

SUBMISSION FROM KIEREN DELL, CEO MAJESTIC CINEMAS – JANUARY 2018

IN SUPPORT OF INDEPENDENT CINEMA AUSTRALIA'S APPLICATION FOR AUTHORISATION OF INFORMATION SHARING AND COLLECTIVE BARGAINING [Number A91587]

I write in support of ICA's application for authorisation based on my own experience as an independent exhibitor for over fourteen years and also based on my experience speaking with other independent exhibitors, ICA members and small to medium enterprises many of which are family businesses.

I am CEO of Majestic Cinemas which is a chain of cinemas operating in NSW and Queensland that I first established in 2002 by acquiring the 3 screen cinema at Nambucca with a range of investors and we now operate 7 cinemas with a total of 21 screens all in regional locations in northern NSW and SE Qld, and varying between 1 and 5 screens per location. I also book films for another small twin in regional NSW.

I am presently Vice President of Independent Cinemas Australia, am a past President of the Association for 7 years during the conversion to digital, and have served on the Board for over 12 years. Over the past 10 years I have also served continuously as the ICA representative member on the Film Industry Code of Conduct Administration Committee and worked closely with the Committee, Secretariat and Conciliator on FEDCAC matters.

Public Benefits

I have read Mr Denis Parkes submission and agree with his remarks. In my experience, independent cinemas are an important and valued service in both regional and metro communities and I consider that authorisation will provide an opportunity to generate public benefits to independent exhibitors, their patrons and the wider community.

I do not agree with the various distributors that suggest the potential closure of an independent cinema is not a legitimate concern for ICA, for the ACCC or for the affected community. However the vast majority of box office income for distributors is generated by either the major exhibition chains, or a small number of independent exhibitors some of whom are ICA members - so the risk of closure particularly of small regional exhibitors would have little impact on distributors. In my experience of speaking with independent exhibitors over the years many of their businesses are seasonal, variable, with high fixed running costs and complex programming demands undertaken with very limited access to adequate information. Authorisation of collective information sharing and negotiation will deliver cost savings and efficiencies of the kind clearly outlined by Mr Parkes.

Over the last twelve months I have directly engaged in the programming of the Majestic Cinema chain and in that capacity have dealt with sales representatives from all the major distributors in Australia, many on a weekly basis. Negotiating for 8 cinema sites definitely creates time efficiencies for both parties compared to negotiating for 1 or 2 sites. While most negotiations are friendly and agreement is reached reasonably easily, especially with some distributors, there are a number of day to day negotiations that are protracted and difficult, particularly with some distributors both major and independent. This can involve much time and effort discussing terms with distributors sales representatives and arguing back from unreasonable 'standard' policy proposals more suited

to larger multiplex sites. In particular, when terms are changed unilaterally by distributors, the response has tended to be one of “no discussion allowed – you just have to take it”.

ICA does not believe that every site is deserving of the same offer as every other site, however authorisation of information sharing and collective negotiation will deliver more transparency and equity about the terms offered to similar sites. Authorisation may also enable ICA to negotiate a minimum asking policy for sites with certain screen numbers that will not result in a ‘one size fits all’ but may set a reasonable starting point on policy to guide bilateral discussions between distributors and participating ICA members. I expand on this in more detail below.

I understand that many distributors do not wish the status quo to change and have opposed ICA’s application. I respect their decision as participation in any collective negotiation would be voluntary however I do not agree that this is a basis to reject ICA’s application, or that no distributor would benefit from granting the application. At least two distributors have confirmed support for the application, recognising the public benefits and I am unsure why the ACCC would not provide the opportunity to access these benefits on the basis that distributors who do not wish to participate are vigorously opposing the application.

