



# The WALT DISNEY Company Australia

## Restriction of Publication of Part Claimed

Dear Mr Bell

### Independent Cinemas Australia Inc. application for authorisation A91587 – Interested party consultation

I refer to your correspondence of 5 and 11 December 2017 and the pre-determination conference held in Sydney on 8 November 2017 (**Conference**).

The Walt Disney Company (Australia) Pty Ltd (**Disney Australia**) thanks the Australian Competition and Consumer Commission (**ACCC**) for the opportunity to make a further submission in this matter. Disney Australia's submission will address:

- the potential impact of Independent Cinemas Australia Inc's (**ICA**) authorisation application (**Application**) on the Film Exhibition and Distribution Code of Conduct (**Code**); and
- certain specific issues raised in ICA's response of 4 December 2017 (**ICA Response**).

Portions of this submission contain information that is confidential and commercially sensitive to Disney Australia. These have been highlighted and are preceded by the word **CONFIDENTIAL**. Disney Australia requests that this information be withheld from the ACCC's public register and not be disclosed to third parties without the written consent of Disney Australia. Disney Australia consents to the disclosure of its confidential information to the ACCC's external advisors and consultants on a confidential basis or if the ACCC is compelled to do so by law or in accordance with s.155AAA of the *Competition & Consumer Act 2010* (Cth).

A public version of this letter for placing on the ACCC's public register is enclosed.

#### 1. The Film Exhibition and Distribution Code of Conduct (**Code**)

The Conference record notes<sup>1</sup> "...the ACCC will further consider the impact of authorisation on the code of conduct." Disney Australia welcomes the ACCC's renewed examination of the Code and the possible effect on Code participation if the ACCC grants ICA's Application.

Disney Australia acknowledges that the ACCC is not directly adjudicating on the operation of the Code, but submits to the extent the Application is likely to negatively impact upon Code processes this should form part of the ACCC's "net public benefit" analysis.

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<sup>1</sup> ACCC Conference record at p. 6

***Industry codes of conduct are valuable***

In many sectors and over many years the competition regulator has consistently endorsed the value of industry codes of conduct. The ACCC regulates mandatory industry codes that are prescribed under the *Competition and Consumer Act 2010* (Cth) (CCA) and provides guidance to industries looking to develop their own voluntary industry codes. As a matter of general principle:<sup>2</sup>

*The ACCC encourages industry to develop codes that will deliver effective compliance with the Competition and Consumer Act 2010. Effective codes potentially deliver increased consumer protection and reduced regulatory burdens for business.*

More specifically, in the film distribution and exhibition sector the Code was launched by the ACCC on 13 August 1998<sup>3</sup> as a voluntary code and represented the outcome of an ACCC enquiry into business practices in cinema exhibition and distribution.

Disney Australia reiterates that – in its experience – the Code is still working well. Exhibitors appear comfortable raising concerns either directly with Disney Australia or within the Code’s dispute resolution framework. The annual Code Conciliator’s reports also suggest the Code is providing a valuable and effective means of resolving disputes. For example:

- The 2017 Code Conciliator Report concluded: *“The relatively low number of disputes that reach the Secretariat suggest that the parties are effectively negotiating commercial outcomes directly with one another.”*
- Prior to that, the 2016 Code Conciliator Report noted: *“As the Code Administration Committee has increasingly and successfully dealt with industry wide issues, this has led to the minimisation of disputes coming before the Secretariat or myself”.*

To the extent concerns exist, Disney Australia is willing to work with exhibitors within the existing Code framework to better understand those concerns and to improve the Code’s terms and processes. For example, certain independent exhibitors may be reluctant to utilise the Code because they have little exposure to it and do not appreciate its role and functions. Disney Australia would be happy to support a proactive engagement strategy to raise awareness of the Code, the Code Secretariat and the Code Administration Committee (FEDCAC) amongst independent exhibitors.

***Assertions regarding distributor “retribution” should be given little weight***

Assertions in ICA’s Response that exhibitors are reluctant to raise issues under the Code because distributors engage in “retribution” (i.e. vengeance or punishment) are simply not supported by the material on the public register and are not reflective of Disney Australia’s own experience in dealing with exhibitors. Accordingly, they should be given little weight by the ACCC. It is not possible for Disney Australia to address vague and unsubstantiated claims, the details of which it is unaware, but it strongly objects to any suggestion by ICA that Disney Australia and other distributors have disingenuously “feigned ignorance” of such behaviour.

