

**Report of The Code Reviewer
(The Hon K E Lindgren AM, QC,
Formerly a Justice of the Federal Court of Australia) upon
a Review of the Operation of the Code of Conduct of the
Copyright Collecting Societies
of Australia**

Issued April 2014

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INTRODUCTION

1. Clause 5.3 (a) of the Code of Conduct for Copyright Collecting societies (the Code) provides that the Code is to be reviewed following the expiry of two years from the Code's coming into effect, and at least once within each subsequent three year period.
2. The last Triennial Review of the Code was issued by my predecessor in the role of Code Reviewer, the late Hon J C S Burchett, QC, in June 2011.
3. The Code came into effect in the second half of 2002. Although the precise date is not entirely clear, there is good reason to think that it was 1 July 2002. A *Preliminary Assessment Report* on a draft of the Code by Kim Wilson and Michelle Sawyer dated July 2002 observed (in Section 1.2) that the Code was to have commenced operation in January 2002, that the authors understood that it would be formally launched in the second half of 2002, and that the latest draft had been available on the websites of most of the collecting societies since January 2002. The first Code Reviewer's report on the collecting societies' compliance with the Code was in respect of the year 1 July 2002 to 30 June 2003, and in his Triennial Report issued in April 2008 on the operation of the Code, Mr Burchett stated that the Code had been adopted by the collecting societies from 1 July 2002 (page 1, third paragraph).
4. Triennial Reviews have been the subject of reports issued by Mr Burchett in April 2005, April 2008 and June 2011.

5. Clause 5.3 contains requirements as to the steps to be taken to ensure that there is ample opportunity for submissions to be made to the Code Reviewer to be taken into account in the Triennial Review. A copy of Clause 5.3 is Appendix A to this Report.
6. On 7 December 2013 a notice inviting submissions was published in *The Australian* newspaper and on or about that date the same notice of invitation was published on each individual collecting society's website.
7. As a precautionary measure, by mail dated 29 January 2014, each licensee and peak industry body was individually notified.
8. A copy of the notice of invitation is Appendix B to this Report. As can be seen from it, a meeting was to be held on Tuesday 25 February 2014 at which members of the collecting societies, their licensees and the general public were to have the opportunity to make oral submissions. That meeting was held on that date.
9. Both written and oral submissions have been made to the Code Reviewer as part of the review of the Code.
10. It is important to note the distinction between the Triennial Review required by Clause 5.3 (a) and the annual reviews of the compliance by collecting societies with the Code. Some of the submissions made as part of this Triennial Review have been in the nature of complaints of non-compliance. Complaints of that kind do not necessarily suggest that amendment of the Code is called for.

CLAUSE 2.3 (d): COLLECTING SOCIETIES AND THEIR LICENSEES

11. Clause 2.3 of the Code addresses dealings between a collecting society and its licensees. Clause 2.3 lays down certain norms or standards which a collecting society must satisfy in relation to those dealings. The first sentence of Clause 2.3 (d) is as follows:

“Licence fees for the use of copyright material be fair and reasonable.”

The remainder of para (d) of Clause 2.3 sets out certain matters to which a collecting society “may have regard” in setting or negotiating licence fees for the use of copyright material.

12. In the Code, “Licensee” is defined (in Clause 6.1) to mean, inter alia, “a person who requires a licence from a collecting society to use copyright material”. I will use the word according to this meaning.
13. Clause 1.2 of the Code provides that the Code applies to those collecting societies that have agreed to be bound by it. It follows that they have bound themselves to ensure that the licence fees that they charge will be “fair and reasonable”.
14. I raised at the meeting held on 25 February 2014 a difficulty that I saw in the operation of the sentence set out above. How is the Code Reviewer to determine whether licence fees are fair and reasonable? How is the Code Reviewer to receive and take into account submissions made by the collecting society and the licensee or licensees on the question of fairness and reasonableness? What procedure is the Code Reviewer to follow? How much evidence is the Code Reviewer to receive on the issue, and in what manner is he or she to receive it?
15. The Code is silent on these questions.
16. This fact, coupled with the size of the task that would be involved, makes it difficult to think that the drafters of the Code intended that the Code Reviewer was to embark upon an investigation of the kind that would be required if he or she had to determine whether a particular licence fee being charged by a particular collecting society was fair and reasonable.
17. Yet this is what the first sentence of Clause 2.3 (d) seems to require.
18. The unlikelihood that this was the intention of the drafters of the Code is also borne out by the provisions of the *Copyright Act 1968* (the Act) which provide a means by which a licensee who is aggrieved at the unfairness or unreasonableness of licence fees being charged for the use of copyright material can have the dispute determined by the Copyright Tribunal of Australia (the Tribunal).

