



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Applications for authorisation**

**lodged by**

**Viscopy Limited and Copyright Agency Limited**

**in respect of**

**A service agreement under which Copyright Agency Ltd will provide services to Viscopy Ltd including the arrangement and administration of day-to-day operations, and to jointly discuss and negotiate terms and conditions for the services provided by the Applicants to their respective members and licensees under the Service Agreement.**

**Date: 5 April 2012**

**Commissioners:** Sims  
Court  
Dimasi  
Schaper  
Walker

**Authorisation no.: A91285 &  
A91286**

**Public Register no.: 2011/1015**

## Summary

The ACCC proposes to grant authorisation to Viscopy Limited (Viscopy) and Copyright Agency Limited (CAL) to enter into a Service Agreement pursuant to which CAL will provide various services to Viscopy and Viscopy members. While Viscopy will retain an independent Board, the Service Agreement will result in CAL fully managing and administering the day-to-day operations of Viscopy's business.

The ACCC proposes to grant authorisation to Viscopy and CAL for five years.

Viscopy and CAL (the Applicants) are copyright collecting societies that provide services to, amongst others, visual artists and licensees of artistic works. The Applicants seek authorisation to jointly discuss and negotiate terms and conditions for the services they provide to their respective members and licensees under the Service Agreement.

The ACCC considers that the proposed conduct is likely to result in public benefits by improving efficiency in the administration of copyright licensing; improved efficiency and reduced transaction costs from the Service Agreement will benefit artists and licensees who wish to use artistic works. Further, the Service Agreement has the potential to improve the quality of services to artists, provide for greater access to copyright services for artists and to copyright materials for licensees.

The ACCC is of the opinion that the Service Agreement will result in little public detriment, if any, due to its very limited effect on competition. The ACCC accepts the Applicants' submission that there is limited overlap between the services provided by Viscopy and CAL, and consequently the Service Agreement will not significantly reduce competition nor increase fees or prices associated with the voluntary and statutory copyright collective licensing schemes currently in place in Australia.

On balance, the ACCC considers the public benefits that are likely to result from the conduct will outweigh any public detriments. Accordingly, the ACCC proposes to grant authorisation for five years.

### *Next steps*

The ACCC will now seek further submissions from the Applicants and interested parties in relation to this draft determination prior to making a final decision. The Applicants or interested parties may also request a conference to be held to make oral submissions on the draft determination.

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## **1. The application for authorisation**

- 1.1. On 6 December 2011, Viscopy Limited (Viscopy) and Copyright Agency Limited (CAL) lodged applications for authorisation A91285 and A91286 with the ACCC.
- 1.2. Authorisation is a transparent process whereby the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.

## **2. Background to the application**

### ***Copyright licensing***

- 2.1. Copyright is a form of intellectual property which is granted automatically upon the creation of certain forms of work or subject matter. The *Copyright Act 1968 (Cth)* (*Copyright Act*) grants various exclusive rights to copyright owners, including for artistic, literary, dramatic and musical works and other subject matter. For artistic works, which include paintings, photographs, sculptures, engravings, sketches, blueprints, drawings, plans and maps, these exclusive rights are:
  - the right to reproduce the work in a material form
  - the right to publish the work
  - the right to communicate the work to the public, including on-line.
- 2.2. Copyright owners may exercise these rights themselves, or give permission to others to do so through the granting of a licence. However, there can be significant transaction costs associated with individual copyright holders negotiating, monitoring and enforcing copyright.
- 2.3. The collective administration of copyright through a collecting society is one way to reduce transaction costs and improve the effectiveness of copyright regimes. Collecting societies act on behalf of their members, who are owners of certain copyrights. These societies grant licences to, and collect royalties from, users of copyright works, and distribute this revenue to members.
- 2.4. By their nature, collecting societies typically face little competition from other collecting societies.
- 2.5. There is a worldwide system of collective administration of certain rights in specific types of copyright material, whereby copyright owners are remunerated for certain

uses of their works, and members of the public are able to obtain licences for the use of those works from collecting societies, normally for a fee.

- 2.6. A collecting society may be ‘declared’ under the Copyright Act and thus become responsible for the administration and collection of fees under a particular licensing scheme.<sup>1</sup> Such schemes are known as ‘statutory’, or compulsory, copyright licensing schemes. Other collecting societies are not ‘declared’ and do not collect fees under statutory licensing schemes, but rather under separate licensing arrangements that are entered into voluntarily.
- 2.7. A declared collecting society is subject to various requirements under the Copyright Act and Regulations which are intended to promote the efficient, honest and fair operation of the declared collecting society. A declared collecting society that does not comply with the relevant requirements under the Copyright Act may have its declaration revoked.
- 2.8. For some types of usage of copyright works and subject matter, it is possible for copyright owners to deal directly with licensees and thus collective licensing arrangements are not essential. However, copyright owners may still choose to participate in ‘voluntary’ collective licensing arrangements where it is in their interests to do so. Licences issued by ‘voluntary’ collecting societies can be ‘blanket licences’ which give licensees access to the collecting society’s entire repertoire. When a blanket licence is obtained users can be certain that they are licensed in respect of the entire repertoire and thus are not at risk of breaching copyright laws. Licences may also be ‘transactional licences’ (for single pieces or series of works).
- 2.9. The Copyright Tribunal is a specialist administrative Tribunal, established under Part VI of the *Copyright Act*. One of the key rationales for establishing the Copyright Tribunal was to counterbalance the perceived monopoly or potential monopoly positions of collecting societies.
- 2.10. The Copyright Tribunal has jurisdiction over the terms of statutory licences (including remuneration) and the sampling systems that are referred to in the *Copyright Act*. It also has jurisdiction over the distribution arrangements of certain collecting societies (including CAL), voluntary licence schemes offered by collecting societies and in certain circumstances over the declaration of collecting societies under statutory licence schemes.

