

DECEMBER 1, 2017

ICA RESPONSE TO SUBMISSIONS MADE AT THE ACCC PRE-DECISION CONFERENCE ON NOVEMBER 8 2017 BY INTERESTED PARTIES ON INDEPENDENT CINEMA AUSTRALIA'S APPLICATION FOR AUTHORISATION

ICA thanks the ACCC for the opportunity to attend and observe the pre-decision conference held in Sydney on November 8th, 2017 and for your letter of 17 November 2017.

In our view, no material new points were raised by the distributors at conference than had already been raised in submissions prior to the ACCC's draft determination.

We consider that our previous application, supplementary submissions and confidential examples address the majority of points raised by interested parties. In particular the specific open and also confidential examples previously supplied to the ACCC refute the allegations from some distributors that our submission is based 'on unsubstantiated assertion' or are 'simply untrue'. They also outline how we consider the proposed authorisation will work to enhance and not undermine the effectiveness of the Film Industry Code of Conduct and the willingness of independent exhibitors to raise concerns under that framework. We do not propose to restate those examples but would be happy to discuss and expand on any aspect with the Commissioners should that be requested.

Additional information from exhibitors

ICA understands that some individual exhibitors may approach the ACCC in response to the summary of comments made at the pre-decision conference:

- to outline their experience of negotiating with distributors in Australia;
- to describe why ICA's application would be of benefit to them; and
- to provide supporting examples.

ICA understands they will do so reluctantly, fearing retribution by at least some of the distributors.

Despite distributors' assertions to the contrary, most exhibitors fear the displeasure of their distributor partners for reasons including those clearly outlined by Mr Gardiner to Commissioner Court. Many exhibitors comment to ICA that retribution is rarely something as easy to see and to prove as a naked refusal to supply. Small exhibitors are essentially at the mercy of the distributors and distinguishing between a distributor's arbitrary conduct and retribution is very difficult. Very few exhibitors are prepared to expose themselves to that risk.

The conduct of a distributor, which could be engaged in as retribution and can materially adversely affect an exhibitor's business, includes:

- Delay by the distributor in supply from release date to sub-run;
- A refusal by the distributor to accept an exhibitor's sub-run offer for a title and insisting on first release;
- Conduct implying that, if the exhibitor does not take this title, they won't be offered another future title;

- The imposition of more onerous session and season requirements for a title, than the exhibitor usually receives or can sustain at the time;
- Increase in the quantum of minimum revenue guarantee required for a title; or
- introduction of a guarantee or bond when these had not previously been required.

ICA considers it disingenuous of distributors attending the pre-decision conference to feign ignorance of such behaviour by members of their respective sales teams from time to time. ICA considers similarly disingenuous the suggestion that concerns about fear of retribution have never previously been raised by ICA or its members in the context of the effectiveness of the Code of Conduct in dealing with disputes.

Clarification of terminology

Some distributors asserted that the proposed authorised conduct was unclear and/or that the draft determination was inconsistent concerning the description of the proposed authorised conduct.

ICA considers that some distributors are intentionally trying to obfuscate this issue. However, confusion may arise from colloquial use of certain terminology in the film exhibition industry. To minimise confusion, ICA sets out below its understanding of the nature and content of film licensing agreements.

ICA also sets out below descriptions of the film booking process and the role of film bookers.

Terms and conditions of film licensing agreements

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.

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:

- standard terms and conditions or terms of trade, - these apply to all licences (referred to in this submission as "**Standard terms and conditions**"); and
- the specific terms and conditions or booking confirmation applying to an individual film title (referred to in this submission as "**Title-Specific terms and conditions**").

'Standard terms and conditions' include such matters as:

- 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

Some Standard terms and conditions may also include a standard schedule of payment tiers commonly known as a 'performance deal' based on box office achieved by each title. A performance deal is commonly set and then applied by the distributor to all titles until amended. It states the box office percentage share payable by the exhibitor to the

distributor per week of the season (e.g. 55/50/45 etc.) based on the actual gross box office generated by the film in Australia (e.g. 0 – 5 million; 5-10 million; 10-20 million etc.). The 'performance deal' applies to each film title licensed by that distributor.

