

MinterEllison

L A W Y E R S

WATERFRONT PLACE, 1 EAGLE STREET, BRISBANE QLD 4000, DX 102 BRISBANE

To Mr Gavin Jones
ACCC

Email adjudication@acc.gov.au
Your ref C2004/763-06

From Margaret Brown

Email magaret.brown@minterellison.com
Direct line +61 7 3119 6388
Our Ref MAB 40-4446962

Date 10 October 2005

Subject Attention Gavin Jones - Submission in response to draft determination issued by ACCC

Dear Mr Jones

Please find **attached** a submission in response to the draft determination issued by ACCC and provided to us on 31 August 2005. The submission has been prepared on behalf of our clients, the Cinema Operators.

Should you have any queries, please do not hesitate to contact Margaret Brown on 07 3119 6388.

Yours faithfully
MINTER ELLISON

Minta Ellison

APRA Application for Authorisation

Cinema Operators - Written submission to ACCC in response to Draft Determination issued by ACCC

1. This submission is made by Village Cinemas Australia Pty Limited, The Greater Union Organisation Pty Limited, Birch, Carroll & Coyle Limited, Reading Entertainment Australia Pty Limited, Australian Multiplex Cinemas Pty Ltd, Hoyts Cinemas Limited, Cinema Operators Association of Australia Inc and the Australian Entertainment Industry Association (referred to throughout this submission as the **Cinema Operators**).
2. This submission replies to the Draft Determination issued by the Australian Competition and Consumer Commission (ACCC) on 31 August 2005.

OVERVIEW

3. The Draft Determination indicates that the ACCC is inclined to re-authorise APRA's performing rights licensing arrangements in respect of musical works in Australia for a further four year period.
4. While the ACCC recognises the public benefit stemming from APRA's arrangements, it also acknowledges that APRA's arrangements generate 'significant public detriment' and come at 'considerable cost' to users and the general community. In doing so, the ACCC acknowledges the validity of a number of the key points in the submissions of the Cinema Operators.
5. The Cinema Operators contend that the Draft Determination does not adequately address limitations or conditions which may be imposed on APRA, as a condition of the granting of the authorisation, to mitigate the 'significant public detriment' and 'considerable cost' to users and the general community which flows from the proposed Draft Determination.
6. The Cinema Operators submit that, as a condition of the granting of the authorisation sought by APRA:
 - (a) APRA's current exclusive international arrangements with overseas collecting societies in respect of all jurisdictions with which APRA has an arrangement should become non-exclusive, modelled on the existing arrangements with the United States; and
 - (b) APRA's constitution should be amended to:
 - (i) allow members to opt out in respect of certain types of users within a particular category of works; and
 - (ii) allow members to nominate the name of a particular user and a particular musical work when exercising the licence back right, rather than a whole category of users or rights.
7. The Cinema Operators endorse the ACCC's proposal that APRA should implement/offer more flexible licence arrangements, specifically APRA's current blanket licence arrangement should incorporate an arrangement which provides for a

discount if end users manage to secure some of their rights directly at source; this would to some extent remove the 'fundamental impediment' to direct dealing.

8. The Cinema Operators also endorse the concept of some form of alternative transactional licence, as a real alternative to the current inflexible blanket licence offered by APRA.
9. The Cinema Operators do not contend that a blanket licence, incorporating a discount structure, should not be part of the APRA licensing arrangements but rather that the blanket licence (with an incorporated discount structure) should exist alongside the alternative transactional licence so that the requirements of the full range of the Cinema Operators are addressed; flexibility in APRA's licence arrangements is the only way these requirements can be satisfactorily addressed and the significant public detriment and considerable cost to users and the general community be minimised.

