

Copyright Act 1968

DECLARATION OF COLLECTING SOCIETIES

Guidelines

Outline

This document deals with requirements for declaration of collecting societies under –

- Part VA (educational copying of broadcasts);
- Part VB (copying of works for education and people with disabilities); and
- Part VC (retransmission of free-to-air broadcasts)

It also covers matters that might give rise to the withdrawal of the declaration of a society.

A need for regulation arises from the monopoly position conferred on declared societies to operate the above schemes.

Fundamental objectives of regulation are to ensure

- that each society diligently collects all money to which it is entitled, and none to which it is not;
- that the society manages its operations efficiently and does not incur improper expenses;.
- that the distribution of royalties to relevant copyright owners is fair, and is seen to be fair;
- that the society maintains an even hand as between current and future beneficiaries.

In sum, the requirements are directed to efficiency, honesty and equity.

A degree of control could be achieved by means of existing laws relating to companies, fraud, winding up, and so on. But Parliament clearly expects a higher standard of the collecting societies. In, some instances therefore the requirements go beyond the general law, while in other cases they appropriately re-emphasise standards contained in general law.

It is important to understand that the detailed requirements for declared collecting societies operate at a number of distinct levels -

- (1) requirements of the Act directly concerning the society's behaviour, eg, those relating to rights of membership and the provision to the Attorney-General of annual reports, etc, and alterations of rules;
- (2) requirement of the Act that the rules contain a certain provision, namely prohibition on the payment of dividends;

- (3) requirements of the Regulations that the rules contain certain provisions, eg, a provision limiting the percentage of revenue which can be given for cultural or benevolent purposes. These provisions must be provisions (in the words of the Act) "necessary to ensure that the interests of the collecting society's members who are relevant copyright owners or their agents are protected adequately", and must include provisions about a number of matters stated in the Act;

It should be noted that, in imposing requirements as to the provisions of the Society's rules, (2) and (3) above are bringing to bear the existing law governing the obligations of companies to comply with their rules.

- (4) mere "guidelines": which may relate directly to the society's behaviour, eg, requirement of "even-handedness", or which provide guidance on the Attorney-General's interpretation of the laws referred to in (1), (2) or (3) for the purposes of exercising his discretion to declare a collecting society.

In the detailed notes which follow, references are given where appropriate to the Act or Regulations to indicate the level at which each requirement operates. Notations of the form : "Act para (a)" are references to the stated paragraph in each of ss. 135P(3), 135ZZB(3) and 135ZZT(3); which relate respectively to the 3 schemes. Notations of the form: "Regs para (a)" are references to the stated paragraph in each of rr.23J(1), 23JM(1) and 23L(1), which also relate respectively to the 3 schemes.

The detailed requirements are necessarily expressed in general language in places. Once established, societies will need to make their own interpretations. Neither the Attorney-General nor his Department has power over a society's day-to-day operations or decisions, notwithstanding the statutory requirements to report to the Attorney-General and notify changes in rules. Only where the Attorney-General or the Department becomes aware of conduct by the Society that may constitute non-compliance with the Act, regulations or other guidelines, will the society's attention be drawn to the possibility that the conduct might constitute grounds for revocation of its declaration.

Detailed Guidelines

1. Guarantee company. (Act para (a)). The society must be a company limited by guarantee and incorporated under a law in force in a State or Territory relating to companies.
2. Membership rights. (Act para (b)). Membership should be open to all "relevant copyright owners" or their agents. (In the case of Parts VB and VC, this stipulation relates to the *class* of relevant copyright owners *in respect of which the society seeks declaration*, or their agents.) It would not be acceptable to *impose* any substantive collateral conditions, eg, that members *assign* rights to the society, or agree to constitute the society as their collecting agent for any other purpose. In particular, it would not be acceptable to *require* members to constitute the society as exclusive licensee (so as to prevent parallel licensing by the owner). It would not be acceptable to require that members assign to the society rights to collect royalties from equivalent foreign schemes. The society's monopoly relates to operation of the statutory scheme only. Purely procedural conditions (eg, completion of application form listing repertoire) would be acceptable. It would also be acceptable to require an agent purporting to act on behalf of a principal (author) to

indemnify the society against claims from the author in respect of any money distributed to the agent.

