

Annual Report

**Film Exhibition and Distribution
Code Administration Committee**

2000-2001

Outlook

The Code of Conduct has now been in operation for three years.

It has taken some time for the signatories to come to grips with the Code's provisions and how they can be used to bring about a more harmonious regime for business transaction to take place and for disputes to be resolved.

There have been distinct signs during the third year of the Code that it is becoming an integral part of the industry's method of doing business.

Since the time it became operational, there have been attempts by various sections of the industry to make it work better for its members and to build upon what had already been achieved.

It was never intended that the Code should remain in the pristine condition in which it was passed.

This year the Committee proposed some significant changes to the operation of the Code in an attempt to make it more accessible and more effective.

In May 2001, the Australian Competition and Consumer Commission signalled its intention to conduct a review of the Code and to assess its effectiveness as a voluntary code.

One of the reasons to hope that the adaptation of the Code will lead to better effectiveness is the more frequent use of the Code umbrella in discussions between different segments of the industry.

Review of operation.

During the year, aspects of the Code came under scrutiny and the effectiveness of its dispute resolution procedures were put to the test.

Five disputes over the supply of first run prints at a particular centre went before the Code Conciliator. Three of those disputes were successfully resolved, one was partially settled and the fifth remains unresolved despite a recommendation by the Code Conciliator.

At the meeting where these issues were considered, Commissioner Ross Jones from the ACCC indicated that from the Commission's perspective, failure of signatories to accept recommendations of the Conciliator was troublesome in the extreme and that parties who were unwilling to accept the Conciliator's recommendations should reconsider being a signatory to the Code

The Committee expressed its disappointment in writing to the signatory concerned that the recommendation had not been acted upon and that the unresolved dispute could not be settled under the Code's provisions.

Following publication of the details of one of the conciliations, the Committee investigated whether or not the confidentiality provisions of the Code in relation to settlement of disputes should be reinforced with sanctions.

An examination by the Committee at its next meeting of the issues which would be involved should such a proposal proceed persuaded members that the sanctions option was inappropriate given the voluntary nature of the code.

Complaint Handling

The Committee considered the fall off in the number of inquiries and complaints to the Secretariat in comparison with the earlier years of operation. There was anecdotal evidence to suggest that Code signatories were wary of invoking the Code, even at the early stages of a dispute, because of the expense which might be involved should the matter go the path of a full conciliation.

There were concerns expressed that the earlier "user pays" decisions by the Committee, although subsequently modified, were deterring signatories from raising matters of concern with the Code Conciliator. There were also some reservations that the time limits set out in the Code were proving to be a barrier as many of the matters which arose in dispute had a much greater urgency about them than the Code procedures provided for.

The Committee considered procedures used by the Banking Industry Ombudsman which involved the Conciliator at a much earlier stage and shifted the emphasis to a swift resolution of the problem before it came to the conciliation stage.

Financial Assistance

Because of the financial implications such a change could bring about and because of the costs associated with the running of the Committee, it was decided to approach the Minister for Small Business to seek financial assistance.

The letter said in part

There have been some notable successes under the umbrella of the Code. For the first time in the history of the industry there are a set of rules which set parameters for business negotiations and all groups in the industry indicate that this has proved to be a significant plus in business dealings. It has resulted in the freeing up of terms and conditions for some, but not all sections of the industry.

It has also resulted in the first multilateral discussions in the history of the industry between the independent cinema operators and all five of the films distributors.

Further, the Code has had remarkable success with disputes which have either been dealt with through conciliation or during the formal disputes resolution process. Of the 34 disputes which have arisen, 30 have been resolved at different stages of the conciliation process.

Despite these successes, there is still a widespread perception in the industry, particularly in the independent segment, that the Code is not meeting their problems. There is a perception that the Code was framed to deal with the larger operators in the industry and that the smaller operators feel powerless to have their problems satisfactorily resolved under the Code's procedures.

There is a widespread perception amongst the smaller operators that if they 'stir the pot' there will be some retributive action taken against them; that if they become involved in a conciliation process with one of the major distributors, they will be outmuscled in the proceedings or that they will be outlasted and be unable to meet the costs involved. Many of these matters can be dealt with under the dispute resolution procedures. Yet despite appeals by myself, the Code Conciliator and the Administration Committee have been made to Code signatories to bring these matters forward for resolution under the Code's procedures, there is still reluctance to do so by many of the independent operators.

There are some within the industry who believe that the Code should be made mandatory and I would be surprised if such a suggestion had not been made to your Department or to the ACCC. My own view, and the view of the Committee, is that such a step is not warranted at this stage.

One of the matters which was never addressed in detail by the founders of the Code was how it was to be financed. The Code merely provides that one of the roles of the Administration Committee will be to "provide adequate financing for the administration of the scheme."

Initially the Committee resolved that each of the 12 Committee members would make equal contributions for the administration and the operation of the Code. These contributions which have varied between \$3800 and \$2000 annually have been used on the administration and promotion of the Code and initially to fund the dispute resolution procedures.

