

Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2009 to 30 June 2010

INTRODUCTION AND SUMMARY CONCLUSIONS

This is the eighth annual report of the Code Reviewer, J. C. S. Burchett, QC, assessing the compliance with their Code of Conduct ("the Code") of the following eight 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"). The practice adopted in previous reports of referring to APRA and AMCOS, which is administered by APRA, where it is unnecessary to distinguish between them, simply as "APRA" will again be followed in this report.

As required by cl 5.2(b) of the Code, each society, for the purpose of the review, has delivered to the Code Reviewer a report of its compliance, dealing specifically with three aspects of that compliance to which the Code Reviewer has previously drawn attention but which are worth repeating at the forefront of this report, as follows:

- " (i) its training of employees and agents in accordance with cl 2.7 [which, under the heading of "Staff Training", requires the taking of "reasonable steps to ensure that its employees and agents are aware of, and at all times comply with, this Code", and, "[i]n particular ... that its employees and agents are aware of the procedures for handling complaints and resolving disputes set out in cl 3, and are able to explain those procedures to Members, Licensees and the general public"];
- (ii) the activities it has undertaken under cl 2.8(a) [which requires the Society to "engage in appropriate activities to promote awareness among Members, Licensees and the general public about ... the importance of copyright; [about] the role and functions of Collecting Societies in administering copyright generally;" and, in particular, the role and functions of the Society so reporting]; and

- (iii) the number of complaints it has received and how those complaints have been resolved.”

The review has not been confined to a consideration of these reports, which themselves were not limited to the three topics mentioned, but also dealt broadly with the work of each society, and its relations with the broader creative and business communities. As in each year, the opportunity to make submissions to the review was widely advertised, and, by mail and through the websites of societies, members, licensees and many representative bodies were specifically advised and invited to have their say. Substantial submissions are discussed in this report, a copy of which will be sent to all those who made any submission. Details of the advertisements and of those who responded are in the Appendix.

Again this year, the Code Reviewer arranged to interview senior executives, generally including the Chief Executive, of each society to explore aspects of the administration of the society and to look at particular records, especially records relating to any complaint or to the circumstances out of which it had arisen.

In by far the majority of cases, it has been appropriate to consider a complaint on the basis that the facts alleged by the complainant were correctly stated (and the relevant society had so treated the matter), while any conflict about the facts, and the grounds of it, emerged clearly from correspondence or other records. The Code Reviewer’s important task was to evaluate what had occurred, or was alleged to have occurred, and the society’s response to the complaint, against the requirements of the Code. However, there were a couple of submissions to the Code Reviewer which were in the nature of complaints, that could not in fairness be considered without any further exposition of the opposing view. In one of these cases, the party making the submission readily acceded to its being handed to the relevant society for comment, subject to any comment being disclosed, a condition the society as readily accepted. This matter is discussed later. The other submission, which was of an argumentative nature, was made expressly on the basis it would not be disclosed to the society concerned, so the Code Reviewer was unable to reach a conclusion upon it, certainly not a conclusion that a breach of the Code had occurred.

It is convenient to state here, in this introductory section, that the material considered by the Code Reviewer from the various sources described shows a genuine adherence by the societies to the principles of the Code. The training of their staff, and their practical administration, are revealed by their records as regularly drawing attention to its obligations. Each of them places particular emphasis on the taking of prompt action (verified by appropriate records) to satisfy anything in the nature of a complaint. Furthermore, it is very noticeable to a reviewer who has performed his task now for a number of years that there has been a growing practice of ensuring that a complaint is considered from the standpoint that whatever failing on the part of the society may have led or contributed to it is fairly examined and steps are taken to endeavour to prevent a recurrence. The attention paid over a long period to resolving complaints is also reflected in the low numbers of complaints in recent years in the context of increasing numbers of members and licensees and increased collections and distributions. As in previous years, the Code Reviewer is satisfied, in the terms of cl 5.2(f) of the Code, that good “compliance generally by Collecting Societies with this Code”, during the period under review, has been demonstrated.

COMPLAINTS

This report follows the usual pattern of examining various aspects of the activities of the societies upon which the Code impinges, beginning with the number and nature of complaints made against each society, and its responses to them.

Copyright Agency Limited (“CAL”)

CAL publicises its complaints handling procedures, which are available to all members and licensees, through its website and publicly available information sheets. They are also referred to at presentations and seminars and in the quarterly newsletter, *CALendar*.

CAL undertakes, upon request, to provide assistance in the formulation and presentation of a complaint. It has a Complaints Officer, currently a lawyer, and a time-frame and procedures aimed at making the process accessible, open and effective. The Complaints Officer meets regularly with departmental officers to ensure the procedures are observed, and CAL also

regularly reviews them to confirm they comply with the Code and are aligned to its current business practices. The following complaints are recorded for the period under report:

1. A publisher of examination and study materials complained: (a) that another publisher, who had received a distribution for copying, only had the copyright for two (later amended to four) out of eleven (amended to thirteen) years during which the material copied was produced, and the complainant should have received the lion's share of the distribution; and (b) that copying of other material had not been included in the distribution. As to (b), CAL responded by pointing out the nature of a sample survey which cannot pick up every instance, but also drew attention to the possibility, under its rules, of an "ex gratia" payment if extensive copying could be shown to have not been picked up by the surveying. As to (a), CAL responded that it had relied on dates of publication where disclosed by the materials available on survey, and, in other cases, on historical usage patterns, and had paid upon warranties given in the claim form. It drew attention to its alternative dispute resolution procedures. The matter has not been pursued further.
2. A potential member complained that CAL had authorised the British Library to copy his works in breach of his copyright. CAL explained that the British Library had acted "primarily in reliance on the exceptions for library copying included in the UK Copyright Act" and "not in reliance on any grant of rights by CAL or CLA" (its UK sister organisation).
3. A potential publisher member complained: (a) that she was philosophically opposed to membership of anything; (b) she was concerned membership would allow copying of entire works; and (c) she wanted any payment to go to a particular women's refuge. She was telephoned the next day and told, as to (a), that the Attorney-General's guidelines required CAL only to make payments to members; as to (b), that the statutory licence did place limits on copying; and as to (c), she could give CAL a direction of the kind she contemplated. It was also explained she could exclude directly licensed works in respect of copying from her website.

