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LAWYERS

28 January 2010

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The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Dear Sir

Australasian Performing Right Association Limited – Applications for Revocation and Substitution A91187-A91194

We act for Village Cinemas Australia Pty Limited, the Greater Union Organisation Pty Limited, Reading Entertainment Australia Pty Limited, Australian Multiplex Cinemas Pty Limited, the Hoyts Corporation Pty Limited and the Independent Cinemas Association of Australia (the **Cinema Operators**).

We **enclose** a supplementary submission on behalf of the Cinema Operators in relation to the 'Comments on Submissions to ACCC by Interested Parties' provided to the Australian Competition and Consumer Commission by the Australasian Performing Right Association Limited in respect of the above referenced application.

Yours faithfully
MINTER ELLISON

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Copy to Mr John Rouw
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SUPPLEMENTARY SUBMISSION

TO: THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

BY: VILLAGE CINEMAS AUSTRALIA PTY LIMITED

THE GREATER UNION ORGANISATION PTY LIMITED

READING ENTERTAINMENT AUSTRALIA PTY LIMITED

AUSTRALIAN MULTIPLEX CINEMAS PTY LTD

THE HOYTS CORPORATION PTY LIMITED

INDEPENDENT CINEMAS ASSOCIATION OF AUSTRALIA

(The Cinema Operators)

RE: AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED: APPLICATION FOR REVOCATION AND SUBSTITUTION

DATE: 28 JANUARY 2010

Introduction

1. This supplementary submission is made by Village Cinemas Australia Pty Limited, the Greater Union Organisation Pty Limited, Reading Entertainment Australia Pty Limited, Australian Multiplex Cinemas Pty Ltd, the Hoyts Corporation Pty Limited, and the Independent Cinemas Association of Australia (the **Cinema Operators**). It addresses certain comments in the 'Comments on Submissions to ACCC by Interested Parties' (**APRA Comments**) provided to the ACCC by the Australasian Performing Right Association Limited (**APRA**).

APRA Comments on Cinema Operators Submission

2. Paragraph 39 of the APRA Comments states that 'The Cinema Operators real complaint is that they are unable through direct licensing to utilise their market power to secure a more favourable outcome from their perspective'. The Cinema Operators in their submissions pointed out that, under the arrangements sought to be authorised, APRA is a monopoly of composers who pool their works for the purpose of licensing and that those arrangements produce incentives to increase the price charged above the competitive level. It is not the Cinema Operators but APRA which is in a position to exercise significant market power as a result of the arrangements which it seeks to have authorised.

3. In paragraph 40 of the APRA Comments it is suggested that the Cinema Operators 'appear to set at naught the jurisdiction of the Copyright Tribunal to determine what are reasonable charges and conditions'. The Cinema Operators do not 'set at naught' the jurisdiction of the Copyright Tribunal. They have in their submissions noted:

    (a) that the jurisdiction of the Copyright Tribunal does not extend to the direct consideration of the anti-competitive affect of the totality of APRA's arrangements;

    (b) the limitations on the market information regarding competitive price levels available to the Copyright Tribunal in the context of APRA's monopoly in the market; and

    (c) the cost, complexity and duration of proceedings in the Copyright Tribunal,

    and that these have the effect that APRA's monopoly power can still be exercised to produce outcomes above the competitive price level despite the jurisdiction of the Copyright Tribunal.

4. Paragraph 42 of the APRA Comments states that 'it appears … that the real complaint of the Cinema Operators is that they are unable to negotiate licences with film distributors that pass through the performing rights to the territory of Australia. This is beyond APRA's knowledge or control'. The issue is not whether the arrangements between Cinema Operators and producers or distributors are beyond APRA's knowledge or control. The issue is that the totality of APRA's arrangements, including:

    (a) APRA's exclusive licensing arrangements with affiliated collecting societies throughout the world; and

    (b) its propensity to grant blanket licences,

    have the effect of precluding the Cinema Operators from negotiating directly with overseas copyright holders or obtaining 'through to viewer' licences from distributors.

