

Twentieth Century Fox Film Distributors Pty Ltd

**Submission on the application for authorisation by
Independent Cinemas Australia Inc (A91587)**

31 July 2017

1 Executive Summary

Twentieth Century Fox Film Distributors Pty Ltd (**Fox Distribution**) opposes the application by Independent Cinemas Australia Inc (**ICA**) for authorisation on behalf of itself and current and future members to collectively bargain with film distributors to negotiate terms, conditions and policies for film licensing agreements.

The application does not provide any evidence that authorisation of the conduct is necessary to address any current failure in the market and proposes minimal if any efficiency gains. Fox Distribution works closely with exhibitors of all kinds, including independent exhibitors, to ensure its films are enjoyed by the widest possible audience. Independent exhibitors have enjoyed the benefits of fair and commercial terms from distributors as the sector has grown – and to the extent that any issues arise between exhibitors and distributors – exhibitors have access to industry-approved protections under the Code of Conduct for Film Distribution and Exhibition (**the Code**).

Fox Distribution submits that the application is extremely broad and vague, and that the conduct has the potential to be harmful to the cinema industry. In Fox Distribution's view there is no public benefit arising from the proposed authorisation and there is a risk of a lessening of competition such that the benefit does not outweigh the detriment.

2 Background

2.1 Twentieth Century Fox

Fox Distribution is an Australian film distribution company. Fox Distribution is a subsidiary of Twentieth Century Fox Film Corporation, an American film studio and production company.

2.2 Distribution companies in Australia

Many film distribution companies operate in Australia. In addition to Fox Distribution, these include:

- Sony Pictures Releasing Pty Ltd (**Sony**);
- Warner Bros. Pictures International (**Warner**);¹
- Roadshow Films Pty Ltd (**Village**);
- Paramount Pictures Australia Pty Ltd (**Paramount**);
- Universal Pictures International Australasia Pty Ltd (**Universal**); and
- The Walt Disney Company (Australia) Pty Ltd (**Disney**).

Fox Distribution outlines in the table below its estimates of the industry revenue shares of these distributors for the 2016-2017 financial year.

Distributor	<i>Village</i>	<i>Disney</i>	<i>Universal</i>	<i>Fox</i>	<i>Sony</i>	<i>Paramount</i>
Approx. Market Share	21.72%	19.57%	17.47%	13.39%	5.79%	5.57%

A number of smaller independent distributors also operate in Australia. Independent distributors are classified as such because they are not affiliated with a film studio, but instead distribute films from various studios. Independent distributors operating in Australia include eOne, Transmission,

¹ Fox Distribution understands that Warner Brothers Entertainment Australia currently operates under an arrangement for Village Roadshow to distribute its films in Australia. The market share for Village in the table below includes the market share for Warner.

Madman and StudioCanal. Fox Distribution outlines in the table below its estimates of the industry revenue shares for independent distributors in the 2016-2017 financial year.

Distributor	eOne	Transmission	Studiocanal	Madman	Others
Approx. Market Share	4.86%	3.67%	1.39%	1.36%	5.16%

2.3 Exhibition companies

The Australian exhibition industry comprises a small number of 'major' or 'circuit' exhibitors and many popular independent exhibitors. These independent exhibitors employ a diverse spectrum of business models and may have one or a number of exhibition sites.

The major exhibitors in Australia include:

- Event Hospitality and Entertainment Pty. Limited (**Event**);
- Village Cinemas Australia Pty. Limited (**Village**);
- Hoyts Cinemas Pty. Limited (**Hoyts**); and
- Reading Entertainment Australia Pty. Limited (**Reading**).

Fox Distribution estimates that the industry revenue shares of these major exhibitors are: 30.81% (Event), 21.08% (Hoyts), 13.61% (Village) and 7.14% (Reading).

Exhibitors that are not listed above are generally labelled as 'independents'. These are often exhibitors with long-standing presence in the Australian cinema industry with prominent or unique sites. In many cases, such cinemas have a presence in smaller towns that have limited other comparable entertainment options (eg, other cinemas or stage events).