The Title-Specific terms and conditions for a film include the terms, policy, supply date, and applicable minimum guarantee or marketing provisions (if any)

- **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** - The word 'policy' is often used to denote the obligations of the exhibitor with respect to season and sessions for a particular film. The "policy" for a particular film is part of the Title-Specific terms and conditions for that film.

The experience of ICA members is that distributors may be more willing to negotiate 'policy' than 'terms'. Nonetheless, some distributors adopt, either generally or for some films, a "take it or leave it" approach to both the terms and the policy.

In summary and for the avoidance of doubt, in this submission references to the 'terms and conditions' of film licensing agreements encompass all the provisions of a film licence agreement whether Standard or Title-Specific unless otherwise stated.

Film Booking Process

Another area of complexity and potential for confusion is the process by which an exhibitor (or a film booker) "books" each title to be exhibited by that exhibitor. The film booking process is an important part of the context within which the supply of film licences and negotiation of terms and conditions of film licence agreements take place.

The process of booking films is often complex, balancing numerous considerations but can, in general, be condensed into two broad categories: Long term planning and short term planning.

Long term planning involves an exhibitor securing film licence agreements with a film distributor, usually focused on the release date and 'policy', as the price is rarely negotiable. As outlined above, 'policy' refers to the exhibitor's obligation to screen a film title for a number of weeks and for a specified number of (usually daily) sessions in each given week.

An exhibitor must generally commit to a film policy 4-6 weeks ahead of the Australian release date. This is despite the fact that key information is generally not available to the exhibitor at the time of booking. The exhibitor may, in evaluating a film offered by a distributor, have regard to:

- trailers or scene selections and other information provided by the film distributor;
- social media awareness and trending on the film;
- comparisons of the upcoming film with comparable historical titles to determine potential box office and audience appeal;
- information about the classification (G, PG, M etc.) and length of a film.

The reality is that, at the time of booking key information is frequently not available. Distributors rarely have or make available information about the classification and length of a film prior to requiring an exhibitor to commit to book the title. Advertising for titles also

frequently is directed by distributors to the opening week of release and hence it is only then that awareness of a film may increase considerably.

In the long-term planning process for booking a film the exhibitor generally considers the potential national box office of a film, the anticipated local appeal and box office for the film and the cinema audience at the specific cinema. Along with this, other films in the market place at the time are considered and the exhibitor's existing policy obligations in respect of those films are considered when the exhibitor is negotiating the policy for a new film.

Unfortunately, when several films are released on the same date or in a busy corridor - (generally school holiday periods) - the process of negotiating film policy can become lengthy and very often even more time consuming. This is exacerbated by distributors and cinema owners/film bookers viewing the film booking process from two very different and distinct perspectives.

Each distributor is driven to secure the maximum number of sessions (maximising its market share as against other films represented by other distributors), whilst an exhibitor needs to secure as many films on a given release date (and continuing to screen films already committed to) with the purpose to offer the **consumer maximum choice in film offerings**.

The latter is particularly important for regional and country exhibitors where, unlike city areas, another cinema screening the film is not within easy travel time of the consumer. A regional consumer seeks a diverse range of offerings at the cinema, as this is often the only entertainment option for viewing new release films legitimately. The rates of piracy in regional areas are anecdotally higher than city and metro areas.

Cinemas in regional areas also have fewer screens (than many city complexes) to accommodate titles in release, hence the negotiation of a film policy can be prolonged and is particularly challenging when policy is regarded by a distributor as not negotiable for 'must have' titles.

Short term planning involves programming weekly session grids by the number of cinema houses/theatres at a cinema site, and constructing session times in each cinema having regard to the licensed film policy but with the aim to provide a range & choice of films to the movie going audience and to maximise box office takings. Short term planning and setting of weekly session times occurs every Monday for the coming Thursday to Wednesday cinema play week, and can involve renegotiating already agreed session policy.

