

MinterEllison

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BY EMAIL

Darrell Channing
Director | Adjudication Branch
Australian Competition and Consumer Commission
Level 2
23 Marcus Clarke Street
Canberra ACT 2601

Dear Mr Channing

Independent Cinemas Australia Inc. application for authorisation

We refer to the pre-decision conference held on 8 November 2017 regarding Independent Cinemas Australia's (**ICA**) application for authorisation under the *Competition and Consumer Act 2010* (A91587). We also refer to the statement of Stephen Basil-Jones which we provided to the Commission following the pre-decision conference.

Sony Pictures Releasing (**SPR**) appreciated the opportunity to participate in the conference to outline issues regarding the Commission's Draft Determination in this matter. We note that, following the conference, the Commission issued an information request to ICA seeking clarification about a number of significant issues raised by distributors in written submissions and during the pre-decision conference.

As the Commission will appreciate, the issues raised by Mr Basil-Jones – both at the conference and in his statement – were generally consistent with the concerns identified by the other distributors that were present, including the Australian Independent Distributors Association (**AIDA**) on behalf of its small and independent distributor members. They do not all need to be repeated in this submission, but SPR has asked us to write on its behalf to reiterate and amplify some of the issues that were ventilated at the pre-decision conference, and to address matters raised in further submissions to the Commission.

The Code of Conduct

The significance of the Code of Conduct for Film Distribution and Exhibition (**the Code**) was a key issue raised in written submissions and during the pre-decision conference. As the Commission will know, the Code was developed at the instigation of, and endorsed by, the Commission, specifically as a means to resolve disputes that arise between distributors and exhibitors.

The Code is relevant to the Commission's task in two respects. First, it is directly relevant to the assessment to be made of the balance of anticompetitive detriment and public benefit. Secondly, it is relevant for the Commission in terms of whether a decision to grant authorisation would impact detrimentally on the operation of the Code.

(i) Balancing detriment and benefit

As to the first, collective bargaining is rightly regarded by the Commission as presumptively anticompetitive. So a relevant question is, given there is a Code specifically directed at reducing and resolving disputes between exhibitors and distributors, to what extent would an authorisation provide additional public benefit? As you know, SPR contends that, for the reasons given by Mr Basil-Jones,

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any incremental increase in benefit would be marginal at best. SPR rejects the transaction cost benefits that ICA suggests will follow from authorisation and the assertion that benefits will flow to consumers.

Commissioner Court correctly noted at the pre-decision conference that, in certain other authorisation applications seeking approval for collective bargaining, authorisation has been granted even though there was a voluntary industry code in place. However, not all codes are the same, nor are they, like this Code, directed specifically at reducing the level of dispute and efficiently resolving disputes where they arise. SPR considers the Code has, and continues to, succeed in achieving its stated objectives.

(ii) Impact on the Code

As Mr Basil-Jones explained, the Code provides a tailored and effective safety net for exhibitors, and authorisation risks undermining the operation of the Code. The Code addresses a range of matters including the supply of film copies to exhibitors, the importance of flexibility in respect of trading terms, and the provision of terms of trade to exhibitors on a confidential basis. The Code's objectives include:

- to provide a framework for fair and equitable dealing between all distributors and exhibitors; and
- to provide a timely, non-legalistic, cost-effective and commercially orientated means of avoiding and settling any disputes that arise.

Mr Basil-Jones and other participants at the conference provided the Commission with factual support for the conclusion that the Code has been very effective in achieving its aims. That view is supported by the recent submission of Sharmill Films / Cinema Nova, which describes the Code as a 'great success'. SPR supports that assessment of the Code. The risk an authorisation would present to that continuing is something we expect the Commission will be carefully considering in finalising its review.

Unlike more general codes the Commission has considered, the Code was specifically designed to facilitate a level playing field by addressing the information that is to be shared bilaterally between distributors and exhibitors, without the risk of inappropriate disclosure of confidential information that a collective approach to those matters would necessarily involve. In particular, the Code provides a referee in the form of the Code Conciliator to facilitate confidential conciliation in those cases where individual exhibitors and distributors have been unable to resolve disputes informally.

An authorisation would inevitably lead to information sharing and collective negotiations which would undermine confidence in, and therefore the effectiveness of, the Code. That would not be in the public interest. ICA's recent submission in response to the Commission's information request concedes that collective negotiations and dispute resolution under the Code will overlap.