4. A publisher member repeated an old complaint which the new system, *CALdirect*, unfortunately not yet in place, is intended to remedy. Although the great majority of distribution payments are made through publishers, the rules provide for payments to author members upon an undertaking to pay other rightsholders (including publishers) their share. But publishers complain they are frequently not paid. This complaint was a general one about the system, to which CAL responded by referring to its projected introduction of *CALdirect* and a promise to remind all members of the obligation to pass on to other rightsholders their share of any distribution. CAL is reviewing the terms in which this obligation is expressed to ensure the utmost clarity in its statement.
5. A publisher member complained of an erroneous payment of a distribution to a member not entitled instead of to the complainant. The error was admitted and steps taken to have the payment passed on to the complainant. But in a lengthy email correspondence, a number of issues were raised, centring upon delays. Although there was clear dissatisfaction, there was no formal complaint about these, but in an endeavour to prevent any repetition, CAL has placed this member's affairs under the direct monitoring of the Member Services Manager. There has been no further complaint since.
6. This complaint arose from an unfortunate chain of errors. A member included on his website a book published by the Australian War Memorial which in fact (it now appears) was out of copyright and in the public domain. At the time, it was assumed the website owner had copyright and he was contacted and invited to join CAL. He seems himself to have assumed he had a published edition copyright, so he joined and claimed purportedly in the name of the website. A cheque was sent out in that name, for which a replacement in his own name was sought. The true position was then realised and he was told CAL's statutory mandate does not include published edition copyright, so that he could not be paid. The member was very upset. The CEO later telephoned him to apologise for errors, frustrations and delays. The conversation ended with the member thanking the CEO for calling and wishing him "all the best". There was no formal complaint, although one was invited by CAL.

The CEO has directed that where an error occurs, a senior member of staff should personally contact the member involved to apologise. In this case, he also directed that if any question of a distribution to this member comes up, a senior member of staff should confirm its accuracy and contact the member about it.

7. A member's application form was completed only in respect of the statutory licences for educational and government reproduction. CAL sent a formal letter seeking to know whether membership was required in respect of certain voluntary schemes and offering, if so, to complete the form accordingly. The response was a complaint that CAL seemed to be encouraging its member to surrender valuable rights while supplying only vague information. CAL explained that the voluntary licences involved were not exclusive and that "in nearly all instances" members wished, upon explanation, to have the benefit of them. Perhaps the member's reaction might have been avoided had CAL's original letter placed more emphasis on the member's ability to discuss his needs with an appropriate CAL staff member. But, at worst, CAL's letter was no more than a little lacking in desirable clarity. Its form is now being reviewed.

8. A potential member was contacted in 2006 but did not complete a membership form. He was again contacted in 2010 (being again identified as an author copied), but his claim form went astray (which, of course, could have resulted from an error in CAL's office, or from a failure to address it properly – at any rate CAL has no record of it). A second claim form was submitted, but without any claimed amount being inserted in the appropriate column of the form. CAL requested this be done, and the complaint followed alleging the process was "absurdly bureaucratic". But, as CAL's CEO pointed out in reply, it has to rely on the information and warranties in the completed forms in order to process payments. The complainant expressed "appreciation" for Mr Alexander's "prompt response". With the benefit of hindsight, misunderstanding of the need for a properly completed form might have been avoided had the original letter about the incomplete form explained that payment could not be made on an inadequately filled out claim and warranty. Perhaps a sufficient explanation in a form letter sent out at the beginning to each member might assist? The form of communication involved in this matter is now under review.

9. Another member complained (perhaps exaggerating!) of “countless forms and still to no avail”. He was offered the personal assistance of the Member Services Manager, and appeared quite satisfied. There has been no resumption of the correspondence.
10. In his 2009 report, the Code Reviewer referred to two complaints by the one member, one alleging a breach of privacy and the other a failure to place certain disputed payments in a suspense account. As to the latter, it was noted that CAL acknowledged it had acted in error, and it had now placed further payments in suspense. As to the privacy question, the Code Reviewer noted the complainant had taken it to the Privacy Commissioner who had rejected her complaint.

The complainant was not satisfied that the Code Reviewer had been properly informed by CAL, but CAL has offered to disclose the relevant portion of its report to the Code Reviewer to show it revealed all the correspondence on the issues received by it from the complainant. The complainant’s ultimate response on 14 December 2009 was: “Thank you for the apology [as to an aspect of a mistake concerning rights claimed which also bore on the question of privacy]. I will leave it at that.” Nothing in the renewed correspondence calls for any substantive change to what the Code Reviewer reported about this matter last year.

11. A member made a special request relating to the timing of a payment to be despatched by CAL, with which CAL consented to comply. However, its manner of performance of the requested action was not what the member had anticipated. CAL, on receiving a complaint about this, took steps to amend its compliance with the request. There may have been a misunderstanding, or an outright mistake; however, what occurred was not a breach of the Code, but an attempt to comply with an unusual request from a member.
12. CAL distributed to an illustrator member from funds collected for copying. Two publisher members complained that the illustrator had no copyright, and that CAL had solicited a fraudulent claim. In a detailed letter, CAL made it clear it had simply acted in accordance with normal practice in notifying the illustrator member that the work (in which he was cited as an author) had been copied and providing him with a claim form.

He was requested in writing to cross out any title in which he did not control the rights. By signing the form he warranted he was entitled to claim and that where any other rightsholder had an entitlement to part of the payment, this would be paid within 60 days. CAL's letter also advised the complainants it was developing a new system, *CALdirect*, to enable it to split payments between several rightsholders. For the present matter, it referred to its alternative dispute resolution procedure, and in the meantime stated all further payments would be held in suspense until a resolution could be achieved. The dispute between the claimants to payment remains unresolved at this stage.

13. CAL's survey work threw up for consideration two small amounts for copying, and CAL invited a member to claim. He did so, and was paid. But it turned out the author was another man of the same name, writing in the same field of learning. The incident is reminiscent of Mark Twain's reaction to literary critics who attempted to debunk the accepted authorship of ancient documents; he said they had now proved *The Iliad* was not written by Homer, but by another man of the same name! However, in the present context, what is made clear is the complexity of a collecting society's task of the identification of the rights involved. Unfortunately, what ensued, when CAL endeavoured to recover its payment to the wrong person, was an outburst of irritation which may have been due to the circumstances, or to the deployment of insufficient tact by the member of CAL's staff who made the approach for a refund. In any case, the member's complaint does not show a breach of the Code.

