary industry codes of conduct, July, p. 26.
[176] Screenrights (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p13.
[177] Free TV Australia (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, October, p. 2.
[178] Universities Australia (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p. 20.
[179] Australian Publishers Association (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p. 6.
[180] See Parts VA, VB, VC, VD and Division 2 of Part VII of the *Copyright Act 1968*.
[181] ss.135ZZB and 153F, *Copyright Act 1968* (Cth).
[182] ss.135P and 153F, *Copyright Act 1968* (Cth).
[183] See for example Sydney Morning Herald (2017), Copyright Agency diverts funds meant for authors to $15m fighting fund, April.
[184] *Code of Conduct for Copyright Collecting Societies* (2017), clause 2.5 (b).
[185] Copyright Agency Limited, Directors' Report and Financial Report for the year ended 30 June 2017, p5.
[186] Being 3.2% of total distribution revenue of $141,644,452 as reported in the Annual Report of Copyright Agency Limited for the Financial Year 2011-2012 at p. 12.
[187] Copyright Agency Limited, Directors' Report and Financial Report for the year ended 30 June 2015, p. 26.
[188] Copyright Agency Limited, Directors' Report and Financial Report for the year ended 30 June 2017, p. 3.
[189] Universities Australia (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p. 9.
[190] Official Journal of the European Union (2014), Directive 2014/26/EU of the European Parliament and of the Council, clause 13(6), February.
[191] Queensland University of Technology School of Law (2017), submission to the Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, October, p. 4.
[192] Australian Society of Authors (2017), submission to the Discussion Paper, available from the Review of the Code of Conduct for Copyright Collecting Societies, October.
[193] Universities Australia (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, p2.
[194] Copyright Advisory Group to COAG Education Council (2018), submission to the Draft Report, review of the Code of Conduct for Copyright Collecting Societies, March, p4.
[195] PPCA (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, p1.
[196] AWGACS (2018), submission to the Draft Report, Review of the Code of Conduct for Copyright Collecting Societies, March, p3.
[197] Australian Government (2017), *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, August; Productivity Commission (2016), Intellectual Property Arrangements, Inquiry Report No. 78, 23 September, p.32 (recommendation 5.4).
[198] See *Copyright Act 1968*: Part IVA Divisions 4 and 5, Part VC, Part VD and Part VII, Division 2 and section 153F. See also the *Copyright Regulations 1969*: regulations 23J, 23JM and 23L.
[199] The Productivity Commission has recommended the repeal of section 51(3), which the Australian Government supports. See: Productivity Commission (2016), *Intellectual Property Arrangements* (Productivity Commission Inquiry Report No. 78), 23 September, recommendation 15.1; Australian Government (2017), *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, August, p. 17.
[200] Except for misuse of market power and some mergers.
[201] Sections 88 and 90 of the *Competition and Consumer Act 2010.*
[202] Australian Government, *Determination of provisions to be contained in collecting society rules*, 16 March 2010.
[203] *Resale Royalty Right for Visual Artists Act 2009*.
[204] *Competition and Consumer Act 2010* (Cth), Schedule 2.

