14 March 2018

Copyright Code Review

Director, Economic Research

Bureau of Communications and the Arts

GPO Box 2154

CANBERRA ACT 2601

Dear Director

**REVIEW OF CODE OF CONDUCT FOR AUSTRALIAN COLLECTING SOCIETIES: APRA AMCOS RESPONSE TO DRAFT REPORT**

APRA AMCOS is grateful for the opportunity to respond to the Bureau’s Draft Report dated February 2018. We would be pleased to elaborate on any of the matters raised in this letter, if that would be helpful.

**Draft Recommendations 1 -3**

The Bureau proposes amendments that refer, among other things, to “equitable” outcomes and operations. APRA AMCOS notes that the word “equitable” reflects the wording (“equitable remuneration”) of the educational and government statutory licences in the Act, and as such could perhaps be interpreted more narrowly that the broader references to “reasonableness” contained in other parts of the Copyright Tribunal’s jurisdiction.

*In principle APRA AMCOS supports Draft recommendations 1 and 2 but observes that the word “equitable” might be more appropriately replaced with “reasonable”*.

*APRA AMCOS supports Draft Recommendation 3 as drafted*.

**Draft Recommendation 4**

APRA AMCOS supports, and adheres to, the transparency requirements of the Code. The Draft Report’s discussion of the issues around transparency highlights the difficulty of drafting targeted provisions of a Code that will be applicable to all collecting societies.

For example, the criticisms made by the schools sector reflect very different concerns to those expressed by Live Performance Australia, and a Code that must address the concerns of such disparate licensee groups must of necessity be general in nature. APRA AMCOS is concerned that if the Code is too specific as to obligations of transparency regarding licence fees and distribution arrangements, it will impose obligations on all societies that may be incompatible with their other obligations (as is arguably the case in Draft Recommendations 1 and 2).

Given that a number of allegations by Live Performance Australia (**LPA**) regarding APRA AMCOS’ conduct have been included in the Draft Report, APRA AMCOS would like to take this opportunity to respond on the record. APRA AMCOS trusts that in the interests of publishing a balanced report which will be made available to the public, the Bureau will include APRA AMCOS’ response to LPA’s allegations in its Final Report.

The Draft Report refers to an allegation from LPA that “following reclassification [by APRA from one event tariff rate to another] one of their members was invoiced almost $150,000 for an event that they had paid approximately $5,000 for the previous year. LPA states that collecting societies need to provide more information around the classification / re-classification of licences.” (*Draft Report, p. 18*).

The dispute to which the LPA refers involved the question of whether a particular series of events should be licensed as a Special Purpose Featured Music Event or as a Sporting Event. In previous years APRA AMCOS had licensed the events as a Sporting Event, but on attending the event one year, considered the events were more appropriately licensed as a Special Purpose Featured Music Event in future years. APRA AMCOS explained its new position to the promoter in advance, in writing and provided reasons for the change in approach. The promoter then entered into and reported under the Special Purpose Featured Music Event for the next event. Only on receiving the invoice did the promoter dispute the new classification of the event. To resolve the dispute, APRA AMCOS invited the promoter to explain the basis on which it disputed the new classification, which APRA AMCOS considered in good faith. Despite APRA AMCOS holding the view that either licence scheme could arguably apply to the events, APRA AMCOS agreed to apply the Sporting Event licence scheme that resulted in payment of a much lower licence fee. Contrary to LPA’s submission and the inference of the Draft Report, APRA AMCOS in fact provided the promoter with detailed information around the reasons for its re-classification of the events, considered in good faith the promoter’s opposing view, and ultimately agreed to resolve the dispute in the promoter’s favour, without the need for ADR or Copyright Tribunal proceedings.

The Draft Report also refers to a submission from LPA that “some of its members have been subject to licence fee arrangements wherein costs have changed without notice or explanation.[In particular] … licence fees for free admission events that were previously calculated according to gross expenditure on live artist performers have now been broadened to include transport and freight costs.” (*Draft Report, p. 18*). APRA AMCOS rejects LPA’s assertion that it has changed the way it calculates licence fees under its event licences. The current event licences offered by APRA AMCOS have been in place since around 1991 in the case of the Concert Promoters licence scheme, 2004 in the case of the Featured Music Event licence scheme and 2008 in the case of the Dance Parties licence scheme. APRA AMCOS also notes that complaints regarding the alleged conduct could have been made under the current Code, but were not.

In relation to Draft Recommendation 4, APRA AMCOS supports any recommendation that requires transparency around the *calculation* of licence fees; however we observe that the concerns expressed by licensee groups are directed more towards the *formulation* of tariffs. As previously submitted, APRA AMCOS is required to consult, and does consult widely on the formulation of all new licence schemes. 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.

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. The Code should not require transparency of privileged material.

Further, in the ordinary course of its business, APRA AMCOS collects an extraordinary amount of data in relation to licence schemes generally. Even absent the confidentiality and privilege issues discussed above, it would be unreasonably burdensome if APRA AMCOS were compelled to disclose that data to any licensee that wished to have “transparency” regarding the formulation of a licence scheme.

