

SCOTT SEDDON SUBMISSION IN SUPPORT OF INDEPENDENT CINEMAS AUSTRALIA
APPLICATION FOR AUTHORISATION NUMBER A91587 – FEBRUARY 2018

I am making this submission from the perspective of my two roles. One is as President of Independent Cinemas Australia. The other is as an exhibitor operating a five screen hard top cinema complex and a single screen drive-in.

As President of Independent Cinemas Australia, I would like to make it clear from the beginning that in my mind the underlying motive for this application is and has always been to make it easier for distribution and exhibition to work together to achieve mutually successful outcomes. When I read through some of the distributor responses I am amazed and cannot fathom what distributors have to fear.

In case it isn't already clear I feel I need to state that ICA has no intention, nor desire, to add a whole layer of bureaucracy to the movie exhibition process.

ICA has no intention, nor desire, to book every session of every title on every screen of its members' locations.

ICA is not seeking and has never considered an exemption which would allow Collective Boycott.

ICA is not seeking and has never considered trying to bring any sector of film distribution "to its knees". Indeed, the inverse is true.

ICA is seeking on behalf of its members the ability to share information and to collectively negotiate because we consider that will benefit exhibitors, distributors and the cinema going public.

It is very difficult for independent fruit and veg shops to compete with Coles and Woolworths. We have a similar situation in exhibition and distribution, I believe. We have an operator, Event Cinemas, whose GBO (Gross Box Office) is greater than that of every member of ICA combined. That's not a criticism of Event by any means. I am just acknowledging the fact. So, if Fred, with a cinema in country Queensland talks to Paul with a cinema in country Victoria and Mike with a cinema in country New South Wales and they find out that Fred is paying 40% in week 3 of a movie when the other two are paying 35% it's my belief that the consumer isn't being detrimentally disadvantaged in that case. Fred at least has the opportunity to ask why he is paying more.

If there is some promotion activity that some members are performing that enhances the box office potential, then that could possibly be encouraged among other exhibitors. Indeed, information sharing in this case will make a significant contribution to achieving the Code's objective of fair and reasonable terms and to assist in ensuring that the bargaining imbalance does not result in unjustified discrimination.

There is one point about the structure of the cinema industry however that I believe is either unique or almost so. That is the extent of competition in the distributor – exhibitor realm.

If I run a sandwich shop I need things to sell. I need bread. I can no doubt get it from a number of bakers both large industrial ones or local hot bread shops. I need butter. I need strawberry jam. I need honey, I need avocado. I need flavoured milk. I need fruit juice. All things I can choose a supplier for, taking into account quality and price. If avocados are too expensive I can drop it from the menu.

The situation for a cinema is quite different. I own and operate a Drive In cinema in the Hunter Valley and a hard top 5 screen cinema at Raymond Terrace in New South Wales.

If I am to run a successful cinema I need to have the top films. For Example, in December 2017 the highest grossing film by a clear margin was 'Star Wars: The Last Jedi'. If I want to run a successful cinema with a steady income and supply of major movie titles which my consumers can rely on to be their local cinema, I have to have 'Star Wars'. I have to go to Disney. I can't go to Roadshow and negotiate a better deal on Star Wars. Disney has the exclusive rights to Star Wars. Similarly with 'Paddington 2' from StudioCanal, and 'Ferdinand' from Fox. These titles and distributors are named only as examples. If you are an arthouse cinema there is a similar set of constraints. Film distribution involves a series of temporary monopolies which mean that small cinemas are utterly dependant on product supplied by each of the distributors at one time or another so is not in practice a "free market". Authorisation by the ACCC would give independent cinemas some bargaining power.

CODE OF CONDUCT

The Code of Conduct for Film Distribution and Exhibition has its genesis in the mid 1990's and in my opinion, is absolutely successful in filling the needs of the FEDCAC committee, however it is of little relevance to smaller independent exhibitors. The issues I see include.

- 1 The divide and conquer nature of the process. Even if an issue affects a number of exhibitors each is required to separately raise their concern and not discuss the situation with each other, nor the course of proceedings nor the outcome. ICA members are in the position where they come to their industry body for assistance in difficulties they are having with their suppliers but are unsure whether this is legally permissible especially if they are approaching a member of the ICA executive who is very likely to have relevant advice and experience to assist as they are also a cinema owner/manager.
- 2 The daunting nature of the process and the fear of retribution. The process makes even the smallest exhibitor face the largest film studio alone. The time-consuming nature of the steps an exhibitor must take. By the time you jump through all the hoops, whilst being distracted in time and focus from your normal duties the movie has usually opened and any opportunity is lost.
- 3 Under Section 17.5.1 of the Code "an in-house employee of a party who is legally qualified may represent that party before the Conciliator; ". It is far more likely that a distributor, many of which are owned by large multinational corporations,

