

## **Submission from NSW Department of Justice (NSW Justice) to the Productivity Commission Inquiry into Intellectual Property Arrangements**

This submission addresses issues relating to copyright law as they affect NSW Government. It follows the structure of the Commission's Issues Paper. Many of the issues raised here are covered in detail in the State's submission to the ALRC review in response to the ALRC's Discussion Paper.<sup>1</sup>

### **Chapter 1: Introduction**

Copyright law has failed to adapt to the changes resulting from digital technology that have happened over the past 20 years and continuing. In an array of cases courts and tribunals have attempted, with varying levels of success, to understand digital processes and apply copyright law to them – going at least as far back as *Australian Video Retailers Association v Warner Home Video*.<sup>2</sup> However, there is an obvious, and increasing, gap between the way the world works and the way it is envisaged in the *Copyright Act*.

Copyright debate in Australia has been highly polarised, often dominated by emotive examples rather than systemic issues and the underlying policies. In recent years copyright law reform has been characterised by sweeping extensions to copyright owners' rights<sup>3</sup> and attempts to restore 'balance' through limited amendments to the exceptions to infringement.

The Productivity Commission review provides a welcome opportunity to review the underlying policy and, it is to be hoped, recommend changes to better address current needs.

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<sup>1</sup> Available online at <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc> (Submission 740).

<sup>2</sup> (2001) 114 FCR 324.

<sup>3</sup> For example, extension of the duration of copyright and expansion of the technological protection measure provisions in compliance with the US Free Trade Agreement.

## **1.1 Changes arising from digital, online and mobile technology**

Technological advances have drastically changed the ways that individuals and organisations deal with copyright material and information. Digital technology has extended the reach of copyright owners' rights to situations where they previously had no application. Key changes include:

1. Perfect copies are easily and cheaply made and distributed, and the process in many cases appears seamless to the user. This of course raises both risks and opportunities for the copyright industries and for users.
2. Accessing, using and distributing digital material necessarily involve the copyright owner's rights in a way that reading and sharing hard copy material does not.<sup>4</sup> As a result, everyday activities for individuals such as reading, listening to music and sharing with friends may involve them in copyright issues, making it more important that the law be accessible and comprehensible.
3. Copyright industries have developed technological protection measures (TPMs) and other techniques to protect their material and copyright law has been amended to provide ancillary protection for these measures. Access to and use of digital material can be limited, restricted, and subjected to pay walls in a way that is not possible with hard copy material.
4. New business models have emerged, and new players are, in effect, taking on important roles in copyright licensing and administration, but are largely ignored in copyright policy debate. Examples include YouTube, Spotify, Creative Commons and Google Books.
5. Online databases, aggregations of material and search engines are increasingly available and important, including as a means of accessing relevant materials. These provide potentially enormous public benefit but a corresponding risk for copyright owners, aggregators and publishers.

## **1.2 Government use of digital, online and mobile technology**

Governments have made enormous and continuing changes to the ways in which they deal with information internally and the ways they distribute information and interact with the public. There is now a public expectation that members of the public

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<sup>4</sup> What seems to the user to be a single act may be legally characterised as a succession of acts of copying and communication. Legislators have sought to come to terms with this issue by passing new provisions stating that certain 'temporary reproductions' do not count as copies (unless the original was itself an infringing copy) – ss 43A, 43B. Courts and the Copyright Tribunal have also grappled with this issue, notably the Copyright Tribunal in the *Surveyors* case: *Copyright Agency Ltd v State of NSW* [2013] ACopyT 1, paragraphs 28-30.

be able to interact with Government agencies online and that Government information, decisions and data will be available online.

Legislation and policies have emphasised the importance of proactively making information available online and there is a clear public interest and benefit in doing so. However, the copyright issues are problematic since many datasets have been developed organically for internal use, in some cases over many years. They may include material such as unpublished reports, and diagrams and compilations that are very old but still protected by copyright. Because of the way the statutory licence operates, Governments may be required to pay fees in respect of the use of such material, even where the creator is long dead and no current copyright owner can be identified or can claim remuneration.

A number of organisations – principally local councils - are bound by statutory obligations such as freedom of information but are not part of a State for purposes of the statutory licence. They are in a difficult position as material they copy for such purposes is often not published, making it effectively impossible to obtain a licence. (In line with the principles stated above, such a licence should not be remunerated). The only solution constitutionally available to the State was to amend the *Government Information (Public Access) Act*, and accordingly s6(6) was inserted to exempt agencies from their disclosure obligations where these would result in copyright infringement. This is not considered a satisfactory outcome from a public policy point of view.

