

**Report of The Code Reviewer
(The Hon K E Lindgren AM, QC, FAAL,
formerly a Judge of the Federal Court of
Australia and President of the Copyright
Tribunal of Australia) upon a Review of the
Operation of the Code of Conduct of the
Copyright Collecting Societies
of Australia**

Issued April 2017

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Report of The Code Reviewer (The Hon K E Lindgren AM, QC, FAAL, formerly a Judge of the Federal Court of Australia and President of the Copyright Tribunal of Australia) upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia

INTRODUCTION

1. Clause 5.3 (a) of the Code of Conduct for Copyright Collecting societies (the Code) provides that the Code is to be reviewed following the expiry of two years from the Code's coming into effect, and at least once within each subsequent three year period.
2. The last Report on the Triennial Review of the Code was issued by me on 30 April 2014. However, the State of New South Wales (the State), supported by the Copyright Advisory Group (CAG), raised an important and fundamental issue relating specifically to the statutory licence under Div 2 of Part VII of the *Copyright Act 1968* (Cth) (the Act), which I addressed in a Supplementary Report dated 28 October 2015 (the Supplementary Report).
3. The Code came into effect in the second half of 2002. Although the precise date is not entirely clear, there is good reason to think that it was 1 July 2002. A *Preliminary Assessment Report* on a draft of the Code by Kim Wilson and Michelle Sawyer dated July 2002 observed (in Section 1.2) that the Code was to have commenced operation in January 2002, that the authors understood that it would be formally launched in the second half of 2002, and that the latest draft had been available on the websites of most of the

collecting societies since January 2002. The first Code Reviewer was the Hon J C S Burchett, QC. His first report on the collecting societies' compliance with the Code was in respect of the year 1 July 2002 to 30 June 2003, and in his Triennial Report issued in April 2008 on the operation of the Code, he stated that the Code had been adopted by the collecting societies from 1 July 2002 (page 1, third paragraph).

4. Triennial Reviews were the subject of reports issued by Mr Burchett in April 2005, April 2008 and June 2011, and by me in April 2014 with a Supplementary Report in October 2015 as noted above.
5. Clause 5.3 of the Code contains requirements as to the steps to be taken to ensure that there is ample opportunity for submissions to be made to the Code Reviewer to be taken into account in the Triennial Review. A copy of Clause 5.3 is **Appendix A** to this Report.
6. On 10 December 2016 a notice inviting submissions was published in *The Australian* newspaper and on or about that date the same notice of invitation was published on each collecting society's website.
7. As a precautionary measure, by email on 15 December 2016, each licensee and peak industry body was individually notified.
8. A copy of the notice of invitation is **Appendix B** to this Report. As can be seen from it, a meeting was to be held on Monday, 13 February 2017 at which members of the collecting societies, their licensees and the general public were to have the opportunity to make oral submissions. That meeting was held on that date.

9. Both written and oral submissions have been made to the Code Reviewer as part of the review of the Code.
10. It is important to note the distinction between the Triennial Review of the content and operation of the Code required by Clause 5.3 and the annual reviews of the compliance by collecting societies with the Code.

CLAUSE 2.3 (d): LICENCE FEES TO BE FAIR AND REASONABLE

11. Clause 2.3 of the Code addresses dealings between a collecting society and its licensees. Clause 2.3 lays down certain norms or standards which a collecting society must satisfy in relation to those dealings. Prior to the amendment referred to below, the first sentence of Clause 2.3 (d) was as follows:

“Licence fees for the use of copyright material will be fair and reasonable.”

The remainder of para (d) of Clause 2.3 sets out certain matters to which a collecting society “may have regard” in setting or negotiating licence fees for the use of copyright material.

12. In paragraph 27 of my Report dated 30 April 2014 I adopted a submission made by Australasian Performing Right Association Ltd (APRA) that the first sentence of Clause 2.3(d) be deleted and replaced by the following:

“Each collecting society’s policies, procedures and conduct in connection with the setting of licence fees for the use of copyright material will be fair and reasonable.”

