Response to the Copyright Modernisation consultation paper

Joint Submission from the Australian Film & TV Bodies

4 July 2018

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Executive summary

The Australian Film & TV Bodies[1] welcome the opportunity to provide comments in response to the Department of Communications and the Arts' Copyright Modernisation consultation paper. Many of the reforms proposed would directly affect our members' businesses. We are accordingly eager to discuss many of the issues raised in this review.

> **Question 1a – Additional fair dealing exceptions:** To what extent do you support introducing additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?

The current fair dealing exceptions, including the recently introduced exception for access by persons with a disability, are fit for purpose and effective. Nonetheless, the Australian Film & TV Bodies are not opposed to the introduction of additional fair dealing exceptions or new specific exceptions, where it can be demonstrated that they appropriately balance the interests of copyright owners and users and that there is a need for additional prescribed uses warranting a change to the existing framework.

Quotation and text and data mining: The Australian Film & TV Bodies would support an additional fair dealing exception for quotation, and a specific and limited exception for text and data analysis, provided that these exceptions are appropriately framed in the ways set out below.

Incidental and technical use: Introducing an exception for incidental and technical use would cause serious damage to copyright owners and creators and blur the existing contours of legitimate use for consumers and other users. The premises of the arguments offered so far for introducing such an exception are flawed and should not be relied upon. These include:

- False Premise 1: The claim that copying of the content is part of a 'merely technical' process;
- False Premise 2: The claim that search engines are illegal under Australia's Copyright Act; and
- False Premise 3: The claim that Australia is lagging behind as other countries have broad exceptions for technical and incidental use in place.

Further, the negative implications of introducing such an exception should not be understated. These include: assisting mainstream platforms to claim legitimacy while simply enabling pirated content to permeate on their services, causing substantial and irreparable damage to copyright owners and creators; inconsistency with Australia's international obligations and the scheme of the Act; and potential cross-over impact on parallel Government enquiries. This submission details why such an exception should not be supported.

Non-commercial private uses: The Australian Film & TV Bodies also strongly oppose the introduction of additional exceptions for non-commercial private uses. The current time and format shifting copyright exceptions provide significant flexibility to copyright users to copy works for private and domestic purposes.

> **Question 1b – A 'fair use' exception:** To what extent do you support introducing a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

Consistent with the arguments made in our response to the Productivity Commission's reports and elsewhere, the Australian Film & TV Bodies strongly oppose the introduction of a 'fair use' exception, either as a replacement to the current fair dealing exceptions or in addition to them.

[1] Further details on members of the Australian Film & TV Bodies can be found in Appendix A.

Question 2: What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB

- specific exceptions relating to galleries, libraries, archives and museums.

The Australian Film & TV Bodies support the submissions of Screenrights with regards to this question.

Question 3: Which current and proposed copyright exceptions should be protected against contracting out?

Question 4: To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?

- all copyright exceptions?

The Australian Film & TV Bodies will not oppose restrictions against contracting out, provided that these should only apply where there is a demonstrable need, supported by evidence, related to a specific exception. We believe that at present, the only current copyright exceptions that meet these criteria for protection against contracting out are the libraries and archives exceptions (ss 48A, 49, 50, 51 and 104A) and the new exceptions facilitating access to works for people with a disability (ss 113E and 113F).

The Australian Film & TV Bodies may be able to support an extension of protection against contracting out for other exceptions, including any new exceptions that are contemplated, provided that we and other stakeholders are appropriately consulted once the language for the exception has been specified and the case for any such restriction against contracting out has been made.

However, a blanket restriction against contracting out will have many unintended consequences and is not supported by the Australian Film & TV Bodies. For example, the exceptions for format shifting, universities and incidental and technical use that are considered in this consultation have the potential to cause real harm and should not be automatically protected against contrary contractual provisions if the Government were to decide to introduce such exceptions.

Question 5: To what extent do you support each option and why? (statutory exception, limitation of remedies, or a combination of the above)

Question 6: In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)

- capping liability to a standard commercial licence fee

- allowing for an account of profits for commercial use

Question 7: Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

Concerning Question 5, the Australian Film & TV Bodies support the Government's proposal of a legislative solution to address the problem of access to, and use of, orphan works. We would support limitation of remedies, but not the statutory exception or a combination of a statutory exception and limitation of remedies. Adopting an entirely different model of a statutory copyright exception would have adverse consequences.

Concerning Question 6, the limitation-of-remedies provision should not prescribe a manner of limiting liability, as it will be important for the Court to have discretion to determine the appropriate remedy.

Concerning Question 7, we do not support a separate approach for collecting and cultural institutions, either as the only form of the new Australian orphan works regime or as a separate limb of the regime.

About us

The Australian Film & TV Bodies are made up of the Australian Screen Association (ASA), the Australian Home Entertainment Distributors Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators-Australasia (NACO), the Australian Independent Distributors Association (AIDA) and Independent Cinemas Australia (ICA).

Our aim is to support, protect and promote the safe and legal consumption of movie and TV content across all platforms, allowing creators to get compensated fairly for their work. We work together to promote this aim through education, public awareness and research programs. Our members represent a large cross-section of the film and television industry that contributed $5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.[2]

A General comments

The Australian Film & TV Bodies support the approach of the Department in reviewing the Copyright Act (1968) (Cth) (the **Act**) to ensure that it is fit for purpose in the current environment.

Australia has consistently been at the forefront of international developments in copyright, most notably in implementing the right of communication to the public and other aspects of the WIPO Internet Treaties before many other jurisdictions, in our early implementation of an express exception for parody and satire (some eight years before the UK) and in introducing site blocking language under section 115A.

Past reforms have been successful because they have involved a process of extensive consultation and incremental reform based on a broad consensus of stakeholders and a careful review of the implications of the proposed reforms, both from a practical perspective and with respect to the development of Australia's copyright law as codified in the Act. This approach to reform is especially important in the context of copyright, a complex and finely balanced area of law, where a change in one aspect will affect other aspects, potentially with serious negative effects given the various interests and policies that must be balanced.

