

Competition in the Film Industry

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1. INTRODUCTION

In late 1996 the Australian Competition and Consumer Commission launched an investigation into the state of competition in the film industry. The Commission was responding to a number of complaints received from industry participants and also the rapid growth of the industry in terms of both revenue and number of cinema outlets.

Today I would like to give you an overview of the direction of the Commission's enquiries to date and give a brief explanation of the provisions of the Trade Practices Act which are most relevant to film industry participants.

But, first I would like to explain the aims and functions of the ACCC.

2. AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

The Australian Competition and Consumer Commission (ACCC) commenced operation on 6 November 1995 as a consequence of reforms set out in the Competition Policy Reform Act 1995. The ACCC has the role of administering the Trade Practices Act 1974, State and Territory Application Acts and the Prices Surveillance Act 1983.

The ACCC is the only nationally operating agency dealing generally with competition matters and has offices in each capital city as well as Townsville and Tamworth.

In enforcing the Trade Practices Act and the Prices Surveillance Act, the ACCC aims to:

- · improve competition and efficiency in markets;
- · foster adherence to fair trading practices in well-informed markets;
- · promote competitive pricing wherever possible and to restrain price rises in markets where competition is less than effective;
- · inform the community at large about the Trade Practices Act and Prices Surveillance Act and their specific implications for business and consumers; and
- · use resources efficiently and effectively.

Where it has a discretion on whether or not to act, the ACCC gives priority to matters where:

- · there appears to be blatant disregard for the law;

- · the matter particularly affects disadvantaged consumers;
- · there is significant public detriment;
- · successful enforcement, by litigation or other means, would have a significant deterrent or educational effect; or
- · an important new issue is involved, eg. one arising from economic or technological; change.

3. FILM INDUSTRY INVESTIGATION TO DATE

Film Industry Structure

To properly analyse competition in a particular industry, the ACCC must first determine what the relevant market is and then judge the state of competition by referring to that relevant market. In relation to the geographic size of the relevant market(s), exhibitors have stated that they see their market as being local. Most exhibitors typically claim that consumers will travel no more than around 20 minutes to a suburban cinema complex so they usually describe their market as a geographic market within around 10 km of their site.

On the other hand, the major film distributors' behaviour would indicate that they see markets from both a local and a national level. Most films in Australia are now given a national release. That is, a particular title is released in a large number of cinemas across the country on the same day. Distributors will typically take national television and magazine advertising to promote a particular title. Distributors' terms and conditions for film hire tend to be standard across the country (with some distinction made between city and country locations).

In their decisions as to when to release a title and how many prints to supply, distributors consider the national behaviour of their competitors. For example, the wide release of a popular film by one distributor will likely cause another distributor to delay its popular release. Distributors also consider local markets. The decision as to how many prints to make available is often related to aspects of a particular geographic market. For example, distributors may decide to supply no more than one print of a title in a country town which has competing exhibitors on the grounds that the local market is too small to justify a second print.

Relationship Between Cinema, Video and other Media

Our enquiries to date have led us to believe that television (including pay TV) and videos are not seen as effective substitutes for cinema.

In relation to videos, it may be that rather than cinema and video being substitutes, there is some degree of complementarity. The recent expansion of the cinema market may be related to the growth of the video rental market. The long term effect of video appears to be an increase in the growth of cinema admissions as consumer interest in cinema is enhanced by regular viewing of movies on video. Certainly the success of many sequels in the cinema is related to the widespread popularity of their predecessor on video.

Change in Demand and Supply Over Time

Australians are among the world's most regular cinema goers. Annual cinema admissions in Australia grew throughout the 1970's and early 1980's but slumped in the mid 1980's as video rental took market from cinemas. However, in the late 1980's demand was back to where it was at the beginning of the decade and continued to rise rapidly in the 1990's.

The growth in demand is probably attributable largely to the growth in the number of screens. It would appear that as the number of screens has expanded, especially via the growth of multiplex cinemas in the suburbs of major cities, admissions have increased. It may be that there still exists some scope for further supply expansion. Our enquiries indicate that Australia may still be under screened as compared to a number of other countries.

Exhibition Market Structure

Our enquiries indicate that cinema exhibition in Australia is dominated by three companies, The Greater Union Group (GU), the Village Roadshow Group (VR) and Hoyts Cinemas (Hoyts). The fourth largest exhibitor in Australia, Birch, Carroll and Coyle, concentrated largely in Queensland is a wholly owned subsidiary of Greater Union. Greater Union is also the second largest shareholder in Village Roadshow while a joint venture between Greater Union, Village Roadshow and the US studio, Warner Bros, operates a large number of cinemas (mainly suburban multiplexes). Our enquiries also reveal that, outside of the CBD areas of the capital cities and Parramatta in Sydney's west, there is no competition between Greater Union and Village. Hoyts and small independents provide the only competition.

Regional Concentration of Cinema Screens

Mainstream independent exhibitors (those showing mass appeal films) are now almost completely confined to the suburbs of the capital cities and to provincial and country areas. Only in Adelaide does an independent (the Wallis group) have a CBD first release mainstream cinema. Distribution Market Structure

Distribution of films for cinema exhibition in Australia is dominated by four large firms. These are Roadshow Distributors (Roadshow), United International Pictures (UIP), Columbia Tristar Film Distributors (Columbia) and Twentieth Century Fox Film Distributors (Fox).

Roadshow is 50% owned by the Village cinema group and 50% by Greater Union and has agreements with two of the major US studios, Warner Bros and Disney to distribute their films theatrically in Australia. Under these arrangements all Warner Bros and Disney titles to be distributed in Australia will be handled by Roadshow.