19. The Act's provisions fall into two classes according to whether a licence scheme applies or does not apply (I leave to one side the statutory licences, since the "equitable remuneration" payable under them must be determined by agreement or by the Tribunal). In the former case, s157(2) provides that where a particular licensee considers that the grant of a licence in accordance with the scheme would be subject to the payment of charges or to conditions that are not reasonable in the circumstances of the case, the licensee may apply to the Tribunal under s157.
20. In the second class of case (where a licence scheme does not apply) s157(3) provides that a licensee who cannot get a licence subject to the payment of charges or to conditions that are reasonable, can likewise apply to the Tribunal under s157.
21. Subsection (6B) of s157 provides that if the Tribunal is satisfied that the claim of a licensee is well founded, the Tribunal must make an order specifying the charges, if any, and the conditions, that the Tribunal considers reasonable in the circumstances in relation to the applicant-licensee, or an order that the applicant be granted a licence in the terms proposed by the applicant, by the licensor concerned or another party to the application.
22. It should not need to be said that the hearing and determination of such applications, requiring as they do the determination of the issue of the reasonableness of licence fees, is a time consuming and costly process, potentially involving a hearing of some days' duration.
23. The drafters of the Code can hardly have expected the Code Reviewer or a complainant licensee or the collecting society concerned to have to engage in a process of that kind.
24. Yet this seems to be precisely what the first sentence of Clause 2.3(d) mandates.
25. In written and oral submissions to the Code Reviewer as part of the present triennial review, Australian Performing Right Association (APRA) submitted that the first sentence of Clause 2.3(d) be deleted and replaced by the following:

"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."

I have not been able to think of a better solution than this, although it may not be ideal. Even this modified form of standard would require some investigation of the collecting society's policies, procedures and conduct, which, in a particular case, might be extensive and even arduous.

26. But the alternative of omitting entirely from the Code any reference to the fairness and reasonableness of the setting of licence fees would be unfortunate. After all, one might reasonably expect the amount of licence fees being charged by a collecting society to be the matter of primary concern to most licensees.

27. I recommend that the Code be amended in the manner indicated above.

DISTINCTION BETWEEN “COMPLAINTS” AND “DISPUTES”

28. It has been submitted that there is some confusion in the market place regarding the appropriate forum for the resolution for “Complaints” and “Disputes”.

29. “COMPLAINTS AND DISPUTES” is the heading of Clause 3 of the Code. In the various paragraphs within Clause 3, both expressions, “Complaints” and “Disputes”, are used, sometimes separately and at other times in association with each other.

30. The submission made is that a “Complaint” should be understood to relate to a collecting society's conduct in its dealings with its members and licensees. According to the submission, a complaint arises where a member or licensee is dissatisfied with a collecting society's service levels or conduct. In such a case, according to the submission, it is appropriate for the complaint to be raised with the Code Reviewer who will determine whether or not the collecting society's conduct contravenes its obligations under the Code.

31. “Disputes” on the other hand, are, according to the submission, in the nature of commercial disagreements between a collecting society and a licensee, for example in relation to which licence scheme administered by a collecting society is the one under which a licence should be held in the circumstances of the particular case, or in relation to the basis on which licence fees have been calculated under a particular licence scheme.

32. The submission acknowledges that a dispute may also arise between a collecting society and a member, for example, in relation to the amount to which a member is entitled under a particular royalty distribution.
33. The submission argues that commercial disputes, whether involving licensees or members, are better resolved according to a collecting society's dispute resolution procedures, or by the Tribunal, rather than by way of a referral to the Code Reviewer.
34. The submission concludes by suggesting that it may be appropriate to insert definitions of "complaint" and "dispute" into the Code.
35. I accept that there is a distinction between the core meanings of "complaint" and of "dispute", generally in accordance with the submission outlined above. I also acknowledge that there have been cases where what has been raised with the Code Reviewer is in the nature of a commercial dispute in which the collecting society and another person or entity assert rival positions as to their respective rights and obligations. The Code Reviewer cannot resolve such disputes in a way that would bind the disputants unless they appointed the Code Reviewer as an arbitrator for the purpose.
36. If pressed, I would define the two terms in the present context as follows:
- "complaint"** means "an allegation that a collecting society's conduct has fallen short of a standard of conduct required of it by the Code."
- "dispute"** means "the taking of rival positions by a collecting society on the one hand and a member, licensee or other person on the other hand, as to their respective legal rights and obligations, resolution of which depends on a decision as to what the law is or a finding as to what the facts are".
37. If these or other definitions of "complaint" and "dispute" were to be included in the Code (apparently they would be included in clause 6.1) it would be necessary for all the other provisions of the Code to be scrutinised to ensure that the two words are not used in different senses in any of them.
38. I consider that a better course, at least for the time being and pending the carrying out of that exercise, would be to attach an explanatory document to the Code which would set

out the above definitions accompanied by illustrations of situations that fall within one term or the other.