The Australian Film & TV Bodies urge the Department to take the same approach in this current review. The Consultation's three areas targeted for review directly implicates this balance:

- **Copyright exceptions** impact not only the exclusive rights of copyright owners, but also the existing licensing frameworks and business models.
- **Restrictions on 'contracting out'** require a careful analysis of the interaction between copyright law and contract law, including the purposes and beneficiaries of copyright exceptions in a rapidly evolving digital marketplace for copyright works.
- guiding the use of **orphan works** to ensure that their use is governed in a principle way that fits within the existing scheme of the Act.

The Government should take care not to introduce reforms benefitting a small set of stakeholders, without carefully considering how those changes will affect the copyright balance and the interests of all other stakeholders, and whether a more incremental approach is more appropriate and adapted to the circumstances.

This submission identifies areas where reforms could appropriately be made in line with the above approach, in order to be most consistent with Australia's existing copyright jurisprudence, international norms and Australia's international obligations.

Finally, the Australian Film & TV Bodies urge the Government to carefully consider the most current circumstances and developments during its inquiry. Caution should be exercised when referencing the findings and recommendations of the ALRC in its 'Copyright and Digital Economy' report, handed down in February 2014

[2] Access Economics, *Economic Contribution of the Film and Television Industry* (February 2015) Australian Screen Association <http://screenassociation.com.au/wp-content/uploads/2016/01/ASA_Economic_Contribution_Report.pdf> iv.

– over four years ago. The premise for the ALRC's recommendations in the context of fair use was that exceptions in Australia under Fair Dealing are more limited than they are in the United States under fair use. What the ALRC failed to consider were remunerated exceptions, and when these are taken into account Australian users have far greater access to legal content than those in the United States.[3] Furthermore, there have been significant market changes since 2014, including the number and variety of digital business models offering copyright materials online. *Netflix* and *Stan* did not launch in Australia until 2015. Now these types of streaming services are widely available, reflecting a move by consumers from possessing the work to accessing the work temporarily online under license. This shift has implications for the appropriate scope of various copyright exceptions and their relationship to contract law, and for the ways in which we should approach reforms to copyright in general.

B Flexible exceptions

Question 1a

> **Additional fair dealing exceptions:** To what extent do you support introducing additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?

The current fair dealing exceptions, including the recently introduced exception for access by persons with a disability, are fit for purpose and effective. Nonetheless, the Australian Film & TV Bodies are not opposed to the introduction of additional fair dealing exceptions or new specific exceptions, where it can be demonstrated that they appropriately balance the interests of copyright owners and users and that there is a need for additional prescribed uses warranting a change to the existing framework.

When considering the arguments for new copyright exceptions, the Department should take into account that Australian copyright law is generally functioning very effectively in the contemporary environment, is progressive in comparison to other jurisdictions, and that incremental and proportionate amendments rather than radical amendments are the appropriate approach.

Australia is often well ahead of other jurisdictions in considering and introducing new exceptions as circumstances change. The parody and satire exception in sections 41A/s 103AA was introduced in 2006, well ahead of comparable jurisdictions (e.g. the equivalent defence in the UK was only introduced in 2014).

The structure of fair dealing exceptions; fairness factors

Setting to one side the question of whether any additional exceptions should be introduced, there should be no substantive change to the framework for examining or adopting copyright exceptions in the Act. The existing fair dealing provisions function well and, with one exception mentioned below, should not be changed in form, content or location within the Act.

The five factors that are currently prescribed for consideration in determining fairness remain appropriate for both the existing and any new fair dealing exceptions (see s 40(2) of the Act). It is important that these five factors are made applicable to any new exceptions. While the new exceptions for access by persons with a disability (ss 113E and 113F) omit the third factor ('the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price'), this was based on considerations unique to that exception and the context for its introduction (the Marrakesh Treaty). These considerations do not apply in the context of any other current or proposed copyright exceptions. To the contrary, this factor recognises that the starting point under the Act in any other context is that rightsholders are entitled to be paid for uses of their works.

Although the Act does not expressly refer to these factors for each fair dealing exception (see e.g. ss 41A-43 and 103A-103), courts have assumed that they would be applied. (One improvement to the existing framework for exceptions would be to codify this principle. A simple amendment could be made to the Act to clarify that, for the purposes of each of the fair dealing exceptions, the five factors set out in s 40(2) are to be examined.

[3] For more details, please refer to Screenrights' submission to this consultation.

Any more radical amendment, such as the introduction of 'flexible fair dealing' (i.e. consolidating all existing fair dealing exceptions into a single provision that lists the various purposes and fairness factors) would not be appropriate. Flexible fair dealing is strongly opposed by the Australian Film & TV Bodies for the following reasons. Flexible fair dealing is equivalent to fair use. It remains a type of copyright exception that is unknown to Australian copyright law and untested in Australia. Adopting such an approach would not 'streamline' the Act; it would be a radical amendment. The consequences of introducing it are uncertain and unpredictable. Flexible fair dealing is not appropriate for specific copyright exceptions (such as the format and time shifting exceptions), which incorporate specifically negotiated limitations that are designed to balance the competing interests of stakeholders (e.g. limitation to particular technologies or retrospective removal of the exception if a copy is subsequently dealt with – see e.g. s 110AA). A flexible fair dealing regime that incorporates these exceptions would remove these limitations, undermine the copyright rights and cause real economic damage to copyright owners and creators, while creating uncertainty for users and intermediaries.

The ALRC called flexible fair dealing a 'step towards fair use'.[4] The Australian Film & TV Bodies consider that it would amount to 'fair use by the back door' and strongly oppose it. More on these points is provided in response to question 1b below.

New exceptions supported

The Australian Film & TV Bodies would support an additional fair dealing exception for quotation, and a specific and limited exception for text and data analysis, provided that these exceptions are appropriately framed. However, introducing other new exceptions – including for incidental and technical use and for non-commercial private uses – will cause serious damage to copyright owners and creators and blur the existing contours of legitimate use for consumers and other users. These exceptions should not be introduced.

1. Quotation

Quotations will not generally infringe copyright in the source work, because they are insubstantial. However, this remains an issue for legal analysis and risk assessment in any given case. An appropriately limited exception could properly be introduced in Australia to clarify matters for copyright users, in line with Article 10 of the Berne Convention.