3. Dividends. (Act para (c)). The society's rules must prohibit the payment of dividends to its members.

4. Voting rights. The society's structure should be such as to avoid the potential for, or appearance of, victimisation of minority shareholders, eg, those represented directly rather than through other collecting societies.

5. Accounting periods. (Regs para (a)). The rules should provide for the society's operations to be broken down into periods for accounting purposes. An accounting period is terminated by the end of a financial year; otherwise it is up to the society to define shorter accounting periods, ie, to specify what events - such as a fresh Tribunal determination – delimit a shorter period.

6. Consistent attribution. (Regs para (b)). The society should adopt a consistent practice in regard to the attribution to particular accounting periods of various categories of receipts and disbursements, including –

- gross royalties received;
- amounts recovered in legal proceedings to collect unpaid royalties (eg, where these relate to a past accounting period);
- costs of bringing such proceedings;
- gifts for cultural purposes (see further para 8);
- bringing trust moneys back into account after trust period has expired (see further para 18);
- bank interest earned (including interest on the trust account);
- payment of interest on borrowed funds;
- taxation liabilities;
- recovery of overpayments (see further para- 19).
- unanticipated claims in respect of past periods - (para 20);
- other administrative and legal expenses, including those associated with the conduct of surveys and with Copyright Tribunal proceedings (see further para 9);
- carrying forward an amount to provide continuing operating funds (see further para 10); and
- allocation of net proceeds to qualified persons and distribution to those who are members or (in certain cases) payment into trust account (see further para 11 et seq).

This is intended to prevent "juggling" of accounts. In this regard rigorous accounting standards are expected.

For each distribution period, there should be a separate "money pool" constituted and dealt with as specified in the succeeding paragraphs. (See also annexed diagram.)

7. Collection of revenue. (Act para (d) (i) and Regs para (c)). A society should exercise reasonable diligence in the collection of equitable remuneration due to the society. The costs of collection are to be taken into account. Offers of discounts for concessions which are in the long term interests of members would be acceptable.

8. Gifts. (Regs para (d)). Gifts by the society for general cultural purposes determined by the society to be relevant to its objectives, and/or for a benevolent fund for the relief of hardship amongst relevant copyright owners and their dependants would be acceptable. The rules should

provide that any gifts made by the society for cultural or benevolent purposes are not to exceed a stated percentage of royalties attributable to that accounting period.

9. Administrative expenses. (Act para (d)(ii) and Regs para (e)). Proper and reasonable administrative expenses may be met, prior to any allocation and distribution. These may include ex gratia payments in settlement of claims in respect of past periods. (See further para 20).

10. Reservation of amounts. (Regs, definition of "distributable amount"). At the end of each accounting period the society should determine an amount of "operating revenue", however described, to be withheld from allocation and distribution and to be carried forward to the next period to provide funds for continued operation and (as to a minor part) to cover contingencies such as unforeseen claims which might be made by qualified persons after distribution has been finalised. (This does not imply any explicit differentiation of the amount reserved into sums for several specific purposes.) In the early stages it is accepted that the amount may need to be relatively large. However, when the society is established on a firm footing the amount brought forward at the beginning of a period, and that reserved from allocation at the end of the period to be carried into the succeeding period, should approximately cancel each other out.