In this process the exhibitor considers contractual licence obligations committed to in the long-term planning process, the current box office of the film (if the content is in release) or the box office potential of a film (if it is opening in that given week). Session times are spread across the day and each timeslot is considered given the potential audience of the film (ie am sessions are often dedicated to family films, later evening sessions often dedicated to M or MA titles.).

For an exhibitor who has the knowledge and capacity to do so, sessions are negotiated (or at least discussed) with distributors on a weekly basis and with regard to business and box office takings for films in release. However, this weekly process can be cumbersome for the exhibitor. The differing objectives of a distributor and the exhibitor can lead to frustration. Distributors wish to maintain market share and minimise what the industry calls 'the weekly drop off' for their title (often referred to in % box office lost from the previous week). On the other hand an exhibitor, in seeking to offer the consumer a range of choice, maximise

overall revenue against costs, and also to screen the new must-see film, is attempting to set sessions for maximum overall box office and consumer choice at their cinema site.

Film Bookers

A 'film booker' acts as an agent paid by an exhibitor to negotiate with distributors to acquire titles for exhibition at the exhibitor's cinema. A film booker usually acts for a number of separately owned sites at the same time and negotiates with a distributor for film licence agreements for all or some of the sites depending on the suitability of the title for each site. The booker usually determines which titles to request for each site but the exhibitor (ie cinema owner) may also request a specific title or retain space in their program from time to time to run their own selection of alternate content or local events.

Film bookers negotiate for each cinema considering the number of screens, the audience and demographic of the cinema site. Whilst for example most single screens, twin cinemas or triple cinema complexes frequently take the same films at the available release date, there is no 'one size fits all', and each cinema has local considerations such as opening hours, demographics etc.

Due to the varying characteristics of each cinema a film booker and distributor may agree different Title-Specific terms and conditions for different sites within the booker's responsibility. Each cinema has its own film licence agreements with a distributor, provides the distributor their box office receipts and pay their own invoices.

Film bookers negotiate the Title-Specific terms and conditions of the film licence agreements and consult on sessions and other terms and conditions with the exhibitor and the distributor. It is then the responsibility of the site to play the title in accordance with the program and the agreed film licence agreements which the booker informs them of each week. Sessions times and weekly programs for each week are constructed in consultation with the cinema and the booker. The distributors often insist on being advised of session times and frequently seek to exercise the right of approval over session times. Any change to contracts or agreed film policy is negotiated by the film booker with relevant distributors.

1. Information Exchange

1.1 Please specify in as much detail as possible the terms ICA and its members intend to share and explain in what circumstances the terms will be shared...Please comment on whether any of this information is the subject of confidentiality agreements between distributors and exhibitors.

If authorised, ICA and its members intend to share information about the terms and conditions or proposed terms and conditions of film licensing arrangements.

The purposes of the information sharing include:

- Ensuring that ICA members are aware of each distributor's Standard terms and conditions and changes and proposed changes to them;
- Assisting ICA and its members to transparently assess whether particular Title-Specific terms and/or conditions offered to particular ICA members are fair and reasonable.

The need for transparency concerning Standard terms and conditions is the result of the poor disclosure, by some distributors, of their current Standard terms and conditions to all exhibitors. The disclosure of distributors' Standard terms and conditions to exhibitors varies significantly. Some distributors supply their Standard terms and conditions once to an exhibitor on first licensing a film but do not update them to reflect changes made. Other distributors provide their Standard terms and conditions more frequently. Others do not supply them at all.

This systemic lack of transparency and the volume of materials involved is reflected in the fact that as a member of the sub-committee of FEDCAC charged with clarifying the 'Terms of Trade' and the 'Terms of Trade Policies and Guidelines' on offer from each distributor, ICA has not been able to conclusively investigate and make final recommendations to the Committee on how to improve understanding of and compliance with the Code.