Fox Distribution's estimates of the overall industry revenue shares of the larger independent exhibitors in Australia are as follows:

- Palace Cinemas (**Palace**) – 3.5%;
- Grand Cinemas – 2.07%;
- Cineplex – 1.8%;
- Wallis (including Wallis and Wallis Booked Cinemas) – 1.25%;
- Dendy Cinema Group – 1.2%;
- Ace Cinemas – 0.81%; and
- Majestic Cinemas – 0.52%.

2.4 The Australian independent cinema industry is strong

In Fox Distribution's view, the Australian cinema industry, including independent cinemas, is strong and growing.

This view is supported by a recent IbisWorld report on *Motion Picture and Video Distribution in Australia*, which affirms that:

'Demand from cinemas is expected to increase in 2016-17, providing the industry with an opportunity to grow.'

Strong consumer demand for film exhibition is not limited to large cinema chains. The ICA itself acknowledges this on its website, where it notes that:

'...even through difficult economic times cinema attendances have stayed strong as audiences return again and again to the unique experience that cinema offers... Independent cinema remains a strong and vibrant part of the industry and nearly 30% of Australian box office comes through the doors of your local independent cinema.'

Independent cinemas have over the past five years invested in many new sites and have increased the number of screens in their cinemas. In respect of ICA members specifically, Fox Distribution understands that in the last five years those members have:

- added at least 10 new cinema sites;
- reopened, expanded and/or taken over at least 4 cinema sites;
- upgraded facilities, including some installation of gold lounges, in at least 2 cinema sites; and
- added additional screens in at least 12 cinema sites.

In addition, Fox Distribution understands that there are currently plans for ICA members to, in the next 12 months, open at least 3 new sites and add screens to at least 1 existing site.

These investments clearly show that, in contrast to the position advanced in the ICA application, Australian exhibitors generally, and ICA members specifically, see a positive future for their businesses.

Further, the suggestion by the ICA that the film industry is seeking to 'recoup' lost DVD sales from higher revenue from cinemas is without basis and is not supported by an analysis of the film exhibition and distribution industries. While DVD and Bluray sales have been in decline over the past five years, this decline has been offset by significant growth in online streaming. Film studios have therefore not 'lost eyeballs' – viewers have simply moved to another medium.

It is also clear that independent exhibitors are able to compete with the major exhibitor chains, such as Event and Hoyts. The authorisation application itself acknowledges that independent exhibitors may offer cheaper film tickets than major exhibitors. In Fox Distribution's view, independent exhibitors are able to price below major cinemas for a range of reasons, including that the costs of owning and operating independent cinemas can be lower than for the majors. This is because:

- many independent cinemas operate in regional Australia, or have cinemas in less high traffic areas. This means that the site rent can be lower than major exhibitors, who typically lease premises in large Westfield or Stockland shopping malls, which have high rent costs;
- many independent exhibitors have a long history of exhibiting from a particular cinema site. For this reason, they may own the building and land and as such pay no rent on the property; and
- some independent cinemas also own and obtain revenue from shops and businesses within the same complex as the cinema.

Fox Distribution therefore submits that independent exhibitors are thriving, have many cost advantages over major exhibitors and that there is no evidence that they are at a disadvantage relative to the larger cinemas.

3 Terms of Authorisation are vague and scope of conduct is uncertain

3.1 Conduct is very broad and may lead to collective boycott

The ICA has sought authorisation of:

- exchanging information on the terms or proposed terms of agreements;
- collective negotiation of terms and conditions;
- collective negotiation of terms for specific categories of members including but not limited to regional cinemas or cinemas with less than 4 screens; and
- collective negotiation of terms for specific titles if requested from time to time.

Fox Distribution submits that while the ICA authorisation is "opt out" on the part of exhibitors and distributors, this conduct is extremely broad and uncertain and there is an inherent risk of the conduct leading to a collective boycott and potentially other cartel conduct.