will have a legally qualified person than a small independent exhibitor with a single location. The provision under Section 17.5.2 of the code “a legally qualified support person who is not an employee of a party may attend the conciliation proceedings to consult with, and provide assistance to, that party provided that the person does not present or seek to present that party’s position before the Conciliator” is more likely to apply to a small independent exhibitor who is placed at a tactical disadvantage. In any case it is to be assumed that the head of a multinational backed distribution company would be more at home arguing the distributor’s case before a conciliator than many exhibitors arguing theirs. Further indication of the intimidation, especially smaller exhibitors, feels when considering lodging a dispute.

Looking at this application and the tiny concession we are requesting, to be able to collectively bargain in an environment where any party can opt out if they choose, the vehemence with which distribution is objecting and the casting call of high-level trade practice lawyers engaged by distributors is an indication of the daunting nature of any decision by an exhibitor to take a dispute to FEDCAC.

Section 8.3 states: “Prior to the booking deadline for a film, each distributor shall in a timely manner give written notification (which may be by facsimile transmission or email) to each exhibitor to whom it has offered, or intends to offer, a Film Copy of a film, of its intended terms of supply...” I note that at my very first COAA Conference (Rose Hill Racecourse circa 2001) the lack of compliance by distribution was raised and has still not been fully addressed more than a decade and a half later. It is no help to an exhibitor to state that ‘distributors don’t have that information’, or this is ‘the modern nature of the film industry’. The principle is simply that exhibitors are entitled to know what the film hire terms for a title are before committing to it, giving them the option of perhaps choosing another title or, in the case of a site with a low screen count, taking one title as sub-run over another title which they may take first release. Imagine test driving half a dozen cars and the dealers refusing to give you the price until after you had committed by signing an order. I must acknowledge that some distributors have released standard performance based terms which is a credit to them, but a significant number of others don’t. I would say at least 50% of the time, we do not learn of the terms until after the charts have closed, often not until the booking confirmation is issued and in some cases, we don’t learn the terms until the final invoice is received. This issue has been raised on numerous occasions over at least a decade and a half that I know of without substantial compliance and is an illustration of the toothlessness of the Code. It is to be hoped that if authorisation is granted and there is some information sharing on the subject, collective negotiation with non-complying distributors could improve the position. Among all else it is only fair to the distributors who are doing the right thing.

- 4 Section 9.2 states: “Each distributor must make its Terms of Trade Policies and Guidelines available on a confidential basis to exhibitors and the Conciliator”. The conciliator has reported to FEDCAC that now, almost two decades after the Code has commenced, there are some distributors who still haven’t complied with this requirement. It is to be hoped that if authorisation is granted ICA would be in a position to negotiate such guidelines and policies with distributors.

I feel that the Code of Conduct does not present a pathway that exhibitors such as I can confidently take if we believe we are being treated unfairly and the ability of ICA to be able to make representations to distribution on our behalf, especially on situations which affect a number of members similarly, would allow a faster and more efficient manner of problem solving and members like me would be less likely to just accept behaviour by distributors we feel is unreasonable and which negatively impacts our business and the service we provide to consumers.

For example, my business would be assisted by the negotiation of a more flexible approach to at least three issues which I know impact many independent exhibitors. On my own I have not been willing or have had the resources to tackle the subject with any distributor but with assistance from ICA I would be prepared to participate in a collective attempt to raise the issues for consideration.

1. The first is wider adoption of ‘performance deals’ by distributors.

A performance deal sets the price payable for any title based on the actual box office performance of the title not the sales-projected performance. This would introduce more certainty into an exhibitor understanding what a title will actually cost and ensure that exhibitors do not overpay for under-performing titles. It would enable exhibitors to program less mainstream titles with more confidence, thus offering an increase in diverse programming to the public. It will also increase the sustainability of more marginal cinema businesses enabling them to stay open and offer wider choice to the public.

A number of distributors have commenced this practice and I am broadly in support of such arrangements but make the following comments:

- a. There is a significant argument that these are a breach of Section 6.2 of the Code of Conduct as precluding individual negotiation of price terms. I acknowledge the risk that distributors who do not offer performance based terms may retrospectively embrace this comment. I still believe, however, that they are a positive contribution to transparency and simplifying the booking process and thus lead to improvements in efficiency and greatly reduce the frustration created by the practice of some distributors of not informing us of the terms until the charts for the title have well and truly closed.
- b. I note that in the cases of the distributors who do have performance based deals, these never-the-less have been imposed on independent exhibitors without reference to time limits or indexation linked to CPI, the inflation rate nor average

ticket price.

