Copyright Advisory Group to COAG Education Council

Submission to the Department of Communications and the Arts Review into the efficiency of the Code of Conduct for Australian Copyright Collecting Societies

CAG welcomes this opportunity to provide input into the Government's review of the legislative and regulatory framework governing collecting societies.

As outlined in a number of submissions over many years, CAG has long standing concerns about the lack of appropriate governance arrangements for declared collecting societies, and the practical consequences of these deficiencies. Neither the Code of Conduct, nor the existing legislative framework applying to collecting societies, provide any mechanism for the education sector to have these concerns addressed.

CAG's specific issues relate to the conduct of declared collecting societies, particularly Copyright Agency/Viscopy (Copyright Agency). Our concerns falls into two broad categories:

1. Concerns that Copyright Agency uses its market power as a monopoly declared collecting society to engage in rent seeking to such an extent that Australia has become a complete outlier; and
2. Concerns regarding a lack of transparency by Copyright Agency.

We believe that these concerns justify a significant strengthening of the governance arrangements for declared collecting societies.

A solution to these problems must be found urgently.

This submission is organised as follows:

- Part 1: Identifying the practical problems that need fixing
- Part 2: What is the proper role of a declared collecting society, and what governance arrangements should apply?
- Part 3: The context for this review - comparison of what Australian schools are paying Copyright Agency compared with what schools in other jurisdictions are paying for a broadly equivalent licence.
- Part 4: A roadmap for reform

Part 1: CAG's concerns regarding Copyright Agency's conduct

1.1 Use of market power to engage in rent seeking

Overview

CAG submits that over many years, Copyright Agency has used its market power as a monopoly declared collecting society in a manner that has led to inequitable results under the statutory licence it is declared to administer. Under Copyright Agency's administration, the statutory licence has been used to do the following:

- Create a false market for the use of freely available internet material that no one ever expected to be paid for (and for which no one else in the world is paying).
- Artificially inflate "usage" data relating to use of internet and other content by the imposition of a monitoring system that results in multiple remunerable uses being recorded for what would previously have counted as one use.
- Require Australian schools to pay millions of dollars a year in circumstances where Copyright Agency will never be in a position to distribute the money to the rights holder.
- Facilitate "double-dipping" by publishers who licence their works directly to schools in Australia and elsewhere in the world, but seek a second payment - under the statutory licence - only in Australia.
- Require schools to pay when a teacher uses an electronic whiteboard to display text.

There is also a long history of Copyright Agency seeking payment from schools for basic internet activities. For example, in 2006, Copyright Agency sought payment when students click on a link in class, or visit a website. Copyright Agency also argued that schools were required to pay under the statutory licence when they engaged in proxy caching for efficiency purposes and child protection purposes. In each of these cases, CAG was required to seek amendments to the Copyright Act (the **Act)** in order to make clear that Copyright Agency was not entitled to seek payment for these activities.

In what follows we provide more detail on each of the above points.

1.1.1 Creating a false market for the use of freely available internet material

In negotiations with the schools sector, Copyright Agency has adopted what CAG considers to be a highly unreasonable approach to the question of what internet copying Australian schools should pay for under the statutory licence.

The internet has effectively given publishing capabilities to anyone with access to a computer and the internet. A vast amount of the material that is published on the internet and made freely available (ie not behind a paywall) was published with the intention that it be freely accessed, without payment.

CAG has never objected to Copyright Agency treating as remunerable internet content that the rights holder clearly intended to commercially exploit, but we do strongly object to

schools being required to pay to use content that no one ever wanted or expected to be paid for. We have - over many years - sought to reach agreement with Copyright Agency as to the circumstances in which it will accept that freely available internet content ought to be treated as non-remunerable under the statutory licence. While those negotiations led in 2006 to Copyright Agency agreeing to exclude *some* internet content from payment when certain website terms and conditions are used, Copyright Agency has continued to treat as remunerable a great deal of content that would never attract remuneration in other jurisdictions. The following are actual examples of recorded uses of freely available internet content that were treated as remunerable by Copyright Agency in the 2016 schools copying survey:

- Telling students to print the Participation and Privacy Consent Form for the 2-15 Bebras Australia Computation Thinking Challenge
- Displaying a Spanish translation using a translation app to a Spanish class; Displaying an image of a cat on screen from www.petfinder.com.au
- Taking screenshots of course offerings at a number of universities' websites
- Taking a screenshot of a website that compares times in different cities around the world
- Telling students to print an information sheet on malaria from The Royal Commonwealth Society's website
- Telling students to print a web page from the RSPCA's website giving information about how to be an animal foster carer
- Taking a screenshot of a yellow raincoat from a Bunnings advertisement to include as a graphic in a PowerPoint presentation.