Appropriate limitations on the new exception can predominantly be found in Article 10 of the Berne Convention, and in the exception for quotation that was introduced in the UK following the Hargreaves Review (see s 30(1ZA) of the *Copyright, Designs and Patents Act 1998*). With the exception of point 1 below, the limitations in the UK exception reflect the limitations that would be appropriate in Australia (when combined with the fairness factors).

Quotations from works (not subject matter)

Article 10 of the Berne Convention prescribes an exception for quotations from works (i.e. in the Australian context, Part III works, not Part IV subject matter other than works). Specifically, Article 10(1) refers to quotations from 'newspaper articles and periodicals in the form of press summaries'.

This reflects the ordinary understanding of the concept of quotation in Australia. The Macquarie Dictionary defines quotation as 'that which is quoted; a passage quoted from a book, speech, etc' (emphasis added). Australian Courts would look to this definition for the meaning and scope of quotation – i.e. that it would be limited to quotations from literary and dramatic works only. Expanding the concept beyond this definition would create a fiction that is contrary to community expectations and cause confusion, by implying that it extends beyond these types of works.

It would also cause substantial harm to the interests of copyright owners, by undermining existing commercial licensing markets for short extracts of other types of copyright works, especially films, musical works and commercial sound recordings.

The Australian Film & TV Bodies propose that any new exception for quotation be limited to Part III works, and for additional clarity, to literary and dramatic works. If that is done, quotation does not need to be separately defined. The concept is clear and would be widely understood as intended.

[4] ALRC Final Report at [6.41].

The recently introduced quotation exception in the UK is a useful model here (see section 30(1ZA) of the *Copyright, Designs and Patents Act 1988 (UK)* (**UK Act**), with one exception, as follows. The UK quotation exception is not limited to particular types of copyright works, as this reflects the different scheme of the UK Act, which does not distinguish between works and 'other subject matter' in the way that the Australian Act does. However, the UK position relies on the ordinary meaning of quotation and the concept of fair dealing to limit the application of the exception to particular types of works: for example, the guidance issued by the UK Intellectual Property Office states that the exception will not apply to photographs, except in 'exceptional circumstances'.[5]

Lawfully made available to the public

The requirement that the work has already been lawfully made available to the public is a feature of Art 10(1) of the Berne Convention and also of the UK exception for quotation.

It should be reflected in any new Australian exception.

Fair dealing

As prescribed by Art 10(1) of the *Berne Convention* and as per the UK exception, any new quotation exception should be a fair dealing exception (i.e. the use of the quotation must be a fair dealing with the work for the purpose of quotation). In the Australian context, the five fairness factors set out in s 40(2) should then apply when determining what constitutes a fair dealing. Not including the third factor (e.g. 'the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price') would be especially detrimental in the context of a quotation exception, where there are existing licensing markets.

To further protect against any unintended consequences on licensing markets, the Australian Film & TV Bodies propose that the Explanatory Memorandum clarify that the fairness factors must be applied so as not to exclude the use of short extracts of works that are the subject of a commercial licensing market.

Extent of quotation does not exceed what is justified for the purpose

As prescribed by Art 10(1) of *Berne* and as per the UK exception, any new quotation exception should only apply to quotations that do not extend beyond what is required for the specific purpose for which the quotation is being used. Quoting more than is needed would not be a fair dealing under this exception, but it would be useful in practice for this to be specified (as recognised by *Berne* and sections 30(1ZA) of the CDPA).

Acknowledgment of source and author

Article 10(3) of the Berne Convention contains an absolute requirement to acknowledge the source and (if available) the name of the author wherever reliance is placed on the quotation exception. The UK exception reflects this requirement, but includes a qualification related to practicality. The Australian Film & TV Bodies would support either approach.

2. Text and data mining

While licensing markets should always be considered and given time to develop in the first instance before new exceptions are introduced, if that does not occur, it would be consistent with the existing copyright balance and developments in other jurisdictions to include an appropriately qualified specific exception (not a fair dealing exception) for the purposes of text and data mining. This is in contrast to the position for a new exception for incidental and technical use discussed below.

Such an exception for text and data mining would resolve the only potential gap in the provision made by the Act for technical uses of copyright material under exceptions (i.e. the only uses that should be covered by a copyright exception but currently are not so covered). In order for such an exception to work in an effective, efficient and proportionate way that balances the interests of stakeholders, it must be appropriately limited. This has been done in other comparable jurisdictions, notably the UK and Ireland. The Australian Film & TV Bodies could only support such an exception if it includes all of these express limitations.

[5] UK Intellectual Property Office 'Exceptions to copyright: Guidance for consumers', p 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448273/Exceptions_to_copyright_-_Guidance_for_consumers.pdf>.

Consistent with the new UK exception in s 29A CDPA, and the proposed new exception currently under consideration in Ireland,[6] we suggest the appropriate parameters of a text and data mining exception are as follows:

- The sole purpose of the copying should be limited to non-commercial research. (Users wishing to copy content for text and data analysis should obtain permission (i.e. a license) from the copyright owner.
- The person making the copies has lawful access to a legitimate copy of the work.
- Specify that any subsequent dealing with the copy would be infringing.

New exceptions opposed

The Australian Film & TV Bodies are concerned about some other exceptions under consideration and urge the Department to carefully consider the consequences of these exceptions.

3. Incidental or technical use

The Australian Film & TV Bodies strongly oppose additional copyright exceptions in this area, including any attempt to replace the existing tailored and proportional exceptions with a blanket fair dealing exception for 'incidental or technical use'. No substantive evidence has been presented to show that these changes are required for the digital economy to be able to function properly.[7] The Copyright Modernisation consultation has not considered other models and it has not demonstrated why the existing exceptions (s43A, 43B, 111A and 111B) are inadequate. By contrast, the risks of implementing the exception as currently framed are immense and have not been addressed.

The arguments advanced for an Incidental and Technical Use exception are based on a number of false premises, each of which we address below.