In particular, given the information sharing aspect of the authorisation, members may be aware when other members choose not to proceed with a particular distributor and the terms on which they chose not to proceed. If in respect of a particular film, the ICA on behalf of its member exhibitors offers terms to a distributor and the distributor does not accept those terms, all member exhibitors are likely to be aware of this. If a distributor puts forward terms on which it can commercially supply the film, there is a real risk that:

- ICA will lobby its members not to accept that offer (even if it is a decision for each exhibitor);
- ICA will let individual members know that other members are also refusing to accept the offer; and
- if a distributor attempts to negotiate terms with an ICA member directly, that member is likely to draw on information it obtained from ICA to inform its decision whether or not to accept that offer.

The authorisation application therefore poses a real risk that the sharing of information will protect an implicit boycott. If the information sharing component of the application is authorised, there will be little restriction on the kind of information that can be shared by the ICA and its members and the context in which this information can be shared. This information sharing creates greater opportunities for explicit or tacit collusion and greater shared knowledge between independent exhibitors of major exhibitors' and distributors' costs and rates.²

Fox Distribution submits that clearly a boycott will not be in the public interest. The ACCC has previously noted that:³

Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because the target, faced with the threat of withdrawal of supply, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.

Collective boycotts can also significantly disrupt downstream and upstream businesses. The Tribunal has found that collective boycotts have the potential to inflict significant damage upon the target of the boycott, its employees, consumers and, also, the boycotters themselves. The Tribunal

² Fox Distribution notes that this was considered a public detriment in the ACCC's Final Determination to deny authorisation to Aioi Nissay Dowa Insurance Company Australia Pty Ltd & Ors (A91556-A91557).

³ Applications for authorisation lodged by St Vincent's Health Australia Limited, The Congregation of Religious Sisters of Charity of Australia trading as St Vincent's Private Hospital Sydney, Trustees of Mary Aikenhead Ministries, The Holy Spirit Northside Private Hospital Limited in respect of the Applicants acting as a group in order to engage in conduct including collective bargaining with health insurers and suppliers of other goods and services to the group, collective boycott activity, and exclusive dealing arrangements, 12 September 2012 (A91295 - A91297).

considered that the threat of a boycott – even without it ultimately being engaged in – is likely to come at a high cost to society.

Similarly, in the present scenario, a collective boycott could produce a number of harms to the film industry, including an ability for ICA members to boycott groups of films at a time, while seeking to 'bundle' more consistent terms across these various titles. For example, ICA and its members may refuse to screen a more niche film or series of more niche films, or reduce the exposure that a film with less broad market appeal receives, unless a distributor offers more favourable terms on popular features.

3.2 Unclear who and what conduct the authorisation will cover

The dangers of the authorisation of collective bargaining and information sharing (and potential boycott) are highlighted by the fact that it is unclear in the application which cinemas will participate in the collective negotiation. ICA is seeking authorisation on behalf of 'itself and all its present and future members'. One can therefore envisage a scenario where just about any Australian exhibitor – of any size and market share – could join ICA and receive coverage of the authorisation. There is therefore significant uncertainty around the size and composition of any collective negotiation group. Certainly, the larger the collective negotiating group, the larger the size of any potential detriment is likely to be.⁴

Further, there is uncertainty as to how the application will apply to existing ICA members. The authorisation contemplates ICA sharing information with ICA members even in circumstances where they 'opt-out' and choose not to participate in any collective negotiation. For example, at 2.17 it appears that ICA anticipates benchmarking terms for such exhibitors, notwithstanding that they have elected not to participate in the collective negotiation and may have reasons to engage in standard bi-lateral negotiations with distributors. This means that the effect of any authorisation must be presumed to apply across at least the entire ICA member base.

Further the authorisation seeks to bargain on behalf of "segments" of the cinema industry, which may be but is not limited to regional cinemas or cinemas with less than 4 screens. Fox Distribution is concerned that this aspect is also extremely vague, broad and uncertain. For the reasons set out in this submission it is unnecessary and could, for example, be used to collectively bargain on behalf of competing cinemas. This would exacerbate the above information sharing and potential anticompetitive consequences.