14. A complaint from a member followed an article in *The Australian* newspaper referring to CAL's salaries and administrative expenses. The complaint called these "excessive" and "bloated". It was stated (though the article itself did not say this) that salaries roughly equalled CAL distributions. In fact, salaries were 8.3% of revenue and total expenditure including salaries was 13.7%. CAL's CEO responded to the complainant and also placed a reply to the newspaper article on CAL's website. Certainly, it could not be said a breach of the Code is shown by a newspaper article which does not attempt a comparison with other collecting societies or any kind of analysis of the complex work and its costs which the fulfilment of CAL's statutory tasks requires.

15. A further newspaper complaint related to the retail royalty scheme for art works. But the criticism seemed to be directed at allegedly hasty Commonwealth policy implementation and the design of the scheme – which, it was asserted, would benefit a few heirs of outstanding artists rather than the general body of artists or the promotion of art. Whether this be true or not, no breach of the Code was demonstrated or, properly speaking, even suggested.

Comment

In addition to the foregoing complaints, CAL received, as did **Viscopy** and **Screenrights**, a letter from the Arts Law Centre of Australia. As the problem will be found to be elucidated in the discussion, later in this report, of correspondence between the Centre and Screenrights, it would involve a mere duplication to go through it in detail here. Suffice it to say that where a claim to a distribution in respect of a work of visual art is made to CAL or Screenrights, but payment is effected through Viscopy, the question raised by the Arts Law Centre is whether it is made sufficiently clear to the claimant that a fee is payable to Viscopy as well as to CAL or Screenrights. As the claimant's membership is in Viscopy, this seems primarily a matter for it to clarify, as it has set out to do. But both the other societies have accepted they should also take steps to ensure the position is explained in the clearest terms. CAL has prepared an information sheet in conjunction with the Arts Law Centre and published it on its website as suggested by the Centre. It explicitly states that where a payment from CAL is received indirectly, via a publisher, an agent or another collecting society, "the intermediary may be entitled to deduct a portion of the CAL payment under a contract or agreement before remitting the remainder to the artist or author". It also makes it plain that authors and artists can receive payments direct from CAL by becoming members, subject to the obligation "to on-pay any amounts due to other right holders".

While two of the 15 recorded complaints relate to mistakes, for which appropriate remedial action was taken and apology made, on analysis, the recorded complaints do not suggest a failure on CAL's part to implement the Code both assiduously and very effectively. It is necessary to measure the relatively small number of complaints against the continually increasing membership (at 30 June 2010, 16,270, as compared with 13,823 at 30 June 2009) and the complex tasks involved in surveying copying in many areas to a total value of well over

\$100 million in the year, and determining on the distribution of collections, often in the face of partial or even inadequate information. To do this, CAL conducted surveys at over 350 sites during the year, including schools, universities, TAFEs, independent colleges and corporations.

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

APRA continues to maintain separate registers for Member Services complaints and Licensing Services complaints. In the year to 30 June 2010, 5 Member Services complaints and 4 Licensing Services complaints were recorded, while the complaints raised by the Association of Liquor Licensees Melbourne (“ALLM”), discussed in last year’s report, remained not wholly resolved. As in the case of CAL, APRA has procedures and trained staff to facilitate the formulation and recording of any complaint a member or licensee wishes to make.

Member Services

1. A member complained she had lost a casual job singing at a café because of the cost of the necessary licence. APRA’s Director, Corporate Services wrote to explain the cost would be very low – a live music licence for a café such as APRA understood to be in question would be based on 2% of the expenditure on the music. He offered to discuss the matter, if the complainant wished, with the café proprietor. There was no response.
2. A member’s distribution account had a large debit balance (because of an overpayment) which was being reduced in accordance with normal practice as royalties were earned. But separate payments through APRA’s New Zealand account were being sent to the member. He complained that the system left him in the dark about the state of his overall account with APRA. APRA apologised and the Chief Executive wrote explaining the position and that the financial system was being amended to remedy the problem of inadequate information in such cases.
3. A member’s account was placed “on hold” pending receipt of updated banking details. When the updated details were obtained, on 4 November 2009, the account remained

on hold for a short period (less than two weeks). After a further approximately two weeks, the amount due, which was \$70, was paid. However, the incident evoked a very abusively worded complaint. System changes have now been made to avoid an account remaining on hold in such circumstances.

4. A member complained about a telephone call to a member of staff at APRA. The problem was the person spoken to was a new employee who misunderstood the whole point of the call. The Manager of Membership Administration telephoned the member to explain and seek personally to assist with the member's problem which related to a three-year delay in receipt of UK mechanical royalties. The value of royalties was below the MCPS (UK society) payment threshold, but this was lowered in this case to allow payment. Although the amount (\$42) was small, the member was delighted, emailing APRA: "Wow, thank you so much, this is great news!! I really want to thank you for getting on to these people, you've gone above and beyond!!" Perhaps the lesson of this complaint is that the system should provide, in cases where APRA is reliant on a possibly dilatory affiliate abroad, for the automatic sending of some progress advices at intervals, even if somewhat large intervals.

5. APRA assisted with the organisation of a songwriting competition which raised funds for a charity. Donations by sponsor organisations funded the prize. Entries were not restricted by reference to any association with a sponsor organisation, but no such organisation was involved or represented in the judging process which also had a built-in safeguard in that the names of the competing writers were withheld from the judges. Employees of APRA and their immediate families were ineligible to compete. The prize was won by a songwriter who had entered into and signed a music publishing agreement with one of the sponsors – a substantial donor.

A complaint was made to APRA by a member, who had unsuccessfully competed, that "there exists a perception of a conflict of interest in that the major cash sponsor's signing turned out to be the winner", and that she should not have been eligible. APRA's position is that the complete separation of the judging process from all sponsors denied any possibility of a conflict of interest or of any appearance of such a conflict. The Code Reviewer agrees that the complaint shows no conflict or appearance of

conflict, and certainly there is no breach of the Code of Conduct in APRA's involvement in the organisation of the songwriting competition.