The submissions made by some distributors suggest that they appear to consider that it is not in their interests to clarify, simplify, materially negotiate or improve access to their Standard or Title-Specific terms and conditions for exhibitors.

As stated by Mr Gardiner, not disputed by the representatives of the distributors and confirmed at meetings of FEDCAC, independent exhibitors are routinely not given copies of the Standard terms and conditions applying to film licence agreements by some distributors. In addition, as ICA expects would be reflected in the FEDCAC minutes, the previous conciliator, the late David Newton, expressed the view that some of the Standard terms and conditions lodged with the FEDCAC secretariat did not meet the minimum standards of the Code.

Whether or not a distributor's current Standard terms and conditions have been disclosed to an exhibitor, they become part of each new contract, which arises from the specific booking confirmation from a distributor for a new title licensed by that distributor to the exhibitor for screening at their cinema. Accordingly, if the current Standard terms and conditions of a distributor have not been adequately disclosed or made known to exhibitors, authorised information sharing will materially assist in rectifying this information asymmetry.

In relation to Title-Specific terms and conditions, the information likely to be disclosed will assist ICA and its members to assess whether the terms and conditions offered to particular ICA members are fair and reasonable. .

As evidenced in examples already provided to the ACCC, independent exhibitors are routinely not given all the proposed Title-specific terms and conditions prior to being required by the distributor to commit to book titles for their cinemas and/or in adequate time to negotiate those Title-Specific terms and conditions or seek to replace the title with an alternate film.

ICA has also provided examples where distributors did not confirm all the terms and conditions for a specific title until after that title has finished screening at the cinema.

ICA members repeatedly state that, without knowing what other comparable independent exhibitors are offered by a distributor, they are unable to assess prior to booking whether that offer is fair and equitable, or whether a complaint under the Code is warranted.

It has been asserted by distributors that confidentiality obligations will prevent information sharing and render authorisation nugatory. ICA submits that such assertions should not be a basis to deny authorisation.

The reality is that some Title-Specific terms and conditions, such as the policy applicable to a particular title, become common knowledge once the session times for that title are advertised by exhibitors. In other words, the policy is not inherently or enduringly confidential but some distributors seek to use confidentiality to keep small exhibitors at a bargaining disadvantage at the crucial time of negotiation.

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.

To the extent that confidentiality provisions prevent a properly informed assessment of the fairness and reasonableness of any of the terms or conditions of any particular distributor, then ICA will seek to negotiate, on behalf of its members, amendments to the confidentiality provisions so as to permit ICA and its members to share that information. This is because ICA and its members consider the capacity to assess whether terms and conditions offered are fair and equitable is a fundamental requirement of the Code for all signatories.

It is also relevant to an informed assessment of the extent to which a distributor's terms and conditions contain unfair contract terms.

Information sharing would also ensure that disputes could be more effectively addressed by the Code as distributors would transparently state the criteria for offering particular terms and/or conditions and exhibitors (and their advisors including ICA) could fairly judge whether or not that decision should be sensibly challenged.

The need for information sharing concerning a film licence agreement is likely to become apparent when an exhibitor raises a concern with ICA directly, or with another ICA member, about a particular provision of a distributor's terms and conditions.

The exhibitor may be seeking to better understand the meaning of that provision, its impact on their business, and/or whether the provision has been required of other like exhibitors.

Similarly information could be shared concerning particular offers by a distributor of marketing support or exclusive screening opportunities for titles. Such offers would not be expected to apply equally to all sites but the discrimination between exhibitors should be reasonably capable of justification by the distributor who has made the offer in their discretion under the Code.

Impact on AIDA members:

In contrast to the view expressed in the AIDA submission that information sharing would result in irreversible damage to independent distributors, the submission made by Icon Films made clear that variations in terms and conditions offered to cinemas deserving of different terms and conditions was an understood principle of distribution under the Code and that transparent information sharing would not damage that principle.

