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Director
Adjudication Branch
Australian Competition & Consumer Commission

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Dear Mr Channing

A91587 - Independent Cinemas Australia Inc. – Application for Authorisation – Additional Submission in response to ICA

We are writing on behalf of Paramount Pictures Australia Pty. (**Paramount**) in response to the ICA Response to Submissions dated 1 December 2017 (**ICA's Response**).

Our client relies on the submissions already made on its behalf in relation to the subject Application, and, without accepting the accuracy of many of the assertions made in the ICA's Response, we are instructed to make the following additional points on its behalf.

1. The ICA's original Supporting Submission dated 8 June 2017 was, at best, ambiguous as to the scope of the conduct sought to be authorised.

It is apparent from paragraph 98 of the Draft Determination that the ACCC was proceeding on the understanding that the ICA was not proposing to negotiate the standard terms and conditions for film supply or the initial season, sessions and film rental fee.

The ICA's Response has made it clear that they wish to be authorised to negotiate in relation to ALL terms and conditions of film licensing arrangements (i.e. both the "Standard" terms and conditions and the "Title-Specific" terms and conditions) – see pages 3 and 8 of the ICA's Response.

2. Similarly, the ICA's Response has made it clear that if authorised, it proposes to share information in relation to ALL terms and conditions of film licensing arrangements with ALL of its members (regardless of whether they are large or small exhibitors, and whether or not they are vertically integrated).
3. Paramount supplies film-specific terms and conditions for its films to all its exhibitors before the commencement of the film, and does not withhold 'key information' in the manner suggested by the ICA.
4. In Paramount's experience, the ICA's Response does not accurately reflect the dynamics of the film booking process.

In particular, it does not accurately reflect the key objective of distributors such as Paramount, which seek to maximise box office for their portfolios of films. This does not equate to maximising the number of exhibition sessions for any particular title. If a film is doing well and is commercially successful a distributor will advocate for its retention. If a film performs poorly it is not in either the exhibitor's or the distributor's interests to seek additional sessions.

The ICA's Response does not acknowledge the investment by Paramount in the promotion of individual film titles, often long before the exhibitor makes any commitment to the film. If the exhibitors work with imperfect information about the film and how it will perform, so too does Paramount.

5. It is not at all apparent how the proposed authorisation would alleviate the dilemmas that the ICA's Response suggests its members face (at pages 1-5). Indeed Paramount is concerned that ICA's involvement will complicate the process further, adding to the cost and time taken with negotiations.
6. It is important to recognise that the function of Film Bookers is essentially different from what the ICA proposes, and for which it seeks authorisation. As a specific example, Film Bookers do not engage in collective bargaining.
7. The ICA's Response makes a number of references to Mr Gardiner's submissions and comments at the PDC. We are instructed that as a matter of course Paramount provides exhibitors with what ICA would refer to as its standard terms and conditions at the time that an exhibitor's account with Paramount is established. Paramount's standard terms and conditions have not been changed in approximately 10 years.

This issue aside, it is evident that the conclusion to be drawn from Mr Gardiner's submissions, when taken as a whole, and the conclusion which he wanted the ACCC to draw, is that the authorisation should not be granted.

8. In terms of confidentiality, without limitation, Paramount considers that the terms on which a particular title are offered to a particular exhibitor (and/or agreed with them) to be confidential, and ought not to be shared between exhibitors (especially not those which compete with each other). While certain terms (such as sessions) may become evident by observation over time, that does not detract from the confidential nature of that information at the time of negotiation between Paramount and the particular exhibitor.
9. The ICA's response to the ACCC's specific questions do not give any comfort to Paramount in terms of alleviating its concerns and ought not persuade the ACCC that the proposed authorisation will deliver benefits which would outweigh the anti-competitive detriments inherent in the proposal. Paramount remains of the view that the ICA has failed to demonstrate that any real public benefit will flow from the proposed conduct.
10. As far as we are aware, para 2.2.1 at page 10 of the ICA's Response, is the first suggestion that the ICA members who had not 'opted out' of the collective negotiation at the outset would be "*contractually bound*" by the outcome of any agreement reached with a distributor. There is no explanation as to how such contractual relations would be established, who they would be between, or how a distributor would be able to enforce this outcome against the individual ICA members. These are all critical issues for the working of what now appears to be put forward as a justification for approving the ICA's proposal.
11. Without repeating the detail of the many submissions already made to this effect, Paramount believes that the Code is working well as a means for resolving issues between exhibitors and distributors.
12. We note from the submissions filed with the ACCC that some of the ICA members do not support ICA's Application, and at least one has expressed concerns about the potential adverse impact of the requested Authorisation.

While Paramount has other concerns in relation to many of the factual assertions made in the ICA Response, it does not propose to address each of these in detail in this additional submission. Accordingly failure to address any particular assertion raised in the ICA's Response is not to be taken as agreement to that assertion by Paramount.

Conclusion

Based on the clarifications provided by the ICA's Response it is apparent that the dealings and conduct which the ICA is seeking to have authorised extend significantly beyond what was understood and contemplated by the ACCC at the time the Draft Determination was issued.

The ACCC should not be satisfied that the likely benefit to the public (if any) would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.

If the ACCC was minded to grant the authorisation in some form, it ought not to do so without imposing further limitations on its scope to reflect the ACCC's understanding of the representations originally made by the ICA in support of its Application. These include:

- *"ICA does not propose to share information about specific collective negotiations with members once they have opted out of the proposed conduct"* [69] DD;
- *"ICA is not proposing to negotiate the standard terms and conditions for film supply or the initial season, sessions and film rental fee."* [98] DD
- *"ICA is not proposing to book individual film titles for the members who remain in."*[2.6] ICA Subs
- A distributor may choose not to collectively bargain with ICA and that the granting of Authorisation to ICA will have no negative impact on any such distributor. [6] ICA Subs.]

Further, no authorisation should be granted without a clear understanding of, and conditions attaching to, the contractual framework which the ICA evidently proposes would underpin any negotiations undertaken by the ICA on behalf of its members with distributors and no authorisation should be granted that would last for 10 years as requested by the ICA in the ICA Response.

Please feel free to contact me if you should wish to discuss further any aspect of this or Paramount's previous submission.

Yours sincerely
DibbsBarker



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