

For Public Register

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Mr Darrell Channing
Director
Adjudication Branch
Australian Competition & Consumer
Commission
23 Marcus Clarke Street
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19 December 2017

Attn: Mr Simon Bell

By email

Dear Mr Channing

**RE: INDEPENDENT CINEMAS AUSTRALIA INC. - APPLICATION FOR
AUTHORISATION A91587**

1. Introduction

As the Australian Competition and Consumer Commission (**ACCC**) is aware, we act for Universal Pictures International Australasia Pty Ltd (**UPI**) in this matter. Our client has reviewed the submission by Independent Cinemas Australia Inc. (**ICA**) dated 1 December 2017 in relation to ICA's application for authorisation dated 8 June 2017 (**Application**). UPI wishes to make a short submission on several matters raised by this latest submission from ICA.

2. ICA's submissions as to industry interaction

UPI notes that most of the commentary as to the practical manner in which distribution arrangements are negotiated and the practical operation of booking films as contained in the ICA submission, is highly contentious and is not accepted by UPI.

Further to UPI's submission at the pre-decision conference on 8 November 2017, it is important to recognise the following:

- UPI invests in the production budget of a film with no guarantee or commitment requested from exhibitors that they will play the film. By way of example, a

Blockbuster film can cost well in excess of US\$200 million to produce and many general release films cost from US\$30 million to US\$100 million.

- Once production is completed, UPI undertakes the marketing, publicity, promotion and advertising (generally considered the distribution of the film) of a film around the world. In a market such as Australia this can exceed a \$4 million investment. UPI does not request any exhibitor to underwrite or contribute towards this investment up front. UPI believes that the terms and session policy it requests per film is indicative of its risk and reflective of the share of the box office it requires to obtain a return on the production and distribution costs of a film.
- Further, at this point of bringing a film to market, in order to exhibit the film the exhibitor typically requires an exclusive 90 day period when they and they alone may exhibit the film to the consumer. This is regardless of whether the film remains in cinemas for the full duration of the 90 days or is removed by the exhibitor from their screens earlier than this date. UPI notes that on average, films run 28 days in cinemas.

These three examples are provided to illustrate the various commercial risks which the distributor assumes in the commercial arrangement with exhibitors.

Distributors undertake these risks as part of the overall understanding that exhibitors also take on commercial risk in operating cinemas. This relationship has existed for mutual benefit over the past 100 plus years. UPI are of the view that 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 exclusive rights to present a film to consumers.

We further point out that each distributor has a substantial commercial self-interest and incentive to see films distributed as widely as possible and on terms and conditions that are reasonable and simple in order to achieve this objective. This approach is required given that there are multiple distributors competing for consumers to view their films. Those consumers have a range of media on which to do so and have alternative forms of content they may wish to watch, so it is very important that films provide an exhibition experience that meets consumer expectations both as to content and the theatre itself.

In this context, the Code of Conduct for Film Distribution and Exhibition 2013 (**Code**) strikes an appropriate balance as to the interests of distributors and exhibitors in how films are provided to the public. The Code is available to resolve disputes, whether raised by exhibitors or distributors. We understand the ACCC is fully aware of the

terms of the Code. We and others have commented extensively on it in earlier submissions.

There is a significant danger in the ACCC accepting the positions that are being raised by the ICA in its submission. The ICA has adopted, in its submission, the positions largely put by one party at the pre-decision conference as to alleged inadequacies in the Code. It is understood that that party's business is not consistent with the membership requirements of ICA and accordingly it would never benefit from the proposed arrangements put forward by ICA. On that basis, it is difficult to see how the arguments of that party could be accepted. Those arguments should not be given any weight.

UPI also wishes to share the following with the ACCC to provide some additional factual context to ICA's representations as to the use of minimum guarantees:-

- In 2017 UPI has released 15 titles that play on average at [REDACTED – confidentiality claimed] first run locations per release.
- In 2017, first-run locations accounted for approximately [REDACTED]% – confidentiality claimed] of UPI's 2017 gross box office.
- In 2017, sub-run locations (ie where the film plays after initial release), accounted for approximately [REDACTED]% – confidentiality claimed] of UPI's 2017 gross box office.
- In 2017, minimum guarantees (\$[REDACTED] – confidentiality claimed] were sought for [REDACTED – confidentiality claimed] bookings of sub-runs with the minimum guarantee sought to cover the costs of supply.

Mention was made by ICA in its submission as to minimum guarantees and the difficulty involved in their negotiation. This suggested these are significant and impose substantial detriments to ICA members. From UPI's perspective, its minimum guarantee is generally in the order of \$[REDACTED – confidentiality claimed] plus GST for sub-runs of its films. This guarantee amount barely covers UPI's licence fees for such film screenings. First run bookings account for approximately [REDACTED]% – confidentiality claimed] of UPI's box office in 2017. In 2017 sub runs have occurred at [REDACTED – confidentiality claimed] locations for ICA members. As with any other exhibitor of sub-runs, the guarantee is for one week only and is deducted from any amounts paid by the exhibitor for the particular film. In 2017, the amount paid to UPI in relation to sub-run guarantees overall totalled approximately \$[REDACTED – confidentiality claimed]. Accordingly, in context, it is very clear that these minimum guarantees are not significant. This is but one example of the differing perspective that distributors may

take of the arguments advanced by ICA having regard to the overall size and nature of the industry.