The authorisation will permit the ICA and participating members to collectively negotiate with distributors on 'screen content licensed for theatrical exhibition in a cinema or similar venue (eg drive-in) including but not limited to cinematographic films'. However, there is no detail provided in the application about how the ICA and its members will conduct this negotiation. Fox Distribution is concerned about the lack of clarity provided on how the collective negotiation will be administered given the diversity of the ICA member base.

Finally, the ICA has not commented on how collective negotiations will impact other aspects of the commercial relationship related to the booking of films. Fox Distribution understands that the authorisation may not cover programming agreements (centred on the number of session times) which usually account for the diversity of cinemas included in the collective bargaining. It is clear that the authorisation will also fail to address other key aspects of the commercial relationship between exhibitors and distributors, including marketing campaigns and accounts receivables.

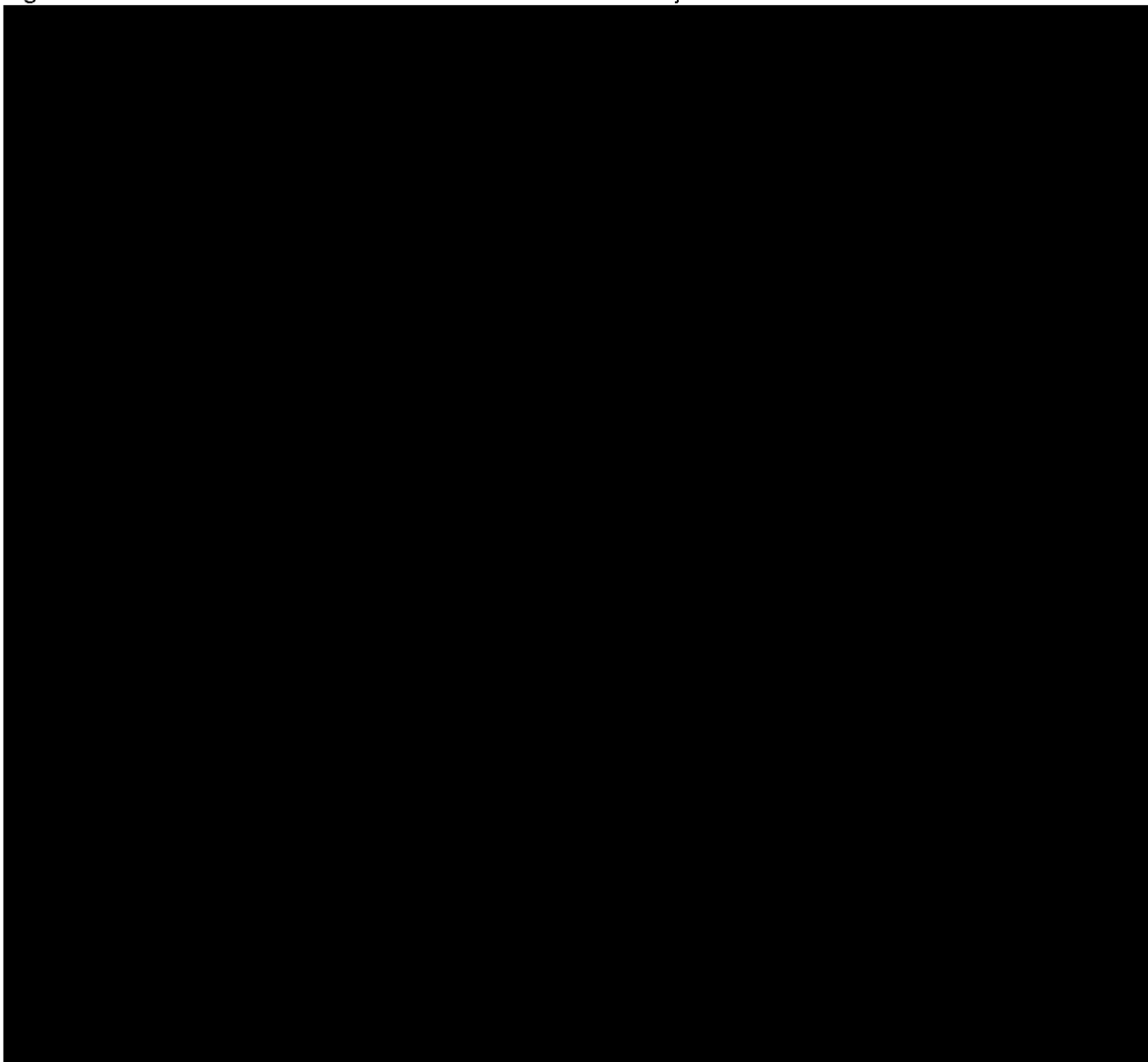
⁴ See for example the ACCC's Draft Determination (A91537-91538) in which the ACCC proposed to deny authorisation to Property Media Group for collective bargaining and collective boycott.