Licensing Services

1. Each of two licensees was sent, by mistake, detailed reassessment forms intended for the other. One noticed that figures in the form received by her were inapplicable and corrected them before returning it. The other simply returned it, with the consequence that an invoice in the wrong amount went out to the former licensee, who, knowing it was wrong, did not pay it. Upon APRA pursuing what it thought was a debt, a complaint was made. Once that happened, APRA looked into the matter very promptly, and offered to waive the amount actually due (a mere \$42.99) as a gesture of its regret and acknowledgement of the waste of effort and irritation caused. APRA also instituted new checking procedures in respect of the preparation and mailing out of reassessment forms to avoid any recurrence.

2. A compliance call at a gallery in a remote town led APRA to seek to license the gallery on the ground music was played there without authorisation. When contacted by an APRA representative, the proprietor of the gallery did not deny the playing of the music but complained the representative was "quite abrupt in her manner" and spoke "in a very rude tone of voice". The occasion when the music was heard at the gallery was castigated as "snoop[ing]", and APRA's letters were said to be confrontational. Although the use of the music was not denied, a licence has still not been signed after many months, and APRA is pursuing this question. However, it has also reminded its representative of existing procedures, adherence to which might have reduced the risk of conflict, by which a representative is required to follow a letter up by a personal telephone call to make sure the situation is understood. At the same time, it should be acknowledged the gallery proprietor wrote in her letter of complaint that she "had been absent from the Gallery for several months", so compliance with these procedures may not have been easy.

3. APRA's new scheme relating to recorded music for dance use in nightclubs (GFN), although it has been accepted by the great majority of licensees, has been the subject of

objections including objections from members of Western Australian Nightclubs Association (WANA). These have been recorded as complaints, although they really relate to particular terms of the GFN licence and the fact that APRA has not taken the question of the adoption of its terms to the Australian Copyright Tribunal. But the Copyright Act does not require APRA to do that – it is open to WANA and its members to do so. APRA has not, for the reason that the fundamental issues in question were recently decided by the Tribunal in *Reference by Phonographic Performance Company of Australia Limited [2007] ACopyT 1*, the principles of which APRA has sought to apply in the GFN tariff. APRA did make what it put forward as a concession in basing the tariff on actual attendances rather than the capacity of a nightclub. This has been objected to by WANA, and it appears in some circumstances capacity may be more favourable to the licensee. APRA has therefore made provision for capacity to be chosen as an alternative and some nightclubs have done so. All the matters raised are issues of the kind to be expected to be debated in respect of a tariff, and APRA gave ample opportunity for all views to be canvassed. A number of WANA members have since accepted the GFN tariff, although negotiations continue with a few Western Australian nightclub proprietors.

In addition to WANA's objections raised with APRA, six of the companies represented by WANA put a submission to the Code Reviewer in response to the advertisement of the present review. It was accepted that APRA should see this submission so that it could respond and that WANA should have a copy of the response.

Having considered the submission and the response, the Code Reviewer is satisfied that what is alleged is not a case of breach of the Code, but arguments against the particular tariff. The Copyright Act, as APRA has pointed out, gives an objector access to the Copyright Tribunal which is equipped to deal with the sorts of issues in question after an adequate hearing. And in fact the Copyright Tribunal has considered the matters of substance recently. It is not disputed that the great majority of affected nightclubs (at least 685 around Australia) have accepted the GFN tariff in the light of the Tribunal's decision and subsequent lengthy negotiations and, that being so, it cannot be deemed unreasonable of APRA to leave it to the few that still object to take the matter to the Tribunal if they wish. The one aspect of difference of approach between the Tribunal's

2007 decision and APRA's tariff upon which emphasis has been laid, the criterion of capacity rather than attendance, disappears as a realistic issue when it is appreciated that APRA has provided for those few who wish to do so to choose the alternative criterion.

So far as a hardship argument is available in the current economic climate, APRA has made a concession to the extent of deferring, at the request of Association of Liquor Licensees Melbourne (ALLM) and others, for the benefit of all GFN licensees, the increase due under the tariff on 1 November 2010 until 1 November 2011.

4. An establishment where background music was being played was contacted by letter and telephone by a business licensing representative of APRA. The response was abusive, and a complaint was made to the Director of Licensing Services alleging the representative "was harassing her with numerous letters and phone calls". In fact, there was a minor dating error in the form of licence proffered by the representative, and a follow up telephone call was received the same day as a letter. Other complaints appear trivial. Eventually, APRA had to refer the matter to solicitors to achieve a result, but then it was accepted a licence was required for background music, and it was executed.

To reduce problems of this sort, APRA reviewed relevant practices, instituting procedures: (1) requiring a business licensing representative, where a client hung up or was abusive on the telephone, to refer the matter to APRA's Deputy Director of Licensing Services; (2) requiring the checking by a second member of staff of all documents sent to licensees and potential licensees; and (3) forbidding backdating of licences in the absence of an acknowledgement from the client of receipt of notice.

Comment

It will be noticed that some of these complaints led to changes in procedures at APRA, as, indeed, it will also have been noticed, did some of the complaints discussed earlier that were made to CAL. The Code Reviewer has had occasion to comment previously on the value of a society treating a complaint as an insight into possibilities for improvement in its practices. This

proactive, rather than a defensive, reaction is an important fruit of the Code of Conduct. A summary prepared by APRA for the Code Reviewer shows that between 2007 and 2009, some 13 complaints to APRA resulted, apart from solutions to the particular issues in question, in reviews of or changes in broader practices and procedures. Two complaints caused a communications consultant to be engaged to review a category of material sent out by APRA. One caused APRA to amend its form of “overdue” notice. One led to the review of a form of invoice which, however, upon that review, was considered satisfactory. One led to review of an office system to ensure there would be an appropriate audit trail of any changes to client details. A complaint of “user unfriendliness” of an electronic system resulted in the addition of an explanatory sentence to the instructions for its use. Two complaints about different sources of delays led to changes of practice to overcome them. A system error in invoicing was found to be remediable under a new system which was due to be implemented. A problem caused by verbal notice of cancellation of a licence (obviously a real problem in view of the significance for the legality of conduct of a licence and the risk of misunderstanding) was taken up between the Licensing Department and the Finance Director, and new procedures were adopted, following a complaint. Two complaints regarding emails resulted in a tightening of procedures related to the sending of them by APRA to members, and a different complaint about particular emails also led to a change in procedure.