ASSOCIATION OF AUSTRALIAN MUSICIANS AND AUSTRALIAN PERFORMING RIGHT ASSOCIATION (APRA)

39. The Association of Australian Musicians (AM) wrote to the Australian Performing Right Association (APRA) on 28 November 2013, to the Australian Competition and Consumer Commission (in connection with APRA's re-authorisation application) on 7 November 2013, and to APRA on 5 March 2014, raising a variety of issues. The letters also referred to meetings between members of AM and officers of APRA that had been held on 31 October 2013, 4 December 2013 and 11 February 2014 at which those issues had been discussed.
40. On 8 March 2014 AM forwarded the correspondence to the Code Review Secretariat asking that it be treated as AM's submission in connection with the present review of the operation of the Code.
41. I have read the correspondence carefully. It does not refer to any particular provisions of the Code or suggest any particular amendments of the Code. Rather, and in general terms, it is directed to urging APRA to take a role in advancing the interests of Australian musicians by promoting the increased use of local music content in the media.
42. The Chief Executive of APRA wrote a point by point reply dated 13 March 2014 to AM's letter to him dated 5 March 2014.
43. There are two aspects of AM's letter dated 7 November 2013 that might be said to suggest amendment of the Code.
44. The first is this:

“AM recommends a maximum of three publishers or musicians signed to publishers on the board, directorships limited to a maximum of three one-year terms and no proxies.

In the past, publishers have played a vital role in the music industry, but with the advent of technological advancements and media convergence, musicians can now fund, produce, publish and distribute their own music from home.

The profile of APRA's board members should reflect this with more independent musicians as board members.”

45. The Code does not prescribe the contents of the constitutions of collecting societies. The provision nearest to touching on the issue raised by AM is found in clause 1.1 (b) (ii) which is to the effect that each collecting society aspires to “be responsive to the needs of Members ...”.
46. It might be said that this provisions requires each collecting society to ensure that its constitution is responsive to the needs of all of its members including classes of members.
47. But if APRA's constitution in some way falls short of meeting that standard, that would be a case of non-compliance by APRA with the Code, rather than a shortcoming in the Code itself.
48. Apart from a very general provision such as that found in Clause 1.1 (b) (ii), it is difficult to formulate a provision of the Code which would apply to all collecting societies and would meet the point raised by AM.
49. I should make it clear that my discussion of the present complaint by AM should not be taken as a view that there is or is not any merit in it. APRA's responsive letter dated 13 March 2014 deals in detail with the question of the merits of the complaint.
50. The second of AM's grievances referred to above relates to APRA's dispute resolution mechanism procedures. AM describes APRA's dispute resolution procedures and recommends the introduction of a “peer review” process for complainants who remain dissatisfied after lodging initial complaints and discussing options with the staff of APRA.
51. AM proposes that the disputing parties would submit evidence to an agreed five-member panel of musical peers who are not members of the board of APRA, and that the disputants would pay a set fee to cover the professional fees of the panellists. AM proposes that expert testimony by introduced early in the dispute resolution process and that either party “could suggest mediation or litigation” if dissatisfied with the result.

52. Clause 3 of the Code, headed “Complaints and Disputes”, requires each collecting society to develop and publicise procedures for dealing with complaints by members and licensees and for resolving disputes between the collecting society and its members and licensees. Paragraph (c) of Clause 3 of the Code sets out principles with which the dispute resolution procedures are to comply. Those principles are of a general nature, such as “(viii) each Collecting Society should establish appropriate alternative dispute resolution procedures”.
53. Again, it is difficult, if not impossible, to derive from AM’s present complaint an amendment of the Code that would apply to all collecting societies. In any event, in his responsive letter dated 13 March 2014 to AM, the Chief Executive of APRA describes the suggestions made in AM’s letter as “very helpful”, and undertakes to include them in the materials provided to APRA’s ADR consultant, “Resolve Advisors”, which is devising an improved ADR system for APRA.
54. The Chief Executive’s letter responds to AM’s present suggestion in other respects too.

