

Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2002 to 30 June 2003

This report is made by J. C. S. Burchett, QC as Code Reviewer conducting an independent review pursuant to clause 5.1 and 5.2 of the Code. It relates to the level of compliance by the Collecting Societies with their obligations under the Code during the first full financial year of its operation. The societies are Australasian Performing Right Association Limited ("**APRA**"), Australasian Mechanical Copyright Owners Society Limited ("**AMCOS**"), Phonographic Performance Company of Australia Limited ("**PPCA**"), Copyright Agency Limited ("**CAL**"), 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**").

For the purpose of this review, members and licensees of the Societies were invited to make submissions, as were a number of trade associations and bodies which might be expected to represent licensees. (Further details are set out in the appendix to this Report.) A small number of submissions were received from these sources. The great bulk of the material reviewed came from the quite comprehensive documents annexed to the reports of the Societies to the Code Reviewer under clause 5.2 (b) of the Code, which requires these reports to include information concerning:

1. the Society's staff training in the Code, including in complaint handling procedures;
2. the Society's promotion of the importance of copyright and of the role and functions of collecting societies, including its own, and including the dissemination of information on these matters; and
3. the number of complaints received by the Society and how those complaints have been resolved.

The Review included interviews with senior officers, as well as other staff, of each of the Societies, in which their reports were examined and issues raised by them were clarified. Representatives of the Australian Broadcasting Corporation were also interviewed.

The focus of the Review is specified by clause 5.1 (d) of the Code as “the level of compliance by Collecting Societies with the obligations imposed on them by this Code”, and the report of the Review is required by clause 5.2 (c) to “report on compliance generally by Collecting Societies with [the] Code”. The latter provision also requires that a copy of the report be made available to:

1. each Collecting Society;
2. the Commonwealth Department responsible for the administration of the *Copyright Act, 1968*;
3. each individual or group that made a submission to the Code Reviewer; and
4. members of the public.

It may be said at once that the matters put before the review demonstrated, in terms of clause 5.2(c), a high level of “compliance generally by Collecting Societies with [the] Code”. Its importance was emphasised in many documents sent out to members and licensees; there was a great deal of educational material that was put before the Review; and the number and nature of complaints, and the manner in which they were dealt with, did not suggest the Code was not generally observed. There were, however, some instances where it appeared a complaint involved some undue delay or failure to provide adequate explanation of a problem.

The way complaints and disputes are dealt with lies indeed at the heart of the Code. In examining this question, one should keep in mind some general considerations. On the one hand, for every member or licensee who actually raises a complaint, there may well be several others dissatisfied for the same or a similar reason who do not go the length of complaining. As is pointed out in the Australian Standard for Complaints Handling (AS 4269-1995 at para 3.12), a complaint may be an opportunity to gain insight into a problem and to improve a service. On the other hand, not all complaints are objectively

justified. In a large organisation, such as **APRA/AMCOS** which has over 60,000 licensees and 36,000 members, for example, some complaints are to be expected; what must be asked, apart from how they have been responded to, is whether a significant number of them could and should have been avoided.

APRA/AMCOS (which I shall generally refer to simply as “**APRA**”, since **APRA** carries out the administration of **AMCOS**) is in a different position from some of the other societies, insofar as it has to deal with numerous small businesses making use of music, commonly by means of a radio or CD player, which it must attempt to persuade to take out a licence. Some proprietors have an entrenched attitude of opposition, that is reinforced by the failure of our community in the past to recognise and enforce the rights of copyright owners. **APRA** has developed literature aimed at explaining the relevant legal obligations, and its own role, as well as procedures for the resolution of complaints. It offers alternative dispute resolution, and one dispute with a licensee has been referred to an expert for determination. But on occasion, proceedings are brought for infringement.