## ***The Applicants***

- 2.11. Viscopy and CAL (the Applicants) are copyright collecting societies that provide services to, amongst others, visual artists and licensees of artistic works under the *Copyright Act 1968*.

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<sup>1</sup> A collecting society may be declared under Part VA (educational copying of broadcasts), Part VB (copying of works for educational and to assist people with disabilities) and Part VC (retransmission of free-to-air broadcasts) of the Copyright Act.

## Viscopy

- 2.12. Viscopy was incorporated in 1995 following a recommendation of the Federal Government's review of the Australian Copyright Collecting Societies (the Simpson Report) to the Commonwealth Government that there was a need for the collective administration of copyright in the works of visual arts.<sup>2</sup>
- 2.13. Viscopy is an associate member of the International Federation of Reproduction Rights Organisation and its Chief Executive is a member of the International Authors Forum working group. Viscopy is also a member of the International Society of Authors and Composers.
- 2.14. Viscopy is a not-for-profit copyright collecting society which provides a centralised means of assisting visual artists to get a return on their artistic works by:
- granting licences to organisations and individuals in Australia and New Zealand who wish to reproduce or communicate copies of artistic works the copyright in which is owned or controlled by Viscopy members or members of affiliated societies
  - distributing royalties received pursuant to such licences and licences administered by other collecting societies to Viscopy members and affiliated societies
  - educating visual artists on the copyright protections available to them and
  - lobbying and advocating for the interests of visual artists.
- 2.15. Viscopy's members are predominantly fine artists, photographers and cartoonists. Viscopy is expert in the valuation and licensing of high quality reproductions of single artistic works, for example a particular image to be reproduced online, on a postcard, in a gallery catalogue or on an item of clothing.
- 2.16. In contrast to many collecting societies, Viscopy mainly licences individual works on a standalone basis on particular terms of use. Unlike blanket licensing, this type of licensing can require additional consents from the copyright owner. Similar services for certain types of usage are provided by prominent image banks and under Creative Commons licences.<sup>3</sup>
- 2.17. Although Viscopy has in the past entered into blanket licences with certain licensees, and does still offer that service, it is not currently licensing its repertoire under any such blanket licence.
- 2.18. Membership of Viscopy is voluntary and free. Members can elect which of the income streams facilitated by Viscopy they wish to have Viscopy collect on their behalf. Viscopy charges artists an administration fee deducted as a proportion of the royalties it collects to cover the costs of providing its services. Currently, the administration fee

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<sup>2</sup> Simpson, S, "Review of Australian Copyright Collecting Societies", A Report to the Minister for Communications and the Arts and the Minister for Justice, July 1995.

<sup>3</sup> A Creative Commons Licence is one that allows an unrestricted distribution of copyrighted works to anyone and for any reason and is parallel to the current copyright regime. Creators of such works may choose to impose gradations of restrictions on the use of material covered by Creative Commons licences.

is 25 percent for royalties Viscopy collects in Australia and New Zealand and 10 percent for royalties collected from overseas.

2.19. Viscopy represents approximately:

- 8,000 Australian and New Zealand visual artists and their beneficiaries. Approximately half of Viscopy's Australian members are Indigenous visual artists and
- more than 40,000 international visual artists and beneficiaries in Australian and New Zealand territories through reciprocal agreements with 43 visual arts rights management agencies around the world.

2.20. Since 2003/2004, Viscopy's principal funding source has been the commission on the royalties it collects for members and affiliated bodies. Viscopy receives revenue from voluntary transactional licences and voluntary blanket licences.

2.21. Viscopy does not itself administer any statutory licensing scheme but collects money on behalf of its members from other collecting societies from their licensing activities under:

- statutory licences
- licence schemes and licences administered by foreign collecting societies and
- *Resale Royalty Scheme for Visual Artists* which is administered by CAL (refer to discussion below).

2.22. In addition to rights management, Viscopy also provides a broad range of services including a broad range of copyright education services to visual artists around Australia and delivering copyright education to Aboriginal and Torres Strait Islander artists in urban, regional and remote communities.

## **Copyright Agency Limited**

2.23. CAL is a not-for-profit copyright collecting society representing the interests of Australian authors, journalists, visual artists, surveyors, photographers and newspaper, magazine and book publishers.

2.24. CAL is a declared collecting society for the purpose of the educational statutory licensing scheme contained in Part VB of the *Copyright Act* for the copying and communication of published literary, dramatic, musical and artistic works (for example, books, magazines, newspapers, material on the internet) by educational institutions and institutions assisting people with disabilities. It is also the declared collecting society for the Government copying provisions set out in section 183 of the *Copyright Act* insofar as they relate to text and images.

2.25. CAL administers the copying and communication of print material by corporations, associations, religious organisations, and funeral directors and crematoria. These uses are of multiple works, which in many cases are not identified at the time of entering into the relevant licence.