Following a resolution of the Committee that the dispute resolution procedures and inquiries relating to individual disputes should be paid for on a "user pays" basis, there seems to have been a reluctance to invoke the conciliation procedures by independent signatories to the Code.

There is also financial difficulty for independent cinema operators seeking representation on the Committee if they are not aligned with the two associations representing independent cinema owners. A similar problem exists for independent cinema distributors.

The Committee would therefore like to apply for financial support along the lines of the support made available to other Codes under the Federal Government umbrella. The Committee believes that many of the issues which trouble the small independent cinema operators could be resolved by the present dispute resolution regime but that it is concern about the financial entanglements which may be causing the reluctance.

An injection of funds would also allow some basis educational and promotional aspects of the Code to be undertaken in the hope that the provisions and the dispute resolution structure can be more positively used.

I would be happy to meet with you to discuss any of these matters or to provide more detail should you require it.

In his reply on 22 March, the Minister for Small Business, The Hon. Ian Macfarlane included the following:

I note your positive comments on the successes of the Film Code to date and agree with your comment that the Code should not be made mandatory.

As the Film Code has been operating for over two years, it may be timely to review the operation of the Code the ensure it is effectively addressing the issues that gave rise to its development. I understand the Minister for Financial Services and Regulation, the Hon. Joe Hockey MP, has asked the Treasury, in consultation with other government agencies, to consider whether it would be desirable to review the Film Code.

With regards to the financial assistance to the Film Code, it is the Government's preference that industries self regulate with minimal government involvement and the Film Code is no exception. Properly formulated codes that enjoy industry support benefit all industry participants and demonstrate their capacity to look after their own affairs in a responsible and fair

manner. Government intervention would leave industries with no real ownership of their codes.

I would be happy to hear of any other proposals that you may have to address the issues in the film exhibition and distribution industry which you have outlined in your letter.

Thank you for bringing these matters to my attention

Meeting with Minister for Small Business

The Committee considered the Minister's response. It agreed to take up the offer to meet with the Minister to discuss proposals to make the Code more effective for the signatories.

At the meeting in Sydney attended by the chairman, the Code Conciliator and COAA Committee delegate, Mr Harry Waghorn proposals for upgrading of the Code were put to him. The Committee had sought \$36,000 from the Federal Government to assist in the administration of the Code.

The following is an extract from the document put to the Minister on behalf of the Committee

Operation of the Code

The Code has now been in operation for nearly three years. In general terms it is working well. During its first year and a half of operation it was described by the ACCC as an example of how a successful code should operate.

Despite this, there is a perception among smaller independent operators that it is not meeting the expectations they had when it was introduced.

They believe that there are some inherent weaknesses in the Code that tilts it permanently against them. They also believe that the procedures in the Code are such that they will not be able to achieve a just result.

There are several steps which can be taken which can improve matters in the short and in the longer term.

Access to dispute resolution

The Code has a rather cumbersome dispute resolution procedure. Yet it has been remarkably successful for those

who have used it and only a handful of cases have gone through to conciliation.

What has been detected from calls that have come in during the last twelve months especially from the smaller cinema operators is a belief that if a dispute is successfully resolved in their favour, that some form of retribution will be taken against them by the film distributor.

The second perception is that those seeking assistance from the Code believe they are in an unequal situation as against the major distributors. They are also wary of the cost of initiating a complaint. The Committee has decided that the user pays principle should apply and there is an apprehension that if they become involved in a knock down drag out dispute, that the distributor will outlast them.

Early Resolution

The aim of the Code should be to encourage potential disputes to be dealt with under the Code and to have them resolved at an early stage.

The proposal is that we should make the procedures easier for those who have a potential complaint. Instead of the present procedure where the first recourse is to the distributor followed up by a notice of dispute, the secretariat should take up the potential complaint and that if necessary the Code Conciliator should be engaged at an early stage to try to resolve the issue.

At present under the user pays resolution of the Committee, the moment the Conciliator becomes involved in a dispute, the meter starts to tick over.

If potential complainants believed that the Conciliator could become involved and, to a certain extent, take up the ball and run with it in appropriate cases, many more would be encouraged to bring matters troubling them to the code secretariat.

Code Cover of the Industry

The second part of that proposal would be to convince those who are signatories to use the Code and its provisions.

While there have been considerable efforts to encourage this at Conventions and meetings, it is considered that the most effective way to bring this about would be to meet the operators on their home turf and explain the Code's virtues, especially if the revised dispute procedures were in place. Meetings such

as this would also try to persuade those who have not yet signed up to the Code to do so.

Representation

The third proposition is to make sure that the full range of independent cinema exhibitors and the independent distributors are represented at Committee level.

At the moment, the Code operates solely on the contributions of the Committee. The Committee is made up of three representatives from the major exhibitors, three from the major distributors, three from the independent exhibitors and three from the independent distributors

The fee to sit at the table varies between \$2700 to \$3900 for each Committee depending on what the budget figure has been set at.

Independent exhibitors are represented by the Cinema Owners Association of Australia and the Electronic Industries Association of Australia.