Copyright Agency has also taken steps over a number of years to actively encourage rightsholders who had no intention of commercially exploiting the content they had made freely available on the internet to rethink that choice when it comes to seeking payment from Australian schools. For example, Copyright Agency posted this message in 2009 in response to CAG advocating for an exception to permit schools to copy this kind of content without payment:

> *In 2008 Australian schools used, on average, 75 pages per student of digital content, most of which was from the internet.*
>
> *So what are some practical tips for members who want to make sure their intention to receive CAL payments for use of their web content is clear?*
>
> *Libby says taking the following practical steps will help to make it clear to people who have access to content from your website, and to CAL, that you want to receive CAL payments for educational and government use of the content:*
>
> - *providing an obvious link to your terms of use on each page of your website;*
> - *having a separate webpage for your terms of use;*

- *making your terms of use clear and consistent for each piece of content on your site;*
- *avoiding phrases that might exclude your content from payment such as 'non commercial'; and*
- *making sure there is a link to your terms of use for downloadable documents.*

*And **if you use the word "free", make sure you are clear about what uses of the content are free, and for who they are free,**' she says.*

'For example, you may wish to invite teachers to download sample pages from a resource to encourage them to purchase the resource, but you need to make it clear that use of the sample pages in class is covered by the statutory licence.' [1]

Copyright Agency's most recent messaging[2] on what **not** to do if you want to ensure that content you've made freely accessible on a website will be paid for when that content is used in Australian schools is:

Don't -

- *use any of the following phrases without qualification: 'non commercial use', 'use in your organisation', 'all rights reserved', 'free copying', 'free for education'*
- *simply prohibit commercial use (this will be treated as allowing any non commercial use, such as educational and Government use)*
- *have more than one terms of use on your site, unless it is completely clear which terms of use apply to each piece of content on the site*
- *use the word "free" without being clear about:*
  - *what is "free": for example, viewing, downloading one copy for personal use, downloading one copy to use in connection with teaching, and*
  - *for whom the use is free: for example, teachers who subscribe to your loyalty program or alert service*

1.1.2 Artificially inflating "usage" data through the imposition of a monitoring system that results in multiple remunerable uses being recorded for what in other jurisdictions would count as one use

The monitoring system that is used by Copyright Agency to measure "usage" under the statutory licence artificially inflates - to a significant extent - the amount of copying that schools are actually doing, and are thus required to pay for. By way of example, during a

[1] Copyright Agency information sheet "On Just Terms", accessed in October 2012 here: http://www.copyright.com.au/get information/about publishing/publishing news/on just terms. The link is no longer active and the content no longer appears to be accessible on Copyright Agency's website.

[2] https://www.copyright.com.au/about-copyright/website-terms/

Copyright Agency survey, teachers are asked to record whether they used electronic content that they copied or downloaded from the internet in any of the following ways:

- Download/save/copy to computer storage device
- Make available on or from network/online
- Email
- Tell student to print/copy/save
- Display or project
- Take digital photo/screenshot

The way in which this artificially inflates usage data can be seen as follows:

> *Ms Jones teaches year 1. She wants to make a copy of a scene from a play for a classroom exercise. She saves a copy of a scene from a play from an e-book to her laptop hard disk. She emails it to her school email account and then uploads it to the school's learning management system (LMS). She then uses the interactive whiteboard in the classroom to display the text to her 25 students.*
>
> *Under the monitoring system used by Copyright Agency, Ms Jones is required to record the copy made when saving the text to her laptop, the communication made when emailing it to her school account, and a further communication when she uploads it to the LMS. She would also be required to record the display of the scene from the interactive whiteboard to an audience of 25.*

Contrary to claims made by Copyright Agency, this approach to measuring usage **does** have a direct impact on the amount that schools pay under the statutory licence. While it is correct that schools pay Copyright Agency on a per-student basis (not a per copy basis), Copyright Agency relies very much on the usage data when negotiating with CAG on the per-student price for a particular period.

So far as we are aware, there is no other jurisdiction where a collecting society adopts this kind of methodology to measuring usage of copyright content in schools. CAG believes this is at least partly reflected in the fact that these jurisdictions are paying so much less than Australian schools are paying.

CAG and Copyright Agency recently engaged in a collaborative process to reach agreement on a model for a new statutory licence - as reflected in the *Copyright Amendment (Disability and Other Measures) Act* 2017 - that we had understood would enable us to go at least *some* way towards addressing our concerns with respect to Copyright Agency's approach to measuring usage, and the extent to which it has artificially inflated reported copying levels. We are currently engaged in negotiations with Copyright Agency regarding the sampling methodology and the amount that schools will pay from 2018. Unfortunately, early indications from Copyright Agency in the course of those negotiations are that far from acknowledging that the amount that schools are currently paying should be reduced on the basis that it was calculated on the back of artificially inflated usage data, they are actually seeking an uplift in payment.

1.1.3 Requiring Australian schools to pay millions of dollars a year in circumstances where Copyright Agency will never be in a position to distribute the money to the rights holder

The question arises: who benefits from Copyright Agency's insistence on treating freely available internet content as remunerable? For the most part, it's certainly not the authors or rightsholders of the content.

Prior to 2013, the beneficiaries of this money were Copyright Agency members who received the payments as a windfall. This was based on Copyright Agency's longstanding practice of retaining undistributable funds (ie funds where the relevant rights holder cannot be identified or located, or where the amount owing is less than $200) for up to four years, after which this money was distributed to Copyright Agency members who had **no** connection with the works that had been copied. As we discuss in section 1.2.1 below, since 2013, Copyright Agency has retained undistributed funds for its own purposes. In other words, from 2013 until at least 2016, no author or publisher received any of this money. Despite the fact that it is abundantly clear that no rightsholder would suffer if schools were not required to pay for this copying, Copyright Agency has strongly resisted attempts by CAG to find a solution that would result in schools no longer having to pay millions of dollars a year to copy freely available internet content and orphan works.

