

Submission in response to ICA authorisation application

1. This submission is lodged on behalf of STUDIOCANAL Pty Limited (**STUDIOCANAL**).
2. STUDIOCANAL submits that the ACCC should not grant the authorisation sought by the ICA. For the reasons set out in this submission, STUDIOCANAL is concerned that if the cartel conduct is authorised:
 - a) it will have a significant and detrimental effect on competition in the cinematic distribution of films in Australia and the diversity of films available to Australian cinema audiences; and
 - b) no public benefits will in fact arise.
3. With the emergence of new platforms and avenues for the public to access and enjoy film content, the entire Australian film industry is in a state of flux. All industry participants are facing challenges (including film distributors). It is STUDIOCANAL's view that ICA's authorisation request could result in conduct which would simply distort the competitive process in the market place and that market forces should be allowed to operate freely.
4. The Code of Conduct for Film Distribution and Exhibition (2013) (**Code of Conduct**) (recently reviewed in 2017) was developed at the instigation of the Australian Competition and Consumer Commission (**ACCC**) to provide for, amongst other things, a forum to address and prevent disputes between cinema exhibitors and film distributors in a timely, cost effective and commercially orientated manner. The overriding principles (clause 4.2) of the Code of Conduct include the legitimate commercial objectives of the film distributor and the cinema exhibitor, and the commercial basis and relevant circumstances for Film Bookings.

Background - STUDIOCANAL and its distribution of independent films in Australia

5. STUDIOCANAL distributes independent films in Australia and New Zealand through theatrical, home entertainment, television and digital channels.
6. STUDIOCANAL distributes its films theatrically via the major cinema chains (Event/GU/BCC, Hoyts and Village) as well as through independent cinemas.
7. Independent cinemas account for approximately 28.8% of box office sales in Australia.
8. When releasing films via cinemas in Australia, STUDIOCANAL competes with multinational distributors such as the members of the Motion Picture Distributors Association of Australia (**MPDAA**) and vertically integrated distributors such as Icon Film Distribution Pty Limited (**Dendy Cinemas**), Palace Films (**Palace Cinemas**) and Natalie Miller Pty Limited trading as Sharmill Films (**Nova Cinemas Carlton**).
9. STUDIOCANAL estimates that it theatrically releases approximately 2% of all films (local and international) released in the Australian cinema market annually. STUDIOCANAL's estimated theatrical market shares in Australia* for the past 3 years are:

2014: 2.83%;

2015: 1.6%; and

2016: 0.93%.

**GBO market share on value not volume.*

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10. STUDIOCANAL negotiates film bookings separately with each independent cinema or major cinema chain to agree mutually acceptable terms, including session times, seasons, start dates and film hire rates (**Film Bookings**). These negotiations are very much film dependent (i.e. content, genre) and can vary greatly from cinema to cinema, depending on a range of factors, including time of the year (for example public or school holidays), the number of screens, session times, target audience, competitive environment, advertising budget, the number of patrons they attract, the costs to supply and box office sales they expect to achieve.

Outline of STUDIOCANAL's submission

11. In STUDIOCANAL's view, ICA's authorisation request should not be authorised because:
- a) the resultant conduct is likely to result in anti-competitive detriment, being parallel conduct and coordination by cinemas and likely loss of content diversity;
 - b) ICA has not submitted any evidence (i) in support of a need for any such authorisation, nor (ii) that the current Code of Conduct is not effective for ICA members;
 - c) the concerns which the authorisation is said to be necessary to address either do not arise in respect of STUDIOCANAL and/or are capable of being addressed by the existing Code of Conduct;
 - d) the Code of Conduct has operated effectively and has not been shown to be broken;
 - e) in STUDIOCANAL's view, the Code of Conduct is a more appropriate framework to ensure fair and equitable dealing between film distributors and cinema exhibitors than the broad conduct the subject of this authorisation application, without any cartel conduct or other anti-competitive detriment;
 - f) there are few, if any, public benefits arising from the proposed conduct and any public benefits that might arise do not outweigh its anti-competitive effect; and
 - g) ICA is a trade association and not a commercial entity, as such, its interests are not necessarily aligned with the diverse interests of its members.

