



Determination

Application for authorisation

lodged by

Independent Cinemas Australia

in respect of

information sharing and collective bargaining

Date: 16 March 2018

Authorisation number: A91587

Commissioners: Rickard
Schaper
Court
Featherston

Summary

The ACCC grants authorisation to Independent Cinemas Australia (ICA) and its current and future Australian members, on a voluntary opt out basis, for five years to make and give effect to contracts, arrangements or understandings pursuant to which they may participate in:

- collective negotiation on behalf of ICA member exhibitors of film licensing agreements
- collective negotiation on behalf of ICA member exhibitors of film licensing agreements applying to specific categories of members such as, but not limited to, regional cinemas or cinemas with four or less screens
- collective negotiation on behalf of ICA member exhibitors of film licensing agreements applying to specific titles from time to time if requested by a member or group of members
- information sharing concerning film licensing agreements or proposed film licensing agreements.

The ACCC has carefully considered the numerous submissions from both the applicants and interested parties before and after the ACCC's draft determination, and at the pre-decision conference held on 8 November 2017.

Taking all that information into account, the ACCC considers that the conduct is likely to result in public benefits in the form of transaction cost savings and improved input into negotiations.

The ACCC also considers that the conduct is likely to result in limited public detriment.

In reaching this view, the ACCC notes that participation in collective bargaining is voluntary for exhibitors and distributors. ICA and its members are not authorised to engage in collective boycott conduct.

The ACCC also notes that authorisation provides statutory protection to ICA and its current and future members from legal action for conduct that might otherwise breach the relevant provisions of the *Competition and Consumer Act 2010*. It does not protect parties from legal action should they breach their confidentiality obligations in any agreements with distributors. This means that ICA and its members (small, large, and vertically integrated or not) will need to ensure that any authorised information sharing does not breach confidentiality obligations in their respective agreements with distributors or they may face legal action for that disclosure.

Overall, the ACCC considers that the likely public benefit would outweigh the likely public detriment from any reduction in competition between ICA members arising from the authorised conduct.

The ACCC notes that the conduct represents a potentially significant change from current arrangements, in an industry subject to changing technology and customer preferences. If ICA seek reauthorisation in 2023, the ACCC will test whether the expected benefits outweigh any detriments. Accordingly, the ACCC grants authorisation for the conduct for five years rather than the 10 years sought by the applicants.

Authorisation is granted until 7 April 2023.

Contents

Summary	i
Contents	ii
The application for authorisation	1
The proposed conduct	1
The applicants	2
The counterparties	2
Background	3
Overview of the Australian feature film industry	3
Film distribution and exhibition	3
Changes in the film distribution industry	4
The <i>Code of Conduct for Film Distribution and Exhibition</i>	4
Submissions received by the ACCC	5
ACCC evaluation	6
The relevant area of competition	7
The future with and without	7
Clarification of the scope of conduct	8
Authorised conduct and the Code of Conduct	10
ACCC's approach to considering the likely benefits and detriments from the proposed conduct	14
Public benefit	14
Public detriments	21
Balance of public benefit and public detriment	28
Length of authorisation	28
Determination	29
The application	29
The net public benefit test	30
Conduct authorised by the ACCC	30
Date authorisation comes into effect	31
Appendix A	32
Summary of stakeholder submissions	32
Submissions before the draft determination	32
Independent Cinemas Australia	32
Interested parties	32
Independent Cinemas Australia submissions in response to interested party submissions ...	36
Submissions after the draft determination	37

The application for authorisation

1. On 13 June 2017, Independent Cinemas Australia Inc. (ICA) lodged application A91587 with the ACCC, under subsection 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the Act),¹ seeking authorisation for 10 years to engage in information sharing among ICA members and to engage in collective bargaining with film distributors.
2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Act.² In this instance, ICA sought authorisation of the proposed conduct as it may involve the making or giving effect to arrangements that contain a cartel provision and/or a provision that may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
3. Authorisation does not protect parties from breaches of other laws or contractual obligations including any confidentiality obligations in agreements with other parties.

The proposed conduct

4. ICA sought authorisation, on behalf of itself and its current and future Australian members on a voluntary opt out basis,³ to make and give effect to contracts, arrangements and understandings pursuant to which the applicants may participate in:⁴
 - collective negotiation on behalf of ICA member exhibitors of the terms and conditions of film licensing agreements, and/or
 - collective negotiation on behalf of ICA member exhibitors of booking terms and terms and policy for film licensing agreements applying to specific categories of members such as, but not limited to, regional cinemas or cinemas with four or less screens, and/or
 - collective negotiation on behalf of ICA member exhibitors of booking terms and policy for film licensing agreements applying to specific titles from time to time if requested by a member or group of members, and/or
 - information exchange concerning the terms or proposed terms of film licensing agreements.
5. ICA did not seek authorisation to engage in collective boycott conduct.

¹ On 6 November 2017, a number of amendments to the Act came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the Act. Pursuant to section 182(3), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the Act as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the Act as amended.

² Detailed information about the authorisation process is contained in the ACCC's *Guidelines for Authorisation of conduct (non-merger)* available: <https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger>

³ ICA members will be able to opt out of collective bargaining conduct, either generally or for a specific collective bargaining negotiation, by providing written notice to ICA.

⁴ Independent Cinemas Australia Inc., *Form B, Application for Authorisation*, 8 June 2017, p. 2, available: [ACCC public register](#)

6. The meaning of 'terms and conditions of film licensing arrangements' in this context is clarified and discussed in sections 50 - 66 below.
7. The proposed conduct includes information sharing where ICA members and ICA can discuss the contractual arrangements and proposed changes to those arrangements as the need arises. Where necessary, ICA and its members will seek to collectively bargain with distributors to achieve, in their view, a fair and equitable outcome.

The applicants

8. ICA is a not for profit industry association representing film exhibitors that operate independent film cinemas in Australia and New Zealand.
9. ICA members include exhibitors ranging from those operating several cinema complexes in metropolitan areas to single complex urban and regional cinemas.⁵ At the time of lodgement, ICA had 84 cinema exhibitor members in Australia. ICA members include exhibitors operating several cinema complexes at different locations such as Palace Cinemas and Dendy Cinemas, and single complex urban and regional cinemas.
10. ICA members accounted for approximately 29 per cent of the 2016 Australian box office revenue.⁶
11. Major film exhibitors such as Event Hospitality and Entertainment (including Event Cinemas, Greater Union Cinemas and Birch, Carol and Coyle Cinemas), Hoyts Cinemas and Village Cinemas are not ICA members and accounted for approximately 66 per cent of the 2016 box office.⁷

The counterparties

12. In addition to seeking authorisation to share information among members about the terms and conditions of film licensing arrangements, ICA sought authorisation to engage in voluntary collectively bargaining on film licensing arrangements with all Australian film distributors. Authorisation does not create any legal obligation for distributors to participate in collective bargaining if they do not wish to do so.
13. Major Australian film distributors include Paramount Pictures, Sony Pictures Releasing, Twentieth Century Fox Films, Universal Pictures International Australasia, the Walt Disney Company (Australia) and Warner Bros/Roadshow.
14. In addition, ICA identified 14 independent film distributors including Entertainment One Films Australia, Madman Entertainment, Studiocanal and Transmission Films as potential counterparties.

⁵ Independent Cinemas Australia Inc., website, viewed 18 August 2017, available: <http://www.independentcinemas.com.au/>

⁶ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 10, available: [ACCC public register](#). Since lodging the application for authorisation ICA's membership has decreased slightly, therefore its percentage of future box office revenue is likely to be lower as a result.

⁷ The estimated market share is based on figures provided by ICA in its application.

15. ICA clarified that it intends to seek to engage in the proposed conduct with any distributor that offers a film for theatrical license in Australia including smaller distributors not named in ICA's application for authorisation.⁸

Background

Overview of the Australian feature film industry

16. In the 2017 calendar year, the Australian feature film gross box office revenue was \$1.20 billion, compared to \$1.25 billion in 2016.⁹
17. Feature films distributed by the six major distributors accounted for 85 per cent of the total box office revenue for both the 2016 and 2017 calendar years. Together, the remaining independent distributors accounted for 15 per cent of the total box office revenue during these two periods.¹⁰
18. In 2017, there were 513 cinema complexes in Australia, compared to 498 cinema complexes in 2016.¹¹
19. In the 10 year period from 2008 to 2017:¹²
 - the total number of screens in Australia (including digital screens) increased from 1980 to 2210 screens (an increase of 12 per cent)
 - the number of cinema seats fell from 462 000 to 445 000 (a decrease of 4 per cent).

Film distribution and exhibition

20. The Australian film industry relies on a systematic model for the distribution and release of feature films. Most films are released for theatrical viewing for an exclusive window of 120 days. At the end of this period, films are released for home entertainment, via DVD, Blu-Ray or increasingly for online streaming directly into consumers' homes.¹³
21. For theatrical film release, distributors develop a distribution strategy for each film. The decision to offer to supply a particular film to an exhibitor depends on various criteria including the location of the exhibitor, the cinema's infrastructure and the expected return based on the exhibitor's previous returns. Other standard terms and conditions such as film hire rates, length of screening season, session

⁸ Independent Cinemas Australia Inc., Email to the ACCC, 12 September 2017.

⁹ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 10, available: [ACCC public register](https://www.accc.gov.au/public-register) and Screen Australia, *Distributor box office share, 2003-2017*, viewed 26 August 2017 and 8 March 2018, available: <https://www.screenaustralia.gov.au/fact-finders/cinema/industry-trends/box-office/distributor-market-share>

¹⁰ Screen Australia, *Distributor box office share, 2003-2017*, viewed 26 August 2017 and 8 March 2018, available: <https://www.screenaustralia.gov.au/fact-finders/cinema/industry-trends/box-office/distributor-market-share>

¹¹ Screen Australia, *Cinema industry trends, screens and theatres, Total screens, seating capacity and theatres in Australia, 1980-2017*, viewed 26 August 2017 and 8 March 2018 available: <https://www.screenaustralia.gov.au/fact-finders/cinema/industry-trends/screens-and-theatres>

¹² Screen Australia, *Cinema industry trends, screens and theatres, Total screens, seating capacity and theatres in Australia, 1980-2017*, viewed 26 August 2017 and 8 March 2018 available: <https://www.screenaustralia.gov.au/fact-finders/cinema/industry-trends/screens-and-theatres>

¹³ Screen Australia, *Issues in feature film distribution*, July 2015, p.7 and p. 13, available: https://www.screenaustralia.gov.au/getmedia/1216e7e0-59a1-4e16-906a-8809b8b7be0c/IssuesInFeatureFilmDistribution_2015-07-30.pdf

requirements and guarantees are intended to be fairly negotiated between the distributor and exhibitor.¹⁴

Changes in the film distribution industry

22. Significant changes have occurred in the nature of feature film distribution. Until recently, distributors released 35mm prints or copies of films to exhibitors. Once the exhibitor's season for the film was over, the film reels would be returned to the distributor and then sent to another exhibitor.
23. Digital technology has changed the way films are supplied and screened. Most cinemas now use digital technology to screen films that arrive on a digital hard drive. However some cinemas still have the equipment to screen films supplied on film reels.
24. According to Screen Australia, digital film distribution is not only changing the way films are screened it is also altering how consumers view films. Transactional video on demand has added several new pathways for consumers to watch films that did not exist 10 years ago.¹⁵

The Code of Conduct for Film Distribution and Exhibition

25. The voluntary *Code of Conduct for Film Distribution and Exhibition* (the Code of Conduct)¹⁶ was developed in 1998 following a report on the cinema distribution and exhibition industry commissioned by the ACCC.¹⁷
26. As at November 2015 there were 255 signatories to the Code of Conduct.¹⁸
27. The objectives of the Code of Conduct include to:
 - provide a framework for fair and equitable dealing between all distributors and exhibitors
 - provide a timely, non-legalistic, cost-effective and commercially orientated means of avoiding and settling disputes
 - reduce the likelihood of litigation between parties to the Code.
28. The Code of Conduct includes guidelines for various aspects of film distribution and exhibition including:
 - That each distributor and each exhibitor will engage on a fair and equitable basis and in the manner set out in the Code.