1.1.4 Facilitating "double-dipping" by publishers who licence their works directly to schools in Australia and elsewhere in the world, but seek a second payment in Australia

Another example of Copyright Agency using its monopoly to create false market in works is the way in which it encourages publishers who licence their content directly to the education sector to "double-dip" by seeking an extra payment under the statutory licence when content is used in the classroom.

An example of this is LearningField, a product developed by Copyright Agency in conjunction with publishers.[3] It is a subscription based service that is offered to schools, teachers and parents, and provides access to a vast range of educational content. There is a catch, however. The LearningField terms of use[4] create a carve-out for uses that would be covered by the statutory licence. Those uses are not prohibited; it's just that they are not covered by the LearningField licence fee, and must be paid for under the statutory licence. In other words, Copyright Agency has developed a product that allows publishers to "double dip": they are paid once by the school, teacher or parent who has taken out the licence, and again (under the statutory licence) when the content they have already paid for is actually used in the classroom.

[3] https://learningfield.com.au/what-is-learningfield/

[4] https://learningfield.com.au/terms-of-use/

1.1.5 Requiring schools to pay when a teacher uses an electronic whiteboard to display text

There is a long standing exception in s 28 of the Act that permits schools to display copyright content in the classroom. Copyright Agency takes the view that this exception is limited in a way that - in CAG's view - parliament did not appear to intend. They say that the exception can be relied on by teachers to display artistic works on a classroom whiteboard etc, as well as to display "non-static" text (eg display of a web page on a screen), but **not** when displaying "static text" such as a pdf.

The real world implications of this are ridiculous:

> Teacher A is an art teacher. He brings his laptop to class and plugs it into the classroom's interactive whiteboard to show students some pictures of modern art works. Copyright Agency accepts that this activity is covered by s 28 and therefore non-remunerable.
>
> Teacher B is an economics teacher. She brings her laptop to class and plugs it into the classroom's interactive whiteboard to show students the text of a page from a freely available website that discusses recently released economics data. Copyright Agency accepts that this activity is covered by s 28 and therefore non-remunerable.
>
> Teacher C is a history teacher. He found a copy of historical document on a website. He saves a PDF copy of the text to his USB drive then plugs that into an interactive whiteboard to show his class on screen. Copyright Agency refuses to accept that this activity is covered by s 28. This means that schools are required to pay when a teacher displays text in this way. That is despite the fact that the content being displayed is material that was uploaded onto the internet by the rightsholder without any expectation of payment.

CAG estimates that approximately $4.58million in 2016 licence fees could be attributed to displaying text-based content on screens in classrooms.[5] The only avenue open to CAG to have this anomaly addressed is to seek legal clarification from the Federal Court, or seek further reform of the Act.

[5] The $4.58 million figure was determined using the 2016 EUS processed dataset and setting filters for the display/project of all non-artistic works. This came to 355,114 pages, which represents 30.6% of the 2016 EUS included dataset. Based on pages, the EUS made up $14.97 million of the 2016 Part VB licence fees.

1.1.6 Copyright Agency's history of unreasonable and overly technical licensing claims

Wanting schools to pay when students clicked on a link or viewed a website

In a case that was described by a leading copyright expert as "giving copyright a bad name",[6]Copyright Agency argued that schools should pay whenever a teacher directed a student to view a website.

Copyright Agency's argument was that when a student clicks on a hypertext link to view a freely available website - for example the CSIRO website, or the NASA website - the student is "communicating" the website content to him or herself, and that the school is authorising this communication. Despite the fact that this activity occurs in homes, businesses and classrooms all around the world, every day, without anyone having to pay, Copyright Agency argued in the Copyright Tribunal in 2006 that Australian schools *should* be paying for it. In other words, a teacher asking a student to go to the library to read a book would not attract a payment, but a teacher telling the same student to browse a website would. This became known colloquially as the "tell students to view" case.

Associate Professor Kim Weatherall described the case this way:

> *Please, someone, tell me what I'm missing here. Because if I could see a reason why copyright owners were suffering as a result of teachers telling their students to view material online, I would perhaps be more inclined to be sympathetic. But I'd be grateful if anyone could enlighten me how there is any loss to copyright owners here.*
>
> *I also don't think that the government ever intended such a result – that schools would pay for telling people to look at stuff.*

Schools were confident that the law was on their side. The Government had, after all, enacted a temporary copying exception that the Explanatory Memorandum to the Digital Agenda reforms said was "intended to include the browsing (or simply viewing) of copyright material."[7] Despite this, schools were forced to spend public money resisting Copyright Agency's claim in the Copyright Tribunal. The dispute was only resolved when the schools requested that the Government amend the Act to make clear that a person who merely clicks on a hyperlink to gain access to a website is not exercising the right of communication. This is now made expressly clear in s 22(6A) of the Act.

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[6] See 2006 blog post on the case by Associate Professor Kim Weatherall http://www.lawfont.com/2006/03/03/shutting-down-the-internet-in-australian-schools-surely-not/

[7] Copyright Amendment Bill 2006, Explanatory materials for Exceptions and other Digital Agenda Review measures p 5.