4 No evidence or prospect of film producers offering uncommercial terms to independent cinemas

4.1 Fox Distribution offers reasonable commercial terms to all exhibitors

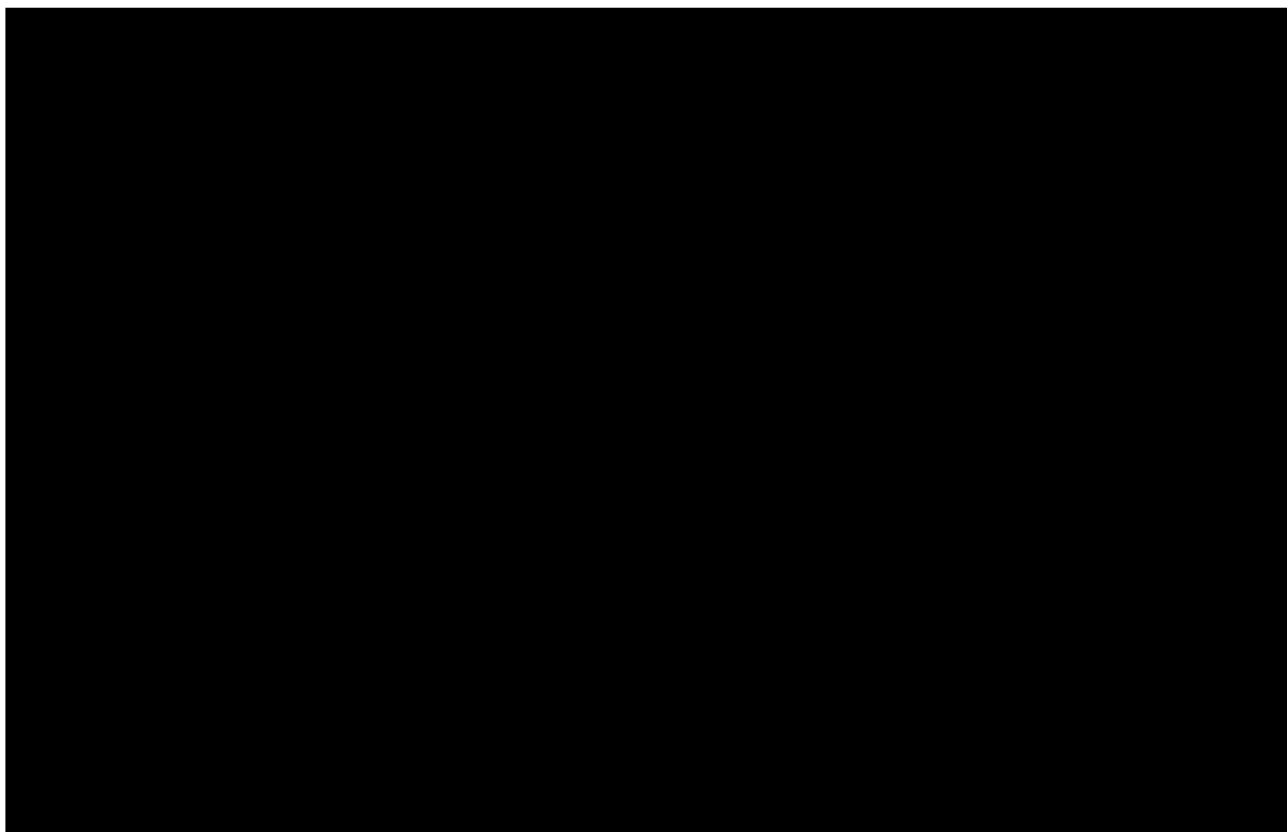
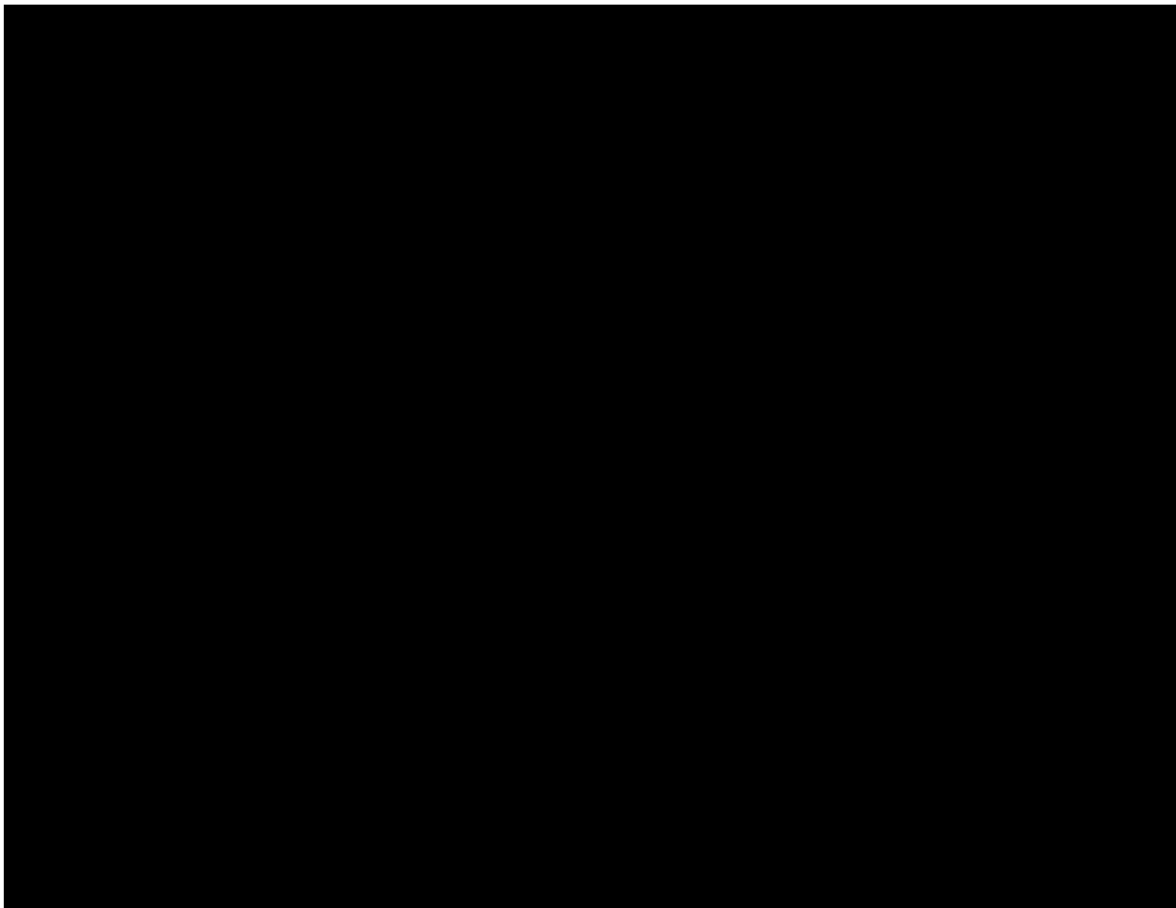
The commission-based supply model that Fox Distribution adopts in Australia incentivises both Fox Distribution and exhibitors to work together to ensure that every film title draws the greatest number of ticket sales possible.

Fox Distribution distributes films by entering into film hire agreements with exhibitors. These agreements enable exhibitors to exhibit films commercially.



