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To whom it may concern

Review into the efficacy of the Code of Conduct for Australian copyright collecting societies

The Australian Digital Alliance (ADA) is grateful for the opportunity to provide feedback to the government on the regulation of Australia's copyright collecting societies.

The ADA is a non-profit coalition of public and private sector interests formed to provide an effective voice for a public interest perspective in copyright policy. It was founded by former Chief Justice of the High Court of Australia, Sir Anthony Mason in February 1999, to unite those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture. ADA members include universities, schools, disability groups, libraries, archives, galleries, museums, technology companies and individuals.

Noting the particular importance of this review to the education sector, the ADA supports the submissions of our members the Copyright Advisory Group of the COAG Education Council (CAG) and Universities Australia. We do not provide specific recommendations of our own, but rather support the recommendations of these two submissions.

However, we would also like to highlight the importance of the collecting society system to a broader range of copyright user groups, including libraries, archives, galleries and museums. These groups participate in collective licensing as government bodies and as venues for live and recorded performance, as well as through their connections with educational institutions. As such they also have a strong interest in the good governance of Australia's collecting societies.

This broader membership echoes the conclusion of the UA and CAG submissions that the shortcomings of the current system cannot be addressed by mere amendments to the Voluntary Code of Conduct – reforms to the regulatory system as a whole are required. As the UK Intellectual Property Office's 2012 report *Collecting Societies Code of Conduct* notes "to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct [including that of Australia] struggle to meet these criteria."¹ We agree with the report's

¹ Intellectual Property Office, *Collecting Societies Codes of Conduct*, BOP Consulting in collaboration with Benedict Atkinson and Brian Fitzgerald (December 2012) <https://www.gov.uk/government/publications/collecting-societies-codes-of-conduct> https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310172/ipresearch-collecting-071212.pdf p.52.

conclusion that Australia’s regulatory model does not “achieve the aims of improving transparency, accountability, governance and dispute resolution – and thus, in turn, strengthening confidence in the system.”²

As our education members state at greater length in their submissions, the current regime:

- does not impose appropriate obligations of transparency or accountability;
- grants an inappropriate degree of discretion to collecting societies; and
- does not incorporate sufficient measures for effective oversight, including sanctions for non-compliance and independent mechanisms for external review and amendment.

We note that the current system breaches the Australian Competition and Consumer Commission’s guidelines for voluntary codes,³ and as far back as 2000 has been criticised for providing inadequate powers for the government to direct and oversee the behaviour of individual societies.⁴ The voluntary and ambiguous nature of the current system results in inconsistent obligations and behaviours across Australia’s collecting societies⁵ and does not provide an effective mechanism to respond to criticisms from either members or licensees.⁶

These are only the most obvious places in which Australia’s regulation of its collecting societies falls short of international or even national best practice. Broad reform, including legislative amendments and mandatory guidelines that set clear standards and incorporate effective enforcement mechanisms, is necessary to ensure consistency, accountability, and transparency for the Australian collective licensing regime.

Our principal contact with respect to this review is our Executive Officer, Jessica Coates, who can be reached at jessica@digital.org.au or on 02 6262 1118.

Yours faithfully



Derek Whitehead

Chair

Australian Digital Alliance

² Ibid.

³ See for example recommendations regarding commercially significant sanctions for noncompliance at p.11 of the ACCC’s Guidelines for developing effective voluntary industry codes of conduct <https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>.

⁴ Review of intellectual property legislation under the Competition Principles Agreement, the final report of the Intellectual Property and Competition Review Committee (September 2000) https://www.ipaustralia.gov.au/sites/g/files/net856/f/ergas_report_september_2000.pdf p.127.

⁵ Compare, for example, the extreme variation in information on moneys collected and distributed provided in the Annual Reports of Australia’s different collecting societies.

⁶ See for example the ongoing legal action by the Australian Writers Guild against Screenrights and the 2014 petitions to the Code Reviewer by user groups CAG and the New South Wales Government Department of Justice. These activities saw both members and licensees request greater transparency regarding distributed funds, including a breakdown of money going to publishers versus authors. Despite recent amendments, this information is still not being provided by collecting societies.