Anti-competitive effects of conduct

12. The conduct for which authorisation is sought is described in wide and imprecise terms in the application and supporting submission.
13. In practical terms, the scope of the conduct is extensive and if engaged in to the fullest extent would have a significant and detrimental effect on competition in the cinematic distribution of films in Australia and the diversity of films available to Australian cinema audiences.
14. This is illustrated through the following description of the conduct as it would affect STUDIOCANAL, which falls within the class of conduct referred to in the authorisation application. If the conduct is authorised, all independent cinemas would:
- a) have access to and be permitted to share the terms on which STUDIOCANAL distributes films to each cinema;
 - b) have access to and be permitted to share the terms on which STUDIOCANAL's competitors distribute films to each cinema;
 - c) be permitted to collectively negotiate with STUDIOCANAL (and with STUDIOCANAL's competitors);
 - d) be permitted to agree the terms on which they will hire from STUDIOCANAL (and from STUDIOCANAL's competitors); and
 - e) be permitted to agree to boycott film bookings from STUDIOCANAL.
15. The application states that ICA does not envisage any likely detriments to the public because film distributors will not be compelled to engage in the proposed collective bargaining if authorisation is granted (paragraph 6). This is incorrect. In commercial reality, STUDIOCANAL will have no option other than to participate. If independent cinemas choose to engage in the conduct (to the fullest extent if authorised), STUDIOCANAL (and the independent film distributors who are not vertically integrated) will have no commercially realistic option other than to supply to independent cinemas. According to ICA's submission (paragraph 9.1) independent cinemas (including ICA members) account for approximately 48% of the screens in the Australian market.

16. The application acknowledges that the members of the ICA are competitors. The anti-competitive effects of information sharing between competitors, agreements between competitors as to the terms on which they will hire and/or the persons from whom they will hire and boycotts of particular suppliers or class of supplier are well known and acknowledged through the prohibitions against such conduct in the CCA.
17. Such anti-competitive effects are likely to arise from the proposed conduct. In particular, permitting ICA and its members and future members to engage in the conduct for which authorisation is sought, is likely to result in the following anti-competitive consequences:
- a) film distributors are likely to be forced to deal with all independent cinemas on the same terms, regardless of the strength of a cinema's offer;
 - b) an independent cinema with an inferior offer will have the opportunity to hire on the same terms as a cinema with a stronger offer, regardless of the difference in the costs of the film distributor to service each cinema, which could jeopardise the ongoing viability of smaller independent distributors;
 - c) even if an independent cinema "opts out" and does not participate in any collective negotiations or boycotts (as noted in paragraph 2 of the application and paragraph 2.5 of the submission) and even if independent cinemas are not compelled to engage in the conduct (as noted in paragraph 6 of the application), they will still be able to receive information about the terms on which STUDIOCANAL and its competitors distribute films to that cinema's competitors (and provide information to other cinemas about the terms on which it is supplied). Providing independent cinemas with this highly commercially sensitive information will inevitably risk coordination or parallel conduct amongst cinemas;
 - d) such sharing of commercially sensitive information will give a particular advantage to the vertically integrated operators (as referred to in paragraph 8 above), because the distribution business of those operators will have access to information received by the cinema business. Such information could include the terms on which its competitors distribute films to its cinema business and to competing cinema businesses. Some of these vertically integrated operators are STUDIOCANAL's competitors ; and
 - e) a distortion of the competitive process due to the information asymmetry between buyers and sellers. On the one hand, all independent cinemas could have access to full information about the terms on which all film distributors supply all independent cinemas. On the other hand, independent film distributors such as STUDIOCANAL will only know the terms on which they supply independent cinemas. This information asymmetry resulting from the sharing of commercially sensitive information amongst all buyers but not amongst sellers considerably reduces the scope for competition between distributors in the offers they make to independent cinemas. This is further complicated by ICA members who also operate film distribution businesses, who will be at an even greater advantage of having transparency across all film distributors' terms and conditions.

Concerns raised in application are not uniform across film distributors and are addressed (or capable of being addressed) by Code of Conduct

18. The application and supporting submission state that authorisation of the conduct is necessary to address the concerns set out in paragraph 2 of the submission. Many of those concerns are expressed in general terms or as assertions without any supporting evidence, and so should be given little or no weight. No evidence has been presented either in terms of:
- a. the severity of concerns by cinema exhibitors (quality); or
 - b. the number of concerns of cinema exhibitors (quantity); or
 - c. conflicts that have **not** been satisfactorily resolved by the Code of Conduct,
- over any period of time or at all.
19. In addition, STUDIOCANAL questions the extent to which these concerns arise in relation to all of the film distributors and/or independent cinemas that fall within the scope of the proposed conduct. Isolated examples or experiences with one particular film distributor do not justify authorising conduct affecting **all** film distributors, or that may otherwise be in breach of the CCA.

20. STUDIOCANAL considers that the Code of Conduct is capable of addressing and does in fact address many of those concerns. The Code of Conduct has been working well for years and has not been shown to be "broken". To the extent independent cinemas have concerns arising from conduct of some film distributors, this can be addressed through the Code of Conduct or improvements to the Code of Conduct. There is no justification for independent cinemas to engage in cartel conduct or conduct otherwise in breach of the CCA in order to address those issues.

21. The specific concerns raised in the authorisation application and STUDIOCANAL's comments on those concerns are set out in Table 1 below.