The ICA Application asserts that the major distributors (including Fox Distribution) do not currently offer commercial terms to ICA members and that this authorisation will improve this situation for its members. To the contrary, Fox Distribution offers reasonable commercial terms to all exhibitors.

⁵ Article 6.



⁶ This refers to the national box office takings of a particular film across all cinemas.

4.2 Independent exhibitors not disadvantaged

Fox Distribution disagrees that independent cinemas do not have any bargaining power. Many independent exhibitors, including exhibitors that have a monopoly within an area of limited competition, for example in a regional setting, have real bargaining power during negotiations with Fox Distribution. This is particularly the case for blockbuster films where Fox Distribution's affiliated studios have incurred substantial production and promotional costs. It is imperative that Fox Distribution appropriately monetises this content. It is also the case for niche films where distributors often rely on independent cinemas for exhibition.

Fox Distribution is therefore exposed to real financial risk if it cannot secure distribution arrangements with as many exhibitors as possible. Exhibitors are well aware of this dynamic and can credibly threaten to reduce the number of screens and viewing slots available to Fox Distribution titles. For this reason, independent cinemas have substantial bargaining power in respect of new release distribution deals.

Further, as noted above, independent exhibitors do not receive unreasonable commercial terms and have sufficient bargaining power to protect their interests during negotiation with Fox Distribution and other distributors. However, in the unlikely event that an exhibitor is concerned that they will be offered terms that are unreasonable, there are sufficient existing mechanisms in place to manage these risks. Collective bargaining is unnecessary. These options include, most relevantly:

- the Code; and
- potentially, the unfair contract terms regime, as set out in the Australian Consumer Law.

In respect of the Code, there are a range of protections for independent exhibitors, which include that:

- distributors must review the sessions requirement for a film where requested by an exhibitor (art 9.6);
- independent exhibitors are represented on the Code Administration Committee (art 11.2);
- two dispute resolution mechanisms – informal and conciliation (art 15, 16); and
- a prohibition on retaliatory conduct (art 21).

These are real protections for exhibitors and no distributor would bear any ill will towards an exhibitor that availed themselves of rights under the Code. Indeed, as pointed out in the ICA Application, 'there is provision in the Code of Conduct prohibiting retaliatory conduct' (para 2.13). Section 21.1 of the Code states that 'No distributor or exhibitor may engage in retaliatory conduct against a distributor or exhibitor because the second mentioned distributor or exhibitor has invoked the provisions of this Code (including, without limitation, conciliation procedures) to challenge the conduct of the first mentioned distributor or exhibitor'.

The ICA application asserts but does not provide any evidence of exhibitors being 'unwilling' (para 2.4) or 'fear[ful] of diminishing their relationship with the distributor and future terms of

supply of films essential to their businesses' (para 2.13) were they to exercise rights under the Code.

Fox Distribution is not aware of any circumstances that would make ICA members fearful of using the dispute resolution mechanisms provided for in the Code.

In respect of the unfair contract terms regime, this regime may also apply to the film hire agreements between some ICA members and distributors which mean that the interests of exhibitors have further protection in addition to the Code.

5 Authorisation will reduce competition and will not benefit consumers

5.1 Overview

The ICA members collectively hold a market share of 21.43%.⁷ Granting this authorisation would in effect create a new player in the market with equivalent market share to one of the major exhibitors, resulting in further concentration in the industry and with no benefits passed on to consumers. This new player will also have greater market share than Fox Distribution and most other distributors, which is significant given the existing degree of negotiating power that independent cinemas already have as outlined above.

5.2 Competition among independent cinemas will reduce

Fox Distribution submits that the effect of the authorisation will be to potentially reduce competition in the film exhibition industry. Standardising wholesale pricing for independent exhibitors will soften the imperative to innovate and develop consumer benefits.

At present, consumers benefit from competition between independent exhibitors. This is clear from the lower average consumer pricing that they offer. However, consumers also benefit from the diversity of content that is available from independent exhibitors, as well as broader service improvements, such as specialty food and beverages, themed movie nights and premier events.

