



44 Avenue Road  
Mosman NSW  
Australia 2088

T : 61 2 8968 7100  
F : 61 2 9969 3520  
W : [freetv.com.au](http://freetv.com.au)

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Copyright Code Review  
Director, Emerging Policy Issues  
Bureau of Communications and Arts Research  
Department of Communications and the Arts  
GPO Box 2154  
**CANBERRA ACT 2601**

By email: [codereview@communications.gov.au](mailto:codereview@communications.gov.au)

To Whom It May Concern,

### **Review into the efficacy of the Code of Conduct for Australian Copyright Collecting Societies**

Free TV thanks the Department for the opportunity to comment on the *Review of the efficacy of the Code of Conduct for Australian Copyright Collecting Societies Discussion Paper (the Discussion Paper)*.

Free TV represents Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide a variety of channels of content across a broad range of genres, in addition to a range of online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, free-to-air television is watched by an average of 13 million Australians.

As major owners, licensors and licensees of copyright material, Free TV recognises the importance of the role of copyright collecting societies for both rightsholders and licensees. The collective administration of copyright by collecting societies make transactions easier for both parties, is the most effective way to manage these rights and is generally working well.

At the same time, it is important to recognise that exclusive collective administration of rights by a single collecting society removes competitive pressures on those organisations and gives rise to monopolies, which in turn can lead to inefficiencies. As such, a balance needs to be struck between promoting efficient outcomes through collecting administration and ensuring that a framework is in place to address potential market power issues and achieve fair and efficient outcomes.

Free TV's view is that the existing framework would benefit from being strengthened and is particularly concerned that there is currently no process to ensure that the obligations in the *Code of Conduct for Copyright Collecting Societies (the Code)* are complied with. We set out below, our view on how the existing framework can be strengthened to ensure the balance is maintained. In summary, Free TV recommends:

- Introducing a process to oversee and ensure compliance with the Code;
- Introducing a requirement for collecting societies to be bound by the Code;
- Including a more prescriptive requirement in the Code in relation to disclosure of information to licencees regarding the calculation of their licence fees;
- Strengthening the Code Review process to require consultation and input from members, licensees and the Code Reviewer; and
- Incorporating a process to ensure that the Code Reviewer is independent.

## **Ensuring the objectives of the Code are met**

As outlined in the Discussion Paper, the original purpose of the Code was to ‘...ensure the societies operate efficiently, effectively and equitably.’

Free TV’s view is that, while the collective management of rights is generally working well, the framework regulating collecting societies should be strengthened to ensure that the objectives of the Code are being met by:

- Strengthening some of the minimal obligations contained in the Code in relation to disclosure of information to licensees (detailed further below);
- Introducing a requirement for collecting societies to be bound by the Code; and
- Introducing a process to oversee and ensure compliance with the Code.

Currently, there is no complaints resolution mechanism or independent body that licensees can go to in relation to issues that arise under the Code. The lack of any such mechanism is a structural weakness which creates a risk of inefficient outcomes for rightsholder and licensees. Whilst all key stakeholders have agreed to participate, it would be preferable if participation was mandatory rather than voluntary.

Free TV therefore supports the introduction of an additional oversight mechanism to address this including a requirement to be bound by the Code as well as an effective complaints mechanism so that complaints can be brought, investigated and addressed by a regulator. Without this kind of regulatory oversight, the Code lacks the ability to achieve its objectives as there are no consequences for non-compliance.

An effective complaints-based mechanism is necessary in order for issues that arise under the Code to be addressed and ultimately remedied. This would also provide greater certainty and confidence in the operation of collecting societies and the capacity of the regulatory framework to respond in the event that issues arise.

The declared collecting societies, CAL and Screenrights, are subject to legislative oversight under the Copyright Act, including in relation to appropriate handling of trust funds and administrative costs. This oversight allows the Minister or Tribunal to step-in to revoke the declarations of those societies.<sup>1</sup> While this power has never been exercised, it provides greater certainty for rightsholder and licensees and therefore increases confidence that these societies will be held to account in the event that issues do arise.

By contrast, other than APRA/AMCOS, which voluntarily subjects itself to review of its ACCC authorisation, there are no administrative oversight mechanisms to address issues or complaints under the Code as they arise.

Free TV notes that, as the Code is only one part of the overall accountability framework, it is difficult to assess the extent to which objectives are being achieved without a review of the efficacy of the entire framework, including the mechanism for an independent determination of licence fees.

## **Transparency**

Free TV agrees with the sentiments expressed in the Discussion Paper, that transparency is an essential element of robust governance arrangements. In the context of copyright collecting societies, it is essential that negotiations and other dealings between Collecting Societies and licensees are conducted transparently to enable licensees to negotiate a fair and reasonable agreement with collecting societies.

There are a number of transparency provisions in the Code which require transparency in relation to collecting societies’ dealings with members and licensees and around information about standards of service, financial performance and policies and procedures that directly impact either members or licensees. However, Free TV agrees with the suggestion in the Discussion Paper that transparency

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<sup>1</sup> Copyright Act 1968: Part VA Division 3; Part VB Division 6; Part VI Division 3.

around the calculation of licence fees could be improved to enable the parties to an agreement to better understand the basis of the fees, particularly given that this is one of the most likely areas of dispute.

While the Code at clause 2.3 requires collecting societies to treat licensees fairly and honestly and also requires them to make available information about the licences or licence schemes, these provisions are crafted in general terms. In practice, there is significant information asymmetry between collecting societies and licensees and the basis for licence fee calculations is unclear. This makes it very difficult to make an assessment of whether the terms of an agreement are fair and reasonable or not.

Free TV recommends addressing this by including a requirement in the Code in relation to disclosure of information to licensees regarding the calculation of their licence fees. As indicated above, to be effective, there also needs to be an effective complaints resolution mechanism so that complaints under such a provision can be brought, investigated and addressed.

### **Code Review Process**

Free TV agrees with the point made in the Discussion Paper that 'Accountability generally involves an external body with the ability to seek answers, demand responses and impose sanctions.'

The Discussion Paper notes that the powers of the Code Reviewer in this regard are limited in that the Code Reviewer cannot make binding decisions or enforce recommendations under the Code. As indicated above, Free TV agrees that this is a weakness in the construction of the Code. The fact that there are no substantive enforcement mechanisms or sanctions for non-compliance necessarily negates its effectiveness and undermines stakeholders' confidence in it.

The fact that the Code can be changed by participating collecting societies without consultation or input from members or licensees, or consideration by the Code Reviewer, also demonstrates the lack of due process in the existing regulatory framework. Licensees should be key stakeholders in the Code review process given that the Code should properly act as a constraint to regulate interactions with collecting societies with licensees, and protect the interests of licensees in circumstances where collecting societies can wield substantial market power in negotiating blanket licences that licensees sometimes have no other choice but to enter into for essential business inputs.

Free TV also notes that, the Code Reviewer is appointed and paid for by the Collecting Societies, and reappointment is at their absolute discretion. While there is nothing to indicate there has been any lack of independence of Code Reviewers, it would increase confidence in the operation of the Code if stronger guarantees of independence were incorporated in the process in relation to appointment and re-appointment.

### **Contact**

If you have any queries or wish to discuss any of the matters raised in this letter, please contact either Sarah Waladan or myself on (02) 8968 7100.

Kind regards,

A handwritten signature in black ink, appearing to read "Pam Longstaff". The signature is fluid and cursive, with a large initial "P" and "L".

**Pam Longstaff**  
Acting CEO  
Free TV Australia