Table 1

	Concern	STUDIOCANAL comment
1	Films are often offered on a take it or leave it basis.	STUDIOCANAL does not engage in this conduct. It negotiates terms with independent cinemas and reaches agreement on different terms with different independent cinemas depending on many variable factors, some of which are listed in paragraph 10 above. Many independent films require different release strategies, such as a more limited release pattern, or a platform release pattern (if there is a limited audience), or reliance on <i>word of mouth</i> strategy to capitalise on a subsequent expansion of screens.
2	Theatrical film distributors are under increased pressure to achieve a higher share of revenues from theatrical exhibition.	This is incorrect. The market is changing, and this affects all participants, not just the independent cinemas. STUDIOCANAL has and continues to negotiate its bookings terms on a film by film basis, taking into account the many market variables, some of which are listed in paragraph 10 above.
3	ICA member exhibitors are not able to negotiate individual films or standard terms of supply for "must have" films.	This is incorrect. STUDIOCANAL negotiates Film Bookings on a film by film basis taking into account all relevant factors, including genre of film, time of the year (for example, public or school holidays), the number of screens, session times, target audience, competitive environment, advertising budget, the number of patrons and box office sales they expect to achieve. STUDIOCANAL submits that if an ICA member has some difficulty negotiating with some film distributors, this does not justify authorising conduct that extends to all film distributors. STUDIOCANAL negotiates with ICA member exhibitors for individual films and for "must have" films. It is not aware of any exhibitor concerns that have not been amicably resolved to mutual satisfaction.
4	Pressure to appropriate a higher share of revenues from theatrical distribution may: <ul style="list-style-type: none"> • reduce the diversity of films and other content available at local cinemas; and • increase the price cinema 	STUDIOCANAL does not agree that there is pressure to appropriate a higher share of revenues from theatrical distribution, for the reasons noted in point 2 of this Table 1. STUDIOCANAL believes that if the conduct is authorised, it will likely result in a reduction in content diversity, as set out in paragraph 13 above and point 7 of Table 2 below.

	Concern	STUDIOCANAL comment
	exhibitors must charge to incorporate film distributor requirements.	The prospect of a price increase is not a reason to authorise conduct that would otherwise be in breach of the CCA. All film distributors incur costs in supplying films to cinemas and any price increases will reflect naturally occurring market changes in cost and other competitive dynamics, some of which are beyond STUDIOCANAL's control.
5	Absent authorisation, ICA members, CEO and Board are at risk of breach of the CCA and prosecution if they engage in conduct in breach of the CCA.	Anti-competitive conduct should not be authorised simply to protect those that might engage in that conduct from prosecution/penalty.
6	ICA member cinema exhibitors do not feel able to approach the Code of Conduct secretariat with an individual dispute for fear of diminishing their relationship with the distributor and future terms of supply of films essential to their business.	<p>The authorisation application acknowledges that the Code of Conduct has been broadly successful in resolving disputes between exhibitors and film distributors and this is also STUDIOCANAL's experience.</p> <p>To the extent that this is a concern, it can be addressed through improvements to the Code of Conduct dispute resolution processes.</p> <p>In support of STUDIOCANAL's long term approach of fair negotiations and strong relationships with its cinema exhibitor clients, STUDIOCANAL has never had a dispute brought before the Code of Conduct.</p> <p>STUDIOCANAL abides by the Code of Conduct, and STUDIOCANAL believes that the Code of Conduct works.</p>
7	In most instances ICA members have significantly less bargaining power than their film distributor suppliers.	<p>This is not STUDIOCANAL's experience. As noted in paragraph 9 above, STUDIOCANAL's theatrical box office market share is approximately 2% in Australia whereas independent cinemas account for approximately 28.8% of box office sales.</p> <p>As noted above, even if it could be shown that there is an inequality of bargaining power between some independent cinemas and some film distributors, this does not justify authorising conduct that extends to all film distributors in the Australian market.</p> <p>Further no evidence (of quality nor of quantity) has been provided to substantiate this claim.</p>

Conduct is unlikely to result in public benefits

22. STUDIOCANAL does not consider that there are any public benefits arising from the granting the authorisation request for the proposed conduct that would outweigh the anti-competitive detriments outlined above.

23. In summary, STUDIOCANAL considers that the asserted public benefits:

- a) are not likely to arise from the conduct, if authorised (in fact the opposite); and

- b) are already taken into account in the Code of Conduct in any event and will continue to do so, with or without authorisation.

24. The public benefits that the authorisation application asserts will arise if the conduct is authorised and STUDIOCANAL's comments on those asserted public benefits are set out in Table 2 below.