False Premise 1: The claim that copying of the content is part of a 'merely technical' process

In reality, the primary beneficiaries of an incidental and technical use exception would be commercial entities that would seek to use third party copyright material as part of their business operations for free and without the consent of the rightsholder. In the digital environment, 'incidental' and 'technical' uses of copyright material which are not covered by an existing exception are uses of copyright material that is of commercial value to a rightsholder and of commercial value to a commercial user. This fact has become increasingly clear and persuasive in the time that has passed since the ALRC issued its final report in 2014. It is now well-known that online platform providers are big businesses that rely on third-party content, and users' data related to such content, in order to generate profits. These platforms are capable of obtaining licenses for the third-party content and should be incentivized to do so.

Incidental and technical uses of copyright works do not become less commercial or revenue-generating in character just because they operate in the background and are not customer-facing (e.g. as an input to a business process, or the development of commercial technology).

A perfect example is a new initiative from Google, which recently published a paper on research into a new algorithm[8] that would take content from various sources and use it to generate 'coherent' articles. The effect of this is that Google can answer a user's question without having to send them to another website. This makes the content copied clearly a direct input to a business process.

Another compelling example is the use of cloud storage services. There is nothing particularly 'technical' and certainly nothing 'incidental' about the copies being made by these services. The copying and indexing of information is specifically what these businesses do; they are remote file storage services provided on a commercial basis. For these companies to avoid liability for infringement on their services, it is entirely reasonable they are required to take steps to effectively mitigate the infringement that takes place on their service. In our submission to the *Review of the Copyright Online Infringement Amendment* we pointed out that the US Trade Representative's 2017 Out-of-Cycle Review of Notorious Markets Report classifies some of these

[6] *Copyright and Other Intellectual Property Law Provisions Bill 2018*, s 13 <https://www.oireachtas.ie/en/bills/bill/2018/31/>.

[7] In the Incidental and Technical Use roundtable summary, proponents for introducing this new fair dealing made broad statements saying that search engines are illegal under Australian law, without providing a detailed assessment backing up such a claim.

[8] Roger Montti, Search Engine Journal May 17, 2018, 'Google's new algorithm creates original articles from your content' <https://www.searchenginejournal.com/google-article-algorithm/>.

storage services as 'prominent and illustrative examples of online and physical marketplaces that reportedly engage in, facilitate, turn a blind eye to, or benefit from substantial piracy.'[9] In our opinion, these services should not be able to argue from behind the shield of a fair dealing because the reproduction of the infringing content was apparently 'technical' or 'incidental'.

In addition, a recent Australian example of unauthorized exploitation of others' content can be seen in the findings of the Full Federal Court in relation to the online marketplace Redbubble. In that case the Court stated:

> *The business established by Redbubble carried the inherent risk of infringement of copyright of the kind complained of by [Pokémon]. It is true that Redbubble sought to mitigate the risk, but it was an inevitable incident of the business, as Redbubble chose to conduct it, that there were likely to be infringements. It could have prevented them by taking other steps but* ***for business reasons*** *Redbubble chose to deal with the risk of infringement by a process that enabled the infringements to occur. Such infringements were embedded in the system which was created for, and adopted by, Redbubble. There may have been a sound commercial basis for Redbubble to manage the risks of infringement as it did, but in doing so it authorised the infringements which occurred.*[10] [bold emphasis added]

The Court's statement makes it clear that this should not be considered as a mere technical process, but rather a business strategy to avoid the costs of paying rightsholders for the use of their intellectual property. The content that is being copied and indexed is an essential input to the commercial products that these companies develop and should be treated as such.

False Premise 2: The claim that search engines are illegal under Australia's Copyright Act.

The current search business model of indexing websites is not illegal in Australia. This action is covered by sections 43B and 111B of the Copyright Act, which provide exceptions for use of all types of copyright material 'as a necessary part of a technical process of using a copy of the subject matter'. Sections 43A and 111A provide further protection for copies made as part of the technical process of making or receiving a communication.

The fact that the copy is 'temporary' is a relevant limitation that should be retained: 'temporary' is merely defined as against 'permanent'. Temporary does not mean 'instantaneous'. We are concerned that such an exception is being sought by platforms seeking to build entire permanent databases of copyright works to the detriment of creators.

False Premise 3: The claim that Australia is lagging behind as other countries have broad exceptions for technical and incidental use in place

The Australian Film & TV Bodies are not aware of any country that has a broad and flexible exception covering technical uses. The incidental and technical use exception under European law (Art 5(1) of the 2001 Copyright Directive (2001/29/EC)) is limited and identical in scope to the current Australian exceptions (ss 43A 43B, 111A, 111B). On the other hand, a broad exception for non-consumptive use was rejected in the UK following the Hargreaves Review process with a specific exception for text and data mining adopted instead. This is no coincidence, given the previous point; the risk of infringement is theoretical only. It also reflects the unacceptable harm that would be caused to rightsholders by such an exception, as explained in more detail below.

The incidental infringement issues associated with the internet were addressed many years ago, when Australia and other countries updated their copyright laws in line with the WIPO Internet Treaties (Australia was one of the first countries to do so). These treaties have stood the test of time, as indicated by the fact that there remain no genuine legal risks for the operators of online businesses that do not attempt to generate revenue from third-party copyright works without obtaining appropriate licences from rightsholders.

<u>Negative implications of introducing such an exception</u>

The Australian Film & TV Bodies submit that the consequences of such a broadly worded exception would be significant**.** They include the following immediate concerns:

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[9] Office of the United States Trade Representative, 2017 Out-of-Cycle Review of Notorious Markets (January 2018) <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

[10] *Pokémon Company International, Inc v Redbubble Ltd* [2017] FCA 1541.

- ***Assisting mainstream platforms to claim legitimacy while simply enabling pirated content on their services***

  In practice, the exception would become the defence of choice for legitimate platforms seeking to avoid compensating creators for the use of their works. The majority of significant online platforms in Australia and overseas have consistently maintained that all they are doing is providing 'technical' services, such as indexing, storing and the like. They would inevitably claim that the use is simply an 'incidental or technical use' even where they serve a combination of infringing and non-infringing purposes (e.g. cyberlockers). Even if this defence would eventually fail before the Courts, it would nevertheless provide platforms a shield to use to deter the majority of creators from pursuing litigation against them. The majority of smaller creators would never be able to pursue litigation against large platforms from a practical perspective, even if they did think their exclusive rights were being infringed. For those larger creators and rightsholders that could marshal enough resources to pursue litigation against them, major platforms could delay the proceedings for years through the court system. In a time where the competition and regulatory authorities across the world are reviewing the already considerable market power of such platforms, it would be ironic to grant them an implicit license to infringe then dare rightsholders to pursue them for doing so.