Icon's view was that information sharing, in effect requiring distributors and exhibitors to justify how and why their offers differed, would result in more equity between like sites and would also encourage better performance (in local area marketing etc.) from lesser performing exhibitors keen to merit equivalent offers from distributors.

2. Collective Negotiation:

Proposed Conduct:

At 2.1 the ACCC asks 'Exactly what terms and conditions and booking terms and policy are intended to be negotiated collectively?'

ICA confirms that the conduct for which ICA and its members have requested authorisation is set out in the draft determination but could be more clearly stated as amended below:

"... to make and give effect to contracts, arrangements or understandings pursuant to which they may participate in:

- information exchange concerning the terms **and conditions**, or proposed terms **and conditions**, of film licensing agreements, and/or*
- 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 terms and conditions 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, and/or*
- collective negotiation on behalf of ICA member exhibitors of terms and conditions of film licensing agreements applying to specific titles from time to time if requested by a member or group of members.*

Participation in collective bargaining is voluntary for exhibitors and distributors.

ICA has not applied for authorisation to engage in collective boycott conduct."

The draft determination contains the following observation in section 98. Some interested parties consider this inconsistent with the conduct described above:

98. While some exhibitors raise concerns that the proposed conduct would be inefficient as it would introduce another layer of bureaucracy in the process, the ACCC understands that ICA is not proposing to negotiate the standard terms and conditions for film supply or the initial season, sessions and film rental fee. ICA acknowledges that these arrangements are determined by distributors. However, ICA does wish to collectively negotiate with distributors on behalf of exhibitors, or a subset of exhibitors, on certain common issues such as where there are material changes in terms and conditions for a particular film.

ICA agrees that this statement is not consistent with the conduct described above.

ICA has stated that, initially it is not proposing to routinely negotiate the terms and conditions for all film supply but, for the avoidance of doubt ICA 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).

It is not possible or reasonable to comprehensively identify or delimit the requested authorisation without knowing what terms and conditions distributors may seek to change, or

which ones are considered not to be fair and reasonable on examination however, without limitation, we provide the following examples:

Negotiation concerning the policy for a particular film: if the policy for a particular film offered to exhibitors would oblige them to screen 4 or recently even 5 sessions of that film per day, small regional exhibitors with twin screen cinemas, for example, may find such a policy patently unreasonable and request that ICA propose a collective negotiation with the distributor on their behalf.

Negotiation concerning a provision of a particular distributor's Standard terms and conditions that applies to all films licensed by that distributor. For example, ICA members may wish to collectively negotiate the performance deal offered by a distributor. Different performance deals could be collectively negotiated for different classes of cinemas such as those in regions where no advertising support is provided by the distributor for their films.

The suggestion that collective negotiation in circumstances such as the above and allegations of an expected increase in 'bureaucracy' seems to suggest that distributors are not presently offering or negotiating tailored policies or payment tiers with the vast majority of independent exhibitors and would not consider it a benefit to be requested to do so.

The assertions of a possible increase in bureaucracy, revealingly, have no regard to the circumstances of the independent exhibitors. It has apparently not occurred to the distributors to consider this through the eyes of the exhibitors. Negotiation of the policy and other Title-specific terms and conditions of each film licence is time consuming, arduous (because the starting point of the offers of many distributors are manifestly inappropriate for many independent cinemas) and complex for a proprietor of an independent cinema. What the distributors, many of which have substantial and well-resourced sales teams, may view as "bureaucracy" would, in fact, be a major increase in efficiency for many independent cinema proprietors and, although they will not admit it, also for the distributors.

ICA expects that it will, from time to time, seek to collectively negotiate terms and conditions like those outlined above intended to simplify the film booking process and establish fairer practices for our members.

At 2.2 the ACCC asks 'How ICA sees collective negotiation operating in practice:

2.2.1 In what circumstances will ICA and its members engage in collective bargaining?

ICA will engage in collective bargaining with agreement of its Executive when

- a. requested to do so by members, and/or
- b. when requested to do so by a distributor.