STRENGTHENING OF CODE’S REQUIREMENT OF TRANSPARENCY, PARTICULARLY IN RELATION TO DECLARED COLLECTING SOCIETIES AND STATUTORY LICENCES

55. The New South Wales Department of the Attorney-General and Justice has raised an important and fundamental issue relating specifically to the statutory licence under Div 2 of Part VII of the Act in favour of the governments of the Commonwealth and the States, and, in particular, the role of Copyright Agency as a declared collecting society for the purposes of that Division.
56. Although the issue arises out of a particular dispute between the State and Copyright Agency (see *Copyright Agency Limited v State of New South Wales* (2008) 233 CLR 2789; [2008] HCA 35; *Copyright Agency Limited v New South Wales* (2013) 102 IPR 85; [2013] ACopyT1; *Copyright Agency Ltd v New South Wales (2)* (2013) 103 IPR 68; [2013] ACopyT2), the question raised has wide ranging ramifications.
57. Shortly, the issue arises in this way. One effect of the statutory licence is to allow the State to do acts that would otherwise constitute an infringement of the copyright of

registered surveyors who produce survey plans. Copyright Agency represents the interests of registered surveyors. The State makes use of the survey plans lodged in the office of the Registrar General for the purposes of land title registration as required by the *Conveyancing Act 1919* (NSW).

58. The State asserts that it has experienced significant difficulties in obtaining from Copyright Agency information concerning the use made of the remuneration that it is required to pay to Copyright Agency for the use that the State makes of the survey plans. The State asserts that as the custodian of public monies, it has, as a matter of public policy, an interest in ensuring that the money that it pays to Copyright Agency is used for purposes consistent with the State's obligation as custodian of public monies.

59. In its submission, the State states as follows:

“Publicly available information provides little assistance in identifying how much of the remuneration paid to Copyright Agency for Government copying of works ... will eventually be remitted to copyright owners. A review of Copyright Agency's annual report indicates that large amounts of money are not distributed and are ultimately turned to other purposes, which would appear contrary to the intent of the legislation. As the vast majority of the income of the declared collecting societies is public money, the State considers that these collecting societies should, at least, account to the public in detail as to the amount that is distributed to copyright owners and the manner in which the undistributed money is spent.”

60. The State advises that Copyright Agency's response has been that it is a declared collecting society for the purposes of Div 2 of Part VII of the Act, and that the expenditure and distribution of monies paid to it are matters between itself and its members.

61. The State submits that the present issue is relevant to the Code's provisions dealing with transparency, and refers to the following provisions of the Code:

“Each Collecting Society will ensure that its dealings with Licensees are transparent” (Clause 2.3(b))

“Make available to Licensees and potential Licensees information about the licences or licence scheme offered by the Collecting Society, including the terms and conditions applying to them, and about the manner in which the Collecting Society collects remuneration and/or licence fees for the use of Copyright Material ” (Clause 2.3(c)(i))

“Each Collecting Society will at all times maintain proper and complete financial records, including in relation to:
(i) the collection and distribution of Revenue; and
(ii) the payment by the Collecting Society of expenses and other amounts described in clause 2.5. ” (Clause 2.6(b))

62. The State’s ultimate submission is as follows:

“The State respectfully submits that the Code of Conduct should provide for greater transparency, and to achieve this the Review could consider whether to:

1. Consult with the statutory licensees as to whether specific requirements should be added to clause 2.3(b);
2. Amend Clause 2.3(c)(i) to require that the Collecting Societies provide information as to the distribution of monies received from licensees;
3. Amend Clause 2.3(c) to require that the Collecting Societies provide access to the financial records described in clause 2.6(b).”

63. While the State’s position as licensee is special, in that the money that it pays to Copyright Agency is public money, other statutory licensees may argue that they too should have access to information of the kind referred to by the State in relation to the declared collecting societies with which they have to deal.

64. Moreover, although the position is different, licensees under licences voluntarily entered into may wish to make a similar case in relation to their licensor collecting societies.

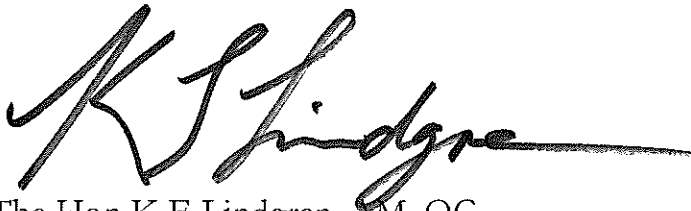
65. In view of the fundamental and important nature of the State’s submission, I have decided not to deal with it in this Report but to do so in a supplementary Report. It will be necessary for wide ranging consultation on the issue to take place. As to the extent and form of that consultation, I will seek submissions from the State, the collecting societies and the Commonwealth.