¹⁴ These arrangements are set out in the *Code of Conduct for Film Distribution and Exhibition* available online: <http://www.filmcode.info/>

¹⁵ Screen Australia, *Issues in feature film distribution*, July 2015, available: https://www.screenaustralia.gov.au/getmedia/1216e7e0-59a1-4e16-906a-8809b8b7be0c/IssuesInFeatureFilmDistribution_2015-07-30.pdf

¹⁶ The *Code of Conduct for Film Distribution and Exhibition* is also called the 'Film Code' and is available online: <http://www.filmcode.info/>

¹⁷ Jones, R., 1998, *Developments in the Cinema distribution and exhibition industry*, 31 March 1998, available: <https://www.accc.gov.au/publications/developments-in-the-cinema-distribution-exhibition-industry>

¹⁸ Film Exhibition and Distribution Code Administrative Committee, *List of signatories*, November 2015, available: <http://www.filmcode.info/>

- Principles for flexibility of trading terms.
 - The development of terms of trade policies and guidelines.
 - Arrangements for information exchange between distributors and exhibitors.
29. The Code of Conduct states that each distributor decides if and when an exhibitor will be offered supply of a film. It acknowledges that a distributor can develop its own distribution strategy in relation to a film.¹⁹
 30. The Code of Conduct also states that exhibitors acknowledge that the development of a film distribution strategy is '*...dependent upon the skill, experience, expert intuition and business judgment of the individuals responsible for such decisions within each distributor*'.²⁰
 31. The Code of Conduct is administered by the Film Exhibition and Distribution Code Administration Committee (FEDCAC). FEDCAC includes representatives from major exhibitors, the Motion Picture Distributors Association of Australia,²¹ independent exhibitors²² and independent distributors. Where disputes between parties cannot be resolved under the informal dispute resolution procedures of the Code of Conduct, FEDCAC appoints an independent conciliator to resolve the dispute.
 32. The Code of Conduct's Conciliator's Annual Report for 2016/2017 notes that four new enquiries were received by the Code Secretariat in the period from 1 July 2016 to 30 June 2017, one fewer than the previous year. A total of 223 dispute enquiries have been received since 1998.²³

Submissions received by the ACCC

33. The ACCC tests the claims made by an applicant in support of an application for authorisation through an open and transparent public consultation process.
34. The ACCC sought submissions from a range of interested parties potentially affected by the application, including film distributors, exhibitors, FEDCAC and film industry associations.
35. Submissions supporting authorisation were received from:
 - Independent Cinemas Australia (ICA)
 - Australian National Theatre Live (ANTLive)
 - Icon Film Distribution
 - Majestic Cinemas
 - Scotty's Cinema Centre and Drive-in (Scotty's Cinemas Centre)²⁴
 - The Picture Show Man Cinema.

¹⁹ Film Exhibition and Distribution Code Administration Committee, *Code of Conduct for Film Distribution and Exhibition*, 2013 version, Section 5.1, p. 4, available: <http://www.filmcode.info/>

²⁰ *ibid.*, Section 5.2, p. 4.

²¹ The six major distributors are members of the Motion Picture Distributors Association of Australia.

²² Independent exhibitors are represented by the ICA and Majestic Cinemas in NSW.

²³ Film Exhibition and Distribution Code Administration Committee, Conciliator's Reports, CR 2016-2017, Available: <http://filmcode.info/reports.html>

²⁴ The submission was on behalf of Scotty's Cinemas. The owner is the President of ICA.

36. Submissions opposing authorisation were received from:
- Australian Independent Distributors Association (AIDA)
 - Digital Cinema Network
 - Entertainment One Films Australia (Entertainment One)
 - Paramount Pictures Australia (Paramount Pictures)
 - Sharmill Films/Cinema Nova
 - Sony Pictures Releasing
 - Studiocanal
 - The Walt Disney Company (Australia) (Disney)
 - Transmission Films
 - Twentieth Century Fox Film Distributors (Twentieth Century Fox)
 - Universal Pictures International (Universal).
37. The ACCC has considered all submissions. A short summary of each public submission is set out at **Attachment A** and all public ICA and interested party submissions are available on the [ACCC public register](#).
38. Further discussion on specific issues outlined in public submissions is in the 'ACCC evaluation' section.

ACCC evaluation

39. On 6 November 2017, a number of amendments to the Act came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the Act. Pursuant to section 183(2) of the Act, these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the Act as amended will apply to these applications, notwithstanding that they were lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the Act as amended.
40. Pursuant to subsections 90(7) and 90(8) of the Act,²⁵ the ACCC must not make a determination granting authorisation in relation to conduct unless it is satisfied in all the circumstances that the conduct would result or be likely to result in a benefit to the public and that benefit would outweigh the detriment to the public that would result or be likely to result from the conduct.
41. The ACCC is often asked to authorise collective bargaining arrangements. Collective bargaining refers to an arrangement under which two or more competitors come together to negotiate terms and conditions, which can include price, with a supplier or a customer. Information sharing can facilitate effective collective bargaining.
42. Under the Act, except in certain limited circumstances, businesses are required to act independently of their competitors when making decisions about pricing and

²⁵ As the conduct may involve a cartel provision, the alternative test under sub-section 90(7)(a) does not apply.

other terms and conditions of business, so information sharing and collective bargaining conduct may breach the Act.

43. However information sharing and bargaining collectively, rather than on an individual basis, can generate public benefits by improving the efficiency of the bargaining process and negotiated arrangements. These benefits are achieved by lowering the transaction costs associated with putting supply arrangements in place, increasing input into contracts, and reducing information asymmetries. Other benefits are also possible.

The relevant area of competition

44. The ACCC considers that the relevant area of competition for assessing ICA's application for authorisation is the supply of films for exhibition in cinemas. This is the area of activity where ICA intends to focus its proposed collective bargaining and information sharing. The ACCC notes that exhibitors use those films (along with physical characteristics of the cinema, such as cinema infrastructure) to supply cinema exhibition services to consumers, and therefore this is also likely to be a relevant area of competition.
45. The ACCC notes that these areas of competition are likely to have both local and national dimensions. Exhibitors, particularly small independents in regional locations, are likely to see their market as being local. National exhibitors may see their market as both local and national.
46. Distributors' behaviour suggests that they see markets from both a national and local level. Films are generally released on a national level on the same day across the country. However, distributors also develop a distribution strategy for each film which is likely to include a consideration of the characteristics of a particular local geographic market.

The future with and without

47. To assist in its assessment of the conduct against the authorisation tests, the ACCC compares the likely future with the conduct that is the subject of the authorisation, to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs, against the future in which the conduct does not occur.
48. The ACCC considers that without the proposed conduct, the existing model for the distribution and release of feature films will continue. That is, distributors will develop a distribution strategy for each film and engage individually with exhibitors. ICA will continue to negotiate with distributors on behalf of individual members from time to time, to the extent permitted under the terms of any contractual agreements between distributors and exhibitors. As they do now, ICA and its members would also need to assess whether the sharing of any information about film terms and collective bargaining are likely to raise competition concerns under the Act.

49. The ACCC notes that with or without the proposed conduct, the Code of Conduct will continue to operate. An assessment of the possible impact of the proposed conduct on the Code is discussed in sections 67 - 85 below.

Clarification of the scope of conduct

50. Several interested parties submitted that the scope of the conduct in the application was unclear and vague. In response to these concerns, ICA provided an additional submission to clarify the conduct.

Independent Cinemas Australia

51. ICA submits that the supply of a film by a distributor to an exhibitor for exhibition in a cinema is subject to all the terms and conditions of the distributor's film licence agreement.²⁶
52. Film licence agreements typically comprise written and oral provisions. The written provisions for each distributor are made up of a range of different component documents, which are described in various ways, but which generally comprise two parts:²⁷
- standard terms and conditions or terms of trade including:
 - supply and return of materials
 - general licence terms for exhibition
 - accounting and payments
 - security and storage
 - box office information and records checking
 - warranties, indemnities and termination provisions
 - the specific terms and conditions or booking confirmation applying to an individual film title (title-specific terms and conditions) including:
 - terms - in the film exhibition industry, the word 'terms' (on its own) is often used colloquially to denote the price or rental required to be paid by the exhibitor to license a film from the distributor
 - policy - used to denote the obligations of the exhibitor with respect to season and sessions for a particular film
 - supply date
 - minimum guarantee and marketing provisions.
53. If authorised, ICA and its members intend to share information about the terms and conditions or proposed terms and conditions of film licensing arrangements.²⁸

²⁶ Independent Cinemas Australia submission, dated 1 December 2017, (published 4 December 2017), p. 2, available: [ACCC public register](#)

²⁷ Independent Cinemas Australia Inc. submission, dated 1 December 2017, (published 4 December 2017), pp. 2-3, available: [ACCC public register](#)

²⁸ Independent Cinemas Australia Inc. submission, dated 1 December 2017, (published 4 December 2017), p. 5, available: [ACCC public register](#)

54. ICA submits that it may, if authorised, seek to collectively negotiate any of the terms and conditions from time to time, if requested to do so by ICA's members (especially if these have been unilaterally changed by a distributor).²⁹

ICA clarification

55. On 1 December 2017, in response to a request from the ACCC, ICA submitted, '*Initially 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.*'³⁰
56. On 13 February 2018, ICA clarified its response in section 2.2.2 of its 4 December 2017 submission, '*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.*'³¹

Interested party responses

57. The President of ICA (also the owner of Scotty's Cinemas) submits that the underlying motive for seeking authorisation is to make it easier for distributors and exhibitors to '*...work together to achieve mutually successful outcomes.*' ICA has no intention or desire to book every session of every title on every screen of its members' cinemas.³²
58. Paramount Pictures submits that it is now clear that ICA intends to share all information with all its members.³³
59. Sony Pictures Releasing submits that ICA has confirmed the scope of its application, however uncertainty remains:³⁴
- The Code of Conduct sets out what information distributors must provide to exhibitors and that it is provided on a confidential basis.
 - In Sony's view, ICA's submission reaffirms there is uncertainty by suggesting that, *initially* it anticipates engaging in negotiations where ICA members have concerns.
60. Twentieth Century Fox submits that the scope of information sharing and negotiation is broad and will introduce delay and cost inefficiency to film licensing and has the potential to cause detriment to the industry.³⁵
61. Universal Pictures submits that if the ACCC grants authorisation, the ACCC should be very clear that a distributor's information should not be shared unless and until the distributor consents in writing. It should also make clear that any

²⁹ Independent Cinemas Australia Inc. submission, dated 1 December 2017 (published 4 December 2017), p.8, available: [ACCC public register](#)

³⁰ Independent Cinemas Australia Inc. submission, section 2.2.2, dated 1 December 2017 (published 4 December 2017), available: [ACCC public register](#)

³¹ Independent Cinemas Australia Inc. submission, 13 February 2018, p. 1, available: [ACCC public register](#)

³² Scotty's Cinemas submission, 7 February 2018, p.1, Available: [ACCC public register](#)

³³ Paramount Pictures submission 22 December 2017, available: [ACCC public register](#)

³⁴ Sony Pictures Releasing submission, 20 December 2017, available: [ACCC public register](#)

³⁵ Twentieth Century Fox submission, 19 December 2017, available: [ACCC public register](#)

distributor can opt out of collective bargaining at any stage of the negotiation process.³⁶

62. Disney expresses concerns at the breadth and scope of the conduct and restates that the ACCC should not grant authorisation.³⁷

ACCC view

63. The ACCC accepts that the scope of the conduct is necessary to enable ICA and its members to share (non-confidential) information to identify issues of concern, gauge the extent of any impact and then seek to collectively bargain with distributors where appropriate.
64. The ACCC notes ICA's submission that:
- it does not intend to routinely engage in information sharing
 - the extent of any information sharing will depend on the issues that arise; and that
 - therefore, ICA and its members need to be authorised to share any information in order to be able to identify and discuss issues of concern.
65. The ACCC emphasises that authorisation does not protect ICA and its members from breaches of other laws or contractual obligations including confidentiality obligations in agreements with other parties. ICA and its members will need to ensure they are not breaching confidentiality terms that are part of the terms and conditions of film licensing agreements that they have agreed to under any film supply contract.
66. ICA will attempt to engage in collective bargaining on issues identified through information sharing. The ACCC notes that no party, including ICA, its members and distributors, is under any obligation to engage in collective bargaining. Any party can choose not to engage in collective bargaining if it is not in their interests to do so.