11. Allocation. (Act para (d)(iii) and Regs para (f)). The Society's rules are to include provision for the determination of a "scheme of allocation", however described, for each accounting period. A scheme may be documented in diverse sources which, when read together constitute the scheme, provided that the documents can be identified with certainty. Elements in a scheme of allocation may be contained in the rules. It is not necessary that a scheme be determined before the end of the accounting period to which it relates, but it must be determined before an allocation is commenced. A scheme should specify the manner in which, or the procedure by which, the distributable amount is to be allocated to qualified persons in accordance with such criteria as are declared in the rules to be relevant. These criteria may include, but need not be limited to, the following -

- the extent of copying of their material under the licence;
- the nature and value of the material;
- the effect of such copying on the value of, or the potential (sale, rental, broadcast etc.) market for, the material;
- (where more than one have contributed) the relative contribution of individual relevant copyright owners to the material.

Criteria should not be such as to discriminate between members and non-members, or between relevant copyright owners from Australia and those from other countries. No qualified person should be arbitrarily excluded from the allocation.

Where another body (eg, a collecting society, professional association, etc.) which is a member of the society controls the right (as agent and/or assignee) to receive royalties in respect of the works of many copyright owners or many works in which it holds the copyright, the society need only concern itself with allocation of an aggregate amount due to that body (ie, not with any further apportionment by the body).

12. Data. Having regard to the criteria referred to in para 11 the scheme would need to spell out data upon which the claims of qualified persons are to be quantified or assessed. The data specified should address the criteria, directly or indirectly, having regard to the cost of collecting or obtaining that data. There need not be a one-to-one correspondence between each datum and

each criterion. Indirect correspondence may entail, for example, that copying is presumed, wholly or in part, to be in proportion to sales or airplay, library holdings or lending, newspaper circulation figures, amounts earned by feature writers, etc. It would be permissible to use statistical "smoothing" techniques to even out extremes in samples which are assumed to represent random fluctuations.

13. Hotchpotch. There need be no exact correspondence between the statistical or record-keeping basis for assessing (agreeing or awarding) quantum of royalty due to the Society and the statistical basis for quantifying amounts to be allocated to those entitled. For example, it would be permissible (provided it was in line with the "criteria" in force for the society under para 11) for different weightings to be applied to different categories of material for allocation purposes, whether or not they are taken into account in assessing equitable remuneration/royalties due. Inadequacy in copying records might be another reason to apply fresh considerations to the allocation task.

14. Discretion. The scheme of allocation should leave to directors the *minimum* discretion that is consistent with necessity.

15. Collateral arrangements. Rules should prohibit the society or directors making any binding arrangement, separate from the scheme, regarding the future exercise of discretions allowed under the scheme. This means that the society, and its directors, should exercise their allocation role in accordance solely with the scheme of allocation approved under the society's rules, as noted above, and should not enter into any collateral arrangement with particular beneficiaries, or groups of beneficiaries, which have the effect of placing fetters on the future exercise of discretion left to them under the scheme. If any "arrangement" is thought to be in the interests of all members, it should be incorporated in the scheme itself and approved as such in accordance with the society's rules. In short, distribution should be in accordance with the scheme, the whole scheme, and nothing but the scheme.

16. Distribution. (Act para (d)(iii) and Regs para (g)). Distribution of shares of royalty allocated to qualified persons should be completed as expeditiously as practicable. Where the person is a member, the share should be paid to him or her. It would not be acceptable to impose any unreasonable substantive conditions on distribution of the amount allocated to a member. It would be acceptable to require compliance with purely procedural conditions; eg, that members regularly provide information on repertoire controlled by them. It would also be acceptable to require an agent purporting to act or behalf of a principal (author) to indemnify the society against claims from the author in respect of any money distributed to the agent. Where the person is not a member, the share should be paid into the trust account referred to in para 17 and disbursed (expeditiously) when the person becomes a member or is represented by an agent who is a member.

