

**Report of Review of Copyright Collecting Societies
Compliance with their Code of Conduct
for the Year 1 July 2012 to 30 June 2013**

The Hon K E Lindgren AM, QC

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Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2012 to 30 June 2013

INTRODUCTION AND SUMMARY CONCLUSIONS

1. This report of the Code Reviewer, the Hon K E Lindgren, AM, QC, is the eleventh annual report assessing the compliance with their voluntary Code of Conduct (“Code”) of the following eight 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**”).
2. As in previous reports, the practice is adopted of referring to APRA and AMCOS, which is also administered by APRA, collectively as “APRA” except where it is necessary to distinguish between the two societies.
3. As foreshadowed in the Report for 2011-2012, by a Services Agreement which came into effect on 2 July 2012, Viscopy engaged Copyright Agency to manage its services. Therefore, the practice will be followed in this Report, except where it is necessary to distinguish between the two societies, to refer to Copyright Agency and Viscopy, collectively as “Copyright Agency”. (A similar practice continues to be followed for APRA and AMCOS.)
4. For the purposes of the review, each society reported to the Code Reviewer in respect of its activities covered by the Code. The review and the opportunity to make submissions were widely advertised: see the Appendix to this Report for the notice of the review and for details of the publication of the notice.
5. Certain organisations and individuals were individually notified by the Code Review Secretariat of the review. The Secretariat has prepared and holds an alphabetical list of

them. It is available for inspection on request but is so voluminous that in the interests of convenience, it is not attached to this Report.

6. A report, a draft determination, and a Discussion Paper of relevance to this Report should be noted.
7. In December 2012 “BOP Consulting in collaboration with Benedict Atkinson and Brian Fitzgerald” provided their report entitled *Collecting Societies: Codes of Conduct* that had been commissioned by the Intellectual Property Office of the United Kingdom (IPO) to the IPO. I will call it “the UK Report on Codes of Conduct”.
8. The UK Report on Codes of Conduct is addressed to the IPO and makes much reference to the Code, the roles of Australian collecting societies and of the Copyright Tribunal of Australia, and the procedure of review by the Code Reviewer of compliance by collecting societies with the Code.
9. Simply for the sake of the record, I note that the authors of the Report did not contact the Code Reviewer (I do not suggest that they were bound to do so - only that it should not be thought that the UK Report on Codes of Conduct has had the benefit of input from the Code Reviewer).
10. It is best that I say no more about the UK Report on Codes of Conduct.
11. The draft determination is dated 15 October 2013 and was issued by the Australian Competition and Consumer Commission (ACCC) in response to an application lodged by APRA for revocation and substitution of authorisations A91187-A91194 and A91211 (Draft Determination).
12. Officers of the ACCC contacted me in my capacity as Code Reviewer in the course of their deliberations on APRA’s application. In response to questions asked by them, I described my perception of aspects of the operation of the Code and of my role under it.
13. I will say more of the Draft Determination in the APRA section of this Report at [530] ff below.

14. The Discussion Paper referred to was issued in May 2013 by the Australian Law Reform Commission (ALRC) and is entitled *Copyright and the Digital Economy* (ALRC DP 79). It contains proposals for the amendment of the *Copyright Act 1968 (Cth)* of fundamental importance to the collecting societies. The Discussion Paper elicited submissions to the ALRC. Consideration of these submissions and of its own proposals in the Discussion Paper by the ALRC is ongoing at the time of the preparation of this Report.
15. This report focuses on the requirements of the Code and compliance with these requirements in the year 1 July 2012 to 30 June 2013 (“Review Period”). Each of the eight collecting societies furnished a written report to the Code Reviewer addressing the question of its compliance with those requirements during the Review Period (as already noted, composite reports were furnished in respect of APRA / AMCOS and Copyright Agency / Viscopy - six reports in respect of the eight collecting societies). In the case of some of the societies the report was lengthy and was supported by lengthy appendices.
16. I will refer to the *Copyright Act 1968 (Cth)* as “the Act”.
17. While there were some isolated failures to comply with the Code, on the evidence before him, in the terms of cl 5.2(f) of the Code, the Code Reviewer is satisfied that in the Review Period the collecting societies complied generally with the Code.
18. I record my thanks for Kylie Toombs who constitutes the Code Review Secretariat for her considerable help to me in bringing this Report to a conclusion.

COMPLIANCE WITH CODE REQUIREMENTS OTHER THAN THOSE RELATING TO COMPLAINTS AND DISPUTES IMPOSED BY CLAUSE 3 OF THE CODE (WHICH ARE ADDRESSED IN A SEPARATE SECTION, “COMPLAINTS AND DISPUTES”, BELOW)

19. This section of the Report, structured society by society, addresses significant events, changes and developments during the Review Period by reference to the relevant clauses of the Code.

Australasian Performing Right Association Limited (“APRA”) and Australasian Mechanical Copyright Owners Society Limited (“AMCOS”)

General

20. APRA administers AMCOS under an arrangement between the two collecting societies dated 1 July 1997; they jointly occupy the same premises; and they provided a joint report to the Code Reviewer. Accordingly, generally speaking, this report deals with them together.
21. As at 30 June 2013, APRA had 75,593 (Australian and New Zealand) members, comprising composers and authors (together, “writers”) and publishers. Of these 74,995 were local writer members and 598 were local publisher members. In addition, APRA had 897 overseas resident writer members and 10 overseas resident publisher members. Most Australian and New Zealand composers and publishers are members of APRA. The requirements for membership of APRA are set out in its Constitution.
22. As at 30 June 2013, AMCOS had 12,001 (Australian or New Zealand) members, of whom 11,516 were writers and 485 were publishers. In addition, AMCOS had 181 overseas resident writer members and three overseas resident publisher members.
23. Neither APRA nor AMCOS is a declared collecting society under the Act. Accordingly, neither is required to comply with the Attorney General’s Guidelines for collecting societies. In practice, however, they satisfy many of those requirements.

Legal Framework (Code, Clause 2.1)

24. APRA/AMCOS have not changed any of the principal characteristics of their membership structures in the Review Period.
25. The APRA Board has six writer directors, elected by the writer members, and six publisher directors, elected by the publisher members. The AMCOS Board is elected by the members of AMCOS.

Members (Code, Clause 2.2)

26. Statistics as to the membership of APRA and AMCOS as at 30 June 2013 were given under “General” above.
27. As at that date, APRA/AMCOS had 969 Aboriginal and Torres Strait Islander (ATSI) members, representing an increase of 9% during the Review Period.
28. During the Review Period, APRA’s Writer Services Department engaged in email correspondence with Writer Members on some 51,235 separate occasions, and its Publisher Services Department sent approximately 33,571 emails to Publisher Members, which included the sending of 10,436 generic emails relating to song ownership. In addition, over 1,469,580 individual broadcast emails were sent to members containing information including event notices, payment advices and publications of the two collecting societies.
29. In respect of the quarterly distributions during the Review Period, APRA paid royalties to an average of 15,446 members per quarterly distribution.
30. APRA/AMCOS have an International Department which is responsible for reciprocal representation agreements with societies administering performing and mechanical rights around the world. The International Department undertakes royalty distributions for performing rights to members, and in the last financial year distributed over \$21m to members in eight separate distributions. The distribution of mechanical rights income through AMCOS is currently undertaken by the Distribution Department rather than the International Department.
31. The International Department monitors the use of the APRA repertoire overseas, and makes claims for missing payments and researches members’ notifications and enquiries related to overseas use and payments.
32. APRA provides to members the opportunity to “opt out” and to request that their entire repertoire be assigned to them for all territories in respect of all or particular usages, or to “license back” specific works for specific uses in Australia and/or New

Zealand. During the Review Period no “opt out” applications were received, but APRA did receive (and approved of) 25 “license back” applications.

33. APRA states that it has developed an extensive program of benefits for its members. A copy of the membership program information provided on APRA’s website was included in the report to the Code Reviewer.

Licensees (Code, Clause 2.3)

34. APRA/AMCOS has “licensing departments” that are dedicated to liaising with licensees and prospective or potential licensees. The three main areas of licensing operations are: Licensing Services, Broadcast & Online Services, and Recorded Music Services. Collectively, these three licensing departments administer approximately 68,150 annual licences representing approximately 96,900 businesses.
35. The licence fees payable vary according to the licence scheme applicable.
36. Details of all major APRA/AMCOS tariffs have been provided previously to the Code Reviewer.
37. The Licensing Services Department administers most of the licences, with approximately 64,173 annual licences, representing approximately 93,785 businesses. During the Review Period, this Department executed 13,140 new annual licences and 4,922 one-off event licences, including dance parties, festivals and music used in theatrical performances.
38. During the Review Period, APRA/AMCOS commenced a review of its “Client Relationship Management” processes. It was decided that these processes should be integrated with the existing “Copyright Management System”. During the Review Period, work was undertaken on the functional specifications of the new system and the building of the database commenced. It is hoped that the new system will be launched in September 2013, with the online portal for licence application and re-assessment submissions being added later in the year.

39. During the Review Period, the Licensing Services Department had more than 340,708 contacts with licensees, including by letter, email and telephone. A breakdown in the statistics is included at Tab 11 Vol 1 of the report to the Code Reviewer.
40. The Broadcast & Online Services Department administers APRA/AMCOS's commercial and community radio and television broadcast to clients, along with cinema and airline licensees. In total approximately 900 broadcast licensees were administered by this Department during the Review Period. The Department also administers production music (written and recorded for inclusion in all forms of audio and audio-visual productions). There were 857 Australian production music clients licensed during the Review Period.
41. The Broadcast & Online Services Department also grants licences in respect of various online services, including user-generated content sites, online portals, on-demand streaming sites, webcasters, podcasters, online simulcasters and online production music usage. In total there were 155 Online Services clients administered by the Department during the Review Period.
42. The Recorded Music Services Department issues a range of licences relating to the reproduction of musical works in various contexts including CD sales, digital download sales, video on-demand services, digital subscription music services, ringtones, business-to-business applications, dance schools, and videographers. During the Review Period this Department administered more than 1,200 annual licences and issued an additional 900 one-off licences.
43. In its report to the Code Reviewer, APRA outlined the steps that it took during the Review Period to provide information to licensees and potential licensees, the steps that it took to foster relationships with relevant trade associations, and new licence schemes that APRA/AMCOS negotiated during the Review Period. These schemes included a Community Radio Tariff, an Airline Tariff, a Pay Television Tariff, a Digital Online Music Services Tariff and an Online Low Level Licence Scheme.
44. During the Review Period, the Licensing Services Department engaged with 240 clients who were affected by bushfire and flooding, in implementation of a policy that APRA/AMCOS had adopted in 2010. The policy is intended to alleviate financial pressure on affected businesses, including deferral of licence fee renewals for up to

three months, extended payment periods and donations by APRA/AMCOS to appeals for disaster relief.

Distribution of Remuneration and Licence Fees (Code, Clause 2.4)

45. APRA/AMCOS's audited financial accounts for the period 1 July 2012 – 30 June 2013 show that the total combined net distributable revenue was \$243.5 million, representing an increase of approximately 5.05% above that for 2011-2012. APRA/AMCOS comment that in the light of the general economic conditions in Australia and New Zealand during the Review Period, this was "an excellent result". As reported to the Code Reviewer previously, in 2011 APRA moved from half yearly to quarterly distributions. An exception is the distribution of revenue from live performances which is still done annually because it is based upon annual returns submitted by members (the "Live Performance Return" system).
46. APRA and AMCOS maintain and make available on the website comprehensive Distribution Rules and Practices. The "APRA Distribution Rules" are at Tab 16 of Vol 1 of the Report to the Code Reviewer. In July 2013 (just outside the Review Period) the APRA Distribution Rules were updated in the light of approvals given by the Board of Directors during the Review Period. They had also been amended in January 2013.
47. APRA/AMCOS are founding members of the "Global Repertoire Database" (GRD) which is an initiative to develop a single, comprehensive, authoritative and multi-territory representation of the global ownership and control of musical works. When implemented, the GRD will save considerable costs and effort which are currently expended in the duplication of data processing. The GRD will be available to songwriters, publishers, licensors and licensees. Further information in relation to the GRD project and its progress can be found at <http://www.globalrepertoiredatabase.com/>.
48. In March 2013, APRA/AMCOS delivered to Publisher Members a new system under which they can access details of "Unclaimed/Dispute/Suspense" royalties.
49. During the Review Period, APRA/AMCOS introduced Music Recognition Technology (MRT) to help identify music being played in nightclubs. APRA entered

into an agreement with DJ Monitor to use music fingerprint recognition technology for APRA's analysis of music played in discos and nightclubs. Special digital recording and streamlining devices have been placed in selected nightclubs to record and stream the music to DJ Monitor. Through its music fingerprint database, DJ Monitor identifies the musical works being performed and reports to APRA to assist it in identifying the correct copyright owners for those works.

50. Unfortunately, as APRA/AMCOS acknowledge, they did not consult fully enough with members prior to implementing MRT with the result that a group of dance music writers and publishers submitted a complaint in respect of the process. APRA/AMCOS say that they are now consulting with their members as to how they can best utilise MRT.
51. The complaints mentioned are dealt with below under the heading "Complaints and Disputes".
52. APRA/AMCOS's large Membership Department comprise staff who are trained to deal with enquiries by members and others, including enquiries in relation to distribution. The Boards of both APRA and AMCOS have membership and distribution committees which deal with, among other things, requests by members for distributions in relation to "unlogged performances". These committees also deal with complaints from and disputes between members. Members are encouraged to resolve disputes between them using alternative dispute resolution procedures made available by APRA/AMCOS.

Collecting Society Expenses (Code, Clause 2.5)

53. APRA's accounts show that its operating expenses are deducted from total gross revenue. Commission on revenue pays AMCOS's expenses. The commission rate depends on the source of the revenue.
54. In the most recently audited financial statements for the year ended 30 June 2012, APRA achieved an expense to revenue ratio of 12.82%. Further information concerning APRA's expense to revenue ratio is contained in the "2012 Year in Review" documents contained in Tab 2 Vol 1 of the report to the Code Reviewer.

Governance and Accountability (Code, Clause 2.6)

55. The Annual Report of each of APRA and AMCOS contains the matters set out in Cl 2.6(e) of the Code.
56. The relationship between APRA and AMCOS and their respective Boards of Directors is governed by each company's Constitution and "Charter of Corporate Governance".
57. The Boards of Directors are elected directly by the membership and each Board has established an "Audit and Governance Committee" which meets at least five times a year and focuses exclusively on issues relating to corporate governance.
58. APRA/AMCOS management also have an internal Governance Committee which meets each fortnight to discuss matters relating to the day to day operation and management of the societies.
59. During the Review Period, the Governance Committee introduced "Staff Code of Conduct Policy", which complements the Code. A copy has been supplied to the Code Reviewer (Tab 17 Vol 1).
60. APRA and AMCOS maintain financial records which are audited each year, and a statement by each company's auditors is included in its Annual Report (Tab 2 Vol 1). APRA's membership, licensing, distribution and international arrangements are all the subject of "authorisation" by the Australian Competition and Consumer Commission (ACCC).
61. APRA's existing authorisations from the ACCC continue until 31 October 2013.
62. On 30 April 2013, APRA launched an application with the ACCC for re-authorisation of its arrangements which, in broad terms, cover its:
 - "input" arrangements – the assignment of performing rights by members to APRA and the terms on which membership of APRA is granted;
 - "output" arrangements – the licensing arrangements between APRA and users of musical works;

- “distribution” arrangements - by which APRA distributes to relevant members the fees it has collected from licensees / users; and
 - “overseas” arrangements – the reciprocal arrangements between APRA and overseas collecting societies under which each grants to the other the right to license works in their repertoires.
63. APRA’s application to the ACCC was for revocation of authorisations A 91187 – A91194 and A91211 and the substitution of authorisations A91367 – A91375 for those revoked.
64. On 15 October 2013 the ACCC issued its Draft Determination which would grant conditional authorisation for three years to continue its arrangements for the acquisition and licensing of performing rights in music, but subject to conditions C1, C2, C3, C4 and C5.
65. A number of Interested Parties’ Submissions to the ACCC raised concerns that APRA considered were more appropriately directed to the Code Reviewer. APRA says that it has notified the relevant Interested Parties, where possible, that APRA will submit those Submissions as complaints under the Code. Summaries of those complaints and of APRA/AMCOS’s actions in response to them are included in its report to the Code Reviewer (Tab 2 Vols 1 and 2). They are dealt with in the “Complaints and Disputes” section of this report.
66. APRA suggests that its authorisations over the years by the ACCC and the conditions attached to those authorisations form an important part of APRA’s governance and accountability framework.

Staff Training (Code, Clause 2.7)

67. APRA/AMCOS say that their staff at management level have all been comprehensively trained regarding the Code.
68. During the Review Period, members of the Board and senior executives attended a “Board Retreat” which included a full day’s training session on directors’ duties and financial issues for boards of directors presented by the Australian Institute of Company Directors.

69. Divisional Heads, General Counsel and the Chief Financial Officer meet on a weekly basis and discuss matters relating to policy and strategy development and assessment. At these meetings issues relating to service and staff performance and training are regularly dealt with.
70. In addition, the wider senior management team meets every four to six weeks to discuss interaction with members, licensees and the wider community. At these meetings, the Code is regularly discussed.
71. Manager and Team Leader forums are held four times a year at which the Chief Executive addresses the middle and front line management teams.
72. The Licensing Services Department and Member Services Department each holds staff training conferences at least once (usually twice) in each year. Programs from those conferences showing session titles and presenters included the APRA/AMCOS report to the Code Reviewer (Tabs 18 and 19, Vol 1).
73. In their report to the Code Reviewer, APRA/AMCOS give fairly detailed descriptions of the induction and training sessions that they provide for staff.

Education and Awareness (Code, Clause 2.8)

74. APRA/AMCOS devote, they say, “considerable resources” to the education of members, licensees, industry associations and members of the public, regarding the matters set out at Cl 2.8 (a) of the Code. A list of the organisations and associations with which APRA/AMCOS have an ongoing relationship is set out in the report to the Code Reviewer (Tab 22 Vol 1).
75. In its report, APRA claims that as Australia’s oldest and largest collecting society (incorporated in 1926), it is in a position to have developed extensive materials and expertise in relation to education of the kind described. In the report, APRA/AMCOS describe their educational activities under the headings “Member Education”, “Licensee Education”, “International Relations”, “Government Relations”, “APRA/AMCOS Website & Social Media”.

Complaints and Disputes (Code, Clause 3)

76. This subject is dealt with in a separate section, “Complaints and Disputes”, below.

Publicity of the Code and Reporting of Compliance with it in the Annual Report (Code, Clause 4)

77. APRA/AMCOS claim to have kept their members and licensees updated with information regarding the Code, in particular by maintaining relevant information including a copy of the Code on their website. On their website they invite any interested person to make submissions to the Code Reviewer.

78. Of course, APRA/AMCOS’s annual report to the Code Reviewer is itself directed to the issue of their compliance with the Code.

Copyright Agency Limited (“Copyright Agency”) / Viscopy

79. As noted earlier, with effect on and from 2 July 2012, Viscopy has retained Copyright Agency to manage its services. A joint Copyright Agency/Viscopy report was provided to the Code Reviewer in respect of the Review Period. Accordingly, this report by the Code Reviewer deals with both collecting societies together.

General

Copyright Agency

80. Copyright Agency is a company limited by guarantee that has more than 26,000 members.

81. Copyright Agency is “declared” by the Attorney-General as the collecting society appointed to manage the statutory licence in Part VB of the *Copyright Act 1968*, which is for the educational use of text, images and notated music, and the statutory licence for people with disabilities.

82. Copyright Agency is also the declared collecting society under ss 153F and 182C of the Act for Div 2 of Part VII in relation to the government copying of published editions of works (other than those embodied in sound recordings, films and television and sound broadcasts).
83. As distinct from the statutory licences under the Act, Copyright Agency manages the scheme for the payment of royalties to visual artists under the *Resale Royalty for Visual Artists Act 2009* (Cth) (“Resale Royalty Scheme”).
84. In addition, Copyright Agency formulates and manages voluntary licensing arrangements in accordance with the authority of its members and foreign affiliates.

Viscopy

85. Viscopy is also a company limited by guarantee. It represents more than 10,000 artists and artists’ estates and beneficiaries from Australia and New Zealand. Viscopy also represents more than 40,000 international artists and their estates and beneficiaries in the Australasian territory through reciprocal agreements with more than 40 visual arts rights management agencies round the world.
86. Copyright Agency provides services to Viscopy under the arrangement that has operated since 2 July 2012. Those services include management of the Viscopy licences for Australia and New Zealand, which are primarily licences for the reproduction and communication of art works by auction houses and public galleries.

Legal Framework (Code, Clause 2.1)

Copyright Agency

87. Copyright Agency states that during the Review Period it complied with its obligations under the legislation and other documents referred to for Clause 2.1 of the Code.
88. On its website, Copyright Agency publishes its Constitution; Corporate Governance Statement; Customer Services Charter; Privacy Policy; Dispute Management Procedure; and Complaints Management Procedures (<http://www.copyright.com.au/about-us>).