Wanting schools to pay when they undertook caching for efficiency and child protection purposes

Copyright Agency also saw an opportunity to seek payment from schools for caching. Schools use this technology for a number of reasons, including to improve the efficiency of their IT systems as well as to ensure that students are not exposed to inappropriate internet content.

In 2006, the then Copyright Agency CEO Michael Fraser told Copyright Agency's members: "new technology brings new uses ...such as caching" which "*provide opportunities for rights holders to seek payment.*"[8]

No one in the world was paying for this kind of caching, but Australian schools were faced with the very real prospect of being forced to pay for caching under the educational statutory licence. This was averted only by schools asking the Government to enact a new exception - s 200AAA - to ensure that they were not required to pay for this activity.

1.2 Lack of transparency

CAG has also raised with successive governments since at least 2000 our concerns regarding a lack of transparency by collecting societies, particularly Copyright Agency. The existing arrangements have proved completely inadequate to ensure that the interests of statutory licensees are taken into account.

Would greater transparency address our concerns regarding excessively high licence fees?

The Department has suggested that greater transparency from collecting societies as to the methodologies adopted by them to set fees may help relieve CAG's concerns that fees are overinflated due to a lack of competition.

In our submission, greater transparency regarding the distribution of statutory licence funds - particularly undistributed funds (which we discuss below) - may go some way towards this, as it would potentially provide CAG with a more equal footing to negotiate a fair licence fee based on the fact that a large percentage of what is being copied should properly be treated as non-remunerable. It would not, however, be a complete answer. The concerns that we discuss in section 2.1 below regarding the appropriate role for a declared collecting society are also - in our submission - highly relevant when seeking to understand why Australian schools are paying excessively high licence fees.

Part 3 of this submission highlights the stark difference between Australian and international licence fees.

[8] Michael Fraser, Copyright in the Digital Age, May 2006

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, which are required to ensure value for money and accountability of public funds. The obligation to spend public money responsibly is entrenched in law and policy. All governments in Australia, both Commonwealth and State, have procurement policies which require organisations to ensure 'value for money' and appropriate expenditure of public funds.

1.2.1 Lack of transparency regarding undistributed funds

Perhaps the most egregious example of Copyright Agency's lack of transparency is creation of the Future Fund in 2013, which resulted in funds that were previously distributed to Copyright Agency members instead being retained by Copyright Agency for use in its own advocacy.

Copyright Agency Future Fund

In January 2017, CAG became aware that Copyright Agency had changed the way that it deals with "undistributed funds".

As we have discussed in section 1.1.3 above, prior to 2013, Copyright Agency had a policy of retaining this money in trust for four years, after which it was paid to Copyright Agency members who had no connection with the content that had been copied. CAG has raised concerns regarding this practice over many years, including with the ALRC during its Copyright and the Digital Economy review, and with the Productivity Commission. The Productivity Commission shared CAG's concerns: it said that any undistributable funds should be returned to the education departments that have paid to use the content. [9]

Unbeknown to CAG and the Productivity Commission, however, in 2013 Copyright Agency adopted a new policy. Rather than distributing unclaimed funds to other rights holders whose works have been copied by schools, Copyright Agency began retaining these funds, and paying them into what it describes as a "Future Fund", whose purpose is to finance Copyright Agency's campaign against the copyright reforms being sought by the education sector [10].

In the period 2013 to 2016, Copyright Agency also paid all interest earnings on statutory licence payments into the Future Fund. In just three years, the size of this fund grew significantly: [11]

- $5.1 million as at 1 July 2014 (the first year of the Future Fund)
- $9.3 million as at 30 June 2015

[9] Productivity Commission Intellectual Property Arrangements Inquiry Report, September 2016, p 160

[10] Copyright Agency 2015/2016 Directors' Report, p 26 http://copyright.com.au/wp-content/uploads/2015/04/TCA4906-Copyright-Financials-30-June-2016.pdf

[11] Copyright Agency 2015/2016 Directors' Report, p 14 http://copyright.com.au/wp-content/uploads/2015/04/TCA4906-Copyright-Financials-30-June-2016.pdf

- $15.5 million as at 30 June 2016.

In other words, over the course of three years, Copyright Agency amassed a fund worth **$15.5 million** - collected from public education budgets and from Catholic and Independent schools - to fund its campaign against fair use, instead of being returned to education budgets or paid to Australian authors and publishers.

Copyright Agency has described the proposed fair use exception as a "challenge to our business model". [12] This, in our submission, is telling, and goes to the heart of what should be the appropriate role of a declared collecting society.

Notwithstanding that the Future Fund was established in July 2013, there was **no mention** of it in Copyright Agency's 2013/14 Directors' Report and Financial Report. The first mention of the Future Fund appears in the 2015 Directors' Report and Financial Report (a separate document to the Annual Report): [13]

> *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 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.*

The **only** reference to this in the 2014/15 Annual Report is the following statement, together with the following cryptic footnote:

> *An allocation that has not been paid to a rightsholder after four years is 'rolled over'. The Board determines how funds rolled over are applied for the benefit of members. 83*
>
> 83 *See Note 4 in Notes to Trust Account Statement in Directors' Report and Financial Report regarding the allocation of amounts rolled over to the Future Fund in 2014–15*.