Finally, it may fairly be said of the period now under report that the number of complaints is very small when compared with APRA’s operations and most of them are not significant in nature. There were one or two simple mistakes, and two complaints by persons who had been observed to be playing music in their businesses without a licence. APRA has now over 60,000 members, including a significantly (15%) increased indigenous membership. In the year under report, its licensing departments executed over 15,000 new licences and its Member Services department responded to over 38,000 emails from members.

Audio-Visual Copyright Society Limited (“Screenrights”)

It was explained in last year’s report that Screenrights, while no complaint was made against it, had had to deal with a considerable number of disputes involving conflicting claims made to entitlements to distributions. Screenrights had a three-step policy for these matters, the first

step being to put the claimants in touch with each other (this solved most problems which had generally arisen from some misunderstanding); the second step (if necessary, and the parties agree) being mediation; and the third step being expert determination arranged by Screenrights. In the year to 30 June 2010, 1901 stage one disputes were dealt with, involving \$2.59 million. To assist the resolution of such matters, a Multiple Claims Database was developed to operate from April 2010, and has been successful in settling 646 multiple claims to the value of \$800,000. A fulltime Conflicts Resolution Co-ordinator manages these claims. No claim has proceeded to stage two in the period under report, but one matter did go to stage three, expert determination by a senior counsel specialising in copyright law engaged by Screenrights. Although the losing party expressed dissatisfaction with the decision, Screenrights acted upon it as a final expert determination and no complaint has been lodged against Screenrights.

One dispute between parties as to entitlement arose too close to the statutory cut-off date for expert determination to be practicable, with the result the claimed share of royalties was forfeited. No formal complaint ensued.

One complaint was received by Screenrights from the Arts Law Centre of Australia, which was also sent to CAL and to Viscopy. As it arose out of Viscopy's representation of certain artists in respect of claims to distributions of statutory royalties, and although it has already been referred to in relation to CAL, it will receive further consideration in the section of this report dealing with complaints to Viscopy. But it also requires to be considered here. The concern is about transparency in respect of the fees deducted from these distributions. Apparently, the Arts Law Centre was under the impression that, in these cases, "the distribution function is undertaken by Viscopy for Screenrights", but neither Viscopy's website nor Screenrights' website stated that Viscopy's fees would be charged in addition to the charges made by Screenrights. Concern was also expressed about the difficulty said to be involved for an artist who wished to ascertain Screenrights' own charges. Screenrights' Chief Executive responded, as to the last point that the information appeared in the Annual Report, newsletters, and on the payment statements themselves. Turning to what appeared to be the substantial issue, he made it clear: "Viscopy does not undertake a distribution function on behalf of Screenrights, rather Viscopy claims royalties on behalf of the artist it represents in the capacity of their agent. Any artist can join Screenrights directly if they choose. There is no cost to Screenrights

membership". The fact is the Viscopy members in question do not join Screenrights – Viscopy does. Similarly, an artist could choose to claim through his or her accountant, or a gallery, and would, of course, pay fees to the accountant or the gallery for handling the claim.

Although this response seems entirely correct, as a business and legal proposition, it is necessary to bear in mind the wide spread of levels of business experience and education of the members represented by Viscopy; and Screenrights, accepting that, has discussed with the Arts Law Centre a form of notice which it has included in its website, as follows:

"Because Screenrights is a non-profit organisation, all money it collects is distributed to members after the deduction of administrative overheads only. These overheads vary from service to service and from year to year, however as a rough guide, for 2010 our overall ratio of administrative expenses to total collections was 14.2%. More information on expenses to collections ratios for each service can be found in our Annual Report.

Rightsholders should note that if they appoint an agent to collect Screenrights royalties on their behalf, the agent may also charge an administrative or agent's fee on top of Screenrights costs."

Phonographic Performance Company of Australia Limited ("PPCA")

As noted in previous reports, PPCA has an established policy for dealing with complaints which is available on its public website and internal intranet and is provided in hard copy to new employees. It has a Complaints Officer with access to all other employees, and its policy aims at ensuring the fair resolution of any complaint. Mediation, neutral evaluation and conciliation options are also available. Would-be complainants are advised of the policy, of the availability of assistance in lodging a complaint, and to consult the Complaints Officer. If appropriate, PPCA will engage in a process of independent resolution of a dispute, the cost being shared equally, but it seeks to minimise cost, and no matter has been dealt with in that way in the period under review. All complaints are recorded in a Complaints Register which is reviewed to identify any recurring problems.

In the period under review, 25 complaints were received in relation to a reference by PPCA to the Copyright Tribunal of Australia, concerning the tariff applicable to recorded music used in

fitness classes. There were three complaints in relation to public performance licences and one in relation to artists' distributions. One old dispute as to the applicable tariff in particular circumstances, which has been referred to in two previous reports of the Code Reviewer and found not to raise any question under the Code, remains a live dispute which may yet go to independent determination. Summaries of the complaints in the year under report follow:

1. Of the 25 complaints about the tariff for music in fitness classes, somewhat less than half object to PPCA bringing its proposed tariff before the Copyright Tribunal, but more than half object also or primarily to the decision of the Tribunal itself. This may be contrasted with the objection (discussed earlier) against APRA for *not* putting its new nightclubs tariff (GFN) to the Tribunal. The fact is the Tribunal is available, as the arbiter provided by the Copyright Act, both to a collecting society and to a licensee or group of licensees, for the settlement of just such questions. In general, a society's judgement that a tariff, which has not been the subject of a comprehensive review in a lengthy period, should or should not be brought by it before the Tribunal cannot, in itself, amount to any breach of the Code. The determination made by the Tribunal clearly shows that PPCA had at least arguably good reason to take the matter before it, although the decision has since been referred back to the Tribunal by a full Federal Court on legal grounds.
2. A complaint was received from a food outlet that, for four years, it had paid a licence fee to PPCA in reliance on verbal information by telephone from a licensing representative that this would be required if music were played by means of a radio. Investigation failed to uncover any record of a telephone call from the licensee four years earlier although a record does exist of a call two years ago about the licence fee. All calls are required to be logged. Of course, the advice alleged to have been given by PPCA would have been wrong as its tariff does not apply to radio broadcasts, although, if APRA had been telephoned, it would have advised that its licence was required if music was played in the establishment via a radio. However, accepting that in fact recorded music was not played so a PPCA licence was not required, PPCA refunded the full four years of licence fees. It also undertook to make all members of its licensing team aware of the complainant's problem.

