

Report of the Code Reviewer
(the Hon J. C. S. Burchett, QC, formerly a Justice of the
Federal Court of Australia) upon a review of the operation of
the Code of Conduct of the Copyright Collecting Societies of
Australia

Issued April 2008

In addition to annual reviews of the conduct of the eight Copyright Collecting Societies listed in the appendix as evaluated by reference to their Code of Conduct, the Code Reviewer is required to examine triennially the operation of the Code itself and consider the question whether any amendment should be recommended. This is the second report upon a triennial review, and it should be read with the first such report, issued April 2005. If it is necessary to refer to an individual society, it will be identified by its abbreviated title: APRA, AMCOS, PPCA, CAL, Screenrights, Viscopy, AWGACS or ASDACS.

Publicity, as required by the Code, was given to the review (details of which are contained in the appendix), so that persons and organisations concerned in the operations of the Collecting Societies would have the opportunity to make submissions, either in writing or orally at a public meeting which was held on 4 February 2008, chaired by the Code Reviewer. Two formal written submissions from representative bodies were received commenting upon the Code, and a representative of the Attorney-General's Department was present at the meeting.

When the Code was adopted by the Societies from 1 July 2002, it was envisaged that the Code Reviewer, in reviewing its operation, should draw upon his experience gained in the annual reviews made of the conduct of the Societies in implementing it. So that he might do so in respect of the year 1 July 2003 to 30 June 2004, in the review issued April 2005, the societies

agreed upon a minor amendment to the timing provision in CI 5.3(a)(i) of the Code, giving it the effect of requiring the review to take place, not “within two years of the Code coming into effect”, as originally provided, but “following the expiry of two years from the Code coming into effect”. In making the present review, the Code Reviewer is able to engage in a longer survey, taking account of the state of affairs revealed by each of the five annual reviews he has now completed of the conduct of the societies in relation to their Code. A perusal of the five annual reports provides many illustrations of the beneficial impact of the Code in a wide range of particular instances. More importantly, it shows that the Code has become embedded in the policies and day-to-day procedures of the societies. Where failures occur, as they will in any large organisation, they are dealt with in accordance with the Code, which both tends to ameliorate the harmful effect of a particular inappropriate action and tends also to lessen the prospect of any repetition. In the annual report for the year ended 30 June 2005, it was pointed out that the number of general licensing complaints against APRA had dropped over the period since the adoption of the Code “to exactly one third of the number of general licensing complaints recorded for the initial year”. Subsequent annual reports have demonstrated that this great improvement was no mere statistical aberration. Although it was probably not due solely to the Code, another factor in it being the growing public awareness of the legal rights of authors and composers, of the public interest asserted by Parliament in the observance of those rights and of the corresponding obligations of users of copyright material, nevertheless the conclusion drawn by the Code Reviewer as a result of the annual reviews is that the Code’s contribution was very substantial.

The provision of easily accessible formalised complaints procedures and of means designed to assist in the determination of complaints amenable to determination without resort to litigation, have proved beneficial in many instances. And the records show a meticulous care to acknowledge complaints, record them faithfully, and deal with them. The very fact of officers and employees of the societies being regularly reminded that all those activities covered by the Code will be subjected to annual independent review has had an inevitable impact upon the way in which many things are done. Apart from this subtle but important effect of the Code, it governs

quite directly how societies operate in the various respects that have been examined in the annual reports and need not be repeated here.

Nothing was put to the Code Reviewer at the public meeting which would qualify the foregoing discussion.

One of the two written submissions made to the review came from the Australian Digital Alliance and the Australian Libraries' Copyright Committee. It raised a series of issues which will be discussed in the following numbered paragraphs:

1. Although the submission expresses "support [for] this Code and recognise[s] its importance", there is a general complaint of "lack of practical detail in parts of the Code". Of course, a Code of Conduct is very much concerned with broad principles, such as fairness or transparency, and does not consist of detailed regulations of the kind that, relevantly to the present Code, will be found particularly in the legislation and rules applicable through the Copyright Tribunal and the ACCC. Nevertheless, the Code of Conduct does contain many quite precise obligations. The question raised by the submission can really be considered only with reference to specific further obligations put forward as desirably to be imposed on the societies. The one such specific obligation that emerges clearly from the submission is a proposed extension of the obligation of transparency in CI 2.3(b) of the Code to require a society to disclose raw survey data. This is a question which has been the subject of debate for the past decade in the Copyright Tribunal and the Federal Court; has been discussed by the Code Reviewer in two of his annual reports; and was raised again in *Copyright Agency Limited v Queensland Department of Education* before the Copyright Tribunal. Because of the very real complexities involved, it obviously is not susceptible of satisfactory solution by any recommendation to amend the Code, at least before the final word has been spoken by the Tribunal or the Court, and the submission ultimately acknowledges as much.