APRA keeps Complaints Registers, in which both written and verbal complaints are recorded. In the two Complaints Registers in respect of licensing, there are recorded 47 complaints (5 in respect of media licences) dealt with over the period of a year. A high proportion of them were really expressions of dissatisfaction about the law as it applies to small businesses. A number were actually enquiries rather than complaints. But there were also communications expressing rejection of copyright law, and **APRA**'s role, in intemperate and abusive terms. It is, of course, difficult to assign cut-and-dried categories to often rambling communications, or, indeed, to clearer ones that move from one topic to another. But analysis of the 42 complaints which did not relate to media licences shows that 12 of them were couched in very rude or abusive or even obscene terms, suggesting a lack of rationality, and generally a strong objection to paying anything for the use of music. A further 12, reasonably expressed, were nevertheless indicative of objection to the copyright law of Australia and the role of **APRA** rather than any particular failing alleged against **APRA**, except that two of them showed the complainants did not understand (and were implicitly blaming **APRA** for this) how their licence fees could be regarded as payments in respect of the

music they had played, in the absence of any records of what had been played – a matter to which it will be necessary to return. There were 6 more that arose out of the complainant's own default in payment of licence fees, as did also a number of the abusive complaints. A further 6 concerned what should be classified as misunderstandings, and one referred to a copyright ownership problem of some difficulty and complexity. But 10 related to what, in some cases admittedly, and in other cases on a complainant's account which *might* well be true, amounted to office error or oversight within **APRA**. Of these, it can be said the records confirm that **APRA**'s officers have generally adopted an attitude of frank acknowledgment of mistakes, although sometimes there has been an undesirable delay in their dealing with the matter. Delay in sorting out an error is, of course, apt to irritate the complainant unnecessarily. The final category of these complaints is represented by 3 instances where, a small business having been sold during the period of a licence, the complainant objected to **APRA**'s policy of not adjusting the licence fee. (In one case, an *ex gratia* decision to apportion was made.) It is understandable that small adjustments may be something of a headache, but in one case the complainant pointed out that the effect was "double dipping" by **APRA** for the unexpired portion of the licence, since the purchaser of the business had to take out a licence from the date of settlement of the purchase. A review of the policy in question might enhance **APRA**'s reputation for the fairness of its dealings.

It will be appreciated that the numbers of complaints assigned to categories in the foregoing analysis add up to more than the total of 42. This is because some complaints have been assigned to more than one category.

The 5 complaints registered in relation to media licences were as follows:

1. There was a complaint from a small production company affected by a steep rise in **AMCOS** royalties. As the number of videos produced by it was indeed small, a reduced rate was readily acceded to.
2. A further complaint about royalties arose from a misunderstanding in respect of licensing arrangements, on which agreement was reached by discussion.

3. The third complaint is a confidential one from a member of the public alleging that a dance school reproduces music without a licence. **APRA** has written an appropriate letter to the dance school, and the matter awaits resolution.
4. A complaint from a radio station about the time taken in filling out an annual **APRA** form was responded to by an invitation to utilise alternative methods of which other radio stations had availed themselves without complaint.
5. One complaint from a radio station was pursued by it through several acrimonious letters which received detailed and appropriate replies from **APRA**. An examination of the correspondence reveals no departure by **APRA** from the Code. One thing it does reveal, however, is that, even at the level of a Chairman of a company conducting a radio station, there may be a failure to appreciate the need for collecting societies to use statistically valid survey methods, in determining the allocation of small amounts of royalties, to avoid administrative costs reducing the sum distributable to a derisory figure. The heat that is generated by inability to perceive this, as evinced by the particular complaint, and by other complaints, suggests the educational efforts of the collecting societies ought to include some greater emphasis on this problem and on the way the societies resolve it. The ubiquitous prevalence of a distrust of experts would make explanation of the techniques essential, even if the commitment of the Code to transparency did not. Although it is suggested the matter should receive further attention in the literature disseminated by collecting societies, it is appreciated explanations are already given, and the serious importance of the questions involved has long been recognised: see, for example, Shane Simpson: *Review of Australian Copyright Collecting Societies* (1995) at p. 142 (para. 14.6). But the explanations made are not always understood – or, perhaps, sometimes, have not been read. One submission to the Review was from a Church treasurer who, despite the considerable amount of information made available by both **APRA** and **CAL** on church music licences, did not understand how the societies “would ... know who to pay” out of the licence fees for hymns. Patient repetition, to be

distinguished from repetition by rote that is vain, seems here to be the only answer.