I see significant opportunity for the authorisation of information sharing and collective negotiation to benefit my business and my community and I agree with Mr Parkes’s submissions. Streamlining the complexity of programming, helping me better understand a distributor’s offer, enabling me to join with other exhibitors to raise a matter of common concern supported by ICA will ensure I have more time to focus on other areas of my business. In particular I would focus on improvements to customer service, innovations in cinema operations, and authorisation should in time enable more diverse programming choices for my customers. The extent of benefit will depend on the extent to which distributors and exhibitors choose to take part however negotiation of even a small number of outcomes will benefit both my business and other participating independent exhibition businesses and their customers without causing any material detriment envisaged under the Australian Consumer and Competition laws. I am not of the view, and do not understand the ICA Board to hold the view, that the independent exhibition industry is failing or in crisis and do not understand such a contention to be the reason for the ICA application. My view is that the industry is changing, and our businesses need to be in a position to navigate those changes sustainably. It is also the case that unlike the major exhibition chains, independent exhibitors do not hold adequate market power on their own to negotiate on a level playing field with the vast majority of distributors and so have very limited, if any, capacity to negotiate to have our perspective and needs taken into account. I understand, for example, that the national box office for the first week of Star Wars: The Last Jedi was approximately \$27,800,000 and note that the box office of one of our two screen cinemas in rural New South Wales for that film was approximately \$17,360 ie 0.06% of the total box office. For that cinema, however its total box office for the week was approximately \$24,170 and Star Wars: The Last Jedi represented 71.8%. In other words an independent cinema must have successful product from a distributor but that distributor would suffer no material detriment if it did not supply that film to that particular independent cinema.

My own experience with a major studio negotiation in 2016, together with similar experiences by many other ICA members, made clear that as individual small businesses we were not well

equipped to explain our needs and concerns and to negotiate appropriate outcomes in the face of a major change. In some instances, ICA member exhibitors did not feel able to even tell the distributor of their concerns. Others such as myself explained our concerns individually to the distributor without result. One exhibitor invested considerable time and expense to take the distributor to conciliation under the Industry Code. The time and resources of ICA and its CEO were significantly taken up for nearly six months supporting many different member attempts to address the issue exhaustively on a one on one basis with the distributor. This experience illustrated to me and other members that ICA needs to be granted authorisation to collectively negotiate, and members need to be able to share information about distributor offers, so that ICA can help members such as myself and others assess and navigate the next major change proposed by a distributor and propose solutions more effectively and efficiently.

Similarly, ICA has dealt on a one on one basis with many smaller examples of inflexibility from a range of distributors during the many years I have been on the Board. We do not suggest there to be an overwhelming number of concerns or that every distributor generates concerns. However problems arise from time to time and it would be much more effective and efficient for ICA to address issues of common concern collectively with distributors who were willing to participate in such an approach. The consolidation of market power amongst distributors and pressures on the theatrical distribution of films makes this need more necessary and more urgent for independent exhibitors.

Scope of the authorised conduct

Opponents of the application insist that authorisation will add a layer of bureaucracy to negotiations and that collective negotiation is incompatible with the widely varying circumstances of various independent cinemas. I think that these concerns are misconceived and exaggerated.

I consider that the ability to negotiate collectively should be in respect of all aspects of the arrangements between distributors and exhibitors and that all members of ICA should be able to participate if they wish. If limitations are placed on scope or participation I expect there would be considerable potential for definitional debates ie whether or not collective negotiation of a particular issue is or is not authorised for particular ICA members.

I am confident that, based on my industry experience, collective negotiation could operate beneficially in a number of respects.

Standard terms and Conditions

Each distributor has, in my experience, a document which records its Standard Terms and Conditions governing the supply of films and the basis on which the film may be exhibited by a cinema. Aspects of these standard terms and conditions are onerous and intrusive (eg rights to inspect all records of the exhibitor, with or without notice).

There are some terms of many of these documents which seem to be unduly one-sided. I consider that collective negotiation could assist in redressing this: For example, many if not most of the standard terms and conditions have a limitation of the distributor's liability along the following lines:

"In so far as permitted by law, [Distributor] is not liable for any damages suffered by Exhibitor arising in any way out of (including but not limited to negligence by [Distributor] or its employees or agents or contractors) the supply, delay in supplying or failure to supply the [Materials/Film/Copy/etc] in respect of the Film or termination of any licence and/or these Trading Terms."

The complete exclusion of any liability for the distributor's negligence or failure to supply a film seems unfair to me.

Many members of ICA employ fewer than 20 people and I understand that the unfair terms laws apply to our contracts with distributors.