- ***Inconsistency with Australia's international obligations and the scheme of the Act***

  The proposed exception is not recognised in any of Australia's bilateral and multilateral treaties. Introducing such an exception would be contrary to Australia's international obligations, including the three-step test contained in the *TRIPS Agreement*, the *Berne Convention* and the Australia-US Free Trade Agreement (AUSFTA) which benchmark the limits of permissible exceptions.

  More specifically, the exception would effectively immunize a broad category of infringing intermediary uses, which would significantly and adversely disrupt the careful balance set up in the Act under the safe harbour regime. The safe harbour regime is prescribed by the AUSFTA and creates protections for qualifying service providers provided that they take prescribed steps to prevent infringements of copyright occurring on their networks. The proposed new exception is very different from the safe harbour regime, which at least conditions a defence to claim for monetary damages on the taking steps to assist rightsholders to minimise infringement. As such, introducing the proposed new exception would most likely also put Australia at odds with its obligations concerning the safe harbour provisions of the AUSFTA.[11]

- ***Potential impact on parallel Government enquiries***

  The exception also risks disrupting other reforms, such as legislative or regulatory changes that may arise out of the current ACCC Digital Platforms enquiry, which is considering whether online platforms should be required to pay for the content that they copy and communicate to the public. This is not something that is only under consideration in Australia. The EU is considering similar issues and is currently preparing proposals where platforms would have to compensate publishers for the use of snippets or seek licenses for the use of music videos.[12]

4. Non-commercial private uses

The Australian Film & TV Bodies strongly oppose the introduction of additional exceptions in this area.

The current time and format shifting copyright exceptions provide significant flexibility to copyright users to copy works for private and domestic purposes. Many of these exceptions are no longer required in practice, given the proliferation of legitimate services such as Netflix, Stan and iTunes that are governed by licence agreements giving consumers the rights that they need (e.g. to download for offline use and to share content with family via linked accounts on streaming services). This is discussed further in section C below. No need for a further exception in this space has been demonstrated.

If additional exceptions were to be introduced for this purpose, we would have significant concerns about harm caused to legitimate markets and compliance with Australia's international obligations, including the Berne (and

[11] See AUSFTA, Art. 17.11.29.

[12] Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM(2016) 593 final < https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>.

TRIPS) three-step test, given that these would likely conflict with the normal exploitations of the works and unreasonably prejudice to the legitimate interests of copyright owners and creators.

5. Certain educational uses and certain government uses

The Australian Film & TV Bodies support the submissions of Screenrights on these exceptions. We consider that the exceptions currently set out in the Act for educational and government uses of statutory material remain appropriate and adapted in the current environment. Taken with the related statutory licences, they set an appropriate balance between the needs of copyright owners and users in the educational and government sectors. We endorse Screenrights' submission that careful reform of section 200AB should be able to address some of the concerns raised about access to content for teaching purposes.

Process for introducing new exceptions

Any new exceptions proposed to be included in the Act should be undertaken in line with the usual process in Australia and other jurisdictions such as the UK and Canada. The alternative process proposed, which would allow the Minister to add, amend and remove exceptions, is neither required nor desirable, as it is likely to create uncertainty and confusion about the scope and applicability of exceptions.

Question 1b

> **A 'fair use' exception:** To what extent do you support introducing a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

The Australian Film & TV Bodies strongly oppose the introduction of a 'fair use' exception, either as a replacement to the current fair dealing exceptions or in addition to them.

The arguments and evidence in support of this position have been set out extensively in other submissions by the Australian Film & TV Bodies, in particular, to the Productivity Commission's initial issues paper and draft report in 2015 and 2016, and to the ALRC 'Copyright and the Digital Economy' issues paper and discussion paper in 2013. They are not set out in full again here, but are summarised below.

The case for fair use has not been established

Fair use is not appropriate for the Australian environment. The case for it has not been established. There is no consensus in support of it, and the supposed 'need' for a fair use exception is more theoretical than real.

There is no evidence that a fair use system will assist with innovation or participation in the digital economy. The evidence to the contrary is strong: in particular, that a broad open-ended fair use exception is likely to produce uncertainty (leading to regulation by litigation) and will actually have a *negative* impact on the Australian economy, including by prejudicing the ability of copyright owners to receive a fair return for the exploitation of their works. This is reinforced by the latest research, which is discussed below.

Only a very small minority of *Berne* countries (six of 176 countries), have adopted a similar style of flexible exception; yet many more have considered and rejected it based on similar concerns to those mentioned above. Of those six countries, only the US has developed jurisprudence guiding the application of the exception; in the other jurisdictions, the factors have largely sat dormant in the law. Accordingly, economists Beard, Ford and Stern concluded that the size of a market for copyrighted goods is a key consideration when determining how strict exceptions should be; the smaller the market, the more restrictive the exceptions.[13] There is no reason to expect a different result if fair use was imported into Australia.

For these reasons, fair use has been rejected by the Australian Government each and every time it has been considered (in September 2000 by the Ergas Committee, in 2006 as part of the Explanatory Memorandum for the *Copyright Amendment Bill 2006* (Cth), and in 2014 following the ALRC 'Copyright and the Digital Economy' review).

