



INDEPENDENT
HIGHER EDUCATION
AUSTRALIA

IHEA SUBMISSION

**REVIEW OF THE CODE OF CONDUCT
FOR COPYRIGHT COLLECTING
SOCIETIES BY THE TRIENNIAL CODE
REVIEWER**

7 April 2025

IHEA Submission

Review of the Code of Conduct for Copyright Collecting Societies by the Triennial Code Reviewer

Independent Higher Education Australia (IHEA) welcomes the opportunity to provide feedback on the Review of the Code of Conduct for Copyright Collecting Societies by the Triennial Code Reviewer, for which submissions are due by 7 April 2025.

Introduction

The Code of Conduct for Collecting Societies (the Code) was developed and adopted by Australian copyright Collecting Societies in 2002. The stated purpose of the Code is to ensure that Collecting Societies protect the interests of creators and users of creative works.

Objectives of the Code

The Code's identified objectives are to facilitate efficient and fair outcomes for members and licensees by:

- Promoting awareness of and access to information about copyright or the resale royalty right or both and the role and function of Collecting Societies in administering copyright or the resale royalty right or both on behalf of Members.
- Promoting confidence in Collecting Societies and the effective administration of copyright or the resale royalty right or both in Australia.
- Setting out the standards of service that Members and Licensees can expect from Collecting Societies.
- Ensuring that Members and Licensees have access to efficient, fair and low-cost procedures for the handling of Complaints and the resolution of Disputes involving Collecting Societies.

Coverage of the Code

The Code covers:

- Governance and accountability.
- Transparency to members and licensees.
- Education and awareness.
- Complaints and disputes.

The Code does not cover matters that the Copyright Tribunal can determine, such as licence fees.

The Code of Conduct for Copyright Collecting Societies was adopted in 2002.

Code Reviewers

There are two separate Code Reviewers:

1. To review, annually, Collecting Societies' compliance with the Code (the Code Compliance Reviewer).
2. To review, every three years, the Code itself (the Triennial Code Reviewer).

Both Code Reviewers are appointed, and remunerated, by the Collecting Societies.

The current annual Code Compliance Reviewer (since 2012) is the Hon Dr Kevin Lindgren AM QC, who is a former judge of the Federal Court and former President of the Copyright Tribunal. He was also the Triennial Code Reviewer in 2014 and 2017.

The Hon Alan Robertson SC was formally appointed as Triennial Code Reviewer by the Collecting Societies in September 2021 and conducted the Triennial Review in March 2022. After 22 April 2025, the Triennial Code

Reviewer will prepare a report of the Review and will make such recommendations as they consider appropriate in relation to the operation of the Code, including recommendations for amendments of the Code.

Issue for Independent higher education providers

IHEA's principal concern is that independent higher education providers are treated fairly compared to public providers with respect to licence fees they pay. This is not only in relation to hard or electronic copies of written works (Copyright Agency), but also in relation to playing music (Australasian Performing Right Association (APRA) and Australasian Mechanical Copyright Owners Society (AMCOS)) and broadcasts such as films (Screenrights).

Our interest is in how independent higher education providers are treated in terms of licensing for all of these media. However, throughout this submission we will specifically focus on the detail surrounding licence fees that are administered by the Copyright Agency, by way of a specific case study.

The Copyright Agency has been the declared Collecting Society for the Statutory Education Licence available to educational institutions since 1990. However, we are concerned that the Copyright Agency is applying different approaches to license fees for public and independent (private) providers. While it is stated that the Code "does not cover matters that the Copyright Tribunal can determine, such as licence fees", it is clear that there are requirements on agencies' conduct, as follows:

- "1.3 The Objectives of this Code are to facilitate efficient and fair outcomes for members and licensees by...(b) promoting confidence in Collecting Societies and the effective administration of copyright or the resale royalty right or both in Australia".
- "2.3 (a) Each Collecting Society will treat Licensees fairly, honestly, impartially, courteously, and in accordance with its Constitution and any licence agreement.
 - (d) Each Collecting Society's policies, procedures and conduct in connection with the setting of licence fees for the use of copyright material will be fair and reasonable."