### **1.3 Major problems in copyright legislation**

Although it has been subject to almost constant review and amendment over recent years, the current form of the *Copyright Act* does not suggest a history of considered, principled reform. The *Copyright Act* is unwieldy, extremely hard to understand for anyone not specialising in the field, difficult to comply with in some respects, and inapplicable to contemporary ways of managing information, business and government.

Particular issues that impede innovations for the public benefit include the following:

- Most of the exceptions to infringement are highly specific and technical and apply to limited situations,<sup>5</sup> often with complex reporting and/or record-keeping requirements.<sup>6</sup>

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<sup>5</sup> For example, the fair dealing provisions, which created extraordinary jurisprudential confusion in the various decisions in *The Panel* case.

<sup>6</sup> For example, the library exceptions, which require librarians to obtain declarations in various situations and keep them for a number of years, in chronological order, and make them available for inspection by copyright owners, on pain of criminal penalties (see sections 49-50 and 203A to 203G).

- The *Copyright Act* still generally requires consideration of **each act** comprised in the copyright owner's rights (for example, each act of copying, communication to the public, performance etc) in relation to **each use** of copyright material. This does not reflect the reality of digital use and communication.
- Amendments made with the intention of accommodating technological developments have often been drafted to make the minimum possible change and have therefore been, or rapidly become, outdated or ineffective.<sup>7</sup> This approach inevitably creates a long lag between the development of new technological possibilities and the availability of a legal framework to accommodate them.
- The statutory licence for Governments imposes obligations which are virtually impossible to fulfil, and impose a significant unnecessary cost on Governments.
- Related to the previous point, the position of the declared copyright collecting societies, which have substantial statutory power but are subject to limited scrutiny or accountability, impedes diffusion of information by Governments and imposes unnecessary costs.
- The system of public libraries and copyright exceptions, which previously ensured all Australians had the opportunity to access material held in the collections of public libraries, has become substantially less effective, since online publications are not normally considered part of a library's 'collection'. Access to and use of such material is governed largely by the library's agreement with the publisher.

### **Chapter 3: Framework for assessing IP arrangements**

The Commission has proposed a framework for assessing IP arrangements, in summary that they should be:

- Effective
- Efficient

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<sup>7</sup> By way of example, the 'Digital Agenda' amendments changed the library exceptions such that librarians could send copies of articles by fax or email as well as by handing over photocopies – provided they obtained declarations and kept copies on file in chronological order. The amendments were outdated almost as soon as implemented, since digital (and especially online) technology have completely changed the role of librarians, the way libraries operate and the way research is done. As a further note on the consequences of the minimal amendment approach, the 2006 amendments to permit personal copying as originally drafted authorised the making of only 1 copy, which would not have allowed the purpose of the amendments to be achieved (since at least two copies are needed to copy, say, music from a CD onto an ipod or mobile phone).

- Adaptable
- Accountable.

This an appropriate framework, but one aspect of the principles merits greater emphasis, namely that **dissemination of, and access to, existing IP-protected material should not be unduly inhibited**. In other words, the system should encourage additional beneficial and innovative **uses** of IP protected material, as well as creation of more such material.

## Chapter 4: Improving arrangements for specific forms of IP

### 4.1 Copyright

**4.1.1 Effectiveness: To what extent does copyright encourage additional creative works, and does the current law remain ‘Fit for purpose’? Does the ‘one size fits all’ approach to copyright risk poorly targeting the creation of additional works the system is designed to incentivise?**

In respect of copyright, the legal system is not fit for purpose, since it actively inhibits dissemination and innovative use of protected material, even where there is no potential detriment to the copyright owners. The difficulties largely arise from:

- the low threshold for copyright protection,
- the long duration of copyright (indefinite, in the case of unpublished material),
- the limited exceptions to infringement, and
- for governments, the way the statutory licence for governments is drafted and administered.