- c. I am puzzled by the opposition by distributors who have performance based terms to an information sharing policy in which any party may at any time opt out on any issue. If everybody gets the same email with the same terms, then the status quo is that the information is already shared so why spend many thousands of dollars on legal representation to oppose it?
- d. I note that there are some countries where such discussions do take place.

2. The second is 'bundling'.

Many Distributors' agreements say ticket sales cannot be bundled with any other products and if they are then film hire is calculated on the total price charged to the consumer.

The landscape was set many years ago in the Mt Vic Flicks Case: Mount Vic Flicks ran a supper and movie deal. From memory consumers paid \$15.00 for movie and supper. The cinema proportioned \$7.50 for the movie and \$7.50 for the supper. The Distributor Roadshow insisted that film hire be paid on the entire cost paid by the consumer i.e. 40% of \$15.00 instead of 40% of \$7.50.

I believe all terms of trade documents of all distributors cover this but most have a "without prior approval" clause. About 5 years ago I attempted to have the conversation with the head of a major distributor in his office. Before I had finished my first sentence he had left his chair and was standing up leaning across his desk towards me yelling "There will be no bundling".

In my President's address at the 2016 conference I called for a review of the practice as it was becoming popular in the USA and other territories to acknowledge that movie tickets and food and drink purchases were being bundled. It's good for business.

In such case, if directed by the Board, ICA would circulate members regarding a proposed negotiation of more flexible terms for bundling and informing them we wish to hold a conversation with a distributor about the issue and asking any members who wanted to be specifically excluded to formally opt out.

Inform distributors that we (listing the participating member exhibitors) are wanting to formulate a set of guidelines along proposed lines to allow independent cinemas to also offer bundled Dinner and Movie products.

Appoint a representative to conduct the negotiation with the distributor alongside the ICA CEO.

Advise members of the terms or guidelines that have been agreed with the distributor OR advise members that the distributor has not agreed to a collective negotiation. I am offering this as an example of an issue where negotiations could conceivably take place which couldn't at the moment.

3 The third issue is one which causes me issues as the operator of Heddon Greta Drive-in. We are a single screen drive-in located in the Hunter Valley. We have all the programming constraints of a single screen venue with the additional constraint caused by the sun coming up every morning. Drive-ins can only operate in darkness. This means that we run two sessions on the nights we are open during daylight savings months and three sessions during the nights that daylight savings is not in operation. I must state that generally, distributors show flexibility and understanding, with the exception of one.

We charge admission by the car (up to 8 people). This decision came from discussions with distributors before we re-opened the venue in the mid 1990's based on the ease of auditing procedures by distributors. A product of this policy is that we have a regular following of low income families, especially those with 5 or 6 children for whom a trip to the multiplex as a family would be exorbitant. The distributor in question refuses to supply us with product unless we:

- (a) Do not screen movies released by any other distributor on days when we screen their movies or;
- (b) Change our pricing structure on nights when we screen their movies in a manner which results in an increase to the price charged to the consumer.

The only explanation I can get is that the company does not allow their titles to be screened as part of "movie marathons". I have asked on numerous occasions for their definition of "movie marathons" and every couple of years I attempt to negotiate the impasse but get a "talk to the hand" response.

Forgetting for a moment that we are a drive-in, I can look at any number of single screen hardtop cinemas' websites and nearly all of them are regularly screening titles from different distributors on the same days, including the distributor in question.

It would seem that a logical approach for me would be to make a complaint of a breach of the Code to the FEDCAC Secretariat. The issue is, however, that Sections 5.1 and 5.2 of the Film Industry Code of Conduct actually endorse this behaviour.

So as for our families, such as Mrs JW of Ashtonfiled who works 2-3 days per week, has 5 children between 5 and 15 years old whose husband died of colon cancer in October after a long illness and many others, they are effectively precluded from seeing movie titles released by this distributor which is owned by a multi-billion dollar international corporation at a price they can afford due to a practice which appears to be effectively condoned by the Industry Code.

I have tried to persuade the distributor that they are misconstruing my business model without success. If I were able to discuss this issue with other independent exhibitors and found them to be similarly affected by this issue I would be willing to collectively raise the

issue with the distributor and/or collectively refer the issue for dispute resolution under the Code. As it is however, after fifteen years of frustration, I do not feel equipped to pursue this issue any further.

ICA is not seeking and has never considered trying to bring any sector of film distribution “to its knees”. We acknowledge the interdependence of exhibition and distribution and believe the granting of authorisation will facilitate opportunities for distributors to work in harmony with ICA on behalf of its members to strengthen the independent sector of the industry.

