APRA

Application for Authorisation

Further submissions in Reply

Response to Further Submissions of Cinema Operators of 22 March 2005

1 These submissions reply to the further submissions of the Cinema Operators, dated 22 March 2005 (**Further Submissions**).

A Respective roles of ACCC and Copyright Tribunal: paragraphs 2-12

2 APRA has experienced some difficulty understanding paragraphs 2-12 of the Further Submissions. APRA assumes that those submissions are directed to establishing that (if the authorisation is granted) the Copyright Tribunal will not able to constrain the exercise by APRA of market power, with respect to:

(a) the offering of alternative options to the blanket licence; and

(b) the price of the licence fee.

The Further Submissions include or repeat a number of fairly fundamental misconceptions apparently held by the Cinema Operators.

Alternative options to the blanket licence

3 APRA submitted that "the Copyright Tribunal is in no way fettered or constrained in relation to the terms upon which licence schemes are determined": see paragraph 46(a) of Submissions in Reply. The Further Submission appears to ignore what was said there. We refer the ACCC to the arguments set out there.

4 There appear to be a number of matters relied upon by the Cinema Operators in support of the proposition that the authorisation which APRA seeks (**Authorisation**) will frustrate the capacity of the Copyright Tribunal to determine that APRA should provide licences *otherwise* than on the basis of the "blanket licence".

5 First, the Cinema Operators submits that "the Copyright Tribunal will be asked by APRA to determine the reasonableness of licence fees for cinemas *solely*

within the parameters of the particular input and output (consisting of blanket licensing) arrangements which comprise APRA's proposed licensing arrangements": [7]; see also [4]. In reply, APRA submits that:

(a) the Copyright Tribunal is not constrained in its determinations by the structure of the licence scheme in respect of which APRA seeks to have a fee determined. On the contrary, the Tribunal has an unfettered right to determine that licence structure on the application of other parties; and

(b) therefore, the provision of the Authorisation does not preclude the Tribunal from ordering the provision of licences on terms other than the blanket licence.

6 Secondly, the Cinema Operators submit that the Copyright Tribunal is in fact "fettered and constrained in determining the terms of APRA's licence scheme" by the fact that "the terms of the input and output arrangement of its licensing scheme could not be varied in any way which would take APRA's conduct outside the scope of the conduct authorised by the Commission": [8]. In reply, APRA submits that:

(a) it readily acknowledges that the Copyright Tribunal cannot create a licence structure which would cause APRA to engage in conduct outside the scope of the Authorisation, and which was otherwise in breach of the Trade Practices Act; and

(b) that fact is entirely irrelevant.

(c) The Tribunal is not obliged to establish a licence structure founded upon the authorisation of the "blanket licence" output arrangements. It is entirely at liberty to (in effect) order that APRA provides a licence that does not exploit any authorisation which might be provided in relation to the blanket licence.

7 Thirdly, the Cinema Operators seem to place reliance on the fact that "at no time, whether in discussions with the Cinema Operators or in its submissions to the ....Commission, has APRA indicated that it would not be prepared to adopt input or output arrangements in terms other than those which are the

subject of the previous authorisations as extended by the current interim authorisations": [6]. In reply, APRA submits that:

(a) the fact that APRA has an expressed preference for blanket licensing is in no way indicative of the possession by APRA of market power with respect to the determination of the general structure of the licence. Needless to say, the jurisdiction of the Copyright Tribunal with respect to setting the licence structures is not circumscribed by the stated preferences of APRA; and

(b) in any event, APRA has never indicated that it is not prepared to consider licensing on terms other than the blanket licence. It has always been (and remains) willing to consider other proposals. The simple fact is that the Cinema Operators have never approached APRA for a licence other than a blanket licence.