APRA keeps separate records of members' complaints. These are dealt with by its Member Services department, the staff of which are trained to deal with members' inquiries. A great deal of information is made available to members, the accessibility of which has been reviewed since the Code was adopted. The following matters have been registered as member complaints in the period following that adoption:

1. A member queried the amount received by him upon a recent distribution of royalties. This was not actually couched as a complaint, but rather as a request for the explanation, which was given in detail within three days.
2. A female member, who had been married and then divorced, and had abandoned her married name, complained in a lengthy letter that **APRA** had referred to her by the wrong name. Her letter indicates that confusion had antedated her divorce, since her unusual first name was wrongly spelled in her birth certificate. **APRA** wrote back apologising.
3. A member put forward two separate complaints – one that queries raised by him some years earlier about royalties for his works played on community radio overseas had not been answered, and the other questioning the paucity of a royalty payment received by him in respect of music played in retail stores. **APRA's** records showed that the queries about radio broadcasts had been appropriately investigated, but apparently there had been a failure to advise the member. A detailed explanation, with apology, was provided within one week of receipt of the complaint (to which an interim reply had been sent on the day of its receipt). As for the music played in retail stores, **APRA's** comprehensive reply appears to demonstrate that no error had occurred, and certainly no breach of the Code.
4. A complaint from a member who had received no distribution, although works of his had been broadcast on community radio, was made to the Department of Communications, Information Technology and the Arts

of the Commonwealth, and referred to **APRA**. A full reply was sent to the member, explaining that the small pool of licence fees received from community radio necessitated a distribution system based on a small sample survey. The explanation appears to have satisfied the complainant, but the matter provides yet another instance of the problem discussed earlier in relation to the fifth of the media licence complaints.

5. The final complaint by a member relates to **APRA**'s determination of certain distributions in respect of jingles. The complaint has been pursued through lengthy correspondence involving the complainant's solicitors, and has also been the subject of a formal submission to this review of the quality of **APRA**'s compliance with the Code. The complainant submits there has been a failure to comply with the Code insofar as "**APRA** has not developed any procedure for resolving disputes between **APRA** and it [*sic*] members"; that the distribution policy in respect of jingles lacks certainty; and that **APRA**'s administration in respect of remuneration for jingles is not transparent. This Review, of course, is being carried out pursuant to specific provisions of the Code; it is not an arbitration to determine the correct legal view of the application of a particular distribution policy to particular facts. **APRA** does have a formal procedure to deal with complaints through a committee known as the Complaints Committee or, particularly where a policy issue is involved, the full Board of **APRA**. The peculiar problems raised by issues of distribution, which must affect all other members entitled to share in the distribution, obviously restrict the methods of alternative dispute resolution which might be suitable. In this case, the correspondence shows the complainant declined to discuss whether some appropriate method could be substituted. As for the distribution policy with respect to jingles, that policy has to cope with certain practical difficulties, and the existence of problems in its application in some circumstances does not demonstrate that clause 2.4 of the Code has been neglected. Nor does the detailed and careful elaboration of the issues, in **APRA**'s correspondence with the complainant, support the allegation its dealings with its member were not "transparent" as required by clause

2.2(c) of the Code. No breach of the Code was shown by the submission.

CAL has had no complaints or disputes in the period under review. In accordance with the Code, **CAL** has established a complaints procedure and has also established a procedure for determination of an unresolved dispute by an expert in cases where both parties are willing to have the dispute dealt with in that way. If **CAL** is not so willing, it has undertaken to give reasons within 14 working days. **CAL** has also established a procedure for expert determination of a dispute between members concerning entitlement to a distribution from **CAL**. The existence of these procedures has been advised to members through **CAL**'s newsletter, *CALendar*, and to both members and licensees in various other ways.

Screenrights has had one complaint concerning a sum of less than \$1,000 to which there were two claimants. No allegation against **Screenrights** was involved, and the disputed entitlement was satisfactorily determined by an expert engaged by **Screenrights**. Reserving distribution policy to its Board of Directors, **Screenrights** has established a procedure for expert adjudication of other disputes between it and its members by agreement of both parties. **Screenrights** will bear the cost of the expert. **Screenrights** has also established a procedure for dealing with multiple claims and a procedure for mediation of disputes between it and its licensees, by agreement and provided the dispute does not relate to the quantum of equitable remuneration, a matter for which, of course, the *Copyright Act*, 1968 makes provision.