So far as it might be thought any other (as yet unspecified) particularity might usefully be imposed upon the obligation of transparency, it needs to be borne in mind that decisions under this, as under other broad provisions of the Code, are reviewed annually by the Code Reviewer, so that an element of particularity is added to the Code's general obligations. In fact, the review process has led to the modification of practices in particular instances by reason of an application of a general standard in a manner considered by the Code Reviewer (and upon reflection by the Society in question) to be more appropriate than that previously adopted.

2. The next submission unfortunately involves a misreading of Cl 3(a)(ii) (A) and (B) of the Code. Under that clause, each society binds itself to "develop and publicise procedures for resolving disputes between the Collecting Society and: A. its Members; and/or B. its Licensees."

The suggestion is that the word "or", in the composite expression "and/or", should be deleted because it somehow aborts the obvious intention of the provision to require the creation both of procedures to relate to Members and of procedures to relate to Licensees. But the clear objective of the drafting of the clause was to be comprehensive, not to exclude a named category; indeed, it may be that it was envisaged a particular member might also be a licensee. The suggested amendment is unnecessary.

However, the submission raises a separate question whether the Code should require a society to adopt some alternative means of fixing the unresolved terms of an appropriate form of *proposed* licence, where the process of negotiation has led to an impasse, in order to bypass the Copyright Tribunal established by the Copyright Act for the purpose. In suggesting that such an alternative should operate under the Code's requirement in respect of a dispute between a society and a licensee, the submission makes no reference to the question whether that requirement can simply be

applied to someone who, by hypothesis, is not truly a licensee since the terms of the proposed licence have not been accepted. The statutory assumption is that the terms of licences will be negotiated, subject to the ultimate control in the public interest of the Copyright Tribunal. Certainly, there will be cases where the cost of a Tribunal hearing will be a deterrent to the pursuit of some issue (this is generally true of arbitration, mediation and other methods of dispute resolution). But it has already been pointed out in this report that the Code Reviewer is intended to utilise the experience of the operation of the Code gained through its annual reviews. That experience, to date, confirms that disputes not concerned with large issues or licensees in a substantial way of business have generally been resolved sympathetically under complaints procedures, the use of which has come up for the Code Reviewer's review and report whenever those procedures have been invoked. There has not been revealed a need to impose some further regulatory requirement by the device of amending the relevant provision of the Code. Certainly, the suggested device of simply deleting the word "or" from Cl 3(a)(ii)(A) would be confusing rather than helpful.

3. A submission was also made concerning cl 5.3, the provision of the Code headed "Review and Amendment of the Code". This heading's succinctness masks an ambiguity which the submission exposes. At the outset, it should be said the heading should read "Review and *Recommendations for* Amendment of the Code". For the substantive provisions that follow do not, of course, make the Code Reviewer a legislator who may impose a Code provision: he or she simply makes recommendations in a report to the societies, the relevant Commonwealth department and others. The Code is an example of self-regulation, and can only be amended by the societies, notwithstanding that in practice they seek input from the Attorney-General's Department and the Code Reviewer, as well as persons who respond to the advertisement of the triennial reviews.

Unfortunately, the undoubted ability of the societies to amend their own Code of Conduct, which in practice has only been exercised after consultation with the Attorney-General's Department and/or upon the recommendation of the Code Reviewer, has been thrown into some obscurity by an error in reproduction of some copies of the Code. Early in 2007, upon a suggestion discussed by the societies with the Attorney-General's Department and the Code Reviewer, it was decided to amplify the Code Reviewer's powers under CI 5.2 to include the additional powers now to be found in CI 5.2(c), (d) and (e). The desirability of these additional powers has not since been questioned, although it will be recommended in this report that a slight alteration, purely in the interests of clarity, be made to the drafting of CI 5.2(e). But, either in connection with the consideration of these amendments, or their insertion into copies of the Code made publicly available by the societies, which involved the insertion of a reference to them in CI 5.1 (see para (c) (ii) of that clause), or by some independent error in the reproduction of the Code, an important part of CI 5.1 was omitted from the version posted on a number of websites. The amendment discussed and resolved upon did not involve any such omission, which was never put forward as desirable, or even contemplated, and it seems quite clear it occurred through a simple mistake. Because, by the time it came to attention, the new paragraphs had been inserted in CI 5 which were required by the amendment that had been adopted, the easiest way to restore the original language was to write it back as the opening two sentences of CI 5.1(b), where the meaning is in no way affected. That has already been done, as an administrative measure, by all the societies, in the copies of the Code made available to members, licensees and others, there being no actual need for a further resolution since there never was a resolution to delete the provision. Nevertheless, in order to remove any risk of further confusion, it is recommended that the societies resolve to confirm the action taken to restore the mistakenly deleted language in cl 5.1(b), as follows:

(b) The Code Reviewer will be independent of the Collecting Societies and will have no association with any of them. Neither a lack of independence nor any "association" will, however, be inferred purely by virtue of that person having provided professional services to a collecting society of a kind that does not, or did not, relate to a matter covered by the Code. The Code Reviewer will be appointed for a minimum period of three years.

The final sentence of cl 5.1(b) was not affected by the reproduction error. It, like the first and second sentences, was part of the Code from its inception, and attention was specifically drawn to it as confirming the Code Reviewer's independence when he was appointed: that is to say, as is the case with Acting Justices of several Supreme Courts (although in practice their terms are shorter than three years), for instance, his appointment was (and by the Code was to be) for a fixed term, not terminable at the whim of the societies or any of them.

Upon reconsidering the drafting of Cl 5.1(b), and having the benefit now of a number of years of experience both of the operation of the Code and of the issues that have arisen under it, the Code Reviewer does not recommend any amendment of this provision. The fact that, although his or her appointment is required to be for a term of a minimum duration of three years, the appointment is made by the Collecting Societies which have to bear the costs and fees involved (being of course fixed from the outset under the contract of appointment) does not detract from the independence of the role for which the Code provides. That role is an integral part of the self-regulation the Code was designed to achieve. The Code supplements, but in no way supplants, the regulatory control imposed by the Copyright Act through the powers of the Copyright Tribunal and by the Trade Practices Act.

The slight alteration, earlier referred to, which it is recommended should be made to cl 5.2(e) would not change the effect of the provision. But para (c) of cl 5.2, which para (e) implements, refers to two distinct complaints: an initial complaint to a society under cl 3(c), and a subsequent complaint to the Code Reviewer under cl 5.2(c). It is, of course, the complaint to the Code Reviewer the decision on which is the subject of cl 5.2(e), but (in the interests of greater clarity) the Code Reviewer recommends the insertion in para (e), after the words "the merits of the complaint", of the further words "that the society failed to comply with cl 3(c)".

The other submission from a representative body was received from The Restaurant and Catering Industry Association of Australia (Restaurant & Catering). This body states that it represents Australia's 40,000 restaurateurs and caterers, its membership comprising some 7,500 businesses. Its submission focuses on the following assertion:

"The greatest concern of the Association and its members is the habitual licence fee creep that both collecting societies with whom the Association is involved (APRA and PPCA) seek and the constant review of fees that pose a potential burden on business."

At the same time, Restaurant & Catering emphasises what it says is the financial advantage of the societies in waging disputes before the Copyright Tribunal, and urges that the Code should require Collecting Societies to negotiate fee increases before lodging an application to the Tribunal.

Reading this submission, one would naturally infer that the members of Restaurant & Catering had been the victims of "habitual licence fee creep" sought by APRA and PPCA "and the constant review of fees" pursued by the societies, so as to impose unreasonable burdens of costs upon the Association and its members.

But, to take first the case of APRA, the first society mentioned in the submission, its licence fees are generally increased annually in accordance with the Cost Price Index (CPI), not by “constant review”, whether through the Copyright Tribunal or otherwise, but pursuant to a term of the licence which itself reflects either a tariff negotiated to cover a substantial period of years, or a tariff approved by the Copyright Tribunal on the same basis. On occasion, APRA has agreed not to apply the CPI for a period, or, where a new tariff has been negotiated or approved by the Tribunal, to be phased in over a period, APRA has agreed not to apply a CPI increase while the new rate is being phased in. CPI adjustments cannot be said to be unusual in business, or in contractual arrangements, especially when a tariff is to endure for a substantial period. As for any implication that APRA has indulged in the constant review of fees through the Tribunal (thus forcing licensees to incur a heavy burden of costs), a glance at the published decisions of the Tribunal since 2002, when the Code was adopted, demonstrates that APRA has been involved in only a handful of matters before the Tribunal, nor has any other collecting society been involved in more than a few. On closer examination, it will be seen that less than one published decision a year, over the period, related to rates, and that of the small number of published decisions, a good proportion involved parties opposing a collecting society that could not be said to have litigated on unequal financial terms.