As a practical matter there is limited scope for amending the first or second of these because of Australia’s obligations under the Free Trade Agreement with the US – although it is noted that jurisprudence in recent years has clarified and arguably slightly raised the threshold for originality.<sup>8</sup>

The development of large online databases and collections of material has resulted in renewed significance of some old copyright material, of which each item may have little or no commercial value. Such a compilation may be a new copyright work and is often of great value in terms of public benefit. Examples include digitisation of museum and gallery collections for online viewing and research. Volunteer-run projects such as Open Street Map raise some similar issues. There are major

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<sup>8</sup> See *IceTV v Nine Network* (2009) 239 CLR 458; *Telstra Corp Ltd v Phone Directories Co P/L* (2010) 194 FCR 142.

problems in developing and publishing such compilations, given that in many cases the copyright owners are not known and cannot easily be identified or contacted, especially where the items have not been commercially exploited.

**4.1.2 Efficiency: Are the protections afforded under copyright proportional to the efforts of creators? – Are there options for a ‘graduated approach’ to copyright that better targets the creation of additional works?**

The statutory licence for Governments in Division 2 of Part VII of the *Copyright Act* falls short of each of the principles proposed by the Commission in its Framework for IP arrangements. The statutory licence imposes excessive costs and resource demands on Governments, fails to reward copyright owners whose work has been used, and provides windfall gains to some copyright owners whose material has not been used. Details are set out below.

There may be benefits in having a system by which people wishing to exploit their copyright can actively demonstrate their interest and receive procedural or other benefits. However, a preliminary issue is what purpose would be served by a ‘graduated approach’ and what should be the consequences of being at one or other end of the graduated scale.

US law in effect creates a graduated approach by providing for registration of copyright works, with advantages in terms of procedure and the damages that can be claimed in the event of infringement. Section 126B of the *Copyright Act* takes a step in a similar direction by establishing presumptions of ownership where copyright notices or similar statements are used, reducing the evidential burden on owners in the event of action for infringement. The use of ‘unique identifiers’ such as those proposed by Copyright Hub may also be relevant.

However, such systems fail to deal with a fundamental problem: copyright law prevents the development of innovative products and services because of the risk involved in using copyright material without permission, even where the copyright owners have never intended any exploitation of the material and are unconcerned about its use by others. ‘Graduated protection’ approaches seem to operate by granting additional rights to certain copyright owners; an equally important problem for the online society is the high level of protection accorded to non-commercial material.

This issue could be addressed to some extent by way of a fair use exception, which could allow courts to consider issues such as whether or not a work has been exploited by the owner, and the way in which the work is being used, in determining whether or not a particular use is ‘fair’. Such an exception could apply, for example, in situations where governments, archives or collecting institutions digitise collections for online access by the public.

## **Efficiency: the Government statutory licence**

The government statutory licence in Division 2 of Part VII of the *Copyright Act* does not meet the Commission's proposed standards.

Conducting a sampling survey as required by s183A has proved extremely difficult within governments, and to date no agreement has been reached as to a sampling system. Requests for payment are not related to an estimate of current government copying (as required by the *Copyright Act*) and appear to be developing a character of a tax or levy.

The scheme fails the test of effectiveness since it does not reward creators of the copyright works that are copied by governments. This was indicated by the Copyright Tribunal in the decision in *CAL v NSW*,<sup>9</sup> at para 60 in the judgment, commenting on:

'the futility of this litigation. Whatever the Tribunal awards will have little impact on the parties. ...

61. The Australian Taxation Office will also incidentally benefit through the additional income tax payable by surveyors, as will CAL on the commission it charges for the collection of the remuneration. So viewed, this litigation appears to offer little benefit to those whose interests are said to be at stake.'

A further point is that payment of remuneration in respect of survey plans cannot have any effect on the creation of new plans, since the making of them is entirely unrelated to any copyright market. Survey plans are created as part of a service provided by a surveyor to a client, for which the surveyor is remunerated. Surveyors do not depend on copyright payments to be rewarded for the work. Demand for survey plans is related to development activity and land transactions, not to the qualities of the plans. Further survey plans will continue to be made regardless of whether or not a surveyor receives any copyright payments, which are in the nature of a windfall. Other payments received by Copyright Agency under the government statutory licence would appear to have a similar character.

### ***4.1.3 Is licensing too difficult / costly? What role can/do copyright collecting societies play in reducing transaction costs? How effective are new approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?***

Governments are in a peculiar position in relation to licensing because of the statutory licence for governments, discussed below.

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<sup>9</sup> *Copyright Agency Ltd v NSW* [2013] ACopyT 1.