89. Other documents accessible from the website include the Code; the Attorney-General's Guidelines for Declared Collecting Societies; the Attorney-General's Declaration of Copyright Agency for Part VB Purposes; and the Copyright Tribunal's declaration of Copyright Agency for the purposes of Div 2 of Part VII of the Act.
90. Copyright Agency's in-house lawyers oversee compliance issues and monitor relevant legal and regulatory developments.
91. During the Review Period, Copyright Agency amended its Privacy Policy, began a review of its Privacy Policy and practices and arranged training for key staff in the light of forthcoming legislative changes; and reviewed its social media policies and practices in the light of increased social media activity.

Viscopy

92. Viscopy also claims that during the Review Period it complied with its obligations under the legislation and other instruments referred to in Clause 2.1 of the Code.
93. There was no change in Viscopy's legal status or compliance status with regard to relevant laws since last year's Report.
94. Compliance by Viscopy is also overseen by Copyright Agency's in-house lawyers, and the description above in relation to compliance by Copyright Agency applies also to Viscopy.
95. Viscopy's Constitution is available to all members and to the general public for free downloading on the Viscopy website.

Members (Code, Clause 2.2)

Copyright Agency

96. Membership of Copyright Agency is open to owners of copyright in works and their licensees and agents, as well as to those entitled to royalties under the Resale Royalty

Scheme. Membership is free. Applications for membership are approved by the Board. Applications for membership can be made online.

97. Visual artists are invited to become a member of both Copyright Agency and Viscopy. They are also encouraged to “register” their contact details for the Resale Royalty Scheme.
98. Copyright Agency claims to have adopted a range of policies and processes aimed at ensuring that its members are treated fairly, honestly, impartially, courteously, and in accordance with its Constitution and membership agreements. It has a “Service Charter”, induction training for new staff and annual training for all staff on the requirements of the Code.
99. In its report to the Code Reviewer, Copyright Agency gives details of its modes of communication with its members and potential members.
100. Copyright Agency’s Constitution is available on its website and new and potential members are directed to it.
101. In 2013, Copyright Agency’s Board of Directors approved some changes to its Distribution Policy, and members were advised of these by a range of means including a news item on the website; e-News; and members’ industry associations.
102. In October 2012, Copyright Agency conducted a survey of its members on a range of issues including their satisfaction with the society’s services to its members. The results are set out in a table on page 8 of the report to the Code Reviewer and give a “mean” result of “quite satisfied”.

Viscopy

103. Membership of Viscopy is open to all artists and other owners of copyright in artistic works, including the estates of artists. Membership of Viscopy is free of charge.
104. Information on Copyright Agency and Viscopy websites invites artists to join both societies.

105. In October 2012, Viscopy's members were invited to participate in a survey on a range of issues including their satisfaction with Viscopy member services. The results are depicted on a table on page 8 of the Copyright Agency/Viscopy report to the Code Reviewer. The "mean" result lies mid-way between "neither satisfied nor dissatisfied" and "quite satisfied".

Licensees (Code, Clause 2.3)

Copyright Agency

106. Copyright Agency claims to have adopted a range of policies and processes aimed at ensuring that its licensees are treated fairly, honestly, impartially, courteously and in accordance with its Constitution and licence agreements. These include: a "Service Charter", induction training for new staff, and annual training for all staff on the requirements of the Code.
107. In the case of the statutory licences for education and government, Copyright Agency deals mostly with bodies or departments representing a class of licensees, such as Universities Australia, the Copyright Advisory Group for most schools and TAFEs, and the Commonwealth Attorney-General's Department for the Commonwealth, rather than with individual licensees. A major exception is the independent colleges which are licensed individually.
108. Most aspects of the statutory licences are governed by the Act and the Regulations under it. The major areas for negotiation are the amount of remuneration, the manner of collecting information about usage, and the processing of that information to estimate the "volume" of usage.
109. Copyright Agency publishes information about its "voluntary" licences ("blanket" and pay-per-use) on its website and on the RightsPortal website (rightsportal.com.au). As well, it provides information about its licences through, for example, seminars, trade shows and in response to specific enquiries.
110. Copyright Agency claims that it regularly reviews the terms of its voluntary licence agreements to ensure that they are expressed in plain language and correspond to its mandate from its members.

111. New industry licence schemes are usually designed by Copyright Agency with the benefit of comment by the relevant industry association. For example, in the Review Period, Copyright Agency designed, in consultation with the Public Relations Institute of Australia (PRIA) a licence agreement to address the compliance and information needs of public relations businesses.

Viscopy

112. Since 2 July 2012, Viscopy's licences have been managed by Copyright Agency, which has established a visual arts unit with staff dedicated to managing relationships in the visual arts sector, including those with licensees, artists and individuals affected by the Resale Royalty Scheme.
113. Licences issued by Viscopy cover reproduction, publication and communication of artistic works in such contexts as the print media, internet, merchandise, advertising, film and television. The licences cover "one off" uses as well as uses under "blanket" annual licences. Licensees include those in the government and corporate sectors as well as individuals.
114. Viscopy also claims that its licences and agreements are expressed so as to be readily understood by licensees. Copyright Agency staff provide additional information where required.
115. Viscopy claims that its licence fees and other licence terms are regularly reviewed and updated to reflect changing kinds of reproduction and customer needs.
116. During the Review Period, a review of the "rate card" for auction houses was conducted in consultation with the auction houses.
117. The Viscopy website includes a searchable database of Viscopy members, information about licences and licence fees, and information about the circumstances in which a licence is not required.

Distribution of Remuneration and Licence Fees (Code, Clause 2.4)

Copyright Agency

118. On its website, Copyright Agency publishes its “Distribution Policy”, a schedule of forthcoming distributions and its deductions for its administrative expenses. It distributes in accordance with the Distribution Policy and its Constitution.
119. In the Review Period, the Board of Directors approved of changes to the Distribution Policy. The changes are described on Copyright Agency’s website and were communicated to members and others by a variety of means.
120. Copyright Agency distributions are audited at several stages. For example, Pitcher Partners undertakes a “compliance audit” by tracing works listed on a sample of Notification of Copied Works forms back through the system to the original records supplied to Copyright Agency by the licensee. During the Review Period, this audit included an audit of the documentary authorisation for the sharing of royalties, for example, between an author and a publisher. The notified payment share system enables Copyright Agency to distribute an allocated payment to more than one person in accordance with the contractual arrangement between them. If Copyright Agency does not have the required payment share information, it pays the entire allocated amount to one rightsholders on his, her or its undertaking to on-pay any amounts due to others.

Viscopy

121. Viscopy’s “Payments Policy” sets out the basis for calculation of entitlements to remuneration and licence fees, the management and frequency of payments to members, and the amounts deducted by Viscopy. The Payments Policy is available on the Viscopy website and also in hard copy upon request. There is also information on the relevant page of the Viscopy website about when distributions are scheduled to be made.

Collecting Society Expenses (Code, Clause 2.5)

Copyright Agency

122. Copyright Agency's administrative costs associated with managing the statutory and voluntary licence schemes are met from its revenue. In some cases, the deduction is a fixed percentage (eg for distribution of licence fees collected from overseas) but in most cases the deduction represents the actual cost relevant to the particular licence scheme.
123. Copyright Agency's Board of Directors must approve the annual operating budget and in fact reviews the budget at each meeting of the Board.
124. Copyright Agency received funding from the Australian Government to assist with the cost of administering the Resale Royalties Scheme during the establishment of that Scheme. In accordance with its agreement with the Government, Copyright Agency deducts ten percent of each royalty towards its administrative costs.
125. Copyright Agency's Constitution allows it to deduct up to 1.5% of revenue for cultural or benevolent purposes. Its Board approves the amount to be deducted and allocated for these purposes. Copyright Agency publicly invites applications for cultural support. The Board approves of the successful applications following a recommendation by a committee of the Board.
126. Copyright Agency publishes information about deductions in its Distribution Policy and on its website. It publishes information about expenses, including the expense to revenue ratio for each financial year, in that year's Annual Report.

Viscopy

127. Under the Services Agreement between Copyright Agency and Viscopy, Copyright Agency receives deductions from Viscopy's licensing revenue. In the Review Period this was:

- 25% of fees from Viscopy’s voluntary licence agreements and from statutory licensing remuneration collected by Copyright Agency and by Screenrights for Viscopy members; and
 - 10% of royalties collected from overseas via Viscopy’s international partner organisations.
128. The Services agreement with Copyright Agency provides that the deductions from statutory licensing income will decrease over time in accordance with a schedule set out in that Agreement.

Governance and Accountability (Code, Clause 2.6)

Copyright Agency

129. Under Copyright Agency’s Constitution, its Board comprises a director elected by author members, a director elected by publisher members, two directors appointed by the Australian Society of Authors, two directors appointed by the Australian Publishers Association, and up to four directors appointed by the Board. The current directors and the capacity in which they were elected or appointed appears on Copyright Agency’s website.
130. Copyright Agency provides, on request, information to rightsholders about entitlement to payment, subject to the terms of its Privacy Policy. For example, that Policy allows Copyright Agency to disclose to a person who has a copyright interest in a work (such as an author) the amount being paid to another in respect of the work (such as the publisher of the work).
131. The society’s financial statements are audited annually. Information about revenue, expenses and distribution of licence fees is included in each year’s Annual Report which includes the auditor’s report and is made available to the public on Copyright Agency’s website as well as to members and to the Attorney-General. In addition, the Annual Report is tabled in Parliament.

Viscopy

132. Viscopy is governed by a non-executive Board of Directors which includes artist members and business experts from various professions. The Directors may serve a maximum of three two-year terms. Viscopy's Directors are unpaid but are reimbursed out of pocket expenses incurred in connection with their attendance at meetings.
133. Viscopy's Constitution provides for its Board to have a minimum of seven directors. There is information about Viscopy's current Directors on its website.
134. Viscopy claims to maintain proper and complete financial records, including records relating to the collection and distribution of royalties and payments of expenses.
135. Viscopy's financial statements are audited annually by external auditors, the results being published in its Annual Report. The Annual Report and the auditor's report are available from Viscopy's website.

Staff Training (Code, Clause 2.7)

Copyright Agency

136. Copyright Agency's procedures for making its staff aware of the Code include:
 - induction training for new staff members on the requirements of the Code;
 - policy documents implementing those requirements on the society's intranet; and
 - annual training for all staff on the requirements of the Code.

Viscopy

137. The staff training for Copyright Agency staff on the Code includes training in relation to Viscopy's obligations under the Code.

Education and Awareness (Code, Clause 2.8)

Copyright Agency

138. At page 15 of its report to the Code Reviewer, Copyright Agency has given considerable detail of the education and awareness activities which it conducted during the Review Period. Those activities included activities directed to members and licensees and other organisations, such as the Australian Copyright Council, the National Association for the Visual Arts, and the Australian Society of Authors.

Viscopy

139. Copyright Agency's education and awareness activities referred to above cover issues relevant to Viscopy's members and licensees. In addition, there is information specific to those members and licensees on the Viscopy website.

Complaints and Disputes (Code, Clause 3)

Copyright Agency

140. This subject is dealt with in a separate section, "Complaints and Disputes", below.

Viscopy

141. This subject is dealt with in a separate section, "Complaints and Disputes", below.

Publicity of the Code and Reporting of Compliance with it in the Annual Report (Code, Clause 4)

Copyright Agency

142. The Code is available on the Copyright Agency website as is information about the Annual Review of its compliance with the Code, the Code Reviewer's annual reports, and his triennial review of the Code itself.

143. Copyright Agency alerts its members and others to the Code and to the Code Reviewer's Annual Review of the activities of Copyright Agency in several ways, including on its website and monthly e-News.
144. Of course, Copyright Agency's annual report to the Code Reviewer is itself directed to its compliance with the Code.

Viscopy

145. The Code and information about how to participate in reviews of Viscopy's compliance with the Code are also available on the Viscopy website. Viscopy members and licensees also receive information about the Code and the annual reviews of Viscopy's compliance with it, through Copyright Agency/Viscopy communications, such as *eNews*.
146. Of course, Viscopy's annual report to the Code Reviewer is itself directed to its compliance with the Code.

Audio-Visual Copyright Society Limited (“Screenrights”)

General

147. Audio-Visual Copyright Society Ltd, operating under the name "Screenrights", was established in 1990 to be the declared collecting society for purposes of the statutory licence for the copying and communication of broadcasts by educational and other institutions under Pt VA of the Act. (see s135P of the Act).
148. Screenrights also represents the owners of the copyright in sound recordings and cinematograph films (and works included in sound recordings and cinematograph films) for the purposes of the statutory licence in favour of educational and other institutions under Pt VB Div 4 of the Act. (see s135ZZB of the Act),
149. In addition, Screenrights is the sole collecting society for the collection of equitable remuneration for the retransmission of free-to-air broadcasts under Pt VC of the Act. (see s135ZZT of the Act).

150. Finally, Screenrights is the declared collecting society in respect of television and radio broadcasts under the government copying scheme in Div 2 of Pt VII of the Act (Copyright Agency is also declared for that purpose) (see s153E of the Act).
151. As at 30 June 2013, Screenrights had 3,560 members and 912 licensees. It collects royalty payments from schools, universities, vocational training bodies, government agencies, TAFEs, resource centres, retransmitters, and New Zealand schools and tertiary institutions, as shown in the following table (page 2 of Screenrights' report to the Code Reviewer):

Type of Entity	Number
Screenrights Members	3,560
Licensees	912
<i>Schools -- Govt, Catholic Systemic, Independent -- Peak Bodies</i>	26
<i>Higher education including universities</i>	44
<i>Private Vocational Education/ Training Organisation (inc ELICOS)</i>	5
Government Agency	126
TAFE (including individual institutions and Departments representing multiple institutions)	5
Resource Centre	8
Retransmitter	7
NZ -- Tertiary	26
NZ -- Schools	665

Legal Framework (Code, Clause 2.1)

152. Screenrights' Articles of Association were amended by Special Resolution passed on 25 October 2012 in ways that do not appear to be relevant to the present review of compliance with the Code. In Annexure A to its report to the Code Reviewer,

Screenrights has set out the amendments and has provided a copy of its Memorandum and Articles of Association as amended.

Members (Code, Clause 2.2)

153. Statistics in relation to the membership of Screenrights were set out under “General” above.
154. Information sheets, Membership and Registration Forms remained unchanged during the Review Period.

Licensees (Code, Clause 2.3)

155. During the Review Period, Screenrights updated application forms for licensees to reflect CPI based changes in rates and entered into new agreements with TAFE administering bodies following negotiations with the sector’s peak body, the TAFE Copyright Advisory Group.

Distribution of Remuneration and Licence Fees (Code, Clause 2.4)

156. Changes to Screenrights’ “Distribution Policy: Exceptional Use Policy”, came into effect on 3 April 2013 when the changes were approved at a Board Meeting.
157. Exceptional use includes any legitimate activity under the licence that is outside the normal copying and communication activities of an average institution. By its nature, exceptional use is difficult to predict or quantify.
158. Screenrights sought the advice of ACNielsen Research Pty Ltd (Nielsen) and it was Nielsen’s view that instances of exceptional use would distort the representative sample, as they do not, by their very nature, approximate typical behaviour under the licence. The exceptional use policy was introduced to remove records of exceptional use from the representative sample and to remunerate the relevant rightsholders using a methodology that sits outside the representative sample model.
159. A copy of Screenrights’ current Distribution Policy was supplied to the Code Reviewer as Annexure B to Screenrights’ submission.

Collecting Society Expenses (Code, Clause 2.5)

160. Screenrights' expenses for the year ending 30 June 2013 were 14.6% of gross revenue (see Clause 2.5 (a) of the Code). This figure is unaudited and the audited figure will be in Screenrights' Annual Report. A detailed summary of Screenrights' expenses to collections ratios will be found in Screenrights' Annual Report for the financial year 2012/2013, where a comparison with the years 2010-2011 and 2012 -2013 will be depicted. This report will be available as at 22 September 2013.

Governance and Accountability (Code, Clause 2.6)

161. Screenrights' Annual Report for 2012/2013 will be available from 22 September 2013, including the audited accounts as at 30 June 2013.

Staff Training (Code, Clause 2.7)

162. Screenrights reports that all new staff are informed of and trained in Screenrights' Dispute Resolution Policies as part of their induction. The relevant information is also available on Screenrights' website.
163. Screenrights reports that staff training in relation to the society's obligations under the Code and as to the handling of complaints and alternative dispute resolution procedures is carried out regularly. In addition, there are regular staff meetings at which specific issues are raised and training given, such as in relation to privacy issues.
164. Screenrights provided to the Code Reviewer as Annexure C to its submission a copy of the training materials that were in use during the Review Period.

Education and Awareness (Code, Clause 2.8)

165. This is dealt with under "Members" (Clause 2.2), "Licensees" (Clause 2.3) and "Staff Training" (Clause 2.7) above.

Complaints and Disputes (Code, Clause 3)

166. This subject is dealt with in a separate section “Complaints and Disputes” below.

Publicity of the Code and Reporting of Compliance with it in the Annual Report (Code, Clause 4)

167. Screenrights publicises the Code and its undertaking to be bound by it by referring to that fact and making the Code available on its website for downloading by members and licensees and other interested persons.

168. Screenrights includes a statement in its Annual Report (under “Governance”) that it complies with the Code (see Clause 4 (b) of the Code).

169. Of course, Screenrights’ annual report to the Code Reviewer is itself directed to its compliance with the Code.

Phonographic Performance Company of Australia Ltd (“PPCA”)

General

170. As at 30 June 2013, PPCA had 1,347 licensors, 3,001 registered artists and 55,000 public performance licensees.

171. PPCA is not a declared collecting society for the purpose of any of the mandatory licensing schemes under the Act.

172. On 17 September 2012, PPCA referred a proposed licence scheme to the Copyright Tribunal of Australia (CT 1 of 2012) under s154 of the Act. This was a “Subscription Television Broadcast Licence Scheme”. It is a scheme for the use of PPCA’s sound recordings by subscription television providers who compile packages of subscription television channels by producing channels or by acquiring of licensing channels from channel providers, and broadcast a subscription television service to residential and commercial subscribers.

173. PPCA states that the proposed scheme was referred to the Tribunal only after extensive consultation with the subscription television sector beginning in late 2010. PPCA expects the proceeding to be heard in the latter half of 2014 and hopes that it may be resolved by negotiation in the meanwhile.

Legal Framework (Code, Clause 2.1)

174. During the Review Period, PPCA's Constitution and its Privacy Policy remained unchanged. Copies have been provided to the Code Reviewer in the PPCA's submission.

Members (Code, Clause 2.2)

175. PPCA is a company limited by shares, the shares being held equally by four of the six founding members. The four members are ineligible for any dividend, and receive remuneration only on the same basis as all other licensors, in line with PPCA's "Distribution Policy", a copy of which has been supplied to the Code Reviewer.
176. As a result, whereas other collecting represent the interests of their "members", PPCA represents the interests of "licensors" (ie the owners of copyright in sound recordings), only four of which are in fact members of PPCA.
177. PPCA's relationship with licensors generally is governed by the terms of its Standard Input Agreement, a copy of which has been supplied to the Code Reviewer, rather than by PPCA's Constitution. The Input Agreement allows PPCA to sub-license on a non-exclusive basis, and to create blanket public performance and broadcast licensing schemes used by the users of sound recordings (particularly, small businesses).
178. PPCA's letterhead states: "PPCA provides licences for the public use of sound recordings and music videos protected by copyright. Users may alternatively obtain licences directly from all relevant copyright owners."
179. In the same way, PPCA has "registered artists" rather than artist members. The payments made available to Australian featured artists under the PPCA Distribution Policy is on an ex gratia basis and does not arise from any copyright held by the artists.

180. As at 30 June 2013, PPCA had 1,347 licensors representing major record companies and independent copyright owners. At that date the number of “registered artists” was 3,001.
181. PPCA’s Distribution Policy was not amended during the Review Period.
182. However, during the Review Period the Input Agreement was changed to facilitate the licensing by PPCA of certain new digital services. PPCA also took the opportunity to amend the Input Agreement to clarify the rights that PPCA is able to grant within Australia and those that it is able to grant in relation to various international services.
183. On 21 September 2012, PPCA wrote to existing licensors advising them of the proposed changes and enclosing an explanatory statement and a marked up copy of the Input Agreement highlighting the proposed changes. In its report to the Code Reviewer, PPCA relates the process leading to the execution of an Input Agreement and of the process leading to the registration of an artist under the PPCA Artist Direct Distribution Scheme.
184. PPCA reports that increasingly registration takes place on-line.

Licensees (Code, Clause 2.3)

185. As noted under “General” above, as at 30 June 2013 PPCA had over 55,000 businesses licensed for the public performance of protected sound recordings and music videos. By volume, this is the largest part of PPCA’s licensing activity and is managed by its Public Performance Licensing Department. PPCA also has in place licences with broadcasters (including linear and customer influenced streaming services).
186. PPCA’s report to the Code Reviewer attaches its standard form documents that illustrate the general statements contained in this report.
187. PPCA’s Public Performance tariffs generally increase on 1 July every year by an amount reflecting the CPI increase. By 1 April each year PPCA writes to relevant key industry associations it has been able to identify, advising them of the proposed

increases and inviting them to contact PPCA if they wish to have advice about the proposal or to discuss it.

