

**Authorisation Application by Independent Cinemas Australia**  
**ACCC Pre-Decision Conference – 8 November 2017**  
**Statement of Stephen Basil-Jones on behalf of Sony Pictures Releasing**

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1. Sony Pictures Releasing (**SPR**) has significant concerns in relation to the Draft Determination, and serious questions about the benefits that would supposedly flow from authorisation.
2. SPR's concerns can be summarised as follows:
  - (i) First, SPR has longstanding relationships with its exhibitors which are productive and collaborative. From SPR's perspective, there is no need for time consuming collective negotiations that could undermine those relationships. Prior to ICA's application, neither ICA – nor any small or large exhibitors – had raised any issues or concerns directly with SPR.
  - (ii) Second, to the extent there are concerns, the industry is already protected by an effective dispute resolution safety net in the form of the Code of Conduct.
  - (iii) Third, SPR has significant concerns about the scope of the proposed authorisation. The conduct as it is described in ICA's application, its submissions and the Draft Determination is unclear, and creates risk and uncertainty for the industry in Australia.
  - (iv) Fourth, the claimed benefits are overstated and are not supported by industry practice. SPR believes that authorisation will not reduce costs for ICA members or distributors, nor will it lead to any direct or indirect benefits for Australian moviegoers.
  - (v) Fifth, SPR is concerned the Commission has not properly tested ICA's assertions. The Draft Determination has relied on confidentiality obligations, loosely described, and the voluntary nature of negotiations in considering ICA's application. There is a real risk that authorisation may affect the competitive position of SPR against other distributors, and add a further layer of complexity to what has been a healthy market.
- (i) SPR relies on the success of its exhibitors**
3. First, the facts do not support ICA's submission that distributors do not deal fairly with ICA members. ICA represents a significant number of exhibitors, both large and small, some of which are vertically integrated. ICA provides no evidence to support the conclusion that distributors, including SPR, offer unreasonable terms.
4. Contrary to ICA's submission, the success of SPR in Australia relies on the success of exhibitors. SPR engages with exhibitors to work toward successful releases of its motion pictures. A clear example is independent cinemas operating in regional Australia. Without exhibitors in regional areas, SPR could not reach Australian moviegoers who only have access to a single cinema operator. SPR deals with all exhibitors on an open and fair basis – a positive release depends on a close working relationship with all exhibitors.
5. ICA suggests that the inability to negotiate fairly affects the ability of independent exhibitors to operate sustainably in regional and metropolitan areas.<sup>1</sup> But the evidence available to SPR shows that exhibitors in Australia are more than capable of negotiating favourable terms. The percentage split between ICA members and SPR favours ICA members – for SPR titles, Australia ranks toward the bottom of all countries in terms of the percentage of sales retained by SPR. Specifically, while Australia is ranked in the top 10 for its contribution to Sony Pictures' worldwide gross box office, it ranks outside the top 50 countries for its rental return.
- (ii) The Code is an effective industry safety net**
6. Related to this is the treatment of the Code of Conduct in the Draft Determination. The ACCC has accepted that some exhibitors may be reluctant to make a complaint under the Code, as it

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<sup>1</sup> ICA Application Supporting Submission (13 June 2017) pg 8.



could damage their relationship with distributors.<sup>2</sup> ICA has provided no support for its assertion that its members do not feel able to approach the Code of Conduct Secretariat to raise issues.

7. SPR is concerned that the Commission has undervalued the safety net that the Code offers ICA members. The Code has evolved over time, including the introduction of early resolution procedures to deal with issues quickly and with little formality or cost. Despite this, over the past 10 years SPR has managed to work through issues with ICA exhibitors without need for formal processes under the Code. This demonstrates SPR's strong relationship with exhibitors.
8. When Professor Fels launched the Code he described it as a 'quick, accessible and relatively inexpensive means of settling disputes'. The Code Conciliator indicates that almost all disputes are resolved prior to conciliation, and estimates conciliation would cost a maximum of \$1,350. Over almost 20 years the Code has continued to develop to meet the needs of the industry.
9. Australia is unique in having put in place a well-functioning Code to facilitate the commercial relationship between distributors and exhibitors. The Code provides ample protection for exhibitors. ICA has so far failed to put forward evidence that would suggest otherwise.