3. A complaint was made by a music-on-hold licensee that he had received no response to an adjustment request made three months earlier. PPCA's records showed a prompt reply had been sent, but it apologised on the basis its communications had not been received. It mailed a copy of its earlier credit adjustment.
4. A complaint was made that a restaurant was playing recorded music without a licence. PPCA thanked the complainant, and took steps to check the allegation with the restaurant.
5. The right to income distributions from PPCA is a right of the copyright owner. However, PPCA operates an ex gratia scheme pursuant to which record companies agree that direct payments may be made by PPCA to featured Australian artists in relation to income or repertoire for which they have lodged registrations with PPCA. An agent for certain artists claimed that PPCA had made payments to a record company which ignored artists' rights. But the artists had not lodged the requisite registrations. Accordingly, the company was entitled to the distribution, and the artists were relegated to any claim they may have had under their contracts with it.

Comment

Although the number of the 25 complaints about the new fitness tariff might, prior to examination of their contents, seem alarming, it is plain from what has already been noted about them that the gravamen of them has nothing to do with any breach of the Code. Their real quarrel is with the decision of the Copyright Tribunal set up by the Copyright Act to settle just such disputes. That leaves only 4 complaints, none of which can be said to suggest a breach of the Code, or even to point in a very broad sense to any definitely established failing of any kind on the part of an employee of PPCA.

Viscopy Limited ("Viscopy")

Viscopy's Complaints Policy and Alternative Dispute Resolution Policy are available on its website, and also in hard copy on request. These policies were reviewed in January 2010 and in

February a new database was constructed for recording complaints and the responses to them. Staff were trained in its use. During the review period, 9 complaints were received plus a letter of concern from the Arts Law Centre to which reference has been made earlier. The complaints were the following:

1. A former member complained he had ceased to be a member about six years previously, but still received statements, despite asking Viscopy to stop acting for him. After investigation, a letter was sent to him apologising and assuring him it would not happen again.
2. A former member complained about a royalty statement on the basis Viscopy had no right to collect royalties for him since he was no longer a member. But the royalties had been collected by an overseas affiliate in relation to the period when the complainant was a member. Nevertheless, when this had been explained to him, the complainant remained adamant that he did not want the money, and it was returned to the affiliate with instructions not to collect anything on this former member's behalf.
3. A member complained that a leading auction house had cropped a reproduction of a work in its catalogue. But Viscopy's agreement with the auction house did not permit this without authorisation which had not been sought. Viscopy drew its attention to its breach, for which it apologised, and obtained its agreement (to the satisfaction of Viscopy's member) to send future catalogues to the member free of charge.
4. A member emailed to say he was due to receive a royalty payment, and also that his works had been infringed. Viscopy responded that no royalty was due; it also asked for details of the alleged infringements. No reply has been received.
5. A telephone request from an artist for information about the licence fees for reproductions of particular sizes resulted in a misunderstanding about the fees Viscopy might charge and a complaint they were insufficient. Viscopy emailed an explanation and an assurance that the proposed reproduction, if it went ahead, would be on terms agreed with the artist. The artist remains a member, and appears satisfied.

6. A German member of Viscopy's German affiliate Bildkunst alleged that a complaint he had made a year previously of infringement of his photographs by reproduction had been ignored. Viscopy was unable to locate any correspondence from him, but contacted Bildkunst which advised the complainant was not a member in relation to reproduction rights. Accordingly, Viscopy informed him that it could not assist, but it offered to supply information about Australian law firms should he wish to pursue the matter. Nothing further has been heard.
7. The complainant, who had sought a quotation for a licence, asserted it was too high, and upon it being confirmed, asked a series of questions of an apparently hostile nature (such as: "Do you take copyright fees without [the] artist's consent?"). He was referred to Viscopy's website for the answers, and offered an appointment to discuss any further concerns. He did not proceed either with the quotation, or with the offer to discuss his concerns.
8. The wife and business partner of an artist member notified Viscopy of the unauthorised use of a work of his in a United States publication. For that, he sought some compensation. It was also alleged the work appeared in a book with foreign language editions in breach of the member's moral right – but no details were supplied. Viscopy arranged for its US affiliate, ARS, to make a claim, which was initially resisted, but eventually led to a payment of a few hundred dollars, in respect of the US publication. This was accounted for to the member. However, in the absence of details, the alleged foreign language infringement could not be traced, and the member did not provide the necessary information. Nevertheless, the member's wife emailed Viscopy to express her disappointment concerning the amount of the US payment, the lack of compensation for moral rights or for foreign language editions, and finally because there was not an alternative way to seek compensation for infringement of copyright. The same day Viscopy replied that the amount was all ARS could obtain, the alternative being court action in the US which would be too expensive to be realistic; and that US law does not recognise moral rights. No direct response to this was received by Viscopy, but in a subsequent telephone call, the member's wife said she would send a resignation letter on his behalf. No such letter was received, and the member, having later won an aboriginal art prize, sent an email of thanks to Viscopy.

9. A member emailed Viscopy to compliment it on its new website, but added a complaint about an apparent defect. The same day, the website manager emailed her that there was a temporary glitch which the website developer was in the process of correcting. The response was an email of thanks for the reply, together with further positive comment.

Comment

Of the nine recorded complaints, only that numbered one above suggests any significant default on the part of Viscopy. Bearing in mind the staff changes that occurred during the period in question and the complexities of the administration of a relatively small society with such a wide coverage of membership throughout Australia, including in remote areas, as well as in New Zealand, this lapse does not deny the Society's concern to comply with the Code of Conduct it has adopted. There remains the matter raised by the Arts Law Centre which was outlined in the section of this report dealing with complaints made to Screenrights. As the society directly involved in the relationships with members to which the Centre refers, this matter required the attention of Viscopy. It has taken the step of adding to its website the following clear notification which satisfies the Arts Law Centre's concern:

"Once you become a member, Viscopy will deduct a proportion of any royalties we collect for you to cover our administration costs. Our current charges are 25% for royalties Viscopy collects in Australia and New Zealand and 10% for royalties Viscopy collects from overseas. Viscopy members that choose to receive royalties from statutory copyright schemes for photocopying and re-broadcasting through Viscopy pay commissions to CAL and Screenrights, the organisations that administer those schemes, and also pay commissions to Viscopy."

