

BY EMAIL AND FOR PUBLIC REGISTER

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Mr Darrell Channing
Director
Adjudication Branch
Australian Competition & Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

27 July 2017

Attention: Mr Simon Bell

Dear Mr Channing

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

1. Introduction

We act for Universal Pictures International Australasia Pty Ltd (UPI), which has been sent an invitation by the Australian Competition and Consumer Commission (ACCC), to make a submission in relation to the application dated 8 June 2017 by Independent Cinemas Australia Inc (ICA), to engage in information sharing and to collectively bargain with film distributors to negotiate various terms, conditions and policies for film licensing agreements (Application).

UPI is one of the motion film companies the subject of the Application by ICA. We note the proposed authorisation period requested of 10 years is a long time in a changing environment of technology and consumer preferences. In these circumstances we anticipate it will be difficult for the ACCC to be able to draw the necessary conclusion that the likely benefit of the authorisation would outweigh the detriment caused. However, other than this initial comment, we will only focus on the proposed information sharing aspects of the Application.

2. Information sharing

The Application suggests that there will be no anti-competitive detriment because ICA members may opt out and distributors could choose not to collectively bargain. However, as the Application is requesting that all ICA members across Australia have the ability to collectively bargain and share information, there is a significant risk that the Application will lead to anticompetitive outcomes, to the detriment of consumers. The Application is also

unclear as to the proposed information exchange process that is involved, which appears to be broad and open ended, and this heightens the concern of UPI.

We are concerned that the conduct, if authorised, would facilitate information sharing amongst ICA members without any meaningful restrictions or safeguards in relation to commercially sensitive information, when those members may be in competition with each other for both consumers and for obtaining movies from distributors both locally and nationally. This is of particular concern given:

- (a) information could be shared that is irrelevant for the purposes of particular negotiations taking place; and
- (b) there are various and distinct types of exhibitors and there are several distributors operating nationally who have differing types of films and who have differing levels of bargaining power.

The Application also risks information sharing as to a broad range of terms in relation to a distributor who chooses not to engage in collective bargaining.

As a practical matter this Application may be distinguished from the Queensland Canegrowers Collective Bargaining Authorisation as in that case the collective bargaining is occurring on a local basis in terms of negotiations between local growers with a local mill. In contrast, the position in this matter is more complex with a multi layered range of interactions. The nature of many of the exhibitors who are ICA members means that many have multiple locations across Australia and are engaging with multiple film distributors, with those distributors competing to have their films shown on as many screens as possible.

We have also noted the ACCC's comments in the Queensland Canegrowers Authorisation that the authorisation only addresses existing competition laws and does not override commercial confidentiality provisions. As the ACCC will be aware, Courts will err on the side of granting injunctions to prevent confidentiality breaches, rather than granting awards of damages, because of difficulties in meeting the legal standard for showing damage. This difficulty is exacerbated in the case of a confidentiality arrangement with multiple parties (as would be the case here), which raises additional practical issues including as to detecting breaches. This means that any distributor (and derived from that, consumers) that suffers real economic damage from the sharing of information by exhibitors may have no effective remedy, given an injunction prohibiting further sharing is likely to be of little practical benefit.

Finally, the Canegrowers Authorisation highlighted that a reason information sharing was permitted was to resolve common industry issues in complex arrangements. The Industry Code of Conduct exists to achieve this result and the past history of both exhibitors and distributors aligning to and utilising the Code for this purpose is evidence thereof.

3. Recommended alternative

Given the proposal of the Government to introduce new concerted practices provisions in the *Competition and Consumer Act 2010 (Cth)*, and also to seek to put forward a proposal which achieves a practical balance, one means for ameliorating the anti-competitive detriment of the information exchange proposed in the Application is that it not be permitted unless and until a distributor agrees to participate in collective bargaining on a case by case basis. In agreeing to a collective bargaining process, that would mean that the distributor would be giving full consent to the information sharing arrangement.

Such an approach allows collective bargaining but also safeguards the competitive process to the benefit of consumers.

We would be happy to elaborate on this submission if that would be of assistance to the ACCC in its consideration of the Application.

Yours Sincerely,



Dave Poddar
Partner