The proponents of fair use currently rely heavily on the 2018 Deloitte report, titled 'Copyright in the Digital Age' (the **Deloitte Report**). However, as the disclaimer on the last page of that report indicates, it was prepared 'solely

[13] T. Randolph Beard, George Ford and Michael Stern, *Fair Use in the Digital Age*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, September 2016 <http://www.phoenix-center.org/pcpp/PCPP51Final.pdf>.

for the *(sic)* Google Australia' and is 'not intended to be relied on by anyone else'. Setting that to one side, Dr George Barker's recent analysis of the Deloitte Report[14] demonstrates the substantial flaws in the analysis, which reflect a fundamental misunderstanding of the nature of copyright and licensing markets. Dr Barker shows how the Deloitte Report ignores and misrepresents the negative impact of fair use on the copyright industries, in favour of promoting the economic benefits of fair use to downstream users, leading to the conclusion that 'Fair Use is really being advocated to secure Free Use'.[15]

It would be irresponsible of the Government to embark on such a substantial upheaval of Australia's copyright framework in the face of an unsubstantiated case for such a major shift, advocated for by players with a clear economic interest in diminishing copyright to the real detriment of creators.

Question 2

> What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:
>
> - section 200AB
>
> - specific exceptions relating to galleries, libraries, archives and museums.

The Australian Film & TV Bodies support the submissions of Screenrights with regard to this question.

C Contracting out of exceptions

The importance of contracts

Contracts, and the business models that they permit, are fundamental to the ability of copyright owners to monetise their works. This is particularly true in the digital economy which facilitates a multiplicity of offerings underpinned by contract. To meet the needs and expectations of users, copyright works are increasingly being licensed for a variety of uses. For example, in the case of streaming services for entertainment content such as Netflix, Stan or Spotify, or subscription services for books, articles and magazines, access to an electronic platform or database is provided to users on specific terms and conditions in exchange for subscription fees. These access-based arrangements contribute to the broad accessibility of copyright works in the online environment, make piracy less attractive and enable individual creators to monetise their works online.

These new business models rely for their operation on licence terms that impose specific conditions of access to copyright material. The limitations imposed by these licence terms are tailored to the requirements of parties, and are factored into the price paid by the consumer for access to the service. For example, a user who requires access to content for a temporary period will pay less than a consumer wanting portable access permanently, the same for plans enabling access on multiple devices with multiple users. The terms of access are sufficiently flexible and specific to adapt to the diversity of the market: for example, rights to download content for use offline are now the norm for these services.

In short, contractual terms enable broader functionality, portability, flexibility and variable pricing which translates into greater consumer choice. This facilitates the efficient and competitive distribution of copyright materials, especially in the multi-jurisdictional online environment.

Restricting the enforceability of contractual terms relating to copyright risks undermining the operation of these types of legitimate business models in Australia, and the ability of Australian consumers and businesses to access them. If business models which are developing globally for the distribution of copyright content were to be adversely affected by the operation of local copyright exceptions nullifying agreed terms and conditions of use, those business models may become less available here. At present, Australia is widely perceived as an excellent jurisdiction for the launch of licensed online services, because of the stability and predictability of Australia's copyright and contract laws. This would be undermined if copyright provisions overriding contractual arrangements were mandated.

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[14] George Barker, *More Unfair Claims about Fair Use in Australia*, SSRN, May 24, 2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184614>.

[15] Ibid.

The Department does not refer to, and the Australian Film & TV Bodies are unaware of, any evidence suggesting that copyright and contract do not function effectively, proportionately or fairly in these types of private transactions. The same observation applies in the context of the licensing of copyright materials for commercial uses (e.g. paid online databases).

Australia's international competitiveness is also likely to be adversely affected by the introduction of restrictions on contracting out. Businesses that distribute copyright materials are likely to elect to contract in other jurisdictions where these restrictions, and the uncertainty that they generate, do not apply. As the ALRC recognised, an amendment to the Act will not affect contracts governed by foreign law, even when they apply to businesses operating in, or even based in, Australia.[16] This will tend to reduce reliance on Australian laws (both copyright and other laws, such as consumer protection and taxation laws), and disadvantage parties who choose to apply Australian law to their contracts.

There are other adverse, unintended consequences of restrictions on contracting out of copyright exceptions. The certainty and clarity provided to copyright users by a clear licence regime would be replaced by uncertainty about the impact of the restriction on contracting out, and the scope of the relevant copyright exceptions – giving rise to debates and disputes about the scope of copyright exceptions that does not exist at present. The ability of rightsholders to ensure the enforceability of technological protection measures (TPMs) may also become uncertain.

New copyright provisions that have the effect of overriding contrary contractual provisions could equally apply to terms that prohibit the circumvention of TPMs. Overriding anti-circumvention provisions should be made specifically in that context (as has occurred during the recent consultation relating to TPMs), not by default or implication in a different policy context.

Overall, the arguments in favour of broad restrictions on contracting out of copyright exceptions (e.g. the option of applying to all copyright exceptions, or even to all fair dealing exceptions) appear to be based on a fundamental misunderstanding of the purpose and nature of exceptions to copyright. Exceptions to copyright apply to all users of copyright, usually in circumstances where there is no contract in place between the owner and user of the work or subject matter.

There is no good legal or policy reason for restricting the freedom of the parties to agree on the scope and conditions of a licence, especially in the context of the digital business models described above. Existing principles of contract law that prevent enforcement of terms that are contrary to public policy (including consumer protection and competition legislation) provide sufficient protection against any unfairness.[17]

We acknowledge that there may be a rationale for limiting the ability of parties to a licence to enforce terms that may adversely affect the ability of users who are not parties to the licence to rely on certain socially useful exceptions. However, it is important to distinguish between exceptions that serve core 'socially useful' purposes, and exceptions that merely serve technical or practical purposes (with the latter able to be altered by contract).

Details of the potentially relevant copyright exceptions are set out in the response to question 3 below, and details of the form of restriction on contracting out are set out in the response to question 4 below.

Question 3

> Which current and proposed copyright exceptions should be protected against contracting out?

The Australian Film & TV Bodies would not oppose restrictions against contracting out, provided that these should only apply where there is a demonstrable need, supported by evidence, to prohibit contracting out. We believe that at present, the only current copyright exceptions that meet the criteria outlined above for protection against contracting out are:

[16] ALRC Final Report, [20.107]. Of course, this is in addition to the complexities involved in enforcing Australian local laws in the online environment.

[17] These principles are conveniently summarised at [20.28] of the final ALRC report. In addition, the unfair contract terms regime in the Australian Consumer Law has now been extended to small business contracts.