In other words, it was necessary to trawl through the Directors' Report and Financial Report in order to become aware of this significant change of practice in the treatment of undistributed funds. At no point did Copyright Agency seek to clarify its position when CAG - and the Productivity Commission - raised concerns (based on their understanding of Copyright Agency's practice) that statutory funds were being distributed to rightsholders who had no connection with the works that had been copied by schools and universities. There is no mention of this change in policy in Copyright Agency's response to the Productivity Commission's final report, notwithstanding that it is clear from that report that the Commission

[12] http://copyright.com.au/wp-content/uploads/2015/04/CopyrightAgency-AGMMinutes-2012-13.pdf
[13] http://copyright.com.au/wp-content/uploads/2015/04/CA-financials-2015-FinalLR.pdf p 26

was clearly under the misapprehension that Copyright Agency was continuing to distribute these funds to rightsholders.

This lack of transparency regarding a practice that Copyright Agency must of known would be highly controversial is - in our submission - not good enough.

1.2.2 Lack of transparency as to how Copyright Agency spends statutory funds

CAG also has concerns regarding the lack of transparency as to how Copyright Agency *spends* statutory funds. For example, there is no information in either the Directors' Reports or the Annual Reports to indicate what activities have been financed by the Future Fund. It is, however, apparent from a review of the Annual Reports for period 2011/2012 to 2015/2016 that Copyright Agency has spent almost $2 million on marketing and communications since the Future Fund was established. That amount is over and above the almost $2.3 million that Copyright Agency has spent on consultancy fees since 2011/2012.

There is also a very large spend each year that is listed in the accounts as "other expenses" ($7.8 million since 2011/2012), but again, no information is provided as to what these "other expenses" were. So far as CAG has been able to ascertain from the information that is publicly available (see table below), it appears that the marketing and communications spend of $645,275 in 2013/2014 may have been included in the amount listed under "other expenses".

Year	Consultancy costs	Marketing and communication costs	"Other expenses" **(This is a category that appears in the accounts each year. There is no information on what spending comes under this category)**
2011/2012	$321,227	-	$1,679,181
2012/2013	$447,197	-	$1,795,350
2013/2014	$601,471	$645,275 There is no mention of any amount being spent on marketing and communications in the 2013/2014 Directors' Report and Financial Statement. This information only	$1,810,390

		appears in the 2014/2015 Directors' Report and Financial Statement. P 11 However, from our review of the information that it is publicly available, it appears that there was money spent on marketing and communications in 2013/2014, but that this was included in the item that appears in the accounts headed "other expenses": In the 2013/14 Directors' report, the amount for "other expenses" is listed as $1,810,390 for that year. The 2014/15 Director's Report, however, lists the amount spent on "other expenses" in 2013/2014 as being $1,165,115. The discrepancy would be explained if the marketing and communications spend was rolled into the "other expenses" column on the 2013/2014 accounts, but separated out in the 2014/15 accounts.	
2014/2015	$476,500	$687,437	$1,353,712
2015/2016	$439,397	$575,433	$1,247,153

Given the large proportion of Copyright Agency's revenue that comes from public education budgets, this lack of disclosure and transparency about expenditure is in CAG's view inconsistent with CAG's obligations to ensure appropriate expenditure of public funds.

1.2.3 Lack of transparency regarding the extent to which authors benefit from the monies paid by the education sector

For many years, CAG has sought more transparency with regards to the distribution of statutory licence revenue between classes of recipient (for example, the breakdown between authors and publishers, or domestic and international royalty recipients). This information is not sensitive, nor confidential. Access Canada's annual report provides similar information

in a simple infographic format.[14] So too does the UK equivalent collecting society, Copyright Licensing Agency. [15]

This information would not only benefit licensees in assessing market-based licensing opportunities, but also authors and creators in targeting their work to education markets, and having better visibility of the flow of royalty distributions.[16]

Some of these concerns have been addressed in recent changes to the voluntary Code of Conduct, but as we discuss below, we have real concerns about the process by which the Code was amended to address this.

Part 2: What is the proper role of a declared collecting society, and what governance arrangements should apply?

2.1 What is the proper role of a declared collecting society?

The primary purpose of a declared collecting society such as Copyright Agency is to carry out its *statutory* functions; ie administering the statutory licences in VB of the Act and the government statutory licence in Pt VII Div 2 of the Act). It is clear from Copyright Agency's own governance materials, however, that it understands its role as declared collecting society for the education and government statutory licences as extending far beyond merely administering these licences. Copyright Agency lists its strategic objectives as including achieving a "growth in licensing revenue" and advocating for "legislative outcomes which continue to support collective licensing". [17]

CAG submits that it is entirely appropriate for a collecting society to be motivated to expand the scope and profitability of its *commercial* licensing arm(s). We do, however, have significant concerns about these profit motives being similarly applied to statutory functions. We also have concerns about the fact that Copyright Agency staff appear to have a vested interest in ensuring that there continues to be a "growth in revenue" from educational and government licensees.

Each year, the Copyright Agency Annual Report contains a table that sets out the number of Copyright Agency staff in certain pay levels. In 2015-16 (the last year for which information is available) there was:

- one employee in the $250-$299K level
- one employee in the $300-$349K level; and
- one employee in the $350K+ pay level.