CONCLUSION

66. In his last report, my predecessor Code Reviewer, Mr Burchett, observed that the Code was effective and that the collecting societies had set for themselves a high standard of conduct.

67. My assessment is also that the Code serves a useful purpose. One cannot fail to be impressed with the detailed annual reports that the collecting societies provide on their compliance with the Code.
68. The Code is expressed in general terms appropriate to be applied to all of the collecting societies. No doubt some who have dealings with a particular collecting society would wish the Code to impose specific stringent standards and requirements pertinent to that collecting society. The generality of the Code's standards could therefore be seen as a shortcoming. If so, that is a shortcoming of all generally formulated norms, including those imposed by statute. The Code's strength remains in the annual compliance reports that it requires of the collecting societies.

Dated this 30 day of April 2014

A handwritten signature in black ink, appearing to read 'K E Lindgren', with a long horizontal flourish extending to the right.

The Hon K E Lindgren, AM, QC
Code Reviewer

APPENDIX A TO REPORT

Triennial Review of Code of Conduct

Clause 5.3

- 5.3 **Review and Recommendations for Amendment of the Code**
- (a) This Code will be reviewed:
- (i) following the expiry of two years from the Code coming into effect; and
 - (ii) at least once within each subsequent three year period.
- (b) For the purposes of a Review of the Code, the Code Reviewer will:
- (i) invite written submissions on the operation of the Code and on any amendments that are necessary or desirable to improve the operation of the Code;
 - (ii) convene and publicise widely, during the period in which submissions may be made, one or more meetings that Members, Licensees and the general public may attend to make oral submissions to the Review; and
 - (iii) undertake such other consultations as he or she considers appropriate, including consultations of the kind set out in clause 5.2(a).
- (c) Each Collecting Society will inform its Members and Licensees in an appropriate manner that the Review is being conducted and that they may make submissions to the Code Reviewer.
- (d) The Code Reviewer will allow a period of at least two months for the making of submissions.
- (e) At the completion of the period for the making of submissions, the Code Reviewer will prepare a report of the Review, and will make such recommendations as he or she considers appropriate in relation to the

operation of the Code, including recommendations for amendments of the Code.

- (f) The Code Reviewer will make a copy of the report of the Review available to:
 - (i) each Collecting Society;
 - (ii) the Commonwealth Department(s) responsible for the administration of the *Copyright Act 1968*;
 - (iii) each individual or group that made a submission to the Code Reviewer; and
 - (iv) members of the public.

APPENDIX B TO REPORT

Triennial Review of Code of Conduct

Notice of the Review, with an invitation to make submissions by mail to the Code Reviewer at a specified address or by email by 7 March 2014, was given by the Societies to their members via publication on their respective websites. The Notice was published in an advertisement in *The Australian* newspaper on 7 December 2013. It was in the following terms:

Code Review Secretariat

Suite 704, 4 Young Street

Neutral Bay NSW 2089

Email: codereviewer@gmail.com

COPYRIGHT COLLECTING SOCIETIES CODE OF CONDUCT CALL FOR SUBMISSIONS

A meeting open to the general public will be held by the Code Reviewer (The Hon Kevin Edmund Lindgren AM, QC) in respect of the Code of Conduct of the Collecting Societies (Australasian Performing Right Association Limited ("APRA"), Australasian Mechanical Copyright Owners Society Limited ("AMCOS"), Phonographic Performance Company of Australia Limited ("PPCA"), Copyright Agency Limited ("Copyright Agency"), Audio-Visual Copyright Society Limited ("Screenrights"), Viscopy Limited ("Viscopy"), Australian Writers' Guild Authorship Collecting Society Limited ("AWGACS") and Australian Screen Directors Authorship Collecting Society Limited ("ASDACS") at:

APRA

Function Room & Terrace on Level 4

16 Mountain St, Ultimo

on Tuesday, 25 February 2014

From 10.00 am

at which members of the Societies, their licensees and the general public may make oral submissions to the Review being conducted by the Code Reviewer of the Code of Conduct, its operation and its terms. A copy of the Code may be obtained on the societies' websites or by application to the address of the Code Review Secretariat set out above.

Persons wishing to make an oral submission at the meeting hereby called are requested to notify the Code Reviewer at the address of the Code Review Secretariat set out above and to submit on or before **18 February 2014** an outline of their submission.

Written submissions are also invited, to be sent on or before **7 March 2014**, to the Code Reviewer at the address of the Code Review Secretariat set out above, on the operation of the Code and/or on any amendments that are necessary or desirable to improve the operation of the Code.

K E Lindgren AM, QC
Code Reviewer

7 December 2013