[205] See: http://registers.accc.gov.au/content/trimFile.phtml?trimFileTitle=D17+44265.pdf&trimFileFromVersionId=1201742&trimFileName=D17+44265.pdf for the 2016 report.
[206] ACCC (2014), Determination- Application for revocation and substitution of authorisations A91187-A91194 and A91211 lodged by the Australasian Performing Right Association Limited in respect of arrangements for the acquisition and licensing of performing rights in music, 6 June, p. 90.
[207] See APRA AMCOS, Alternative Dispute Resolution, http://apraamcos.com.au/feedback-centre/alternative-dispute-resolution/.
[208] The Hon K E Lindgren AM, QC (2015), Report of the Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2014 to 30 June 2015, December, p. 76.
[209] See Resolution pathways, http://www.resolutionpathways.com.au/Costs
[210] http://apraamcos.com.au/news/2016/august/apra-amcos-wins-australian-dispute-centre-award/ . In the 2015-2016 annual report, the Code Reviewer noted that seven disputes were referred to APRA/AMCOS's ADR facility in calendar year 2015, two being licensee disputes and the remainder member disputes. APRA/AMCOS bore the costs of all disputes in this reported period and advised that all 'were resolved with positive feedback'
[211] https://www.copyright.com.au/about-us/governance/compliments-complaints/dispute-resolution/
[212] Ibid.
[213] Ibid.
[214] Copyright Agency (2017), submission to Discussion Paper, Review of the Code of Conduct for Copyright Collecting Societies, September, p. 17
[215] For example, in the 2015-2016 review period, the Code Reviewer noted that Screenrights dealt with 1.3 million individual claims and 6,848 competing claims, with 2,974 of the competing claims resolved in that period.
[216] https://resolution.screenrights.org/express-resolution/
[217] The presumptions 'draw on general principles of Australian copyright law, standard terms of industry agreed contracts and industry practice' and initial assessments undertaken by Screenrights indicate that 'ERP has resulted in the timely resolution of many competing claims'.
[218] https://www.screenrights.org/sites/default/files/uploads/ADR_Policy.pdf
[219] Ibid.
[220] Ibid.
[221] https://www.screenrights.org/sites/default/files/uploads/ISUADRL0413.pdf
[222] Ibid.
[223] Ibid, p. 1.
[224] Screenrights has also advised that all of its agreements with statutory licensees include provisions for alternative dispute resolution if a dispute arises during the life of the agreement.
[225] Phonographic Performance Company of Australia (2008), Complaints Handling and Dispute Resolution Policy, p.4.
[226] Ibid at p. 5.
[227] Ibid.
[228] If AWGACS does not agree to resolve the dispute via Expert Determination they must provide the complainant with a letter setting out reasons for its decision.
[229] http://awgau.s3-ap-southeast-2.amazonaws.com/wordpress/wp-content/uploads/2016/04/18200446/AWGACS-Complaints-and-Disputes-Procedures-03.16-FINAL.pdf at page 5; Report of the Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2015 to 30 June 2016, p. 120.
[230] Official Journal of the European Union (2014), Directive 2014/26/EU of the European Parliament and of the Council, February.
[231] Productivity Commission (2016), Intellectual Property Arrangements, Inquiry Report No. 78, 23 September, p. 160.
[232] Consortium of International Federations and the World Intellectual Property Organization, *TAG Compendium of Good Practices Concerning the Collective Management of Copyright and Related Rights*, Working Document of the Consortium of Federations and the World Intellectual Property Organization (WIPO) within the Framework of the TAG of Excellence Project.