[14] Access Canada Annual Report 2015, pp7-8.
[15] https://www.cla.co.uk/sites/default/files/Distribution%20Model%20Report.pdf
[16] See CAG submission the Department of Industry, Innovation and Science Consultation on recommendations from the Productivity Commission's Inquiry into IP Arrangements, pp 13-15 for more on this.
[17] See Copyright Agency's 2014/2015 Directors' Report and Financial Report, p 4 http://copyright.com.au/wp-content/uploads/2015/04/CA-financials-2015-FinalLR.pdf

These are base salary levels. They do not include incentive payments, which are tied to Key Performance Indicators (**KPIs**). In recent years, the annual reports have provided no information as to what those KPIs are, but earlier annual reports (which are no longer available on the Copyright Agency website) make clear that they include "delivering **growth** in corporate and **statutory licences**".[18] In other words, the incentive payments of senior Copyright Agency employees are tied directly to ensuring that statutory licensees - ie the education sector and governments - continue to pay more. So far as we are aware, Copyright Agency has never provided information on the amount of incentives payments made in any particular year.

We have no concern with Copyright Agency tying executive incentive payments to increases in commercial licensing income: the reward here would be for finding and exploiting new commercial licensing opportunities. It is quite a different matter, however, when it comes to educational licensing. Providing a financial incentive to extract higher payments from publicly funded entities that are *already* licensees potentially creates an incentive for the kind of over-reach that we have described above in section 2.1. Further, CAG believes it is outside of the proper role of a declared collecting society.

CAG also has serious concerns about the appropriateness of a declared collecting society using funds obtained via its statutory functions - $15.5 million in the case of the Future Fund - to engage in advocacy intended to influence government policy beyond that linked to the fulfilment of its role as a declared collecting society. CAG does not believe that it is appropriate that a declared collecting society uses revenue obtained from the statutory licence to advocate against the very reforms sought by the entire Australian education sector.

> Schools are advocating for fair use so that they will no longer have to pay Copyright Agency when they use orphan works and freely available internet content. Copyright Agency is using the money that schools pay for these uses to lobby against this reform, which self evidently would cause no harm to rightsholders.
>
> This makes no sense at all. The only winner here is Copyright Agency, which gets to continue receiving payments from the education sector that cannot be distributed to rightsholders.

2.2 What governance arrangements ought to apply to declared collecting societies?

In our submission, governance arrangements applying to declared collecting societies must be capable of addressing each of the two concerns we have raised; ie the abuse of

[18] See, for example, the 2006-2007 Annual Report which was accessed via the Web Archive: https://web.archive.org/web/20080719121153/http://www.copyright.com.au/corporate/CAL_AR07_Web.pdf, p 53

monopoly power that has led to rent seeking, and a lack of transparency. The current governance arrangements do not meet this requirement.

With respect to abuse of monopoly power, in theory, the jurisdiction of the Copyright Tribunal to determine "equitable remuneration" (in the event that schools and Copyright Agency are unable to agree to this) should operate as a potential break on the capacity of Copyright Agency to abuse its monopoly position. In practice, however, this does not occur. The main reason for this is the extremely high cost of Tribunal proceedings, together with the length of time that these proceedings take (typically 12-18 months or more). A further shortcoming, in our submission, is that there is no statutory obligation on the part of declared collecting societies to take into account the interests of statutory licensees. Such an obligation may operate to put a break on Collecting societies' unreasonable exercise of monopoly power.

2.2.1 The legislative framework

CAG submits that the legislative framework for regulating collecting societies should be reformed to impose a statutory obligation on the part of declared collecting societies to take into account the interests of statutory licensees as well as the interests of their own members. One way to achieve this would be to amend ss 113W (1)(d), 113X (1)(b) and 113Z (5) of the Copyright Act 1968, as amended by the *Copyright Amendment (Disability and Other Measures) Act* 2017, to include obligations towards statutory licensees.

The legislative obligations should also ensure that the relevant Minister has the appropriate powers to review and make determinations regarding the formal structure and conduct of declared collecting societies, including powers to review and require changes to a society's Constitution, distribution arrangements or reporting obligations.

An illustration of the problem

On the current state of governance arrangements applying to declared collecting societies, Copyright Agency appears to have complete discretion to retain undistributed funds in the way that it has with the Future Fund.

Copyright Agency has purported to rely on article 74(b)(ii) of its Constitution to set up the Future Fund. This article provides as follows:

RECEIPT AND ALLOCATION OF EQUITABLE REMUNERATION
74 (a)..
.

(b) Payments from ER Fund to the Company

There shall be paid to the Company from the ER Fund as provided by Article 74(c) in respect of each Accounting Period the following amounts:

(i) ….

(ii) except to the extent to which provision is made under paragraph 74(d)(i), such amounts as the Directors consider to be reasonable to meet the anticipated expenses of and incidental to the collection, allocation and distribution of Equitable Remuneration of future Accounting Periods; and

(iii) …

It appears from this that Copyright Agency has characterised spending on anti-fair use advocacy as being spending that is "incidental to the collection, allocation and distribution of Equitable Remuneration of future accounting periods".

In our submission, this underscores the need for a review of the governance arrangements applying to declared collecting societies. There is something seriously wrong with a governance regime that leaves it to a declared collecting society to decide for itself whether to spend millions of dollars of public funds received from schools, universities and government on public relations campaigns and advocacy, rather than distributing this money to rights holders (or returning it to Australian schools as suggested by the Productivity Commission).

