Voluntary code set to govern movie industry

The result of the ACCC's report into cinema industry conduct is a Code which is intended to restrict any unfair practices

The Australian cinema industry's Code of Conduct was formally launched at the Australian Cinema Convention in August 1998.

The Code, which is voluntary and only applies to signatories in their dealings with each other, followed the release in March 1998 of an Australian Competition and Consumer Commission (ACCC) report on developments in the cinema distribution and exhibition industries and their impact on competition. The report, *"Developments in the cinema distribution and exhibition industry"*, was carried out by consultant Ross Jones. It was commissioned because of an increase in the number of complaints received by the ACCC from cinema exhibition interests relating mostly to access to first release movies and conditions of film hire imposed by distributors on small independent exhibitors. Complainants identified allegedly unfair session and pricing policies as the main problems.

Trade Practices Act provisions

On July 1, 1998, new provisions came into effect concerning the Trade Practices Act. The new s.51AC prohibits unconscionable conduct between small and large traders, the aim being to remove apparent imbalances in bargaining power that can lead to the exploitation of smaller operators.

"Unconscionable conduct" is not defined in the Act. But the legislation provides that a court may consider whether there was insufficient disclosure of risk, lack of good faith, lack of willingness to negotiate or breach of a Code of Conduct.

The cinema Code and s.51AC are intended to better protect smaller sized ("economically captive") firms. But s.51AC is the real sanction: it can be used to obtain an injunction, compensation or to have contracts varied or set aside.

Listed public companies are not entitled to the protection of s.51AC and it only applies to transactions under $1 million.

Since July 1, cinema industry participants have been exposed to this new liability under s.51AC. Suppliers need to implement strategies for protection; particularly since s.51AC was intended to benefit "small" business but arguably protects any unlisted business from unconscionable conduct if the transaction falls below $1 million.

The ACCC's enquiry into the cinema industry did not find any breaches of the Trade Practices Act but as conduct was "close to the line", the commission urged the industry to resolve its tensions by implementing a Code of Conduct. Accordingly, industry groups met under the auspices of the ACCC and agreed to adopt a voluntary Code and dispute resolution mechanism. The Code's objectives are to:

- provide a framework for fair and equitable dealing between distributors and exhibitors;
- provide a non-legalistic, cost-effective and commercially orientated means of avoiding and settling disputes; and
- reduce the likelihood of litigation between parties to the Code.

The overriding principle is that each distributor and exhibitor will deal with the other on a fair and equitable basis at arms length having regard only to legitimate commercial objectives, and on the basis of the Code. The latter sets out model behaviours for signatory distributors and exhibitors, as well as a dispute resolution process that is to be followed before court action is taken, except urgent interlocutory relief.

The dispute resolution process requires signatories to attempt resolution within 14 days of the complaint arising. If that fails, the Code Conciliator (appointed by an industry committee) has 14 days to assist the parties. After that, the parties may involve the ACCC or the courts.

While the Code is voluntary and does not carry any sanctions as such, any party acting inconsistently with the Code is more likely to be found liable for breach of the new unconscionable conduct laws in the Trade Practices Act (see box).

One of the key obligations under the Code is that contracts between signa-

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tory exhibitors and distributors "should be freely negotiated" having regard to the specific circumstances of each screen.

The Code gives exhibitors the right to choose whether to negotiate for the supply of print in accordance with (i) the distributor's prevailing film policy or (ii) on a picture-by-picture basis having regard to the distributor's own "distribution strategy", the nature of the picture and a range of objective criteria including expected returns, the cinema's location and the parties' overall business relationship. In relation to advance screenings, distributors must undertake negotiations in accordance with (ii).

Distributors must give exhibitors to whom they intend to offer prints reasonable notice of release dates and, 14 days before release, information regarding intended supply terms and promotional opportunities. On request, distributors must give reasons for refusal to supply prints and must review session commitments if a film substantially under-performs.

Among other obligations, exhibitors must not prevent distributors from supplying films to competitors. They must play trailers and display advertising at least two weeks before the opening date. Exhibitors can be required to provide credit references and box office receipts in certain situations.

If an exhibitor fails to comply with any obligations in the Code, supply of print may be withheld after reasonable notice of the distributor's objection.

If the Code fails to achieve its objectives, the ACCC has said it might make it mandatory or promote the enactment of legislation. The ACCC will review the operation of the Code in 12 months' time.

Karen Winton

From The Archives

Australian TV service for Southeast Asia

An Australian controlled company, Satellite Education Systems (HK) Ltd., is planning to beam educational and entertainment programs to 1.5 billion potential Southeast Asian viewers from November.

SES signed a contract for a seven year transponder lease on Indonesia's Palapa satellite in December last year.

But the requisite Intelsat coordination to allow overseas broadcasts out of Australia was only approved by the Intelsat board last month where it was supported by the Overseas Telecommunications Commission (OTC) and its Indonesian and Thai counterparts.

Director of operations David Kiernan has not yet reached a decision on whether to uplink to Palapa via Telecom Singapore or via OTC from Darwin. "In some respects Singapore is attractive because there is no duty payable on studio and earth station equipment," he explained.

If the uplink is established in Darwin, it will be owned and operated by OTC though the department's telecommunications division is currently reviewing policy on international transmission from and to private earth stations in Australia.

The Palapa venture clearly provides the opportunity for the department to open up the skies for Aussat to provide foreign telecasts into and out of Australia.

Trading as the Emerald Network, SES is 63 per cent owned by Perth second board company, Industrial Resources Holdings Ltd., and 20 per cent by PT Satmarindo, an Indonesian oil exploration company and supplier of services to the offshore industry.

A potential investor, Ecosphere International, operates a satellite network operator in the U.S. and Kiernan says he has a small SES stake.

Kiernan was formerly general manager for Parry Corp.'s Icom subsidiary which took over the Darwin-based satellite dish distributor, Homesat TV, in 1984.

He is enthusiastic about the use of Palapa since the fixed price for TV capacity is "only US$750,000 a year, quarter the rate charged by Aussat."

Australian soaps & golden oldies

Initially, Emerald will concentrate on exporting English language programs for the Indonesian market.

"Our main charter is to send western education into Southeast Asia during the day, and then from 5pm each evening we will turn into a normal TV entertainment format," said Emerald sales and marketing manager, Guy Sherrington...

The potential Asia-Pacific market

Emerald is targeting corporate sponsors in Australia such as the tourist industry which has expressed interest in the new network. A limit of four minutes of advertising each hour in the evenings is also on the agenda.

Sherrington said that by mid 1989, "we will be looking at Thailand and toward the end of 1989 we are hoping Malaysia will come on line."

A Papua New Guinea group has also expressed interest. "We have talked with a Port Moresby cable network - Channel Eight - who want to downlink the programs and do a joint venture situation where they distribute the signal," he said.

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