Authorised conduct and the Code of Conduct

67. ICA submits that the Code of Conduct sets out that film exhibitors and distributors should engage in fair negotiation of terms of supply for films; however the opportunity to negotiate terms may be limited. The volume of content and the market conditions means films are often supplied on a 'take it or leave it' basis.³⁸
68. ICA submits that its members are sometimes unwilling to take action against a distributor under the dispute resolution sections of the Code for fear they will damage the relationship and it will affect future film supply.³⁹ Further, information asymmetry impedes achieving the Code of Conduct's objective of providing a fair

³⁶ Universal Pictures submission, 19 December 2017, available: [ACCC public register](#)

³⁷ Disney submission, 21 December 2017, p. 5, available: [ACCC public register](#)

³⁸ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 2, available: [ACCC public register](#)

³⁹ *ibid.*, pp 1-3.

and equitable framework for both distributors and exhibitors. Information sharing may remedy this, with or without collective bargaining.⁴⁰

69. ICA submits that the Code of Conduct is an important and useful tool and that if the proposed conduct is authorised, ICA and its members will continue to abide by the spirit and terms of the Code.⁴¹
70. Scotty's Cinemas submits the Code of Conduct is successful for some industry participants, however independent exhibitors are daunted facing the dispute processes with distributors alone, and they fear retribution. The Code allows an in-house employee of a party, who is legally qualified, to represent the party in conciliation. It is more likely that distributors, rather than independent exhibitors will have these resources in-house. Further, many issues need to be resolved quickly immediately prior to the release of a film and there is insufficient time to address the matters using the Code processes.⁴²
71. Entertainment One, Sony Pictures Releasing, Studiocanal, Disney, Transmission Films, Twentieth Century Fox and Universal Pictures submit that the Code of Conduct is an efficient and effective framework for ensuring mutually beneficial commercial dealings and they would be concerned if authorisation impacted on the efficacy of the Code.^{43 44 45 46 47 48 49}
72. At the conference, many distributors spoke of the efficacy of the Code of Conduct. In particular they expressed the following views:⁵⁰
- the Code of Conduct continues to work well and provides a robust process for negotiation between distributors and exhibitors
 - exhibitors are comfortable referring issues to the Code of Conduct administrative committee and the administrative Committee meets several times each year
 - there is no cost to either party if an issue is informally referred to the Code of Conduct administrative committee and costs associated with formal referrals are split 50/50 between the parties
 - Twentieth Century Fox is open to working with ICA to improve the Code of Conduct and to understand any concerns exhibitors have about taking complaints to the Code of Conduct administrative committee.

⁴⁰ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p. 4, available: [ACCC public register](#)

⁴¹ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p. 4, available: [ACCC public register](#)

⁴² Scotty's Cinemas submission, 7 February 2018, Available: [ACCC public register](#)

⁴³ Entertainment One Films Australia, *Submission on the application for authorisation*, 3 August 2017, p. 4, available: [ACCC public register](#)

⁴⁴ Sony Pictures Releasing, *Submission on the application for authorisation*, 21 July 2017, available: [ACCC public register](#)

⁴⁵ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, available: [ACCC public register](#)

⁴⁶ The Walt Disney Company Australia, *Submission on the application for authorisation*, published on 3 August 2017, available: [ACCC public register](#)

⁴⁷ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available: [ACCC public register](#)

⁴⁸ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, available: [ACCC public register](#)

⁴⁹ Universal Pictures International Australasia, *Submission on the application for authorisation*, published on 27 July 2017, available: [ACCC public register](#)

⁵⁰ Australian Competition and Consumer Commission, 8 November 2017, *Conference record*, available: [ACCC public register](#)

73. AIDA submits that the ACCC should read the minutes from FEDCAC to gain a better understanding of what issues are raised with the Code of Conduct administrative committee.⁵¹
74. Digital Cinema Network submits that some exhibitors do not take issues to FEDCAC because they are concerned there will be ramifications if they do. More effort could be put into educating exhibitors about the benefits of taking issues to the Code of Conduct administrative committee.⁵²
75. Sony Pictures Releasing submits the Code of Conduct is relevant to the assessment of the application for authorisation for two reasons:⁵³
- Balancing benefit and detriment – given the Code is specifically directed at reducing and resolving disputes between distributors and exhibitors, it is unclear whether authorisation will provide additional public benefits. Any increase would be marginal.
 - Impact on the Code - the Code was specifically designed to facilitate a level playing field by addressing the information that is to be shared bilaterally between distributors and exhibitors, without the risk of inappropriate disclosure of confidential information that a collective approach to those matters would necessarily involve. In particular, the Code provides a referee in the form of the Code conciliator to facilitate confidential conciliation in those cases where individual exhibitors and distributors have been unable to resolve disputes informally. An authorisation would inevitably lead to information sharing and collective negotiations which would undermine confidence in, and therefore the effectiveness of, the Code. That would not be in the public interest.
76. FEDCAC submits that the Code of Conduct has operated effectively over the last 19 years and in that time significant and enduring trust has been developed between distributors and exhibitors. There has not been a significant number of disputes raised via the Film Code. The FEDCAC Chair hopes to upgrade and simplify the Code of Conduct. There is a need to educate members and their staff on obligations under the Code.⁵⁴
77. Universal Pictures submits that the Code of Conduct strikes an appropriate balance between the interests of both distributors and exhibitors. Authorisation will damage this balance.⁵⁵
78. Disney submits that it is happy to assist in the education of ICA members about the Code and its processes and to understand exhibitors' concerns about the Code. Distributors engage with the Code in good faith and the Code continues to offer an efficient, cheap dispute resolution process. A weakening of the Code and its use as an effective framework for industry negotiations is a very real possibility. Such an outcome would be a genuine detriment.⁵⁶

⁵¹ Australian Competition and Consumer Commission, 8 November 2017, *Conference record*, available: [ACCC public register](#)

⁵² Australian Competition and Consumer Commission, 8 November 2017, *Conference record*, available: [ACCC public register](#)

⁵³ Sony Pictures Releasing submission, 20 December 2017, available: [ACCC public register](#)

⁵⁴ FEDCAC submission, 19 December 2017, available: [ACCC public register](#)

⁵⁵ Universal Pictures submission 19 December 2017, available: [ACCC public register](#)

⁵⁶ Disney submission, 19 December, available: [ACCC public register](#)

ACCC view

79. The ACCC notes the concerns of some interested parties about the possible impact of authorisation on the Code of Conduct. The proposed conduct is not intended to replace the Code of Conduct. Currently the Code of Conduct does not provide for collective bargaining and information sharing. Authorisation provides statutory protection from legal action under the Act for the proposed conduct.
80. The proposed conduct will enable exhibitors to gain a better understanding of the individual film terms and conditions being offered to other exhibitors (including changes to film terms and conditions) to assist them understand if the terms and conditions being offered to them are fair and reasonable and then attempt to collectively bargain those terms and conditions. This will enable exhibitors to make more informed decisions about whether to pursue a complaint under the Code.
81. Some issues need to be resolved quickly, before the commencement of film screening or during the screening season. Authorisation is likely to provide an opportunity for issues to be identified quickly and, to the extent that parties agree to participate in collective bargaining, be resolved quickly. This process for dealing with issues en masse is likely to be quicker and more efficient than individual exhibitors using the Code of Conduct's dispute resolution processes.
82. Authorisation is likely to trigger amendments to the voluntary Code of Conduct, for example, currently the Code does not provide for information sharing or collective bargaining. The ACCC notes that the FEDCAC Chair considers it may be time to upgrade and simplify the Code and increase efforts to educate Code signatories on their obligations. Several distributors also support improving education on aspects of Code operation.
83. The ACCC has reviewed several of the publicly available Code Conciliator's Annual Reports and the confidential minutes from FEDCAC meetings of the last two years. The ACCC agrees with FEDCAC that there has not been a significant number of disputes raised via the Code of Conduct. There were four new enquiries in the 2016/17 financial year. However this is not necessarily an indication that parties do not have concerns that require resolution.
84. The ACCC accepts that some exhibitors, particularly small exhibitors, may be concerned that taking a complaint to the Code secretariat will damage their relationship with the other party and will therefore be reluctant to do so. Information sharing, to understand if other exhibitors have similar concerns and the ability to work together to resolve disputes, is consistent with the objectives of the Code of Conduct.
85. The ACCC considers the earlier that concerns can be identified and resolved, the less likely those concerns will need to be resolved under the Code of Conduct's processes. Accordingly the ACCC does not consider the conduct sought to be authorised is likely to have a detrimental effect on the operation of the Code of Conduct.

ACCC's approach to considering the likely benefits and detriments from the proposed conduct

86. In assessing the application for authorisation, in order to determine whether the claimed public benefits and detriments are likely to result, it is open to the ACCC to consider the likely outcome of the proposed conduct. However, in this instance, rather than attempting to predict the likely outcomes from the collective negotiations, the ACCC has assessed whether the claimed public benefits are likely to arise assuming that ICA and its members are successful in information sharing and/or collective bargaining with distributors, and weighed these against the likely public detriment.
87. The ACCC's assessment of the likely benefits and detriments arising from the conduct follows.

Public benefit

88. Public benefit is not defined in the Act. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:⁵⁷

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.

Transaction cost savings

ICA submissions

89. ICA submits that the proposed conduct is likely to result in lower costs, such as costs to engage accountants and lawyers, for its members and the more efficient use of members' time and resources.⁵⁸ The benefits arising from transaction cost savings are likely to be reinvested in the business, delivering consumers a better experience at their local cinema.⁵⁹
90. Further, ICA submits that in the event of a dispute with ICA members, distributors' dispute resolution costs are likely to fall because they will be able to collectively, rather than individually negotiate disputes with ICA members. This is likely to be more significant for relatively under resourced independent distributors.⁶⁰
91. ICA submits that its members currently engage advisors such as lawyers, accountants, film bookers and the ICA CEO to act for them when bargaining (individually) with distributors. Lawyers are sometimes engaged when disputes are being negotiated. ICA members incurred significant legal costs when

⁵⁷ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

⁵⁸ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 5, available: [ACCC public register](#)

⁵⁹ Independent Cinemas Australia Inc., *Supplementary response to public submissions made by interested parties*, 31 August 2017, available: [ACCC public register](#)

⁶⁰ *Ibid.*, p. 2.

*“...attempting to negotiate a major change in custom and practice from a major studio in 2016.”*⁶¹

92. ICA submits that if distributors choose to collectively bargain, distributors will only need to negotiate once rather than several times with each exhibitor individually and this will result in transaction cost savings. Negotiating films directly with distributors is time consuming and resource intensive for exhibitors. Collective bargaining will free exhibitors’ time to focus on other aspects of their business.⁶²
93. ICA submits that the conduct may be of particular benefit to distributors releasing Australian films, many of which have low marketing and distribution budgets. Collective bargaining with ICA members may reduce the transaction costs for these distributors.⁶³

Interested party submissions

94. Icon Film Distribution⁶⁴ submits that helping independent exhibitors improve business practices between themselves and distributors creates time and cost efficiencies.⁶⁵
95. The Picture Show Man Cinema, a two screen cinema in coastal NSW, submits negotiation on film licensing agreements with distributors is conducted in consultation with lawyers, accountants and other advisors as required. Collective negotiation of even some aspects of some film bookings would deliver considerable efficiencies and increase time to devote to improving the cinema service for the patrons.⁶⁶
96. Majestic Cinemas operates cinemas at seven locations in New South Wales and South East Queensland and books films for another twin screen cinema in regional New South Wales. Majestic Cinemas submits that negotiating for eight cinema sites creates time efficiencies for both the cinemas and distributors compared to negotiating for one or two sites.⁶⁷
97. Majestic Cinemas also submits that many independent cinemas are seasonal businesses, with high fixed running costs and complex programming demands undertaken with very limited access to adequate information. Authorisation will provide an opportunity to generate public benefits for independent exhibitors, their patrons and the wider community. It will deliver cost savings and efficiencies to exhibitors of the kind outlined in the submission by The Picture Show Man Cinema.⁶⁸
98. Scotty’s Cinemas submits collective bargaining will provide an opportunity for independent exhibitors to have one conversation on an issue of concern instead

⁶¹ Independent Cinemas Australia Inc. submission, dated 1 December 2017, (published 4 December 2017), available: [ACCC public register](#)

⁶² Independent Cinemas Australia Inc. submission, dated 1 December 2017, (published 4 December 2017), available: [ACCC public register](#)

⁶³ Independent Cinemas Australia Inc. submission, dated 1 December 2017, (published 4 December 2017), available: [ACCC public register](#)

⁶⁴ Icon Film Distribution is part of the Dendy Icon Group, comprising Icon Film Distribution, Dendy Cinemas and Dendy Direct (a video on demand service). Dendy Cinemas are members of ICA and a party to the application for authorisation.