Distribution of Remuneration and Licence Fees (Code, Clause 2.4)

188. PPCA maintains and makes available on its website its Distribution Policy, which sets out how PPCA collects licence fees for the use of sound recordings and music videos, and allocates and distributes payments to licensors who have authorised PPCA to issue licences on their behalf. The PPCA Distribution Policy also incorporates details of the Direct Artist Distribution Scheme. As indicated above, this is an ex gratia arrangement under which featured Australian artists may register to receive payments direct from PPCA, regardless of whether they have retained copyright in the sound recordings on which they feature.
189. PPCA's Distribution Policy was unchanged during the Review Period.

Collecting Society Expenses (Code, Clause 2.5)

190. PPCA's operating expenses are deducted from total gross revenue, yielding a surplus available for allocation and distribution in line with PPCA's Distribution Policy.
191. PPCA's Annual Report for the year ended 30 June 2012 (published during the Review Period) showed that the expense to revenue ratio was 20.3%. This compared with 22.6% for the year ended 30 June 2011, the Annual Report for which was published during the year ended 30 June 2012 (to which the Code Reviewer's last report related).

Governance and Accountability (Code, Clause 2.6)

192. PPCA's annual financial statements are audited. Reports of the Board of Directors and of the external auditors are published in the Annual Report which is available on the PPCA website and which contains the information specified in the Clause 6.2(e) of the Code.
193. The PPCA Management Team meets each week to discuss operational and strategic matters.

Staff Training (Code, Clause 2.7)

194. PPCA's practice of providing staff at the commencement of their employment with a number of key documents, including the Code, the PPCA Privacy Policy and the PPCA Complaints Handling and Dispute Resolution Policy, continued to be followed during the Review Period.
195. Members of the Licensing Department meet at least once each month and individual licensing teams meet more frequently. At these meetings, staff are reminded of PPCA's obligations under the Code and of various PPCA policies.
196. Staff training sessions for the Licensing and Distribution Departments on the subject on the Code are held regularly.
197. During the Review Period, new staff were also sent to external courses dealing with customer service and telephone skills.

Education and Awareness (Code, Clause 2.8)

198. PPCA reports that it regularly meets with licensees and key licensee representative bodies. It distributes explanatory materials and publishes a quarterly newsletter, *In The Loop*, which is forwarded to each licensee with the periodic licence renewal notice. PPCA is itself also a member of several licensee representative bodies.
199. During the Review Period, PPCA wrote to some 4,476 businesses advising them of the licensing obligation relating to the use of protected sound recordings, and the convenience in this respect of the PPCA licence.
200. During the Review Period, PPCA met with artists and licensors to make them aware of the role and function of PPCA, presented at seminars and panel discussions, and distributed explanatory materials.
201. PPCA issues a newsletter, *On the Record*, to artists and licensors.
202. PPCA uses Facebook and Twitter to communicate directly with registered and potential artists and licensors.

203. Awareness of PPCA is also enhanced through its sponsorship and support of various prizes, details of which are contained in PPCA's report to the Code Reviewer.
204. PPCA's website is a source of information for music users and copyright owners, and is updated regularly.

Complaints and Disputes (Code, Clause 3)

205. This subject is dealt with in a separate section, "Complaints and Disputes", below.

Publicity of the Code and Reporting of Compliance with it in the Annual Report (Code, Clause 4)

206. PPCA publishes notification of the process for the annual review of compliance with the Code on its website and in its newsletter, *In the Loop*.
207. Of course, PPCA's annual report to the Code Reviewer is itself directed to the issue of its compliance with the Code.

Australian Writers' Guild Authorship Collecting Society Ltd ("AWGACS")

General

208. The Australian Writers' Guild (AWG) was started 50 years by radio writers who formed a guild to represent their professional interests as television started to take over from radio plays.
209. Today the Australian Writers' Guild is the professional association representing Australian writers for performance including performance via film, television, theatre, radio and narrative games and digital media.
210. The Australian Writers' Guild Authorship Collecting Society (AWGACS) was born out of the AWG for the purpose of collecting secondary royalties within the internationally recognised framework of voluntary collecting societies.

211. The number of members of AWGACS at 30 June 2013 was 1,208, an increase of 76 during the Review Period (coincidentally the increase during the preceding review period of 1 July 2011 to 30 June 2012 was also 76).
212. AWGACS does not deal with licensees.
213. AWGACS continues to pursue royalties owed to Australian screenwriters which, it says, have been incorrectly paid to the Writers' Guild of America (WGA), the Motion Picture Association of America (MPAA), the Alliance of Motion Picture and Television Producers (AMPTP), and other US entities. AWGACS states that pursuit of these royalties is hard fought, and that the attempts made to seek collaborative protocols with the WGA to stop the misdirection of Australian writers' funds to the United States have, to date, been "to no avail".
214. For this reason, under the auspices of the International Confederation of Societies of Authors and Composers (CISAC), AWGACS initiated the CTDLV_EN_WORKS Working Group. The first action taken by the Working Group was to survey all CISAC sister societies in an effort to establish a better understanding of international identification / distribution processes and conflicting claims management. As a result of the Working Group's preliminary research, the CISAC Director of Legal and Public Affairs has confirmed that the issues with the WGA, DGA and MPAA are within the remit of CISAC, and that it is committed to becoming actively involved in negotiations towards a resolution.
215. The issue of recovery from Screenrights of that part of the royalties that Screenrights receives to which AWGACS asserts its members' entitlements is addressed below at [473] ff in the Screenrights "Complaints and Disputes" section of this Report.

Legal Framework (Code, Clause 2.1)

216. There has been no change to the legal framework of AWGACS since the previous Code Reviewer's report (for 2011-2012). It is noted that AWGACS is not a declared collecting society under any of the provisions of the *Copyright Act 1968*.

Members (Code, Clause 2.2)

217. As noted above, the number of members of AWGACS as at 30 June 2013 was 1,208, an increase of 76 during the Review Period.

Licensees (Code, Clause 2.3)

218. Clause 2.3 of the Code does not apply to AWGACS because AWGACS is not a licensor of copyright material.

Distribution of Remuneration and Licence Fees (Code, Clause 2.4)

219. AWGACS does not grant licences and therefore does not receive licence fees for distribution.

220. In relation to remuneration collected by AWGACS on behalf of its members, it has a “Distribution Policy” a copy of which is Attachment 1 to its report to the Code Reviewer. The Distribution Policy is posted on the AWGACS section of the AWG website. That Policy deals with such matters as the registration of audio-visual works written in whole or in part by its members, “percentage splits” and the preference accorded to the credited writer, the deduction of the actual operating expenses, and the requirement that writers provide a Warranty and Indemnity in favour of AWGACS in respect of each title in relation to which the writer claims an entitlement.

221. The AWGACS financial year is a calendar year. In the calendar year ended 31 December 2012, AWGACS collected royalties of \$999,314 (to be distributed in the following calendar year, 2013), and distributed \$1,012,184 (from prior years' collections).

Collecting Society Expenses (Code, Clause 2.5)

222. AWGACS deducted 5% of gross royalties received as a “cultural levy” to be directed towards appropriate activities in support of its members.

Governance and Accountability (Code, Clause 2.6)

223. The Board of Directors of AWGACS comprises five directors, of whom two are AWGACS members who are appointed by the Board of the Australian Writers' Guild, two are AWGACS members who are elected by the members, and one is the AWGACS Executive Director.
224. The audited annual accounts for calendar 2012 were attached to AWGACS's report to the Code Reviewer.

Staff Training (Code, Clause 2.7)

225. During the Review Period, the new Collections and Distribution Manager trained a new Collections and Distribution Officer.

Education and Awareness (Code, Clause 2.8)

226. AWGACS is a relatively small collecting society with limited funds and capacity to conduct education and awareness campaigns. However, during the Review Period AWGACS made an effort to educate its members and the broader writing community about its role, functions and activities. It did so by way of advertising (via the AWGIE awards program; 'Storyline' (the flagship journal for performance writers); chairing an international working group on the collection and distribution of English language titles and the entitlements of the authors of those works, Question & Answer sessions on moral rights; advice to members and producers on moral rights, entitlements, contractual provisions, and individual advice on request.
227. In addition, the AWGACS website provides information about AWGACS's Policies and Procedures, Constitution, Privacy Policy, Complaints Handling Procedure, Dispute Resolution Procedure and Distribution Policy.

Complaints and Disputes (Code, Clause 3)

228. The subject of complaints and disputes is dealt with in a separate section of this report, "Complaints and Disputes", below.

**Publicity of the Code and Reporting of Compliance with it in the Annual Report
(Code, Clause 4)**

229. The Code is posted on the AWGACS page of the AWG website and is made available to members and the general public upon request.
230. Of course, AWGACS's annual report to the Code Reviewer is itself directed to the issue of its compliance with the Code.

**Australian Screen Directors Authorship Collecting Society Ltd
("ASDACS")**

General

231. As at 1 July 2012 ASDACS had 556 members. By the end of the Review Period, membership stood at 788 – an increase of 232 members.
232. ASDACS is not a declared collecting society under the Act. All of its income was from overseas. The amount of that royalty income during the Review Period was \$554,584. In addition a small payment was received from Screenrights arising out of Australian retransmission rights, and was passed on to members of ASDACS without any deduction.
233. In its report to the Code Reviewer, ASDACS states that the significant increase in membership in the Review Period was due to increased research and email contact. It also states that the only significant increases in its costs were in development costs for its overseas registration system.
234. ASDACS reports that through its association with the Australian Directors Guild, it was active in promotion of small gains for directors.
235. ASDACS continues to employ 1 staff member full-time.

Legal Framework (Code, Clause 2.1)

236. There was no change during the Review Period.

Members (Code, Clause 2.2)

237. There was no change during the Review Period.

Licensees (Code, Clause 2.3)

238. ASDACS does not grant licences to use copyright works.

Distribution of Remuneration and Licence Fees (Code, Clause 2.4)

239. ASDACS reports that after another year of disappointing income in 2012, it used its reserves to “bolster the distributable funds for its members, reducing the administration fee charged in 2013 to a long-term average fee of 25%.

Collecting Society Expenses (Code, Clause 2.5)

240. ASDACS deducts a 25% administration fee to cover its operational expenses.

241. ASDACS’s financial year is a calendar year. It is required, however, to report to the Code Reviewer on a review period of twelve months ending on 30 June. This disconformity sometimes makes for awkwardness. During the Review Period (in fact in late 2012), ASDACS distributed income received by it in calendar 2011.

242. The members of ASDACS received the full gross royalties that ASDACS had received from its European sister societies for their works, less an amount of no more than 4% which is set aside for strengthening the industry and directors’ rights (the “Cultural Purposes Fund”); an administrative deduction of 25% covering the cost of running ASDACS during the year in which the money was collected; and any membership fee applicable to working directors who are not members of the Australian Directors Guild or of the Screen Directors’ Guild of New Zealand (SDGNZ) (for these, 10% of the net amount due).

243. The Cultural Purposes Fund is authorised by the ASDACS Constitution and is (as it has been for several years previously) an amount of \$24,000, which is paid to the ADG.

Governance and Accountability (Code, Clause 2.6)

244. The governance principles implemented by ASDACS remained unchanged during the Review Period.
245. At the annual general meeting of ASDACS in 2013, its Constitution was amended allowing for directors who had served three terms to be eligible to re-nominate with the support of a majority of Board members, rather than the unanimous support of the Board.
246. ASDACS now has six directors, five of whom are elected by the membership, four being members of the Australian Directors Guild, and one being the ASDACS Executive Director.

Staff Training (Code, Clause 2.7)

247. During the Review Period the full-time staff member and the external database consultant received training on the operation of the international works database, IDA (International Documentation on Audio-Visual Works), from the IDA Development Manager.

Education and Awareness (Code, Clause 2.8)

248. As in previous years, ASDACS's website has updates to keep its members informed and aware of its work and progress. The website discusses the importance of copyright and refers to the nature of copyright as administered by collection societies in Australia and overseas, addressing the particular role and policies of ASDACS.
249. ASDACS used the newsletter of the Australian Directors Guild as a vehicle for broader awareness campaigns, and provides sponsorship and cultural support through the Guild to enhance its visibility to the wider film and TV community.

Complaints and Disputes (Code, Clause 3)

250. This subject is dealt with in a separate section, “Complaints and Disputes”, below.

Publicity of the Code and Reporting of Compliance with it in the Annual Report (Code, Clause 4)

251. ASDACS publicises the Code on its website and in all information documents provided to members and potential members.

252. The Code is posted on the ASDACS website in an area called “Governance”, where those interested can also find related topics. Members can download those documents or obtain paper copies upon request to the ASDACS office.

253. Of course, ASDACS’s annual report to the Code Reviewer is itself directed to the issue of its compliance with the Code.

COMPLAINTS AND DISPUTES

Australasian Performing Right Association Limited (“APRA”) and Australasian Mechanical Copyright Owners Society Limited (“AMCOS”)

General

254. APRA/AMCOS has included their complaints Policy and Procedure document in their report to the Code Reviewer (Tab 1 Vol 2). They have included in their report the background documents to all complaints. These include nine of the Interested Parties submissions to the ACCC.

255. During the Review Period there were three new member complaints, not including one member submission to the ACCC. There was one complaint carried over from previous Review Periods.

256. Complaints by licensees included one new licensee complaint during the Review Period. There were also the eight licensee submissions to the ACCC. There were no licensee complaints carried over from any previous Review Period.
257. APRA/AMCOS say that they have adopted a broad definition of “complaint” for the purpose of disclosure in their report to the Code Reviewer. However, where they have been unsuccessful in their attempts to license a user of music and the matter is referred to the society’s external solicitors, the matter is not characterised as a complaint unless a complaint is made regarding the actual conduct of an employee.
258. On 30 June 2013 there were 97 ongoing general infringement matters under the management of the Licensing Services Department, 26 of which were under the management of APRA/AMCOS’s external solicitors.
259. Where a licensee refuses to pay invoices issued by APRA/AMCOS, the matter is pursued by the Finance Department and is then referred to an external mercantile agent to pursue if necessary through debt recovery proceedings. As at 30 June 2013, there were 676 licensees who were under the management of external mercantile agents. These matters are not characterised as complaints unless a complaint regarding the conduct of the Finance Department or debt collectors has been made, and no such complaints were made during the Review Period.
260. Sometimes members might dispute ownership details relating to a work. Where APRA/AMCOS are notified of such a dispute among members or involving members of an affiliated society as to the allocation of shares in a work administered by APRA/AMCOS, APRA/AMCOS may, at their discretion, place all or any of the performance credits relating to the work in suspense until the dispute is resolved.
261. APRA/AMCOS encourage the members to resolve disputes among themselves or by way of the ADR facility they provide for their members. During the Review Period only one such dispute was referred to the ADR facility, and that dispute (over ownership of the work) was resolved by way of mediation.
262. APRA/AMCOS also have an ADR facility to resolve disputes between APRA/AMCOS and licensees or potential licensees. Following the ACCC re –

authorisation of APRA's arrangement in April 2010, the ADR facility was updated, and a copy of the current facility for licensees (or potential licensees) is included in the report to the Code Reviewer (Tab 5 Vol 2).

263. The APRA/AMCOS ADR facility is publicised on the website, in materials released to the public, and in legal correspondence. APRA/AMCOS's external solicitors have a standing instruction to make the existence of the ADR facility known to parties before legal proceedings are commenced.
264. Under the terms of its most recent authorisation from the ACCC, APRA is required to amend its ADR facility and also to comply with the condition that it submit an annual report to the ACCC giving details of disputes notified to APRA under its dispute resolution process for licensees and potential licensees. A copy of APRA's annual Dispute Report to the ACCC for the year ended 31 March 2013 is included in the report to the Code Reviewer (Tab 6 Vol 2).
265. During the Review Period, four licensees sought to resolve their disputes with APRA/AMCOS by way of the ADR facility for licensees. Two of those disputes were resolved by commercial negotiation prior to ADR, and two proceeded to expert determination. Details of all four disputes are set out in APRA's annual Dispute Report to the ACCC referred to above.
266. APRA/AMCOS suggest that the limited utilisation of the ADR process by licensees demonstrates that the societies are effective in resolving licensing disagreements, and that licensees are relatively satisfied with the arrangements for licences to be granted.

Complaints by Members

APRA/AMCOS Member Complaint 1

267. Various writers and publishers of dance music made a complaint concerning the distribution of royalties in respect of performance of music at nightclubs.
268. Prior to a decision of the APRA Board on 18 April 2013, the distribution process that had operated involved the use of broadcast logs (for 44% of the pool) and the ARIA

(Australian Record Industry Association) Dance Chart (for the remaining 56% of the pool) to arrive at the allocations.

269. A new process approved by the Board on 18 April 2013 substituted the use of music recognition technology (via the DJ Monitor system) for the use of the broadcast logs, but changed the percentages of the pool involved. The ARIA Dance Charts proportion was reduced from 56% to 17%, and the DJMonitor music recognition data was used for the remaining 83%. APRA explains that the new percentages of 83% and 17% were employed because they directly reflected the number of discrete works produced by each set of data. (“DJMonitor” is a reference to a Dutch music recognition company that specialises in the technological identification of dance music.)
270. The introduction of the technology followed a two-year trial of the DJ Monitor system. APRA had been concerned that the ARIA Dance Charts did not provide a full picture of the music being performed in nightclubs. The Dance Charts are not derived from sales or performances, but from a self-assessment process by participating DJs of determining “audience reaction” to performed tracks.
271. The new policy applied for the first time in Distribution P1304 which related to the quarter ended 30 March 2013. APRA began receiving complaints by email and telephone over the period from 24 May 2013 to the end of the Review Period, from APRA members, many of whom experienced a steep decline in their earnings.
272. Late on 8 July 2013, APRA also became aware that a group of disgruntled DJ members had filed a highly critical submission with the ACCC in June 2013 in connection with APRA’s authorisation application. That submission is lengthy (13 pages) and is signed by 24 Writer Members, one Publisher Member and one “Artist Manager”.
273. APRA acknowledges the following failures on its part:
- It failed to keep its members advised of the changes being planned or to consult with them on the impact of those changes. Beyond its initial advice on the commencement of the trials in early 2011, it remained largely silent about the project insofar as its members were concerned;

- APRA implemented the changes too quickly and without first properly amending the formal document by which its members are supposed to understand how APRA calculates their earnings (ie, APRA’s Distribution Rules and Practices documents). This was not done until 11 June 2013, and APRA acknowledges that this failure was a breach of Clause 2.4 of the Code.
 - APRA failed to ensure that its members’ interests were being adequately protected in important technical respects associated with the project, and, in particular, that it failed to ensure that all members were advised of the importance of, and of the procedures associated with, the uploading of their works into the DJ Monitor database; and
 - APRA failed to make a sound and justifiable estimation of the proper share of the pool to distribute on the basis of the music recognition technology.
274. APRA states that in response to the complaints it spoke to as many of the writers (and their managers) as it could, “one-on-one”, produced an information sheet explaining the changes and their underpinnings, and set up meetings to be addressed by APRA’s CEO and Head of Member Services in Sydney (on 11 July 2013) and Melbourne (on 15 July 2013).
275. APRA claims that these meetings were very successful and that an atmosphere of hostility and suspicion has largely been replaced by a positive, optimistic and more trusting environment. As well, APRA has now established a consultative industry committee which will consider the appropriateness of the current Nightclub Distribution methodology and other alternatives.
276. Following the meetings, the APRA Board decided to re-run the distribution for the quarter ended 30 March 2013 insofar as the Music Distribution Pool was concerned, and it made credit adjustments in relation to each work which received less under the new system than it would have received under the old system. The Board also resolved that APRA not implement the use of music recognition technology as a basis for distribution of the Dance Music Distribution Pool, at least for the next two quarterly distributions, pending further consultation with members and consideration of the additional music identification tools.
277. Finally, APRA states that its management has introduced new procedures in its reporting to the APRA Board and the Committees of the Board, wherever members’

interests are directly involved. These new procedures require management to report on the issues:

- Who is affected by the change?
- What is the impact of the change on those affected?
- Has proper consultation occurred in relation to the change?
- Has the change been properly communicated?
- Has relevant formal documentation been amended?

278. In consequence of the way in which it has responded to the complaints, APRA considers that they have been resolved.

Code Reviewer's Comment (if, and to the extent, appropriate):

279. As noted above, APRA has acknowledged that it breached the Code. I need not elaborate on this, beyond noting that the complaint was an important one that affected members generally, as distinct from one that affected a particular member.

280. Prudently, APRA:

- (1) “undid” the distribution for the quarter ended 30 March 2013;
- (2) decided not to implement the music recognition technology for the time being; and
- (3) has established, to advise it, a “Consultative Group” with which APRA now has ongoing and regular contact.