13. I need not repeat the reasons underlying the recommendation. Shortly, it could hardly have been intended that the Code Reviewer conduct an enquiry of the kind carried out by the Copyright Tribunal of Australia into substantive fairness and reasonableness.
14. The collecting societies have amended the Code by replacing the former first sentence of Clause 2.3(d) with the sentence set out in paragraph 12 above.

DISTINCTION BETWEEN “COMPLAINTS” AND “DISPUTES”

15. In my last Report dated 30 April 2014, I recommended that the question of confusion between the concept of “complaints” and “disputes” be addressed by attaching an explanatory document to the Code which would set out the definitions that were set out in paragraph 36 of that Report, accompanied by illustrations of situations that fall within one term or the other.
16. The collecting societies have adopted that recommendation. **Appendix C** to this report is the Explanatory Memorandum which now accompanies the Code on all of the collecting societies’ websites.

STRENGTHENING OF CODE’S REQUIREMENT OF TRANSPARENCY, PARTICULARLY IN RELATION TO DECLARED COLLECTING SOCIETIES AND STATUTORY LICENCES

17. As noted earlier, this matter was the subject of the Supplementary Report. For reasons given there, I did not recommend amendment

of the Code as sought by the State and CAG, or indeed, any amendment of the Code in the present respect.

18. As noted at [16] of that Supplementary Report, however, a benefit that arose from the exchanges between the State and CAG on the one hand and Copyright Agency Limited and Audio-Visual Copyright Society Ltd (Screenrights) on the other hand is that those two declared collecting societies have amended the form of their annual reports to include some, but not all, of the additional information sought by the State and CAG.
19. At the public meeting held on 13 February 2017 I asked the representatives of those two societies to confirm that the only remaining substantial difference between the further disclosure that was sought by the State and CAG and that which is now made in their annual reports, is the disclosure of how much money is paid by the collecting societies to individual copyright owners. They confirmed that that is the case (unfortunately, no representative of the State or of CAG attended the meeting this year).
20. Annexure B to the Supplementary Report was a form of a new additional Clause 2.9 which Copyright Agency and Screenrights suggested if I had been mind to recommend any amendment, while Annexure C was the form of a new additional Clause 2.9 sought by the State and CAG.
21. The collecting societies have in fact now amended the Code by introducing a new additional Clause 2.9 in the form of Annexure B to the Supplementary Report. A further copy of that new Clause 2.9 is **Annexure D** to this present report.

PRODUCTIVITY COMMISSION'S REPORT NO 78, ON INTELLECTUAL PROPERTY ARRANGEMENTS

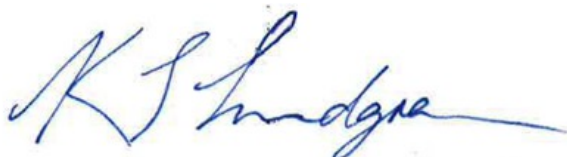
22. The Productivity Commission provided this report to the Government on 23 September 2016 and it was publicly released on 20 December 2016.
23. Recommendation 5.4 of the report is as follows:
- “The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:
- The Australian Competition and Consumer Commission should undertake a review of the current Code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees.
 - The review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.”
24. As part of the present Triennial Review, Australian Digital Alliance and Live Performance Australia both made submissions generally supportive of the Commission’s recommendation 5.4, while APRA has made a submission against it.
25. It will be noted that recommendation 5.4 is not a recommendation that the Code should be amended in any particular way, or, indeed at all.
26. If recommendation 5.4 is implemented, the Australian Competition and Consumer Commission (ACCC) will undertake a thorough review of the Code.
27. Australian Digital Alliance and Live Performance Australia make interesting submissions firmly in support of a review by ACCC but do not recommend any particular amendments to the Code.