Indeed, in the case of independent distributors the inverse is true. During 2015 discussions were held between ICA and the Australian Independent Distributors Association which led to several face-to-face meetings of ICA and AIDA members focussed on nurturing the potential of independent films in independent cinemas. It is a fact that many independent films perform best in independent cinemas. Many independent titles have zero prospect of even being considered by the major exhibition chains and so the logical place to nurture and grow these titles is within independent cinemas. Before the first meeting could commence, however, we had a 15-minute briefing from a trade practices lawyer telling us what we could and could not talk about.

This is one area where authorisation could allow exhibitors and distributors to openly discuss placement of single titles or even groups of titles perhaps in a festival type format. This would enhance the fortunes of these titles and their distributors, give them a bigger profile in independent cinemas, offer a greater choice of titles to consumers who frequent independent cinemas be they in metropolitan or in regional areas. I might add that the subject area of many of these independent titles is such that it is unlikely that there would be any measurable impact on sales of the next major blockbuster and the income would be incremental to the industry, and to independent distributors and exhibitors thus enhancing their viability and the immediate short term and long-term choices for consumers. Such group negotiations could assist in reducing the burden on cinema owners in assembling product sequences for non-major films.

Why these things will deliver cost efficiencies for exhibitors.

It is very hard and time consuming to negotiate with distributors every week. On terms there is no negotiation. It is simply ‘do you want to book the film’. So the bargaining imbalance may be able to be redressed by a collective negotiation and information sharing for example.

Some people are charged more than others simply because they can – perhaps the amount of time on their hands, or their capacity to ask questions, to what extent they feel intimidated.

If they know that one member exhibitor can check this information with an ICA representative, it should

- influence distributor behaviour so their offers are justifiable on merit and are less exploitative
- provide information to approach FEDCAC

I feel the granting of an exemption to allow information sharing is necessary for achieving the Code's objective of fair and equitable terms and to assist in mitigating some of the consequences of the bargaining imbalance.

Recently I received a policy for a title which I felt was quite outrageous. I contacted my retained consultant and discussed the issues involved with this title and was convinced that the policy was steep but not significantly unreasonable. The title has since released in overseas markets and I am now comfortable with the policy requirements but the ability to have a brief exchange with an ICA representative would save that time and expense and in fact guarantee that title a booking which it could possibly have missed out on otherwise.

I feel the allowance of collective bargaining will allow an opportunity for us to have one conversation on an issue of common concern instead of a dozen smaller ones with potentially different outcomes for different members and thus save a lot of time and distraction allowing us to operate our cinemas more efficiently. The allowance of information sharing will not mean that all members will automatically be granted or have the expectation of being granted the same policy for the same title – but it may mean that differences in these offers are well justified by distributors and better understood by participating independent exhibitor members.

Although I expected some opposition to the application, I did not expect the vehement reactions we have seen from some distributors. I think we must look at our further direction should our application not be granted, or be watered down to a point where it doesn't work. As our application is so minimalist, it is difficult to see how to limit its scope without negating the intended benefits while there is very little in the various opposing distributor submissions that suggests any room for compromise.

Firstly, I think we need to acknowledge the pointlessness of the Voluntary Code of Conduct in its current form. If authorisation to negotiate collectively and share information is not granted, I personally believe the very minimum independent exhibitors would need to achieve fair and equitable dealings without fear of retribution is a mandatory code with prescribed minimum penalties.

Secondly, if you had asked me a year ago if there was widespread price gouging of independent cinemas by distribution I would have said not. The sheer amount of executive energy and expenditure on the most expensive trade practices legal brains in the land to fight the concept of information sharing leads me to question that opinion. Why else would distribution expend so much fighting the proposal if there was not a significant level of income that they see as at risk? The Australian Box Office in the 2017 calendar year was in excess of \$1.2 billion. If we consider that between 40% and 50% of this is collected by distribution in film hire, and that the majority of that revenue is exported directly, I feel there could be a clear case for a Productivity Commission Enquiry into cinema exhibition and distribution in Australia, or alternatively a review by a relevant committee of the

Federal Parliament, to investigate the impact of current practices in parts of the distribution sector on the long term benefit of independent exhibitors and consumers.

This is not an outcome I ever imagined or intended when supporting ICA's application for authorisation and would not welcome as an ideal outcome or focus for our industry which must work so closely together. What we are asking is so small. The opportunity for exhibitors and distributors to bargain collectively and share information in an environment where any party can opt out at will. I sincerely hope that the opposing distributors belatedly recognise the constructive spirit in which this application was intended otherwise the vehemence of the opposition by some distributors is such that I am forced to wonder if there is a detrimental practice or practices of which they must fear discovery.

Scott Seddon

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