

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 2005.

"O, it is excellent

To have a giant's strength, but it is tyrannous

To use it like a giant." –

Measure for Measure, Act 2, Sc.2, l. 109

From the beginning of Copyright Collecting Societies, there were those who feared the strength they might achieve. Historically, this was a factor in the creation of a Copyright Tribunal, both here and in the United Kingdom, although countries like France have preferred to rely on their general laws regulating competition and monopoly powers. A recent approach to the problem in Australia, which has attracted some attention overseas, is the voluntary adoption by the eight Collecting Societies, the names of which are noted in the Appendix, of a Code of Conduct designed to set a benchmark for their own performance, and at the same time, to assure the community, their members and those with whom they deal that, in Shakespeare's words reproduced above, they will not use their strength "like a giant", but will observe a high and clearly stated standard of conduct.

In order to ensure that the Code of Conduct should not become a form of words changing nothing, but should find expression in the daily actions of the societies and grow with their growth and development, provision was made for annual reviews of their observance of it and for triennial reviews of the Code itself and its operation. This is the first such triennial review carried out independently by the Code Reviewer, as required by the Code.

It should be recorded, at the outset, that the review was publicised widely (details will be found in the Appendix), submissions being invited from interested persons and bodies, and a public meeting, advertised well in advance, being held and chaired by the Code Reviewer on 7 February 2005. The responses received did not suggest that the Code has failed of its purpose, or is not being observed, or requires significant amendment at the present time. On the contrary, it appears to be achieving the results that were hoped for from it.

This review of the Code itself was deliberately delayed until after the completion of the second annual review of the societies' observance of the Code. An amendment of a time provision was required so that the experience of those two years might be taken into account. In each of them, the review showed there had been a high level of "compliance generally by Collecting Societies with [the] Code", to use the words of CI 5.2(c).

Although, in almost all instances, these reviews showed that the responses of the Societies to complaints had been reasonable and appropriate, analysis of the nature of some complaints did, perhaps, reveal where the saddle might rub for some people. It is not possible, or at any rate wise, to rest content with the past level of success. In my first report, I drew attention to the admonition provided by the Australian Standard for Complaints Handling (AS4269-1995 at para 3.12) that a complaint may be an opportunity to gain insight into a problem and to improve a service. I believe this is the spirit in which the Societies have generally approached compliance with the Code.

I turn to the question whether there is any reason to recommend any amendment of the Code. A few issues have been raised in that regard, to which I shall refer in numbered sections, as follows:

- (1) Two questions relate to cl 2.3, headed “Licensees”, which provides:

2.3 Licensees

- (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;
 - (ii) take reasonable steps to ensure that all licences offered by the Collecting Society are drafted in plain English and are readily understandable by Licensees; and
 - (iii) consult with relevant trade associations in relation to the terms and conditions applying to licences or licence schemes offered by the Collecting Society.
- (d) Licence fees for the use of copyright material will be fair and reasonable. In setting or negotiating such licence fees, a Collecting Society may have regard to the following matters:
 - (i) the value of the copyright material;
 - (ii) the purpose for which, and the context in which, the copyright material is used;
 - (iii) the manner or kind of use of the Copyright Material;
 - (iv) any relevant decisions of the Copyright Tribunal; and
 - (v) any other relevant matters.

The first question is whether the clause should generally, not merely in subclause (c)(i), embrace “potential Licensees” as well as actual “Licensees”. The suggestion that it should raises a conflict that is at the heart of the competition policy enforced by the *Trade Practices Act 1974*. Corporations are required to compete with real vigour, and some arrangements often made in the past to lessen that vigour have become illegal, but at the same time competition must be kept within rules such as those dealing with misleading conduct. Should the secretiveness and bluff inseparable from hard bargaining be seen as misleading? The drawing of an appropriate line was attempted by the Full Court of the Federal Court of Australia in *Poseidon Limited v. Adelaide Petroleum NL (1991) 105 ALR 25*, and the Full Court’s approach on that issue was not challenged when the matter went on further appeal to the High Court of Australia.