⁶⁵ Icon Film Distribution, *Submission on application for authorisation*, 10 July 2017, available: [ACCC public register](#)

⁶⁶ The Picture Show Man Cinema submission, 28 November 2017, available: [ACCC public register](#)

⁶⁷ Majestic Cinemas submission, 2 February 2018, available: [ACCC public register](#)

⁶⁸ Majestic Cinemas submission, 2 February 2018, available: [ACCC public register](#)

of many individual conversations (at times involving separate consultants or advisors) with potentially different outcomes.⁶⁹

99. Studiocanal submits that there are few, if any, public benefits arising from the proposed conduct, and reducing individual exhibitor costs is not a public benefit and would not be passed on to consumers.⁷⁰
100. Twentieth Century Fox submits that the proposed conduct will not benefit consumers and there is no evidence that, absent authorisation, prices will rise. Further, ICA does not indicate that prices will fall if the proposed conduct is authorised.⁷¹
101. Entertainment One, Sony Pictures Releasing and Transmission Films submit it is not feasible to negotiate with an industry or trade body such as ICA and doing so will add an additional layer of bureaucracy to the negotiation process and therefore create inefficiency.^{72 73 74}
102. Disney submits that exhibitors are not homogeneous and there are a number of issues that a single cinema or group of cinemas will need to agree one-on-one with a distributor. Further, Disney is increasingly formulating bespoke marketing and promotional activities and content with individual exhibitors. This relies on individual negotiation and agreement with exhibitors. Collective bargaining would jeopardise this bespoke support.⁷⁵
103. During the conference, several attendees submitted that the public benefits of authorisation will not be realised, exhibitors are not a homogenous group and therefore many issues need individual negotiation, and there is no evidence that benefits will be passed on to consumers by exhibitors.⁷⁶
104. Twentieth Century Fox resubmitted that authorisation will add an additional layer of bureaucracy in the negotiation process and therefore may increase costs.⁷⁷
105. Paramount Pictures submits that authorisation will complicate the process of film negotiation and add to negotiation time and costs for distributors.⁷⁸
106. Scotty's Cinemas submits (as President of ICA) that ICA has no intention, or desire to add a whole layer of bureaucracy to the movie exhibition process. The underlying motive for the application for authorisation is and always has been to make it easier for distribution and exhibitors to work together to achieve mutually successful outcomes.⁷⁹

⁶⁹ Scotty's Cinemas submission, 7 February 2018, p. 1, available: [ACCC public register](#)

⁷⁰ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, pp. 5-8, available: [ACCC public register](#)

⁷¹ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, available: [ACCC public register](#)

⁷² Entertainment One Films Australia, *Submission on the application for authorisation*, 3 August 2017, available: [ACCC public register](#)

⁷³ Sony Pictures Releasing, *Submission on the application for authorisation*, 21 July 2017, available: [ACCC public register](#)

⁷⁴ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available: [ACCC public register](#)

⁷⁵ Disney submission 3 August 2017, p.6, available: [ACCC public register](#)

⁷⁶ Australian Competition and Consumer Commission, 8 November 2017, *Conference record*, available: [ACCC public register](#)

⁷⁷ Twentieth Century Fox Film Distribution submissions, 19 December 2017, available: [ACCC public register](#)

⁷⁸ Paramount Pictures submission 22 December 2017, p. 2, available: [ACCC public register](#)

⁷⁹ Scotty's Cinemas submission, 7 February 2018, p. 1, available: [ACCC public register](#)

ACCC view

107. The ACCC accepts that each ICA member individually negotiating with distributors will incur transaction costs, such as the time taken to negotiate and legal or other expert advice costs. Distributors will also incur transaction costs in negotiating with multiple individual exhibitors.
108. Major exhibitors negotiate film supply with distributors on behalf of several individual cinema complexes at different locations. These exhibitors enjoy the benefits of negotiating on behalf of several cinemas. Many independent exhibitors currently are unable to enjoy these advantages. The proposed conduct is likely to redress this imbalance.
109. Some distributors raise concerns that collective bargaining would be inefficient as it would introduce another layer of bureaucracy in the negotiation process. However, no distributor is under any obligation to participate in collective bargaining. Further, ICA is not proposing to routinely negotiate all aspects of film licensing agreements. ICA intends to collectively negotiate with distributors on behalf of exhibitors, including from time to time, subsets of exhibitors, on certain common issues such as:
- material changes in terms and conditions for a particular film
 - issues that affect a particular subset of exhibitors in a similar way; for example, small regional exhibitors may seek to negotiate aspects of film licensing agreements that affect them in ways that larger multiplexes are not affected, such as film season length and the number and time of sessions.
110. The ACCC accepts that some independent exhibitors operate cinemas with similar business models and therefore are likely to face similar issues and would benefit from collectively bargaining on those issues.
111. Without the proposed conduct, exhibitors concerned about or seeking variations to their agreements would need to individually negotiate with a distributor. Resource constrained exhibitors with relatively minor concerns may choose not to pursue them individually because of the time and cost of doing so. In these circumstances, the ACCC considers that the proposed conduct is likely to result in transaction cost savings for exhibitors by allowing for the sharing of adviser costs and removing duplication of processes undertaken by individual ICA members.
112. The ACCC notes ICA's submission and those of ICA's exhibitor members, that cost savings resulting from the conduct will likely be reinvested in the business and deliver consumers a better experience at their local cinema. Any cost reductions and improved terms from collective bargaining may help the viability of small cinemas, and allow them to reinvest into their cinemas, creating a better experience for consumers.
113. The ACCC notes distributor submissions that the proposed conduct will not result in the claimed transaction cost savings and it will not reduce film prices to consumers. The ACCC considers it likely that authorisation will lead to efficiency gains, which is a public benefit. These gains may then be reinvested into the business to the benefit of consumers.
114. The ACCC considers that the proposed conduct is also likely to result in some transaction cost savings for distributors since they will not always need to engage with exhibitors individually, for example where ICA negotiates on behalf of a group of exhibitors.

115. By reducing the costs of negotiating for all parties, it is likely that more contractual issues can be addressed, because each party can obtain the benefit from negotiating these issues at less cost to itself, resulting in more comprehensive and efficient negotiation leading to better contracts and a more suitable outcome for the cinema and its customers.

Improved input into negotiations

116. ICA submits:

- Information sharing is likely to reduce information asymmetry. ICA members are not always provided information about matters that affect their business, such as changes to the 120 day exclusive theatrical window, digital delivery and marketing practices.⁸⁰
- ICA members currently feel they have insufficient bargaining power to oppose proposed amendments to film licence conditions. Collective bargaining is likely to improve this situation.⁸¹
- ICA provided an example of a change in pricing methodology, which created hardship for some exhibitors and resulted in an increase in ticket prices at some cinemas. Information sharing and then collectively bargaining on the proposed changes is likely to result in the timely resolution of these types of issues.⁸²
- Exhibitors are not a homogeneous group. Some exhibitors have the capacity to bring different offers to a negotiation. Information sharing will mean that a distributor will be more likely to justify the terms it offers as being fair and equitable, which are requirements under the Code of Conduct but cannot be monitored now.
- Greater transparency and more effective negotiations will assist ICA exhibitors to continue to offer and to increase the range of films offered to meet the diverse needs of the people in their local communities.⁸³

117. ICA submits that it is likely that some issues will be negotiated on behalf of similarly situated exhibitors, for example those operating cinemas with four or less screens or those operating in remote locations. For example, terms and conditions regarding the delivery and return of materials have a greater impact on exhibitors operating in remote locations.⁸⁴

118. Submissions from The Picture Show Man Cinema, Majestic Cinemas and Scotty's Cinemas support ICA's submissions. They submit that smaller exhibitors lack the scale of larger businesses and the business owner must be involved in most if not all aspects of running the business; collective bargaining on at least some elements of film licensing agreements will provide these businesses with the opportunity to spend more time on other aspects of their business.

⁸⁰ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p.1, available: [ACCC public register](#)

⁸¹ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 6, available: [ACCC public register](#)

⁸² Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p. 4, available: [ACCC public register](#) and Independent Cinemas Australia Inc., *Supplementary response to public submissions made by interested parties*, 31 August 2017, p.1, available: [ACCC public register](#)

⁸³ Independent Cinemas Australia Inc., *Supplementary response to public submissions made by interested parties*, 31 August 2017, p.2, available: [ACCC public register](#)

⁸⁴ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p.4, available: [ACCC public register](#)

119. Icon Film Distribution submits that the proposed conduct will simplify terms and negotiations with the independent exhibitor sector and increase the speed and efficiency of dispute resolution between distributors and exhibitors.⁸⁵

ACCC view

120. The majority of ICA's members are small businesses. The ACCC accepts that, when negotiating with large counterparties, small businesses can be at a disadvantage in terms of resources and experience of negotiating.
121. One way in which small businesses can seek to redress such disadvantage is to bargain collectively. In this case, information sharing is also likely to identify issues of concern to several ICA members and collective bargaining may allow for more effective negotiation between ICA members and distributors. For example, where an exhibitor notices a departure from the usual terms for film season, sessions and rental fee, it can alert ICA who can contact other members to determine if they are also affected. ICA can then attempt to collectively bargain with the distributor on behalf of relevant members.
122. Further, resource constrained exhibitors with relatively minor concerns may choose not to pursue them individually because of the time and cost of doing so. However, these concerns could be raised with distributors as part of a collective bargaining group.
123. The ACCC considers that information sharing is also likely to enable ICA members to become better informed of relevant market conditions and developments. Reducing this information asymmetry is likely to improve the input that ICA members have in negotiations with distributors to identify and achieve more efficient outcomes and therefore to negotiate improved terms and conditions for individual films.
124. Information sharing can play an important role in improving the effectiveness of collective bargaining. Information sharing is implicit in many collective bargaining groups. Bargaining groups share information and then set about negotiating better outcomes than they can achieve on their own.
125. It is likely that some exhibitors are offered better terms and conditions by distributors. It may be because of the size and location of the cinema, the quality of its facilities or the way the cinema is managed. It is possible that some distributors offer different terms and conditions for reasons other than these efficient cost-based reasons. The proposed conduct is likely to identify differences in terms and conditions. This is likely to contribute to more informed negotiation for both distributors and exhibitors.
126. The proposed conduct provides distributors with the opportunity to collectively negotiate with specific groups of exhibitors. For example, where specific groups of exhibitors, such as regional or smaller exhibitors, have common needs or requests regarding the terms of supply for a particular film (or changes to those terms during the screening season), it may be more efficient for both the exhibitors and the distributor to collectively negotiate a resolution.
127. Collective bargaining and/or information sharing may provide the opportunity for ICA members to have better input into contracts.

⁸⁵ Icon Film Distribution, *Submission on application for authorisation*, 10 July 2017, available: [ACCC public register](#)

Maintaining and improving film diversity

128. ICA submits that the proposed conduct will support a more healthy and sustainable independent cinema sector resulting in benefits for consumers including continued access to a cinema and greater choice of films.⁸⁶
129. The Picture Show Man Cinema submits:⁸⁷
- Information sharing and then collective bargaining could help identify gaps in schedules or identify new scheduling practices, providing distributors with more access to screens, resulting in greater film diversity for regional audiences.
 - Due to the prevailing requirements of film licence agreements, it is a challenge to meet the content needs of the local community with only two screens.
 - Information sharing and collective bargaining could assist distributors gain access to screens more efficiently and therefore result in more diverse content for regional audiences.
 - Negotiation is required because often distributors offer to supply films on terms that are appropriate for a large multiplex exhibitor but inappropriate for a regional two-screen cinema, for example distributors require films to be screened for longer than local demand requires.
130. Australian National Theatre Live submits:⁸⁸
- There is one large and competitive market in metropolitan areas and a smaller market serving rural and regional centres, however terms and policy arrangements seem to be the same for both markets. This has the effect of squeezing out opportunities for smaller distributors trying to sell films to independent exhibitors and limiting film diversity in some regions.
 - In rural and regional Australia, building a sense of community is important. Establishing a cinema as a hub for local entertainment, not just for mainstream films, but for 'events', such as theatre screenings, opera, ballet, or televised rock concerts from around the world, is important not just for the exhibitor, but for the community as a whole.
131. Majestic Cinemas submits that authorisation should, in time, increase film diversity for customers.⁸⁹
132. Scotty's Cinemas submits that authorisation may lead to the film rental price being based on the actual box office performance of the title rather than the sales-projected performance. This may improve exhibitors' understanding of the actual costs and enable exhibitors to program less mainstream titles, offering an increase in diverse programming to the public.⁹⁰
133. Studiocanal submits that the scope of the proposed conduct is extensive and if engaged in to the fullest extent would have a significant and detrimental impact on competition in the cinematic distribution of films in Australia and the diversity of

⁸⁶ Independent Cinemas Australia submissions 31 August 2017 and 1 December 2017, (published 4 December 2017), available: [ACCC public register](#)

⁸⁷ The Picture Show Man Cinema submission, 28 November 2017, available: [ACCC public register](#)

⁸⁸ Australian National Theatre Live submission, 15 December 2017, available: [ACCC public register](#)

⁸⁹ Majestic Cinemas submission 2 February 2018, available: [ACCC public register](#)

⁹⁰ Scotty's Cinemas submission, 7 February 2018, available: [ACCC public register](#)

films available to Australian cinema audiences.⁹¹ Independent film distributors are typically the strongest supporters of locally made films, often releasing significantly more local films than major studio competitors. Any diminution of the independent film distribution sector may result in a decrease in the number of Australian films being made and released.⁹²

134. AIDA submits that if independent distributors already minimal bargaining power is compromised, the number of independent, Australian, foreign, documentary, arthouse or 'diverse' films distributed in Australia will fall.