Film distribution is highly concentrated. The four largest distributors, UIP, Roadshow, Columbia, Tristar and Twentieth Century Fox, generally hold in excess of 90% of the Australian market. Enquiries have also revealed that there are several potential barriers to the entry of new film distributors. The most important are access to product and access to finance.

Distribution Behaviour

Independent exhibitors have raised a number of concerns regarding the behaviour of film distributors, including:

- · their inability to negotiate film hire terms;
- · the terms for second run films, in particular the fact that they are obliged to pay a higher percentage than first release cinemas at that stage while the earning capacity of the film has been severely reduced;
- · the requirement by distributors of minimum exhibition periods which it is argued, forces smaller exhibitors to forego particular titles, thereby diminishing their commercial viability;
- · non-availability of prints, due to the traditional alignments between the major film distributors and major film exhibitors; and
- · inconsistent treatment by distributors of cinemas in like circumstances.

Distributors

The ACCC is concerned that the various agency and joint venture arrangements for film distribution may in effect facilitate the co-ordination of release dates and reduce competition between partnered companies. For example, in the US a Warner Bros release might open the same day as a Disney release. In Australia, Roadshow (which has exclusive access to the Warner Bros and Disney companies films) and UIP (which distributes for Paramount, Universal and MGM/UA) may be in a position to stagger the release to prevent opening week competition between titles.

Such activity may reduce consumer choice of first release films at any particular time and may have the effect of preventing small independent distributors not linked to US production houses from gaining access to cinemas.

Independents' Pricing Behaviour

The major advantage the independents have had is price. Independent cinemas are often family managed, operating out of older, fully depreciated sites. Our enquiries have revealed that there appears to be some price competition from major exhibitors but it is usually confined to situations where a major exhibitor is competing against an independent rather than against another major exhibitor. The limited price discounting by the major exhibitors appears to cease when the competing independent closes down as has happened in a number of instances throughout Australia.

It would appear that there is generally very little competition between the major exhibitors. Many small independent exhibitors are finding that their inability to compete against the major exhibitors is not a function of inefficiencies and consequent high costs. Instead it is due to their inability to obtain films on appropriate terms and their inability to expand to improve their competitive position.

As the major exhibitors move into territories previously serviced by independents, some of the independents face difficulty in securing day and date releases with a competing multiplex operated by a major. Those cinemas who do not secure supply have little chance of survival.

Our enquiries have revealed that the major exhibitors have plans for major expansion over the next three years. If such plans are fulfilled, they will double the number of screens that they are currently operating.

4. TRADE PRACTICES ACT 1974

The two main parts of the TPA are complementary:

Part IV deals with mergers and restrictive trade practices, and although Part IV is more complex and detailed, it is based on two broad principles:

- · that any behaviour which has the purpose or effect of substantially lessening competition in a market should be prohibited; and
- · that put broadly, such behaviour should be able to be authorised when its anti-competitive effects are offset by associated public benefit.

The main types of anti-competitive conduct which are prohibited include:

- · anti-competitive agreements and exclusionary provisions, including primary and secondary boycotts (s.45), with a per se ban on price fixing and boycotts;
- · misuse of substantial market power, for the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competitive conduct (s.46);
- · exclusive dealing which substantially lessens competition (s.47), with third line forcing prohibited per se;
- · resale price maintenance for goods (ss. 48, 96-100); and
- · mergers and acquisitions which substantially lessen competition in a substantial market (s.50).

Conduct that may substantially lessen competition under Part IV of the Act may be granted authorisation, which is a mechanism that provides immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the Act.

Authorisation is granted on the grounds of prevailing public benefit. Depending on the arrangement or conduct in question, the Commission must be satisfied that the arrangement results in a benefit to the public that outweighs any anti-competitive effect; or that the conduct results in such a net benefit to the public that the conduct should be allowed to occur. Decisions made by the Commission in relation to authorisations can be appealed to the Australian Competition Tribunal which was recently renamed from the Trade Practices Tribunal.

Part V of the Act deals directly with the interests of consumers (and businesses which qualify as consumers in particular transactions). It is a means of promoting fair competition by protecting consumers' rights, especially the right to full and accurate information when purchasing goods and services. It provides an important safety net in markets where vigorous competition might tempt some businesses to cut corners to gain a competitive advantage - eg by making misleading claims about a product's value, quality, place of origin or impact on the environment.

Part V of the Act contains a range of provisions aimed at protecting consumers and businesses that qualify as consumers by:

- a general prohibition of misleading or deceptive conduct (s.52);
- specific prohibitions for false or misleading representations (ss. 53-65A);
- product safety provisions;
- prohibiting unfair practices (Division 1), including the unconscionable conduct provisions in Part IVA that prevent businesses from behaving unconscionably when they supply goods and services to individual consumers (s.51AB) and when corporations are engaged in commercial transactions (s.51AA);
- conditions and warranties in consumer transactions (Division 2) and actions against manufacturers and importers (Division 2A);

5. CONCLUSION - ACCC NEXT STEPS

The Commission's next step will be to carefully consider the complaints it has received to date and decide what action, if any, should be taken under the Trade Practices Act 1974 in relation to these complaints.

As such, the Commission encourages all film industry participants to feel free to approach the Commission to discuss any issues of concern or even just to discuss the industry at large. In conclusion I would like to say that the Commission is ready, willing and able to work with those companies wishing to comply with the law. However, the Commission is equally ready, willing and able to work against those who don't.