There is provision for a seat at the table for unaligned regional and country exhibitors. It is apparent that the contribution fee has been a barrier to the smaller operators who are not members of the two associations.

The same position applies to independent distributors. The independent distributors association provides and pays for two members while the third position for unaligned members remains vacant.

Provision for their participation in Committee discussions would provide an insight into their problems and give some additional confidence to those who are still hesitant about signing up with the Committee.

Review

In the time it has been in operation, the Code has had notable successes.

It has provided for the first time a framework in which distributors and exhibitors can work comfortably. Both distributors and exhibitors believe that the flexibility of negotiations has increased enormously with benefits for both. The overwhelming majority of disputes which have been brought for resolution have been resolved.

With this contribution, together with a matching contribution from the industry, the Code should be able to deal with all matters before it which concern the smaller and regional operators.

We have worked this through with the representatives of the ACCC and their view is that these proposals would substantially improve the working of the Code.

It would also mark a Government commitment to the continuing presence of smaller independent operators in country towns and regional centres where they provide one of the major sources of entertainment and culture for the district.

The report of that meeting was distributed to members of the Code Administration Committee. In part it says:

The Minister strongly expressed views as follows:

He considered the application of the user pays principle to the disputes handling procedures of the Code was ill advised. He did not know how the Committee could have taken such a decision. Such an approach meant that the people the Code was primarily designed to protect and the section of the industry who could least afford it, the independent exhibitors, would be the ones who would be disadvantaged by the decision. He wanted this situation remedied immediately.

He said that the proposed new complaints procedure with the Secretariat taking up the complaint in the first instance and calling in the Code Conciliator to act informally if the situation required it should also be implemented straight away.

He said the Committee should take steps to reach as many of the people in the industry as possible to widen the reach of the Code especially among the independent operators.

He said the industry had opted for a voluntary code; that industry was under an obligation to fund the code to a sufficient level to allow the code to function to fulfil these expectations. The level of funding sought from the Government for the improvement of the effectiveness of the code and the extent of its reach should come from industry sources.

He said all sections of the industry should be committed to the code and should support it financially as an industry body. It should be viewed with confidence by all sections of the industry,

especially those who were seeking remedies under the dispute resolution provisions.

He said he would be happy to express these views and to expound on them to any members of the Committee who wished to take it up with him.

Failure to implement these changes to the way the Code was working would be viewed by the Government as an indication that the code was not operating as the Government thought it should.

He said the Government would not hesitate to make the code mandatory if the Government formed the view voluntary code was not working. He presumed that the industry would prefer not to have government regulators making decisions about the way it conducted its business. However if the code did become mandatory, government officers would have to attend Committee meetings to ensure that the Code provisions were carried out.

He did not make any reference to the request for the financing of the unaligned independent exhibitor representative on the Committee nor the independent distributor.

He said his Departmental representative, Mr Chesworth, would keep in touch and report to him what progress had been made as a result of the meeting today.

He hoped we could meet again in several months time so that he could revisit the issues.

Subsequent Committee Action

Some weeks following the meeting with the Minister, the MPDAA suggested by letter that the members of the Code Administration Committee should contribute the amount sought from the Federal Government to bring about the reforms which had been proposed.

The MPDAA also proposed a new formula for contributions to the running of the Administration Committee with the MPDAA contributing the majority of the funds. The new funding proposal and the proposed reforms to the operation of the Code are to be put to the next meeting of the Committee on 12 July.

Government Relations

Throughout the year the Code has been given support by the Australian Competition and Consumer Commission. The Commission has been represented at Committee meetings by Mr Daniel Boardman and then by Mr Darrell Channing.

Both have been supportive of the work of the Code and have helped materially in providing meetings rooms and by distributing information bulletins to Code signatories.

Commissioner Ross Jones addressed the Committee and Signatories at the Australian Movie Convention and he attended another of the Committee meetings.

Mr Peter Chesworth of the Department of Small Business and Mr Wallace Fernandes from the Consumer Affairs Division of the Department of the Treasury have also given assistance to the Committee throughout the year.

Conciliation

The Code Conciliator, Mr David Newton, has provided his own report on the disputes resolution segment of the Code's work. Mr Newton successfully conciliated some major matters during the course of the year.

He is one of Australia's leading mediators and his advice and counsel both at and outside Committee meetings has been enormously helpful. I particularly thank him for the help he has given me.

Administration

Support services to the Code's administration have been provided by The Accord Group and in particular by Ms Nathalie Birt.

Ms Birt is the Committee's secretary and Minute taker and is also the front line receiver of calls from Signatories seeking information about the Code's operation. She has been most efficient in the way she has dealt with the finances and the administration and behalf of the Committee I would like to thank her for the help she has given.

The Committee

Finally I thank the members of the Committee.

Meetings have always been conducted constructively and without animosity. Committee members do not shy away from taking on difficult issues but do so with the aim of resolving them in a way thought to be best for the whole of the industry.

An indication of the spirit of cooperation is that in three years, all decisions have been taken by consensus. I hope it can continue that way.

John Dickie
Chairman