17. Trust account. (Act para (d)(iv) and Regs para (h)). A trust account should be established and used, inter alia, to hold any share of the distributable amount which is, and so long as it is, undistributable. More broadly (see Regs para (i)) the account should be used to hold any portion of the distributable amount which cannot (for any reason) be allocated or distributed. Circumstances for use of the account might thus include-

- the society has lost contact with the member concerned;
- the qualified person entitled is not currently a member;
- the relevant copyright owner or agent entitled to the amount is not finally ascertained;

- there is a dispute as to entitlement;
- the accumulated aggregate amount due to a member would be uneconomic to distribute, ie, is below a threshold limit;
- a portion of funds collected cannot be allocated immediately as there is presently inadequate data for apportionment;
- monies are required, under mutual arrangements, to be held pending acquittal with a foreign society;
- it is desired to set aside a specific sum to meet *ex gratia* claims which might later arise in respect of the current period (see further para 20).

However, immediate distribution in accordance with the society's allocation scheme (albeit on imperfect data) should be considered as a preferable alternative to placing funds in trust in circumstances where they are unlikely to be claimed within the trust period referred to para 18. Where funds do go into trust, distribution on the best data which is to hand immediately prior to expiration of that trust period should be considered as a preferable alternative to allowing the funds to fall back into general revenue (para 18).

18. Disposition of trust funds. (Regs Para (i)). Amounts placed in trust are to be held in trust for a minimum period, stated in the rules, of at least 4 years (the "trust period"). They would be paid out (without interest) to a person who becomes entitled in this period, ie, where the circumstances that required the amount to be placed in trust have ceased. Note that in cases where the allocation (as well as distribution) was delayed, eventual allocation should be in accordance with the scheme for the period in which the moneys formed part of the distributable fund. Interest earned by the trust fund would fall into the general revenue of the society, ie, along with other receipts and expenses, it would help determine the size of the distributable amount for the accounting period in which the interest is credited. Amounts which remain in the trust fund at the expiration of the trust period would fall into general revenue for distribution in respect of the then current accounting period (or the period just terminated if that happens to coincide with the expiration of the trust period).

19. Errors in allocation or distribution. In the case of an overpayment of royalty to a particular member, recovery of the amount overpaid may, and should where possible, be effected out of future distributions. Major overpayments should be recovered by exercising such rights as exist at law (e.g. "unjust enrichment" doctrine).

20. Ex gratia payments. Entirely apart from the scheme of allocation and the gifts for general cultural or benevolent purposes, provision for *ex gratia* payment should be made in the case of a copyright owner who could establish substantial copying of his work under the licence, but who, under the sample on which distribution was based, received little or nothing. The general revenues of the society should be used to meet contingencies of this kind, ie, they are to be treated as any other administrative expense.

Alternatively, provision might be made within the scheme of allocation to set aside an amount to meet *ex gratia* claims in respect of the current period, in which case the amount concerned should be transferred to the trust account pending receipt of claims.

Ex gratia payments should be kept to a minimum.

21. Conflict of interest. Directors of the society should avoid any conflict of interest, eg, by trafficking in the Society's property. Whilst this may well be able to be regulated within the

framework of company law, observance will also be a matter for consideration in any review of the declaration of the society.

22. Cross-subsidy. The society's property attributable to the relevant statutory licence scheme, and funds collected, should be kept separate from other property. Directors should minimise any element of cross-subsidy between the operation of the statutory licence scheme and any other activities of the society, eg, if the society is voluntarily constituted the agent of some of its members for the collection of proceeds from comparable foreign schemes. There should be separate books of account (as for a trust). Reporting to the Attorney-General need only concern the society's statutory operations. Note that under the educational statutory schemes the society does not hold rights to enable it to offer licences to copy, although it may agree on the quantum of remuneration for copying, and functions as statutory agent of copyright owners for collection purposes. On the other hand, the society's administration of rights voluntarily assigned or licensed by copyright owners would be outside the statutory scheme.

23. Impartiality towards current members and qualified persons. The society, and directors, should act impartially towards all members. In addition, in allocating shares in the distributable fund the society should not discriminate between members and qualified persons who are not members. (See para 11).