I and most individual members of ICA do not have the time or resources to pursue individual negotiations with each distributor in respect of clauses in their terms and conditions which we consider are unfair. Nor have I wanted to complain to the ACCC and encourage it to investigate these issues because of the harm this could do to my relationships with distributors.

I would prefer the position where ICA, with the benefit of authorisation, could negotiate with a distributor, on behalf of ICA members who wish to be represented, modifications to terms which ICA members consider to be unfair or unreasonably one-sided.

Such negotiations would not add a layer of bureaucracy to the general dealings between exhibitors and a distributor; they would be an efficient way of addressing a common issue. Such negotiations would also not be incompatible with the different commercial circumstance of some exhibitors.

Terms of Trade Policies and Guidelines

The Code requires, in Section 9.1, that each distributor must establish terms of trade which incorporate its policies and/or guidelines in relation to matters including:

- Film hire rates
- length of seasons including minimum seasons applicable to exhibitors with four screens or less
- session requirements; and
- bonds and guarantees

Section 9.2 requires each distributor to make its Terms of Trade Policies and Guidelines available to exhibitors. Section 9.3 requires the Code Conciliator to take into account a distributor's Terms of Trade Policies and Guidelines in conciliating disputes under the Code.

I recently requested distributors (including Disney, Fox, Paramount, Sony, Universal, Entertainment One, Becker, Madman, Studiocanal, Transmission, Sharmill and Umbrella) to send me their current Standard Terms and Conditions and their Terms of Trade Policies and Guidelines (as required under section 9.1 of the Code).

Only one distributor sent me their Terms of Trade Policies and Guidelines. I believe that the other distributors and, in fact, most distributors, do not have Policies or Guidelines concerning their Terms of Trade, despite the fact that they are central to the operation of the Code, including its dispute conciliation mechanism.

In my view many of the concerns of ICA members, eg dealing with a distributor's 'one size fits all' approach to minimum sessions, could be significantly mitigated if, with the benefit of collective negotiation with ICA, a distributor prepared, as required by the Code, its guidelines as to matters such as length of season and session requirements. Such guidelines could, for example, reflect the different capacities and requirements of cinemas with 1 or 2 screens compared with those with 5 or more screens. Such guidelines would not prevent a distributor and an exhibitor reaching agreement in relation to a particular film but would significantly reduce the need for a 2 screen cinema operator to repeatedly push back against session requirements which might only be appropriate for a larger cinema complex.

In other words, authorising collective negotiation by ICA could, if approached by a distributor with a constructive spirit, assist that distributor to comply with a key obligation under the Code. Collective negotiation with a distributor of these guidelines, tailored for example to reflect some of the differences between 1 and 4 screen cinemas and others would not add a layer of bureaucracy, would reduce repeated friction and would not preclude film or cinema specific offers. Authorised collective negotiation of an important element of the Code framework could assist in keeping the Code a voluntary code, rather than a mandatory code enforced by the ACCC.

Pricing methodology

Currently exhibitors tend to set their film 'rental' or 'licence' fee in one of two ways:

- an actual performance based sliding scale eg X% of exhibitor's box office if total box office for the film is \$10million or less; Y% if total box office is \$10million to \$20million; Z% if total box office is above \$20million.
- a deemed performance model eg Distributor considers that total box office for a film is likely to exceed \$20million and sets a fixed weekly fee as a % of the exhibitor's box office for that film.

Many ICA members prefer the actual performance model. The deemed performance model leads to considerable friction between a distributor and exhibitors when a film under-performs and exhibitors feel they have paid too much in film hire, as there is no ability to re-negotiate the fee.

Collective negotiation by ICA on behalf of members seeking to persuade the distributor to adopt a performance based methodology would, if successful, reduce the need for time consuming and fractious individual negotiations. Collective negotiation of the pricing methodology need not involve negotiation of the precise rates for particular cinemas or classes of cinemas if the distributor did not wish to negotiate them collectively.

Major commercial considerations

A fundamental consideration for exhibitors in relation to the terms offered by a distributor for a film is how long the theatrical window is for that film. The theatrical window is the period in which the film is lawfully available only in cinemas ie not online or otherwise.