PPCA has had no complaints in the period under review and no disputes other than ordinary debt collection actions in respect of defaults in payment under licences. There have been some queries, but all of these have been satisfactorily resolved. **PPCA** has established formal procedures to deal with complaints from licensees, copyright owners and artists. If a complaint is not resolved by these procedures, **PPCA** has provided for mediation between itself and a copyright owner, or referral to a Board of Review of a dispute with a licensee. Perusal of the two decisions given by a Board of Review (both before the adoption of the Code) suggests the procedure works impartially and well.

ASDACS is as yet a very small Society, which was formed in 1995 and began distributing payments to members in 1998. Its sole source of monies is receipts from some European collecting societies. As the gross sums in question are not large, administration inevitably absorbs a higher percentage than would be the case if economies of scale were available. Some members have raised entirely friendly questions about the deductions made from gross receipts, but have expressed satisfaction with the explanations given them. Otherwise, the Society has had no complaints. **ASDACS** has not yet formalised procedures to deal with complaints and disputes, but is in the process of doing so.

AWGACS is also a very small Society, established in 1996. Like **ASDACS**, it receives monies only from overseas societies. It has had no complaints in the period under review. It is still in the process of setting up a complaints procedure.

Viscopy has had a complaint that arose out of an agreement to handle licensing for posters etc for a travelling exhibition of a particular artist's works under the auspices of the National Gallery of Australia. Perusal of the correspondence between **Viscopy** and the copyright owner shows there was a measure of dissatisfaction on the owner's part about the conduct of the exhibition, and **Viscopy** was blamed, on grounds that were not made quite clear, for allowing matters to develop as they had. It does not appear that the problems involved any failure to comply with the Code, and they appear to have been resolved – in part, by a mutual rescission of the contract as between **Viscopy** and the owner.

In addition to this matter, **Viscopy** advised the Review of an issue raised by a copyright owner about an online service provided by **Viscopy**. This did not appear to be a complaint so much as a request for further details of information which had been provided.

Another matter reported as a complaint was really a case of a copyright owner rejecting advice about copyright law, which **Viscopy** had obtained from a lawyer and passed on to the copyright owner. There was certainly no breach of the Code here.

Another “complaint” related to **Viscopy**’s failure to provide a service which would have fallen outside its normal role as a collecting society, and would certainly have involved time and expense.

An oral complaint rejected in writing by **Viscopy** as factually incorrect was not pursued. In any case, it was made, investigated and responded to before the adoption of the Code.

A complaint by one member about **Viscopy**’s failure to achieve distribution to certain non-members was fully and appropriately answered.

A matter not made the subject of a formal complaint to **Viscopy**, but the subject of a submission to the Review, was a dispute between a member and a client of the member concerning certain reproduction rights. This arose long before the adoption of the Code. At the request of the member, **Viscopy** instructed solicitors on her behalf; solicitors also represented the other party. The dispute dragged on for a very long time, despite an initially abortive arrangement for settlement. Ultimately, a significant amount of royalty was recovered, and it was received by the member in full as **Viscopy** had arranged the representation. The submission complains that, over the long period, **Viscopy** was lacking in candour in that the member was not kept informed promptly of problems that were encountered. It may well be there were some failures of communication in a complex matter involving, if not too many, at least several cooks. But, on the other hand, it should be recognised that **Viscopy** was going well beyond what a collecting society could normally be expected to do for a member, and did ultimately achieve an agreed recovery. As has been said, the dispute antedated the Code, and under current practice at **Viscopy**, the Review was informed, such a dispute would not now be undertaken by **Viscopy** on a member’s behalf.

In the light of the misunderstandings implicit in a number of these matters, and having regard to the general terms in which **Viscopy**’s membership documents are expressed, a reconsideration of their terms to ensure their clarity as to what **Viscopy** can and cannot do for members seems desirable. There are, of course, practical limits, for reasons of cost, to the extent of the informative material a small society can send out.

The Review has dealt at length for each society with whether complaints have been received, their nature, and how they have been handled. This is because:

1. The question of complaints and complaints handling is a major focus of the Code; and
2. The content of complaints received, if on examination they appear justified, is the clearest indication of any breaches of the Code which may have occurred in other respects.

In view of the absence of other than a small number of complaints of relevance to the Code, and the generally appropriate reactions to those complaints that have been made, it will be sufficient to comment more broadly on some obligations of the Code compliance with which few members or licensees have questioned. Earlier in this Report, compliance generally with the Code has already been found.