28. Apart from noting their and APRA's submissions, there seems nothing for me to do but to await the outcome of the Productivity Commission's Recommendation 5.4.

CONCLUSION

29. In my assessment, the Code serves a useful purpose. As I noted at [67] of my last Triennial Review report, one cannot fail to be impressed with the detailed annual compliance reports that the collecting societies provide.
30. As mentioned at [68] of that report, the Code is expressed in general terms appropriate to be applied to all of the collecting societies (the newly introduced Clause 2.9 is an exception – it applies only to Declared Collecting Societies). No doubt those who have dealings with a particular collecting society would wish the Code to impose specific stringent standards and requirements pertinent to that collecting society and their dealings with it. As I noted then, the generality of the Code's standards can be seen as a shortcoming.
31. I do not think that I should embark upon, or seek to pre-empt, the conclusions that the ACCC may reach following any review by it.

Dated 10 April 2017

A handwritten signature in blue ink, appearing to read 'K E Lindgren', with a stylized flourish at the end.

The Hon K E Lindgren, AM, QC, FAAL
Code Reviewer

APPENDIX A TO REPORT

Triennial Review of Code of Conduct

Clause 5.3

- 5.3 Review and Recommendations for Amendment of the Code**
- (a) This Code will be reviewed:
- (i) following the expiry of two years from the Code coming into effect; and
 - (ii) at least once within each subsequent three year period.
- (b) For the purposes of a Review of the Code, the Code Reviewer will:
- (i) invite written submissions on the operation of the Code and on any amendments that are necessary or desirable to improve the operation of the Code;
 - (ii) convene and publicise widely, during the period in which submissions may be made, one or more meetings that Members, Licensees and the general public may attend to make oral submissions to the Review; and
 - (iii) undertake such other consultations as he or she considers appropriate, including consultations of the kind set out in clause 5.2(a).
- (c) Each Collecting Society will inform its Members and Licensees in an appropriate manner that the Review is being conducted and that they may make submissions to the Code Reviewer.
- (d) The Code Reviewer will allow a period of at least two months for the making of submissions.
- (e) At the completion of the period for the making of submissions, the Code Reviewer will prepare a report of the Review, and will make such recommendations as he or she considers appropriate in relation to the

operation of the Code, including recommendations for amendments of the Code.

- (f) The Code Reviewer will make a copy of the report of the Review available to:
- (i) each Collecting Society;
 - (ii) the Commonwealth Department(s) responsible for the administration of the *Copyright Act 1968*;
 - (iii) each individual or group that made a submission to the Code Reviewer; and
 - (iv) members of the public.

APPENDIX B TO REPORT

Triennial Review of Code of Conduct

Notice of the Review, with an invitation to make submissions by mail to the Code Reviewer at a specified address or by email by 10 March 2017, was given by the Societies to their members via publication on their respective websites. The Notice was published in an advertisement in *The Australian* newspaper on 10 December 2016. It was in the following terms:

Code Review Secretariat

Suite 704, 4 Young Street

Neutral Bay NSW 2089

Email: codereviewer@gmail.com

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 Kevin Edmund Lindgren AM, 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 ("Copyright Agency"), Audio-Visual Copyright Society Limited ("Screenrights"), Viscopy Limited ("Viscopy"), Australian Writers' Guild Authorship Collecting Society Limited ("AWGACS") and Australian Screen Directors Authorship Collecting Society Limited ("ASDACS") at:

APRA

**Function Room & Terrace on Level 4
16 Mountain St, Ultimo**

on

Monday, 13 February 2017

From 10.00 am

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, its operation and its terms. A copy of the Code may be obtained on the societies' websites or by application to the address of the Code Review Secretariat set out above.

Persons wishing to make an oral submission at the meeting hereby called are requested to notify the Code Reviewer at the address of the Code Review Secretariat set out above and to submit on or before **6 February 2017** an outline of their submission.