2.2.2 Collecting society internal governance arrangements

The concerns that we have outlined above regarding profit motives being applied to statutory functions could, in our submission, be addressed to some extent by ensuring that there was a clear separation between the statutory and commercial functions of declared collecting societies. CAG submits that the statutory functions should be limited to negotiating with licensees regarding the amount of equitable remuneration to be paid under the statutory licence, collecting information about uses made in reliance on the licence, and ensuring the collection and appropriate distribution of equitable remuneration paid under the licence.

We believe the model adopted for structural separation of Telstra between its wholesale and retail arms may be a useful starting point for considering how to achieve greater separation between the statutory and commercial functions of the declared collecting societies.

In the telecommunications context, various models have been explored to ensure transparency and arms-length operations between retail and wholesale divisions, where it is acknowledged that (broadly speaking) wholesale operations have statutory obligations in relation to competitive carriers, whereas retail operations deal directly with customers, and operate commercially with commercial incentives and shareholder obligations with regards to profits and dividends.

The following models have been explored in Australia:

- Accounting separation (simplistically, the maintenance of separate accounts and arms-length transactions between wholesale and retail operations)[19];

[19] See for example the introduction of accounting separation for Telstra in 2003 http://www.theage.com.au/articles/2003/06/27/1056683892703.html; the Australian Competition and Consumer Commission (Accounting Separation—Telstra Corporation Limited) Direction (No. 1) 2003; and Instrument of Revocation 2014

- Functional or operational separation (simplistically, maintaining separate operations between functions within the same legal entity)[20];
- Structural separation (the creation of completely separate business entities between retail and wholesale operations)[21].

We do not suggest that full structural separation is necessarily warranted: we acknowledge that there can be many efficiencies obtained by the statutory and commercial functions of a collecting society sharing premises and administrative resources, as well as processing and distribution mechanisms. However, we believe that against the background of limited legislative oversight and ineffective formal regulatory scrutiny, it is time to explore whether operational separation is required in order to address the concerns that we have outlined.

2.2.3 Code of Conduct and Code review process

In CAG's submission, the Code of Conduct (the Code) has proved to be completely ineffective as a means of dealing with statutory licensee concerns. That's perhaps not surprising given that there are no obligations in the Code for collecting societies to behave fairly towards licensees or to have regard to licensee interests. We do not, however, consider that the problems that we have identified can be fixed by making changes to the existing Code. As we discuss in more detail below, we consider that there is a need for a broader reform of the governance arrangements applying to declared collecting societies. For that reason, we do not see any merit in putting forward suggestions for amending the Code.

The process for reviewing the Code - a triennial review by a retired Federal Court judge - is also ineffective. It has proved totally inadequate for undertaking a root-and-branch review of the kind that in our view is warranted.

By way of illustration, CAG sought, and failed, to have concerns regarding lack of transparency addressed during the 2014 triennial review process. CAG and the State of NSW had each sought greater transparency/disclosure with regards to the distribution of statutory licence revenue between classes of recipient (for example, the breakdown between authors and publishers, or domestic and international royalty recipients). CAG believes that this type of information should be transparently reported as a matter of course. It is in Canada, for example. The equivalent to Copyright Agency in Canada, Access Copyright, provides detail about how royalties are split between authors and publishers.[22] However, these requests for information about the distribution of (mostly) public funds were decided to be too substantial for the triennial review, so a supplementary review was undertaken. That second review concluded that it would take an "investigation far broader than that which is expected of the triennial review and than that which I am capable" in order to reach the

[20] See for example http://www.ictregulationtoolkit.org/en/toolkit/notes/PracticeNote/3286 ; http://www.itnews.com.au/news/bt-functional-separation-was-a-success-159659;
[21] See for example https://www.communications.gov.au/what-we-do/internet/competition-broadband/telstras-separation-framework ; http://www.hlmediacomms.com/2016/07/27/a-conscious-uncoupling-ofcoms-proposals-for-openreach/
[22] Access Canada Annual Report 2016, p8

correct decision.[23] In consequence, no recommendation was made. It is significant that the Code Reviewer noted that his decision not to recommend the change urged by CAG and the State of NSW should **not** be taken to suggest that their concerns were without merit, but rather that the code review process was not an appropriate mechanism to address these concerns. The Code Reviewer offered three options for the parties seeking Code amendment:

- they could seek a related ruling from the Copyright Tribunal, which may address some of the practical outcomes while not changing the fundamental basis of the Code and practices;
- the Minister for Arts could be approached; or
- they could muster political support for changes to the Act.

With respect to the first option - seeking a ruling from the Copyright Tribunal - CAG submits that this is not an appropriate alternative. It should not be incumbent on schools to commence time consuming and costly Copyright Tribunal proceedings in order to obtain access to information as to how the approximately $90 million that the sector pays each year to Copyright Agency and Screenrights has been distributed. There should be an obligation to provide that information.
CAG submits it is clear evidence of a failure of governance arrangements that the only other identified options were to approach Government seeking legislative change.