IHEA is concerned that the requirements of the Code are not being met as a result of the differential approaches that the Copyright Agency is taking for public and independent higher education providers.

IHEA Feedback

Division 4 of Part IVA of the *Copyright Act 1968* establishes a statutory licence (copyright) that permits educational institutions in Australia to copy and communicate certain works without direct permission from the copyright owner. This is on the proviso that the institution pays equitable remuneration to the relevant Collecting Society.

While the purpose of this arrangement is to ensure fair compensation to authors and other rights holders for the use of their works, the application of the term "equitable remuneration" is a matter for interpretation and in practice it is being applied more favourably to public universities than independent (private) higher education providers. This represents a clear inequity based on provider type.

We understand that the Copyright Agency and the 39 public universities, as members of and represented by Universities Australia (UA), had been engaged in litigation from 2019 until an agreement was reached in 2023. The basis for the litigation was UA seeking a better copyright deal for their members. The 2023 agreement stipulated licence fees for public universities, as follows: \$31 million per year for 2019–2022; \$28.5 million per year for 2023–2024; and \$27.5 million per year for 2025–2026. This equates to up to approximately \$15 per Equivalent Full–Time Student Load (EFTSL).

By comparison, although litigation was not pursued by IHEA, the best outcome we were able to negotiate for the independent sector was a rate card to pay either \$40.50 per EFTSL (if they are not–for–profit) and the option of either 25 per cent of revenue or \$45 per EFTSL for commercial entities.

Whilst the negotiated arrangement represents an improved position for independent providers, it still results in a significant divide between the costs that public and independent higher education providers are required to pay. Independent higher education providers are paying about \$20 per EFTSL more than public universities to access the exact same material. This is perplexing and difficult to reconcile as a fair and reasonable outcome.

The agreement with UA stipulates a copyright rate of 9.3 cents per page for electronic copying and communication. This was based on a detailed survey of use, administered by a third party, that produced rolling three year average EFTSL page numbers. However, if, for example, an independent higher education provider is able to show that they only use 10 pages by 30 students, they would only pay \$27.90 for copyright. However, under the current arrangements and methodology, they are paying over \$1000.

Our advice from the Copyright Agency is that the rate agreed with UA is not appropriate for the independent higher education sector, nor is it an appropriate starting point for any discussion and negotiation. The Copyright Agency further advised that the result for public universities is peculiar to those institutions that were party to proceedings (noting that there was also at least one private university included in this grouping).

However, IHEA's view is that the decision in the UA case provides a strong basis for IHEA members to negotiate a reduction in the amount they pay for statutory licence copying and communication. This is because the agreement confirmed that the methodology for determining the amount of "equitable remuneration" payable for statutory licence copying and communication should take into account the amount of copying and communication actually occurring.

IHEA does not think it is fair and reasonable that IHEA should be required to undertake costly legal proceedings to achieve a better outcome for independent providers. Conversely, a review would establish the factual basis for any licence fees.

As part of IHEA's negotiations, it was understood that the Copyright Agency would review the usage by providers in the independent sector. The purpose of the review is to analyse usage by providers to determine the actual number of pages copied and distributed to students during their studies. This would involve multiple members recording data over several months. The Copyright Agency was to appoint an expert to lead the review and IHEA would ask members to volunteer to be involved. Whilst this process would be labour intensive for independent higher education providers to undertake, we have members that are willing and keen to participate. However, this review is yet to commence and we are unaware of any steps the Copyright Agency has taken to commence a review.

Our concern regarding the lack of progress toward a review is that we fully expect that it will identify just how little independent providers utilise the statutory licence. The Copyright Agency has declined to use the results of the survey of public universities, which would also lower costs for independent higher education providers, and so independent providers are at a disadvantage to their public counterparts.

Conclusion

IHEA does not have the resources to fund a protracted litigation process in order to reach a settlement for a better deal for independent providers. We are also of the view that such action should not be necessary to secure a fair and reasonable arrangement for independent higher education providers, and their students, that is comparable to what occurs at public universities.