- The libraries and archives exceptions (s 48A, 49, 50, 51 and 104A); and
- The new exceptions facilitating access to works for people with a disability; (s 113E and 113F);

both of which are referred to in the Department's consultation paper.

In these cases, there may be genuine needs of certain uses to access copyright works – that would otherwise be protected by these current or potential statutory exceptions – which are restricted by the terms of contracts that they are not party to or which are contrary to the public policy underlying those exceptions. The restriction on enforceability that may be acceptable is identified in the response to question 4 below, but overall, it is important that the restriction should only apply to the extent that the contractual terms affect persons or entities that are not parties to the licensing arrangement.

The Australian Film & TV Bodies may be able to support an extension of protection against contracting out for other exceptions, including any new exceptions that are contemplated, provided that we and other members of the public are appropriately consulted once the language for the exception has been finalised and the specific case for any such restriction against contracting out has been made.

However, a blanket restriction against contracting out will have many unintended consequences and is not supported by the Australian Film & TV Bodies. For example, we oppose the following exceptions raised by the Department as potential candidates for protection against contracting.

1. **Format shifting and similar exceptions**, in any context but especially when applied to the consumer that is the licensee in the relevant contract. As described above, the access-based model for consumption of entertainment content is proving highly efficient and effective at making content available to consumers at a price they are willing to pay. The ability of the licence providing access to that content to impose certain conditions is critical to the functioning of these services. Restricting the ability of licensors to impose these conditions on their licensees (customers) would be highly detrimental to the operation and development of these services in Australia, and therefore to relevant parts of the Australian economy as well as to the legitimate interests of Australian consumers. Format shifting and similar exceptions are designed to apply to physical content (i.e. a sale transaction, where no licence is in place and an exception may be needed) and have no place in the context of streaming or downloaded digital content (i.e. a licence-based transaction, where the contract is capable of governing all of the agreed terms, subject to ordinary principles of public policy affecting the enforceability of contracts).
2. **The university example** (point 3 on page 16 of the consultation paper). In this context, the university itself is capable of negotiating and paying for the rights that it needs to use content from journals. It would only be if a student or researcher needed to make a particular use of material that would otherwise fall under the fair dealing for research or study exception that a restriction on enforceability could apply.
3. **Incidental and technical use**, which is not a 'socially useful' exception. It is being sought by, and would predominantly be used by, businesses that exploit copyright as part of their commercial activities, and who are able to negotiate the terms of any licences that they may require.

Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions? (option 1)

- all copyright exceptions? (option 2)

The Australian Film & TV Bodies would not oppose a restriction on contracting out of certain prescribed purpose copyright exceptions (see the response to question 3 above), provided that the restriction takes the form set out below and is subject to appropriate conditions.

The Australian Film & TV Bodies are strongly opposed to a restriction on contracting out of all copyright exceptions, for the reasons set out above.

D Orphan works

The Australian Film & TV Bodies support the Government's proposal of a legislative solution to address the problem of access to, and use of, orphan works. A solution to the orphan works issue should be tailored to benefit all sectors of the Australian economy.

As set out in more detail below, an effective legislative change in this area should:

- apply to all potential users of orphan works, not just to specific institutions;
- be appropriately limited, to avoid abuse and adapt to changes in circumstances; and
- integrate effectively with the existing framework of the Act.

Question 5

> To what extent do you support each option and why?
> - statutory exception (option 1)
> - limitation of remedies (option 2)
> - a combination of the above (option 3)

The Australian Film and TV Bodies support option 2 (limitation of remedies), but not the statutory exception (option 1) or a combination of a statutory exception and limitation of remedies (option 3).

To avoid unintended consequences and difficulties in both interpretation and practical implementation, Australia's new orphan works regime should fit within the existing framework of the Copyright Act and concepts under copyright law. An analogy in the Act to an 'acceptable' use of orphan works not covered by the existing copyright exceptions can be found in the provisions relating to innocent infringement of copyright (section 115(3)). As section 115(3) provides, in the case of an innocent infringer, the plaintiff is not entitled to damages in respect of the infringements. It is a long-standing and effective provision that provides an appropriate balance between the interests of copyright owners and unintentional copyright infringers.

An orphan works provision that adopts this limitation of remedies model provides certainty in those circumstances where a use of orphan works could also be seen as equivalent to an innocent infringement under section 115(3). In such instances, the user can be characterised as akin to an innocent infringer; one who has tried but failed to obtain authorization from the rightsholder after conducting the requisite due diligence. It must be remembered, however, that the rightsholder has the exclusive right to grant or deny any offer to use his/her work with the exception of these few uses subject to compulsory licensing.

As with innocent infringement, the proper characterisation of the orphan works problem is not as an 'exception' to copyright, but a situation where the remedy should be limited, given that the rightsholder of the qualifying orphaned work could not be found despite reasonably diligent steps taken to do so. If an existing copyright exception would otherwise apply to an orphan work, the user can rely on that exception and will not need to invoke the orphan work provision.

Adopting an analogous approach to innocent infringement for all good faith users and uses of orphan works when framing the new Australian orphan works regime would fit well within the Act, both now and in the future. As with innocent infringement, the circumstances in which orphan works may legitimately be used vary widely and cannot all be predicted in advance. The flexibility given to the courts to award appropriate remedies in both provisions avoids inconsistent outcomes and promotes remedies that take into account all relevant circumstances.

In contrast, adopting an entirely different model of a statutory copyright exception would have adverse consequences. It risks disrupting the copyright balance, by removing all rights of copyright owners to remuneration just because they cannot be identified prior to a use of their work – a matter that may be outside their control.

The Australian Film & TV Bodies agree with the Department's proposal (also supported by the Government in its response to the Productivity Commission's final report) that the limitation of remedies provision should apply

in circumstances where a user has conducted a reasonably diligent search. To avoid abuse, the provision should require the reasonably diligent search to be conducted in advance, and by the user (not a third party). Without this restriction, infringers may seek to rely on the orphan works regime by retrospectively engineering an orphan works argument if infringement allegations are made.

A requirement to provide prior notice of proposed uses of orphan works is likely to detract from the practical advantages of an orphan works regime and is not required.