This is because:

(a) the exclusive arrangements of the collecting societies in all jurisdictions other than the United States, together with the exclusive arrangements between them and APRA, mean that neither the Cinema Operators nor film producers or distributors are able to obtain licences directly from copyright holders in those jurisdictions; and

(b) in any event, the terms of APRA's blanket licences to Cinema Operators provide no financial incentives for the Cinema Operators to seek rights directly at source since there is no provision for a reduction of blanket licence fees to take account of any such direct licensing of rights (in effect the Cinema Operator would be paying twice for the same rights).

5. In paragraph 43 of the APRA Comments it is suggested that because the majority of music performed in the screening of films is not of Australian origin, APRA's arrangements with its members may have little effect on the Cinema Operators' contractual arrangements with distributors. The Cinema Operators point out that:

(a) music performed in the screening of films includes music of Australian origin and to that extent APRA's arrangements with its members are directly relevant; and

(b) APRA's exclusive licensing arrangements with overseas affiliated collecting societies tend to preclude the Cinema Operators from being able to negotiate directly with overseas copyright holders or obtaining 'through to viewer licences' from its distributors.

6. Paragraph 44 of the APRA Comments states that 'the principal objection the Cinema Operators appear to have [in relation to APRA's license-back provisions] is with reporting - see paragraph 26'. Paragraph 26 of the Cinema Operator's Submission noted that the license-back provisions require the member to provide *inter alia* such details regarding the date or dates of performance as are reasonably necessary to identify whether the sub-licence extends to a particular area and venue. These cumbersome and onerous requirements do not facilitate the efficient granting by members of public performance rights in musical works for films, most particularly to the producer or distributor of a film incorporating 'through to viewer' licences.

7. Paragraph 44 of the APRA Comments goes onto state that the Cinema Operators 'claim this is because the blanket licence gives them no incentive to put proper recording and reporting procedures in place' and refers to paragraph 37 of the Cinema Operators' Submission. However paragraph 37 of the Cinema Operators' Submission is directed to a quite separate and unrelated point - namely, addressing the assertion in 5.3.7 of APRA's original supporting submission that cinemas are usually unaware of what musical works will be performed before (or sometimes even after) they are performed. The Cinema Operators noted that in the context of blanket licensing, there is no need or incentive for them to have in place procedures to inform them of the musical works in the films exhibited but pointed out that there was no inherent difficulty in their identifying in advance the music to be broadcast in a film.

8. APRA goes onto state in paragraph 44 that 'in any event, APRA does not require Cinema Operators to report the music screened in films, only to report the films that have been screened.' This is irrelevant to either of the points in issue:

(a) in respect of the license-back provisions for APRA members, the issue is not the reporting which APRA requires from Cinema Operators under its blanket licences, but the reporting it requires from its members under the license-back provisions; and

(b) in respect of the capability or otherwise of Cinema Operators to identify in advance the musical works in films (as may be relevant to non-blanket licence schemes, through to viewer licences from distributors or direct licensing from copyright holders), APRA's reporting requirements under its current blanket licences are not to the point.

9. The Cinema Operators welcome the clarification in paragraph 45 of the APRA Comments that it is not proposed that the right to refer a dispute to expert determination be removed.

Period of authorisation

10. The market for performing rights in copyright music has been and will continue to be subject to rapid change, including:

(a) changing technologies for the publishing, reproduction and playing of music, such as music downloads and video on demand over the internet, and downloads to mobile digital devices;

(b) potential convergence between television and internet technologies; and

(c) changing commercial structures as a result of the emergence of these new technologies.

11. In this context and for the reasons set out in their previous submission, the Cinema Operators submit that the Commission should have the opportunity to review the authorisation within a reasonable timeframe and that the period of six (6) years sought by APRA is not appropriate. It is submitted that any authorisations granted should be for a period of no longer than three (3) years.