## **Collecting societies**

As a general comment, copyright collecting societies exercise substantial power in a monopoly situation with little oversight. Because of their monopoly position there is often no obvious point of comparison, and it is not easy for users to determine whether or not it is necessary or beneficial for them to enter a collecting society licence agreement. Terms and conditions of licence agreements are not always publicly available, and it can be difficult or impossible for potential licensees to find out whether the material they use is within the collecting society's repertoire. This is of particular concern because of the methods used by some collecting societies to recruit new licensees.

One factor in the difficulty and expense of copyright licensing is the multiplicity of copyright collecting societies which seem to operate with limited coordination (although the amalgamation of APRA and AMCOS has somewhat improved the situation). It is confusing for users to have to pay fees to a number of separate organisations in respect of what seems to the user to be a single act – as illustrated by the problems the Commonwealth Government experienced in the recent case of *Pocketful of Tunes v The Commonwealth of Australia*.<sup>10</sup>

There is considerable scope for the collecting societies to improve their performance in coordinating their activities and licences for users. This could provide more benefit, more efficiently, than a project such as 'Copyright Hub'.

In relation to the government statutory licence, the transaction costs associated with dealing with the declared collecting societies are high, and likely to be disproportionate to the amount copied. This may also be the case for voluntary licences given the monopoly position and limited regulation of collecting societies.

## **The 'Copyright Hub' approach**

The aim of Copyright Hub, to provide a portal through which users can get information and licences to use copyright material, has been discussed for many years in copyright industry circles. Copyright Hub does not yet seem to have achieved the aim of providing one-click licensing. From the user's point of view, Copyright Hub does not provide a one-stop service as it does not provide links to, or

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<sup>10</sup> [2015] ACopyT 1 and 2. In 2008, the Commonwealth arranged for production of a DVD for use in Australian citizenship ceremonies, incorporating a recording of the song 'I am Australian'. The Commonwealth paid licence fees to the Australasian Mechanical Copyright Owners' Society (AMCOS) and the Australasian Performing Right Association (APRA) in respect of the reproduction and public performance of the song respectively, but was not aware at the time that further payment was required in respect of the 'synchronisation' of the song to the video. The music publisher took legal action concerning the amount of remuneration payable for the synchronisation under the government statutory licence.

mention the existence of, the availability of free licensing approaches such as Creative Commons.

At best, a service such as Copyright Hub, or an Australian equivalent, would provide some assistance to people seeking permission to use some commercially exploited copyright material. This would alleviate some problems but would not resolve the most important problems with the *Copyright Act*.

The Productivity Commission should also consider existing licensing models such as those provided by YouTube, Google, Spotify and the many other services offering blogging resources or streaming or downloading of copyright material. Some require direct payment for use of material, others use a subscription model, and others depend on advertising revenue. Although not without problems, these are successful models that have developed in the market.

#### **4.1.4 What have been the impacts of the recent changes to Australia's copyright regime? Is there evidence to suggest Australia's copyright system is now efficient and effective?**

The major changes in relatively recent years have been those introduced by the *Copyright Amendment Act 2006*, which among other things introduced exceptions for personal copying. The 'time shifting' exception<sup>11</sup> was tested in the National Rugby League case and was held (on appeal to the Full Federal Court) not to apply to the situation where a copy was made jointly by the subscriber and Optus, whose purpose was commercial in nature.<sup>12</sup>

The personal copying exceptions, and the Full Federal Court's decision, have, to a degree, amended a much ridiculed anomaly that made a number of normal everyday activities unlawful. However it could not be said that these were the only amendments needed for the Australian copyright system to function effectively.

There are many problems remaining in the *Copyright Act* that impede its efficiency and effectiveness, as outlined in submissions to the ALRC review. Of particular concern to NSW Justice are:

1. The complex, technical and limited nature of the exceptions to infringement, and the important gaps in coverage especially in relation to freedom of information, open access to government information and data, and other important statutory obligations;
2. The failure of the Act to deal with the changes in the way information is accessed, used and distributed using online and mobile technology, making it

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<sup>11</sup> Section 111 of the *Copyright Act*.

<sup>12</sup> *National Rugby League Investments v Singtel Optus* (2012) 199 FCR 300; (No. 2) (2012) 201 FCR 147.

highly risky to develop new online services or make use of the available technological capacity to digitise collections of works or information;

3. The government statutory licence, in particular s 183A;
4. The lack of clarity as to the role of the declared collecting societies and the limited provision for transparency, oversight or regulation of them;
5. The inability of the library provisions to deal with the changing nature of libraries and distribution of information, reducing the effectiveness of the system set up to promote wide public availability of information.