Distributors, in my experience, are not always forthcoming with information concerning the duration of the theatrical windows for their films.

Improved transparency concerning theatrical windows and changes to them would assist exhibitors to consider the terms for a film on a properly informed basis.

If authorised, ICA could negotiate with a distributor the terms of that distributor's guideline or policy concerning its theatrical window – ie what it currently is and what notice would be given before altering it, and keep its Members informed of this information.

Industry Code and Dispute Resolution

In my time on the ICA Board and the FEDCAC Committee, ICA has had considerable experience supporting members resolve disputes with distributors and where appropriate encouraging them to address unresolved disputes through the Industry Code of Conduct processes. I support the resolution of disputes through the Industry Code however have observed that the processes are not as effective as they could be to address inequity and unfairness to independent exhibitors.

My observation is that presently, as has been the case during my tenure on FEDCAC, only gross breaches of the Code are likely to be the subject of complaints by independent exhibitors who must make individual complaints and must have the information, time and resources available to pursue that complaint.

I personally have refrained from using the Code complaint resolution process due to the time and resources involved, the slim chance a dispute could be addressed in the time available between booking and release date, and a concern that a complaint will single out my business in the eyes of the distributor, most of whom I am reliant on for regular supply of content. I am reluctant to negatively affect my sales relationship with my suppliers and am aware from speaking with ICA members over the years that most are reluctant to make a complaint on their own for the same reasons. In particular, many express an active fear of retribution should they be singled out as a complainant.

I consider the grant of ICA's application for authorisation of information sharing and collective negotiation (together with a similar amendment to the Code) will improve rather than detract from the capacity of the industry to resolve disputes using the Industry Code processes as there will be less fear of individual retribution and more capacity to share the resource burden of bringing a complaint.

I also consider that authorisation of information sharing and collective negotiation will discourage the complacency of some distributors who do not currently meet the minimum standards set by the Industry Code of Conduct since it will enable exhibitors to more efficiently and effectively make a collective complaint in calling out and addressing that behaviour.

ICA has always assisted individual exhibitors resolve disputes, and has always provided information about the Code processes to its members. Many disputes are resolved by the ICA CEO and the distributor's CEO without recourse to the Code Secretariat as ICA assists in disputes as part of the Code processes. That is how ICA forms a view of its members concerns and how many members are reluctant to take further steps under the Code to pursue dispute resolution. Members have also spoken with me directly about their unwillingness to raise issues under the Code.

I have observed that ICA has regularly given time at our industry conference for the FEDCAC Chair and Secretariat to address our membership and explain the benefits and obligations of the Code. I

do not believe that mere education of exhibitors will address the concern members have about lodging individual complaints. In particular I do not consider wider dissemination of Committee Minutes will have any impact or assistance since these mainly record administrative matters and contain no detail of any actual dispute or its resolution. In fact, due to confidentiality provisions, as a 10 year member of the FEDCAC Committee, I have never been made aware of any individual matter that has been brought to the Secretariat or the Conciliator beyond a very general outline of the issue.

I am willing however to discuss at FEDCAC, perhaps with the further assistance of the ACCC, the kind of education and changes to the Code that could be introduced to address independent exhibitors' reluctance to utilise the Code processes and their fear of retribution from distributors. I am also willing to discuss with FEDCAC and the ACCC measures to ensure that the grant of ICA's application for authorisation of information sharing and collective negotiation operates effectively to support more efficient resolution of disputes under the Code, as I believe this will be a major benefit to the industry from the authorisation.

Conclusion

In my experience the majority of distributors are not presently negotiating material issues with independent exhibitors. Distributors who oppose ICA's application appear to be describing authorisation as 'an increase in bureaucracy' rather than a mechanism to level the bargaining capacity of independent exhibitors. Authorisation will not force distributors to bargain collectively with ICA but it will ensure ICA members have more access to transparent information to assess the fairness of offers, make appropriate complaints under the Code, and negotiate efficiently with distributors who are willing to participate.

In my view authorisation will assist ICA to propose industry parameters within which more appropriate and equitable bilateral negotiations and Code dispute resolutions can take place.

Yours faithfully,



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