However, it is important that the orphan works regime has the flexibility to respond appropriately to a change in circumstances, where the user of the orphan work subsequently becomes aware of, or has reasonable grounds to suspect, the identity of the copyright owner. In that situation, the work is no longer an orphan work, and the user should be required to take reasonable steps to obtain a retrospective licence from the copyright owner and to acknowledge the author of the work. The limitation of remedies will continue to apply to protect the good-faith user of the former orphan work from ordinary infringement litigation, or a situation where a licence cannot be obtained even though the identity of the author has become known. This is a proportionate solution that allows users who have conducted a reasonably diligent search in advance to be confident in using orphan works, but does not unnecessarily prejudice the rights of copyright owners to receive appropriate remuneration for the exploitation of their work once the user identifies them as the owner.

A statutory exception (e.g. option 1) for uses of orphan works would not be as effective in practice in achieving this balance. The European orphan works regime under EU Orphan Works Directive (2012/28/EU) does not account for future changes in circumstances. Even if the Government were to seek to craft a limitation on a statutory exception, the usual approach in the Act to a change of circumstances relating to a copyright exception is to remove the applicability of the exception (see e.g. section 111(3), which provides that the format shifting exception is taken never to have applied if there is a subsequent dealing with the copy). This would not be appropriate for orphan works, as the circumstance of the owner subsequently coming forward does not alter the character and legitimacy of the original use of the work.

Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use

The limitation-of-remedies provision should not prescribe a manner of limiting liability, as it will be important for the Court to have discretion to determine the appropriate remedy. The remedies listed above should not be thought of as mutually exclusive. Judges are experienced in distinguishing between the appropriate remedies to be awarded in different factual situations, and will be able to apply the above distinctions appropriately in particular cases, to create useful guidance that will apply in future situations.

There will be distinctions to be made in practice between cases where:

- an account of profits is appropriate (in line with the current position for innocent infringers under section 115(3));
- a reasonable licence fee would have been paid instead, had the user been able to locate the copyright owner. A small amount of damages may be appropriate in such a case, calculated on the basis of a reasonable licence fee; and
- nominal damages are appropriate, because injunctive relief or any monetary payment are disproportionate or impracticable, but it is still necessary for unauthorised use to be recognised.

We note that the inclusion of injunctive relief as a potential remedy may be too extreme; inclusion of such a remedy in the statute could discourage users, such as documentary film-makers, from using orphaned works in the first place because, for example, the risk of the film's release being stopped once considerable marketing funds are committed would lead to substantial legal exposure for the film's producer from claims made by the

film's distributor. This would defeat the purpose of the statute by inadvertently further limiting use of orphan works.

Question 7

> Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

For reasons including the submission made in response to question 5 above, the Australian Film & TV Bodies do not support a separate approach for collecting and cultural institutions, either as the only form of the new Australian orphan works regime or as a separate limb of the regime.

The non-commercial use of orphaned material by this sector would be comprehensively addressed by the combination of:

- Existing copyright exceptions, in particular, section 200AB; and
- The broadly-based limitation of remedies provision recommended in the response to Question 5 above.

It is unclear what additional protection collecting and cultural institutions could legitimately require in the context of orphan works, over and above a limitation of remedies in the event that a reasonably diligent search is conducted in advance, and the author has not subsequently become known in circumstances where appropriate.

If the use is non-commercial, then a financial remedy may not be applicable, but appropriate attribution to the author (where practicable) is an important and valuable right for creators that should continue to be respected by these institutions. In all circumstances, an appropriate copyright balance requires that a reasonably diligent search be conducted. Steps that amount to a reasonably diligent search would necessarily take into account the circumstances and the type of work in question.

Appendix A: Full descriptions of members of the Australian Film & TV Bodies

The Australian Film & TV Bodies are made up of the Australian Screen Association (ASA), the Australian Home Entertainment Distributors Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators-Australasia (NACO), the Australian Independent Distributors Association (AIDA) and the Independent Cinemas Association of Australia (ICA). These associations represent a large cross-section of the film and television industry that contributed $5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.[18]

a) The ASA represents the film and television content and distribution industry in Australia. Its core mission is to advance the business and art of film making, increasing its enjoyment around the world and to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs, to highlight to movie fans the importance and benefits of content protection. The ASA has operated in Australia since 2004 (and was previously known as the Australian Federation Against Copyright Theft). The ASA works on promoting and protecting the creative works of its members. Members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc., and Fetch TV.

b) AHEDA represents the $1.1 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as intellectual property theft and enforcement, classification; media access, technology challenges, copyright, and media convergence. AHEDA currently has 13 members and associate members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment and Defiant Entertainment. Associate Members include Foxtel and Telstra.

c) The MPDAA is a non-profit organisation representing the interests of theatrical film distributors before Government, media, industry and other stakeholders on issues such as classification, accessible cinema and copyright. The MPDAA also collects and distributes cinema box office information including admission prices, release schedule details and classifications. The MPDAA represents Fox Film Distributors, Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International, Walt Disney Studios Motion Pictures Australia and Warner Bros. Entertainment Australia.

d) NACO is a national organisation established to act in the interests of all cinema operators. It hosts the Australian International Movie Convention on the Gold Coast, 2018 being its 72nd year. NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, as well as the prominent independent exhibitors Reading Cinemas, Palace Cinemas, Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners which together represent over 1400 cinema screens.

e) AIDA is a not-for-profit association representing independent film distributors in Australia, being film distributors who are not owned or controlled by a major Australian film exhibitor or a major US film

[18] Access Economics, *Economic Contribution of the Film and Television Industry* (February 2015) Australian Screen Association <http://screenassociation.com.au/wp-content/uploads/2016/01/ASA_Economic_Contribution_Report.pdf> iv.

studio or a non-Australian person. Collectively, AIDA's members are responsible for releasing to the Australian public approximately 75% of Australian feature films which are produced with direct and/or indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).

f) ICA develops, supports and represents the interests of independent cinemas and their affiliates across Australia and New Zealand. ICA's members range from single screens in rural areas through to metropolitan multiplex circuits and iconic arthouse cinemas including Palace Cinemas, Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and Majestic Cinemas. ICA's members are located in every state and territory in Australia, representing over 560 screens across 144 cinema locations.