UPI does not wish to deal with ICA's various assertions as to the operation of the film distribution industry in this response, but ICA's submission highlights the difference in perspectives between distributors and exhibitors as to the screening of distributors' products and it also ignores the extent of competition that arises between distributors to seek to ensure their product is exhibited. This makes it clear that "one size" does not "fit all" in the negotiation of a film's exhibition which occurs on a case by case basis for each film for each distributor.

3. Code of Conduct

UPI notes that it and other major distributors acknowledged at the pre-decision conference that they will take on board genuine issues and concerns by exhibitors as to the operation of the Code. There are established processes in the Code to allow for this to occur.

For the reasons raised by distributors at the pre-decision conference, UPI believes that there is a significant risk that the conduct set out in UPI's submission that is sought to be authorised 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.

UPI submits that, given the real and present risks arising from the matters set out by ICA in its latest submission, that all signatories should seek to review the Code. That course will lead to a better counterfactual and outcome for the industry and consumers overall, than the proposed authorisation of the conduct put forward by ICA.

As an initial step, it would be helpful if the ICA reported to its members what occurs at Code Committee meetings. This would allow its members to see the genuine efforts made to reconcile and address positions between exhibitors and distributors to the benefit of the industry and consumers in general.

4. Collective Negotiations

On page 8 of ICA's submission it expressly states the very broad nature of the collective bargaining that ICA proposes to be able to be authorised to undertake.

No analysis has been put forward by ICA as to the benefits and detriments of that level of negotiation across the diverse nature of its members and the number and diverse

nature of distributors and the films they seek to distribute. We do not believe that, in the time the ACCC has provided to respond to ICA's latest submission, that it is possible to respond to the breadth of what is now being put forward by ICA. ICA should have put forward evidence to substantiate the benefits it claims from such a broad negotiating right compared to the anti-competitive detriments.

UPI also notes that there is a considerable degree of confusion in the ICA submission as to negotiation of terms of "collective dispute resolution". Any authorisation of the conduct proposed by ICA could not establish a process to allow dispute resolution. The authorisation also would not operate consistently with the framework of the Code. There is a great risk of creating false expectations that the ICA authorisation provides any process that would apply in a similar manner as to the dispute resolution processes in the Code.

5. Information Exchange

ICA states at page 7 of its submission:

"Not all distributor agreements contain confidentiality provisions and ICA submits that if confidentiality provisions were now introduced it would be with a view to defeat the intention of the authorisation (if granted). This would be a matter of serious concern. Such conduct would have the effect of undermining the Code by obstructing the parties' capacity to judge whether other parties were abiding by the requirement to offer fair and equitable terms and conditions and to negotiate flexible dealings with each other."

UPI has a straight forward confidentiality clause in its terms and conditions. UPI notes that such confidentiality provisions protect the legitimate rights of distributors as to their intellectual property, pricing and strategic intentions, including in situations where they are competing with other distributors for screening times, including vertically integrated operators such as Icon Films. Accordingly, UPI strongly disputes the position put forward by ICA, as did AIDA. Confidentiality provisions clearly operate within the existing framework of the Code and do not undermine it as the above statement from ICA argues.

ICA's submissions as to distributors having confidentiality provisions in their agreements highlights the practical problem that any authorisation of ICA's proposed conduct is likely to create. ICA members may seek to share confidential information irrespective of their entitlement to do so, purportedly under the auspices of the ACCC

authorisation on the basis that "confidentiality provisions" would "defeat the intention of the authorisation (if granted)".

Having regard to the clear practical issues that arise from ICA's proposed conduct, UPI believes that it should be made very clear in any authorisation, should the ACCC consider granting one (notwithstanding the significant concerns that have been raised), that no distributor's information should be shared unless and until the express consent of that distributor is obtained in advance, in writing. It should also be clear that any distributor may opt out of collective bargaining at their absolute discretion at any stage of the negotiating process.

6. Conclusion

UPI wishes to constructively and genuinely deal with any real issues that are raised by ICA. UPI is willing (as it believes that other distributors would be as well), to seek to address these issues within the existing framework of the Code.

UPI believes that in the absence of specific examples by ICA of public benefits rather than arguments (which arguments are viewed as contentious by UPI and which are challenged), there is a significant danger that ICA's proposed conduct will significantly undermine the Code, creating considerable detriment for Australian consumers.

Yours sincerely



Dave Poddar
Partner