

**INDEPENDENT CINEMAS AUSTRALIA INC  
APPLICATION FOR AUTHORISATION A91587**

**OPENING STATEMENT FOR PRE-DECISION CONFERENCE ON 8 NOVEMBER 2017  
UNIVERSAL PICTURES INTERNATIONAL AUSTRALASIA PTY LTD**

1. This written statement is provided on behalf of Universal Pictures International Australasia Pty Ltd (**UPI**) in relation to the application to the Australian Competition & Consumer Commission (**ACCC**) by Independent Cinemas Australia Inc. (**ICA**) under the *Competition and Consumer Act 2010* (**CCA**) for authorisation to share information and collectively bargain with film distributors.
2. Authorisation may only be granted by the ACCC under the CCA where there are public benefits that outweigh the anti-competitive detriment of the proposed activities. We do not believe that, in this case, any compelling evidence has been provided by ICA that suggests the public benefits from the proposed conduct the subject of the authorisation application, outweigh the potential for anti-competitive detriment.
3. We turn first to look at the potential for anti-competitive detriment. In its media release for the draft decision, the ACCC stated that cost reductions and improved terms from collective bargaining may help the viability of small cinemas. This implicitly assumes that all ICA members are “small” and currently do not have bargaining power in their negotiations with distributors. This is not correct. The ACCC was provided with extensive evidence of this in submissions from many distributors. UPI does not believe that the ACCC has given sufficient consideration to that evidence. If any further evidence of this is required, this may be seen by, for example, the fact that UPI's film hire rates have been largely unchanged for 10 years despite our investment in marketing increasing substantially. This would not have occurred if UPI has any significant bargaining power in negotiations with exhibitors.
4. There is a clear need for the ACCC to undertake a more thorough investigation of what is being proposed by ICA. This will allow the ACCC to understand the realities of the negotiating balance between distributors and cinema operators. Importantly, it is the distributors who bear the risk of producing movie content and have a commercial interest in ensuring that exhibitors screen their product in a modern and welcoming environment that appeals to modern consumers. To do otherwise has the potential to create negative outcomes for consumers (with consequential negative outcomes for both distributors and exhibitors). We appreciate that in dealings between commercial parties there needs to be an appropriate balance and we believe, for the reasons that we will address shortly, there is such a balance in this industry.
5. However, the more egregious anti-competitive detriment from the proposed conduct arises from the proposal that ICA members be able to share information. Our concerns with this are not addressed by the technical suggestions that engaging with ICA will be on a voluntary basis and that there will not be any boycott activity by ICA members. UPI notes that independent exhibitors are not a homogenous group of entities that each simply operate a small number of cinemas. As such there is no compelling reason in terms of bargaining power why the exhibitors should be provided with information of the different terms made available by different distributors to different cinemas. To take a specific example, a key member of the ICA is the Dendy Icon group, a vertically integrated distributor and film

exhibitor. It is very difficult to understand the ACCC's reasoning in authorising information from other film distributors to be shared with the Dendy Icon group. To allow this to occur could have significant anti-competitive outcomes to the detriment of other distributors as well as other exhibitors. We note that the Dendy Icon Group appears to be the only party that has lodged a submission supporting the ICA application. The ACCC's emphasis in its draft decision that concerns about information sharing may be addressed by confidentiality undertakings is not compelling and does not recognise commercial constraints. As with any confidentiality undertaking, it is difficult for the provider of the confidential information to determine when a breach has occurred. It is even more difficult for satisfactory remedies to be obtained (even assuming that distributors were willing to take any matter to court). Added to this, often a breach is not discovered until the provider of the confidential information has suffered serious harm.

6. There is no evidence to support a finding that exhibitors are currently not able to negotiate favourable contractual arrangements without the benefit of collective bargaining. In other words, there is no evidence that there would be any benefits arising from granting the authorisation. We negotiate individually with each exhibitor and seek to make our negotiations straightforward, reasonable and practical. Having reviewed the submissions of the other distributors to the ACCC, we have no reason to believe they adopt a different approach in their negotiations. Also, as has been pointed out in many of the submissions to the ACCC, the suggestion that improved contractual arrangements from the perspective of exhibitors could be put in place if the authorisation was granted, also ignores the role of the voluntary Code of Conduct for Film Distribution and Exhibition (**Code of Conduct**). That Code of Conduct works well in Australia and it appropriately balances the interests of both distributors and exhibitors. Any issues between distributors and exhibitors are readily capable of resolution under the Code. We have not seen in the material from ICA any evidence of complaints by its members in relation to the contractual arrangements with either ourselves or other distributors that could not have been resolved under the Code of Conduct. In fact, the ICA has not provided any evidence from any of its members that suggests the Code is not working well. We also note:

- ICA claims that costs of conciliation are onerous is without foundation -there are no such costs for making an application other than hourly rates for conciliators attendance if disputes reach that level.
- ICA claims that cinemas do not wish to use the Code due to fear of retaliation is not supported by any evidence. Our inquiries with the Film Exhibition and Distribution Code Administration Committee (**FEDAC**) suggest that such an assertion is also not supported by evidence. Since 1998, there have been 220 disputes. Only ten (5%) of these have gone to conciliation and in fact none have gone to conciliation since 2006. 78% (171) have been resolved prior to conciliation by the Secretariat and/or the relevant parties. The remainder were either more of a query than a dispute or where the aggrieved party decided not to pursue the matter further.

UPI accordingly believes that the ACCC should be reticent to accept ICA's propositions in relation to the Code and should be mindful that the proposed application does not undermine the Code, which is considered by the industry to be working well. UPI would encourage the

ACCC to engage with FEDAC to discuss the matters put to them by the ICA as to the operation of the Code.

7. To summarise the above, based on the ACCC's media release and the draft ACCC decision, it appears that the ACCC has determined there is an existing market failure arising from an imbalance of bargaining power, exacerbated by changing technology and consumer preferences, which has resulted in diminishing cinema audiences, that may somehow be addressed by granting this authorisation. Having regard to the submissions that have been made in this matter, and the operation of the Code and its processes, we respectfully submit that there is no evidence to support this view that is put forward in the draft determination.
8. Our aim, as we believe is the aim of other distributors and exhibitors, remains to ensure that the public exhibition of films is an enjoyable experience in modern, hospitable and inviting locations that meet the expectations of modern consumers. Achieving that aim will not be assisted by the grant of the proposed authorisation.

This opening statement is from Mike Beard the Managing Director of UPI and is provided on behalf of UPI. Mike is however overseas at the moment and therefore provides an apology that he will be unable to attend the pre-decision conference. Instead David Collins will be attending the conference.