[233] World Intellectual Property Organization circular C.L. 1982: Good Practice Toolkit for Collective Management Organizations
[234] Directive 2014/26/EU of the European Parliament and of the Council, art 22 and Annex.
[235] Directive 2014/26/EU of the European Parliament and of the Council, article 36.
[236] Copyright Act 1987 (Singapore), Part VII.
[237] Copyright Act 1994 (New Zealand), Part 10.
[238] Ministry of Law, Singapore (2017), Public Consultation on the Copyright Collective Rights Management Ecosystem in Singapore, 16 May 2017.
[239] This is not something that has been relevant. Where PPCA has the rights and potential licensee agrees to the standard (or mutually agreed varied) terms, a licence is always issued on request.
[240] APRA never refuses to grant a licence (provided it has the rights to license)
[241] Not relevant to statutory licences. For voluntary licensing, there are limited scenarios where Copyright Agency is unable to license because it does not have the mandate from members.
[242] Notes 7 and 18 of Notes to the Consolidated Financial Statements, https://www.screenrights.org/sites/default/files/publication/file/AVCS_4505_SCAR_4.10.17_FIN.pdf
[243] Board directors' payments are in the auditor's report (page 10); Information about staff payments is at page 40 https://static-copyright-com-au.s3.amazonaws.com/uploads/2017/01/Annual-Report-2016.pdf.
[244] Executive salaries shown in range
[245] The amount of interest is shown on page 8 (and on p 20 for Viscopy): https://static-copyright-com-au.s3.amazonaws.com/uploads/2017/01/Annual-Report-2016.pdf Interest is currently applied as an offset against the deduction operating costs. That's in the distribution policy rather than the annual report: Distribution policy
[246] Consolidated costs are shown in Annual Report. Costs per category are shown in members distribution statements
[247] Copyright Agency publishes the deduction for each distribution, and advises that the deduction includes the 1.5% for the Cultural Fund: p29 https://static-copyright-com-au.s3.amazonaws.com/uploads/2017/01/Annual-Report-2016.pdf
[248] IBNR deduction is shown in total, not by category
[249] http://www.ppca.com.au/IgnitionSuite/uploads/docs/2016%20PPCA%20ANNUAL%20REPORT.pdf Note that PPCA does not provide the actual %, but the two figures it is derived from are provided
[250] All amounts are allocated during the annual distribution process. The only variant is where there is a dual claim for a track, but the relevant amount is still allocated to the track and the interests of the competing claimants noted. The funds are disbursed as soon as the competing claim is resolved.
[251] http://apraamcos.com.au/media/YIR/2017/APRA_Statutory-Accounts_2017_AU.pdf
[252] All collections are attributed to rightsholders (less expenses)
[253] Note 14 of Notes to the Consolidated Financial Statements, https://www.screenrights.org/sites/default/files/publication/file/AVCS_4505_SCAR_4.10.17_FIN.pdf
[254] http://apraamcos.com.au/media/Distribution-Rules-and-Practices/APRADistributionPractices.pdf
[255] shown in total but not broken down by rights category
[256] For the financial year ending June 2016 (consistent with other years) amounts received represented a mere 0.04% of total revenue. In regard to payments to, PPCA treats CMOs like any other licensor providing a grant of rights for repertoire.
[257] http://apraamcos.com.au/media/YIR/2017/APRA_Statutory-Accounts_2017_AU.pdf
[258] Copyright Agency advises that it does not receive money from non-foreign CMOs, except from Screenrights for Viscopy; Viscopy's annual report bundles the payments it receives from Copyright Agency and from Screenrights, however it is close to merging with Copyright Agency. The only non-foreign CMOs that Copyright Agency makes payments to are Viscopy (with whom they are about to merge) and APRA AMCOS, these payments are not currently reported.
[259] shows royalties received from International CMOs (figure 11 "ICS"). Payments to other CMO's not shown
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[261] http://apraamcos.com.au/media/YIR/2017/APRA_Statutory-Accounts_2017_AU.pdf

[262] Copyright Agency advises that it does not receive money from non-foreign CMOs, except from Screenrights for Viscopy; Viscopy's annual report bundles the payments it receives from Copyright Agency and from Screenrights, however it is close to merging with Copyright Agency. The only non-foreign CMOs that Copyright Agency makes payments to are Viscopy (with whom they are about to merge) and APRA AMCOS, these payments are not currently reported.

[263] shows royalties received from International CMOs (figure 11 "ICS"). Payments to other CMO's not shown

[264] http://apraamcos.com.au/media/YIR/2017/APRA_AMCOS_Year_in_Review_2017_AU.pdf

[265] Consolidated shown not by category or organisation

[266] These are not treated as an expense deduction, but are part of the annual distribution and are dealt with in the distribution policy.

[267] http://apraamcos.com.au/media/corporate/2016/apra_sustainability_report_2016.pdf

[268] Will become relevant for FY 2018 accounts due to introduction of Cultural Fund

[269] http://www.ppca.com.au/IgnitionSuite/uploads/docs/2016%20PPCA%20ANNUAL%20REPORT.pdf

[270] Copyright Agency provides a detailed list of allocations from the Cultural Fund, but it doesn't currently report separately on the management costs for the fund.