**(iii) The Draft Determination creates uncertainty**

10. Third, a key concern for SPR is the scope of the proposed authorisation and the uncertainty created by the Draft Determination. There are inconsistencies in relation to the terms that ICA is proposing to negotiate with distributors on behalf of its members. In particular:
    - (a) In its application and submissions, ICA refers to negotiating all of the following: standard terms, percentage share levels / tiers, proposed minimum guarantees, and standard booking policies.<sup>3</sup>
    - (b) In its submission, ICA suggests it will not negotiate over individual titles, but that it will respond to material changes to 'overarching' terms and conditions, as well as assisting individual members about disputes regarding specific titles.<sup>4</sup> Later, ICA flags that it may negotiate booking policies for classes of members such as those with 4 screens or less.<sup>5</sup>
    - (c) In subsequent submissions, ICA says that small or regional exhibitors may want to collectively negotiate terms of supply, but also that its largest members may participate in negotiations about particular issues.<sup>6</sup> Exactly what those issues are is not specified. Neither is there assessment of whether vertically integrated exhibitors will participate.
    - (d) The Draft Determination also describes the proposed conduct in a variety of different ways. For example, at one point, it suggests that ICA is not proposing to negotiate the standard terms and conditions for film supply, or the initial season, sessions and rental fee.<sup>7</sup> Elsewhere, the Commission indicates that authorisation will apply to the terms and conditions of film licensing, and booking terms and terms of policy for film licensing.<sup>8</sup>
  11. SPR is concerned the Commission is proposing to sanction information exchange and collective negotiations between competitors in circumstances where:
    - (a) the type of information and the scope of negotiations is unclear; and
    - (b) the extent and size of ICA members that will participate is unknown.
  12. If authorisation is ultimately granted, SPR expects that it would be in clearer and more precise terms than those currently set out in the Draft Determination. For example, the authorisation could exclude some ICA members, such as those that exceed the small business threshold.
- (iv) The 'benefits' of authorisation are fictitious**
13. SPR's fourth point relates to the supposed benefits of authorisation. From SPR's perspective, the benefits suggested by ICA do not reflect realities of the Australian motion picture industry.

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<sup>2</sup> ACCC Draft Determination (28 September 2017) at [88].

<sup>3</sup> ICA Application (13 June 2017) pg 2-3.

<sup>4</sup> ICA Application Supporting Submission (13 June 2017) [2.6], [2.17].

<sup>5</sup> ICA Application Supporting Submission (13 June 2017) pg 7-8.

<sup>6</sup> ICA Response to Public Submissions (30 August 2017) pg 1-2.

<sup>7</sup> ACCC Draft Determination (28 September 2017) at [98].

<sup>8</sup> ACCC Draft Determination (28 September 2017) at [167].

14. ICA's application and submissions suggest that:
  - (a) Without authorisation, ICA members would face higher negotiation costs, including for lawyers and accountants.<sup>9</sup>
  - (b) Authorisation will improve the viability of ICA members, especially in regional areas.<sup>10</sup>
  - (c) Authorisation may deliver better prices for consumers, as well as reinvestment of cost savings to improve consumer experience, with better services and infrastructure.<sup>11</sup>
15. The Draft Determination accepts ICA's submission regarding these claimed public benefits, and the gains that will flow to consumers and the community.<sup>12</sup> However, all the supposed benefits are simply untrue.
16. SPR's experience is that distributors and exhibitors do not engage legal or other experts in negotiations – SPR has never participated in a negotiation where external advisers were engaged on either side.<sup>13</sup> Discussions are conducted informally with the aim of maximising the success of a film for the benefit of distributors and exhibitors. Any shift to formalise negotiations is likely to significantly increase the time taken and reduce efficiency for all parties involved.
17. In its application, ICA identifies the expense involved in this authorisation process as a basis for seeking a longer term for authorisation.<sup>14</sup> SPR agrees the authorisation process is expensive. The time and cost in reviewing the application and engaging with the ACCC's consultation processes far exceed SPR's usual costs and time in collaboratively working with its exhibitors.
18. The Commission has also not properly tested ICA's unsupported assertions that any claimed savings would necessarily be reinvested to the benefit of moviegoers. SPR considers that the cost savings suggested by ICA are simply not there, and that consumers will not see any benefit.
19. Significantly, the Commission suggests that authorisation is likely to result in transaction cost savings for distributors.<sup>15</sup> To the contrary, authorisation is unlikely to reduce costs of running our business. We consider that it is likely to be time consuming and inefficient. Based on SPR's own experience, current practice involves each distributor separately working directly and efficiently with ICA members, underpinned by the protections that are provided by the Code.
 