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

AWGACS has developed procedures for the handling of complaints and the resolution of disputes which are available on its website. However, it has no licensees and, once again, in the year under report, it received no complaint.

Comment

At 30 June 2010, AWGACS had 1033 members, an increase of 57 over the year. It had a Manager, Administrator, Distribution Manager and two data entry casuals, all part-time. It currently receives distributions from nine overseas societies, although it has reciprocal relationships with seventeen. It has to cope with the difficulty that the quality of the data submitted by several European societies is unsatisfactory.

Australian Screen Directors Authorship Collecting Society Limited (“ASDACS”)

ASDACS, like AWGACS, has no licensees. Its income is received solely from European societies, or from the USA or Canada pursuant to European copyright laws. Its complaints procedure remains unchanged, but was notified again to members by direct communication during the year under report. ASDACS has again received nothing in the nature of a complaint. It has received several queries from members, but in all cases the answer was accepted with an expression of appreciation.

Comment

As at 30 June 2010, ASDACS' membership had grown from 437 to 490 members. Member services have been handled by one staff member, working full-time with the assistance of one part-time research manger (two days per week). As has been noted in previous reports, relations with this small membership are close, and the recorded communications are very cordial. But the society nevertheless draws specific attention to the standard set out in its Code of Conduct.

SUBMISSIONS

As in previous years, the advertisement of this Review produced a number of responses, not all of which have required separate discussion. Those that raise significant issues not otherwise covered are discussed in the appropriate sections of this report. Whether or not a submission has received specific mention, a copy of the report will be sent to the person who made it.

GOVERNANCE AND ACCOUNTABILITY

The governance and accountability of the societies, as shown by their constitutions and the way they operate, have been examined in earlier reports. The governance of the societies as constituted continues to ensure their accountability and the openness of their operations. In April of this year, the Commonwealth government showed its relevant satisfaction with CAL by appointing it to administer the Resale Royalty Scheme for Visual Artists.

STAFF TRAINING

Particularly in the case of the bigger societies, which have large numbers of staff, it is not sufficient to provide training in the obligations of the Code once at the beginning of employment. Each of these societies has ongoing programs that persistently reinforce those obligations, keeping them and their implementation under review. Each has appointed Complaints Officers, to whom any lapse that may come to light through anything in the nature of a complaint *must* be referred. A conscious effort is made to learn the lessons of any lapse, and to improve any service it may have shown to be vulnerable to mistake or some other source of failure. **CAL**, for example, in addition to induction procedures directed to an understanding of the requirements of the Code, holds specific company-wide Code of Conduct training each year (this year in March 2010); directs all staff to the Code and its Complaints Handling and Dispute Resolution procedures via its staff intranet; and ensures that all staff know of the need to advise the Complaints Officer of any complaint. CAL has a staff handbook

which is regularly updated to reflect any changes to policies and procedures, including those related to the Code, and the intranet was redeveloped in July 2009 to achieve the same objects. The Code of Conduct is a central component of **APRA's** induction program in which all new staff participate. But APRA also has training sessions throughout the year, and the Licensing Services and Member Services departments each hold staff training conferences at least once (usually twice) each year. They also conduct monthly teleconferences with APRA's state based branches and APRA New Zealand at which topics relevant to the Code, and particularly complaints, are discussed. **Screenrights**, too, engages in regular staff training in the obligations imposed by the Code. In addition it has regular staff meetings at which particular issues are raised and training given. These training activities are intended to reinforce staff members' appreciation of the Code gained from initial training. **PPCA**, in addition to providing to employees copies of the Code and the policy documents implementing it, encourages them to review the policies regularly and approach senior staff with any suggestions for their improvement. At least once a month, at meetings of the Licensing department, the Code is referred to and training is given in its requirements. Additional specific training sessions are also given, most recently in the period under report in May 2010, when the Code of Conduct and Complaints Handling and Dispute Resolution policies were discussed. In the year under report, **Viscopy** commenced a new annual training session for all staff to ensure they are up-to-date with best practice in the handling of complaints and remain familiar with the Code's requirements. In addition, one staff meeting a month has been set aside for discussion of Code obligations and review of any recent complaint and how it was responded to. As with other societies, all new staff are briefed on the Code. As the Code Reviewer has previously pointed out, **AWGACS** and **ASDACS** present special cases where those activities to which the Code is primarily relevant are performed by one or two senior persons. The question, for these two societies, is not one of staff training, but whether the controlling individuals understand and fulfil the Code, as the Code Reviewer is satisfied they do.

EDUCATION AND AWARENESS

In last year's report, the Code Reviewer introduced this topic as follows:

“Copyright Collecting Societies are essential links between the legal rights of copyright created, in the public interest and in fulfilment of internationally accepted obligations, by the Australian Parliament and the economic fruits Parliament intended those rights to yield. Without efficient means of collection, the rights would be barren. Therefore it is important that the many who provide or use copyright material should recognise and understand the role of the collecting societies; and accordingly, by the Code of Conduct, cl 2.8, the societies accept obligations to promote awareness about the importance of copyright and the role and functions they perform. In deciding what it can do, a particular society is entitled to take account of its size, membership, the number of licensees it has, its revenue and the possibility of acting jointly with another society.

The societies have traditionally taken a very broad view of their role in relation to copyright; without attempting an exhaustive statement, they have involved themselves in fostering emerging creators of copyright material; in various awards; in seminars, booklets and other means of educating people in copyright developments; and in special projects such as Viscopy's assistance to aboriginal artists or Screenrights' assistance to educators through *enhanceTV*. Societies have also included in their Constitutions and Distribution Rules specific power to allocate a percentage of moneys collected to enable them to make special grants.”