281. This last development, in particular, appears to be a most welcome one which may overcome and pre-empt the kind of problem that arose with the implementation of the DJ Monitor technology. It will be important that the consultation be maintained.

APRA/AMCOS Member Complaint 2

282. A Writer Member complained on 13 February 2013 that he had yet to receive any overseas mechanical (reproduction) royalties in respect of lyrics written by him. The

lyrics were featured on an album released in Italy in 2011. They were also performed on his band's tour of Italy that accompanied the release of the album.

283. APRA/AMCOS investigated the situation and replied within five days advising that with regard to the mechanical royalties there was conflicting information as between the database of the Italian collecting society (SIAE) and AMCOS's database.
284. SIAE's database recorded that the Writer Member was published by a music publisher in Italy in which case the mechanical royalties should have been paid to an Italian collecting society (UM(Italy)) which should have paid them to its Australian counterpart (UM(Australia)) which should have paid them to the Writer Member.
285. However, both AMCOS and UM had records showing that the Writer Member was unpublished in Italy, which was why UM(Italy) had not accepted the royalties from SIAE.
286. In these circumstances, the mechanical royalties should have been paid to SIAE and then by SIAE to AMCOS under its reciprocal agreement with SIAE. AMCOS cleared the matter up with SIAE which released the royalties (\$160.37) to AMCOS which paid them to the Writer Member on 4 March 2013.
287. In regard to the performing royalties, APRA had been awaiting details from the Writer Member of the band tour to assist it in claiming royalties from SIAE. Notwithstanding the lack of that information, APRA successfully claimed those royalties (\$401.35, being \$446.66 less withholding tax of \$45.31) from SIAE which were paid to the Writer Member in APRA's distribution on 21 February 2013.
288. By email dated 1 March 2013 the Writer Member expressed himself to be satisfied with the handling of his complaint by APRA/AMCOS. In his email, he said that his confidence in and respect for APRA/AMCOS were restored. APRA/AMCOS consider the matter resolved.

APRA/AMCOS Member Complaint 3

289. This complaint is a continuation of a complaint from the preceding review period – see Complaint Number 7 recounted at pp 56 – 60 of the Code Reviewer’s Report for 2011-2012. The complainant also made a submission directly to the Code Reviewer – see Submission No 4 at [649] ff below.
290. The complaint is that copyright in the complainant’s lyrics had been infringed by another APRA writer member. The complaint also relates to the decision taken by the APRA and AMCOS Boards to expel the complainant from membership of the collecting societies.
291. During the Review Period, the complainant has continued to write to APRA/AMCOS as well as to various third parties, including the Code Reviewer, with continued allegations that the copyright in her lyrics was infringed by an increasing number of APRA writer members and that the refusal by APRA/AMCOS to act on the allegations shows that APRA/AMCOS are conspiring against her.
292. APRA/AMCOS have included in their report to the Code Reviewer correspondence to and from the complainant.
293. APRA/AMCOS decided in 2011 not to enter into further correspondence with the complainant and the societies have not responded to her during the Review Period. APRA/AMCOS’s concluding comment is that they do not propose to include correspondence from this complainant as a complaint in future reports to the Code Reviewer, unless I advise that I would prefer this to be done.

Code Reviewer’s Comment (if, and to the extent, appropriate):

294. In my report for 2011-2012, I concluded in favour of the complainant that her complaint was reportable but, as my predecessor, The Hon James Charles Sholto Burchett, QC, observed, no harm was done since copies of the correspondence were made available to the Code Reviewer in any event. On the substance of the complaint, his conclusion, which I adopted, is that no breach of the Code was shown.

295. Some idea of the tone of the correspondence from the complainant can be gauged by the following headings: “APRA Deceives QC’s” (a reference to deception of the late Jim Burchett and myself) and “Copyright Infringement (True Believer)”. The complainant has not issued legal proceedings for infringement of copyright or challenging her expulsion from membership.
296. I have read the correspondence and I agree with APRA that an end must be made to this matter. I do not require APRA to continue to supply to me the correspondence with the complainant in relation to the particular complaint that she has already made and which has been finally dealt with. That complaint related to ownership of the copyright in the lyrics, infringement of that copyright and the expulsion from membership.
297. This will not prevent her from complaining to APRA/AMCOS in relation to a different matter from those just described and dealt with, although it is difficult to conceive of any new matter of complaint in view of her having not been a member of either society since 18 November 2010. Nor will it prevent her from making a submission to the Code Reviewer in response to the publicly advertised invitation.

APRA/AMCOS Member Complaint 4

298. A Writer Member complained to APRA by email dated 19 March 2013 that he had not received any performing royalties for the international broadcast of two television programs featuring music which he had composed for the programs, which were first broadcast overseas more than two years ago.
299. He also complained that he had been making enquiries of APRA about the matter for some two years and had received only non-committal answers, such as “overseas royalties can take a long time to collect”. He complained that it was not until his telephone conversation with an APRA Member Services Representative in March 2013 that APRA had ever informed him of the need to complete an “Overseas Broadcast Notification Form” in order for APRA to track down his international performing royalties.
300. In its response, APRA accepts that even though the “Overseas Broadcast Notification Form” was referred to in information sheets and on its website, it was unacceptable

that this information had not been communicated directly to the particular Writer Member whenever he had contacted APRA to enquire about the royalties.

301. APRA acknowledges that the complainant did not receive a level of service he should have received. This, APRA says, was due to a breakdown in processes within the Member Services Department.

302. In order to address the issues raised in the complaint, APRA took the following steps:

- The Writer Member's enquiry was escalated to APRA's Manager, "Film and TV", who telephoned the Writer Member within 24 hours of APRA's receipt of his complaint. An email was also sent by APRA's Complaints Officer on 21 March 2013;
- APRA's Manager, "Film and TV" liaised with the complainant and the television shows' production companies to obtain the necessary information to complete the "Overseas Broadcast Notification" form and to assist APRA in tracking down the overseas broadcasts of the programs;
- APRA's Manager, "Film and TV" liaised with APRA's International Services Department on the complainant's behalf to track the overseas broadcast of his programs and to collect any outstanding international royalties with overseas performing rights organisations relating to the broadcasts of the two programs;
- APRA's Manager, "Film and TV" has continued to liaise with APRA's International Services Department and to provide the complainant with international royalties relating to the programs; and
- APRA's Director of Membership reminded all Writer Services representatives of the procedures that must be followed in relation to future similar enquiries.

303. APRA states that since implementing these steps it has successfully traced and paid to the Writer Member significant international performing royalties arising from the broadcast of the two television programs.

304. On 20 August 2013, the Writer Member expressed satisfaction with APRA's response to his complaint. He said that he was very happy with the outcome. APRA is working with him on an ongoing basis in the interests of the member himself and of other indigenous members placed as he is. APRA considers the matter resolved.

APRA/AMCOS Member Complaint 5

305. A Writer Member made a “Live Performance Return” (LPR) claim through APRA’s website for the year ended 30 June 2012. Since the LPR claim was for more than a certain number of performances, the claim was subjected to APRA’s LPR audit process – a standard APRA policy. The Writer Member cooperated and the LPR claim was subsequently approved, and the Writer Member was paid an LPR distribution for the year ended 30 June 2012.
306. Subsequently, APRA discovered that it had made an error in calculating the amount. APRA had not applied the ceiling or “cap” that should have been applied where a member gives regular multiple performances at the same venue. Nor did APRA take into account whether the venue held an APRA licence, which is another factor relevant to the determination of which cap applies. These errors by APRA had resulted in a significant overpayment.
307. APRA contacted the complainant to advise him of the overpayment and advising that APRA was investigating the matter and would provide an update as soon as possible. The following day, 29 November 2012, the Writer Member wrote his first email of complaint. Among other things, he insisted that the relevant person at APRA be “sacked” and that the sacking be reported to a public authority.
308. APRA’s Director of Membership responded in writing on 13 December 2012. APRA acknowledged its error and accepted that the Writer Member had done everything asked of him in connection with APRA’s audit of his claim. For that reason, even though APRA was entitled to recover the overpayment, it decided to forego that entitlement and not to seek the reimbursement.
309. The Writer Member then wrote a “without prejudice” email of complaint dated 18 December 2012 complaining again of APRA’s conduct. He advised APRA that he had made changes to his live performance arrangements on the basis of the quantum of APRA’s LPR distribution. He advised that instead of suing APRA for damages, he would treat the LPR distribution as an “out of court settlement only”.
310. APRA’s General Counsel wrote to the Writer Member at length on 21 December 2012 explaining in detail the reason for the erroneous LPR distribution and stating

that while APRA would not seek to recover any overpayment, it was incorrect to characterise the overpayment as a “settlement”. APRA also emphasised that the Writer Member’s future LPR distributions would be calculated correctly, with relevant royalty caps correctly applied if applicable, but that future LPR distributions were likely to be for significantly lower amounts.

311. The Writer Member replied on the same day (21 December) and again the following day (22 December), arguing that it was unfair that LPR distributions arising from performances at venues which have not been licensed by APRA are the subject of a lower royalty cap than those at venues which had been so licensed. In substance, his complaint was that he was being penalised because APRA was not adequately enforcing the requirement that venues be licensed.
312. APRA (Complaints Officer) replied on 18 January 2013 advising that it would try to ensure that the venues (that the complainant had identified to APRA as those at which he performed) were licensed, and that the general issue would be referred to the APRA Board’s Membership & Distribution Committee, which was already in the process of reviewing APRA’s LPR Distribution Scheme generally.

Code Reviewer’s Comment (if, and to the extent, appropriate):

313. At the date of APRA’s report to the Code Reviewer (15 August 2013), the review of the LPR Distribution Scheme had not been completed. On that basis, while the particular complaint seems to have been resolved, there remains this outstanding general issue of policy to be addressed.
314. APRA says that it has now consulted widely with its members and others in relation to the issue raised by this complaint. APRA has conducted six open member forums (one in each State capital). A proposal for a new arrangement is on the APRA website.
315. It seems premature to comment on the outcome. From the viewpoint of compliance with the Code, however, what is important is that the system of “caps” and the consequences of a venue’s having or not having a licence must be made clear to members.

Complaints by Licensees

APRA/AMCOS Licensee Complaint 1

316. The complainant-licensee, who operated a venue at which recorded music is played for the purposes of dancing, made the following complaints to the ACCC on 24 May 2013:
- That APRA had increased the licence fees many times over the past five years without informing the licensee why and therefore denying it the opportunity to dispute the increases;
 - That APRA is not transparent regarding its distributions and, in particular, its distribution to overseas copyright owners;
 - That APRA and PPCA are “doubling up” on costs and in enquiry should be held as to whether the two societies should be forced to merge; and
 - That APRA sends out covert operatives who pay door fees to enter venues and spy on the licensee’s operations.
317. In relation to the **first complaint**, APRA says that it is untrue that it increased the licensee’s licence fees many times over the preceding five years without informing it why. Following extensive consultation with relevant industry bodies, APRA wrote to the complainant in November 2008, in a standard form, terminating the existing licence and offering APRA’s new “Recorded Music for Dance Use” licence. After follow up telephone calls from APRA, the licensee returned his signed licence agreement on 22 June 2009 effective 1 January 2009 and APRA promptly issued an invoice for annual licence fees for calendar year 2009.
318. As at 31 July 2009, the invoice remained unpaid. On 11 August 2009, the licensee queried the basis for the increase in licence fees. APRA’s State Licensing Manager responded by email on the same day and explained the history of the new licence scheme including the consultation process that had been undertaken with the Australian Hotels Association and others and the basis for the increased tariff.
319. The licensee subsequently entered into a quarterly payment plan with APRA and its account is currently paid in full.

320. As to the **second complaint**, APRA's Distribution Rules and Practices are published on its website. In relation to the allegation that much of APRA's distribution goes to overseas collections societies, APRA notes that it distributes in accordance with music use. APRA must pay according to the music performed and communicated in Australia, much of which is foreign owned musical works. APRA points out that it has no control over the selection of music that is performed in public in Australia.
321. APRA submits that the **third complaint** wrongly assumes that APRA and PPCA are interchangeable collecting societies, whereas in fact they administer entirely separate rights on behalf of members who are almost always different persons in relation to the same piece of music. APRA trains its staff to respond to enquiries about the difference between APRA and PPCA and other issues.
322. In relation to the **fourth complaint**, APRA acknowledges that it regularly checks premises at which music is performed. The premises are open to the public and APRA pays any applicable entrance or ticket charge. In particular, representative of APRA often attend premises to verify music use and attendance numbers, including where APRA has reason to believe that a licensee has provided inaccurate information. In such a case, APRA's first step is to ask the licensee to verify the information provided.
323. APRA considers that its policy and practices in this regard are reasonable.

Code Reviewer's Comment (if, and to the extent, appropriate):

324. APRA's explanations speak for themselves. They seem to me to be satisfactory.
325. APRA might well consider, however, the desirability of including information on its website or in communications to its licensees or prospective licensees, a "Frequently Asked Questions" section, answering in simple language such questions as:
- Why does so much of APRA's revenue go to overseas collecting societies?
 - Do APRA representatives secretly conduct surveillance activities in respect of the performance of music at nightclubs and other venues? If so, why?

- What are the different roles of APRA and PPCA, and do they replicate the same activities and associated costs?

APRA/AMCOS Licensee Complaint 2

326. This complainant –licensee operates a hotel where music is publicly performed by way of recorded background music, karaoke and live performances.
327. On 27 May 2013, the manager of the venue made the following complaints to the ACCC:
- That in 2010 APRA sent the licensee a blank licence application form which he returned, then APRA sent it an invoice with no explanation which the APRA representative followed up with a series of heated telephone calls in which the threat was made that the licensee would be referred to APRA’s lawyers if it did not pay the amount of the invoice;
 - That when the ownership of the venue changed in 2013, APRA contacted the licensee again to advise it that the new owner would have to enter into its own licence agreement with APRA. In addition, APRA sent the licensee an invoice for a significantly larger amount than in previous years, given the number of television screens that were in use at the venue (the licensee told the ACCC that it proposed to pay only for television sets that were “playing sound”).
328. APRA denies that it sent blank forms of application of licence or invoices without explanation.
329. APRA states that on 2 October 2010, its State Licensing Manager wrote to the licensee as the new owner of the venue in relation to its use of music at the venue. Following a telephone conversation with the licensee, APRA emailed semi-completed “Live Performance and Background Music” licence application forms (which APRA says reflected the information the licensee had provided to APRA by telephone). The licensee signed and returned them. APRA then invoiced the licensee in accordance with the signed documents and the licensee paid the invoices.
330. APRA’s next contact with the licensee was more than a year later when, on 17 February 2012, the licensee provided a signed “APRA Reassessment of Licence

Fees” form. This related to the annual renewal of its “Live Performance” and “Background Music” licences and payment of the following year’s licence fees.

331. APRA’s State Licensing Manager also telephoned the licensee to explain the requirement to hold a “Karaoke Licence” since it was holding weekly karaoke sessions. The licensee provided a signed Karaoke Licence Application as well as the Reassessment forms for its Live Performance and Background Music licences.
332. APRA then invoiced the licensee in accordance with the signed agreements. The licensee queries the amount of the invoice. On the same day, APRA replied explaining the basis of the amount. Receiving no response, APRA sent a reminder regarding the overdue invoice and the licensee then requested a full breakdown of the amount owing and the periods of time covered by the respective amounts. On the same day, APRA emailed the requested information to the licensee, but received no response.
333. APRA’s Credit Officer telephoned the licensee following up the overdue invoice. APRA denies that the phone conversation was heated but acknowledges that the licensee was told that the matter would be referred to APRA’s solicitors if the account remained unpaid. The licensee then paid the outstanding amount.
334. Subsequently, the venue changed hands and on 18 April 2013, APRA’s State Licensing Manager contacted the new owner (who was a director of the previous licensee company and APRA’s point of contact for the venue) to arrange for new licence agreements to be entered into. In the course of the discussions it became apparent that the venue was using more television sets than it had previously reported on its reassessment forms. It was explained to the licensee that APRA’s policy was that while it was appropriate to exclude television screens which showed Keno, TAB and in-house advertisements from its “Background Music” tariff calculation, television screens that showed music videos or sport must be included.
335. On 2 May 2013, APRA wrote a reminder letter to the new owner.
336. APRA has been pursuing the new owner to have application forms completed, but thus far to no avail. APRA is considering its options to resolve the matter, including referral to its solicitors. APRA considers the matter to be unresolved.

Code Reviewer's Comment (if, and to the extent, appropriate):

337. There is some conflict between the version of the facts given by the complainant and that given by APRA which I cannot resolve, but the substance of the dispute is over non-payment, liability and recoverability – matters which lie outside the Code.

APRA/AMCOS Licensee Complaint 3

338. This complainant – licensee operated a multi-purpose venue at which music was publicly performed by various means, including live performances, karaoke, recorded background music and recorded music for dancing. Since July 2012, APRA has been in dispute with the licensee as to whether the venue should be licensed under APRA's "Recorded Music for Dance Use" licence scheme for at least certain areas of the premises on certain nights of operation.

339. The licensee made the following complaints to the ACCC in a letter dated 24 May 2013:

- That it was a "complete fabrication" for APRA to have said, as it did in this second paragraph of a particular letter dated 28 February 2013 to the licensee, that APRA had been advised that a certain person in a certain State Hotels Association had spoken to the licensee and advised him that APRA required the venue to hold a "Recorded Music for Dance Use in Nightclubs" licence because recorded music for dance use was being used on a regular basis at the venue;
- That APRA provided poor assistance with the assessment of the licensing needs of venues, that the assessment process was difficult to comprehend, and that it led to venues signing up for inapplicable licences;
- That APRA was deceptive in the way in which it described and categorised "Sound Sources" and artificially inflated licence fees payable under its "Background Music" licence schemes;
- That APRA was bullying, aggressive and demanding in its correspondence and personal contact and that this arose from the fact that many of its employees were paid on a commission basis; and

- That the rapidly increasing cost of copyright licences is unjustified when the actual value of music to venues was diminishing due to the many new types of entertainment that bring patrons to the venues.

340. In response to the **first complaint**, APRA has supplied to the Code Reviewer an email from the State Hotels Association to APRA which, APRA states, led to its holding the belief in question. The correspondence between the Association and APRA referred to a conversation between the Chief Executive of the Association and the licensee in which the licensee contended that the venue was neither a “dancing venue” nor a “nightclub”.

Code Reviewer’s Comment (if, and to the extent, appropriate):

341. There is no substance in the complaint that APRA’s letter dated 28 February 2013 to the complainant contained a fabrication. It is plain from the correspondence that the Chief Executive of the State Hotels Association was attempting to fill the role of an intermediary or “go between” between APRA and the licensee, and did, indeed, relay to each of them the position being taken by the other.

342. In relation to the **second complaint**, APRA says that it is disappointed that the licensee considers that APRA provides poor assistance and finds the assessment process difficult to comprehend. APRA states what the practices of its staff are. In the present case, in particular, it states that its State Licensing Manager explained to the licensee in detail how APRA’s “Recorded Music for Dance Use” licence scheme applied to the venue on several occasions by letter and by telephone. In addition, so APRA says, the Licensing Manager offered to attend the venue in person and meet with the licensee to explain the operation of the licence scheme and its application to the venue, but the licensee refused the offer stating that “there is no point, we will only disagree”.

Code Reviewer’s Comment (if, and to the extent, appropriate):

343. It is difficult to know what to say about the diametrically opposed positions. The difference between the parties seems to turn on the question of fact of the precise nature and extent of the use made of music on the premises, and on how that use is to be characterised for licensing purposes.

344. In relation to the **third complaint**, APRA rejects the allegation of deceptiveness and in particular that it artificially inflates licence fees payable under the “Background Music” licence scheme. APRA states that its policy is clear: television sets that show Keno, TAB and in-house advertisements are excluded from the “Background Music” tariff calculation, but television sets that show music videos, sport or other general content featuring music are included. APRA states that television sets that themselves are not emanating sound but whose images are synchronised with sounds emanating from separate speakers that are audible in the vicinity of the television sets are included. APRA accepts that it expects licensees to report accurately their music usage on APRA’s “reassessment” forms, and that it seeks to verify the reported usage independently.
345. In relation to the **fourth complaint**, APRA denies the charge of bullying and aggressiveness. It states that the incentive component of the remuneration of its licensing staff is minor compared to base salary. It states that in any event it has begun a confidential review of the commission element of the salaries of certain staff with a view to removing over a two year period any staff commission that is directly related to revenue generation, and that there will be a “salary only” base for all staff from July 2014.

Code Reviewer’s Comment (if, and to the extent, appropriate):

346. APRA wrote to the licensee on 3 July 2012, 17 July 2012 and 28 February 2013 without response, and only in the final paragraph of this last letter threatened to refer the matter to APRA’s solicitors. At least so far as the correspondence reveals, APRA’s conduct was not bullying or aggressive.
347. In relation to the **fifth and final complaint**, APRA does not agree that the cost of its licences is rapidly rising or that the value of music to venues is diminishing due to new types of entertainment. It states that of the numerous APRA licence schemes that apply to the licensee’s venue, the only one which has built-in increases higher than CPI is the “Recorded Music for Dance Use” licence scheme. This is the scheme that the complainant asserts is not applicable to his venue.