But once it is recognised that bargaining parties are entitled to approach their object obliquely, keeping their full intentions hidden, it becomes apparent there would be a difficulty in expanding the obligation of transparency accepted by CI 2.3(b) to embrace potential Licensees with whom a Society may be negotiating. At the same time, CI 1.1(b)(iii) commits the Society to an *aspiration* to “ensure transparency ... in the conduct of its operations”, and CI 2.3(d) does not allow it to attempt to secure fees beyond what is objectively “fair and reasonable”, even by a successful exercise in hard bargaining. These provisions already go some way towards putting a restraint on any too enthusiastic pursuit of some possible techniques of negotiation. Also, although definitions and interpretation provisions in any instrument must always be applied subject to context, it is noteworthy that CI 6.1 of the Code defines “Licensee” so as to include “a person who requires a licence from a Collecting Society to use copyright material”.

On the whole, I think the proper conclusion is that the protection offered in this respect by the Code, in its present form, is appropriate and sufficient. If the reality of the striking of licence arrangements in the future were to reveal a problem, further consideration could be given to a solution at the next triennial review.

2. The second question raised by CI 2.3 is to be found in subclause (c)(ii), which requires the taking of “reasonable steps to ensure that all licences offered by the Collecting Society are drafted in plain English and are readily understandable by Licensees”. If this had been an aspiration expressed in CI 1.1(b), there could have been no problem. But it seems to me the Code, where it lays down a firm rule, should be taken, and is meant to be taken, as expressing what the Societies will do. They do aspire to achieve the matters set out in CI 1.1(b), but they also actually undertake to act in accordance with CI 2.3(c)(ii), which is qualified only by the words “take reasonable steps to ensure”. But licences operate under very complex laws deriving in significant part from

international treaties and foreign legal systems fundamentally differing from our own. They are not like mortgages, leases and insurance policies controlled wholly by our legal system; yet few would claim the language of these documents is “plain” to ordinary people and “readily understandable” by them. The nature of the legal requirements is such as to preclude this. What can and should be done is to eliminate unnecessary obscurities and to provide practical explanations. Therefore, I suggest Cl 2.3(c)(ii) be amended to read as follows:

“Each Collecting Society will:

...

(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; and”

3. A question has been raised whether the Code should be amended so as to inhibit expressly the making by a Society of a small and dubious claim which, if it were made, might put unfair pressure on a recipient who genuinely considered the claim unjustified but could only resist it at disproportionate expense. A real difficulty about making a provision with regard to this problem is that what is dubious in the eyes of one person may be straightforward in the eyes of another. A further difficulty is that Collecting Societies, of their nature, are likely to have numbers of small claims which are important to them in the aggregate, and often must be insisted upon. Nevertheless, some circumstances will occur in which insistence on a small claim would be unfair or unreasonable, or even, in Shakespeare’s term, “tyrannous”. My experience of the two annual reviews that have already been held under the Code is that the societies are generally alive to this possibility and exercise appropriate discretion when it appears to be called for. The Code does provide : (a) an aspiration (in Cl 1.1(b)(ii)) to “be responsive to the needs of Members and Licensees”; (b) a duty (in Cl 2.3(a)) to “treat Licensees fairly” and (in Cl 2.3(d)) that the fees “will be fair and reasonable” having regard to the “context” of the use involved and “other relevant matters”; and (c) a duty (by Cl 3) to provide appropriate means for the resolution of disputes. Finally,

the provision (by Cl 5) for monitoring, review and reporting is a practical check on the overuse of procedures that might be seen as heavy-handed. In practice, there have been a few complaints of this kind, but justified complaints have been rare and usually picked up and remedied by the Societies' own internal procedures. I do not recommend any change to the Code in this respect, but shall continue to regard appropriate flexibility in administration as a key indication of compliance with the objectives and spirit of the Code.

In concluding this report, I consider that the performance of the societies in carrying out the obligations they have assumed under the Code entitles them to have me say that they have set and achieved a high standard. However, the price of maintaining that high standard will be regular review, both internally and externally.

Dated this 26th day of April 2005

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

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 20 November 2004, as follows:

*The Code Reviewer
Suite 704
4 Young Street
NEUTRAL BAY 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, 7 February 2005
if necessary continuing on
Tuesday, 8 February 2005
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.

Written submissions are invited, to be sent on or before **8 February 2005**, 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.

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 **31 January 2005** an outline of their submission.

(b) Posting on individual societies' websites