#### **4.1.5 What should be considered when assessing prospective changes to copyright, and what data can be drawn on to make such an assessment?**

The drafting of the *Copyright Act* makes it almost impossible to decipher for anyone who is not a specialist in the area, as noted above. Proposals to amend the *Copyright Act* must aim to remedy these problems.

1. Any proposed changes should be examined by reference to the Framework principles and the policy aims of copyright law.
2. Any amendments to copyright legislation must be considered in the context of the whole Act and have the aim of making it simpler, clearer and less vulnerable to becoming outdated with each technological development. A critical element in achieving such clarity and flexibility is use of broad principles such as 'fairness' rather than attempting to approximate fairness by prescriptive drafting (such as specifying the number of copies that may be made).
3. Amendments should avoid placing complex and arbitrary conditions on users. For example the statutory licences and the library exceptions are highly complex and prescriptive, making compliance difficult. Some of the administrative requirements, such as elaborate record keeping rules, appear to have no practical function or benefit for copyright owners.

#### **4.1.6 How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance?**

It is important to recognise that creators and consumers are not separate groups. Even those who make their living from copyright, such as publishers and authors, are also users and consumers of copyright material. Similarly, even the least creative consumer of downloaded TV shows is almost certainly a copyright owner as well (even if only in relation to 'selfies' on their Facebook page).

With this in mind, and taking into account the requirements of international treaties to protect certain kinds of material, the task is really to identify where the public interest would favour a right to use copyright material without permission, and the kinds of factors that should affect whether or not such use should be remunerated or should be subject to specific obligations or constraints. Such factors would be appropriately developed in relation to a fair use exception, as indicated in the ALRC report and submissions.

A demonstration of the failure of the current fair dealing provisions was provided by *The Panel* case<sup>13</sup> in which the Federal Court, the Full Federal Court and the High Court all grappled with the question whether the use in a humorous and satirical TV program of a number of clips from a rival broadcaster's programs was, in the case of each clip, a fair dealing for the purpose of reporting news or of criticism and review. Although detailed and carefully reasoned, the judgments do little to clarify the application of the provisions.

The fair dealing defence for purposes of parody or satire,<sup>14</sup> introduced subsequent to the decisions, might have been applicable to some of the clips, but not necessarily all. Some of the clips their Honours considered to be used purely "for entertainment" might have been considered to be used either for satirical or parodic purposes, but others probably would not.

Whether or not a fair use exception could apply to use that is "purely for entertainment" might be a subject of litigation, but on the face of it there is no reason why it could not: rather, the question should be whether or not the particular use is **fair**. The courts in *The Panel* case might have had an easier task, and the decisions might have had greater jurisprudential value, if the legislation had prompted them to answer this question.

#### ***4.1.7 Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators? Does the degree of certainty vary for businesses relative to individual users?***

The problems with the existing exceptions to infringement arise not only from lack of clarity but from the specificity and complexity of the drafting. It is extremely difficult for individuals or businesses to be certain as to whether or not their activities will infringe copyright, and many activities an ordinary person might consider 'fair' would fall between the cracks of the exceptions.

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<sup>13</sup> *TCN Channel Nine v Network Ten* (2001) 108 FCR 235; [2001] FCA 841; (2004) 218 CLR 273; (2005) 145 FCR 35.

<sup>14</sup> Sections 41A and 103AA of the *Copyright Act*.

For governments there are few activities that would infringe copyright, because of the statutory licence. However there is considerable dispute as to how the exceptions interact with the statutory licence, and which acts should not be subject to remuneration. In practice, because of the way the licences are administered, this means that statutory licensees may be required to pay fees in respect of acts that are free to all other users.

#### **4.1.8 To be efficient and effective in the modern era, what (if any) changes should be made to Australia's copyright regime?**

The changes advocated by the Department are substantially those proposed in the State's submission responding to the ALRC Discussion Paper.

1. Introduce a fair use exception.
2. Make clear that acts by Governments are not remunerable where these are to comply with freedom of information or privacy legislation, or other statutes, or in relation to public registers provided for by statute (this could be included in the government statutory licence).
3. Clarify that the government statutory licence only applies where an act would infringe copyright but for s. 183, and that s. 183(1) cannot be taken into account in determining this.
4. Repeal the s183A scheme.
5. Provide for online activities such as digitisation of archives where it is not practicable to consider fairness in relation to each item individually (this could be incorporated in the fair use exception).

