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BY EMAIL

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Mr Gavin Jones
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
Dickson ACT 2602

Dear Mr Jones

APRA application for authorisation

We refer to your conversation with our Margaret Brown on 21 November 2005, and to the pre-decision conference held on 13 October 2005.

Please find **enclosed** the submissions of the Cinema Operators following the pre-decision conference.

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

Yours faithfully

MINTER ELLISON



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enclosure

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APRA Application for Authorisation

Cinema Operators - Written submission to ACCC following Pre-Decision Conference

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 follows the Pre-Decision Conference held on 13 October 2005 (the **pre-decision conference**) and following the ACCC's request for further written submissions on 28 October 2005.

The Cinema Operators' Contentions

3. Performing rights licences are essential to the Cinema Operators' business. APRA's present input arrangements and licensing arrangements give the Cinema Operators no option but to secure such licences from APRA.
4. The Cinema Operators' performing rights licences give the Cinema Operators the right to use all works in APRA's catalogue in return for a percentage of Net Box Office Receipts. APRA has sought a 257% increase¹ in fees for its blanket licences with Cinema Operators.
5. The Cinema Operators acknowledge that the Copyright Tribunal has the jurisdiction to determine licence conditions, and that this places a limited constraint on APRA's exercise of monopoly powers. However, it is the role of the ACCC to determine if the net public benefit of APRA's proposed arrangements outweighs the public detriment, and the authorisation process is the correct forum within which to address these arrangements. It is critical that any authorisation be subject to conditions which provide the opportunity for the development of alternative licensing schemes. This requires more flexible licensing arrangements, and particularly amendments to the APRA Constitution to allow for greater flexibility for 'opt out' and 'license back' arrangements.
6. In its draft determination, the ACCC recognised that significant public detriment flowed from APRA's position as a natural monopolist. Before granting authorisation, and accepting this significant public detriment, the ACCC should consider whether any conditions can be imposed on authorisation which will lessen this detriment. The authorisation process provides an opportunity to facilitate greater competition through the imposition of conditions on any authorisation.
7. Specifically, the Cinema Operators contend that the ACCC should impose conditions relating to domestic input arrangements, international input arrangements and output arrangements to allow for their increased flexibility.

¹ The current fee is 0.55% of Net Box Office Receipts (where NBOR = 60% of Gross Box Office Receipts, such that the current fee could also be expressed as 0.33% of GBOR). The proposed fee would be 0.85% of GBOR, or 0.935% (including GST). This amounts to a 257% increase on the current fee.

8. *Domestic input arrangements:*

- (a) The APRA Constitution currently allows a member to opt out only in respect of all works for particular categories of broadcast or performance. To exercise this right, the member must:

... give not less than three months' notice in writing to the Association expiring on either a 30 June or 31 December ... requiring the Association to assign to him one or more of the categories of the Performing Right listed in Article 17(b) in all of his works.²

Article 17(b) lists types of broadcast and performance rights such as live performance, exhibition of cinematograph films, and television broadcast.

- (b) The opt out clause is of little practical utility, as a member cannot opt out in respect of a single work. Opting out for a class of broadcast or performance means that the member will forego their rights in respect of performance or broadcast of all other works in that class.
- (c) Any authorisation should be conditional on APRA's Constitution being amended to allow members to opt out in respect of a particular work for each of the classes listed in Article 17(b).
- (d) The APRA Constitution currently allows a member to require a non-exclusive license back for all or part of the rights in respect of a work (or works), and to provide at least 2 months notice of such requirement. The APRA Constitution requires that a notice:

(a) specifies the title/s of the relevant work or works;

(b) specifies the identity of all persons to whom the member intends to grant a sub-licence;

(c) specifies

(i) in the case of a performance other than by a Television Broadcast the date or dates on which the performances under the proposed sublicense are to take place; and

(ii) in the case of a performance by a Television Broadcast, the date on which the proposed sub-licence is to take effect, the period in respect of which the proposed sub-licence will operate, and any performance dates which are known to the member at the time of entering into the proposed sub-licence;