Returning to the core complaint made in the submission, that Restaurant & Catering and its members have been subjected to the cost of meeting “constant review of fees”, it is necessary to look at the history of APRA’s tariff applicable to the Association’s members. The current application form calls the licence by the title “Background Music – Hospitality”, and indicates it relates to a “restaurant, café”. In keeping with APRA’s usual practice, it expressly provides for an annual CPI adjustment, subject to a phasing-in period. This current tariff, introduced by agreement reached through negotiations which commenced before and continued after a reference to the Copyright Tribunal, forms part of a more sophisticated tariff system than the previous one for Background Music which had lumped together restaurants and cafés, fitness centres and retail businesses. At the same time as the lodging in the Tribunal of the reference that led to its published decision in

2006 on the rates for background music in retail premises, APRA referred licence schemes relating to background music in fitness centres, hospitality venues, and restaurants and cafés, but in each of these latter cases negotiations with industry bodies, including the Australian Hotels Association, the Registered Clubs Association of NSW and Clubs Australia, and Restaurant & Catering, led to agreed tariffs. When it is suggested that the course taken was part of a burdensome process of “constant review”, it should be understood that the earlier tariff had endured since the early 1970s, and had last been amended by a provision for an annual CPI adjustment inserted by a 1975 determination of the Tribunal.

The other Collecting Society referred to in Restaurant & Catering’s submission is PPCA. Its tariff relevant to restaurants and cafés underwent in 1995 some changes of categories based on restaurant capacity, but otherwise was not increased from 1989, except for a GST adjustment in 2000 and CPI adjustments no more than once per calendar year until April 2007 when objection was raised to any CPI increase. Since then, PPCA has been negotiating with Restaurant & Catering for a new tariff to include CPI adjustments. No application has as yet been made by PPCA to the Copyright Tribunal. As far as PPCA’s other tariffs are concerned, since 2000, and apart from CPI adjustments, (1) through negotiation with an industry group in 2002 it has established a Cinema Exhibitors tariff to operate until June 2008 with annual increments; (2) it has established by a reference to the Copyright Tribunal in 2007 a Nightclubs tariff and a Dance Parties tariff, in respect of each of which the orders of the Tribunal provided for annual CPI adjustments; (3) it has on foot a reference in the Tribunal relating to fitness classes; and (4) it commenced on 7 December 2007, after more than a year of prior negotiation, a reference to the Tribunal for the confirmation of a new television commercial licence scheme, the other parties to the reference being commercial telecasters and Free TV (formerly known as FACTS).

The Code of Conduct of the Collecting Societies contains clearly worded obligations stated in cl 2.3 with respect to licences and licence fees. There is also provision in cl 3 for complaints by a society’s licensees and for disputes between it and them, and under the review provisions of the Code the way the society deals with such complaints and disputes will inevitably come

under review. The as yet untested new provisions in cl 5.2(c), (d) and (e) of the Code provide a specific means of review of the question whether a complaint was addressed as required by cl 3(c) of the Code. While the new provisions *are* as yet untested, the operation of the other provisions has been reviewed now annually over the period since 1 July 2002. During that time, it does not appear that the societies have resorted unduly to the Tribunal established by statute to determine (inter alia) tariffs, nor that individual disputes have been dealt with oppressively. In a number of matters suitable for expert determination (not all matters are), collecting societies have offered it upon terms favourable to disputants and sometimes it has been accepted so as to determine a dispute. Having had the opportunity in five annual reviews to examine, as they arose, the concrete examples that evoked some question, the Code Reviewer does not consider any amendment of the relevant provisions of the Code is now called for.

Specifically as to Restaurant & Catering's suggestion that the Code should require collecting societies to negotiate fee increases before lodging an application to the Copyright Tribunal, and also "to expend the majority of their effort in increasing the coverage of the Licensees as opposed to seeking to generate additional revenue from their existing Licensee base", it is apparent that their practice is to endeavour to negotiate where a tariff appears to them to be inadequate or inappropriate, and that this is just what PPCA has been doing for about one year now in respect of its restaurants and cafés tariff. Ultimately, of course, if agreement cannot be reached, an application to the statutory tribunal seems an unlikely subject for a prohibition in a Code of Conduct governing the operations of a collecting society which owes duties, reflecting an important public interest, to collect monies representing a property right of its members. Restaurant & Catering itself acknowledges, in its submission, that those societies which are subject to the Attorney-General's Guidelines are bound by the following guideline:

"A society should exercise reasonable diligence in the collection of equitable remuneration due to the society."