In practice the ICA CEO will respond to such a request by informing the membership by email of the issue to be negotiated, seeking members to opt out by notifying the CEO in writing, and then approach the distributor with a request to engage in collective negotiation with ICA on behalf of the specified members.

ICA will conduct the negotiation through a nominee confirmed by the Board on behalf of members who will be contractually bound to abide by the terms and conditions of the agreement reached with the distributor.

2.2.2 Will it be engaged in routinely or only in cases where ICA members have concerns?

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.

2.2.3 Will it involve small groups in some instances and all ICA members in others?

Yes it is possible that either a small group or all ICA members could participate in a collective negotiation. This will depend very much on the issues to be negotiated.

2.3 To what extent does the Code of Conduct for Film Distribution and Exhibition (the Code) already deliver the benefits that collective bargaining is intended to deliver?

The Code is intended to provide an agreed framework for how exhibitors and distributors should ensure fair and equitable conduct of business and assist resolve disputes between exhibitors and distributors. It purports to require distributors to negotiate film licence agreements and to conduct fair and transparent dealings with exhibitors however it does not deliver that outcome in all instances. For detail see section 4 of ICA Submission dated 30 August 2017.

In particular:

- Some distributors who are signatories of the Code are not presently complying with its terms e.g. As stated by Mr Gardiner at the hearing distributors have failed to provide him with their Standard terms and conditions even when requested.
- ICA members report to ICA that distributors regularly fail to provide the basic information required under the Code to enable exhibitors to negotiate Title-Specific terms and conditions ahead of committing to book a film at their cinema including but not limited to the classification (G, PG, M etc), running time, price, session and season requirements.

ICA representatives on FEDCAC have raised these issues at Committee meetings with no resulting change in behaviour.

The Code does not cover the collective bargaining or information sharing for which ICA has sought ACCC authorisation and ICA has requested Code amendments in the event authorisation is granted.

The conduct for which authorisation is sought is intended to supplement the Code. It will, among other things, assist ICA and its members, the independent exhibitors, to understand new developments and collectively resolve issues that impact many of our members' cinema businesses. This in turn will help facilitate more sustainable independent cinema businesses and the availability of more diverse and affordable cinema services for the community.

Collective bargaining of a dispute under the Code will enable more timely, efficient, effective and cost effective resolutions for both exhibitors and the distributor affected by the dispute. It will enable those exhibitors who are presently unwilling to raise a dispute under the Code due to time and resource constraints or for fear of reprisal, to do so in company of other similarly affected exhibitors.

These benefits are not currently being delivered by the Code.

2.4 The extent to which collective bargaining is likely to result in detriment by undoing the beneficial effects of the Code.

ICA is very supportive of the Code Committee, Secretariat and Conciliator and sees no circumstances where the beneficial effects of the Code will be undermined by the requested authorisation or requested amendments to the Code itself.

ICA believes the capacity to collectively negotiate is more likely to enhance the beneficial effects of the Code. In particular it will:

- assist members efficiently approach individual distributors to encourage more compliance with the framework for negotiation established by the Code and routinely omitted by some distributors.
- Give confidence to some independent exhibitors presently too afraid of intimidation to bring a sole complaint under the Code.

Summary:

In summary, ICA confirms that it will seek, on behalf of its members to collectively negotiate the terms and conditions of film licensing agreements including both Standard terms and conditions and Title-Specific terms and conditions.