We also note that no licensee is required to disclose to APRA AMCOS any of its modelling or data in connection with the formulation of a new licence scheme, and for APRA AMCOS to be required to do so in the absence of a reciprocal obligation would place it at a significant commercial disadvantage in negotiations. Of course, in a Copyright Tribunal proceeding or Expert Determination process, both sides would typically disclose their respective modelling or data, subject to an appropriate confidentiality regime.

APRA AMCOS publishes plain English Guides to all licence schemes, which provide detailed information into the way the relevant scheme operates. APRA AMCOS licensing staff are expert in the application of particular licence schemes, and APRA AMCOS does not see the need to appoint an additional “contact officer.”

Finally, APRA AMCOS strongly disputes LPA’s submission that “member feedback indicates that APRA is not advising licence applicants that ADR is available, particularly where there is a potential dispute.” (*Draft Report, p.26*). All APRA AMCOS member services and licensing staff are familiar with the availability and operation of APRA AMCOS’ independent ADR facility *Resolution Pathways*, and its existence is well publicised and regularly drawn to the attention of licensees. APRA AMCOS has information about the facility on the home page of its website, as well as numerous other landing pages directed towards licensees. The facility is referred to in every APRA AMCOS licence agreement. The facility is referred to in every piece of correspondence emanating from APRA AMCOS’ dispute resolution team, and in all its legal correspondence. LPA was one of the many parties that participated actively in the development of the facility. An LPA representative is on the steering committee that supervises the ongoing operations of the facility. In these circumstances APRA AMCOS is surprised by LPA’s submission that its members are unaware of APRA AMCOS’ ADR facility.

*For all of these reasons, APRA AMCOS does* ***not*** *support Draft Recommendation 4 as it is currently drafted*.

**Draft Recommendations 5 and 6**

APRA AMCOS provides highly detailed and confidential distribution information to each member, and member services staff members are also available to discuss distributions at any time.

APRA AMCOS distribution rules and policies are made available to the public on its website, and APRA AMCOS publishes summary information about distributions in its annual Year in Review document which is also made available on the website.

As previously submitted, and as noted in the Draft Report, APRA AMCOS would strongly object to any amendment to the Code that required disclosure of distributions made to particular members. APRA AMCOS does not quite understand what it is envisaged would be published as a result of Draft Recommendation 5.

*If it is the intention that each collecting society should report, on an industry level, or where appropriate (see below) on a scheme-by-scheme basis, the total amount of revenue distributed to members, APRA AMCOS would support Recommendation 5*.

However, 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. Similarly, disclosure of amounts distributed under particular distribution pools where there is a single licensee for that pool, would amount to a disclosure of confidential information that might be actual revenue, or relative market position, that would be in breach of APRA AMCOS’ confidentiality obligations.

Similarly, APRA AMCOS does not quite understand what it is envisaged would be published as a result of Draft Recommendation 6.

*If it is the intention that a licensee could reasonably request anonymised information regarding the distribution of revenue under a licence scheme to which that licensee was a party, then provided no rightsholder could be identified by the provision of that information, APRA AMCOS would not object to Recommendation 6*.

**Draft Recommendation 7**

APRA AMCOS is not aware of any member concerns with its distribution rules or practices that have been ventilated through the Bureau. APRA AMCOS distribution rules and policies are developed by management in consultation with the membership, including the Membership and Distribution Committee of the Board and several working parties in particular licence areas. APRA AMCOS is a member based organisation, and is highly responsive to issues with distribution policies generally, and in particular when raised by members.

Except to the extent that they are directly affected, APRA AMCOS does not believe that licensee groups are relevant stakeholders for the purpose of developing distribution policy. For example, if APRA AMCOS were to develop a distribution policy that depended on every licensee providing detailed logs of music use, it would be relevant to consult with licensee groups on that issue in the context of negotiating the terms of the relevant licence scheme. However, a matter such as the weighting of a particular music use for distribution purposes is not a matter which should properly concern licensees.

APRA AMCOS agrees that information about distribution policies should be clear and accessible to all relevant stakeholders.

*Accordingly, APRA AMCOS supports Draft Recommendation 7 to the extent that it refers to the publication of a plain English information regarding the distribution policies, and otherwise to the extent that affected stakeholders comprise relevant members, but not otherwise*.

**Draft Recommendations 8 - 10**

While we believe that distribution issues are largely a private matter between a society and its members and affiliates, APRA AMCOS understands the concerns expressed regarding undistributed revenue. As the Draft Report notes, there are many reasons why revenue may remain undistributed at the end of any accounting period. APRA AMCOS regularly reviews its processes and takes steps to ensure that undistributed amounts do not reach levels that cause concerns for the membership.

*APRA AMCOS supports Draft Recommendation 8, provided the level of detailed reporting required is reasonable*.

*APRA AMCOS supports Draft Recommendation 9*.

*APRA AMCOS supports Draft Recommendation 10, provided the costs of establishing and maintaining such a portal are not unreasonable*.