Each of the collecting societies which has adhered to the Code has adopted the aim set out in cl 1.1(b)(i), to “achieve best practice in the conduct of its operations”. Both reasonable diligence and best practice require collecting societies, certainly to endeavour to reach the full range of businesses that make use of copyright material belonging to members, but also to endeavour to secure fair and appropriate rates of remuneration for such usage.

Prioritisation between these endeavours must surely depend upon the circumstances of each situation confronted by a society, and the suggested preference for one course of action, if written into the Code, would handicap a society in pursuing best practice in a particular case. An amendment to impose such a rule is not recommended.

The Code Reviewer considers, as has already been stated, that the Code is operating effectively, and the only amendments recommended are those previously set out in this report in relation to the heading to cl 5.3 and the drafting of cl 5.2(e). Additionally, the Code Reviewer recommends that the societies resolve to confirm formally the action already taken to restore the language in cl 5.1(b) mistakenly deleted from a number of published versions of the Code.

A final observation. The submissions received by the Code Reviewer over the years, in respect of the annual reviews of the Code, reveal a general acceptance of its value, but, in common with the two formal submissions received upon the present review, complaints about its observance by the Collecting Societies often suggest that unrealistic expectations are held of its effect. It is not a *deus ex machina* solving every problem. Specifically, a collecting society, acting in accordance with the Code, may pursue a policy which a complainant does not like without attracting any condemnation under the Code. In a situation where a society and a complainant hold opposed views (as in the case of raw survey data previously mentioned), it cannot be said that the Code requires the society to abandon a principled stance, just because a different approach is honestly, and (seen only in its own terms) without question reasonably, put forward. In such cases, there needs to be a determination, perhaps by an independent expert, but where large issues, or conflicts between classes of members it is the society’s duty to represent,

are involved, that may not be appropriate. The ultimate decision may have to be made by the Copyright Tribunal, as the body constituted to make such decisions. Cost is often raised as a problem, but most lawyers with practical experience of various modes of determining disputes would contend that the determination of large issues, as distinct from small matters where compromises, both in procedures and on the merits, will often reduce costs, or where early mediation may well succeed, does generally require substantial expenditure, whether or not the parties resort to a tribunal such as the Copyright Tribunal. In the kind of situation under discussion, the Code nevertheless continues to have a role because the society is bound to conduct itself in accordance with standards transcending those sometimes seen in business, but the foundation of the decision must be in the applicable legal rights and obligations.

Dated this 17th day of April 2008

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above a solid black horizontal line.

The Hon J C S BURCHETT, QC
Code Reviewer

Appendix to the Report of the Code Reviewer

1. The societies to which this report relates 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**").
2. Details of the advertisement of this review are:
 - (a) The Australian newspaper – Saturday 1 December 2007, as follows:

*The Code Reviewer
Suite 701
1 Young Street
NEW TRALBY, NSW 2089*

**COPYRIGHT COLLECTING SOCIETIES CODE OF CONDUCT
CALL FOR SUBMISSIONS**

A meeting open to the general public will be held by the Code Reviewer (The Hon J C S Burchett, QC) in respect of the Code of Conduct of the Collecting Societies (Australasian Performing Right Association Limited ("**APRA**"), Australasian Mechanical Copyright Owners Society Limited ("**AMCOS**"), Phonographic Performance Company of Australia Limited ("**PPCA**"), Copyright Agency Limited ("**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**") at:

APRA, 6-12 Atchison Street, St Leonards, NSW
on
Monday, 4 February 2008
between the hours of **9.30 am and 4.00 pm**

at which members of the Societies, their licensees and the general public may make oral submissions to the Review being conducted by the Code Reviewer of the Code of Conduct, a copy of which may be obtained at <http://www.apra.com.au> and <http://www.copyright.com.au> or by application to the above address.

Persons wishing to make an oral submission at the meeting hereby called are requested to notify the Code Reviewer at the above address and to submit on or before **28 January 2008** an outline of their submission.

Written submissions are also invited, to be sent on or before **29 February 2008**, to the Code Reviewer at the above address, on the operation of the Code and/or on any amendments that are necessary or desirable to improve the operation of the Code.

- (b) Posting on individual societies' websites for the period from early December 2007 until the close of submissions.