348. APRA states that its staff have observed recorded music being performed for the purpose of dancing at the venue on a weekly basis and first wrote to the licensee on 3 July 2012 advising it of the need to hold a “Recorded Music for Dance Use” licence. The licensee persists in refusing to apply for such a licence and APRA is considering referring the matter to its solicitors.

Code Reviewer’s Comment (if, and to the extent, appropriate):

349. The complaint concerns both the rate of increase and the level of licence fees in absolute terms.

350. As to the rate of increase, I note APRA’s comments.

351. As to the level of licence fees, of course it is open to a licensee to cease using music and therefore the liability to pay anything if the licensee believes that music’s “actual value” to the particular venue and clientele is too low.

352. If the level of licence fees is in fact unreasonably high, this would constitute a failure by the collecting society to comply with the first sentence of clause 2.3 (d) of the Code which states: “Licence fees for the use of copyright material will be fair and reasonable.” But it would require a major inquiry by a complainant and by the Code Reviewer to establish that the level of licence fees was unfair and unreasonable.

353. This raises a real question as to whether the sentence from the Code quoted above may be misleading by suggesting that the Code Reviewer is in a position to respond meaningfully to complaints of the charging of excessively high licence fees.

354. I propose to deal with this issue in the course of the review of the Code itself under clause 5.3 of the Code, which is due to take place in 2014.

APRA/AMCOS Licensee Complaint 4

355. (This complaint is related to Licensee Complaint No 5 below and should be read with it.)

356. The complainant-licensee is a promoter of large dance parties. There has been a long standing series of disputes between APRA and the licensee as to which licence scheme is applicable in respect of music at various events promoted by the licensee.
357. Its complaint was forwarded to the ACCC under cover of its solicitors' letter dated 31 May 2013 (the firm that represented the fifth complainant – see below).
358. The licensee contends that the “Featured Music Event” licence is appropriate while APRA contends that the appropriate licence is its “Dance Party” licence. The “Dance Party” licence involves a higher tariff.
359. APRA explains that its approach is to determine whether the primary purpose of the use of music at an event is recorded music for dancing. Several times the particular licensee has disputed APRA’s classification of its events as Dance Parties on the ground that certain featured artists were more appropriately classified as “live performers” rather than “DJ’s”.
360. APRA accepts that some of the events promoted by the licensee are “hybrid live and recorded music for dancing events”. Accordingly, APRA has offered licences for them on certain confidential and without prejudice terms.
361. APRA states that it is continuing to consider the development of a new licence scheme to cover such hybrid events.
362. On the basis that APRA and the licensee continue to be in dispute from time to time regarding the proper characterisation of the licensee’s events, APRA considers this matter to be unresolved.
363. There are certain aspects of the licensee’s complaints that APRA rejects outright. It denies that it has:
- treated the licensee prejudicially to its competitors; or
 - taken advantage of its market power to improperly categorise the licensee’s events.

364. APRA also denies the allegation that its representative verbally abused an employee of the licensee or that a staff member of APRA threatened to prevent one of the licensee's events from going ahead. APRA states that staff members do not threaten that APRA will seek an injunction and that it is only once matters are escalated to external lawyers that such remedies are reverted to.

Code Reviewer's Comment (if, and to the extent, appropriate):

365. The complainant-licensee's submission to the ACCC was lengthy and was forwarded to the ACCC by its solicitors. The complaint is that since 2010 APRA has, on at least six occasions, mischaracterised the licensee's events as "Dance Parties".

366. According to APRA, the decisive question is whether the performance of APRA works for dancing is "the primary form of entertainment at the event". The licensee submits that it is not, and that passive listening to music performed live is the primary form of entertainment at the event.

367. It is not clear whether the complainant finds the hybrid solution suggested by APRA satisfactory.

368. Ultimately, if APRA and a licensee remain in dispute, the only way to resolve the dispute is by ADR or litigation.

369. It is difficult to see the substantive issue as one arising under the Code, unless it be one of lack of transparency under clause 2.3(b) constituted by uncertainty in the scope of the respective licences. APRA should ensure that the scope of each of its licences is clear and that its interpretation of them is incorporated within the definition of that scope.

APRA/AMCOS Licensee Complaint 5

370. (This complaint is related to Licensee Complaint No. 4 above and should be read with it.)

371. This licensee-complainant is a promoter of large dance parties with which APRA has had a long standing series of disputes regarding the identity of the appropriate licence

scheme covering the use of music at events promoted by it. In each dispute, the licensee has engaged expert music industry lawyers to represent it.

372. Its complaint was forwarded to the ACCC on 31 May 2013 by its solicitors (the firm that represented the fourth complainant – see above).
373. The licensee’s position is that APRA’s “Featured Music Event” licence is the appropriate one, whereas APRA’s position is that the appropriate licence is its “Dance Party” licence. The Dance Party licence involves a higher tariff than the Featured Music Event licence.
374. The factor which is most influential for APRA in determining which licence scheme to apply is whether the music at the particular event is recorded music for dancing. If that is the primary purpose of the performance of music at an event, APRA will determine the event to be a Dance Party. The particular licensee has disputed APRA’s classification on the basis that certain featured artists were more appropriately classified as “live performers” rather than as “DJ’s”. On this basis, the licensee has argued that the “Featured Music Event” licence should apply.
375. APRA accepts that some of the events promoted by the licensee are hybrid live and recorded music for dancing events. APRA has offered to license such hybrid events on the same confidential and without prejudice basis as in the case of Licensee Complaint Number 9 above. Unfortunately, however, in relation to at least two events, APRA remains in dispute with the licensee. There has been extensive correspondence and telephone communications between APRA and the licensee in an attempt to resolve those two disputes. APRA’s General Counsel has flown interstate to join APRA’s Director of Licensing to meet personally with the licensee and its solicitor in an attempt to resolve the disputes.
376. APRA has invited the licensee to refer the two events to ADR but the licensee has declined and has refused to take up a licence on the terms offered. Meanwhile, according to APRA’s submission, its members continue to be seriously disadvantaged by the licensee’s conduct. APRA is considering its options including commencing legal proceedings for infringement. Separately, APRA is continuing to consider the development of an entirely new licence scheme to cover such hybrid events.

377. APRA considers the dispute to be unresolved.
378. Certain aspects of the licensee's complaint are rejected outright by APRA. Thus, it denies that it has treated the licensee prejudicially in contrast to its competitors, or taken advantage of APRA's market power to improperly categorise the licensee's events. APRA says that it is untrue to suggest that the complainant typically approaches APRA in order to obtain a licence to perform in public works controlled by APRA. On the contrary (says APRA), although it is a sophisticated and experienced user of music, the licensee consistently fails to apply for APRA licences, leaving APRA to monitor its activities and to approach it requiring it to enter into licensing arrangements. Often those arrangements are not finalised until well after the event has taken place. Indeed, according to APRA, during the course of the current dispute, the licensee has conducted two very large music events without any licensing arrangement at all. APRA did not seek to prevent those events from taking place and has not yet commenced proceedings for infringement.
379. The licensee has acknowledged that in each of its disputes with APRA, APRA invited it to refer the dispute to expert determination or mediation in accordance with APRA's ADR procedure but the licensee claims that it did not accept that invitation because of its "limited practicality and utility" and because the costs involved would be "likely prohibitive".
380. APRA claims not to understand the basis on which the licensee takes this position, considers its expert determination and mediation procedures to be practical and useful, and notes that under its ADR procedure APRA is responsible for the costs.
381. APRA strongly denies an allegation that "the majority of disputes with APRA are settled by licensees as a result of APRA's anti-competitive behaviour of putting fear into licensee's [sic] that they will close down the licensee's operation or prevent an event from taking place if there are not APRA licenses [sic] secured in advance [which] fear mongering has the effect of preventing those licensees from fully challenging any license [sic] fees or terms applied from APRA and from utilising APRA's ADR procedure".
382. APRA acknowledges that from time to time when it becomes clear that it is unlikely to reach agreement with a promoter in respect of its licence requirements, APRA will

write to a venue directly and put it on notice that the promoter has not yet entered into a licence with APRA, and that, absent such a licence, the venue may itself be liable for authorising public performance of the APRA repertoire. APRA considers that it is within its rights to do so and has found this direct approach to venue operators to be effective in some cases.

Code Reviewer's Comment (if, and to the extent, appropriate):

383. I repeat my comment in relation to Licensee Complaint No 4 at [365] ff above.

APRA/AMCOS Licensee Complaint 6

384. The licensee is a large scale nightclub that has publicly performed recorded music for dance use for over 15 years.

385. During the Review Period, the licensee made the following complaints to the ACCC:

- That there is no transparency surrounding APRA's "Recorded Music for Dance Use" tariff and its application;
- That APRA charges the licensee and its competitors different rates based on different formulae in connection with the public performance of "Recorded Music for Dance Use";
- That APRA will negotiate and agree on lower than actual attendance rates as a way of conceding a reduction in licence fees payable;
- That APRA's distribution of Nightclub licence revenues are not reaching the artists entitled;
- That APRA's use of the DJ Monitor Music Recognition technology to distribute Nightclub licence revenues is flawed; and
- That DJ Monitor incorrectly advertises that it is installed in the licensee's nightclub.

386. In relation to the **first complaint** (lack of transparency), APRA denies the charge and states that it wrote to the licensee in the form of template correspondence (which APRA supplied as part of its submission to the Code Reviewer) terminating the existing licence and offering APRA's new "Recorded Music for Dance Use" licence. APRA's letter set out the history of the new licence scheme, including the consultation

process that APRA had undertaken and the basis for the increased tariff. In addition, APRA's State Licensing Manager explained the application of the new "Recorded Music for Dance Use" licence scheme to the licensee on 6 November 2008 and the licensee returned a signed form of application for the licence.

387. In response to the **second complaint** (discrimination between the licensee and its competitors), APRA denies the charge and states that all venues which perform recorded music for dance use are licensed under the same "Recorded Music for Dance Use" licence scheme.
388. In answer to the **third complaint**, APRA states that it does not negotiate with licensees over attendance figures and that it requires them to report attendance figures accurately and, indeed, seeks to verify their accuracy. It is true, however, that from time to time, APRA will accept a licensee's explanation of why its reported annual attendance figures are lower than those that APRA has observed at the venue. For example, a licensee may explain that a particular room in the venue was closed to the public for a number of weeks for renovations in which case APRA may accept the licensee's figures.
389. In response to the **fourth complaint**, APRA states that its Distribution Policy is set out in its Distribution Rules and Practices documents and that APRA distributes in accordance with that policy. It notes that DJ's and other electronic artists who perform at the licensee's venue may not be the same people as the songwriters and music publishers to whom APRA distributes royalties for the corresponding performance of the underlying musical works.
390. In relation to the **fifth complaint**, APRA acknowledges that its implementation of DJ Monitor Music Recognition technology and the use of its data in connection with its May 2013 Nightclub distribution was flawed. APRA has since reversed that Nightclub distribution and re-distributed the revenue according to APRA's previous Nightclub Distribution Policy.
391. In addition, APRA states that it has convened an expert industry panel to discuss how music recognition technology can best be used in nightclubs in order to improve the methodology underlying APRA's distributions. The APRA Board's Membership & Distribution Committee has decided not to use music recognition technology in

connection with its nightclub distributions until APRA has consulted with the expert industry panel and relevant members of APRA (see below).

392. In relation to the **sixth and final complaint**, APRA states that it approached the particular licensee inviting it to participate in a trial use of the DJ Monitor Music Recognition technology, but the licensee declined for the reasons expressed in its complaint. APRA was unaware that the venue was referred to on the DJ Monitor website in the manner referred to in the complaint. APRA notes that the reference to the licensee was unrelated to APRA's music recognition technology trial. On receipt of the complaint, APRA contacted DJ Monitor which, APRA asserts, has "rectified the situation", by, I presume, eliminating reference to the particular licensee and its venue.
393. Given that APRA rejects the first four complaints and has taken steps to resolve the last two, APRA considers the matter closed.

Code Reviewer's Comment (if, and to the extent, appropriate):

394. In relation to the **first complaint**, the correspondence supplied by APRA is inconsistent with the charge of lack of transparency.
395. The **second complaint** is in a nature of a very general one without particulars. It is not possible for me to grapple with it in the absence of identification of the competitors and the precise nature of the discrimination alleged.
396. As to the **third complaint**, APRA accepts that the facts are broadly as alleged but asserts that this is not a matter of complaint and explains why.
397. As to the **fourth complaint**, APRA asserts that it distributes in accordance with its published Distribution Policy and suggests why the complainant may misunderstand the position.
398. As to the **fifth complaint**, APRA accepts that the complaint is justified and explains here and elsewhere in this report the steps it has taken and is continuing to take to address the flawed DJ Monitor music recognition technology.

399. As to the **sixth and final complaint**, APRA accepts that the complaint is justified and explains the steps it took to ensure that DJ Monitor corrected its website.

APRA/AMCOS Licensee Complaint 7

400. The complainant-licensee is a music venue that features live performances and performances of recorded music for dance use. The licensee had accepted APRA's offer of a quarterly payment plan by which it paid the annual licence fees quarterly in advance rather than annually in advance.
401. The licensee's invoice for the quarter commencing 1 April 2013 was payable by 15 April. Not having received payment by 30 April, despite a written reminder, an APRA representative spoke with a representative of the licensee by telephone and advised that unless payment was received immediately, the quarterly payment plan would be revoked so that the whole of the remainder of the annual licence fee would become payable. The licensee's representative advised that she would raise the issue with her accounts department.
402. Unfortunately, APRA's automated invoicing system revoked the quarterly payment plan on 8 May 2013 and issued an invoice for the full year. In fact, in the meanwhile the licensee had paid the quarterly invoice on 6 May, but APRA had not "reconciled this payment" before the invoice for the full year was issued on 8 May.
403. The licensee's Finance Manager queried the full year invoice with APRA's Client Services Team Leader by telephone on 13 May. On the same day, the latter emailed the former explaining what had happened and advising that a member of APRA's Finance Credit team would contact the licensee.
404. Unfortunately, due to a breakdown in APRA's internal communications, this did not happen and APRA did not place the licensee's account on hold. The licensee was sent an automated reminder regarding the invoice for the full year.
405. The licensee complained about APRA's conduct to the ACCC and followed this with an email to APRA. While the complaint related primarily to the above invoice issue, the following complaints were also made:

- That APRA’s policy is that short paid provisional licence fees must be paid to APRA within 14 days, while overpayments are, at the discretion of APRA, either to be refunded or credited against the following year’s payment;
 - That APRA’s current tariff levels were not discussed with the licensee or the industry prior to implementation;
 - That APRA charges many multiples (600% more than the PRS in the United Kingdom and 1000% more than BMI in the United States) than that of their overseas affiliated organisations for the same song;
 - That there is a lack of transparency as to the destinations of APRA’s distribution of royalties and how the distributions are calculated; and
 - That APRA repatriates most of its revenue to overseas copyright owners.
406. The complaint concerning the invoices was referred to APRA’s Licensing Services Manager who explained to the licensee the breakdown in APRA’s internal processes and apologised for any inconvenience. According to APRA, the licensee’s account was immediately placed on hold while the invoice for the full year was revoked and the quarterly payment plan was reinstated. The licensee paid the re-issued quarterly invoice. The APRA staff involved were counselled regarding the proper process that ought to have been followed.
407. In relation to the issue regarding the refund of overpayments, APRA accepts that its policy is to credit a licensee’s account with any amount of overpaid licence fees. This is, APRA explains, because any overpayment is discovered as a result of reassessment which usually takes place at the end of the licence year when a licensee is due to pay licence fees for the following year. However, if a licensee ever asks instead for the money to be refunded, APRA meets that request. When APRA next updates the general terms and conditions of its licences, it proposes to amend the relevant clause to make it clear that APRA is obliged to “act reasonably” in exercising its discretion to credit or to refund any amount.
408. In relation to the complaint of failure to discuss current tariff levels, APRA acknowledges that it did not negotiate its current tariff levels with the particular licensee, but asserts it did consult widely within the relevant industry bodies before introducing the new tariff. With regard to the two tariffs the subject of the present complaint, APRA states that it consulted widely in 2008 regarding its new “Recorded

Music for Dancing” tariff with, inter alia, the Australia Hotels Association and Clubs Australia. APRA’s “Live Performance” tariff has not been varied in decades, according to APRA’s submission.

409. APRA simply rejects the claim that it charges many multiples of that charged by its overseas affiliated organisations for the same song.
410. APRA also rejects the claim of lack of transparency as to the destination of distributed royalties and how it calculates the distributions. It points out that its Distribution Rules and Practices are published on its website. The amounts distributed to individual members or in respect of individual works is confidential to APRA and the relevant member.
411. In relation to the complaint that most of APRA’s revenue goes to overseas parties, APRA notes that it distributes in accordance with music use and that Australia is a net importer of music. It is apparent from the reporting by licensees of music use to APRA, that a large amount of foreign music is performed and communicated in Australia. APRA has no control over the selection of music that is performed in public in Australia.
412. APRA has offered to meet with the licensee to discuss any aspect of its complaint but that offer has not been accepted. APRA considers the complaint resolved.

Code Reviewer’s Comment (if, and to the extent, appropriate):

413. It is not enough for APRA to make a money refund of an overpayment if this is requested. Generally speaking, underpayments and overpayments should be treated in the same way – payment in cash within a limited period, such as 14 days. Alternatively, the licensee’s express consent to a crediting of the amount of the overpayment could be sought on the grounds stated by APRA noted above.

APRA/AMCOS Licensee Complaint 8

414. The complainant-licensee operates a number of fitness centres. APRA has been in communication with the licensee since September 2012 in regard to its licensing requirements.

415. APRA states that contrary to the licensee's suggestion, it did not initiate contact with APRA but APRA initiated contact with the licensee. APRA states that in fact it took five emails, three letters and ten telephone messages from APRA before the licensee responded substantively to APRA's approach.
416. Finally, on 20 February 2013, the licensee returned to APRA a completed form of application for "Background Music – Fitness Centres" licences. However, APRA formed the view that the applications significantly understated the number of audio-visual screens in use at the fitness centres, and replied on 25 February 2013 asserting that "cardio equipment with built-in TV Screens" must be included. APRA was aware that the licensee took the position that audio-visual screens on cardio machines should not be included.
417. APRA continued to communicate with the licensee in an attempt to resolve the dispute. APRA's Licensing Representative advised the licensee of his options to resolve the dispute, including escalating the matter to APRA's senior management or ADR. The licensee declined and proposed that he just "pay APRA something to put this to rest".
418. Finally, on 15 April 2013, APRA's Business Licensing Representative sent an email enclosing, and requesting completion and return of, a fresh form of application, and advising that in default APRA would have to refer the matter to its solicitors.
419. The licensee responded by telephone on 18 April 2013, saying that offence was taken at the suggestion of a referral to solicitors. The licensee claimed that guidance from people in the industry was to the effect that audio-visual screens on cardio machines should not be classified as television screens for the purpose of calculating the licence fee.
420. Subsequently, on 23 April 2013, the licensee submitted new applications for additional fitness centres that it had opened in the intervening period, but again excluded audio-visual screens on cardio machines. The licensee gave his reasons for taking this approach in his covering email.

421. The licensee made a submission dated 27 May 2013 to the ACCC, essentially raising the same dispute.
422. The licensee also complained to the ACCC that APRA's Licensing Representative became hysterical and made continued threats of legal action during a telephone conversation. APRA acknowledges that the licensee was advised during this telephone conversation that if he was not willing to resolve the dispute directly or by ADR, APRA considered that it had no option but to refer the matter to its legal department.
423. Ultimately, APRA did not refer the matter to its solicitors as it had other similar enquiries from fitness centres questioning the appropriateness of treating audio-visual screens on cardio machines as television screens for the purpose of calculating APRA's "Background Music – Fitness Centre" tariff.
424. APRA was contacted by Fitness Australia, the body that negotiates on behalf of the fitness industry and met with Fitness Australia in an attempt to resolve the issue. Following the meeting, APRA and Fitness Australia commenced negotiation of a new "Background Music" licence scheme for fitness centres. They agreed on the key terms of a new licence scheme and APRA has sent a draft scheme to Fitness Australia for its approval.
425. APRA states that Fitness Australia has informed its members that it is negotiating the new scheme with APRA, and APRA has placed all licensee accounts affected on hold until it is in a position to implement the new scheme.
426. Accordingly, the particular complainant's account is currently on hold, and APRA will consider it resolved once the licensee has entered into a licensing arrangement under the new scheme.

Code Reviewer's Comment (if, and to the extent, appropriate):

427. It is appropriate that the cardio machine issue be resolved by negotiation between APRA and Fitness Australia. It will be important that APRA inform relevant licensees that these negotiations are taking place. It is important that APRA should not abdicate its responsibility in this respect by relying on Fitness Australia alone to inform its members.