Examples of Standard terms and conditions which might be collectively negotiated include:

- Length of exclusive theatrical window in Australia;
- Minimum guarantee requirements (e.g. as was altered by a major studio in 2016);
- Supply and return of film and advertising materials (e.g. as altered unilaterally in 2016 by an AIDA member);
- Requirements to supply information on box office and admissions (e.g. as requested in 2016 by a major studio);
- Rates and application of Performance Deals which are introduced and/or changed from time to time by distributors

Examples of Title-Specific terms and conditions which might be collectively negotiated include:

- To assist ICA member exhibitors make effective offers to gain access to exclusive paid preview screenings on titles (ranging from major franchises such as the *Bond* movies to smaller titles such as *Daddy's Home 2*) presently granted regularly to the major exhibition chains to the exclusion of most ICA members, or
- To secure fair and equitable terms for a specific title for a specific group of exhibitor members in a similar category e.g. smaller screen sites who need flexibility in season

and session requirements to sustain viable businesses (especially important in peak periods such as Christmas and school holidays)

- To negotiate quickly and efficiently when a large number of member exhibitors are affected by very late notice of a change for example in price such as was experienced on *a major title in 2017*.

In addition ICA may seek to negotiate terms and conditions for specific titles at the request of a distributor of that title on the basis that a collective negotiation will make the determination of terms and conditions and the booking and distribution of their film more efficient, effective and less costly.

ICA has received requests on this basis in the past from small independent distributors with alternate content titles or with fewer films per year than larger distributors such as AIDA members. ICA has however also received such a request from an AIDA member in the past which also informed this application for authorisation.

Exclusion of independent distributors from the terms of the authorisation as requested by AIDA will have the effect of denying this benefit to all other distributors.

3. Public Benefits:

Reduced Transaction Costs were subject of a specific query at 3.1.1. **‘Does ICA envisage that its members might choose to engage advisors to assist them in bargaining?’**

ICA members do presently engage advisors including lawyers, accountants, film bookers and the ICA CEO to provide advice to assist them in bargaining from time to time or to directly bargain on their behalf.

ICA members also engage advisors including lawyers to assist them when disputes arise with distributors concerning film licensing agreements from time to time including matters referred for resolution under the Code.

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’ response.

3.1.2 ‘More generally, please provide additional information on likely transaction cost savings, including examples and evidence to support your submissions.’

ICA disputes the distributor assertion that cost efficiencies would not be gained by collective bargaining and points to examples in our previous submissions.

In addition, in all the examples of potential collective bargaining outlined above, assuming the distributor agreed to the collective negotiation, it would be more efficient to have this negotiation with ICA once than to separately repeat negotiation of the same issue with each affected party irrespective of whether lawyers or accountants were engaged by the parties.

Most importantly ICA members have reported the very labour intensive and time consuming nature of film booking activity and the speed with which interactions with distributors must

take place. Cinema businesses are unique in that they 'sell' a completely different menu of film products each week. 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. That is while conducting all the other critical activities of operating a cinema business.

Collective negotiation of even some aspects of film licence terms and conditions will be a significant saving and benefit to independent exhibitors navigating this pressured environment.

3.2 In the view of some distributors 'Benefits will not be passed on by exhibitors ...If ICA maintains that benefits will flow through to consumers, please provide additional information, examples and evidence relevant to this submission.'

ICA notes that distributors did not evidence this assertion merely stated that ICA's statements about benefits to consumers were 'not true'. However it is clear that the major change in the custom and practice of a major distributor that gave rise to this application for authorisation had the direct result of requiring some exhibitors to raise cinema prices to the public against their will if their business was to remain viable. Had ICA been able to successfully collectively bargain with that distributor, it may have resulted in no cost increase or a lower cost increase in ticket prices to the public at affected cinema sites.

AIDA is correct in stating that independent distributors generally command a lower share of the box office than major studios, and that independent exhibitors' support for independent films results in a disproportionately higher share of the box office for those films coming from ICA members' cinemas. Independent distributors such as Icon recognise this as an opportunity to work more closely with ICA in collective negotiation to ensure that the public gain greater access to independent films at ICA member sites by reducing the transaction costs of distributing films to those sites and increasing the flexibility of the terms on which such films can be licensed at those sites.