The Code requires a society to “treat its members fairly, honestly, impartially, courteously” (cl 2.2(b)), to “ensure that its dealings with Members are transparent” (cl 2.2 (c)), and to treat licensees in the same way (cl 2.3 (a) and (b)). The material before the Review shows these obligations have been taken very seriously.

An aspect of transparency in dealings with licensees is the taking of “reasonable steps” to ensure the language of licences is “plain English” that is “readily understandable by Licensees” (cl 2.3 (c) (ii)). Of course, copyright law is far from readily understandable in various respects, even by lawyers, and indeed some of its concepts have come via international treaties from outside the legal system with which Australians have some familiarity (the Common Law). Its language cannot always be plain to the untutored. So the qualifying words “reasonable steps” are not without meaning. But no specific, reasonable complaint has been made to the Review in this regard. If the forms of licences adopted by the various societies are compared with common forms of leases and insurance policies employed in commercial relations, the comparison will certainly not prove unfavourable. The Code

nevertheless aspires to do better, and the forms must be kept under constant review as any remediable difficulties appear.

The Code provides specifically (by cl 2.7) for the taking of “reasonable steps” to ensure a society’s employees and agents are aware of the procedures for handling complaints and resolving disputes, and are able to explain them. Societies will also “engage in appropriate activities” in the nature of copyright education (cl 2.8). The Review found these obligations, too, to be taken seriously by the societies – in more sophisticated ways by the larger and longer established societies. The website *enhanceTV*, by which **Screenrights** links film and education, so as to promote and assist educational copying, is a good example of an educative activity which is paralleled by various activities of other societies. An example of reasonable steps to ensure employee awareness of complaint handling procedures is a series of circulars to employees at **APRA** emphasising the requirements of the new Code, and detailing the procedures. **APRA** also issues a newsletter for licensees which tells them in detail about the Code, and numerous leaflets giving both specific information on particular matters relevant to copyright and general information about itself and other collecting societies. In addition, it is involved in seminars and lectures and **APRA** and **AMCOS** are responsible for more substantial publications such as *Music Copyright for Schools*, *Music Copyright for Churches*, and *A Practical Copyright Guide to the Use of Print Music in Australia*. It has given wide notice of the existence of the Code. Similarly, **CAL** has adopted specific procedures to make their obligations under the Code known to its employees, and to advise other persons that it aims to meet those obligations. It also disseminates widely information about copyright law and its own role, and publishes a newsletter to which reference has already been made.

In addition to providing for this and succeeding annual reviews of the level of compliance by the societies with their obligations under the Code, cl 5 provides for a review of the Code itself. Cl 5.3 (a) (i) specifies that the latter review shall take place “within two years of the Code coming into effect”, and sub-para (ii) then adds “and ... at least once within each subsequent three year period”. For this purpose, the Reviewer is to “invite written submissions” under cl 5.3 (b) (i); “convene and publicise widely, during the period in which submissions may be made, one or more meetings ... [for] oral

submissions to the Review” under sub-para (ii); and “allow a period of at least two months for the making of submissions” under cl 5.3 (d).

Plainly, compliance with cl 5.3 would involve a substantial process being completed prior to 30 June next if the Review were to be carried out “within” the period specified by cl 5.3 (a) (i). One consequence would be that the Code itself would be reconsidered *before* the experience of its second year of operation had been reviewed – that is, in the light only of the experience gained by the present Review. It seems likely the intention of those who drafted the Code was rather that at least a full two years’ experience would be able to be taken into account, so that any gaps or problems might have become apparent. Perhaps the word “within” in cl 5.3(a)(i) was inserted inadvertently, “after” being intended.

It is respectfully suggested that the collecting societies might with advantage amend the provision by substituting “after” for “within”, so that the review of the Code could be launched following next year’s review of compliance for the period up to 30 June 2004 and in the light of the operation of the Code for two full years. The matter was raised during interviews with a number of representatives of the societies, as well as officers of the Attorney-General, and no objection was seen to the course proposed.

This Report is now submitted to the collecting societies and to the Attorney-General’s Department of the Commonwealth of Australia.

Dated this 26th day of September 2003.

The Hon J C S BURCHETT, QC
Code Reviewer