A Special Case – neither a member nor a licensee

428. This complaint was made, not by a member or a licensee, but by a business which provides “music on-hold” services to other businesses, including a licensee of APRA’s. The complainant said that he had obtained a licence directly from an overseas composer to use the composer’s music in his music on-hold products. The composer was a member of the APRA-affiliated United States performing right organisation, BMI. The complainant therefore claimed that neither he nor his clients required a licence from APRA.
429. One of his clients already held an APRA licence for its use of music on-hold. That client terminated the licence on the basis that it was now using the complainant’s music on-hold product. Unfortunately, due to a breakdown in APRA’s internal direct licence verification procedures, it was unable to confirm that the complainant’s music on-hold service was directly licensed by the US composer, and on that basis continued to advise the complainant’s client that the client required a music on-hold licence from APRA.
430. APRA states that its standard procedure when a potential licensee claims that it already holds a direct licence from a US composer, is to verify the claim by seeking from the relevant performing right society in the United States confirmation and a copy of the relevant contract.
431. However, in this case, the contracting party on the relevant contract supplied by BMI to APRA in 2010, and therefore listed in APRA’s records, did not correspond with the complainant’s trading name used in correspondence with APRA. Even when this issue was clarified, APRA considered that the direct licence agreement provided by BMI was ambiguous as to the permitted use of the music, and as to whether it extended to use in commercial music on-hold services such as those provided by the complainant. APRA sought to clarify the position with BMI, but this occupied some months. BMI finally confirmed that the licence was intended to cover the complainant’s commercial activities.
432. While APRA was still in the process of resolving the matter, the complainant filed a complaint dated 5 December 2012 in relation to APRA’s conduct in advising his client that it needed an APRA licence when it did not.

433. APRA (General Counsel) responded to the complainant on 20 December 2012 acknowledging that it had failed to implement properly its general policy for verifying music on-hold direct licence information. In particular, APRA acknowledged that it should have communicated with BMI in a more thorough and timely manner in order to establish whether a relevant direct licence had in fact been granted to the complainant.
434. In the period January to March 2013, APRA continued to correspond with the complainant. APRA informed the complainant that it had requested that in future BMI ensure that it is more clear about the scope of any of its members' direct licences, and that it correctly specify the trading name of any direct licensee from its members.
435. In APRA's final correspondence with the complainant in May 2013, APRA's Director of Licensing confirmed that the direct licence documentation supplied under correspondence from BMI now confirmed that direct licence agreements were in place for the business. The complainant replied on 17 May 2013:
- “Thanks for that. It's great to finally get the confirmation that I am working within the law. Hopefully your staff will do their job properly in the future so people like me will not lose income and have their reputation soiled. As I have always been honest and upright with APRA/AMCOS you can be sure I will keep you informed of any name change and new music purchases”.
436. Following the complaint, the APRA staff member involved was counselled regarding his original handling of the complaint and about existing APRA licensees correspondence and also about APRA's proper internal overseas direct licence verification process.
437. As a result of the complaint, APRA has taken steps to improve its record-keeping in relation to notifications of direct music on-hold licences so that such errors will not recur. APRA has implemented a new procedure according to which all claims of direct licensing that APRA receives from music on-hold clients are tracked and copied to the Director of Licensing for her review before APRA responds to them.
438. APRA considers the complaint to have been resolved.

Code Reviewer's Comment (if, and to the extent, appropriate):

439. The terms of the complainant's email dated 17 May (set out above) suggest that he was satisfied with the outcome in relation to his particular grievance.

Copyright Agency Limited (“Copyright Agency”) / Viscopy

440. Copyright Agency has developed procedures for the handling of complaints and disputes which meet the requirements of Clause 3 of the Code. Information about those procedures is published on the Copyright Agency website. The society has a “Client Service Charter” which is also published on the website.
441. Copyright Agency's procedures for the management of complaints and disputes also apply to complaints and disputes relating to Viscopy's members and licensees.
442. During the Review Period, Copyright Agency received three complaints from members. Copies of the correspondence relating to them are provided in an Appendix to the Copyright Agency/Viscopy report to the Code Reviewer.
443. During the Review Period, there was one complaint relating to Viscopy services. It was from a Viscopy member. Similarly, copies of the relevant items of correspondence are contained in an Appendix to the Copyright Agency/Viscopy report to the Code Reviewer.

Copyright Agency

Copyright Agency Complaint 1

444. An author was notified on 18 August 2010 by the relevant UK collecting society, Authors' Licensing and Collecting Society (ALCS), that he was entitled to some “secondary royalties” which ALCS had collected. He applied to join ALCS which advised him that, since he lived in Australia, he should join Copyright Agency in order to collect the royalties.

445. The author joined Copyright Agency in November 2010 but did not receive the royalties until January 2013.
446. The author (now a member of Copyright Agency) made his first enquiry in January 2011 and Copyright Agency replied advising that it made its distributions to its members once a year, and the next distribution would be finalised in about July 2011. Copyright Agency received payment for the complainant and other authors from ALCS in August 2011 but did not receive the "recipient data" relating to individual authors from ALCS until November 2011.
447. The author member made follow up enquiries in February, April and July 2012, to which Copyright Agency replied in various forms, explaining that there was a problem with its new database.
448. From September/October 2012 to November 2012, Copyright Agency staff "processed" the recipient data received from ALCS to enable allocation to individual authors, and from November 2012 to January 2013 the staff attempted to overcome further technical problems with the new system to enable notification and payment to take place.
449. On 29 January 2013, the author/member complained about the delay, including about various assurances he received from Copyright Agency indicating that he would receive payment in July 2011, and subsequently that he would receive payment in July 2012 and December 2012.
450. Copyright Agency's Complaints Officer replied on 30 January 2013, properly acknowledging the legitimacy of the author member's complaint.
451. On 30 January 2013, Copyright Agency's Complaints Officer advised the complainant member that Copyright Agency had successfully run the calculation for the ALCS distribution in its new database and that the preliminary payment figure, pre-audit, was \$1,202.73. She advised that the "post-audit" was scheduled for later that week and that she expected that payment would be made electronically into the complainant's bank account on Tuesday, 5 February. Apparently this happened.

452. Apparently there was a telephone conversation on 6 February 2013 in which the complainant advised the Complaints Officer that he did not wish his letter of 29 January 2013 to be treated as a formal complaint and did not seek a formal response to it.
453. Copyright Agency understands that the member does not intend to take any further action.

Code Reviewer's Comment (if, and to the extent, appropriate):

454. The period during which the complainant had to wait for payment was extraordinarily lengthy. His moderation and patience were exemplary. While I accept that the cause of the delay was Copyright Agency's new computer system and that the amount in question is small, I think that in the circumstances, Copyright Agency should pay interest from November 2011 to the date in February 2013 when payment was made to the complainant.

Copyright Agency Complaint 2

455. This complaint was made by a member of Copyright Agency in April and May 2012 about her publisher, who was at that time a member of the Board of Copyright Agency. The complaint was described in Copyright Agency's report to the Code Reviewer in 2012: see Complaint Number 5 referred to at pp 62-65 of the Code Reviewer's Report for 2011-2012. The complaints related to the member's dispute with the publisher which was the subject of litigation and arbitration.
456. The member resigned as a member of Copyright Agency ("recently" as at 10 May 2012.) The director in question retired from the Board as an elected Publisher Member at the Annual General Meeting in November 2012.
457. She made further complaints in the Review Period that her previous complaints had not been dealt with appropriately. By a letter dated 22 March 2013, Copyright Agency replied expressing the view that it had dealt with her complaints fairly, in accordance with the Corporations Act 2001, the Society's Complaints Procedure, and the Code. Copyright Agency has not heard from the member since that time.

Code Reviewer's Comment (if, and to the extent, appropriate):

458. Copyright Agency was not a party to the dispute between the former member and the former director. The former member's complaint against Copyright Agency appears to have been limited to a complaint that it declined to publish on its website certain material which she supplied to it and which Copyright Agency considered to be defamatory. I am not satisfied that Copyright Agency acted unreasonably in this respect or failed to comply with the Code.

Copyright Agency Complaint 3

459. In (apparently) late January or early February 2013, a member made a search request to check if allocations in respect of his works had been paid to his publisher.

460. In February 2013, Copyright Agency staff advised him that its searches had produced a nil result but that if he had substantial evidence that his work had been used, he could apply for an ex gratia payment.

461. The member contacted Copyright Agency again in early June 2013 asking how to apply for an ex gratia payment. He was told that he should submit evidence that his work had been used in reliance on one of the schemes administered by Copyright Agency. This prompted the member to send an angry and abusive email challenging the effectiveness of Copyright Agency's sampling systems and suggesting that it was unreasonable to expect him to provide the evidence referred to.

462. The Complaints Officer wrote to the member outlining Copyright Agency's complaints process and asking if he wishes to take the matter further. The Membership Manager also contacted the member offering to assist him with his application for an ex gratia payment.

Note – Post Review Period

463. On 13 August 2013, a member provided a list of his works and Copyright Agency staff are preparing a memo for the Board concerning the application for an ex gratia payment.

Viscopy

Viscopy Complaint 1

464. During the Review Period, a member of Viscopy complained in relation to services provided by Viscopy. Copies of the relevant correspondence are contained in the Appendix to the Copyright Agency/Viscopy report to the Code Reviewer.
465. The complaint related to payment issues in respect of the estate of a deceased artist. The beneficiary had registered as a member, but because there was a new database system, there was a miscommunication between the Member Services and Finance Departments within Copyright Agency/Viscopy. The payments had been made into the deceased artist's bank account rather than into the bank account of the beneficiary/member.
466. Viscopy reports that internal training has resolved this issue and that appropriate notifications on the file have been amended.

Audio-Visual Copyright Society Limited (“Screenrights”)

467. During the Review Period, Screenrights updated its Alternative Dispute Resolution Policy to raise the threshold for Expert Determination, due to the likelihood, as Screenrights saw it, of the cost of adjudication being greater than the amount of the royalties held in trust. The change took effect on 3 April 2013.
468. A copy of Screenrights' “Alternative Dispute Resolution Procedure: Disputes between Screenrights and its Members” is Annexure D to Screenrights' Report to the Code Reviewer.
469. Screenrights reports that during the Review Period, 2,513 “conflicts were launched”, of which 1,262 have been resolved.
470. Screenrights reports that due to the high number of conflicts launched and the fact that many of them needed to be resolved in what Screenrights considered to be an insufficient time, the deadline for conflicts relating to expiring royalties was extended

to 30 September 2013 to allow members sufficient time to resolve their conflicts under the ADR Policy.

471. In order to inform members of the exceptional nature of the 30 June 2013 deadline, a letter from the Chief Executive was placed on the society's website and was highlighted in emails from the Member Services Department, a copy of which is Annexure E to Screenrights' report to the Code Reviewer.
472. Apparently the source of the problem was that Screenrights had to pay seven years' "deadline money" for retransmission royalties from 2001 to 2007, the amounts having all been received at the same time and therefore all the royalties expired at the same time. In the past, such deadlines had involved assisting about 100 members to claim royalties, but in the Review Period the number was over 1,000 current and prospective members worldwide who needed assistance from Screenrights. The task had grown exponentially with more than 350,000 programs to be paid for.

Screenrights Complaint 1

473. Screenrights received one complaint during the Review Period, but one that represents a source of difficulty that has existed over some years.
474. AWGACS represents "writers for performance", whether the performance be on stage, over the radio or on television. AWGACS's complaint is that Screenrights has not been remitting to it the share to which the owner of the copyright in the underlying literary or dramatic work is entitled out of the total remuneration that Screenrights has been collecting under the Parts VA, VB, VC and VII statutory licences.
475. On 14 June 2013, AWGACS wrote to Screenrights seeking clarification concerning the Scheme of Allocation of royalties, the language used to describe the rights and the royalties that Screenrights pays, and querying Screenrights' conflict resolution processes.
476. Screenrights replied by email on the same day, 14 June 2013, answering questions and suggesting a meeting with representatives of AWGACS to address the issues raised.

477. AWGACS replied on 18 June thanking Screenrights for its “swift” response but seeking a formal written response as a matter of urgency, to the questions asked about “the basis for entitlements, allocation and distribution”.
478. On 19 June 2013, Screenrights replied assuring AWGACS that Screenrights was happy to provide such a formal response, and seeking clarification of the questions outstanding.
479. Although it lies outside the Review Period, it may be noted that on 17 July 2013, AWGACS replied providing further particulars in response to those questions. On 23 July 2013, Screenrights provided a detailed response, including a copy of Screenrights’ Distribution Policy, Articles of Association, previous correspondence in relation to the Scheme of Allocation, and a copy of Screenrights’ Membership and Title Registration forms. Screenrights again offered to meet with AWGACS's representatives to address their concerns.
480. Copies of the correspondence constitute Annexure F to Screenrights’ report to the Code Reviewer.
481. From Screenrights’ viewpoint, at the heart of the issue is the legal possibility under the Act of assignment or licensing of the copyright in the underlying literary or dramatic work (the “script”) and the associated entitlement in someone other than the author, represented by AWGACS, to the remuneration flowing from ownership of the copyright.
482. While AWGACS represents scriptwriters, Screenrights considers that it must be assured that the scriptwriter remains the owner of the copyright in the script for the particular program registered with Screenrights, and that there has not been an assignment or licence, or, if there has been, that AWGACS is the agent of the assignee or licensee.
483. From AWGACS’s viewpoint, at the heart of the issue is the fact that Screenrights distributes statutory royalties in part to persons who are not entitled to them. The part in question is 22.1% of the statutory royalties collected by Screenrights. AWGACS states that this percentage has been fixed by Screenrights itself as reflecting the value of the copyright in the underlying literary or artistic work.

484. Yet, according to AWGACS, Screenrights has been making wholesale distributions for the script entitlement to persons who do not hold the relevant rights. AWGACS asserts that Screenrights is obliged to ensure that the scriptwriters' 22.1% is paid to the persons truly entitled to it.

485. Both Screenrights and AWGACS see themselves as "the meat in the sandwich".

Code Reviewer's Comment (if, and to the extent, appropriate):

486. Both parties to the dispute are well aware of each other's position and been in communication about it over a long period of time. The complaint is not one of non-compliance with the Code but one of legal rights and obligations.

487. If the parties cannot resolve this unfortunate, longstanding issue, they should consider engaging in a process of alternative dispute resolution. If that does not bring about a settlement, unfortunately, there will be no alternative but to resort to litigation.

Phonographic Performance Company of Australia Ltd ("PPCA")

488. During the Review Period, PPCA had in place a Complaints Officer to oversee the complaints process. PPCA's Guidelines in relation to complaints and disputes are available on its website.

489. Staff are initially provided with a hard copy, which is annexed to and forms part of their employment contract, and they are made aware that they can access further copies from the website, the intranet site, their supervisor, or the PPCA Complaints Officer.

490. All complaints are recorded in a Complaints Register database and are reviewed for identification of any issues that are recurring.

491. During the Review Period PPCA received ten complaints as follows:

- Six complaints relating to PPCA's public performance licences;
- One complaint of the nature of a general copyright query; and

- Three complaints that venues appeared to be using recorded music without a PPCA licence.

492. It is only the first of these groups that calls for comment below.

493. PPCA reports that in the case of nine venues that were performing protected sound recordings without holding a licence, PPCA brought proceedings in the Federal Magistrates Court of Australia (now the Federal Circuit Court of Australia). Copies of certain court documents were included in PPCA's report to the Code Reviewer together with a summary of the status of each of the nine proceedings. These enforcement proceedings were not complaints or disputes and are not discussed below.

PPCA Complaint 1

494. A licensee asked PPCA to "explain/justify" the almost doubling in the tariff applicable to his restaurant. He said that he had understood that a process was in place to increase the amount "over five years" but described the increase that had in fact been imposed as "absurd".

495. PPCA wrote a detailed reply referring to the consultation that had taken place with key industry groups and all Tariff R licence holders at that time. PPCA explained that, as a result, the final scheme was simplified, the tariff reduced by 25%, the tariff phased in over five years, and the tariff capped at a maximum daily rate. PPCA explained that the licence period was annual but that PPCA issues quarterly invoices to assist licensees. PPCA referred the complainant to the PPCA Restaurant and Café Tariff Review document on the PPCA website.

496. The letter also referred to ways in which, depending on the usage made, the complainant might be entitled to enter into a different licensing arrangement attracting a reduced tariff.

497. PPCA concluded by indicating what the complainant should do if he wanted to make any change to his PPCA licence.

Code Reviewer's Comment (if, and to the extent, appropriate):

498. On the questions of the rate of increase and the process of consultation, I cannot usefully add to the above account.
499. I note that it appropriate for PPCA, as it did here, to explain ways in which a different licensing arrangement attracting a lower tariff might be appropriate for a particular licensee.
500. On the important question of the level of tariffs, I repeat what I have said at [352]-[354] above.

PPCA Complaint 2

501. After some confusion, it became clear that this complainant wished to create a “slide show” of family photographs with accompanying music that was characteristic of his younger years. There was a deal of confusion about whether he needed a licence at all and if so whether it should be from APRA/AMCOS or from PPCA. APRA advised him that a licence was not required. The individual’s complaint against PPCA then became a complaint over the length of time it had taken PPCA to reply.
502. The complainant completed an on-line "Licensor Registration Form" with PPCA on 11 December 2012. This would be the first step towards a grant by the complainant of repertoire rights to PPCA, and having the repertoire included in PPCA's blanket licensing schemes.
503. As PPCA's Distribution Team was heavily engaged in finalising the annual distribution at that time, and the complainant's application for registration **as a licensor** was not urgent, PPCA acknowledged receipt of the application and indicated that it would be processed.
504. On 11 January 2013, after the annual distribution had been completed, a member of the PPCA Distribution Team queried the complainant's true intention. It then emerged from the complainant's response that he had intended to explore the question of the need for him **to take out a licence**. He expressed his disappointment over the delay

505. The complainant requested an apology which the General Manager of PPCA gave by email on 11 January, explaining that the delay was caused by the fact that, rather than making an inquiry, the complainant had lodged a Licensor Registration form which had been handled by the Distribution Department.

Code Reviewer's Comment (if, and to the extent, appropriate):

506. All the circumstances made the misunderstanding and the delay readily understandable.

PPCA Complaint 3

507. This complainant claimed that virtually every business establishment in a certain city plays pre-recorded CD background music without holding a licence. He named some of those he described as “the worst offenders”.

508. PPCA replied expressing appreciation and advised that in fact PPCA has many licensees in the particular city and conducts inspections there when warranted. PPCA invited the complainant to provide details of any particular venues that he believed should be licensed, over and above those that he had previously notified, for investigation by PPCA.

PPCA Complaint 4

509. This complainant applied on-line on 28 March 2013 for a single event licence in respect of an event to be held 13 days later, on 10 April 2013. The complainant followed up with enquiries on 4, 5 and 8 April 2013 as to the status of its application.

510. PPCA then replied that the licence had been issued and indicating that an invoice would be issued shortly. PPCA's letter explained that PPCA had “currently undergone a system upgrade and [had] had read-only access for some time, causing delay in processing”.

Code Reviewer's Comment (if, and to the extent, appropriate):

511. The lack of a prompt response was unsatisfactory, as was the lack of an apology in PPCA's final letter.

PPCA Complaint 5

512. This complainant complained that a particular business operator did not have a licence "to operate as a DJ". PPCA replied promptly expressing appreciation and indicating that the matter had been handed to PPCA's Licensing Team for further investigation.

PPCA Complaint 6

513. This individual also complained that another person was playing "copyright music in a hall with no licence" in association with fitness classes. PPCA replied promptly expressing appreciation and indicating that the matter had been passed on to PPCA's Licensing Team for further investigation.

PPCA Complaint 7

514. The complainant's grievance (communicated to PPCA on 14 May 2013) was that she had received from PPCA an invoice in circumstances in which she had previously informed PPCA that the particular business had moved out of the building and was carrying on business exclusively on-line. She expressed annoyance at having to repeat herself to companies, to sort out incorrect invoices or to fix other mistakes. She concluded: "you are the second one in the mail received today, ... so I am not impressed I have BETTER things to do. **Please get me off your records.**" (capitalisation and emphasis in original)

515. PPCA's Complaints Officer replied the following day explaining that a renewal invoice had been issued on 9 April in accordance with the terms of the then current licence, and that the request to cancel a licence had been received on 3 May. This had "overlapped" with the PPCA's statement cycle, which is why the complainant received a statement showing the amount of the invoice still outstanding at 30 April. The licence was cancelled as at 3 May and a statement issued showing a balance of \$nil.

PPCA Complaint 8

516. This was case of a person who had requested cancellation of a licence (because of closure of the business and sale of the lease) receiving a further request for payment. In this case, the complainant thanked PPCA for clarifying the matter and getting back to him so promptly.