- 2.26. CAL currently represents more than 20,000 members. In 2010/2011 CAL distributed more than \$121 million to its members and affiliated societies.
- 2.27. CAL has affiliation agreements with 34 reproduction rights collecting societies throughout the world pursuant to which CAL administers the rights in copyright works published overseas.
- 2.28. Membership of CAL is voluntary and free. CAL allocates licence fees in accordance with its constitution after deducting its expenses. Members can elect which of the revenue streams they wish to have CAL collect on their behalf.
- 2.29. In relation to artistic works, CAL is engaged in administering, and collecting fees in connection with the following:
- statutory Licences
  - voluntary blanket licences
  - *Resale Royalty Scheme for Visual Arts*
- 2.30. CAL also offers transactional licences through its Copyright Express service. However, the ACCC understands that this applies principally to text works.
- 2.31. CAL's core business is in the administration of statutory licences for copying and communication of print material by educational institutions and government agencies. Under statutory licensing, CAL is obliged to collect royalties for non-members as well as for members and to hold on trust money collected for non-members until they have been located and have become members or are represented by an agent who is a member.
- 2.32. The voluntary licences offered by CAL are mainly blanket licences for the use of all works controlled by members of CAL. Voluntary licences issued by CAL are generally limited to internal uses within a corporation. This type of licensing requires negotiation of terms for use of particular works rather than multiple uses of many works on standard terms. CAL is not in the business of granting or administering licences that involve publishing (as opposed to reproducing) members' work.
- 2.33. CAL also administers the Resale Royalty Scheme under which artists receive royalties on certain resales of their work. CAL was appointed in 2010 by the Commonwealth Government to administer the scheme under the *Resale Royalty Right for Visual Artists Act 2009 (Cth)*. A rights holder does not need to be a member of CAL to receive payment.
- 2.34. In addition to CAL's licensing activities, CAL provides a number of services to its members, including:
- conducting proceedings in the Federal Court of Australia and in the Copyright Tribunal of Australia in relation to liability for the use of CAL's members' works
  - a range of activities to educate members about copyright and CAL's activities
  - making submissions to government on copyright related policy issues



- paying affiliation fees to and being an active member of the Australian Copyright Council and
- 2.35. CAL also participates in industry and stakeholder conferences and sponsoring industry initiatives through its cultural fund. CAL allocates 1.5 percent of its income to such cultural development.

***Interaction, overlap and potential for competition between the Applicants***

- 2.36. The Applicants submit that there is only a very limited potential for Viscopy and CAL to compete for the following reasons:
- The core of CAL's business is the administration of the statutory licences. The result of CAL's declaration and appointment under the statutory schemes is that visual artists cannot choose to have the statutory licence administered by any other collecting society.
  - The respective expertise of Viscopy and CAL outside of the statutory schemes is very different.
- 2.37. The Applicants submit that given a lack of overlap, artists and licensees are rarely in a position of having to choose between Viscopy and CAL services. For artists and licensees, the services provided by the Applicants are better described as complementary rather than competing.
- 2.38. The Applicants submit that although a visual artist is able to negotiate a direct licence with any licensee, if the licensee chooses to rely on the statutory licence, then the declared collecting society is the only means by which the artist will receive payment.
- 2.39. That said, Viscopy members can choose to receive their statutory licence money via Viscopy, which receives it from CAL (or Screenrights<sup>4</sup>) in Viscopy's capacity as a member of CAL (or Screenrights). Similarly, members of Viscopy can choose to receive Resale Royalties via Viscopy but due to CAL being the appointed administrator of that scheme, the monies must come through CAL. Service fees are paid by the artist to both CAL and Viscopy in this process. The Applicants submit that there is no overlap (or competition) between them in the administration of statutory licences and Resale Royalties.
- 2.40. The Applicants submit that Viscopy acts as payment agent for the following statutory schemes in Australia:
- reproduction and communication by educational institutions of works (including artistic works) in (predominantly) books, magazines and newspapers - administered by CAL
  - reproduction and communication by governments of works in (predominantly) books, magazines and newspapers - administered by CAL and

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<sup>4</sup> Audiovisual Copyright Society Limited trading as Screenrights (Screenrights) is the declared collecting society for the statutory schemes created by the Copyright Act 1968 (Cth) that allow educational institutions and state and federal governments to make copies (recorded "off air") of television and radio programs and make them available to staff and students under Part VA of the Copyright Act.

- copying of broadcasts for use as educational resources in schools, colleges and universities - administered by Screenrights and
  - the Resale Royalty scheme under which artists receive royalties on certain resales of their work - administered by CAL.
- 2.41. The Applicants submit that CAL operates a clearance service called Copyright Express. Copyright Express is a process whereby users may request permission to photocopy or digitally copy from a hard copy original. This service is likely to attract licensees from the publishing industries seeking to reproduce text items including images in books or magazines. Although this service is similar to certain licensing services provided by Viscopy, Copyright Express is a very small component of CAL's total revenue (currently less than 1%) and the ACCC does not consider that it is indicative of significant close competition between the Applicants that would be at risk of reduction from the Service Agreement.
- 2.42. The ACCC accepts that although both Viscopy and CAL provide voluntary licensing services to visual artists, the nature of the rights licensed and the licensees to whom Viscopy and CAL provide services are different. Thus there is limited actual or potential competitive overlap between the applicants.