ACCC view

135. The ACCC considers that it is possible that information sharing followed by collective bargaining on behalf of independent exhibitors on film licensing agreements, including elements such as the length of film season and the number and timing of sessions, will free up rural and regional exhibitors' screens and provide them with the opportunity to screen a greater variety of films. If achieved, this outcome would increase film diversity at those cinemas increasing choices for consumers.
136. The ACCC is of the view that increasing film diversity is likely to provide public benefits to rural and regional communities, which are unlikely to have ready access to a wide range of entertainment. These communities may have insufficient demand to attract live theatre, live ballet and a range of live music. Providing access to these types of live events, by filming them live and then screening them in rural and regional cinemas improves community access and increases entertainment choice for consumers.
137. The ACCC notes that if collective bargaining is successful and it leads to increased film diversity, it is also likely to benefit independent distributors, who submit that independent exhibitors are more likely to screen lower budget arthouse style films.
138. While the ACCC considers greater film diversity is possible with the proposed conduct, it does not have sufficient information to consider it likely for the purposes of its assessment.

Public detriments

139. Public detriment is not defined in the Act but the Australian Competition Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁹³

140. The ACCC considers that in some cases collective bargaining could lessen competition because it involves competitors agreeing on terms. Information sharing can also lessen competition.

⁹¹ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, p. 2, available: [ACCC public register](#)

⁹² *Ibid*, pp. 7-8.

⁹³ See *7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

141. ICA submits that the proposed conduct is unlikely to result in public detriment.⁹⁴
142. Several interested parties are concerned that the proposed conduct is likely to result in public detriment. These concerns are discussed below.

Potential for reduced competition between independent cinemas

143. AIDA submits that the proposed conduct will have a negative effect on competition because ICA members, who are competitors, will be able to share information about the terms and conditions of the supply of films. AIDA is concerned that its members will need to negotiate the same terms of supply with independent exhibitors regardless of the individual characteristics of an exhibitor, which influence individual negotiations now.⁹⁵
144. AIDA, Disney, Studiocanal and Universal Pictures submit that ICA members are competitors for films and sharing information about film offers is likely to be anticompetitive.^{96 97 98 99}
145. Studiocanal submits that the conduct is anticompetitive and market forces should be allowed to operate freely.¹⁰⁰
146. Paramount Pictures and Disney submit that ICA members may share information about what various distributors are offering exhibitors, then opt out of collective bargaining and continue to use the information during individual negotiations.^{101 102}
147. Twentieth Century Fox submits that individual ICA members may use the information gathered from other ICA members in individual negotiations with distributors. ICA may use information to lobby its members to not accept an offer and advise exhibitors that another exhibitor has rejected an offer. Information sharing may lead to explicit or tacit collusion.¹⁰³
148. Universal Pictures submits that information sharing without appropriate restrictions or safeguards is likely to lead to sharing commercially sensitive information where ICA members may be competitors for films and consumers. Although parties can include confidentiality provisions in contracts, Universal Pictures submits that courts will err on the side of granting injunctions to prevent confidentiality breaches rather than granting awards of damages because of difficulties in meeting the legal standard for showing damage. Any distributor that

⁹⁴ Independent Cinemas Australia Inc., *Supporting submission*, 13 June 2017, p. 6, available: [ACCC public register](#)

⁹⁵ Australian Independent Distributors Association, *Submission on the application for authorisation*, 28 July 2017, available: [ACCC public register](#)

⁹⁶ *ibid.*

⁹⁷ The Walt Disney Company Australia, *Submission on the application for authorisation*, published on 3 August 2017, available: [ACCC public register](#)

⁹⁸ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, pp. 5-8, available: [ACCC public register](#)

⁹⁹ Universal Pictures International Australasia, *Submission on the application for authorisation*, 27 July 2017, p.1, available: [ACCC public register](#)

¹⁰⁰ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, pp. 5-8, available: [ACCC public register](#)

¹⁰¹ The Walt Disney Company Australia, *Submission on the application for authorisation*, published on 3 August 2017, available: [ACCC public register](#)

¹⁰² Paramount Pictures Australia, *Submission on the application for authorisation*, 28 July 2017, p. 2, available: [ACCC public register](#)

¹⁰³ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, available: [ACCC public register](#)

suffers real economic damage from information sharing has no effective remedy.¹⁰⁴

149. Entertainment One submits that authorisation will result in a large market participant with a virtual monopoly of independent exhibitors resulting in a reduction in competition.¹⁰⁵
150. During the conference, several distributors restated concerns that authorisation may lead to anticompetitive conduct.¹⁰⁶
151. Post conference submissions made by Paramount Pictures, Sony Pictures Releasing, Twentieth Century Fox and Disney restating concerns about the potential for anticompetitive impact arising from information sharing. These concerns are summarised and are set out in the section '*Clarification of the scope of conduct*' above.
152. Sony Pictures Releasing submits that much of ICA's application and the ACCC's draft determination are directed at small, regional exhibitors. However, ICA's largest members may also participate in information sharing and collective negotiations if the authorisation sought is granted. Accordingly, detriments and asserted benefits should be weighted in respect of all ICA members, including large, vertically integrated exhibitor/distributors. To assess benefits and detriments as they may apply to small exhibitors alone would misapply the test for authorisation.¹⁰⁷

ACCC view

153. Many of the interested party concerns relate to information sharing and the subsequent use of that information by ICA members.
154. The ACCC reiterates that authorisation provides statutory protection from legal action for conduct that might otherwise breach certain provisions of the Act. In this case, the sharing of certain information between cinemas who are each other's competitors risks breaching the cartel provisions and section 45 of the Act. Authorisation does not protect parties from breaches of other laws or contractual obligations, including confidentiality obligations in agreements with other parties.
155. The ACCC considers that this limits any anticompetitive detriment arising from the information sharing that is being authorised. This also means that ICA and its members (small or large, vertically integrated or not) will need to ensure that any authorised information sharing does not breach their respective confidentiality obligations in agreements with distributors or they may face legal action for those disclosures.
156. The ACCC notes the concerns of Universal Pictures regarding remedies for breach of confidentiality. Businesses in most, if not all industries need to manage their response to breaches of confidentiality by contracting parties and do not rely solely on the threat of possible action of a breach of the Act to do so. It is not clear

¹⁰⁴ Universal Pictures International Australasia, *Submission on the application for authorisation*, 27 July 2017, p.1, available: [ACCC public register](#)

¹⁰⁵ Entertainment One Films Australia, *Submission on the application for authorisation*, 3 August 2017, available: [ACCC public register](#)

¹⁰⁶ Australian Competition and Consumer Commission, 8 November 2017, *Conference record*, available: [ACCC public register](#)

¹⁰⁷ Sony Pictures Releasing, *Submission on the application for authorisation*, 20 December 2017, available: [ACCC public register](#)

taking legal action under the Act offers distributors a more effective means of preventing or gaining redress for a breach of confidentiality in an agreement than taking proceedings under contract law.

157. Distributors' participation in collective bargaining is voluntary. This reduces the risk of detriment from collective bargaining since distributors will participate only where it is in their interest.
158. Distributors will retain the ability to develop a distribution strategy for each film, taking into account the individual characteristics of each exhibitor.
159. The ACCC also notes that in 2016, ICA's 84 members collectively accounted for approximately 29 per cent of the 2016 national box office compared to the three major exhibitors with 66 per cent.¹⁰⁸ The actions of ICA members will be constrained by competition from the major exhibitors.
160. Accordingly, the ACCC considers that the proposed conduct is likely to result in limited public detriment through any impact on competition arising from information sharing and use of that information.

Possible boycott activity

161. Disney, Paramount Pictures, Studiocanal and Twentieth Century Fox submit that the proposed conduct may encourage or facilitate boycott activity by exhibitors.¹⁰⁹
110 111 112
162. Transmission Films submits that if collective boycotts occur they are more likely to occur on a small release that may be perceived not to be critical to the profitability of exhibitors.
163. ICA submits that:¹¹³

Speculation that ICA and its members will use the authorisation to engage in unlawful conduct is entirely misplaced. If ICA and its members intended to engage in collective boycotts, they would have sought authorisation for such arrangements and conduct.
164. At the conference, AIDA submitted that if its members decide to opt out of collective bargaining, ICA members may decline an offer to show a film or AIDA members may decide to accept an unfavourable deal to have their film shown.¹¹⁴
165. Twentieth Century Fox submits that there is a real risk that authorisation will lead to collective boycott. One possible outcome is that an exhibitor may only be willing to accept terms on a bilateral basis that match exactly the terms offered during collective bargaining. This outcome undermines the notion of collective bargaining

¹⁰⁸ Since ICA applied for authorisation, at least one large exhibitor is no longer listed as a member on ICA's website. This will reduce the market share of ICA members from the 29 per cent quoted here.

¹⁰⁹ The Walt Disney Company Australia, *Submission on the application for authorisation*, published on 3 August 2017, available: [ACCC public register](#)

¹¹⁰ Paramount Pictures Australia, *Submission on the application for authorisation*, 28 July 2017, p. 2, available: [ACCC public register](#)

¹¹¹ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, pp. 5-8, available: [ACCC public register](#)

¹¹² Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, available: [ACCC public register](#)

¹¹³ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, available: [ACCC public register](#)

¹¹⁴ Australian Competition and Consumer Commission, *Conference Record*, 8 November 2017, available: [ACCC public register](#)

being voluntary. It will be difficult to identify a series of individual boycotts from a collective boycott.¹¹⁵

166. Universal Pictures submits that authorisation will give rise to fractious situations and also to conduct that will, for all practical intents and purposes, constitute boycotts of distributors. This would result in a significant undermining of the Code and the balance that it strikes in the industry in resolving disputes.¹¹⁶

ACCC view

167. The ACCC has granted authorisation to many different groups of businesses seeking to collectively bargain with other businesses. While it is open to those groups to seek authorisation to engage in a collective boycott as part of those arrangements, in most instances parties have not sought, nor have they been granted, authorisation to do so.
168. ICA did not apply for, and the ACCC does not grant, authorisation to engage in collective boycott conduct.
169. Based on its response to interested party submissions, ICA appears to be well aware of the risks to it and its members if they seek to engage in unauthorised collective boycott conduct.¹¹⁷
170. It is also clear that distributors are keenly aware that any such boycott would be engaged in without authorisation. If distributors were to become aware that cinemas were engaged in collective boycott activity (or a series of individual decisions not to screen a film is coordinated) in breach of the Act, cinemas should be aware that distributors can take legal action and/or alert the ACCC.
171. Accordingly, the ACCC considers that the conduct is unlikely to result in public detriment through ICA members engaging in an unauthorised collective boycott of films.

Possible negative impact on small distributors

172. AIDA submits that the proposed conduct will significantly affect its members' current small bargaining power (compared to the major distributors) and as a result, independent distributors may be unable to afford to continue to acquire the Australian rights for foreign, documentary, art house or other diverse films for release in Australian cinemas.¹¹⁸
173. Transmission Films, submits that if authorisation is granted, then ICA and its members will become a major player representing approximately 28 per cent of the national cinema box office. Transmission Films represents on average 1.5 to 2.5 per cent of the box office. Independent distributors will have significantly less bargaining power than ICA and its members.¹¹⁹

¹¹⁵ Twentieth Century Fox submission, 19 December 2017, available: [ACCC public register](#)

¹¹⁶ Universal Pictures International Australasia, *Submission on the application for authorisation*, 19 December 2017, p.4, available: [ACCC public register](#)

¹¹⁷ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, pp. 7-8, available: [ACCC public register](#).

¹¹⁸ Australian Independent Distributors Association, *Submission on the application for authorisation*, 28 July 2017, available: [ACCC public register](#)

¹¹⁹ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available: [ACCC public register](#)

174. ICA submits that it cannot represent the bargaining power of 30 per cent of the industry because ICA cannot collectively boycott any distributor.¹²⁰ That is, while ICA may represent its members in negotiations, without authorisation to collectively boycott, ICA and its members do not have significant bargaining power.
175. ICA submits that independent distributors have bargaining power.¹²¹ Control of a successful film confers significant, if transient bargaining power. On this measure independent distributors can exert comparable bargaining power to a major distributor. ICA provided the example of the film 'Lion', distributed by Transmission Films. *Lion* was the fifth most successful Australian film of all time at the Australian box office.
176. AIDA submitted at the conference that the conduct is likely to have a disproportionately large negative impact on Australian independent distributors, because these distributors rely on ICA members as exhibitors. ICA's market share for AIDA distributed films (43 per cent) is much higher than ICA's share for all films (22 per cent).¹²²
177. Twentieth Century Fox submits that it is more likely that smaller titles will be boycotted.¹²³

ACCC view

178. The ACCC accepts that exhibitors have a strong incentive to negotiate with distributors to ensure they are supplied with films that are suitable and attractive to their audience. This is particularly the case with successful ('must have') films. Any distributor holding the distribution rights for one of these films has bargaining power.
179. The ACCC also accepts that in some circumstances individual exhibitors or groups of exhibitors are important for independent distributors as without them the film may not be available to a particular audience and/or region. In this case the ACCC accepts that independent cinemas are an important outlet for independent distributors and that these distributors are an important source of content for independent cinemas.
180. While ICA would be authorised to negotiate on behalf of any or all of its members, who between them account for approximately 29 per cent of the national cinema box office,¹²⁴ taking into account ICA's diverse membership the ACCC considers it is unlikely all members will wish to collectively bargain on all issues at the same time, for example, the right to screen a particular independent film.
181. Further and more critically, as noted, participation in the proposed conduct is voluntary for both distributors and exhibitors. Any independent distributor that considers it would be disadvantaged by participating in collective bargaining with a group of ICA members is under no obligation to do so.