**(v) The Commission has not properly tested ICA's application**
20. SPR's final point involves an overriding concern that the Commission has not properly tested ICA's application and the consequences that would follow from a lengthy authorisation period.
21. SPR has noted several incorrect claims in ICA's application that seem to have been accepted:
  - (a) First, that the Code is apparently not working effectively to protect exhibitors.
  - (b) Second, that collective negotiations will supposedly generate transaction cost savings.
22. In circumstances where the scope of the authorisation remains very unclear, SPR is concerned that the Commission has not fully tested the detriments that are likely to result from authorisation.
23. For example, much of the Draft Determination is directed at small, regional exhibitors. However, ICA has expressly noted that its largest members may participate in negotiations about specific issues.<sup>16</sup> SPR submits the Commission should carefully consider the impact of authorisation on all participants, rather than a segment of participants that will supposedly be key beneficiaries.
24. The Commission seems to have placed significant reliance on two features of the application:
  - (a) First, participation in collective bargaining is voluntary.<sup>17</sup>
  - (b) Second, information sharing will be constrained by confidentiality obligations.<sup>18</sup>

<sup>9</sup> ICA Application Supporting Submission (13 June 2017) pg 5.

<sup>10</sup> ICA Supplementary Response to Public Submissions (31 August 2017) pg 1.

<sup>11</sup> ICA Supplementary Response to Public Submissions (31 August 2017) pg 1-2.

<sup>12</sup> ACCC Draft Determination (28 September 2017) at [97], [101]-[103].

<sup>13</sup> Other than film bookers working on behalf of a cinema, which would presumably continue if authorisation were granted.

<sup>14</sup> ICA Application (13 June 2017) [2.20].

<sup>15</sup> ACCC Draft Determination (28 September 2017) at [102].

<sup>16</sup> ICA Response to Public Submissions (30 August 2017) pg 1-2.

<sup>17</sup> ACCC Draft Determination (28 September 2017) at [126], [144], [155].

<sup>18</sup> ACCC Draft Determination (28 September 2017) at [125], [151], [155].

25. However, it seems unavoidable, as a practical matter, that authorisation will facilitate the unfettered exchange of information between competitors, large and small. A proper testing of detriments and supposed benefits should not be influenced by the notion that there will be supposed limits, as yet unarticulated and difficult to envision, on the operation of authorisation.

**(iv) Conclusion**

26. In summary, SPR considers the Commission should not grant ICA's authorisation application:
- (a) ICA has provided insufficient evidence to support its assertions that the current negotiation framework has been unfair to ICA members. SPR notes, in particular, that only two submissions have been made in support of the application – one from a vertically integrated distributor / exhibitor, and the second from an exhibitor that applied for and was refused ICA membership.
  - (b) The Code provides an established safety net for exhibitors. It has evolved with industry developments and ICA has provided no evidence to suggest it is not working properly.
  - (c) The scope of the application is entirely uncertain – what terms is ICA proposing to negotiate on behalf of members? Will it seek to negotiate for large and small exhibitors?
  - (d) The key claimed public benefit – reduced transaction costs – is untrue as far as SPR is concerned.
  - (e) Authorisation will facilitate key commercial information exchange between competitors, some being large, vertically integrated, businesses.
27. ICA has noted that it is currently in the process of seeking to amend the Code to further entrench its role in the processes that are provided for under the Code.<sup>19</sup> SPR considers that while authorisation may benefit ICA, it will be of no benefit to distributors, exhibitors or moviegoers.
28. SPR opposes ICA's application. However, regardless of the outcome, SPR will continue to work directly and collaboratively with exhibitors to structure the release of its films in a way that seeks to ensure the success of Sony's motion pictures for both SPR and for its valued exhibitors.