## **The Conduct**

- 2.43. Viscopy and CAL have applied for authorisation to enter into a Service Agreement under which CAL will provide various services to Viscopy and Viscopy members. While Viscopy will retain an independent Board, the Service Agreement will result in CAL fully managing and administering the day-to-day operations of Viscopy's business.
- 2.44. The Applicants have made this authorisation application due to the risk that certain provisions within the Service Agreement, if made and given effect to, may otherwise contravene sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and section 45 of the Act.
- 2.45. The Applicants seek authorisation, pursuant to sections 88(1A) and 88(1) of the Act to engage in the following conduct:
- 2.45.1. Jointly discuss and negotiate common terms and conditions for the services provided by the Applicants to their respective members and licensees under the Services Agreement, including:
    - fees or commission levels charged and
    - the scope of the services provided by both or either of the Applicants;
  - 2.45.2. Make and give effect to contracts, arrangements or understandings between the Applicants containing common terms and conditions upon which the Applicants will provide services to their respective members and licensees under the Service Agreement including:
    - fees or commission levels charged
    - the scope of the services provided by both or either of the Applicants

2.45.3. In relation to any agreements between either of the Applicants and members entered into during the period of any authorisation, continue to give effect jointly to the provisions of such agreements over their term.

2.46. The Applicants seek authorisation for a period of 5 years, being the duration of the Service Agreement.

### ***The Proposed Service Agreement***

2.47. Pursuant to the Service Agreement, Viscopy's employees and selected assets will be transferred to CAL. However, Viscopy will:

- continue to exist as an independent entity, with its own Board of Directors
- retain its separate membership database and agreement
- retain its separate licensing agreements and
- retain its international agreements with affiliates.

### **Objectives of the Service Agreement**

2.48. The Applicants submit that the objectives of the Service Agreement are to:

- minimise the administration charges payable by visual artists under the statutory licence schemes
- streamline payment arrangements under the Resale Royalty scheme
- increase the material available to be licensed under CAL's voluntary licences by enabling CAL to license works controlled by Viscopy members, thus increasing the number of artistic works available for use and also increasing licence fees payable to visual artists by increasing the level of use of their works
- increase the material available to be licensed by Viscopy under its voluntary licences by enabling Viscopy to license artistic works in CAL's repertoire, thus increasing the number of artistic works available for use and also increasing licence fees payable to visual artists by increasing the level of use of their works
- combine repertoires and resources to establish a critical base from which to develop new licensing schemes for the works of visual artists, including online licensing services associated with an image bank of artistic works
- centralise administrative functions to reduce overhead costs for visual artists
- maintain and improve the level of high-quality information and training available to visual artists and
- maintain and improve the level of principal policy advocacy for visual artists in international and local policy making.

## **Services to be provided**

- 2.49. Under the Service Agreement, CAL will provide various services to Viscopy and Viscopy members such that CAL will fully manage and administer the day-to-day operations of Viscopy's business. Services provided by CAL will include:
- licensing
  - data management
  - record keeping
  - sampling
  - distribution
  - finance/treasury
  - reporting, including the preparation of the Viscopy annual report and any reports to international peak bodies in consultation with the Viscopy Board and summaries of operations under the Service Agreement
  - membership
  - compliance (including with the *Code of Conduct for Copyright Collecting Societies* complaints/reporting)
  - back office or administration usually undertaken by Viscopy in the course of operating the Viscopy business and
  - management.

## **3. Submissions received by the ACCC**

- 3.1. The ACCC invited submissions from twenty five interested parties potentially affected by the application, including collecting societies, industry associations and government departments. A summary of the public submissions received from interested parties follows.

### **Australian Copyright Council**

- 3.2. The Australian Copyright Council is an independent, non-profit organisation whose mission is to advance the arts and the creative industries in Australia by promoting the value of copyright. Its members include the peak bodies for Australian writers, musicians, photographers, visual artists, journalists, film makers and architects.
- 3.3. The Australian Copyright Council is supportive of the proposed Service Agreement and considers it to have the potential to create further innovation in this area. It believes that the Service Agreement will enable the respective organisations to execute their roles in a more effective manner and is likely to result in benefits for copyright owners and users alike through enhanced access to their repertoire and reduced costs.

## **Audio-visual Copyright Society Limited trading as Screenrights**

- 3.4. Screenrights administers provisions in the Copyright Act that allow educational institutions to copy from television and radio provided payment is made to the copyright owners. Its members are rights holders in film and television programs.
- 3.5. Screenrights supports the views expressed by the Australian Copyright Council and supports the application concerning the proposed Service Agreement.

## **National Association for the Visual Arts (NAVA)**

- 3.6. NAVA is the national peak body for the visual arts, craft and design sector. It has around 3,000 individual and organisational members including visual artists, craftspeople, designers and media artists.
- 3.7. NAVA believes that the public benefits resulting from the proposed Service Agreement will greatly outweigh any public detriment. In any case, NAVA submits that the two organisations provide different services and expertise and deal with different client groups.
- 3.8. While NAVA acknowledges that the potential dangers are collusion in charging higher copyright licensing fees and a diminution of the level of payments to artistic creator copyright holders, it considers these risks are low and notes that the Applicants are regulated by the *Code of Conduct for Copyright Collecting Societies* in relation to licence fees and the Copyright Tribunal in relation to statutory and voluntary licence schemes.
- 3.9. Copies of public submissions may be obtained from the ACCC's website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) and by following the links to this matter.
- 3.10. The views of Viscopy and CAL are outlined in the ACCC's evaluation in Chapter 4 of this determination below.

## **4. ACCC evaluation**

- 4.1. The ACCC's evaluation of the proposed Service Agreement is in accordance with the relevant net public benefit tests<sup>5</sup> contained in the Act. While there is some variation in the language of the tests, in broad terms, the ACCC will assess the likely public benefit and public detriment, including any lessening of competition that would be likely to result (see paragraphs 5.5 and 5.6 below). If the public benefits outweigh the public detriments the ACCC may grant authorisation.
- 4.2. In order to measure and assess the effect of the proposed Service Agreement and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely counterfactual which will apply in the future should authorisation not be granted.