This is a particular benefit for Australian films many of which have significantly lower marketing and distribution budgets than other films. Screen Australia recognised ICA's and our members' strong support for Australian films and our members' success in promoting Australian films to the public by granting ICA funds to further support exhibition and marketing of Australian films to independent exhibitor audiences through the Enterprise Program.

The capacity to collectively negotiate terms and conditions for films produced in Australia would be of significant benefit in encouraging uptake of those films, reducing the costs of distribution and enabling more flexible terms of exhibition. ICA understands that the ACCC may be approached in confidence by distributors interested to gain the transaction cost benefits of collective negotiation with ICA for Australian films.

Insofar as collective negotiation is entirely voluntary we submit the disadvantage of those Australian filmmakers and distributors being unable to benefit from offering to collectively negotiate with ICA, is significantly more than any possible detriment to distributors who have made clear they are highly unlikely to choose to participate in such a negotiation and seek to prevent others from doing so by opposing our application.

In addition to the opportunity for cost and time efficiency gains for industry, ICA outlined public and consumer benefits in our previous submissions. For detail see section 2 and 3 of our submission dated 31 August 2017 such as:

- diversity of film choice,
- ticket pricing to the consumer,
- more sustainable cinemas in regional areas, and
- investment in enhanced cinema facilities.

An increase in sustainability can mean the difference between a cinema remaining open or closing in many already marginal regional or highly competitive metropolitan areas. This is significant in the face of increasing business challenges such as digital disruption, competition from new online services, and anticipated changes in key terms and conditions of theatrical licensing agreements from distributors. Marginal cinemas in competitive metro areas often provide cinema services at lower prices to the public which would not continue if that cinema was forced to close.

3.3 In the view of some distributors 'There are minimal efficiency gains to be achieved from the proposed conduct; it will increase the time to negotiate, which in turn will increase costs, including because independent cinemas are not a homogenous group. Please respond to these concerns, providing examples and evidence to support your submissions.

Concern was raised by distributors that negotiation with ICA would increase complexity and bureaucracy of dealing with independent exhibitors especially if we undertook film booking on behalf of certain members. We note that conversely no distributor present suggested that collective film buying activity currently undertaken by film bookers operating in Australia gave rise to these concerns or explain why dealing with ICA would be more complex or damaging.

Film bookers such as the Wallis Group already very successfully represent a range of exhibitors that could not be regarded as homogenous. Wallis Group report that distributors have told them how much time and money they save by being able to negotiate with Wallis rather than with each exhibitor on an individual basis.

Further in point 3.1.2 above we have outlined why collective negotiation would reduce the complexity and save time and labour for independent exhibitors dealing with multiple film bookings and multiple distributors on a weekly basis.

This practice is made more exhausting for exhibitors by the fact distributors:

- have been known to provide late or no notice of some licensing terms and conditions;
- conduct many dealings by conversation only and/or
- take some time to respond to email communication to confirm bookings or respond to offers;
- only negotiate on limited aspects of film licence agreements; and
- routinely make a starting offer that they know or reasonably should know is not sustainable for the particular exhibitor in question.

When independent exhibitors are faced with a significant proposed change to terms and conditions, such as that proposed by a major studio in 2016, many sought advice from

lawyers, accountants and industry experts. Many also sought to negotiate changes with that distributor and would have been saved significant time and cost had ICA been authorised to collectively negotiate and the distributor agreed to do so.

Of course a distributor who in fact is not currently negotiating terms and conditions, or prepared to negotiate such terms and conditions at all but simply offering contracts to independent exhibitors on a take it or leave it basis will assert that collective negotiation will result in no perceived transaction cost saving.

Conclusion:

ICA respectfully requests that the ACCC grant a final determination in favour of ICA's application for information sharing and collective negotiation.

In view of the exhaustive enquiry, the legal costs involved and the necessary delay in concluding the final determination while assessing all stakeholder views, we restate our request the final authorisation be for a period of 10 years.

Please let us know if you would like further information.

Yours faithfully,

Adrienne Pecotic
CEO
Independent Cinemas Australia