**Draft Recommendation 11**

APRA AMCOS respectfully agrees that it would not be appropriate for the Code Reviewer to have a role in reviewing licence fee pricing. As noted in the Draft Report, the Copyright Tribunal of Australia ultimately has jurisdiction over such matters, although APRA AMCOS rarely refer schemes to that forum. The majority of licence schemes offered by APRA AMCOS represent the results of industry consultation and negotiation.

*APRA AMCOS supports Draft Recommendation 11*.

**Draft Recommendation 12**

APRA AMCOS does not endorse comments made by licensee groups regarding the operation of the Tribunal, and notes that those proceedings where legal expenses are high are also those where the licence fees at stake are significant and the parties are substantial. APRA AMCOS also notes the draft practice note issued by the Copyright Tribunal, which suggests that matters may in future be conducted with increased expediency where appropriate. APRA AMCOS would not support any attempt to reduce the jurisdiction of the Tribunal.

APRA AMCOS has a state of the art, purpose designed independent ADR facility that complies with APRA’s authorisation under the *Australian Competition and Consumer Act 2010*. The existence of the facility is regularly drawn to the attention of licensees and members and the activities of the facility are the subject of an annual report to the ACCC.

*APRA AMCOS supports Draft Recommendation 12*.

**Draft Recommendations 13 and 14**

*APRA AMCOS supports Draft Recommendations 13 and 14*.

**Draft Recommendation 15**

*APRA AMCOS supports Draft Recommendation 15, with two minor provisos*:

First, it is unclear what is meant by “real time” notification, when a contravention will not be confirmed until it has been reviewed by the Code Reviewer – if it is intended that contraventions will be published as soon as the Code Reviewer’s report has been delivered, APRA AMCOS would support that proposal.

Secondly, in relation to publication of contraventions in the annual report, the annual report is a document closely associated with the audited accounts of the company. APRA AMCOS is concerned at the additional costs that would be incurred were the auditors required to consider and approve the Code Report and the associated documentation. APRA AMCOS also publishes a “Year in Review” document, which is probably more widely read than the annual report. Draft Recommendation 15 should be amended to require publication of any contraventions in the society’s annual report or other similarly distributed document.

**Draft Recommendations 16 - 18**

*APRA AMCOS supports Draft Recommendations 16, 17 and 18*.

**Draft Recommendation 19**

APRA AMCOS respectfully acknowledges the statement in the Draft Report regarding the impeccability of the independence, impartiality and professionalism of the two Code Reviewer.

*APRA AMCOS would not support the establishment of a committee of stakeholders to advise in connection with the triennial review*. The current process permits any interested parties to make submissions and attend public meetings as part of the review process. To establish a committee would be to insert a layer of bureaucracy that we submit is unnecessary for this Code.

*APRA AMCOS otherwise supports Draft Recommendation 19*.

**Draft Recommendation 20**

APRA AMCOS deals with very large volumes of data, and wherever feasible uses the data to improve all relevant processes. For example, we receive highly granular information about streams on music and video streaming services and on traditional broadcast media, and use that data for distribution purposes. That level of useful information is not available from all content platforms. It is not feasible for most premises that use recorded music to report music use in detail, but APRA AMCOS obtains music use information from some background music service providers, and also uses music recognition technology where the level of licence fees justifies its use and the licensee agrees. For other licence schemes, direct music use information is not available, but other information can be utilised efficiently (for example, where music is performed by means of radio or streaming services, music use data from those services can be used to distribute revenue from the background music licence scheme).

*APRA AMCOS supports Draft Recommendation 20*.

**Other matters**

In the time since the commencement of this review, it has become apparent as a result of widespread publicity that there is a high incidence of regrettable conduct occurring in corporations throughout the developed world, including Australia. Such conduct may be illegal, and is always distressing and damaging. It tends to target certain groups, including women and the LGBTIQ community. It is now standard for organisations to be required, for example by funding bodies or by major clients, to put in place an appropriate policy regarding respectful workplace behaviours, including anti-bullying and anti-harassment policies. APRA AMCOS has had such policies in place for a number of years, and in light of recent reported incidents in the media and entertainment industries, has engaged in a top down whole of company training program.

APRA AMCOS submits that the Code of Conduct should be amended to insert a requirement that each collecting society implements an appropriate policy to regulate workplace behaviours. Such a requirement might sit appropriately with the section to be amended under Draft Regulation 3, regarding the broader regulatory environment.

**Timeframe for implementing changes**

The Draft Report recommends a number of significant changes to the current Code of Conduct. The collecting societies will require a reasonable period of time after the publication of the Final Report to draft any amendments to the Code of Conduct and update their procedures such that they comply with any new obligations.

For these reasons, APRA AMCOS submits that the drafting of the amended Code of Conduct be finalised in consultation with the Bureau or the Department of Communications and the Arts within three (3) months of the date of publication of the Final Report but that the amended Code of Conduct ought not come into effect until 1 July 2019, which is the end of the next annual reporting period under the current Code of Conduct.

Thank you for the opportunity to respond to the Draft Report. If we can provide further information, or be of assistance in any other way, please do not hesitate to contact me.

Yours sincerely

Jonathan Carter

Head of Legal, Corporate and Policy

APRA AMCOS