THE DRAFT DETERMINATION

APRA's existing arrangements

Anti-competitive detriments associated with APRA arrangements

10. In the Draft Determination, the ACCC states that APRA's exclusive licensing arrangements (comprising input, output and overseas arrangements) grant it a virtual monopoly in respect of performance rights licences in Australia. It recognises that notwithstanding the opt out and licence back provisions, the terms of those licensing arrangements *effectively exclude any realistic prospect of direct dealing* between rights owners and users of copyright works. This supports the submissions made by the Cinema Operators. In respect of each of the input, output and overseas arrangements, the ACCC made the points set out below.
 - (a) Input arrangements
 - (i) The means by which APRA acquires rights 'severely limits' its members' ability to engage in direct dealings with users in respect of all or part of the members' rights.
 - (ii) The concentration of members' rights in APRA means that APRA is able to set prices for access to its repertoire without having to consider the economically efficient price of those rights, and users are forced to deal with APRA on APRA's terms.
 - (iii) In response to APRA's submission that its members could elect to change the present input arrangements if they wished, the ACCC found that while this is technically possible, members are unlikely to want to change the present position unless they are capable of bargaining more effectively for themselves (and this would only apply to a small percentage of all members). In any event, given APRA's lengthy existence and dominant presence in the marketplace, most members are likely to find it difficult to contemplate options other than APRA.
 - (iv) The reason that most APRA members appear to be content with the current system merely indicates that this system is serving those

members well; it does not necessarily follow (as APRA contended) that the system is serving users, or the community more generally, as well.

- (v) The opt out and licence back provisions are subject to a number of notice requirements and other conditions and, hence, are of practical use to APRA's members only in 'very limited sets of circumstances' and are 'not an effective means of facilitating direct dealing' with end users and/or the development of other alternative mechanisms for the administration of performing rights.

11. In respect of the opt out provisions, APRA members would have an incentive to exercise their option to reserve their rights or require APRA to reassign to them their rights under the opt out provisions 'only in very limited sets of circumstances'. There is currently little or no incentive to self administer/direct deal because:
 - (a) any member choosing to deal directly with users, or any alternative collection society administering a smaller repertoire of rights, would, in most cases, have far less bargaining power in negotiating licence fees than APRA presently has in negotiating on behalf of all of its members and so would be likely to strike a worse deal than if the member allows APRA to negotiate on the member's behalf;
 - (b) the member would be faced with significant competitive constraints in negotiating with any user who also held a blanket licence allowing the user access to APRA's vast repertoire in substitution for the member's works; and
 - (c) under APRA's opt out arrangements it is only possible to withhold or seek reassignment in relation to all (not part) of a member's works in particular category of use (eg the right to publicly perform the work in a film). This means that if a member opts out, the member must forgo all revenue that would otherwise be received from all APRA licence holders in respect of the entire category of use.
12. While APRA members can terminate their membership (at 6 months notice), generally this also does not provide an effective means for direct dealing between rights owners (or competing rights administrators) and users.
13. The licence back provisions have limited practical utility due to the strict conditions with which members must comply before APRA is required to grant them a non-exclusive licence. In particular, APRA members must nominate all users to whom they intend to grant a sub licence and all instances in which the work will be publicly performed, prior to exercising their right to licence back in respect of a work. This is not feasible or even possible in relation to many instances of use of a work.
14. The one exception to the restrictive requirements applying to the exercise of the opt out and licence back provisions is copyright owners in the United States who are members of United States collection societies affiliated with APRA. As these societies confer only non-exclusive rights in their members' works, there is nothing presently preventing members of these societies negotiating directly with Australian users.

Output arrangements

15. The APRA arrangements offer end users blanket licences which do not reflect the needs of the individual user and which do not provide for any discount (or other form of alternative transactional licence) if end users manage to secure some of their rights directly at source. The ACCC considers this to be a 'fundamental impediment' to direct dealing - even more so than the restrictive conditions and strict notice requirements imposed on the opt out and licence back mechanisms - and, as long as this situation persists, there will be no incentive for end users to acquire rights through direct dealing.
16. *The Cinema Operators endorse the ACCC's acknowledgment and recognition of the limitations and constraints of the Input and Output arrangements and that these effectively exclude any realistic prospect of direct dealing between rights owners and users of copyright works; further, that the APRA Output arrangements of blanket licences are a fundamental impediment to direct dealing.*

Overseas arrangements

17. APRA's arrangements give rise to an international monopoly which not only discourages but actually prevents competition between APRA and the overseas societies in their respective jurisdictions and 'severely limits' the ability of Australian end users to deal directly with overseas collecting societies.
18. In the context of direct dealings with overseas rights owners, APRA's propensity to offer blanket licences without building in a mechanism for discounting the price where an end user is successful in negotiation directly for some rights directly at source is a major disincentive to direct dealing.
19. *The Cinema Operators endorse the ACCC's acknowledgment and recognition of the international monopoly which APRA's arrangements confer on it and the recognition that these arrangements severely limit the ability for Australian end users to deal directly with overseas collecting societies or any other rights holders.*