It was thought important to introduce this subject in that way because one representative body, having dealings with collecting societies, appeared to think education and awareness were not proper matters for inclusion in the Code of Conduct. This year, ironically enough, a well-prepared submission from another representative body chided one of the major societies (wrongly) for *not* being involved in programs directed to education and awareness. That

submission will not be further referred to because it was withdrawn upon numerous members of the body from which it came informing that body it was factually wide of the mark. In reality, the societies, proportionally to their respective means, place considerable emphasis on this Code obligation, which underlines their role in the promotion of creativity and the public objectives of the Copyright Act.

CAL uses its website, the magazine *CALendar*, e-communications, information sheets and other publications to educate members, licensees and the public, and heighten awareness of copyright and CAL's functions.

Representatives of CAL attend industry events, write articles for industry magazines and secure media coverage. Frequent media releases are put out. *CALendar* is provided free, and is on CAL's website. CAL's annual report is made widely and freely available. CAL organises special seminars and forums on such topics as the Google Book Settlement, digital content, and the Artists' Resale Royalty Scheme. In relation to the last matter, a wide range of activities has had to be undertaken. Also, during the year under report, CAL allocated from its Cultural Fund \$747,855 in benefits to Australia's creative and cultural communities. CAL's extensive surveys of copying demand a great deal of training and a high level of awareness of the value of copyright for those participating, which CAL achieves by much effort. CAL meets regularly with bodies such as the Australian Publishers' Association, the Australian Society of Authors and the Media Entertainment Arts Alliance, ensuring their up-to-date knowledge of copyright developments and CAL's operations. CAL's staff are daily involved in answering enquiries, technical legal questions being referred to its Legal and International department, and, in appropriate cases, people being recommended to seek independent legal advice.

During the year under report, **APRA** hosted, through its Member Services department, 183 events attended by 8,883 members, while Licensing Services staff attended 102 industry functions and events. APRA provided, through its grants program, \$606,000 to 103 organisations and events. It also launched the Vanda & Young Songwriting Competition, in support of a music therapy charity, raising over \$140,000. Activities of this kind aim to embed APRA in the music scene in Australia and to build awareness of the place of copyright and the role of societies such as APRA. Its staff speak regularly at seminars, providing specialised information and advice to members of the music industry and those who benefit from music.

APRA is committed to the education, protection and promotion of Aboriginal and Torres Strait Islander creators of music. It operates an office in Darwin with a special manager for indigenous and Northern Territory writers of music. It supports the use of music to widen Aboriginal horizons, featuring indigenous artists. In the review period, APRA brought out a report on indigenous music in Australia commissioned by the Australia Council.

APRA has made a number of submissions to different levels of government about questions related to music and copyright.

APRA was again involved in June 2010 in a 3-day conference called Song Summit, attended by over 1,000 delegates, featuring speakers, panel discussions, workshops focussed on creative and business development and a number of other activities. As in the past, APRA was also involved in or issued during the year numerous publications - too numerous to list here.

Screenrights has, with the New Zealand Vice-Chancellors' Committee, jointly produced, for staff members of New Zealand universities, an explanation of the copyright licence agreed between Screenrights and the universities. Much is to be hoped from joint efforts of this kind. Information leaflets issued by Screenrights have also been reviewed and supplemented where possible to improve the accessibility of the information they provide. In the year under report, Screenrights gave 11 university survey trainings, 6 TAFE survey trainings and 16 school survey trainings. Screenrights continues to issue numerous leaflets and information sheets, as well as its much used and highly successful *enhanceTV*, an educational resource which teachers appear to value greatly. It issues a monthly email newsletter to members, as well as regular updates on its website. It has a sponsorship program to support both the film industry and the education sector.

During the year under report, **PPCA** undertook meetings and activities with various bodies representing licensees or the creative community. In addition, PPCA continued its timetable of regular artist/licensor newsletter updates, as well as regularly updating its website.

PPCA continued to support various causes through its grant program, including the music industry benevolent fund Support Act Limited, The Song Room (a not for profit organisation

providing music programs to disadvantaged schools), the Australian Music Prize, the Arts Law Centre of Australia, the Slim Dusty Foundation and Sounds Australia. It also supports the PPCA Performers' Trust Foundation, which provides grants to promote and encourage music and the performing arts. During the period 31 grants were approved by the Trustees. Through these initiatives, PPCA is able to bring its operations to the attention of recording artists and record labels, increasing awareness of the opportunity to register to participate in its blanket licensing schemes. Although yet to be finalised, it is anticipated that the total sum allocated to grants for the year to 30 June 2010 will be approximately \$215,000. PPCA also provided speakers for a range of artist related seminars, including the Bondi Wave and the JB Seed Management workshop, and made staff available to man a PPCA booth at the Song Summit conference held in Sydney in June 2010.

PPCA maintains relationships with organisations representative of licensees in each state, including the Restaurant and Catering, Clubs, HMAA and AHA bodies. During the year it made presentations at meetings of various user groups including, for example, the Community Broadcasters Association of Australia and the Music Therapists Association. PPCA also publishes a regular newsletter for licensees and maintains information on copyright matters on its website.

Viscopy has provided space for exhibitions at its premises and held three during the year under report, including one for artists from the Kimberley. A substantial annual prize for artists has been donated by the family of a Viscopy Board member who died tragically and is administered by Viscopy – the John Fries Memorial Prize. Viscopy has also begun a series of free seminars for artists on copyright, and has launched a new website to provide more information about Viscopy's services. A number of workshops were held in Viscopy's Indigenous Education Program, but unfortunately this program was truncated by funding and other problems. However, it is expected to resume full operation for the next year.

ASDACS, despite its small size, was able to allocate \$24,000 to a Cultural Fund again during the year under report. It is hoped this will support activities aimed at a practical amendment of the Copyright Act to enshrine the new directors' right as a reality by making it inalienable. ASDACS also sends out to its members an information sheet headed "Update" which informs them about copyright developments that are relevant to them, and ASDACS' activities.

Similarly, **AWGACS** has a cultural levy which it pays to the Australian Writers' Guild (AWG) to assist it to promote the rights of stage, screen, radio and new media writers. AWGACS used a half-page promotional spread in the AWGIE Awards program and several items in AWG's weekly e-newsletter, as well as its own website, to educate the public about its own role, functions and activities.

CONCLUDING REMARKS

This report is now submitted to the societies and to the Attorney-General's Department of the Commonwealth of Australia. As stated earlier, copies will also be sent to those persons who made submissions.

Dated this 21st day of December 2010.

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