With that in mind, in finalising its review of ICA's application, the Commission should carefully consider whether authorisation would lead to net public benefits which outweigh the detriments of undermining the Code and facilitating what would otherwise involve anticompetitive conduct, in circumstances where the Code already sets out standards to foster (and continue to foster) a level playing field between distributors and exhibitors.

Finally, on this point, the Commission's Draft Determination suggests that exhibitors, especially small exhibitors, *may be* concerned that taking a complaint to the Code Secretariat will damage relationships with distributors. That is the highest the Commission was prepared to put the point, even having regard, apparently, to confidential information the Commission accepted and which has not been disclosed and therefore tested. ICA did not provide any further evidence at the conference. Any conclusion reached on the basis that the Code is failing to address industry concerns is directly refuted by SPR and other distributors. We assume that, in the absence of evidence to the contrary, the Commission will treat any public benefit asserted in that respect as hypothetical.

We have noted that ICA's further submissions in response to the Commission's information request refers to '*confidential examples*'. SPR is unaware of those examples, nor is SPR aware if any example relates to SPR, given that the Commission has not publicly released non-confidential versions of this material. SPR assumes the Commission will give little weight to untested assertions, especially by ICA office-bearers.

Negotiations between exhibitors and distributors

During the conference it was suggested that there is an imbalance in bargaining power between exhibitors and distributors. As SPR has explained, the successful release of a Sony Pictures film in Australia relies on the success of exhibitors. Our client considers that it has productive and collaborative relationships with each of its exhibitors, which are supported by the framework provided by the Code.

From SPR's viewpoint there is no such imbalance, a view borne out in its case by the facts Mr Basil-Jones provided to the Commission. While Australia is ranked in the top 10 for its contribution to the worldwide gross box office results for Sony Pictures, Australia ranks outside the top 50 countries in terms of rental return to Sony Pictures. In other words, in Australia, exhibitors receive a larger share of the box office receipts than in comparable countries. This clearly indicates that exhibitors in Australia can and do negotiate effectively.

ICA has repeatedly submitted that there is significant asymmetry in bargaining power as between distributors and exhibitors. Australia's global ranking in terms of rental return for Sony Pictures does not support that view. Regarding the relationship between distributors and exhibitors, SPR notes that:

- Distributors bear significant risk in respect of the success of a film. For example, SPR typically spends several million dollars marketing large releases in Australia. This benefits exhibitors.
- Due to the risk that is involved in a release, planning and promotional activities are developed by SPR well in advance of release. SPR's personnel in Australia are dedicated to optimising the release for each title, and exhibitors benefit from that carefully executed release strategy.
- While each distributor typically has only one or two films playing at the same time, exhibitors can choose from a broad range of films, selecting what will provide the best returns for their venue.

Contrary to suggestions by ICA, SPR also points out that:

- The process of releasing a film in Australia takes several months. SPR typically begins promotional activities well in advance of a release date through a variety of channels, including online.
- SPR sets its release policy well out from release – usually 6-8 weeks in advance. SPR provides details of its policy at that time, along with information about run time, synopsis, trailers and classification, if it is available.
- SPR provides a range of materials to exhibitors including media asset updates and promotional and preview opportunities. These are provided to all exhibitors – major and independent – at the same time. SPR's position is that it is the responsibility of individual exhibitors to utilise these materials and opportunities. To assist, SPR has a dedicated Exhibitor Relations Manager who can be approached at any time to obtain a promotion or preview, if one is available for the film.

In ICA's most recent submission, ICA has listed a variety of techniques '*which could be engaged in as retribution*' by a distributor. SPR has instructed us that it does not engage in any form of retribution and has no knowledge of other distributors engaging in this kind of conduct. The Commission's public record discloses no such allegation against SPR. We are confident that, if there were, the Commission would have put the matter to SPR and sought its response.

Responding in relation to two hypothetical examples that are given by ICA in its recent submission:

- SPR has not increased its minimum revenue guarantee for many years.
- While SPR sometimes introduces a bond in respect of an exhibitor, that only occurs in relation to a small very number of exhibitors that have developed a pattern of delaying payment well in excess of SPR's payment terms and is therefore fully justified.

The scope of authorisation

During the conference, a number of attendees raised concerns regarding uncertainty in the Draft Determination, particularly regarding the Commission's view expressed at paragraph [98] of the draft.

