

## **INDEPENDENT CINEMAS AUSTRALIA FURTHER SUBMISSION IN SUPPORT OF APPLICATION FOR AUTHORISATION NO. A91587**

**FEBRUARY 13, 2018**

As requested by the ACCC, ICA provide a further public submission in support of our application for authorisation and to provide further clarity to stakeholders concerning the scope of the application regarding collective negotiation and information sharing and the likely impact on transparency, equitable dealings and confidentiality.

ICA, in seeking authorisation of information sharing and collective negotiation does not seek to compromise the confidentiality of distributor contractual terms in any way that is detrimental to the distributor. The fact of collective negotiation and any outcome of it with a distributor will not be disclosed to any other distributor, as is the case currently.

ICA considers that there is a logical and sensible way of approaching collective negotiation which will have a direct impact on the issues of transparency, fairness and confidentiality.

The logical sequence for negotiations with a (willing) distributor is:

- Standard Terms and Conditions
- Terms of Trade Policies and/or Guidelines
- Specific issues (if required)

Constructive collective negotiation of the Standard Terms and Conditions and of the Terms of Trade Policies/Guidelines will significantly reduce the likelihood of disputes concerning specific titles.

Finally, the ACCC has asked ICA to clarify para 2.2.2. of our submission of 1 December 2017 and we confirm that throughout the period of authorisation ICA anticipates being engaged in collective negotiation where ICA members have concerns or where a distributor requests ICA to do so, the Executive agrees, and on behalf of members who do not opt out of the negotiation.

### **1. Standard Terms and Conditions**

1.1 ICA considers that there should be collective negotiation of some terms of the Standard Terms and Conditions of various distributors.

1.2 For such collective negotiations essentially no information sharing would be required. The fact that a particular distributor had a particular term in its Standard Terms and Conditions would, by definition, be known to all ICA members. Accordingly, as a practical matter, collective negotiations could take place with that distributor without any additional disclosure of information.

1.3 For example, if ICA's Board decides that ICA should seek to negotiate with Distributor A concerning that Distributor's "exclusion of liability" clause because it is unfair. ICA would inform its members of this proposal and request any member who wishes to do so to 'opt out' of the proposed negotiation. This process would not, as a matter of substance involve any disclosure of confidential information to ICA's members. Each of them

already knows what Distributor A's "exclusion of liability" clause says and that it is the same for all of them.

- 1.4 ICA's negotiating position might be for example that it would seek amendment to the Distributor's "exclusion of liability" clause so that the Distributor would be liable for its negligence and breach of its obligations under the Standard Terms and Conditions.
- 1.5 Assuming Distributor A agreed to the proposed negotiation, and a negotiation of amended terms was successful, ICA's members would be informed of that and the Distributor would issue new Standard Terms and Conditions to each participating member including the amended "exclusion of liability" clause.
- 1.6 For the avoidance of doubt the outcome of the negotiations (ie the terms of that distributor's Standard Terms and Conditions) would be kept confidential by ICA and its members ie authorisation would not permit the disclosure of the fact or outcome of the negotiations to other distributors.

## **2. Terms of Trade Policies and Guidelines**

- 2.1 For one of the relatively few distributors which has Terms of Trade Policies and/or Guidelines, ICA considers that the position is substantially similar to the Standard Terms and Conditions – that is, ICA members would all be aware of that distributor's Policies and/or Guidelines and no additional disclosure would be required.
- 2.2 For example, if ICA's Board decides that ICA should seek to negotiate with Distributor A concerning that Distributor's Guidelines concerning its session Policy for cinemas with 1 or 2 screens, ICA would inform its members which have cinemas with 1 or 2 screens of this proposal and request any of those members who wishes to do so to 'opt out' of the proposed negotiation. This process would not, as a matter of substance involve any disclosure of confidential information to ICA's members. Each of them already knows what Distributor A's Guidelines concerning its session Policy for cinemas with 1 or 2 screens say and that it is the same for all of them.
- 2.3 Assuming Distributor A agreed to the proposed negotiation, and a negotiation of amended Guidelines was successful, ICA's members would be informed of that and the Distributor would issue new Guidelines to each participating member.
- 2.4 For the avoidance of doubt the outcome of the negotiations (ie the terms of that distributor's Guidelines) would be kept confidential by ICA and its members ie authorisation would not permit the disclosure of the fact or outcome of the negotiations to other distributors.
- 2.5 In the case of a distributor which, contrary to a key requirement of the Code, does not, currently, have Terms of Trade Policies and/or Guidelines in place, there would appear to be no confidentiality concerns arising commencing collective negotiations with that distributor.
- 2.6 For example, if ICA's Board decides that ICA should seek to negotiate with Distributor A with a view to that Distributor putting in place Guidelines, ICA would inform its members of this proposal and invite opt-outs. That would not involve the disclosure of any confidential information.

- 2.7 The object of those negotiations would be to agree Terms of Trade Policies and/or Guidelines with that distributor. One such Guideline might be, for example, that the distributor's session policy for 2 screen cinemas would not exceed 2 and 1.
- 2.8 For the avoidance of doubt the outcome of the negotiations (ie the terms of that distributor's Guidelines) would be kept confidential by ICA and its members ie authorisation would not permit the disclosure of the fact or outcome of the negotiations to other distributors.

### **3 Specific issues**

- 3.1 ICA considers that, if a distributor is prepared to engage in collective negotiation in relation to its Standard Terms and Conditions and its Terms of Trade Policies and Guidelines, the need for information sharing and collective negotiations in relation to issues concerning a specific film will be significantly reduced. The fairer the Standard Terms and Conditions and the Terms of Trade Policies and Guidelines are, the less scope there will be for disputes.
- 3.2 If, however, individual cinema operators had a concern with an aspect of the basis on which a film was offered by a distributor the authorised information sharing would involve ICA as a hub, so as to mitigate the risk of disclosure of information for purposes other than ascertaining that the offer in respect of a particular film was fair and equitable and/or to negotiate on behalf of affected ICA members in respect of that issue.
- 3.3 ICA's role as a 'hub' would be to receive and transmit information to the extent necessary to enable relevant members to assess whether a particular offer is fair and equitable and/or to seek to engage in collective negotiations. The intention is that ICA members would share information with representatives of ICA such as the Board members, Secretariat and any designated official appointed for this purpose. This approach would ensure that information sharing is dealt with in a structured way that protects confidential information from unintended dissemination.
- 3.4 ICA envisages that the information sharing, which is the subject of the authorisation application would be, in effect, a limited exception to an exhibitor's confidentiality obligations. In other words it is not intended that the information sharing would have the consequence that the information in question would cease to be confidential because of widespread dissemination.

### **4 Practical Application Of Disclosure**

- 4.1 Some sharing of distributor's confidential information is presently a fundamental requirement for the operation of the Film Industry Code of Conduct. ICA proposes that information will be treated in essentially the same way as is currently the case between ICA and individual member exhibitors whereby members share confidential information with ICA when seeking assistance under the Film Industry Code of Conduct. The only difference is that ICA seeks authorisation to share the information with other affected member exhibitors to enable greater transparency about what is fair and equitable and/or a proposal for collective negotiation of the issue to be put to the distributor for consideration.
- 4.2 Authorisation will not oblige the distributor to agree to collectively negotiate the issue, it is entirely voluntary.

4.3 Authorisation of information sharing in this manner will also ensure that a distributor's terms (in the widest sense) will remain confidential and will not become known to their competitors.

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