¹²⁰ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, available: [ACCC public register](#)

¹²¹ Independent Cinemas Australia Inc., *Supplementary response to public submissions made by interested parties*, 31 August 2017, p. 3, available: [ACCC public register](#)

¹²² Australian Competition and Consumer Commission, 8 November 2017, *Conference record*, available: [ACCC public register](#)

¹²³ Australian Competition and Consumer Commission, 8 November 2017, *Conference record*, available: [ACCC public register](#)

¹²⁴ Noting recent changes to ICA membership this percentage may have fallen.

182. For these reasons, the ACCC considers it unlikely that the proposed conduct will result in public detriment by negatively impacting on independent distributors.

Possible competitive advantages to vertically integrated exhibitors/distributors

183. Sony Pictures Releasing submits that some exhibitors are also distributors.¹²⁵ Transmission Films and Studiocanal raised concerns about these vertically integrated exhibitors/distributors having access to information shared amongst ICA members.^{126 127}
184. Transmission Films submits that sharing information across these ICA members will give these exhibitor/distributor businesses an unfair advantage as the distribution side of the business will be competing for screen space with Transmission Films.¹²⁸
185. Studiocanal submits sharing of commercially sensitive information will give a particular advantage to vertically integrated businesses because the distribution side of the business will have access to the information shared with the exhibition business. Some of these distributors are competitors of Studiocanal.¹²⁹
186. ICA disagrees with these concerns¹³⁰ and notes that each distributor currently discloses its terms of supply to exhibitors regardless of whether the exhibitor is also a distributor and there is no suggestion that this disclosure confers an unfair advantage for vertically integrated exhibitors/distributors.¹³¹

ACCC view

187. The ACCC notes Transmission Films' and Studiocanal's concerns about vertically integrated exhibitors/distributors having access to information shared amongst ICA members. The ACCC is aware of three vertically integrated ICA members – Icon Film Distribution (Dendy Cinemas), Palace Films (Palace Cinemas) and Sharmill Films (Cinema Nova).¹³²
188. As noted, authorisation does not provide ICA or its members with legal protection against breaches of any confidentiality obligations in agreements with distributors.
189. Exhibitors with vertically integrated distribution businesses are currently offered the supply of a range of films, giving them access to certain information about the terms on which those films are supplied to them. Any sharing of non-confidential information from other exhibitors with those ICA members that are also distributors is unlikely to confer any significant advantage to those members and therefore it is unlikely to result in public detriment.

¹²⁵ Sony Pictures Releasing, *Submission on the application for authorisation*, 21 July 2017, available: [ACCC public register](#)

¹²⁶ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available: [ACCC public register](#)

¹²⁷ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, available: [ACCC public register](#)

¹²⁸ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available: [ACCC public register](#)

¹²⁹ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, p. 3, available: [ACCC public register](#)

¹³⁰ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p. 8, available: [ACCC public register](#)

¹³¹ Independent Cinemas Australia Inc. Personal communication, 12 September 2017.

¹³² Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, available: [ACCC public register](#) and Screen Australia *Issues in Feature Film Distribution*, p. 26 available: https://www.screenaustralia.gov.au/getmedia/1216e7e0-59a1-4e16-906a-8809b8b7be0c/IssuesInFeatureFilmDistribution_2015-07-30.pdf

Balance of public benefit and public detriment

190. As outlined above, the ACCC considers the proposed conduct is likely to result in the following public benefits:
- Transaction cost savings.
 - Improved input into negotiations.
191. In some cases information sharing and collective bargaining may lessen competition and efficiency because it involves competitors agreeing on terms of supply. However, in this case the ACCC considers that the conduct is likely to result in limited public detriment because:
- Collective bargaining is voluntary for both ICA members and distributors and a collective boycott is not part of the proposed conduct.
 - ICA members account for 29 per cent of the market, while major exhibitors account for 66 per cent.
 - Authorisation does not protect parties from breaching confidentiality agreements. This means that the only impact of the information sharing is to allow sharing of information that is not the subject of a confidentiality agreement.
192. For the reasons outlined in this determination the ACCC is satisfied that the likely benefit to the public would outweigh the likely detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.
193. Accordingly, the ACCC is satisfied that the net public benefit test is met.

Length of authorisation

194. The Act allows the ACCC to grant authorisation for a limited period of time.¹³³ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the likely public detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
195. ICA submits that a 10 year authorisation period is appropriate; applying for authorisation is expensive and it is cost effective to apply for a 10 year period, which is consistent with other authorisation determinations.¹³⁴
196. Universal Pictures submits that a 10 year authorisation is a long time period in an environment of changing technology and customer preferences. Therefore it will be difficult for the ACCC to conclude that the likely benefit will outweigh the likely detriment.¹³⁵

¹³³ Subsection 91(1) of the Act.

¹³⁴ Independent Cinemas Australia Inc., *Form B, Application for Authorisation*, 8 June 2017, p. 4, available: [ACCC public register](#)

¹³⁵ Universal Pictures International Australasia, *Submission on the application for authorisation*, 27 July 2017, p.1, available: [ACCC public register](#)

197. Twentieth Century Fox submits that if authorisation is granted, it should be for a maximum of five years. The film industry is subject to significant change and it is impossible to predict the state of the industry in five years' time.¹³⁶
198. Disney submitted, both before and after the draft determination, that the conduct is a radical departure from current arrangements. Given the dynamic nature of the industry, a 10 year authorisation period is too long. Disney submits that a three-year authorisation period is more appropriate.
199. ICA submits that taking into account the exhaustive inquiry, the legal costs involved and the necessary delay in concluding the assessment, authorisation should be granted for 10 years.
200. Sony Pictures Releasing submits that given the concerns expressed about the impact of authorisation on the Code of Conduct, any authorisation granted by the ACCC should be for a short period so the impact can be assessed.¹³⁷

ACCC view

201. The ACCC notes that although it is unclear to what extent collective bargaining and information sharing will occur in practice, the conduct represents a potentially significant change from current arrangements, in an industry subject to changing technology and customer preferences.
202. The ACCC is more likely to grant longer authorisations where it is being asked to reauthorise previously authorised conduct, there is evidence that anticipated benefits have been delivered, relevant parties continue to support the arrangements and market conditions are stable.
203. The ACCC notes ICA's submission regarding the length of the assessment period and the costs incurred. However authorisation for a shorter period provides an opportunity for the parties to engage in the authorised conduct and for all parties, whether they support or oppose the proposed conduct, to gather evidence of public benefits and public detriments arising from the conduct, which will assist the ACCC in its assessment if re-authorisation is sought in the future.
204. Accordingly, the ACCC grants authorisation for the conduct for five years rather than the 10 years sought by the applicants.

Determination

The application

205. On 13 June 2017, Independent Cinemas Australia Inc. (ICA) lodged application A91587 with the ACCC, under subsection 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the Act), seeking authorisation to engage in information

¹³⁶ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, p. 11, available: [ACCC public register](#)

¹³⁷ Sony Pictures Releasing submission, 20 December 2017, p. 4, available: [ACCC public register](#)

sharing amongst ICA members and to engage in collective bargaining with film distributors.¹³⁸

206. ICA sought authorisation, on behalf of itself and its current and future Australia members on a voluntary opt out basis, to make and give effect to contracts, arrangements and understandings pursuant to which the applicants may participate in:¹³⁹
- collective negotiation on behalf of ICA member exhibitors of the terms and conditions of film licensing agreements, and/or
 - collective negotiation on behalf of ICA member exhibitors of booking terms and terms and policy for film licensing agreements applying to specific categories of members such as, but not limited to, regional cinemas or cinemas with four or less screens, and/or
 - collective negotiation on behalf of ICA member exhibitors of booking terms and policy for film licensing agreements applying to specific titles from time to time if requested by a member or group of members, and/or
 - information exchange concerning the terms or proposed terms of film licensing agreements.

The net public benefit test

207. For the reasons outlined in this determination the ACCC is satisfied, pursuant to sections 90(7) and 90(8) of the Act, that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public that would result or be likely to result from the conduct.¹⁴⁰

Conduct authorised by the ACCC

208. The ACCC grants authorisation to ICA and its current and future Australian members, on a voluntary opt out basis, for five years to make and give effect to contracts, arrangements or understandings pursuant to which they may participate in:
- collective negotiation on behalf of ICA member exhibitors of film licensing agreements
 - collective negotiation on behalf of ICA member exhibitors of film licensing agreements applying to specific categories of members such as, but not limited to, regional cinemas or cinemas with four or less screens

¹³⁸ As noted above, on 6 November 2017, a number of amendments to the Act came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the Act. Pursuant to section 182(3), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the Act as amended will apply to this application. Applications for authorisation under ss 88(1A) & (1) are treated as applications for authorisation under subsection 88(1) of the Act as amended.

¹³⁹ Independent Cinemas Australia Inc., *Form B, Application for Authorisation*, 8 June 2017, p. 2, available: [ACCC public register](#)

¹⁴⁰ As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).

- collective negotiation on behalf of ICA member exhibitors of film licensing agreements applying to specific titles from time to time if requested by a member or group of members
- information sharing concerning film licensing agreements or proposed film licensing agreements

where film licensing agreements include:

- standard terms and conditions or terms of trade including:
 - supply and return of materials
 - general licence terms for exhibition
 - accounting and payments
 - security and storage
 - box office information and records checking
 - warranties, indemnities and termination provisions
- the specific terms and conditions or booking confirmation applying to an individual film title (title-specific terms and conditions) including:
 - terms - in the film exhibition industry, the word 'terms' (on its own) is often used colloquially to denote the price or rental required to be paid by the exhibitor to license a film from the distributor
 - policy - used to denote the obligations of the exhibitor with respect to season and sessions for a particular film
 - supply date
 - minimum guarantee and marketing provisions.

209. The proposed conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.¹⁴¹

Date authorisation comes into effect

210. This determination is made on 16 March 2018. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 7 April 2018.

211. Authorisation is granted until 7 April 2023.

¹⁴¹ The reference to "within the meaning of section 45 of the Act" includes the making and/or giving effect to a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect of substantially lessening competition.

Appendix A

Summary of stakeholder submissions

Submissions before the draft determination

212. The ACCC received 10 submissions on the application for authorisation. Icon Film Distribution supported authorisation. Nine submissions from distributors raised concerns about the proposed conduct.

Independent Cinemas Australia

213. ICA submits:¹⁴²

- Independent exhibitors have little bargaining power with film distributors.
- Collective bargaining is expected to create efficiencies and a more balanced negotiation, which may result in better film licence terms to the benefit of ICA members.¹⁴³
- Information sharing will assist in the collective bargaining process. From time to time ICA members may want to exchange information about the terms and conditions for film licences, developed as part of a distribution strategy and offered to individual exhibitors. ICA is concerned that doing so may place members at risk of breaching the Act.¹⁴⁴ From time to time distributors propose changes to their standard terms and conditions for a particular film after it has been released. These changes affect many ICA members but currently they are unable to exchange information about these changes or respond to the distributor as a group.¹⁴⁵
- Changes to standard terms and conditions of film licensing agreements and film screening season, sessions and rental fees can affect the viability of ICA members. The closure of the only cinema in a town or the closure of an independent cinema in a metropolitan area can reduce film diversity and have a negative impact on the local community. The proposed conduct may improve the viability of independent cinemas and therefore prevent or reduce the likelihood of cinema closure.¹⁴⁶

Interested parties

214. The views of interested parties are summarised below and considered in the evaluation chapter of this determination.

¹⁴² Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017 available: [ACCC public register](#)

¹⁴³ *ibid.*, p. 4.

¹⁴⁴ Independent Cinemas Australia Inc., *Form B, Application for Authorisation*, 8 June 2017, p. 5, available: [ACCC public register](#)

¹⁴⁵ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 6, available: [ACCC public register](#)

¹⁴⁶ *ibid.*, p. 8-9,

Icon Film Distribution

215. Icon Film Distribution is part of the Dendy Icon Group, comprising Icon Film Distribution, Dendy Cinemas and Dendy Direct (a video on demand service). Dendy Cinemas are members of ICA and a party to the application for authorisation.¹⁴⁷
216. Icon Film Distribution submits that collective bargaining is voluntary and information sharing between cinemas is not a concern because the distribution strategy is determined by the distributor. Information sharing will lead to better engagement between distributors and exhibitors on the planning that goes into a theatrical release.