(d) specifies the geographic location of the performances or if a performance other than by a Television Broadcast, the venue of the performance;

(e) in the case of a performance by a Television Broadcast, specifies the broadcasting or on-line service and the program or content segment in respect of which the proposed sub-licence will be granted;

² Article 17(c) of the APRA Constitution

(f) contains a signed consent to the proposed sub-licence and release and indemnity in a form reasonably required by the Board from time to time from all Interested Persons; and

(g) is accompanied by

(i) an undertaking to pay reasonable costs to the Association, in accordance with the Board's predetermined and published schedule of costs (if any), prior to the date of the first performance or (in the case of performances by a Television Broadcast) the date on which the proposed sub-licence is to take effect; and

(ii) an undertaking to pay to the Association such further reasonable costs which may be incurred by the Association in connection with and/or arising out of the granting of the licence back to the member...³

- (e) The Cinema Operators contend that Articles 17(h)(iii)(c) and (d) are too onerous and inflexible. Any authorisation should be conditional on APRA amending its constitution to allow licenses back if the request specifies the licensee and the nature and medium of permitted use.

9. *International input arrangements:*

- (a) APRA's current licences with international collection societies provide for exclusive rights to license those societies' works within Australia. This prevents users from acquiring international works (with the exception of works from the United States of America) otherwise than from APRA. Any authorisation should be conditional on APRA entering into non-exclusive arrangements with international collection societies, which would facilitate direct dealing with those collection societies, and where possible, rights holders.

10. *Output arrangements:*

- (a) The Cinema Operators' current blanket licences with APRA do not provide for any discount if a Cinema Operator obtains the right to a work otherwise than through APRA. This arrangement means that a Cinema Operator will pay twice for any work for which the rights have been alternatively sourced.
- (b) Any authorisation should be conditional upon APRA being required to:
- (i) offer blanket licences which provide for a proportional discount where a user secures rights directly from a rights holder; and
- (ii) offer transactional licences as an alternative to, and in addition to blanket licences.

³ Article 17(h)(iii) of the APRA Constitution

Response to APRA's Contentions*Proper forum for setting parameters for licence arrangements*

11. At the pre-decision conference, APRA contended that the licensing arrangements between it and the Cinema Operators were not relevant to the ACCC's considerations in granting authorisation. APRA argued that these arrangements were a matter for negotiation, or alternatively for determination by the Copyright Tribunal.
12. APRA also contended that any present negotiations relating to licences were not relevant to the ACCC's considerations. With regards to negotiation of licensing arrangements, APRA stated that it had previously considered requests for alternative licences, and recognised the need to facilitate direct dealing with artists.
13. The ACCC recognised in the draft determination that the Copyright Tribunal only places a limited constraint on APRA's ability to exploit monopoly power. APRA's stated willingness to consider alternative licensing arrangements is no constraint on its ability to exploit monopoly power.
14. The Cinema Operators contend that the authorisation process is the correct forum to address any issues arising out of the authorisation affecting competition. Any authorisation granted will establish the framework for negotiation between users of works and APRA, and for any decision of the Copyright Tribunal.
15. APRA's submission that it has and will continue to consider alternative licensing schemes does not address the bargaining power that authorisation would confer on APRA in such negotiations. The conditions are necessary to provide a real alternative for users, and particularly for Cinema Operators. The conditions suggested in this submission would provide users with an alternative source of works, and would promote competition.
16. If APRA's authorisation is granted without conditions, users would have no option but to obtain works through APRA. APRA would have full discretion in deciding whether to adjust its input and output arrangements. The Cinema Operators contend that this is not a satisfactory outcome of any authorisation.

Utility of opt out/license back provisions

17. APRA contended at the pre-decision conference that an opt out provision would be of little utility as it is more practical for rights owners to deal through APRA. This may be correct as a generalisation, however, the option for users to deal directly with rights owners would constrain APRA's ability to exercise monopoly power. APRA's contention does not acknowledge or address the importance of commissioned soundtracks, where rights negotiations can easily occur at the time of commissioning.



Minter Ellison

23.11.05.

Dated