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<sup>19</sup> ICA Response to Public Submissions (30 August 2017) pg 6.



## Authorisation Application by Independent Cinemas Australia (A91587) Sony Pictures Releasing Pty Ltd Key Concerns

SPR depends on exhibitors to succeed	The Code provides an effective safety net	The Draft Determination is uncertain and creates risk	The benefits of authorisation are overstated	ICA's assertions are unsupported and untested
<ul style="list-style-type: none"> <li>▪ ICA says that authorisation is required in order to facilitate fair and equitable collective negotiations between distributors and ICA members</li> <li>▪ That is incorrect – fair and equitable dealings are happening without authorisation. Importantly:               <ul style="list-style-type: none"> <li>• SPR's success depends on the success and long term viability of the exhibitors that screen Sony Picture's films</li> <li>• SPR competes for space in cinemas and for that it requires exhibitor support</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ SPR submits that the ACCC should find that the Code of Conduct is an effective safety net that has evolved with the industry</li> <li>▪ ICA says that exhibitors may be reluctant to raise an issue under the Code. However, ICA provides no evidence to support that conclusion or to suggest that the Code is ineffective</li> </ul>	<ul style="list-style-type: none"> <li>▪ The proposed authorisation is uncertain. In particular:               <ul style="list-style-type: none"> <li>• It is unclear if authorisation will cover standard terms and conditions, film hire terms, and / or season and session policies</li> <li>• The Draft Determination suggests negotiations will not cover standard terms and conditions (at [98]). However, that is inconsistent with ICA's application (i.e. pg 2-3)</li> </ul> </li> <li>▪ The ACCC's analysis focuses on small or regional exhibitors. However, ICA submits that its large members may collectively negotiate on unspecified 'particular issue[s] of common concern' (30 August submission, pg 1-2)</li> <li>▪ The ACCC should not sanction information exchange and collective negotiations where the precise scope of the conduct is unclear</li> </ul>	<ul style="list-style-type: none"> <li>▪ The key benefit claimed by ICA - lower negotiation costs - does not reflect industry practice or reality</li> <li>▪ Specifically, ICA suggests that collective negotiations will:               <ul style="list-style-type: none"> <li>• Reduce costs associated with professional advisers</li> <li>• Improve the viability of exhibitors (particularly in regional Australia)</li> <li>• Deliver lower prices for users and reinvestment in services and infrastructure</li> </ul> </li> <li>▪ On occasions where SPR has had differences with exhibitors, they have been resolved informally, without intervention from lawyers or advisers</li> <li>▪ The key claimed benefit is not supported by industry practice. Negotiations are conducted informally. Authorisation will:               <ul style="list-style-type: none"> <li>• Impose new costs (to the extent advisers are used)</li> <li>• Create an additional time cost compared to dealing directly with exhibitors</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ The Draft Determination relies particularly on the propositions that:               <ul style="list-style-type: none"> <li>• Participation in collective bargaining is voluntary ([126], [144], 155)</li> <li>• Information sharing will be limited by confidentiality clauses ([125], [151], [155])</li> </ul> </li> <li>▪ That, however, does not detract from the fact that authorisation will sanction information exchange between competitors</li> <li>▪ The ACCC should carefully assess:               <ul style="list-style-type: none"> <li>• If there is evidence to support the benefits that are claimed by ICA</li> <li>• Detriments from facilitating information sharing between competitors - some of which are large and vertically integrated businesses - where the scope of the activities remains uncertain</li> </ul> </li> </ul>