8 Fourthly, the Cinema Operators submit that "in the absence of authorisations, APRA's proposed licensing scheme....would be unlawful under the Trade Practices Act". In reply, APRA:

(a) does not concede that the scheme would be unlawful in the absence of authorisation;

(b) notes that the ACCC and is predecessor have always said that the act of applying for authorisation should not carry any presumption as to liability under Part IV. This proposition carries the endorsement of the Tribunal in *QCMA (1976) ATPR 40-012 at 17,241*; and

(c) notes that the ACCC should be aware that the Cinema Operators, among others, have commenced proceedings in the Federal Court against APRA in relation to these matters, which proceedings have been stayed pending determination of the authorisation applications. APRA respectfully submits that, in these circumstances, the ACCC should be more than usually cautious to avoid making any findings as to matters which may come before the Court.

Price of licence fee

9 The Cinema Operators submit that "APRA is now seeking a 257% increase in the licence fee payable by cinemas under the arrangements which are the subject of the present application. This is an unconstrained expression of market power which would be made possible only by the granting of the authorisations which APRA is seeking": [9]. APRA submits that for reasons stated at length in APRA's Submissions in Reply (which were not acknowledged or addressed in the Additional Submissions), the mere act of application to the Copyright Tribunal for a licence fee increase is utterly irrelevant as an indicium of market power: see Reply Submissions, [30]-[33].

B "Proposed modification to APRA licensing system": paragraphs 13 - 27

10 The Cinema Operators refer to "proposed modifications" in the heading of this section, but do not articulate exactly what modifications they intend to refer to. This is unfortunate, particularly in light of the fact that APRA had already submitted that the absence of elaboration of the Cinema Operators' proposals frustrated a proper consideration of them: Submissions in Reply, paragraph 57.

11 APRA will proceed to address the submissions of the Cinema Operators on the assumption that the modifications relate to some variant of opt-out and licence-back provisions.

12 The Cinema Operators submit in paragraph 16 that "it is not for APRA to speculate on the workability or extent of potential usage of such alternatives and the Cinema Operators have no obligation or requirement to refute such speculation on the part of APRA". In reply, APRA submits that:

(a) the submission of the Cinema Operators reflects a fundamental misconception in relation to the manner in which APRA's application should be assessed;

(b) the "future-with-and-without test" which the ACCC must apply is inherently hypothetical and speculative: "In identifying the relevant public benefit the Tribunal must compare the position which would apply in the future were the proposed arrangement not entered into, or given effect to, with the position in the future which would arise if the

arrangement were entered into or given effect": *Re Media Council of Australia (No 2) (1987) 88 FLR 1*;

(c) in light of that test it is entirely appropriate for APRA to make reasoned submissions in relation to the likely outcome in hypothetical future scenarios. The inability to predict the future with certainty does not render reasoned projections of no utility; and

(d) the Cinema Operators are no doubt correct to assert that they have "no obligation or requirement to refute such speculation on the part of APRA". However, the absence of any reasoned refutation strongly supports the ACCC's acceptance of APRA's projections. This is supported by the well established adage: "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." This basic principle of adversarial litigation is not a matter of esoteric legal knowledge; it accords with common sense and ordinary human experience": *Swain v Waverley Municipal Council [2005] HCA 4, per Gleeson CJ at [17]*. Applied to the facts of this case, the ACCC should infer that the Cinema Operators have the commercial incentive and factual expertise to identify and challenge any error in APRA's submissions. In those circumstances, any failure by the Cinema Operators to do so provides support for the plausibility and soundness of APRA's contentions.

13 The Cinema Operators submit that "as a general proposition, any licensing scheme which does not facilitate efficient negotiations between persons wishing to produce, distribute or exhibit film, or organisations acting on behalf of those persons, and performance rights holders, should not have the benefit of authorisation": paragraph 14. In reply, APRA submits that:

(a) the submission of the Cinema Operators reflects a fundamental misconception in relation to the "public benefit" test which the ACCC must apply;

(b) "public benefit" is "anything of value to the community generally": eg, *Re 7-Eleven Stores Pty Ltd (1994) ATPR 41-357*;

(c) "public benefit" is not confined merely to the promotion of competition. Competition is not of itself a benefit. It is valued for what it can deliver in terms of allocative, productive and dynamic efficiency. Competition does not always maximise such efficiency: *Re Australian Association of Pathology Practices Inc [2004] ACompT 4, [143]*;

(d) "public benefit" is therefore certainly not confined (in this case) to the promotion of direct dealing between Cinema Operators and rights holders; and

(e) the Cinema Operators simply fail to address the balance of the public benefit and detriment associated with direct dealing in this context.