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<sup>5</sup> Sections 90(8), 90(5A) 90(5B) 90(6) and 90(7).

## ***The relevant area of competition***

- 4.3. The Applicants submit that it is not necessary to comprehensively define the relevant market as the public benefits will outweigh the public detriments regardless of the precise market definition.
- 4.4. The Applicants submit that in practice, CAL does not conduct the type of transactional licensing services that Viscopy provides, and accordingly, CAL and Viscopy provide licensing services to very different client groups.
- 4.5. NAVA also submits that there is only a small overlap in the licensing activities for visual arts between Viscopy and CAL. Further, NAVA submits that the two organisations largely provide different services and expertise and deal with different client groups. NAVA submits that with respect to voluntary licensing, there are several other bodies which will continue to compete.
- 4.6. Nonetheless, the Applicants submit that to the extent that they compete or could potentially compete, the relevant area of competition is that for the acquisition and supply, by licence or otherwise, of rights in artistic works in Australia.
- 4.7. The ACCC agrees the relevant area of competition is for the acquisition and supply, by licence or otherwise, of rights in artistic works in Australia. In considering the effects of the Service Agreement, it is also relevant to consider any potential effects that the Service Agreement may have both on owners of artistic rights (who may acquire copyright management and fee collection services from the Applicants) and upon users/ licensees of artistic rights and works (who may acquire licences from the Applicants to allow them to use and/or reproduce those works).

## **Other participants**

- 4.8. Copyright in artistic works is owned by the artist or someone to whom the artist has assigned the rights.
- 4.9. For visual artists in some circumstances, an alternative to using a collecting society to collect and distribute royalties is for the artist to perform these tasks themselves. Furthermore, for some specific types of use, organisations such as Getty Images or Bridgeman Art Library may offer similar services to visual artists and users as a collecting society in certain circumstances.
- 4.10. Viscopy considers that licensees wishing to use artworks may consider the following to be alternatives to obtaining a licence from Viscopy: licensing directly from the artist (or the artist's estate); using copyright-free material; or obtaining material from commercial suppliers of images such as the photo libraries and national aggregators listed below.
- 4.11. Viscopy considers artists have a number of alternatives to becoming members of Viscopy, for example:
  - engaging the services offered by the Bridgeman Art Library, the national aggregator OzImages and photo libraries such as Getty Images, Flickr and organisations offering similar services including:

- <http://www.Veer.com>
  - <http://www.Corbis.com>
  - <http://www.SuperStock.com>
  - <http://www.PunchStock.com>
  - <http://www.DigitalVision.com>
  - <http://www.Stockbyte.com>
  - <http://www.Comstock.com>
  - <http://www.IndexStock.com>
  - <http://www.PictureQuest.com>
  - <http://www.BananaStock.com>
  - <http://www.Thinkstock.com>
  - <http://www.Wonderfile.com>
  - <http://www.Ablestock.com> and
  - <http://www.photosecrets.com>.
- the artist undertaking licensing on their own behalf
  - the artist appointing a commercial gallery or art centre to manage the commercial exploitation of their works and
  - artists or their estates appointing administrators with accounting or legal expertise to manage their copyright.

#### *Getty Images*

- 4.12. Getty Images provides customers with 24.7 million images, microstock, footage and music based on a range of licensing models, as well as various digital media management tools. All services are provided at a cost.
- 4.13. Getty Images offers the following goods and services:
- ‘Rights Managed’ images which are licensed based on usage, with some Rights Managed images available for exclusive usage
  - ‘Royalty-Free’ images, provided to customers at a cost which is calculated according to image size, rather than image use. Once purchased, a Royalty Free image can be edited and distributed as a customer chooses. Similarly, Getty Images also sells royalty free footage, which can be edited and reused indefinitely by customers
  - a ‘Rights and Clearance’ service, available to clients who wish to check the legality of any images and
  - a range of editing services.

#### *Bridgeman Art Library*

- 4.14. The Bridgeman Art Library works with museums, art galleries and artists to make images from over 8,000 collections and more than 29,000 artists available for reproduction.
- 4.15. Museums and public and private collections around the world allow the Bridgeman Art Library (under a relevant agreement) to license their works. While some art-holders

grant the right to license specific artworks, others place their entire catalogue with Bridgeman for administration.

- 4.16. Bridgeman then assists with the reproduction and cataloguing of the works under its care. Once a work is chosen by a customer, Bridgeman arranges for reproduction licensing, while offering free advice on how to clear an artist's copyright (where additional permission is needed). Upon receiving payment, 50 percent of the reproduction fee is passed on to the owners of the artwork.
- 4.17. The Applicants submit that the specific repertoire held by Getty Images is very different to that held by Viscopy and the specific repertoire held by Bridgeman Art Library is very different to that held by CAL. Further, Getty Images and Bridgeman Art Library sell the image itself rather than just the copyright licence in the artistic work.
- 4.18. The ACCC considers that there is limited overlap between the activities of the Applicants and image banks such as Getty Images and Bridgeman Art Library. Thus competition between these parties and the Applicants is very limited. The ACCC does not rely on any such competition in reaching its view about the competition effects of the proposed conduct.

### ***The counterfactual***

- 4.19. The ACCC applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.<sup>6</sup>
- 4.20. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted.