24. Even-handedness between current and future members. The society has (as does a trustee) an obligation to maintain an "even hand" as between current, prospective (currently entitled) and future beneficiaries. Aspects of this duty are as follows -

- it should not be for current members alone to meet major capital expenses if this is avoidable. Where possible, these should be amortised over an extended time using mechanisms such as leasehold or mortgage;
- major administrative expenses (such as those associated with Copyright Tribunal determinations) should similarly be amortised if possible;
- the "operating revenue" amount carried forward into each new accounting period should be neither excessive nor too little;
- conversely, the society should not run down its assets so as to disadvantage future members;
- as already noted (para 6), the society is to adopt a consistent approach to allocation of receipts and expenditure to particular accounting periods.
- as already noted (para 7), offering discounts of royalties due in return for appropriate concessions from users of the statutory licence (eg, prompt payment, distribution of publicity material) is acceptable. Any such arrangement, however, should not be exercised in such a way as to disadvantage future members, eg, by binding the society to accept discounted royalties over many periods in return for concessions which apply only to the current, or relatively few, periods.

25. Access to records. (Act para (d)(v) and Regs para (j)). The society must allow members (in particular those who are qualified persons or their agents) reasonable access to its records, at least so far as they relate to the member. The same principle should desirably be applied to prospective members, eg, one ought to be able to obtain an answer to the question: "How much money is held on trust for me?". Any fee for access should not be more than is reasonably necessary to defray the cost of providing such access. Reasonable overheads can be allowed for in calculating this cost.

26. Annual report and accounts. (Act ss. 135R, 135ZZD, 135ZZV). As already noted (para 22), reporting and accounting requirements relate only to the society's statutory operations. Administration of the rights voluntarily assigned or licensed would be outside the statutory schemes.

27. Amendment of rules. (Act ss. 135S, 135ZZE, 135ZZW). The requirements of the Act that alterations to rules be notified to the Attorney-General need no elaboration.

Glossary

"rules": Memorandum and articles of association of a collecting society.

"relevant copyright owner": See Interpretation provision in the relevant Part of the Act.

"accounting period": Period determined by the society for accounting purposes, not extending beyond the end of the financial year. See further para 5.

"equitable remuneration": Equitable remuneration payable under Part VA, VB or VC.

"distributable amount" (in relation to an accounting period): the net amount of equitable remuneration available for distribution after gifts and expenses have been met. See definition in Regs and para 10 above. The definition envisages that a portion of revenue can be withheld from distribution and carried forward to the succeeding period to meet cash flow needs (though in time the amount brought forward at the beginning and that reserved at the end of a period would approximately cancel each other out).

The revenue available includes – in addition to that attributable to the period in accordance with the (consistent) practice of the society – amounts which are "otherwise available" for distribution in respect of the period. Apart from "reserved" (carried over) funds, it is clear that this applies to trust funds which remain unclaimed at the end of the trust period. It would also be appropriate to treat in this fashion amounts such as–

- interest on the trust accounts (see further para 18);
- interest on the bank account balances;
- recovered amounts which have been overpaid in a previous period (see further para 19);
- miscellaneous receipts relating to the society's statutory operations, eg, fees for provision of access to records–

ie, all revenue which is ultimately derivative of the collection of equitable remuneration.

The deduction of gifts is dealt with in para 8 above. It may not exceed a stated percentage of the equitable remuneration attributable to the period.

The deduction of administrative expenses is dealt with in para 9 above. Expenses must be "reasonable". They may include outgoings such as ex gratia payments to qualified persons who consider that they were inadequately remunerated because of the allocation methodology in a prior period, but such payments should be kept to a minimum. (see further para. 20).

"scheme of allocation": Procedure for dividing distributable amount into shares. For detailed requirements see further paras 11-15.

"share": An amount allocated to a qualified person. (Called a "potential share" in the Regs).

"qualified person": A relevant copyright owner (whether or not a member of the society) or a member of the society who is the agent of such an owner.

"distribution": Actual disbursement of amounts allocated to qualified persons who are members, or placement in trust in other cases. (see further paras 16 et seq).

"work": Any relevant copyright material.

Attorney-General's Department
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