APRA's monopoly power

20. In relation to exercise of monopoly power by APRA:
 - (a) The ACCC repeated its views that APRA's exclusive licensing arrangements granted it a virtual monopoly in respect to performance rights licences in Australia.
 - (b) The ACCC also found that:
 - (i) for many users, performing rights licences are essential to the viability of their businesses (the ACCC specifically mentioned Cinema Operators as an example) - these users would not be able to operate without some sort of performing rights licence and therefore they are practically compelled to enter into agreements with APRA irrespective of the terms of such agreements;
 - (ii) APRA's ability to charge monopoly prices results in restrictions on the use of existing works in the short-term and could potentially lead to excessive production of new works in the long term; and

- (iii) APRA's failure to offer products that meet the requirements of the market has anti-competitive effects.

21. *The Cinema Operators endorse the ACCC's acknowledgement that APRA's arrangements have the consequence that APRA has failed to offer products that meet the requirements of the market, and specifically the Cinema Operators as users of those products, and this failure has anti-competitive effects.*

Restraint on APRA's monopoly power

22. The ACCC was of the view that while there are two mechanisms that provide a restraint on APRA's monopoly power, their utility is limited. The ACCC expressed the views that the Copyright Tribunal (CT) operates as a 'limited constraint' on APRA's monopoly power through its power to determine the reasonableness of licence terms and conditions.

23. The ACCC further stated that any authorisation granted to APRA by the ACCC could not be interpreted as:

- (a) an endorsement of APRA only offering blanket licences to users; or
- (b) in any way limiting the CT's ability to impose other licence schemes on APRA. Rather, the appropriate licence scheme for particular users is a matter for the CT to determine in the circumstances of each case referred to it (in expressing this view the ACCC essentially agreed with APRA's arguments). The ACCC stated that APRA is bound by any decision of the CT both in respect of the type of licence offered and the terms on which licences are offered.

24. The ACCC decided that regulation via the CT only serves as a 'limited' constraint on APRA's ability to exploit monopoly power because:

- (a) although the CT may have regard to what the economically efficient price for performing rights licences would be in determining licence terms and conditions, it is not bound by this in determining reasonableness and in setting licence terms and conditions; and
- (b) seeking recourse to the CT is generally a costly and time consuming exercise for users, which limits its utility.

25. The ACCC noted the recommendation made by the Report on Intellectual Property Legislation under the Competition Principles Agreement that the *Copyright Act* be amended to require the ACCC to issue guidelines on what matters it considers to be relevant to the determination of reasonable remuneration and other conditions of licences that are the subject of determination by the CT. The Report's recommendation that the CT be given the discretion to take the ACCC guidelines into account and admit the ACCC as a party to CT proceedings was also noted. The ACCC stated that, although the recommendation has not yet been implemented, its acceptance by the Federal Government is indicative of general concerns regarding the matters to which the CT currently has effective regard when determining licence terms.

26. *The Cinema Operators endorse the ACCC's recognition that the CT serves only as a limited constraint on APRA's ability to exploit monopoly power; further, the ACCC's recognition that the acceptance by the Federal Government of the recommendation*

made by the Report on Intellectual Property Legislation under the Competition Principles Agreement that the Copyright Act be amended to require the ACCC to issue guidelines is indicative of general concerns regarding the matters to which the CT currently has effective regard in determining licence terms.

27. APRA's expert determination process (EDP) was introduced as a condition of the authorisation granted to APRA by the Competition Tribunal in 2000 to provide a cheaper and faster method for resolving disputes compared to the CT. The ACCC noted that while the EDP appears to provide a relatively inexpensive and straight forward alternative to the CT when it comes to resolving disputes over licence terms, it is considered problematic that there are no set criteria in accordance with which the independently appointed expert must determine the terms of licence arrangements, and hence resolve disputes between APRA and users. The ACCC identified this as a particular concern given that most expert adjudicators are unlikely to have expertise in determining what the efficient price for the licence being sought would be.
28. The ACCC further stated that even this relatively inexpensive process is not necessarily a significant constraint on APRA's capacity to exercise its monopoly power because the cost of recourse to the EDP would still largely outweigh the costs of obtaining an APRA licence for many small users and therefore they would not have recourse to the EDP.
29. *The Cinema Operators endorse the ACCC's comments in respect of the EDP.*
30. In its Draft Determination, the ACCC acknowledged that there are many deficiencies in the current APRA system for the licensing of performing rights that give rise to considerable public detriment. Notwithstanding this detriment, users are discouraged from exploring alternative licensing options for the reasons identified by the ACCC in its Draft Determination, namely:
 - (a) the arrangements with international rights holders other than those located in the USA do not work because of the exclusive arrangements between APRA and overseas collecting societies and this is particularly significant in respect of the collecting societies in the United Kingdom and Europe;
 - (b) the opt out and licence back mechanisms as presently embodied in the Constitution of APRA are unworkable and need to be made more flexible before copyright owners will consider them as an attractive, or even feasible, alternative; and
 - (c) there is no incentive for users to engage in direct dealing given that the present arrangements do not provide for a discount or rebate on the blanket licence fee in the event that a user is successful in securing a licence through direct negotiation with a rights holder.