In the context of the Triennial Review, we believe that the Code is not being adhered to in terms of the requirement that Collecting Societies act fairly, reasonably and impartially. We believe the Code needs to be strengthened so that where a Collecting Society is not meeting the Code, that they be required to undertake an independent review. Further, while compliance with the Code is reviewed annually, there is clearly a case for these arrangements to be overhauled to actively capture and address non-compliance.

To assist in achieving parity and to provide an evidence base around actual usage, IHEA recommends an independent review of the license rates as the only way to address the current approach to independent higher

education providers and to ensure that there is parity with public universities. This review would analyse usage by providers to determine the actual number of pages copied and distributed to students during their studies. The outcomes of such a review will provide insights into the amount of material utilised and assist with determining the ongoing fee structure, which was the approach used to inform the agreement with UA.

If at all possible, a review could also include APRA AMCOS and Screenrights, with a requirement to be transparent about differing methodologies for determining licence fees for public and independent providers.

While some steps have been taken to bridge the gap in licence fees between public and independent providers, there is still some way to go to achieve parity. We believe there are steps that must be taken as part of this review to ensure that the Code is effective in achieving its mission – we see that a requirement to undertake a review where it is clear, as it is in this case with respect to independent providers, that a fair, impartial and reasonable approach is not occurring. In accordance with the requirements of section 2.3 of the Code. It is also critical that appropriate arrangements are in place to ensure compliance with the Code.

In time, there will also be a need to review the *Copyright Act 1968* to ensure that the interpretation of “equitable remuneration” is not a matter of interpretation and applied differentially based on provider type. This will ensure that statutory licence provisions and costs reflect modern education practices and reduce unreasonable cost imposts on education.

Who We Are

Independent Higher Education Australia Ltd. (IHEA) is a peak body established in 2001 to represent Australian independent (private sector) higher education institutions. Our membership spans independent universities, university colleges and other institutes of higher education, all of which are registered higher education providers accredited by the national higher education regulator, TEQSA or associate members seeking registration.

Our Vision is that: students, domestic and international, have open and equitable access to world class independent higher education in Australia, built on the foundations of equity, choice, and diversity.

Our Mission is to represent independent higher education and promote recognition and respect of independent providers as they contribute to Australian education, the Australian economy, and to society in general. We achieve this by promoting continuous improvement of academic and quality standards within member institutions, by advocating equity for their staff and students, and by delivering services that further strengthen independent providers' reputations as innovative, sustainable, and responsive to the needs of industry and other relevant stakeholders in both higher education and vocational education and training. IHEA's commitment is to excellence, productivity and growth in independent higher education being delivered through a trusted Australian education system underpinned by equity, choice, and diversity.

IHEA members have different missions, scales, and course offerings across the full AQF range (Diplomas to Doctorates). IHEA has 86 members, which comprise:

- Five private universities (Australian University of Theology, Avondale University, Bond University, Torrens University and University of Divinity).
- Six University Colleges (ACAP University College, Alphacrucis University College, Excelsia University College, Moore Theological College, SAE University College and Sydney College of Divinity).
- Seven self-accrediting institutes of higher education (ACAP University College, Excelsia University College, Griffith College, Kaplan Business School, Marcus Oldham College, Photography Studies College and The College of Law).
- Seventy not-for-profit and for-profit institutions of higher education; and related corporate entities.

IHEA members teach approximately 74 percent of the students in the independent sector (i.e., more than 130,000 students) and educate students in a range of disciplines, including law, agricultural science, architecture, business, accounting, tourism and hospitality, education, health sciences, theology, creative arts, information technology, human services and social sciences.

IHEA holds a unique position in higher education as a representative peak body of higher education providers. Membership in IHEA is only open to providers registered, or seeking registration, with the Australian regulator – TEQSA. However, some IHEA members are dual and multi-sector providers who also deliver VET and/or English Language Intensive Courses for Overseas Students (ELICOS) courses.

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