
To: ACCC Adjudications
From: The Australian Independent Distributors Association Inc. (“AIDA”)
Subject: A91587 – Independent Cinemas Australia Inc. – Submission
Date: 28 July 2017



AIDA makes the following submission for your consideration in relation to the Application for Authorisation A91587 (the “**Application**”) submitted by Independent Cinemas Australia Inc (“**ICA**”).

1. **About AIDA**

Australian Independent Distributors Association Inc (AIDA) represents more than ten (10) independent film distributors in Australia, actively carrying on the business of feature film distribution in Australia. Full members include (not full list) Studiocanal, Palace Enterprises, Sharmill Films, Becker Film Group, Potential Films, Madman Entertainment, Umbrella Entertainment and eOne Films Australia.

A guiding objective for the Association is to represent and promote generally the views and interest of Australian independent film distributors throughout Australia.

2. **Executive Summary**

In summary, AIDA opposes the Application.

While it may be appropriate to empower ICA members to collectively bargain against the major film distributors in Australia, AIDA and its members should be removed from the Application and the Authorisation (if granted) should not impact on AIDA members.

Not only would the Authorisation, if granted, amount to cartel behaviour normally prohibited by the Competition and Consumer Act 2010 (Cth) (“**Act**”), It is in the public interest to allow negotiations regarding smaller, independent films to take place on an individual-distributor-to-individual-exhibitor basis to ensure the independent film market is given the best chance possible to survive in a currently precarious market (under threat due to significant growth in the digital at-home entertainment sphere) so that Australians can continue to enjoy a diverse range of content at their cinemas.

In our view, the Code of Conduct (referred to throughout the Application) provides a more than adequate framework for to the negotiations process currently in place between independent film exhibitors and independent film distributors in Australia.

3. **Public Detriment**

AIDA members, on an individual basis, represent less than 5% share of the total Australian film distribution market. There is currently no collective bargaining arrangement in place on which these independent distributors can rely, so the

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negotiation position of each is reflective of a very small amount of market power in comparison to the negotiation position afforded to Australia's major film distributors.

As a result, the *"sharing of information, collective decision making concerning film licence terms and collective negotiation of proposed terms"* which the Authorisation would allow ICA members to participate in would have a severely negative impact on the already minimal bargaining position held by AIDA members.

Ironically, it is these smaller, independent film distributors who are responsible for ensuring a 'diverse' range of film content is brought to our shores and ultimately, disseminated to cinemas.

If our already minimal bargaining power is compromised by the existence of the Authorisation, then we could quickly see the number of independent, Australian, foreign, documentary, arthouse, or "diverse" films diminish in Australia because independent distributors will simply not be able to afford to continue to acquire Australian rights to such content, and then distribute it to exhibitors on compromised terms, which, by virtue of the Authorisation, have been established due to members of ICA being able to collectively bargain against them.

4. Effect on competition

ICA's request to collectively bargain against individual distributors when negotiating terms, and particularly, the purported conduct which would stem from this, being the access to and sharing of all information regarding the negotiation and the terms themselves amongst ICA members (who, by ICA's own admission, are competitors) would amount to anti-competitive conduct, normally prohibited by the Act.

AIDA is concerned that this conduct would lead to a scenario where film distributors are being forced to deal with all independent cinemas on the same terms, regardless of the strength of that cinema's offer, and in a situation where ICA seeks 'blanket' terms from individual distributors across all films, all normal market forces usually taken into consideration when negotiating film hire terms (such as genre, season of proposed screenings, number of screenings, target audience, advertising budget) will become irrelevant.

5. Inadequacies in the Application

While our position firmly remains that the Authorisation is not granted (and particularly not granted to apply to AIDA's members), there are certain inadequacies in the Application which we would like to bring to your attention.

There are two separate references in the Application which suggest the distributors will "not be compelled" to negotiate with ICA:

1. under section 6(a) of Form B (page 6) it is stated: *"ICA does not envisage any likely detriments to the public from the Authorisation, especially as **neither the ICA members nor any film distributors will be compelled to engage in the proposed collective bargaining if the Authorisation is granted**"*; and
2. under paragraph 6 of the Supporting Submission it is stated: *"Whilst ICA hopes that all distributors doing business in Australia would see the benefit of participating in an authorised collective negotiation through ICA from time to time, **ICA appreciates that a particular distributor may choose not to***

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collectively bargain with ICA and that the granting of Authorisation to ICA will have no negative impact on any such distributor."



While the description of the 'contract, arrangement or understanding' submitted by ICA clarifies that ICA is seeking authorisation from its members on a "voluntary 'opt out' basis", the Application **fails to specify that it is an express term of the Authorisation that distributors will not be compelled to negotiate with ICA.**

With the above in mind, AIDA suggests that should the Authorisation be granted:

1. clarification that distributors may opt out of negotiations is included as an express condition of the Authorisation; and
2. there is process devised for instances where:
 - (i) ICA approaches a distributor on behalf of its members to negotiate terms; and
 - (ii) the distributor chooses to exercise its rights not to negotiate with ICA (pursuant to the 'opt-out' provision),to establish whether the particular ICA members represented in such approach are then permitted to re-approach that distributor directly to discuss terms.

6. Further questions

AIDA thanks you for considering our submission and should you wish to discuss any of the above, please contact

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