### ***Applicants' claims***

- 4.21. The Applicants submit that absent authorisation, Viscopy and CAL will continue to provide separate services, meaning that rights holders and licensees are unlikely to receive the benefits outlined below, as neither Viscopy nor CAL are able to provide these benefits without entering into the proposed Service Agreement.
- 4.22. In addition, if authorisation for the proposed conduct is not granted, Viscopy will need to reduce the scope of its operations. As noted by Viscopy's auditors in Viscopy's Financial Report for the period ending 30 June 2011, Viscopy's status as a going concern is "materially dependent on the company either significantly reducing its costs and levels of service in the short term, or entering into a co-operative venture with another party to allay back office costs".

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<sup>6</sup> *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.



- 4.23. The Applicants submit that the full extent of any reduction in the scope of Viscopy's operations if the Service Agreement does not proceed is yet to be determined. However, to reduce costs, in February 2012 Viscopy relocated its office to a sub-leased section of CAL's premises.
- 4.24. Other reductions in scope that Viscopy submits it will be forced to consider in the absence of the Supply Agreement include:
- a significant reduction in the delivery of membership services to Indigenous artists in urban, regional and remote Australian communities. Viscopy is a Sydney-based organisation and delivery of these services is resource intensive
  - a significant reduction in the delivery of membership services to other artists, particularly those in regional areas
  - a review of its expenditure on active participation in the development of international copyright policy within the peak copyright forums and
  - a reduction in the scope of the domestic advocacy and educational services that Viscopy provides.
- 4.25. Absent authorisation, Viscopy submits that it will incur higher administrative costs than would be the case if authorisation was granted. To continue, in addition to reducing its services, Viscopy submits that it may be required to increase its commission levels and licensing fees.
- 4.26. The Applicants submit that if Viscopy were forced to significantly reduce its services and increase its commission and licensing fees, this would be a clear detriment to visual artists and to licensees of artistic works. They submit that collective management of copyright must have the confidence of all stakeholders, including licensees.

### ***ACCC's conclusion***

- 4.27. The ACCC notes the Applicants' submission made in relation to Viscopy's ability to continue to provide its present services in the future without the Service Agreement. The ACCC notes that in the absence of the Service Agreement, it appears likely that Viscopy may seek to significantly reduce its costs by reducing its services, and/or seek to increase revenue by increasing commission and licensing fees.

### ***Public benefit***

- 4.28. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>7</sup>

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<sup>7</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

- 4.29. Generally, competition can be relied upon to deliver the most efficient market arrangements. In circumstance where there are market failures (for example, high transaction and bargaining costs,<sup>8</sup> market power or information asymmetries<sup>9</sup>), regulation and/or restrictions on competition may be required to deliver efficient outcomes.
- 4.30. The Act recognises that, in certain circumstances, arrangements which restrict competition can deliver public benefits where they address a potential market failure and therefore improve economic efficiency.
- 4.31. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

### *Cost Savings*

- 4.32. The Applicants have submitted that the Service Agreement will reduce their combined administrative costs. In particular they submit that:
- It is more efficient for CAL to administer the licensing services offered by both CAL and Viscopy than it is for each of the societies to do so individually. Under the Service Agreement only one body will incur administrative costs. The amount of commission charged to Viscopy members for statutory licensing is currently 25 percent. Under the Service Agreement, Viscopy's commission level for statutory licensing will be reduced by a significant amount in the second and third years of the Service Agreement.
  - The Service Agreement will operate to combine administrative functions to reduce overhead costs including rent, employee remuneration, membership communications, insurance, plant and equipment and other operational overheads. After initial costs for integrating Viscopy's systems and processes with those of CAL, including membership data and payment systems, CAL and Viscopy expect that Viscopy members will see a real benefit in the reduced costs.
  - The Service Agreement will ensure that fees pass through fewer hands to reach the visual artist, minimising deductions and ensuring a speedier payment.
  - The administrative efficiencies created by the Service Agreement will have the further public benefit of increasing public (and in particular, licensee) confidence in the efficiency of the statutory licences. In particular, there has been a degree of confusion (including internationally) regarding the fact that there are two societies administering rights in artistic works.
- 4.33. In addition, the Applicants have submitted that the Service Agreement will reduce negotiation costs. In particular they submit that:

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<sup>8</sup> Bargaining costs are part of the transaction costs of contracting. If transaction costs are high, markets may not work efficiently.

<sup>9</sup> This refers to a situation where one party has more or better information than another in a transaction. This imbalance can lead to a situation where the party who knows less accepts or offers different terms than they otherwise would, leading to inefficient outcomes.

- The Service Agreement will result in a single body administering the repertoires of both Viscopy and CAL members. This benefits the public by providing a one-stop-shop, with the result that:
    - it will be less time consuming and less expensive for licensees negotiating to reproduce or communicate copies of artistic works and
    - it will create clarity in the marketplace.
  - The Service Agreement will result in the significant reduction of the cost of collecting and distributing statutory and other copyright royalties. This will enable a corresponding increase in the royalties paid to members for the use of their works. CAL will incur some additional costs in the discharge of its obligations under the Service Agreement. However, these costs will be met by capped licensing service charges paid by Viscopy to CAL. It is anticipated that after initial costs, the costs of delivering the Viscopy services will reduce significantly. This will result in a substantial benefit to Viscopy members, who currently are charged a commission of 25 percent (in addition to any costs deducted by CAL for its collection and allocation of licence fees payable under statutory licences).
- 4.34. The ACCC accepts that the Service Agreement is likely to deliver economies of scope and associated administrative efficiencies. It is also likely to reduce transactions costs for both collecting societies and licensees. The ACCC considers that realising economies of scope and lowering transactions costs are both public benefits. The ACCC notes the Applicants' submissions that these public benefits will be passed through to copyright owners in the form of lower commissions, leading to an effective increase in royalties received by visual artists.