14 The Cinema Operators dispute APRA's submission that "film distributors and cinema operators may not have sufficient notice of the repertoire of musical compositions in films to be able to negotiate a licence": paragraphs 18-21. In reply, APRA submits that:

(a) it is a question of present fact whether Australian distributors can get cue sheets in advance. The Cinema Operators merely assert this without providing any evidence which can be tested;

(b) it was reasonably within the power of the Cinema Operators to obtain more substantial evidence in relation to this matter. Such evidence could presumably be readily obtained from overseas affiliates;

(c) in considering submissions which relate to matters of present fact, the ACCC must be careful not to give inappropriate weight to unsubstantiated and untested allegations: *Re Howard Smith Industries Pty Ltd (1977) 28 FLR 385;*

(d) in light of the absence of substantiation of this contention, APRA submits that the ACCC should place little weight upon it; and

(e) in any event, the mere fact that Cinema Operators might be able to procure cue sheets "in time" is of limited weight in the overall public benefit balance. It doesn't address the nature and efficacy of present procedures for "opt out" (section D2-D3 of APRA's submissions in

reply), and the public detriment caused by any modifications to the APRA rules.

15 The Cinema Operators submit that it is "not unrealistic" that film distributors could negotiate the licence of performing rights, because of the "alignments between major Australian distributors and major United States film producers and distributors who routinely acquire performing right licences [in the United States]": paragraph 20. In reply, APRA submits that:

(a) the Cinema Operators have produced no particulars or evidence of those asserted alignments, and APRA is not aware whether there is a reasonable basis for the assertions; and

(b) in any event, the simple but critical fact is that no modifications to the APRA scheme are necessary to enable Australian distributors to obtain a direct licence from "major United States film producers and distributors". There is nothing in the present APRA rules that frustrate or preclude such negotiations: see Submissions in Reply, paragraph 64

16 The Cinema Operators submit that "there is no basis for APRA to assert that there is real doubt as to whether cinema operators...would be able to negotiate the rights themselves": paragraph 21. In reply, APRA submits that the Cinema Operators (in making that assertion) fail entirely to address the detailed submissions made by APRA as to why such negotiations are unlikely: see Submissions in Reply, paragraph 66(d).

17 The Cinema Operators submit that direct negotiation by Cinema Operators would not be to the disadvantage of independent cinema operators because of the industry code: paragraph 22. In reply, APRA submits that:

(a) the Cinema Operators do not elaborate how the Code would allegedly address the potential problems identified by APRA in paragraph 144 of its Submission in Reply; and

(b) the ACCC should make its own assessment of whether the Voluntary Code will protect independent distributors in this context, and afford them the same advantages (if they exist) that the major chains have.

18 The Cinema Operators submit that "film distributors should be free to negotiate licences with [a range of copyright holders] on a transactional basis: paragraph 23. In reply, APRA submits that:

(a) in pressing that submission, the Cinema Operators fail to articulate exactly what they are referring to, and fail to grapple with the balance of benefit and detriment arising from any modifications to the APRA rules which might be involved in the arrangements; and

(b) in any event, forms of "transactional licences" can presently be obtained under the existing APRA rules. Such licences can be procured directly in relation to United States copyright works. It is open to the Cinema Operators to press for transactional licences in the Copyright Tribunal hearing.

19 The Cinema Operators submit that the "imposition" of blanket licences has precluded transactional licences being explored: paragraph 25. In reply, APRA submits that:

(a) as explained in the Submissions in Reply, the terminology of "imposition" is inapt: see paragraph 37-38; and

(b) opportunities to explore transactional licensing have already been in existence.

20 The Cinema Operators submit that direct dealing with copyright holders would lead to a "balanced commercial bargain": paragraph 27. They fail to acknowledge the obvious imbalance in bargaining power that would exist in such dealings. At the very least, there must be a very real question as to whether new and less well known composers would feel comfortable negotiating with the cinema chains and whether they could be assured of reasonable outcomes.