<sup>2</sup> <https://www.accc.gov.au/business/industry-codes/voluntary-codes> - see also ACCC speeches and media releases endorsing the use of mandatory or voluntary industry codes in a range of industries, including agriculture, retail and supermarkets: ACCC seeks comment on voluntary code for pop-up shops (31 October 2017) <https://www.accc.gov.au/media-release/accc-seeks-comment-on-voluntary-code-for-pop-up-shops>; ACCC urges Horticulture Industry to comply with code (17 July 2017) <https://www.accc.gov.au/media-release/accc-urges-horticulture-industry-to-comply-with-code>

<sup>3</sup> <https://www.accc.gov.au/media-release/film-distribution-and-exhibition-code-of-conduct>

In relation to ICA's categories of conduct that it asserts could amount to retribution, Disney Australia notes the following:

- A distributor's decision to amend payment terms nationally for all exhibitors in the form of a minimum revenue guarantee or through a new bond are simply not realistic examples of conduct undertaken as "punishment" for an independent exhibitor raising issues under the Code.
- Disney Australia denies that it has attempted to "punish" independent exhibitors for raising issues under the Code by either threatening to withhold future titles from independent exhibitors or by subsequently imposing more onerous session or season requirements upon them.

Finally, to the extent ICA is also claiming that exhibitor concerns regarding "retribution" by Disney Australia have been raised by ICA with FEDCAC in recent years, Disney Australia confirms that it is not aware of such issues being raised.

#### ***ICA's Application – Impact on the Code***

Disney Australia has always regarded the Code and FEDCAC as an important forum in which exhibitor issues and concerns can be properly considered and addressed and reiterates its commitment to the Code and its principles. Nevertheless, any voluntary code of conduct is only as effective as the people who use it, the extent to which the processes are trusted and the extent to which parties engage with it in good faith.

ICA's submissions to date (including the ICA Response) call these matters into question by offering up proposed collective negotiation (including collective bargaining of disputes) as a way to enhance the Code's beneficial effects, while downplaying or dismissing:

- the Code's current effectiveness in addressing independent exhibitor issues and concerns;
- distributors' good faith engagement with Code processes (e.g. alleged failures to share standard terms and conditions with exhibitors and lack of engagement by FEDCAC); and
- the Code's ability to offer an efficient, cheap dispute resolution process.

Disney Australia disagrees with ICA's claims regarding the Code's alleged failures – for the reasons outlined above and in our previous submission – but notes that in the event the Application is granted it seems clear there will be a re-assessment of current Code arrangements. In a future in which ICA manages collective negotiations and information sharing on behalf of independent exhibitors who, if ICA is to be believed, apparently inherently distrust its processes, a weakening of this voluntary Code and its use as an effective framework for industry negotiations is a very real possibility. Disney Australia submits such an outcome would be a genuine detriment.

## **2. ICA Response – Specific Comments**

Disney Australia also wishes to respond to certain matters raised in the ICA Response.

### ***Film booking process & collective negotiation***

We refer to Disney Australia's original submission of 3 August 2017 (**Original Submission**) and its outline of the film booking process and the negotiation of film licence agreements with exhibitors. This continues to represent Disney Australia's approach to these matters. Against this background, we submit the following:

- The ICA Response implies that distributors systematically withhold information from independent exhibitors during the film booking process and that the Application will allow ICA to redress this apparent market power imbalance. In contrast, Disney Australia's experience is that it regularly engages with independent exhibitors in relation to almost all the key aspects of a film (including sales, marketing and operations) as part of an on-going process that starts over 2 years prior to the release date. This process is designed to help exhibitors make their own commercial decisions on whether to play particular Disney films. **CONFIDENTIAL**  
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- Certain information is rarely available to either distributors or exhibitors at the time films are booked, such as information about classification (which is determined by the Australian Classification Board) or the final length of a film. This reflects the nature of modern film-making, with film-makers now often adjusting the product until very close to the release date.<sup>4</sup> It does not reflect an imbalance in bargaining power, as implied by the ICA Response.
- To the extent that critical reviews, social media awareness or trending on a particular film represents key information when exhibitors are engaging in booking discussions with distributors, Disney Australia notes that distributors bear the not insignificant costs of film promotion, not the exhibitors. In these circumstances, distributors will naturally apply their marketing budgets so as to maximise film awareness and engagement at the appropriate time, which may well mean distributors must focus advertising for a film during its opening week. Once again, this does not reflect an imbalance in bargaining power, as implied by the ICA Response.
- The ICA Response suggests advance negotiations of season and sessions for a particular film ('policy') and the short-term planning or management of currently available films can be lengthy and time-consuming for independent exhibitors. In so doing, it outlines a range of specific factors that are taken into account and which often differ between exhibitors. Disney Australia agrees and repeats its original submission that ICA members are not homogenous and there are a number of issues on which it will remain necessary for individual exhibitors to agree 'one on one' with a distributor (e.g. bespoke marketing and promotional activity) if the Application is authorised. We refer to our Original Submission at pp. 3 and 6 for further details.