PPCA Complaint 9

517. The South Australian Small Business Commission wrote on behalf of a director of a proprietary company against which PPCA had obtained a judgment in the Federal Court of Australia. The Commissioner sought to explore whether settlement might be possible. PPCA wrote some 17 days later summarising the history of the dealings and litigation between PPCA and the individuals concerned. PPCA noted that its preference was to settle without litigating but that in this case the individuals had rebuffed such attempts in the past as a result of which the proceeding had gone to judgement. PPCA invited the Commissioner to inform the individuals that any offer they wished to make would be considered.
518. Apparently later a settlement at a reduced sum was arrived at between PPCA and the Commissioner representing the two individuals.

Code Reviewer's Comment (if, and to the extent, appropriate):

519. This was not a complaint or dispute.

PPCA Complaint 10

520. A licensee telephoned PPCA three times requesting a change in the terms of the licence and complained about the lack of a response.
521. PPCA apologised for not having replied and enclosed a "Restaurant Confirmation Sheet" to be completed by the individual. Apparently it was completed and returned and the licence fee was reassessed according to the new details received.

Code Reviewer's Comment (if, and to the extent, appropriate):

522. It appears that the licensee's request for the change was made on 11 June 2013, the licensee made three follow up telephone calls, and then wrote an email of complaint on 12 June, and PPCA replied on 13 June enclosing a "Restaurant Confirmation Sheet".
523. I do not see the circumstances as constituting untoward delay.

Australian Writers' Guild Authorship Collecting Society Ltd ("AWGACS")

524. AWGACS developed its Complaints Handling Procedure and its Dispute Resolution Procedure in line with the requirements of clause 3 (c) of the Code and with Australian Standard AS4269 – 1995 ("Complaints Handling").
525. During the Review Period, AWGACS received no complaints and was not a party to any disputes.
526. Although no formal complaint has been made to it, AWGACS states that it has received several expressions of grievance from its members, as well as other international agencies representing authors' rights with which it has reciprocal arrangements, concerning the registration, distribution and conflicting claim resolution processes of Screenrights.
527. Screenrights addresses this matter as a complaint made by AWGACS to it during the Review Period – see [473] ff in the "Complaints and Disputes" section of this Report under "Audio-Visual Copyright Society Ltd (Screenrights)".

Australian Screen Directors Authorship Collecting Society Ltd ("ASDACS")

528. ASDACS received no complaints during the Review Period. However, it has been using its "Complaints Log" to record "interactions" with its members. Seven such interactions were recorded in the Review Period. They were not complaints but observations and suggestions of things to do
529. I recommend that they not be recorded in a "Complaints Log" and that they be recorded under some different description.

OTHER MATTERS INCLUDING SUBMISSIONS MADE DIRECTLY TO THE CODE REVIEWER

Draft Determination by the ACCC in response to APRA's application for revocation and substitution of authorisations A91187-A91194 and A91211

530. APRA's arrangements were first authorised in 1999 and they have been authorised by the ACCC several times since then.
531. The Draft Determination, which is dated 15 October 2013, addresses the competition concerns of the *Competition and Consumer Act 2010* (Cth), but there is some overlap with the concerns of the Code.
532. The Draft Determination addresses APRA's application for re-authorisation for six years. The ACCC proposes to grant authorisation for a further three years only of the following five conditions (the first two are conditions of the existing authorisation):
- “• Continue to require an independent expert appointed to determine a dispute to provide a written report to APRA stating whether APRA offered the user a licence that reflects any direct dealing, where relevant (C1);

- Continue to require APRA to provide the ACCC with a report on an annual basis about disputes notified to APRA under its Alternative Dispute Resolution process, including a provision for publication by the ACCC (C2);
- Require APRA to publish, within 6 months of the ACCC’s final determination as a single document, a comprehensive plain English guide that outlines all of the licence categories individually and includes other specified information (C3);
- Require APRA, within three months of the ACCC’s final determination, to take certain steps to increase awareness of the licence-back and opt-out provisions provided by APRA, including a plain English guide and launching an education campaign (C4);
- Require APRA to implement a revised ADR scheme (C5). The ACCC invites interested parties to comment on the proposed features of that scheme before the ACCC finalises the wording of this proposed condition.”

(Summary, p iii)

533. These proposed conditions have a direct relevance to APRA alone, but some also have implications for other collecting societies and for the Code.
534. I had intended to recommend that APRA follow a course along the lines of the third condition described above (the first new condition). Uncertainty over which class of licence applies is not uncommon: see, for example, the submission made by Live Performance of Australia discussed below).
535. I recommend that all of the collecting societies consider carefully the Draft Determination and, in due course, the final Determination, and their implications for those societies.

Submission 1 - Live Performance Australia

536. Live Performance Australia (“LPA”) made a wide ranging and detailed submission dated 31 July 2013 concerning APRA’s compliance with the Code. With the consent of LPA, its submission was forwarded to APRA for response and that response (dated 27 September 2013) was received. With APRA’s consent, the response was forwarded to LPA.

537. I note that a feature of LPA's submission that was particularly helpful to the Code Reviewer was its cross references to the relevant provisions of the Code.
538. The following account includes a summary of LPA's submission and APRA's response.
539. In view of the extent of LPA's submission and APRA's response, I will follow the course of commenting progressively, where appropriate, rather than separately at the end.
540. In my view, the fact of the recording below of LPA's submission and of APRA's responsive submission itself serves the beneficial purpose of holding APRA to account, of providing responses that may satisfy LPA, and of prompting suggestions (sometimes by APRA itself) for improvements in the way in which APRA operates.

LPA's Submission

541. LPA is the peak body for Australia's live performance industry. It was established in 1917 and registered as an employers' organisation under the *Fair Work Act 2009* (Cth). LPA has over 390 members nationally. It represents producers, music promoters, venue operators, performing arts companies, festivals and industry suppliers, such as ticketing companies and technical suppliers.
542. LPA's members hold licences from APRA for the public performance of music works under several categories of licence including the following:
- Festivals (Licence Code: GCLF);
 - Concert Promoters (Licence Code: GCLB);
 - Featured Music Events (Licence Code: GCFM);
 - Live Performance (Licence Code: GCLN and GLA);
 - Recorded Music for Dance Use (Licence Code: GFN); and
 - Special Purpose Licence Scheme (Featured Music) (Licence Code: GCSF).

543. LPA's chief concern relates to the extent to which APRA complies with Clause 2.3 of the Code headed "Licensees". LPA's submission addresses paras (a), (b) and (c) of Clause 2.3 of the Code which are as follows:

- “(a) Each Collecting Society will treat Licensees fairly, honestly, impartially, courteously, and in accordance with its Constitution and any licence agreement.
- (b) Each Collecting Society will ensure that its dealings with Licensees are transparent.
- (c) Each Collecting Society will:
 - (i) make available to Licensees and potential Licensees information about the licences or licence schemes 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; and
 - (ii) to the extent it reasonably can, having regard to the complexity of the questions of fact and law necessarily involved, take steps to ensure that all licences offered by the Collecting Society are drafted so as to be plainly understandable to Licensees, and are accompanied by practical and suitable explanatory material.

...”

544. By way of introduction, LPA notes that it made a submission to the ACCC in relation to APRA's application for revocation and re-authorisation referred to above. LPA opposed APRA's application on several grounds including the ground that APRA is a monopoly whose current arrangements restrict dealings between composers and users. LPA submitted that the ACCC should grant a conditional re-authorisation for one year on revised terms that incorporate improvements to the "licence back" and "opt out" facilities and licensing conditions. (As at the date of LPA's submission to the Code Reviewer (31 July 2013) the ACCC had not released the Draft Determination.)

545. Again, by way of introduction, LPA notes that on 24 January 2013 it received a letter from APRA announcing its plans to review the terms of the Concert Promoters' licence (GCLB), including a proposal to increase the royalty rate of 1.5% of "gross" box office to 3%. As at 31 July 2013, LPA was consulting with its members in relation to this issue.

546. LPA expressed concern about the way in which APRA had arbitrarily proposed this 100% increase in the royalty rate as the starting point for negotiations, and suggested that this reflected APRA's unconstrained market power. LPA claimed to be aware that APRA had plans to introduce similar increases in the royalty rates of other licence schemes for concerts and events, including Featured Music Events (GCFM), Festivals (GCLF) and "Live Venues" (apparently Live Performance GCLM and GLA).
547. LPA expressed concern that such increases would have a significant impact on its industry, given that the users of licences in those categories (many of whom are not-for-profit organisations) would have limited capacity to absorb the proposed increases.
548. In relation to paras (a) to (c) of Clause 2.3 of the Code, LPA submits, in summary as follows:
549. In relation to **paragraph (a)** of Clause 2.3, LPA contends that APRA's conduct falls short of treating licensees "fairly, honestly, impartially, courteously and in accordance with its Constitution and any licence agreement."
550. LPA says that its members complain that APRA is "overwhelmingly compliance focussed" in its interaction with them, and does not respect the significant administrative burden associated with their reporting and remittance obligations under the current terms of APRA's licensing schemes. LPA illustrates by reference to Clause 3 of the Festival Licence (GCLF) which, it complains, places too great a burden on licensees. In particular, LPA complains that the obligation to provide the detailed statements required under Clause 3.3 of the Festival Licence should rest with the licensor rather than the licensee. LPA also expressed concern over APRA's plan to introduce an on-line reporting system which would significantly increase the administrative burden on LPA members.
551. LPA registered its longstanding concern about the inflexibility built into APRA's collection processing systems under which total amounts payable are calculated as a percentage of "gross sums paid for admission", because this does not adequately take into account the percentage of box office that is attributable to performance related activities. LPA illustrates by reference to music festivals that include large non-music components in the ticket price, including food, comedy, interviews with artists, children's activities, market stalls, educational sessions and theatre. APRA's rate (at

present) is simply “1.65% (1.5% plus GST) of Gross Sums Paid for Admission x Music Use Percentage, subject to a minimum fee of \$55.00”.

552. In relation to **paragraph (b)** of Clause 2.3 of the Code (“Each Collecting Society will ensure that its dealings with Licensees are transparent”), LPA says that its members have complained that the rates of royalty payable by a particular licensee are sometimes determined through private negotiations with APRA. This breeds distrust and wariness on the part of LPA members in relation to the way in which the rates are calculated by APRA. Their concern is heightened by the lack of information relating to specific licence schemes (including yearly revenue, expenditure associated with administering the scheme, and net distributable income) contained in APRA’s publicly available annual reports and publications.
553. Members of LPA have also reported cases where APRA has not performed adequate due diligence in respect of song lists that are submitted. For example, royalties have been collected for music that is “out of copyright” and APRA has not taken the initiative in investigating such oversights.
554. Finally, LPA has received feedback that APRA’s royalty distribution practices and interaction with international collecting societies lacked transparency, with reported instances of royalties not being received by creators, despite amounts being collected by APRA on their account. LPA submits that this indicates that APRA is “currently falling short of the requirements of its Distribution Policy which is required to be maintained under Clause 2.4 of the Code ”.
555. In relation to **paragraph (c)** of Clause 2.3, LPA states that it has received complaints from its members that APRA is not assisting participants in the industry “to navigate their rights and obligations”. LPA says that consultation with its members shows that licensees are not always aware of the particular licence they have in place with APRA, let alone the terms and conditions of that licence, and therefore do not have a sufficient understanding of their rights and obligations. As well, according to the submission, the licence schemes and terms and conditions are not published on the APRA website – a cause of confusion for venues which may need multiple licences.
556. LPA asserts that staff in the Licensing Department of APRA work on commission so it is not in their interest to allow licensees the lowest suites of licence fees available.

Also the commission arrangement does not provide an incentive for APRA staff to ensure that licensees fully understand their rights and obligations.

557. Accordingly, LPA submits that APRA needs to take further steps to ensure that it complies for Clause 2.3 (c)(ii) of the Code. In relation to Clause 2.3 (c) (iii) (sub-para (iii) was deleted from the Code in 2011 and was “expanded” into paras (e) and (f) of clause 2.3) of the Code, LPA complained in its submission to the ACCC dated 28 June 2013 that APRA has not consulted with LPA in relation to the terms and conditions applying to its licences or licence schemes, and has not advised LPA of the expectation that LPA should be responsible to educate its members with regard to APRA’s licensing conditions and arrangements. In any event, LPA does not consider that it would be appropriate for it to bear that responsibility. Accordingly, LPA submits that APRA is not performing its obligations under Clause 2.3 (c) (iii).

APRA’s Responsive Submission

558. APRA asserts a belief that LPA, which is engaged in “confidential negotiations in connection with APRA’s proposed review of the Concert Licence Scheme”, has seen a tactical opportunity to advance its members’ commercial interests in connection with those negotiations by way of the attacks made on APRA in connection with APRA’s application to the ACCC, and now in connection with the present review under the Code. APRA points out that so far as APRA is aware, LPA has not previously made a submission to the Code Reviewer in connection with any of the matters raised in its present submission, despite many of the matters complained of having been present in APRA’s licensing arrangements for many years.
559. APRA addresses, in turn, LPA’s complaints of failures to observe the obligations imposed on APRA by Clause 2.3 (a), (b) and (c) of the Code.

Paragraph (a) of Clause 2.3

560. APRA identifies five specific matters raised by LPA in respect of Clause 2.3 (a).
561. **First**, APRA identifies a complaint by LPA that its letter of 24 January 2013 made an “arbitrary” proposal for the increase in licence fee from 1.5% to 3.0%. In response, APRA quotes from a letter dated 11 February 2013 from LPA to APRA stating that

LPA appreciated “the good faith demonstrated in your correspondence” and stated that LPA looked forward to “an honest and open negotiation process”.

562. APRA submits that this reflected LPA’s true view and, further, that APRA’s letter of 24 January was not in fact unreasonable or unfair or “arbitrary”. APRA asserts that the letter was courteous and reasonable in its tone and went to some trouble to set out the reasons underpinning the need for a review of the licence scheme. The letter stated that there was “a powerful case for a rate of 3%” and made it clear that APRA wished and intended to consult and negotiate before coming to any conclusions.
563. In order to assess this aspect of the complaint, it is necessary to read APRA’s letter of 24 January 2013.
564. The letter sought to explain why APRA considered that the current effective royally rate of 1.5% of “gross” box office for “Live Promoted Concerts” should be increased. The letter began by pointing out that the existing scheme had been in place for twenty years and had been negotiated with the Entertainment Industry Association over the period 1990/1991. The letter referred to comparable rates charged overseas and suggested that a rate of 3.00% would be fair and reasonable. However, far from indicating that nothing less would be agreed to, the letter suggested, on a strictly without prejudice basis, that APRA wished “to reach an expeditious, acceptable negotiated solution with the industry”.
565. In a sense any level of increase could be described as “arbitrary” since it is a matter of evaluation and assessment, and there is no single “right” level that is dictated by the facts. But APRA’s letter gave comparable overseas rates (and acknowledged the lower rate charged in the United States).
566. I do not think that the proposal made in the letter could be fairly described as “arbitrary”.
567. **Second**, APRA suggests that LPA has implied that APRA has not been open and honest with it in terms of the schemes it wishes to review. APRA suggests that LPA’s understanding may be based on a comment made by APRA in a public submission to the ACCC. The true position, however, according to APRA, is that it has informed LPA on numerous occasions and unequivocally that it does not currently propose to

review any other relevant licence schemes except to the extent that concerts occur in conjunction with other kinds of musical performance, and there is a necessary “flow-on” effect, for example, by way of a combination of live and recorded musical performances for which admission fees are charged.

568. This statement by APRA in its response to LPA’s submission can itself be taken as an unequivocal statement, but whether LPA was justified in this aspect of its complaint would depend upon an assessment of the public statement by APRA to the ACCC to which APRA refers and on which I can offer no comment.
569. **Third**, in relation to LPA’s complaint that APRA is “overwhelmingly compliance-focused” and “not respectful of the significant burden associated with the reporting and remittance obligations” resting on promoters, APRA says that such comments suggest a failure to understand the nature of the arrangements between APRA and LPA members which rest on the terms of their licence. Accompanying APRA’s responsive submission was its form of “APRA Licence Application – Concert Promoters”.
570. APRA states that in the last financial year (meaning the year ended 30 June 2013) APRA entered into 944 licence agreements with concert promoters in Australia, covering 2,691 music events. APRA points out that its responsibility to its members is to ensure that licences are obtained and that the contractual obligations undertaken in them are performed.
571. As to the complaint that APRA is “somehow over-zealous, officious or aggressive”, APRA rejects the suggestion and states that in the financial year mentioned, of the 944 licences granted, legal correspondence was entered into on only 23 occasions. APRA has offered to provide to the Code Reviewer a detailed confidential summary of the 23 upon request. However, it states that each of the 23 involved either a refusal to take out a licence or a refusal to pay the fees for which a licence entered into provided. On only two occasions was legal action taken against the promoter of a concert.
572. In relation to the “significant burden” of which LPA complains, APRA states that the promoter is obliged to provide it with a list of the musical works performed at the licensed concerts within 30 days after the last concert (Clause 3.1 (c) of the pro forma Licence) and to provide APRA with a certified statement of gross admissions receipts

for the licensed concerts within 30 days (see Clause 3.1 (a) of the pro forma Licence) and to pay the fee.

573. APRA simply submits that such obligations are proper, reasonable and necessary in the context of the licence granted. Each is, according to APRA, fundamental to the licence and imposes no collateral or superfluous administrative or financial burden on the licensee.
574. Moreover, the licence provides a financial incentive (by way of a 10% discount in the licence fee) for licensees who comply in a timely fashion.
575. I note that APRA's response is not quite correct because the statement of gross box office receipts must have attached to it "final reconciliation statements from ticketing agents". Clause 3.1 (b) of the document provides that the applicant for the licence must supply APRA with "copies of all statements and other records received by the Applicant (including statements from venue operators and booking agents) sufficient to verify the calculation of the amount payable". Moreover, the statement of "musical works" referred to in clause 3.1(c) must state in relation to each work the names of the publisher and composer and the duration of the performance and whether the performance was vocal or not (Clause 3.3 (a) and (b) of the Licence).
576. Whether these obligations that go beyond the statements contained in APRA's responsive submission are reasonable or not, they could be burdensome. If APRA would be satisfied with unverified statements by the licensee in the terms contained in APRA's responsive letter, namely, a statement of the musical works performed and a statement of gross admission receipts, the form of Licence should be amended to eliminate the other requirements to which I have referred.
577. I suspect that APRA would concede that its form of Licence does, indeed, demand more than the two statements referred to in its responsive submission. I recommend that APRA have discussions with LPA about ways of simplifying and perhaps abbreviating the additional requirements to which I have referred.
578. **Fourth**, APRA identifies a complaint by LPA that APRA plans to introduce an on-line reporting system. APRA describes itself as "dumbfounded" by this comment as a basis for a charge of unfair treatment of LPA's members. APRA says that it would

simply like to dispense, as far as possible, with paper-based communications and to introduce platforms for the electronic supply of information and payment. It says that the facility would, if anything, make compliance simpler and more efficient for licensees. In conclusion, APRA states that it has not yet developed the platforms and it will certainly consult with LPA and its members when it does.

579. I agree with APRA that, at least at present, there is no substance in this particular aspect of LPA's complaints.
580. **Fifth and last**, APRA identifies a complaint about the "inflexibility of APRA's licence scheme". APRA notes an inconsistency in the charges levelled by LPA. On the one hand, LPA complains of inflexibility in adherence strictly to the defined licence schemes, but on the other hand accuses APRA of lack of transparency by "entering into private negotiations" with a "particular licensee", apparently for the purpose of relenting on the standard terms. APRA responds to the charge of inflexibility by pointing out that it grants thousands of licences each year and that negotiation of them separately would be a never ending, grossly uncertain and prohibitively expensive process, as well as one that would breed complaints of discrimination as between licensees.
581. Without particularisation of the charge of inflexibility, I am inclined to agree with APRA.
582. A separate complaint by LPA is that the present arrangements do not adequately take into account the percentage of box office receipts that are attributable to performance related activities. APRA responds that without music there would be no concert. Whether 1.5% or 3% is a reasonable price to pay for the use of that music is a matter for negotiations between the parties or determination by the Copyright Tribunal of Australia – it is not a matter regulated by the Code.
583. Accordingly, APRA asserts that the present issue is one which, if of concern to LPA members, could actually be raised by LPA with APRA in connection with the licence scheme and, failing agreement, could be determined through ADR or by the Tribunal. APRA says that it can find no record of LPA's having raised the present issue with APRA over the last decade.

584. I agree with APRA in this respect. The remedy available to members of LPA is, ultimately, to take the matter up with APRA, and, failing agreement, with the Tribunal.

Paragraph (b) of Clause 2.3

585. APRA identifies four complaints made by LPA in respect of the Clause 2.3 (b) obligation of transparency in dealings with licensees.

586. **First**, there is the complaint that the rate of licence fee payable by a particular licensee is sometimes determined through private negotiations. APRA's response is simple: a broad denial. APRA refers to the prejudicial nature of the complaint because of its lack of specificity. APRA also notes that, having made the allegation, LPA admits that it is apparently based on rumour and that LPA is yet to ascertain whether there is substance to it.