The Cinema Operators' Contentions

31. The Cinema Operators contend that it is essential, in the context of licensing for the public performance of music and associated lyrics in film, that the Cinema Operators should have flexibility in sourcing the necessary licensed rights. In the absence of such flexibility the Cinema Operators are required to deal, as they are in the current licensing arrangements, solely with APRA to secure a blanket licence for the entire APRA repertoire.

32. The Cinema Operators contend that any authorisation granted by the ACCC should provide the opportunity for alternative sources of licences for the Cinema Operators. For that to occur it is necessary that any authorisation is granted on the condition that APRA's current exclusive international arrangements become non-exclusive. This is essential if the Cinema Operators are to have any ability to source the necessary licence rights from alternative rights holders including production companies, distributors or authors and composers.
33. The Cinema Operators submit that the ACCC has not gone far enough in its Draft Determination and that the Determination, should it be granted, should only be granted on a conditional basis. The conditions would include the matters already raised by the Cinema Operators and have been accepted and acknowledged by the ACCC in the Draft Determination. If users are to have any real ability to source the necessary licence rights from any rights holders other than APRA, the following matters must be addressed in any Determination granted by the ACCC:
- (a) In order to facilitate the use of transactional licences, APRA's current exclusive international arrangements with overseas collecting societies in respect of all jurisdictions with which APRA has an arrangement should become non-exclusive, modelled on the existing arrangements with the United States.
 - (b) In respect of input arrangements, the ACCC has acknowledged the difficulties with which users are faced when attempting to exercise their rights under the opt out and licence back mechanisms. However, in the Draft Determination the ACCC does not provide any indication of how these mechanisms can be amended to make them more flexible and attractive to users. The Cinema Operators submit that the terms of APRA's Constitution should be further loosened in relation to the opt out and licence back mechanisms to allow users to explore opportunities for sourcing rights from alternative sources. It is the Cinema Operators' submission that APRA's Constitution should be amended to:
 - (i) allow members to opt out in respect of certain types of users within a particular category of works; and
 - (ii) allow members to nominate the name of a particular user and a particular musical work when exercising the licence back right, rather than a whole category of users or rights.
34. If such modifications are not made, the transactional licence will continue to remain an impractical and unused vehicle for licensing for the public performance of music and associated lyrics in film and the Cinema Operators will continue to be required to deal solely with APRA to secure a blanket licence of the entire APRA repertoire.
35. In relation to the ACCC's conclusion as to the uncertainty that would prevail if the APRA arrangements were abolished and replaced by something else, the ACCC's dominant view is that the alternative would be a number of smaller collecting societies all competing with each other. The Cinema Operators submit that there are other realistic alternatives to that scenario and that the ACCC did not give sufficient regard to those other alternatives.
36. In relation to the suggested method for calculating the discount or rebate where a user is able to secure some rights at source, the Cinema Operators repeat and rely on the

memorandum on APRA royalties submitted by the Cinema Operators to the ACCC on 11 May 2005. The memorandum sets out the formula for the calculation of licence fees under the current licence scheme; it describes a notification procedure whereby the Cinema Operators would notify APRA, in arrears, of the deduction from the gross box office receipts for any films exhibited by the Cinema Operator for which the Cinema Operator had negotiated a licence from any source other than APRA, together with a certificate from the rights holder from which the licence is secured, evidencing the licence.

Minter Ellison
Minter Ellison

10 / 10 / 05
Dated