Written submissions are also invited, to be sent on or before **10 March 2017**, to the Code Reviewer at the address of the Code Review Secretariat set out above, on the operation of the Code and/or on any amendments that are necessary or desirable to improve the operation of the Code.

K E Lindgren AM, QC
Code Reviewer

December 2016

APPENDIX C TO REPORT

Triennial Review of Code of Conduct

EXPLANATORY MEMORANDUM ACCOMPANYING COLLECTING SOCIETIES' CODE OF CONDUCT

The heading to clause 3 of the Code is "COMPLAINTS AND DISPUTES"

In the various paragraphs of clause 3, both expressions, "Complaints" and Disputes" are used, sometimes separately and at other times in association with one another.

Clause 3(a) obliges each collecting society to develop and publicise procedures for:

- (i) Dealing with complaints from Members and Licensees; and
- (ii) Resolving disputes between the Collecting Society and:
 - A its Members and/or
 - B its Licensees.

Clause 5.1 (c) sets out the functions of the Code Reviewer. These include:

- (i) to monitor, and prepare annual reports on, the level of compliance by Collecting Societies with the obligations imposed on them by the Code; and
- (ii) as part of that function to consider complaints from Members or Licensees.

Finally, paragraphs (c) to (e) of clause 5.2 deals with the reception of complaints by the Code Reviewer.

In summary, it is only "complaints" and not "disputes" that the Code Reviewer is to receive and deal with under clause 5.2.

The expressions "complaint" and "dispute" are not defined in the Code.

In his Report of his review of the operation of the Code issued in April 2014 the Code Reviewer suggested that the following definitions might be considered appropriate:

"complaint" means "an allegation that a collecting society's conduct has fallen short of a standard of conduct required of it by the Code"

"dispute" means "the taking of rival positions by a collecting society on the one hand and a member, licensee or other person on the other hand, as to their respective legal rights and obligations, resolution of which depends on a determination of what the relevant law is and/or a finding as to what the relevant facts are".

For example, an issue as to whether a licensee owes an amount of money to a collecting society is a dispute, whereas an allegation that the collecting society has not responded within a reasonable time to correspondence from the licensee or has been rude in dealing with the licensee over the dispute is a complaint.

Readers should understand that it is part of the role of the Code Reviewer to address complaints by them about the conduct of a collecting society but not to resolve disputes between them and the collecting society.

March 2017

APPENDIX D TO REPORT

Triennial Review of Code of Conduct

New Clause 2.9

2.9 Reporting by declared collecting societies

- (a) The Annual Report of a Declared Collecting Society shall include the following information in relation to each statutory licence for which the society is declared, for the financial year to which the Annual Report pertains:
 - (i) For each Statutory Licensee Class:
 - A. total licence fees received;
 - B. income on investments of licence fees;
 - C. total amount allocated and paid to members;
 - D. the total amount of licence fees held in trust; and
 - E. total licence fees for which the trust period expired.
 - (ii) the total expenses of the Declared Collecting Society.

- (b) A Declared Collecting Society will, upon request from a representative of a Statutory Licensee Class, provide the following information to the extent that it can do so at a reasonable cost:
 - (i) proportions to classes of recipients from the distribution of licence fees from the Statutory Licensee Class;
 - (ii) for each of the total amounts referred to in clause 2.9(a)(i)(E), the proportion not paid to rights holders due to:
 - A. the entitled member not being located;
 - B. the relevant rights holder not being a member;
 - C. entitlement disputes;
 - D. the amounts being below the distributable threshold; and
 - E. other reasons (which reasons the Declared Collecting Society may elect to specify).

(c) In this clause 2.9:

Declared Collecting Society means a Collecting Society that has been declared under ss. 135P, 135ZZB or 153F of the *Copyright Act 1968*;

Statutory Licensee Class means:

- (i) the Commonwealth Government;
- (ii) the State and Territory Governments;
- (iii) schools;
- (iv) universities;
- (v) Technical and Further Education institutions; and
- (vi) other educational institutions.