587. I think that when a representative organisation such as LPA is considering making a complaint of the present kind, it is preferable that the organisation conduct an investigation before making the complaint, rather than make the complaint while acknowledging that the organisation has not yet substantiated it. If a member of LPA wishes to assert that a particular licensee obtained a "favourable deal" from APRA with the discriminatory treatment that that would or might involve, the aggrieved member could either supply specifics of that deal directly to APRA, or to LPA for it to provide to APRA.

588. **Second**, there is the complaint of lack of information relating to specific licence schemes contained in APRA's annual reports.

589. APRA acknowledges that it does not break out its revenue by every tariff line in its annual "Year in Review" document. It points out that it administers licences under 33 individual public performance licence schemes and that it has never been suggested to APRA that a breakdown of revenue, expenditure and net distributions for each licence scheme would be a desirable or meaningful exercise.

590. APRA does break down its revenue by key revenue groupings in its annual financial report and its Year in Review documents.

591. According to APRA, when LPA has requested relevant revenue figures, APRA has been happy to provide them and would be happy to consider any suggestion for inclusion of greater financial detail in its Year in Review documents.
592. **Third**, there is LPA's complaint that APRA has not performed adequate due diligence in relation to song lists that are submitted. APRA sees the complaint as relating to the obligation imposed on the promoter to supply information, but I do not think that this adequately describes LPA's complaint. In para 12 of its submission dated 31 July 2013, LPA complains that APRA has collected royalties in respect of music that is "out of copyright". The complaint seems to be, although it is expressed in general terms, that APRA does not exercise due diligence in relation to the lists provided by LPA's members.
593. APRA asserts, however, that it does ascertain whether a work is outside APRA's repertoire, either because it was written by an author who is unaffiliated with a performing rights society or because it is out of copyright. In such a case, APRA "uniquely among copyright collecting societies around the world" "pro rates the licence fee thus effectively removing any obligation upon the promoter to pay for that work" (the quotes are from APRA's responsive submission).
594. Perhaps predictably, APRA encounters a problem in administering a licence scheme from inaccuracy or incompleteness in the list of works performed, or untimeliness in the provision of the lists.
595. APRA notes that works that are out of copyright may be the subject of arrangements that are themselves protected by copyright with the result that the works are treated as "copyright works". When they are reported to APRA by concert promoters as having been performed, APRA is obliged to treat them accordingly. APRA acknowledges that there have been instances where a promoter has disputed the copyright status or the claimed arrangement, but in each case where that has occurred, APRA has verified that copyright status.
596. In the absence of specifics, I can take this issue no further.
597. **Fourth and last**, there is said to be a lack of transparency with respect to APRA's royalty distribution practices and its interaction with international collection agencies.

598. Again, APRA complains about the lack of specificity in LPA's complaint. APRA points out that each year it makes four discrete distributions to a total of 67 affiliated collecting societies around the world, which account for approximately \$63 million per annum (in 2012 – 2013 the exact figure was \$63,565,957) in respect of some 800,000 discrete musical works annually. Obviously, the degree of financial responsibility involved is significant. Moreover, the detail is private and confidential to the recipients.

599. In the absence of detail from LPA, I can take this matter no further.

Paragraph (c) of Clause 2.3

600. APRA identifies three complaints by LPA under this heading.

601. **First**, it is asserted that LPA members complain that APRA is not forthcoming to assist participants in the industry “to navigate their legal rights and obligations”.

602. APRA again complains about the lack of specificity. It says that while it is not necessarily APRA's obligation to provide the assistance referred to, it has expended a great deal of time and resources to ensure that licensees and potential licensees understand the application of the different APRA licence schemes to their businesses.

603. APRA says that in most cases, the question which licence scheme applies to a business is straightforward. APRA staff refer to the licence applications themselves and to the information sheets relevant to the various tariffs. These are contained behind Tab 13 in the Vol 1, Part 1 of the bundle of documents accompanying APRA's report to the Code Reviewer.

604. APRA states that licensing representatives in each of its State offices are available by telephone to discuss licensees' queries, and that direct telephone numbers are provided in all correspondence to licensees. Behind Tab 11 in Vol 1, Part 1 of the bundle of documents are statistics relating to the contact between APRA and its licensees.

605. APRA states that notwithstanding the matters mentioned above, it is undergoing a major review of its website, and as part of that review has notified the ACCC of

proposals aimed at improving the transparency of licensing alternatives available to music users. Further details of the proposals are contained in APRA's responsive letter.

606. **Second**, APRA identifies a complaint by LPA that the licence schemes are not published on its website. APRA replies that all forms of application for all of APRA's annual public performance licence schemes are available on its website and APRA provides a link to the relevant section of the website which is:
<http://www.apra-amcos.com.au/MusiciConsumers/MusicinBusiness.aspx>
607. For one-off events, new promoters are invited to provide the details via an interactive form on APRA's website, upon receipt of which an APRA licensing representative determines the relevant licence scheme, contacts the promoter, and provides the promoter with a copy of the scheme and discusses its application to the event. If there is disagreement, APRA always consults with the licensee and has dispute resolution processes available if agreement is not reached.
608. APRA proposes to make its licence schemes for one-off events available on its website in future. I recommend that this be done as soon as possible.
609. **Third**, there is a complaint that APRA's Licensing Department works on commission and therefore it is not in the interests of the members of staff in that department to give licensees the lowest suite of licence fees possible.
610. APRA responds that it is not the role of its licensing representative to grant licences to businesses to use music for the lowest licence fees possible. Rather, APRA asserts, the representative works with licensees to ensure that they hold the appropriate category of licence for their music usage.
611. In any event, APRA does not agree with the underlying premise that the inclusion of a small commission component in the remuneration packages of certain licensing representatives results in their offering an inappropriate category of licence.
612. The arrangements between APRA and its employees are confidential but APRA has offered to discuss with the Code Reviewer in confidence the measures it has in place to ensure that the "dysfunctions alluded to by LPA" do not occur.

613. APRA thinks that LPA seems to complain that APRA has failed, in breach of Clause 2.3 (c) (iii) of the Code, to consult with relevant trade associations in relation to the terms and conditions applying to its licences or licence schemes. APRA identifies the two allegations below.
614. **First**, APRA identifies a complaint that APRA has not consulted with LPA in relation to the terms and conditions applicable to its licences or licence schemes.
615. APRA replies that the reason it has not consulted with LPA is that APRA has not reviewed its licence schemes pertaining to live performances in two decades. When APRA did last review its Promoted Concerts Licence Scheme, it did negotiate with LPA's predecessor. Moreover, at the time LPA made its submission on 31 July 2013, APRA had been seeking a meeting with LPA to commence negotiations regarding a review of that licence scheme since January 2013 without success. Representatives of APRA and LPA did in fact meet on 11 September 2013 to commence negotiation of the relevant licence scheme.
616. **Second**, APRA identifies a complaint that it has not advised LPA of its expectation that LPA should be responsible for educating LPA members with regard to APRA's licensing conditions and arrangements.
617. APRA responds that it has never suggested that LPA should bear responsibility for educating LPA's members regarding their music copyright obligations. APRA states that it is "more than happy to assume responsibility for such educational initiatives". APRA refers to Tabs 23 and 25 in Vol 1, Part 2 of the bundle of documents for a summary of its efforts in this regard.
618. Nonetheless, APRA expresses the opinion that LPA is well placed to share its information regarding APRA licences, such as information relating to licence back and opt out, with its members. APRA notes that LPA is the peak body for Australia's live entertainment and performing arts industry with an unparalleled ability to reach the relevant live performance licensees.

Submission 2 - Arts Law Centre of Australia

619. The Arts Law Centre of Australia (Arts Law) made a submission dated 31 July 2013 directly to the Code Reviewer. The submission was in the nature of a complaint over a lack of transparency on the part of Viscopy.
620. Paragraph (c) of cl 2.2 of the Code provides:
- “Each Collecting Society will ensure that its dealings with Members are transparent.”
621. Arts Law’s complaint is that Viscopy has not been transparent in its dealings with its artist-members because it has not made clear to them that by choosing to be members of Viscopy, they suffer the deduction of two “commissions” – one by Copyright Agency in its role as a declared collecting society, and the other one by Viscopy. This is explained below.
622. At the outset it must be said that it is disappointing that Copyright Agency/Viscopy did not draw to the Code Reviewer’s attention the grievance that had been expressed by Arts Law.
623. The issue was dealt with by the Hon J C S Burchett QC at pp 15-18 of his report on compliance for the year 1 July 2010 to 30 June 2011. Apparently, the issue was last discussed between representatives of Arts Law and of Copyright Agency/Viscopy in June 2012, but it was not drawn to my attention to be dealt with in my report for the year 1 July 2011 – 30 June 2012. The first I have heard of this complaint was by way of the present submission by Arts Law dated 31 July 2013.
624. Perhaps the oversight was due to the fact that the complaint had not come directly from a member or a licensee, but, of course, this is no excuse. I urge Copyright Agency/Viscopy to take great care to record every contact that might be regarded as expressing a grievance or complaint, irrespective of its source.
625. Arts Law states that it is unique in the service it provides, “straddling the worlds of both art and law and representing a large group of Australia artists.” It says that it

bases its present submission on the objective of both increasing artists' rights and "promoting their ability to access those rights".

626. Arts Law states that it was established in 1983 and is "the only national community centre for the arts". It says that it provides expert legal advice, publications, education and advocacy services each year to more than 4,000 Australian artists and arts organisations operating across the arts and entertainment industries.
627. Arts Law states that its submission is informed by its "clients' profile" which is described in the letter. At the risk of inaccuracy inherent in a general summary, that profile suggests that many of the client-artists are vulnerable and need of an organisation like Arts Law to safeguard their interests.
628. Copyright Agency deducts operating costs (in 2012-2013 overall expenses were 13.9% of revenue) from the remuneration (conveniently called "royalties" or "statutory royalties") that it receives as a declared collecting society, before it makes a distribution to its member, Viscopy. Viscopy, in turn, has been deducting a commission of 25% before it distributes to its member-artists.
629. When my predecessor, the late James Burchett, addressed the issue, there was, in addition to Arts Law's complaint against Viscopy relating to Copyright Agency, a similar complaint by it against Viscopy in respect of another declared collecting society, Screenrights, and the similar charging of two commissions, one by Screenrights and one by Viscopy.
630. Arts Law has said in its submission that it is satisfied that the position as between Screenrights and Viscopy is made clear on the websites of those two collecting societies, so that an individual artist knows what commissions will be charged if he or she chooses to be or remain a member of Viscopy.
631. Copyright Agency and Viscopy are parties to a Service Agreement dated 22 November 2011 for the provision by Copyright Agency to Viscopy of all of the administrative services that Viscopy needs. The Services Agreement takes effect from the "Effective Date" which is defined in it as the date that is ten business days after the date on which a certain "Condition Precedent" is satisfied. In short, that Condition Precedent

is the giving by the ACCC of all clearances or all authorisations necessary for the Services Agreement to be performed in accordance with its terms.

632. Copyright Agency/Viscopy applied to the ACCC for an authorisation to make and give effect to the Service Agreement. The application was lodged on 6 December 2011. The ACCC made its Determination on 24 May 2012 and the authorisation came into force on 15 June 2012. The authorisation was to make and give effect to the (then proposed) Services Agreement until 30 June 2017.
633. According to para 5.10 of the Determination, the authorisation was in respect of the Services Agreement as it stood at the time of the grant of the authorisation, and any changes to the Services Agreement during the term of the authorisation or future arrangements between the parties would not be covered by the authorisation. In its Summary, the ACCC stated that the Services Agreement would result in Copyright Agency fully managing and administering the day-to-day operations of the Viscopy's business.
634. The date that was ten business days after 15 June 2012 was 29 June 2012 – a Friday. Viscopy and Copyright Agency agreed, however, that Copyright Agency would actually commence to manage and administer the day-to-day operations of Viscopy's business on the first business day on the new financial year, Monday, 2 July 2012, and that date has been treated by them as the effective date on and from which the new arrangement took effect.
635. In their submission to the ACCC in support of their application, Copyright Agency/Viscopy submitted to the ACCC that it could be expected that in the second and third years of the operation of the Services Agreement, there would be a reduction in the aggregate commissions charged to artist-members of Viscopy.
636. Accordingly, at para 4.32 of its Determination, the ACCC noted that the amount of commission charged by Viscopy to its members for statutory licensing income was presently 25% and that under the Services Agreement, the commission level would be reduced by a significant amount in the second and third years.
637. The operating costs charged by Copyright Agency have remained at about 14%, while the charges made by Viscopy have been and will be as follows:

Period	Rate
1 July 2012 – 30 June 2013	25%
1 July 2013 – 30 June 2014	17%
1 July 2014 – 30 June 2015	10%

638. The Services Agreement provides in clause 17.2 that Copyright agency must procure that the proportions of Viscopy revenue set out in that clause are paid to or for the account of visual artists. Paragraph (b) of clause 17.2 deals with distributions of amounts received from Copyright agency in respect of “Statutory Remuneration” which is defined, in substance, as remuneration collected under any statutory schemes, including those established by Parts VA, VB and VII of the Act. For a period from the Effective Date up to (but excluding) the anniversary of that date, the proportion is 75%. For the next year, the proportion is 83%, and for the year following that, the proportion is 90%.

639. Apparently, Copyright Agency/Viscopy have been advised that any agreement between them to increase those proportions (that is to say, to reduce Viscopy’s commissions) would put at risk the ACCC authorisation because para 5.10 of that Determination states, as noted earlier, that the authorisation is in respect of the Services Agreement as it stood at the time of the grant of the authorisation and that any change to it would not be covered by the authorisation.

Code Reviewer’s Comment (if, and to the extent, appropriate):

640. It is not my place to comment on that legal advice.

641. Whatever else may be said about the rates of the charges made by Copyright Agency and Viscopy, the position should be made clear on the Viscopy website. It could be stated that an individual is not required, in order to receive statutory licensing income, to be a member of Viscopy and may choose to be a member of Copyright Agency alone. It could be stated that an individual artist would need to take into account, however, the potential necessity for him or her also to be a member of Screenrights, and that the advantage of membership of Viscopy is the avoidance of multiple memberships of the declared collecting societies and associated administrative inconvenience.

642. In the process of writing this report, I have spoken to representatives of both Arts Law and Copyright Agency/Viscopy and understand that the Viscopy website has now been amended so as to satisfy Arts Law. This does not, of course, mean that Arts Law accepts that the level of the two charges is reasonable, having regard to the fact that all of the administrative work is now undertaken by Copyright Agency.

Submission 3 - Australian Hotels Association, Queensland Hotels Association and Victorian Branch of the Australian Hotels Association

643. On 30 July 2013, the Australian Hotels Association (AHA) forwarded to the Secretariat of the Code Reviewer copies of submissions that had been made by the AHA, the Queensland Hotels Association and the Victorian Branch of the AHA to the ACCC in relation to the application by APRA for a new authorisation.

644. In accordance with usual practice, the Code Review Secretariat asked the AHA for consent to the provision of the submissions to APRA for comment. No consent was forthcoming,

645. In the course of the writing of this report, the AHA was contacted again.

646. The AHA has explained that the reason why it had omitted to respond to the emails from the Secretariat was that it had been devoting its resources to the submission made by the AHA to the ACCC.

647. The AHA advised the Code Reviewer that in the circumstances he should not hold up finalisation of the present report. Apparently consent would have had to be obtained from more than just the AHA. If the consents were granted, the submissions would have been supplied to APRA for comment, and, following receipt of those comments, the submissions and APRA's response to them incorporated as a new section (apparently substantial) in the report.

648. The AHA suggested that the conduct of APRA could be monitored with a view to complaints being made, if necessary, by individual hotels for consideration in next year's review of compliance by APRA with the Code.

Submission 4 - The individual referred to in APRA/AMCOS Member Complaint Number 3 above

649. The former member of APRA/AMCOS referred to in APRA/AMCOS Member Complaint Number 3 above made a submission dated 20 July 2013 directly to the Code Reviewer. With her consent, a copy was forwarded to APRA.
650. The individual's complaint is rather in the nature of recommendations as to what should be done in relation to any organisation "discovered to have deceived the Code Reviewer". She recommends a range of fines starting at \$10,000 for the first offence and an increase of \$10,000 for each subsequent offence over a ten year period (\$10,000 for the first offence, \$20,000 for the second offence, \$30,000 for the third offence and so on to \$100,000 for the tenth offence but apparently back to the start once the ten year period from the time that the first offence has expired!). Another recommendation is that offending organisations together with the penalty imposed be listed in an early part of the Code Reviewer's Report.
651. A third recommendation is that where there is a dispute over the ownership of copyright, the collecting society should endeavour to obtain statutory declarations from all parties and that if a party chooses not to co-operate by providing a statutory declaration, that party "will be considered to be the guilty party".
652. The submitter argues that this should assist the collecting society if it has unwittingly infringed an author's copyright.
653. A fourth recommendation is that in the event of claims of potential "bogus" registrations of lyrics with APRA, a copy of the lyrics "is to be requested with a 24 hour deadline".
654. Finally, the member recommends that the register of Complaints maintained by collecting societies should record complaints made by non members as well as by members.

Code Reviewer's Comment (if, and to the extent, appropriate):

655. It is beyond my power to implement these recommendations. They go to the content of the Code itself.
656. The triennial review of the Code is due to take place in 2014 and I will have regard to the present submissions as part of that review. One particular recommendation that appears to have merit is that of expanding Clause 3 of the Code to refer in some way to complaints by individuals who are neither members nor licensees. But the question is one on which I have not yet heard from the collecting societies.

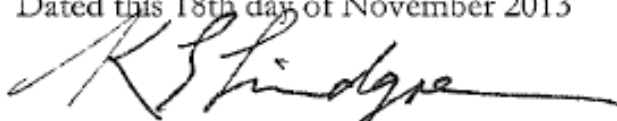
CONCLUDING GENERAL REMARKS

657. It should be said that my overall impression is that all of the collecting societies that have agreed to observe the Code seem to me to seek diligently to do so and to avoid non-compliance.
658. The “Complaints and Disputes” sections of this Report do not indicate how effective the Code is in improving the conduct of the collecting societies. If the Code had never been adopted, to what extent would that conduct today conform to the Code’s standards?
659. The question does not admit of a confident answer. My impression is that the requirement of an annual report to the Code Reviewer of compliance with the Code is a salutary and beneficial one.
660. In relation to the Review Period, three issues deserve to receive special notice.
661. First, APRA’s application for authorisation to the ACCC prompted the making of submissions to the ACCC which APRA passed onto the Code Reviewer. In addition, Live Performance Australia made a lengthy and detailed submission which prompted a lengthy and detailed response from APRA.

662. Second, there was the issue raised by Arts Law in relation to the commission charged by Viscopy on the statutory royalties which it receives from Copyright Agency, which itself has already deducted its own 10% commission.
663. Third, there is the ongoing issue as between AWGACS and Screenrights in relation to the remission to AWGACS of the part of Screenrights' collection to which AWGACS's "writer for performance" members assert an entitlement.
664. These three issues, the third of which is an ongoing source of irritation to AWGACS, has led to my report in respect of the Review Period being much longer than last year's report.

This report is now submitted to the societies and to the Attorney-General's Department of the Commonwealth of Australia. As is the settled practice under cl 5.2 (f) of the Code, a copy will be sent to each of those who made a submission to the Code Reviewer.

Dated this 18th day of November 2013



The Hon K E Lindgren, AM, QC

Code Reviewer

APPENDIX TO REPORT

Review of Code Compliance For the Year to 30 June 2013

Notice of the Review, with an invitation to make submissions by mail to the Code Reviewer at a specified address or by email by 31 July 2013, was given by the Societies to their members, and by the Code Review Secretariat to the licensees of the various societies or to bodies representing large classes of licensees, as well as to other interested persons, names and addresses having been supplied by the societies. The Notice was published in an advertisement in *The Australian* newspaper on 1 June 2013 and it was also placed on the websites of the societies. It was in the following terms:

The Code Reviewer
Suite 704, 4 Young Street, NEUTRAL BAY NSW 2089
EMAIL: codereviewer@gmail.com

COPYRIGHT COLLECTING SOCIETIES CODE OF CONDUCT CALL FOR SUBMISSIONS 2013

Each of the 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"), Viscopy Limited ("Viscopy"), Audio-Visual Copyright Society Limited ("Screenrights"), Australian Writers' Guild Authorship Collecting Society Limited ("AWGACS") and Australian Screen Directors Authorship Collecting Society Limited ("ASDACS"), subscribes to a code of conduct for copyright collecting societies. The Code came into effect in July 2002, and was last reviewed in July 2011. A copy of the Code is available on each society's website and can be downloaded or, if requested, a copy can be sent by post.

Compliance with the Code by participating collecting societies is currently the subject of an independent annual review being conducted by former Federal Court judge, The Hon Kevin Lindgren AM, QC.

The Code provides for interested parties to be able to make submissions directly to the Code Reviewer concerning a collecting society's compliance with the Code. Accordingly, should you wish to make any submissions to Dr Lindgren in that regard, please address them in writing to the following address by no later than 31 July 2013.

The Code Reviewer
Suite 704
4 Young Street
Neutral Bay NSW 2089
Email: codereviewer@gmail.com