We note that in March 2017 - ie 18 months after the Code Reviewer published his report - the Code was amended to address some (but not all) of the issues that CAG raised in the 2014 Code review. CAG was not informed of this prior to this amendment being made, or consulted in any way, and became aware of it only due to it being referred to in the Department's Discussion Paper. While we welcome the fact that the collecting societies have seen fit to address *some* of our concerns regarding lack of transparency, we would make the following comments:

- Firstly, the fact that the Code reviewer felt unable to direct the collecting societies to make these amendments in itself highlights the lack of sufficient oversight created by the code framework. There should be a formal mechanism to ensure that collecting societies operate with the kind of transparency that CAG has been seeking. As the Discussion Paper notes, "accountability generally involves an external body with the ability to seek answers, demand responses and impose sanctions".
- Secondly, the Code is not mandatory. Any collecting society would be free to opt to no longer be bound by it.
- Thirdly, the fact that there was nothing to compel the collecting societies to consult with licensees regarding this change is of concern in itself.

One of the central recommendations of the 1995 Simpson Review was the creation of an Ombudsman for collecting societies. The report stressed that such a role should be

[23] Lindgren K Supplementary Report of the Code Reviewer (The Hon K E 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 October 2015, p 50

"independent of, not a creature of, the societies".[24] CAG submits that this central recommendation of independence is as critical today as it was in 1995. An alternative approach - which was raised by the Commissioners at the Productivity Commission's public hearing on 27 June 2016 - would be for the ACCC to be made responsible for oversight of collecting societies. We would support such a reform. Such an oversight role for the ACCC would be consistent with the policy outcomes that the Government is seeking to achieve through the proposed repeal of s 51(3) of the *Competition and Consumer Act* 2010; ie ensuring that there is appropriate regulation of anti-competitive conduct associated with IP licensing arrangements.

Part 3: Putting this review in context

The cumulative effect of the lack of governance arrangements for collecting societies, combined with the practical problems identified in this submission, is that Australia has become an international outlier in terms of the amount of education budgets allocated to copyright licensing per student.

Australia is not alone in having collective licensing of educational use of content. We are, however, *well and truly alone* when it comes to amount of money that our schools pay for this. By way of example, here's a comparison of what Australian schools are paying Copyright Agency compared with what schools in other jurisdictions are paying for a broadly equivalent licence:

Country	**Schools price per FTE (Part VB statutory licence of equivalent)**
Australia	$16.93
UK	A$3.26
New Zealand	A$1.60 - primary A$3.20 - secondary
Canada	A$2.41

CAG is currently involved in negotiations with Copyright Agency in which it is seeking a substantial uplift from the approximately $65 million that schools are currently paying. This is **in addition** to the estimated $700 plus million that Australian schools pay each year to purchase educational content for schools.

Copyright Agency frequently claims that the Australian statutory licence is "admired throughout the world" because it allows "schools and universities to copy and share everything published in the world". The trouble with this claim is that schools in these other

[24] Simpson Review of Australian Collecting Societies, July 1995 , Executive Summary p5

jurisdictions are - with some minor exceptions[25] - able to do pretty much everything that Australian schools are. The difference between us and them has much less to do with what can and does get copied in schools, and much more to do with the legislative framework governing educational copying in Australia. That includes not only Australia's deficient copyright exceptions regime (which has been the subject of other submissions), but also the regime governing the operation of declared collecting societies.

Part 4: A roadmap for reform

While we appreciate that this review has been established to review the Code, and to recommend changes to the Code that would improve the transparency and accountability of collecting societies, it is our firmly held view that the problems that we have identified in this submission require a more holistic response. They are not capable of being addressed by simply making changes to the Code.

A fit-for-purpose regulatory framework for declared collecting societies should, in our view, have at least the following features:

- Legislative provisions of the kind we discuss in section 2.2.1 above which impose obligations on declared collecting societies with respect to licensees as well as to their members.
- Power for the relevant Minister to review and make determinations regarding the formal structure and conduct of declared collecting societies, including powers to review and require changes to a society's Constitution, distribution arrangements or reporting obligations.
- Mandatory guidelines that set out the information that must be provided in a declared collecting society's annual report. This should include, at a minimum, the information that CAG requested in its submission to the 2014 triennial code review: see Annexure C to the Supplementary Report of the Code Reviewer.[26]
- A requirement that there be a very clear separation between a declared collecting society's statutory functions and any commercial functions that the society may also exercise with respect to non-statutory licences. Further consideration should be given as to whether a form of operational separation is required in order to fully achieve this.
- Independent oversight of a declared collecting society's compliance with its statutory obligations, preferably by the ACCC.
- The Declaration of Collecting Society Guidelines needs to be updated to reflect the new statutory licensing arrangements following the enactment of the Copyright Amendment (Disability and Other Measures) Act 2017. CAG submits that this should

[25] For example, the UK schools licence does not cover use of newspaper content. While it is true that the UK, Canadian and New Zealand collecting societies can only licence content that is contained in their repertoire, it is also the case that these repertoires are extensive. Australian schools neither want, nor need, to be able to "copy everything in the world".
[26] https://www.screenrights.org/sites/default/files/uploads/Triennial_Supplementary_Report_-_Oct_15.pdf

be done in conjunction with a further consultation process to consider what should be included in the updated Guidelines.

We look forward to engaging further with the Department and other stakeholders on the matters outlined in our submission.