



## Response to the Mandatory News Media Bargaining Code Concepts Paper dated 19 May 2020

**ACC Submission date: 5 June 2020**

The Australian Copyright Council (**ACC**) is grateful to Australian Competition & Consumer Commission (**ACCC**) for the opportunity to make a submission in response to the Mandatory News Media Bargaining Code Concepts Paper (**Concepts Paper**).

The ACC does not propose to deal with all the Consultation questions, but will briefly generally discuss the issues raised in questions 1, 16, 18, 38, 52 and 53.

### **A. About the Australian Copyright Council**

1. The Australian Copyright Council is a small, independent, not-for-profit organisation dedicated to promoting understanding of copyright law and its application and to foster collaboration between content creators and consumers. We represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies.<sup>1</sup>
2. Our members include representative bodies for journalists and writers and other creators, including the Media, Entertainment & Arts Alliance, the Australian Writers Guild, the Australian Society of Authors and the Australian Society of Travel Writers. We also regularly provide legal advice and education to journalists and producers, among others.
3. We refer to the ACC submissions to Digital Platforms Inquiry's:
  - Preliminary Report dated [4 March 2019](#)<sup>2</sup>, and
  - Final Report dated [12 September 2019](#)<sup>3</sup>

The ACC's position remains unchanged.

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<sup>1</sup> Please see Schedule 1 for a list of current affiliate members

<sup>2</sup> <https://www.accc.gov.au/system/files/Australian%20Copyright%20Council%20%28February%202019%29.PDF>

<sup>3</sup> [https://consult.treasury.gov.au/structural-reform-division/digital-platforms-inquiry/consultation/view\\_respondent?uuld=190089176](https://consult.treasury.gov.au/structural-reform-division/digital-platforms-inquiry/consultation/view_respondent?uuld=190089176)

4. The ACC continues in its strong belief that the integrity of the Australian media and the work of its journalists, producers and other creators working within the industry, needs to be appropriately valued and preserved to ensure its continued contribution to Australian culture and public interest. To this end we advocate for any remuneration model to ensure that copyright owners of underlying works in news content, be part of the framework.
5. We welcome the ideas outlined in the Concepts Paper as a pathway to the recognition and remuneration of all creators.

## B. Definition of news to be covered by the code

6. Whilst there has been judicial discussion of what constitutes ‘news’ in the context of the copyright exception of fair dealing for the purposes of reporting the news<sup>4</sup>, there remains no clear definition.
7. The ACC therefore supports a broad, inclusive, content focussed definition of ‘news’ to include a wide range of news content, including for example, sports, arts and entertainment. This would necessarily include ‘public interest journalism.’<sup>5</sup>
8. We support that this broad inclusive approach for what would be regarded as newsworthy, be established by objective factors,<sup>6</sup> with the understanding that newsworthiness does not exclude humorous or entertaining content, for example.<sup>7</sup>

## C. Monetisation and sharing of revenue from the use of news

9. The ACC agrees with the proposition that the revenue sharing of any monetisation framework in the Mandatory Code (**the Code**) include revenue-sharing as a ‘necessary and central element’.<sup>8</sup>
10. We propose that the Code outlines for the collection and distribution of fees not only to media organisations (large or small), but that there be provision for payment to underlying rights holders.

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<sup>4</sup> Section 103B *Copyright Act*, 1968 (Cth). See for example, in [De Garis v Neville Jeffress Pidler](#) (1990) 37 FCR 99 Beaumont J, 107 [45]-[52] and *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* (2002) 118 FCR 417, 439 [104]

<sup>5</sup> ACCC, ‘Mandatory News Media Bargaining Code Concepts Paper’, 19 May 2020 at 3

<sup>6</sup> Handler, Michael; Rolph, David – “A Real Pea Souper”: The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia’ [2003] MelbULawRw 15

<sup>7</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* (2002) 118 FCR 417, 439 [104]

<sup>8</sup> Concepts Paper p.7

11. Factoring in payments to these underlying rights holders (and associated administration), should be a factor in determining the appropriate remuneration for news media businesses.<sup>9</sup>
12. The ACC has had the opportunity to view the draft response of ACC affiliate, Screenrights, to the Concepts Paper and supports their position on the definition of 'use'.<sup>10</sup>

#### **D. Collective licensing or fee arrangements**

13. The ACC supports the collective arrangement framework for the payment of fees, with the collection and distribution of fees managed by a nominated collecting society.
14. As outlined in the Concepts Paper<sup>11</sup> existing blanket copyright licences have established structures which may provide guidance for the creation of remuneration schemes for the use of news.
15. The ACC supports a remuneration framework where what constitutes a remunerable 'use' of news content, gives effect to pre-existing rights including copyright.<sup>12</sup>

#### **E. Facilitating open communication between digital platforms and Australian news media businesses**

16. To the extent that the Code ensures that digital platform contact points provide timely responses<sup>13</sup>, we say that this is imperative given the issues highlighted in our response to the Preliminary Report, namely that prompt action (particularly where news items are concerned), is critical to minimise the same unauthorised content appearing at alternative online locations as soon as the original URL is taken down.
17. The ACC supports a local point of contact wherever possible<sup>14</sup> to assist in timeliness and in addition, having local processes for dealing with unauthorised content.

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<sup>9</sup> Consultation question 16, Concepts Paper p15.

<sup>10</sup> Ibid. Consultation question 18.

<sup>11</sup> Ibid 11

<sup>12</sup> Ibid 14

<sup>13</sup> Consultation question 52

<sup>14</sup> Consultation question 53

**F. CONCLUSION**

18. The ACC acknowledges the difficulties involved in the development of the Code and is thankful to the ACCC for considering the terms of this submission.
19. If the ACCC has any further queries or requires further information, please let us know.

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Eileen Camilleri  
Chief Executive Officer  
Australian Copyright Council

**SCHEDULE 1: AFFILIATES OF THE ACC**

As at the date of this response, the Australian Copyright Council members are:

1. Aboriginal Artists Agency
2. APRAIAMCOS
3. Ausdance National
4. Australia New Zealand Screen Association
5. Australasian Music Publishers Association Ltd
6. Australian Cinematographers Association
7. Australian Directors Guild
8. Australian Guild of Screen Composers
9. Australian Institute of Architects
10. Australian Institute of Professional Photography
11. Australian Music Centre
12. Australian Photographic Judges Association
13. Australian Publishers Association
14. Australian Recording Industry Association
15. Australian Screen Directors Authorship Collecting Society Limited
16. Australian Society of Authors
17. Australian Society of Travel Writers
18. Australian Writers Guild
19. Authentic Design Alliance
20. Christian Copyright Licensing International
21. Copyright Agency
22. Design Institute of Australia
23. Media Entertainment & Arts Alliance
24. Musicians Union of Australia
25. National Association for the Visual Arts
26. National Tertiary Education Union
27. Phonographic Performance Company of Australia
28. Illustrators Australia
29. Screen Producers Australia
30. Screenrights