***Increased availability and access to copyright, and improved licensing services***

- 4.35. The Applicants submit that the proposed Service Agreement will result in increased access for licensees to copyright material and greater access for artists to obtain remuneration for their artistic works. This is reflected in the objectives of the arrangement being:
- Each Applicant contributing its respective repertoire of its members' works to the voluntary licensing schemes offered by the other Applicant, thereby consolidating a critical base from which to provide a 'one stop shop' for artistic works licences. This will:
    - increase the coverage of existing licences and
    - provide additional licensing revenues for their members
  - The development of sufficient scale, resources and expertise to justify a business case for an online image bank of artistic works and an associated online licensing system. The Applicants' current services do not include the provision of images of their respective members' artistic works to licensees. Similar image banks are successfully marketed by other visual art collecting societies in Europe, as well as Getty Images and Bridgeman Library. The Applicants believe that they would be able to achieve similar success, to the benefit of artists and licensees. Currently Viscopy does not have the resources,

and CAL does not have the artistic expertise, to develop the image bank or the licensing system on their own.

- 4.36. The Applicants also submit that under the Service Agreement CAL will make available to Viscopy technology systems that attempt to ensure that it is best able to serve its members in the digital sphere. These systems include:
- a member portal and new business operating system which provides a comprehensive interface with members, allowing them to interact with Viscopy and view information pertinent to their membership
  - development of a 'rights portal' to assist in making Viscopy's operations more efficient and to maximise benefits to members and
  - systems which will allow the Applicants to effectively implement direct distribution to members and investment in technology that will give the Applicants a greater capacity to monitor the use of copyright material.
- 4.37. The ACCC accepts that the Services Agreement is likely to deliver public benefits by improving access to artistic works by creating a 'one-stop' shop for licensing of artistic works and through enhancing the potential for the development of new ways to access such works.
- 4.38. The ACCC is of the view that public benefits may also be realised by copyright owners and artists by providing a greater breadth of exposure to their copyright material, creating the potential for increased usage, and thus remuneration, for their artistic works.
- 4.39. The ACCC accepts that the Service Agreement will improve the licensing services provided by the Applicants but especially Viscopy. The ACCC accepts that CAL has developed sophisticated systems and processes to conduct its business and has invested millions of dollars in doing so. The Service Agreement will allow Viscopy to utilise these systems, allowing it to better serve its members.

***Improved ability of the Applicants to provide other services***

- 4.40. The Applicants submit that in addition to the licensing services that the Applicants provide to their respective members, both Viscopy and CAL provide a wide range of other services. These additional services are intended to promote copyright awareness, provide visual artists with a public voice in key policy debates and encourage and promote the visual arts in Australia.
- 4.41. The Applicants submit that the Service Agreement will reduce the administrative costs in implementing other licensing services, thereby increasing the funds available for allocation to these services. The Applicants submit that these services provide a significant public benefit as they promote and encourage the visual arts.
- 4.42. To the extent that any such benefits are not already accounted for in the form of reduced administrative costs, the ACCC considers that increased provision of other services to artists may provide some additional public benefit.

## **ACCC conclusion on public benefits**

- 4.43. The ACCC is satisfied that the Service Agreement is likely to result in public benefits arising from:
- cost savings to Viscopy and CAL members in the form of reduced administrative, monitoring and negotiations costs
  - improved services to Viscopy members through CAL providing advanced technological systems for use by Viscopy
  - an increase in the coverage of existing licences and greater certainty for copyright users where a single body administers the repertoires of both Viscopy and CAL members and
  - transaction costs saving to copyright users.

## ***Public detriment***

- 4.44. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>10</sup>

- 4.45. The Applicants submit that there will be little or no public detriment resulting from the conduct contemplated under the Service Agreement.

## ***Effects of the Service Agreement***

- 4.46. Pursuant to the Service Agreement, a Committee that will comprise representatives of CAL as well as the Chair of Viscopy may determine the commissions paid by Viscopy members for services including the collection and distribution of copyright and statutory licensing royalties. The Applicants acknowledge that it is arguable that the Service Agreement is an agreement that has the purpose or effect of fixing, controlling or maintaining prices for goods or services.
- 4.47. Further, pursuant to the Service Agreement CAL will provide ‘licensing services’ to Viscopy, including negotiating the price for which voluntary licences will be granted to individuals or organisations who wish to reproduce or communicate copies of artistic works. Viscopy currently charges licence fees based on a tariff that is reviewed from time to time and adjusted for CPI increases. Licensing customers that use a large repertoire of works over extended periods of time, such as fine art auction houses or cultural institutions, are encouraged to enter into contracts with Viscopy under which they pay discounted licensing charges.
- 4.48. The Applicants submit that any public detriment arising from the proposed conduct will be minimal because:

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<sup>10</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- the Applicants do not currently compete in the provision of voluntary licensing services and
  - both Applicants are not for profit organisations that operate in the public interest and are not driven by profit making goals.
- 4.49. As detailed above, and submitted by the Applicants, the result of CAL's declaration and appointment under the statutory schemes is that visual artists cannot choose to have the statutory licence administered by any other collecting society. Further, the respective expertise of Viscopy and CAL outside of the statutory schemes is very different. Although both Viscopy and CAL provide voluntary licensing services to visual artists, the licensees to whom Viscopy and CAL provide services are different, as is the nature of the licences themselves.
- 4.50. The ACCC accepts that any anticompetitive effects arising from the Committee setting commissions will be relatively small, as there is very little overlap of licensing services provided by the Applicants and therefore little competition between them. Each deals with predominantly different types of rights to use artistic works and different client groups. Thus there is limited overlap between the applicants and the effect of the Service Agreement on this is small.
- 4.51. Further, there is no evidence that current prices and commissions charged for licensing services provided by each Applicant are constrained by competition from each other. This will continue to be the case after the Service Agreement is implemented. The ACCC accepts that the Service Agreement will not create any additional incentives for the Applicants to act inefficiently, nor any enhanced ability to increase fees/prices rather, as already discussed the ACCC considers the Service Agreement is likely to provide cost savings and efficiencies.
- 4.52. The ACCC notes the Applicants' submission that they are regulated by the *Code of Conduct for Copyright Collecting Societies* and the Copyright Tribunal of Australia.
- 4.53. In general, the ACCC considers access to a Tribunal would not be a satisfactory substitute for the operations of a competitive market if it were the case that the proposed Service Agreement was likely to result in significant harm to competition. However, as outlined above, the ACCC does not consider that such competition concerns arise in this case and it is therefore unnecessary to rely upon any further constraint provided by regulation to address any potential anticompetitive harm from the Service Agreement.

### **ACCC conclusion on public detriments**

- 4.54. The ACCC considers the Service Agreement will result in very limited public detriment.
- 4.55. The anticompetitive effects of information sharing and price agreements between the Applicants will be minimal. There is very little overlap between the Applicants for the provision of licensing services and each deals with predominantly different client groups, such that the effect of the Service Agreement on competition will be small.

- 4.56. The ACCC accepts the Applicants' claim that the Service Agreement will not alter the availability of voluntary or statutory licensing income for visual artists and is likely to reduce the cost to artists of recovering this income.

### ***Balance of public benefit and detriment***

- 4.57. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Service Agreement between Viscopy and CAL is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including from any lessening of competition.
- 4.58. In the context of applying the net public benefit test in section 90(8)<sup>11</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>12</sup>
- 4.59. The ACCC considers that the Service Agreement is likely to result in public benefits by generating greater efficiency for the administration of copyright licensing for Viscopy and CAL and their members. Public benefits will include a reduction in administrative, licensing and negotiation costs, and an improvement to the quality of services for artists. Further, the Service Agreement has the potential to increase the coverage of existing licences and decrease transaction costs for licensees.
- 4.60. The ACCC considers that there is likely to be minimal public detriment from the implementation of the Service Agreement having regard to the following:
- the limited overlap in competition between the Applicants, therefore the competition in the relevant market being likely to remain unaffected
  - the provision of voluntary and statutory licences by the Applicants remaining substantially unaffected.
- 4.61. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct will outweigh the likely public detriment. The ACCC is therefore satisfied that the relevant tests are met.

### ***Length of authorisation***

- 4.62. In this instance, Viscopy and CAL seek authorisation for 5 years. As no concern was raised through the ACCC's interested party consultation as to the duration of the authorisation sought, the ACCC proposes to grant authorisation for five years.

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<sup>11</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>12</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

## 5. Draft determination

### *The application*

- 5.1. On 6 December 2011 Viscopy Limited (Viscopy) and Copyright Agency Limited (CAL) lodged applications for authorisation with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Applications A91285 and A91286 were made using Form A and B Schedule 1, of the Competition and Consumer Regulations 2010. The applications were made under subsection 88 (1A) and 88 (1) of the Act to enter into a Service Agreement under which CAL will provide various services to Viscopy and Viscopy members. While Viscopy will retain an independent Board, the Service Agreement will result in CAL fully managing and administering the day-to-day operations of Viscopy's business.
- 5.3. In particular, the Applicants seek authorisation to (i) jointly discuss and negotiate common terms and conditions for the services provided by the Applicants to their respective members and licensees under the Services Agreement, and (ii) make and give effect to contracts, arrangements or understandings between the Applicants containing common terms and conditions upon which the Applicants will provide services to their respective members and licensees under the Service Agreement including:
  - fees or commission levels charged and
  - the scope of the services provided by both or either of the Applicants.
- 5.4. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### *The net public benefit test*

- 5.5. For the reasons outlined in Chapter 4 of this draft determination, the ACCC considers that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
- 5.6. In addition, the ACCC is satisfied that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.
- 5.7. The ACCC therefore **proposes to grant** authorisation to applications A91285 and A91286.
- 5.8. For more information about the tests for authorisation and relevant provisions of the Act, please see the ACCC's Guide to Authorisation by following the links at [www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister).



### ***Conduct for which the ACCC proposes to grant authorisation***

- 5.9. The ACCC proposes to grant authorisation to Viscopy and CAL to enter into the proposed Service Agreement for a period of 5 years.
- 5.10. The proposed authorisation is in respect of the Service Agreement as it stands at the time authorisation is granted. Any changes to the Service Agreement during the term of the proposed authorisation or future arrangements between the parties would not be covered by the proposed authorisation.
- 5.11. This draft determination is made on 5 April 2012.

### ***Further submissions***

- 5.12. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.