ICA seeks authorisation to conduct collective negotiation with distributors of all terms and conditions of film licensing agreements. It notes "... initially it is not proposing to routinely negotiate terms and conditions for all film supply but ... ICA may, if authorised, seek to collectively negotiate any of the terms and conditions from time to time." This process will "initially" be triggered by a simple request from an ICA member (or a distributor), but ICA also contemplates the likelihood of a collective approach becoming routine. We submit that given current film booking practices, as outlined above, such a wide-ranging authorisation is not warranted.

#### **Information exchange**

The ICA Response makes clear that, if authorised, ICA and its members intend to share all information about Disney Australia's film licensing arrangements or proposed arrangements as a matter of course. Instead of tying the information sharing to a potential collective negotiation, ICA's proposal has been recast as being for the principal purpose of transparency and determining whether a distributor's title-specific offer is "fair and reasonable".

<sup>4</sup> See clause 8.3 of the Code, which acknowledges that distributors may not be able to provide details of the running time and classification of a film prior to the booking deadline

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Disney Australia is extremely concerned at the breadth and scope of this proposal and submits it should not be approved. From a transparency perspective, Disney Australia confirms that it already includes its standard terms and conditions as part of each film booking process with all exhibitors. To the extent other distributors take a different approach, this could be addressed in more targeted ways under the Code, rather than the ACCC authorising blanket information sharing amongst ICA members.

In relation to title-specific terms and conditions, Disney Australia strongly objects to ICA's claim that "at large" information sharing is necessary to determine a distributor's offer is "fair and reasonable" under the Code.

- Firstly, as outlined above, much of the information ICA claims distributors are with-holding from exhibitors is simply not available at the time films are booked. At large information sharing will not change this state of affairs, because it does not reflect an imbalance in bargaining power in favour of distributors.
- Secondly, Disney Australia submits it is not a Code requirement that exhibitors need to compare a distributor's terms amongst themselves to ensure there is "fair and equitable" dealing under the Code. Each exhibitor not only has access to past title-specific terms from the same distributor for similar films as a point of comparison, they also have access to title-specific terms as offered by other distributors. Disney Australia also points to the language of the Code in support of its position (our emphasis) – "each distributor and each exhibitor will deal with each other on a fair and equitable basis" (clause 4.1, Code).

Finally, in relation to the operation of confidentiality provisions it is a matter of serious concern that ICA takes a dismissive approach to an issue the ACCC placed reliance on in its draft determination, including when undertaking its balancing of public benefits and detriment.<sup>5</sup> Moreover, Disney Australia makes the self-evident point that because certain information (such as session times for a particular film) may become public at a particular time, this does not automatically render that information non-confidential in the period prior to its disclosure. **CONFIDENTIAL**

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Disney Australia repeats its submission that authorisation of "at large" sharing of film licensing arrangements or proposals amongst ICA members does not meet the terms of the "net public benefit" test and should not be granted.

### **Claimed public benefits**

The broad authorisation ICA is seeking is in contrast to the more limited description in the ACCC's draft determination at [98]. In these circumstances Disney Australia remains sceptical of ICA's claimed cost savings and efficiencies and repeats its Original Submission at p.6

In relation to reduced transaction costs specifically, Disney Australia refers to ICA's claim at p.12 of the ICA Response that "*significant legal costs were incurred by ICA members attempting to negotiate a major change in custom and practice from a major studio in 2016. In all instances reported to ICA, other than the exhibitor who resorted to conciliation with our support, the studio responded to attempts to negotiate with a 'take it or leave it' approach*".

<sup>5</sup> ACCC Draft Determination (28 September 2017) at [155]; see also [125] and [151]

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***Proposed term***

Whilst Disney Australia submits the Application should not be granted in any form, it repeats its original position that the five year term proposed by the ACCC in its draft determination is too long. If authorisation is granted, a term of no longer than three years would be more appropriate for the following reasons:

- the conduct for which authorisation is sought represents a radical departure from current arrangements in Australia theatrical film distribution and exhibition and therefore should be closely monitored; and
- consumer habits, and therefore film distribution generally, are evolving rapidly with the advent and growth of digital technologies and services, which is highlighted by the Application itself.

The claims in ICA's Response that a longer period is necessary due to the authorisation timeline in this matter and the legal costs involved are not relevant considerations.

If you have any queries about this letter or would like additional information, please let me know. Disney Australia would be pleased to assist the ACCC further.

Yours sincerely

**Jo Bladen**  
General Manager – Studios, Australia & New Zealand  
The Walt Disney Company (Australia) Pty Limited