#### **Role of collecting societies**

A further recommendation is that the role, governance and transparency obligations of collecting societies be reviewed, especially in relation to the statutory licences. The practical problems with administration of the statutory scheme were outlined by the State in its submissions to the ALRC review.<sup>15</sup> There is also a systemic issue with the role of declared collecting societies, which is outlined here.

The government statutory licence allows the declared collecting societies to collect copyright payments from governments in respect of material whether or not the copyright owners are members, and whether or not the material has been (or is capable of being) commercially exploited. Online technology has greatly expanded the range of material that may be copied, for the reasons outlined above. Given the

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<sup>15</sup> Available at <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc> (Submissions 294 and 740).

lack of connection between government copying and payment to copyright owners, it is clear that under the s183A scheme, copyright owners are not compensated for government use of their material, no incentive is provided for creation of further copyright works, and governments are paying fees for use of copyright work for which there is no potential copyright market and which cannot be distributed to the copyright owners.

The role of the declared collecting societies is anomalous, given that the statutory licences (especially the educational licence) are the main source of income for the declared collecting societies. Normally, an organisation with statutory responsibility for collecting and distributing money, or for dealing with public money, would be established as a Government agency or independent statutory body, having a duty to act impartially and subject to strict obligations concerning transparency and accountability. These obligations do not apply to the declared collecting societies. Nor are they subject to oversight by the ACCC, unlike some of the other collecting societies.<sup>16</sup>

Limited information is provided by the declared collecting societies about their distribution of statutory licence payments, and the Collecting Societies' Code of Conduct makes no effective requirements concerning transparency, accountability or obligations to licensees. A recent request by the State of NSW and the national Copyright Advice Group for the education sector to introduce some specific requirements was strenuously resisted by the declared collecting societies, and did not result in a recommendation. However, reform is needed.

Considerable relevant work has been done in this area in the UK. In 2011 the Code Reviewer considered that the best way to manage these tensions is through greater openness and better engagement with users:

'Collecting Societies need to make a culture shift in outlook and practice that would put them closer to being like public bodies in terms of their transparency, accountability and functioning. In doing so, anyone dissatisfied can 'see under the bonnet' and may be clearer about whether their grievance is justified or not'.<sup>17</sup>

The independently commissioned *2012 UK Codes of Conduct Report* (2012 UK Report)<sup>18</sup> discussed the Australian regulatory background in some detail, noting that proceedings in the Copyright Tribunal 'have played a primary role in legitimising

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<sup>16</sup> See <http://apraamcos.com.au/media/3438/2014finaldetermination.pdf>

<sup>17</sup> <http://www.britishcopyright.org/about-us/independent-code-review/principles-collective-management-organisations-codes-conduct/>

<sup>18</sup> <https://www.gov.uk/government/publications/collecting-societies-codes-of-conduct>

collecting societies and excluding from debate the consideration of collective rights administration within completion policy principles'. The authors found that licensees had been 'principally disturbed by the size of licensing fees and what they perceive as the Tribunal's uncritical attitude towards remuneration arguments advanced by collecting societies.'

Two of the three key findings of the 2012 UK Report were:

- 'The most numerous and fierce criticisms of collecting societies stem from users not members. Any consideration of how regulation can improve collecting societies' performance thus needs to focus far more on addressing users' concerns rather than members.
- 'Codes of conduct have little effect on improving the weak bargaining power of the majority of users – bargaining power is determined instead by the external regulatory regime in each jurisdiction, not by collecting societies per se.'

The report recommended a statute-based code of conduct for the UK, stating:

'The international comparative evidence documented in this report indicates then, that to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct struggle to meet these criteria. However, a statutory code of conduct for the UK is more likely to achieve the aims of improving transparency, accountability, governance and dispute resolution – and thus, in turn, strengthening confidence in the system.'

The independent UK code reviewer Walter Merricks, CBE emphasised, in his 2014 review,<sup>19</sup> the need for transparency and the adoption of practices by collecting societies that put them closer to being like a public sector body in terms of their transparency, accountability and functioning; for example, acting as if Freedom of Information laws applied to them.

Similar proposals may be of assistance in the Australian context. However, in light of the comprehensive changes made by digital and online technology, it is suggested that the role and powers of the declared collecting societies – which are more extensive than their English equivalents – requires comprehensive revision.

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<sup>19</sup> <http://www.legislation.gov.uk/uksi/2014/898/contents/made>