(i) While ICA has confirmed the scope of its application, uncertainty remains

The Commissioner acknowledged concerns regarding the scope of the authorisation at the conference. SPR agrees with that view. ICA's recent submission that distributors have intentionally complicated

issues regarding the scope of authorisation is, in SPR's view, a weak attempt to dismiss legitimate, well-founded, concerns about the uncertainty with the scope of the authorisation ICA is seeking. ICA's response to the Commission's information request confirms there were inconsistencies in the Draft Determination, primarily in relation to paragraph [98], which warranted further consideration. Where the Commission's decision would authorise conduct that would otherwise contravene the *Competition and Consumer Act*, considerable care should be taken to properly define the boundaries of the conduct.

If, contrary to SPR's submission, the Commission finds that the anticompetitive effect of collective bargaining proposed by ICA would be outweighed by claimed public benefits and proceeds to grant authorisation, careful consideration should be given to the scope of authorisation, noting that the Code specifically addresses information to be provided by each distributor to each exhibitor, including the requirement that each distributor make its terms of trade available to exhibitors and the Code Conciliator on a confidential basis (cl 9.2).

It appears, from ICA's submission in response to the Commission's information request, that ICA is seeking authorisation to facilitate information exchange and collective negotiation regarding both of what SPR describes as its Terms and Conditions of License and its individual film terms and policies.

ICA has stated that its expectation is that, for participating members (large and small) it will conduct negotiations through a nominee, and those participating members will be contractually bound by the terms negotiated by ICA.

There remains significant uncertainty in ICA's application in other respects. For example, the Commission asked if ICA would routinely engage in negotiations, or only in cases where its members raised concerns. ICA's response reaffirms there is considerable uncertainty in terms of its application, by suggesting that '*initially*' it anticipates engaging in negotiations where ICA members have concerns.

(ii) ICA's application will apply to all members – small, large and vertically integrated

As Mr Basil-Jones noted at the conference and in his statement, while much of ICA's application and the Commission's Draft Determination are directed at small, regional exhibitors, ICA's largest members may also participate in information sharing and collective negotiations if the authorisation sought were granted. Accordingly, detriments and asserted benefits should be weighted in respect of all ICA members, including large, vertically integrated exhibitor / distributors. To assess benefits and detriments as they may apply to small exhibitors alone would misapply the test for authorisation.

Comments were made at the conference to the effect that the Commission may consider whether to limit authorisation to small ICA members. For the reasons already set out in previous correspondence, SPR maintains that the Commission should not grant ICA's application.

(iii) ICA's proposed 10 year authorisation period should be rejected

In its recent submission in response to the Commission's information request, ICA maintained that the length of the inquiry, costs involved and the delay warranted authorisation for a period of 10 years.

If, contrary to SPR's submissions, the Commission does decide to grant ICA an authorisation, it should not grant an authorisation for 10 years. Given the concerns expressed about likely impact on the Code, a short authorisation is all that should be granted, if any. If authorisation is granted, it should be for a short period so the Commission and the industry can evaluate the impact of authorisation on the Code.

The Commission's question regarding confidential terms

Mr Bell's email of 12 December 2017 indicated that it would assist the Commission to understand which distributors prevent exhibitors from sharing information about film licence agreements, and if so, how.

SPR has traditionally relied on the commercially confidential nature of its agreement with each individual exhibitor, supported by the fact that independent exhibitors have obligations under the *Competition and Consumer Act* not to collude with their competitors, particularly about the price and terms on which they acquire films.

Submissions regarding ICA's application

Putting to one side the submissions made by distributors following the Draft Determination, SPR understands the significant public submissions that have been made to the Commission are:

- A submission supporting the application by an exhibitor, Digital Cinema Network Australia, which was refused ICA membership without explanation in April 2017.
- A submission supporting the application by an exhibitor, Mr Denis Parkes – the owner and operator of 'The Picture Show Man Cinema' in Merimbula, NSW. Mr Parkes is a current Board member and past President of ICA.
- A submission opposing the application by an exhibitor / distributor and current ICA member, Sharmill Films / Cinema Nova.

SPR notes, in particular, the brief submission by Sharmill Films / Cinema Nova which opposes collective bargaining, supports the Code of Conduct, indicates that the writer has never had difficulties negotiating terms, and indicates that as an ICA member, they were not consulted regarding ICA's application.

Of course, SPR is unable to comment on other information that may have been provided to the Commission on a confidential basis and for which no non-confidential version has apparently been provided.

Conclusion

SPR opposes ICA's application for authorisation for the reasons outlined at the conference and amplified in this submission.

Please do not hesitate to contact Haydn Flack if there are any issues that you would like to discuss further, or if there is any further information that our client can provide which would assist in the Commission's review.

Yours sincerely



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