The proposed application threatens to reduce the level of competition between independent exhibitors. This is for a number of reasons, including that:

- by standardising wholesale pricing there is less incentive for cinemas to increase volume to obtain volume based wholesale pricing benefits from distributors; and
- by standardising terms of supply with distributors, there is less incentive to provide non-price benefits to consumers when promoting films.

[REDACTED]

[REDACTED] These promotions can take the form of theatrical in-cinema displays, local fliers, social media updates and posts, in-cinema pre-reel promotion, opening day specialty events and give aways and themed character nights. Marketing and promotion of this kind benefits the consumer. Indeed, unique events and unique service enhancements, such as those listed above, go to the core of what many consumers appreciate about an independent exhibitor experience.

The competition that currently exists between independent exhibitors in terms of the diversity of films they show is also likely to reduce if the ACCC authorises this application. For less broadly popular and more niche content, ICA member exhibitors are the only avenue to reach cinema audiences. By forming a negotiating block, the ICA would become close to a monopoly acquirer

⁷ Note: this number is based on 2016-17 gross box office revenue figures.

of this content. ICA member exhibitors currently compete to acquire content of this kind. This capacity is diluted where all ICA members have certainty of standardised wholesale pricing terms.

5.3 No public benefit

The ICA does not suggest in its application that ticket prices will reduce as a result of authorisation. In the absence of such an argument, Fox Distribution can only assume that any reduced prices that the ICA is able to extract for its members as a result of collective bargaining will go directly to the margins of its members.

This application therefore operates as a pure transfer of wealth from distributors to independent exhibitors in circumstances where the independent exhibitors have not:

- taken on more commercial risk to justify these gains;
- demonstrated increased efficiency;
- provided any innovative change to its business; or
- provided any new benefit to distributor to justify margin moving from distributors to exhibitors.

There is no evidence that absent the authorisation, ticket prices will rise, or independent exhibitors will exit the industry. As mentioned above, independent exhibitors are, in Fox Distribution's view, strong and growing. The ICA produces in its application no evidence to the contrary. Indeed, as noted earlier in this submission, on its website the ICA extolls the strength of the independent cinema sector in Australia.

Further, there would be minimal if any efficiency gains as a result of the authorisation. In particular, authorisation will not avoid the need for distributors to negotiate separate terms with each ICA member individually.

Negotiation between independent exhibitors and distributors typically involves discussion about:

- the price that the exhibitor will pay to acquire content from a distributor;
- the technical requirements of that exhibitor's cinema; and
- the manner and extent of cinema specific marketing and promotional campaigns associated with a particular title.

The time and effort spent negotiating each of these points is not even.





In addition, the proposed authorisation would not affect the time that Fox Distribution spends administering the individual payment accounts of each independent exhibitor. For example, Fox Distribution would still be responsible for, and would have to allocate resources to, ensuring that it receives accurate payment from each independent exhibitor.

6 Authorisation period too long

If the ACCC does not accept the position put above, Fox Distribution submits that it should only grant authorisation for a maximum of 5 years, rather than the 10 years that the ICA seeks in the application.

The film industry is subject to substantial fluctuation and change, depending upon consumer preference for particular releases from one season to the next and technological developments. It is impossible to predict the state of the market more than 5 years from now. Indeed, even within a 5 year period there is likely to be profound industry change.

This would be consistent with the ACCC's approach in a number of cases to new authorisations. For the reasons set out above, if the ACCC is minded to grant authorisation, Fox Distribution submits that it should follow this approach and only grant authorisation for 5 years.

7 Conclusion

For the reasons set out above, the ACCC should not grant the authorisation sought by ICA. The ICA application does not clearly identify any public benefit that authorisation would bring. The application suggests that the ongoing presence of independent exhibitors is somehow in jeopardy. However, there is no evidence to support this position – either in the application or externally. Indeed, all evidence demonstrates that independent exhibitors are investing and growing – in many cases more strongly than larger exhibitor chains. Further, there is no evidence that independent exhibitors are receiving uncommercial terms or that there is a failure of negotiation. Rather, authorisation will facilitate coordination among a substantial number of Australian exhibitors.