Australian Independent Distributors Association

217. The Australian Independent Distributors Association (AIDA) submits that each of its members represents less than five per cent of the total Australian film distribution market. Negotiations for smaller independent films should take place between individual distributors and individual exhibitors to give the small independent film market the best opportunity to survive. Collective bargaining with major distributors may be appropriate however AIDA and its members should not be part of the proposed conduct.¹⁴⁸

Entertainment One Films Australia

218. Entertainment One acknowledges that the conduct is voluntary for both distributors and exhibitors.¹⁴⁹
219. However, Entertainment One submits:
- If the conduct is authorised it will result in an additional large stakeholder group comparable to each of the three major exhibitors.
 - Collective bargaining will introduce inefficiencies and hinder dealings and negotiations with each exhibitor. It will add an additional layer of bureaucracy in the process.
 - The Code of Conduct is an efficient and effective framework, which includes a dispute resolution process.

Paramount Pictures Australia

220. Paramount Pictures submits that collective bargaining is unsuitable for the negotiation of terms and conditions for film distribution and exhibition. ICA members are a heterogeneous group of exhibitors. Individual exhibitor negotiations include consideration of the type of audience and the track record of the genre of the film to be shown, the expected revenue and geographical location.¹⁵⁰

¹⁴⁷ Icon Film Distribution, *Submission on the application for authorisation*, 10 July 2017, available: [ACCC public register](#)

¹⁴⁸ Australian Independent Distributors Association, *Submission on the application for authorisation*, 28 July 2017, Available: [ACCC public register](#)

¹⁴⁹ Entertainment One Films Australia, *Submission on the application for authorisation*, 3 August 2017, p. 4, available: [ACCC public register](#)

¹⁵⁰ Paramount Pictures Australia, *Submission on the application for authorisation*, 28 July 2017, available: [ACCC public register](#)

221. Paramount Pictures submits that if ICA members seek to negotiate collectively, Paramount Pictures will have little option but to engage on that basis or face the risk of a collective boycott of Paramount Pictures' films by ICA members.

Sony Pictures Releasing

222. Sony Pictures Releasing currently works directly with exhibitors and is likely to continue to do so. Sony Pictures Releasing submits that it is not feasible or appropriate to negotiate with any trade industry body over film release dates, rental rates, session and season policies or other terms of its agreements with independent exhibitors.¹⁵¹
223. Sony Pictures Releasing submits that the Code of Conduct is an effective and reliable means for ensuring mutually beneficial commercial dealings between Sony Pictures Releasing and all exhibitors and it would be concerned if authorisation impacted on the efficacy of the Code of Conduct.

Studiocanal

224. Studiocanal is a small independent distributor releasing approximately two per cent of films in the Australian cinema market annually.¹⁵²
225. Studiocanal negotiates film supply with each exhibitor to agree mutually acceptable terms, including the screening season, session times, start dates and film hire rates. These negotiations depend on the film and can vary greatly between exhibitors.
226. Studiocanal submits that ICA's conduct could distort the competitive process in the market place and that market forces should be allowed to operate freely. The conduct is likely to result in anti-competitive detriment, being parallel conduct and coordination by cinemas, and likely loss of content diversity.
227. Information sharing will lead to outcomes whereby Studiocanal will have to collectively bargain with ICA members or face the possibility of a collective boycott of its films by the bargaining group.

The Walt Disney Company (Australia)

228. Disney submits that if all ICA members participate in collective bargaining, the group would have a greater market share than any of the major exhibitors. Disney would be in a relatively weak bargaining position and is likely to feel compelled to collectively bargain.¹⁵³
229. The Code of Conduct has operated effectively for many years. Disney's experience is that independent exhibitors discuss their concerns directly with Disney and, where necessary, using the processes outlined in the Code of Conduct.

¹⁵¹ Sony Pictures Releasing, *Submission on the application for authorisation*, 21 July 2017, available: [ACCC public register](#)

¹⁵² Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, available: [ACCC public register](#)

¹⁵³ The Walt Disney Company Australia, *Submission on the application for authorisation*, published on 3 August 2017, available: [ACCC public register](#)

230. Disney is sceptical that collective bargaining will result in transaction cost savings and efficiencies given the number of one-on-one issues that typically need to be negotiated between distributors and exhibitors.

Transmission Films

231. Transmission Films submits that as one of the few independent Australian film distributors, exhibitors rely on Transmission Films to supply content that global distributors tend not to supply. The impact of an independent cinema monopoly will further erode the sustainability of the independent film model.¹⁵⁴
232. The Code of Conduct has been a successful way to resolve conflict and there has been no evidence provided that demonstrates it is not working for the benefit of both distributors and exhibitors.
233. Transmission Films submits that exhibitors may opt out of collective bargaining and continue to use the information gathered via information sharing, resulting in a collective boycott.

Twentieth Century Fox Film Distributors

234. Twentieth Century Fox submits that the Australian cinema industry is strong. Independent cinemas have invested in new sites and increased the number of screens in Australia and some independent exhibitors, such as those in regional areas, already have bargaining power.¹⁵⁵
235. The conduct is broad, anti-competitive and may lead to collective boycott.
236. Twentieth Century Fox submits that there is no evidence that film distributors are offering uncommercial terms to independent cinemas. Independent cinemas are not disadvantaged. If exhibitors believe they are offered unreasonable commercial terms they have a number of mechanisms to resolve issues including the Code of Conduct and the unfair contract terms regime in the Australian Consumer Law.
237. Twentieth Century Fox submits that ICA does not indicate that film ticket prices will fall. Any reduced prices that ICA can negotiate for its members will result in a transfer of wealth from distributors to independent exhibitors. There is no evidence that, absent authorisation, prices will rise.

Universal Pictures International Australasia

238. Universal Pictures submits that ICA's application is unclear about the information exchange process, which appears to be broad and open ended. There is significant risk that the conduct will lead to anticompetitive outcomes, to the detriment of consumers.¹⁵⁶
239. Authorisation will facilitate information sharing amongst ICA members without any meaningful restrictions or safeguards in relation to commercially sensitive information.

¹⁵⁴ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available: [ACCC public register](#)

¹⁵⁵ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, available: [ACCC public register](#)

¹⁵⁶ Universal Pictures International Australasia, *Submission on the application for authorisation*, published on 27 July 2017, available: [ACCC public register](#)

240. The Code of Conduct exists to resolve common industry issues in complex arrangements and distributors and exhibitors have used it to that end.
241. Universal Pictures submits that to ameliorate the anticompetitive detriment of the information exchange between ICA members, information sharing should not be permitted unless a distributor agrees to participate in collective bargaining. In agreeing to collective bargaining, the distributor would be giving consent to the information sharing arrangement as well.

Independent Cinemas Australia submissions in response to interested party submissions

242. ICA made two submissions in response to interested party submissions.
243. ICA submits:¹⁵⁷
- It expects most of its members will want to share information concerning proposed terms and conditions to better understand and assess the terms and conditions being offered to them.¹⁵⁸
 - Some ICA members have expressed interest in collective bargaining to negotiate more appropriate terms of supply.
 - Some of ICA's largest members are likely to continue dealing directly with distributors and are therefore likely to opt out of collective bargaining.
244. ICA further submits:¹⁵⁹
- ICA will share information with all exhibitor members other than those who have elected to opt out of authorised information sharing.
 - ICA does not propose to share information about specific collective negotiations with members once they have opted out of the conduct.
245. ICA submits that the small number of complaints made about distributors under the Code of Conduct does not necessarily mean that the Code has been successful in ensuring a fair and equitable outcome for ICA members. The lack of complaints being referred to the Code secretariat suggests that exhibitors are reluctant to raise concerns with the secretariat because they fear jeopardising their relationship with distributors. ICA submits that the procedures for dispute resolution are disproportionately expensive and unduly cumbersome.¹⁶⁰
246. ICA submits the lack of transparency on price information has the effect of requiring exhibitors to accept film licensing on a 'take it or leave it' basis. In the absence of authorisation to share information, exhibitors are unable to assess whether the proposed licence terms and rental fee are fair.¹⁶¹

¹⁵⁷ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p.1, available: [ACCC public register](#)

¹⁵⁸ In its application for authorisation, ICA submits that presently it risks breach of the Act if it and its members engage in unauthorised information sharing.

¹⁵⁹ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p.2, available: [ACCC public register](#)

¹⁶⁰ *ibid.*, p.5.

¹⁶¹ *ibid.*, pp. 6-7.

247. ICA submits that independent distributors are likely to achieve transaction cost savings by collectively bargaining, for example it is likely to be more efficient to resolve disputes and misunderstandings on a collective, rather than individual basis. Cost savings for ICA members are likely to be reinvested into their businesses to the benefit of the community.¹⁶²

Submissions after the draft determination

248. Universal Pictures and Paramount Pictures made supplementary submissions immediately before the draft determination was published. Therefore these two submissions were not considered in the draft determination and have been considered in this determination.

249. Universal Pictures submits:¹⁶³

- It is not aware of how digital disruption is exacerbating an existing imbalance in market power, as claimed by ICA. Consumers' increasing preference to view films online also affects distributors.
- Universal Pictures also submitted that if ICA is concerned about the operation of the Code of Conduct it should seek amendments to the Code.
- There is uncertainty as to which ICA members will participate in collective bargaining, therefore a reasonable starting point is to assume all members will participate. Collective bargaining by a large and diverse group may reduce the incentive for exhibitors to compete against each other and stifle innovation.
- There does not appear to be safeguards in place to protect confidential information being exchanged between ICA members.
- Booking windows for individual films are negotiated between distributors and exhibitors. It is unclear what role ICA will play in this process.

250. Paramount Pictures submits:¹⁶⁴

- ICA has not provided evidence demonstrating the need for, or the benefits of, authorisation.
- Authorisation will make legal, conduct that is otherwise prohibited under the Act. It is misleading to characterise collective negotiations as voluntary. If ICA members require distributors to negotiate with ICA, rather than individually, then the distributors' participation cannot be said to be voluntary.
- The proposed opt out mechanism is unworkable. There is no certainty on which ICA members will be involved in the conduct.

Pre-decision conference

251. A pre-decision conference to discuss the draft determination was requested by AIDA and Disney. The conference was held in Sydney on 8 November 2017. A summary of the issues discussed at the conference and copies of interested party

¹⁶² Independent Cinemas Australia Inc., *Supplementary response to public submissions made by interested parties*, 31 August 2017, available: [ACCC public register](#)

¹⁶³ Universal submission, 22 September 2017, available: [ACCC public register](#)

¹⁶⁴ Paramount Pictures submission, 26 September 2017, available: [ACCC public register](#)

written submissions tabled at the conference are available on the [ACCC public register](#).

252. Many of the submissions at the conference focussed on the scope of the proposed conduct, the likelihood that benefits will not arise from authorisation, the potential extent of anti-competitive detriment, concerns that the proposed conduct is likely to have a disproportionately large negative impact on Australian independent distributors and claims that authorisation will damage the operation of the Code of Conduct.

Independent Cinemas Australia response to information request

253. Following the conference, the ACCC requested further clarification from ICA regarding the proposed conduct and the likely benefits of authorisation. ICA's response is available on the public register.¹⁶⁵
254. ICA clarified that the information sharing and collective bargaining for which it sought authorisation is broad and intended to encompass all aspects of film licensing agreements, including:
- Standard terms and conditions set by film distributors and communicated to exhibitors when an exhibitor opens an account with a distributor (e.g. supply and return of materials; accounting and payments; and security and storage).
 - Title specific terms and conditions that apply for each film title offered to exhibitors by film distributors (e.g. price/rental to be paid by exhibitor; number of sessions that an exhibitor is obliged to run; and supply date).
255. ICA submits that it does not intend to collectively bargain all terms and conditions all the time, rather the extent of collective bargaining will depend on the issues identified after sharing information. However, information sharing may extend to any standard or film specific terms and conditions.
256. In relation to the likely benefits of authorisation ICA submits:
- Its members use advisors (lawyers, accountants, film bookers and the ICA CEO) when negotiating film supply (and disputes) with distributors and collective bargaining is likely to reduce individual members' advisor costs.
 - Collectively bargaining about issues that are common to several ICA members is likely to be more efficient for both exhibitors and distributors compared to bargaining individually.
 - Members have told ICA that the process of negotiating and booking films is labour intensive and time consuming. The volume of films released in Australia is now more than one a day and exhibitors are required to assess the suitability of each title for release at their cinema, select a range of titles to meet the needs of their local community, and attempt to negotiate sustainable licence agreements for all these films on a weekly basis, while also conducting all the other activities of operating a cinema business. Collective negotiation of even some aspects of film licence terms and conditions will be a significant saving and of benefit to independent exhibitors.
257. Benefits may flow to consumers via:

¹⁶⁵ Independent Cinemas Australia submission, dated 1 December 2017, (published 4 December 2017), available: [ACCC public register](#)

- Greater film choice - current restrictive policies result in the length of the film season being too long for some (smaller) exhibitors, resulting in exhibitors screening films to an empty cinema. If shorter seasons can be negotiated, more films could be shown to the benefit of consumers, exhibitors and distributors.
- Retaining access to discounted tickets - the trigger for the conduct was a distributor's change to pricing policy, which had the effect of some exhibitors increasing ticket prices. Authorised information sharing may have led to ICA and its members becoming aware of the widespread nature and impact of the changes. Subsequent collective bargaining may have lessened the impact on consumers.

258. Independent distributors are likely to benefit from transaction cost savings, and any increased flexibility arising from the proposed conduct is likely to result in ICA members screening more independent films.

Other submissions after the draft determination

The Picture Show Man Cinema

259. The Picture Show Man Cinema, a two screen cinema in coastal NSW submits:¹⁶⁶

- Due to the prevailing requirements of film licence agreements, it is a challenge to meet the content needs of the local community with only two screens.
- Information sharing and collective bargaining could assist distributors gain access to screens more efficiently and therefore result in more diverse content for regional audiences.
- Collective negotiation of even some aspects of some film bookings would deliver considerable efficiencies and increase time to devote to improving the cinema service for patrons.
- Negotiating film supply terms is an exhausting and time consuming practice, which diverts attention from other aspects of running the business.
- Negotiation is required because often distributors offer to supply films on terms that are appropriate for a large multiplex exhibitor but inappropriate for a regional two screen cinema for example, sometimes distributors require films to be screened for longer than local demand requires.
- Negotiation is conducted in consultation with lawyers, accountants and other advisors as required.

Australian National Theatre Live

260. Australian National Theatre Live (ANTLive) films live events such as theatre, musicals, ballet and then distributes these films to exhibitors. ANTLive submits:¹⁶⁷

- Global growth in 'event cinema' suggests independent exhibitors and consumers would benefit from greater programming flexibility leading to greater film diversity.

¹⁶⁶ The Picture Show Man Cinema submission, 28 November 2017, available: [ACCC public register](#)

¹⁶⁷ Australian National Theatre Live submission, 15 December 2017, available: [ACCC public register](#)

- Often independent exhibitors are unable to show ANTLive films because they are committed to showing mainstream films beyond the point dictated by local demand.
- If independent cinemas could negotiate shorter seasons or fewer sessions for mainstream films they could show a wider range of films, this may be particularly beneficial for regional and rural exhibitors and consumers.

Majestic Cinemas

261. Majestic Cinemas operates seven cinemas in regional New South Wales and South-East Queensland and books films for another small cinema in regional New South Wales. Majestic Cinemas submits:¹⁶⁸

- Many independent cinemas are seasonal, variable, with high fixed running costs and complex programming demands undertaken with very limited access to adequate information. Authorisation will provide an opportunity to generate public benefits to independent exhibitors, their patrons and the wider community. It will deliver cost savings and efficiencies to exhibitors of the kind outlined in the submission by The Picture Show Man Cinema.
- Negotiating for eight cinema sites creates time efficiencies for both parties compared to negotiating for one or two sites. Most negotiations are friendly and agreement is reached reasonably easily however, there are a number of day-to-day negotiations that are protracted and difficult, particularly with some distributors both major and independent.
- 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.
- Only gross breaches of the Code of Conduct 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.
- Authorisation of information sharing and collective negotiation (together with a similar amendment to the Code of Conduct) will improve rather than detract from the capacity of the industry to resolve disputes using the Code processes as there will be less fear of individual retribution and more capacity to share the resource burden of bringing a complaint.

Scotty's Cinema Centre and Heddon Greta Drive-in Cinema

262. Scotty's Cinema Centre and Heddon Greta Drive-in Cinema (together Scotty's Cinemas) submits:

- The underlying motive for the application for authorisation is, and has always been, to make it easier for distributors and exhibitors to work together to achieve mutually successful outcomes.
- The structure of the cinema industry is unique and does not operate as a free market. To operate a successful business, an exhibitor needs to screen the

¹⁶⁸ Majestic Cinemas submission 2 January 2018, available: [ACCC public register](#)

best films. The distributors of these ‘must have’ films operate a temporary monopoly, if the distributor wants the film, it cannot choose between suppliers. Authorisation will give independent exhibitors some bargaining power.

- The Code of Conduct is beneficial for some industry participants, however independent exhibitors are daunted facing the dispute processes with well-resourced distributors alone, and they fear retribution. Further, many issues need to be resolved more quickly than the time it takes to address issues under the Code of Conduct.
- Authorisation would assist negotiation of a more flexible approach to at least three issues, which impact other independent exhibitors:
 - Adoption of performance deals, which set the rental price on the actual box office, creating greater certainty for exhibitors, potentially leading to greater film diversity for the benefit of consumers.
 - Bundling of products, for example offering the opportunity to see a film and have a meal before or after the film. Many distributors’ agreements prevent this type of bundling.
 - Improving flexibility in film supply to drive-in cinemas, which have a limited opportunity to screen films (i.e. drive-ins do not screen during the day). Many drive-in cinema patrons are low-income families with five or six children and unable to afford to take the family to see a film at a conventional cinema.
- It is difficult and time consuming to negotiate with distributors every week and some aspects of supply, such as terms (film price) are non-negotiable. Information sharing and collective bargaining may address the bargaining imbalance.
- Collective bargaining will provide an opportunity for a group of independent exhibitors to have one conversation on an issue of concern instead of many individual conversations (at times involving separate consultants or advisors) with potentially different outcomes.

Sharmill Films/Cinema Nova

263. Sharmill Films/Cinema Nova submits that, as an independent distributor and exhibitor, it needs the freedom to deal with clients on a one by one basis. Further, the Code of Conduct protects both distributors and exhibitors and has therefore been a success.¹⁶⁹

Digital Cinema Network

264. Digital Cinema Network Australia submits:¹⁷⁰

- A film’s season and session times (often referred to as ‘policy’) are the most important terms for exhibitors, particularly exhibitors with few screens.
- Distributors’ policy has the effect of locking out screen availability from other distributors.

¹⁶⁹ Sharmill Films/Cinema Nova submission, 20 November 2017, available: [ACCC public register](#)

¹⁷⁰ Digital Cinema Network Australia submission on the draft determination, 23 October 2017, available: [ACCC public register](#)

- It is not surprising that small regional cinemas are being forced out of business by some industry practices.
- The conduct will result in a reduction in competition by allowing ICA to act as the biggest negotiating block, creating a bigger problem for smaller operators.

Twentieth Century Fox

265. Twentieth Century Fox submits that the benefits do not outweigh the detriments:¹⁷¹

- Standard and legitimate confidentiality protections will significantly limit the likelihood of achieving any of the claimed public benefits.
- Discussions with exhibitors are generally in relation to the number of screens or locations, marketing support and screening times, which are specific to each cinema and better handled on an individual basis.
- The proposed conduct will make negotiation more difficult because ICA will become involved.
- There is no basis for assuming that any benefit will be passed on to consumers and the independent cinema industry is strong based on traditional market measures.

266. Twentieth Century Fox also submits:

- There is no market failure and the ACCC should not intervene in a well-functioning market with no evidence of failure.
- The conduct could be detrimental to the cinema industry by encouraging coordination between competitors and creating an environment that may lead to boycott.

The Walt Disney Company (Australia)

267. Disney submits:¹⁷²

- The ACCC should consider any negative impact on Code of Conduct processes as part of its net public benefit analysis.
- Industry codes are valuable and the Code of Conduct is working well. Exhibitors appear comfortable raising concerns either directly with Disney or via the code's dispute resolution framework. Disney is prepared to work with exhibitors to understand concerns and to improve the Code's terms and processes.
- Claims of distributor retribution are unsupported by evidence and therefore should be given little weight by the ACCC.
- Disney regularly engages on key aspects of film release with exhibitors during a process that can start two years prior to film release. It notes some information (such as film classification) is not available to distributors at the time of negotiation and only becomes available close to release date. These circumstances do not reflect an imbalance of power.
- ICA members are not homogenous and there are a number of issues that will continue to be agreed on a one on one basis if authorisation is granted.

¹⁷¹ Twentieth Century Fox submission, 19 December 2017, available: [ACCC public register](#)

¹⁷² Disney submission 21 December 2017, available: [ACCC public register](#)

- Authorisation for 'at large' sharing of film licensing arrangements or proposals amongst ICA members does not meet the terms of the 'net benefit test' and should not be granted.
- Disney remains sceptical of the ICA's claimed cost savings and efficiencies.
- If authorisation is granted, the term should not be longer than three years because the conduct represents a radical departure from current arrangements and consumer habits and film distribution are evolving rapidly with the growth of digital technologies.

Sony Pictures Releasing

268. Sony Pictures Releasing submits:¹⁷³

- The Code of Conduct is directly relevant to the assessment to be made of the balance of anticompetitive detriment and public benefit. Secondly, it is relevant for the Commission in terms of whether a decision to grant authorisation would impact detrimentally on the operation of the Code.
- There is no imbalance in bargaining power as suggested at the conference. Exhibitors can and do negotiate effectively.
- Distributors bear significant risk in respect of the success of a film. To mitigate this risk Sony spends several million dollars marketing large releases in Australia, which also benefits exhibitors.
- While ICA has clarified the scope of its conduct, uncertainty remains around exactly when ICA and its members will engage in the conduct.
- ICA members include small, large and vertically integrated exhibitors and the ACCC needs to weigh benefits and detriments in respect of all ICA members.
- If the ACCC grants authorisation, it should not grant authorisation for 10 years as proposed by ICA. A shorter period will provide the ACCC and the industry with the opportunity to assess the impact of authorisation on the Code.

Paramount Pictures Australia Pty

269. Paramount Pictures submits:¹⁷⁴

- It is now clear that ICA seeks authorisation to share information in relation to all terms and conditions of film licensing arrangements.
- ICA's submission of 1 December 2017 does not accurately reflect the dynamics of the film booking process. Distributors seek to maximise box office return, if a film is successful, distributors will advocate for additional screening sessions. If a film is unsuccessful it is not in distributors' or exhibitors' interests to seek additional sessions.
- The ACCC should not be satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.

¹⁷³ Sony Pictures Releasing submission, 20 December 2017, available: [ACCC public register](#)

¹⁷⁴ Paramount Pictures submission 22 December 2017, available: [ACCC public register](#)

Universal Pictures International Australasia Pty Ltd

270. Universal submits:¹⁷⁵

- Distributors face commercial risk in contributing to film production, marketing, publicity, promotion and advertising of a film prior to distribution. Further, exhibitors require an exclusive 90 day period when they may exhibit the film to consumers regardless of whether the film screens for 90 days. Universal accepts these risks and terms as part of an overall understanding that exhibitors also take on commercial risk operating cinemas.
- It is important to understand the broader commercial context in the commercial relationship and in particular that the exhibitor takes no risk in the production and distribution costs whilst enjoying the exclusive rights to present a film to consumers.
- The Code of Conduct strikes an appropriate balance as to the interests of distributors and exhibitors in how films are provided to the public. The conduct will give rise to fractious situations and potentially boycotts of distributors resulting in significant undermining of the Code of Conduct. Universal submits that all signatories to the Code should seek review of the Code, which would lead to a better counterfactual and outcome for the industry and consumers overall than an environment where the conduct is authorised.
- ICA's submission clarifies the broad nature of the conduct. No analysis has been put forward as to the benefits and detriments of this conduct, taking account of the diversity of both ICA's membership and film distributors.
- If the ACCC grants authorisation, it should make clear that no distributors information should be shared unless and until express consent of that distributor is obtaining in writing. It should also be made clear that any distributor may opt out of collective bargaining at their absolute discretion at any stage of the negotiating process.

Film Exhibition and Distribution Code Administration Committee

271. FEDCAC submits:¹⁷⁶

- The Code of Conduct was developed at the instigation of the ACCC as a self-regulatory model to manage disputes between distributors and exhibitors in a swift and efficient manner. Over the life of the Code there has not been a significant number of disputes.
- There is scope to upgrade and simplify the Code given the changes in the film distribution and exhibition industries and the development and refinement of film codes over nearly two decades.
- There has been little focus on educating and training members and their staff in the operation of the Code. The Code is complex, and could be simplified by preparation of supplementary/summary material, without amendment to the Code itself.
- Where distributors are clear on their obligations and exhibitors understand the extent of their rights, FEDCAC is optimistic that the Code will continue to

¹⁷⁵ Universal Pictures submission, 19 December 2017, available: [ACCC public register](#)

¹⁷⁶ Film Exhibition and Distribution Code Administration Committee submission, 19 December 2017, available: [ACCC public register](#)

operate as a valuable avenue to inform members, air grievances and resolve disputes, regardless of the determination finally made by the ACCC.