Table 2

	Claimed public benefit	STUDIOCANAL comment
1	Reducing the costs of independent cinemas individually engaging in negotiations concerning substantially the same subject matter.	<p>There is no supporting evidence to demonstrate the asserted cost reduction.</p> <p>If the basis of this claimed benefit is to avoid individual cinemas incurring legal and accounting costs in individually negotiating with film distributors, this is not a public benefit.</p> <p>STUDIOCANAL acknowledges that public benefit is a wide concept and may include anything of value to the community generally, so long as there is a causal link between the conduct and the benefit.</p> <p>However, the application does not suggest that the avoidance of legal and accounting costs by individual cinemas is of value to the community generally. Further, it does not appear that any such cost savings (arising from the proposed conduct) would be passed on to consumers in the form of lower prices or improved service levels.</p>
2	Reduce current risk and enable information sharing.	Parliament has determined that persons should only be given immunity from breach of the CCA if the conduct that would otherwise breach the CCA gives rise to public benefits. Removing the risk of engaging in prohibited conduct is not itself a public benefit.
3	Enable collective negotiation of standard terms	<p>The fact that the conduct would enable collective negotiation of standard terms is not of itself a public benefit.</p> <p>The basis of this claimed benefit appears to be unequal bargaining power between independent cinemas on the one hand and the major cinema exhibitors referred to in paragraph 4.3 of the supporting submission, who are said to be better able to secure "must have" titles than independent cinemas.</p> <p>However, it does not refer to the unequal bargaining power between the independent cinemas collectively (if the conduct is authorised) and independent film distributors such as STUDIOCANAL nor the difference in bargaining power of independent distributors such as STUDIOCANAL and the multinational distributors and vertically integrated distributors referred to in paragraph 8. ICA has not provided any evidence where any ICA member has not been able to access a 'must have' title.</p>

	Claimed public benefit	STUDIOCANAL comment
		<p>There is an incorrect assumption that Film Booking negotiations can be standardised (paragraph 7). This goes against the general concept of competition and market forces. STUDIOCANAL negotiates film booking terms after taking into account a number of variable factors on a film by film basis. These cannot be standardised. The ability of all parties to negotiate the variables STUDIOCANAL believes results in a more positive outcome for all parties.</p> <p>The submission supporting the authorisation application states that the conduct would avoid the time involved in the ICA assisting members individually (paragraph 4.4). There is no evidence of such a time saving nor of the way in which such a time saving delivers a benefit to the community or individual ICA members.</p>
4	No negative impact on ICA cinema members who choose not to participate	See paragraph 17 above and paragraph 25 below.
5	No negative impact on film distributors who choose not to participate	<p>See paragraph 17 above and paragraph 25 below. This is incorrect.</p> <p>With ICA member screens typically making up the majority of the release patterns and Gross Box Office (GBO) for a <i>limited release</i> film (ie not a <i>wide release</i>), STUDIOCANAL contends that should the ICA authorisation request be accepted, STUDIOCANAL would essentially be negotiating with just one cinema exhibitor on these <i>limited release</i> films.</p>
6	Enable negotiations for specific categories of ICA members if needed	<p>This public benefit is based on special treatment of regional and country cinemas. STUDIOCANAL submits that it has always negotiated Film Bookings according to individual cinema circumstances.</p> <p>Further STUDIOCANAL considers that this is already recognised and facilitated by the Code of Conduct to the extent appropriate.</p>
7	Protect community interests and consumers in having a local cinema with diversity of content and services available at affordable prices	<p>STUDIONCANAL considers that the proposed conduct, if authorised, is likely to jeopardise diversity of content rather than enhance that diversity, for the reasons noted in paragraphs 13-17 above.</p> <p>It is important to note that independent film distributors (including STUDIOCANAL) are typically the strongest supporters of locally made films, often releasing significantly more local films than some major studio competitors.</p> <p>Any diminution of the independent film distribution sector would have a negative effect on the local feature film production sector and may well see a decrease in the amount of Australian films being made and</p>

	Claimed public benefit	STUDIOCANAL comment
		<p>released.</p> <p>It is also important to note that the significant increase in films released in Australian cinemas in recent years has been fuelled by digital delivery and projection. STUDIOCANAL believes that all cinemas (including ICA members) have never had more choice and diverse range of content (from blockbuster films, independent and foreign language, concert films, Opera, event cinema etc), many of which are being distributed by independent film distributors like STUDIOCANAL. This diverse range of films is being released in innovative ways that embrace the new technologies, and under flexible terms and conditions.</p>

Other matters

25. The application seeks authorisation of the conduct for a 10 year term. STUDIOCANAL opposes authorisation for the reasons set out in this submission for any period of time. The commercially sensitive information that would be obtained by ICA members would harm STUDIOCANAL, even if the term was limited to a much shorter period. Once any cinema exhibitor has information relating to the terms and policies shared between ICA members it will place STUDIOCANAL at an immediate disadvantage.
26. Further to this, ICA members are operating in a relatively small industry, where it is not uncommon for an ICA employee to move to a major cinema exhibitor and take their commercially sensitive knowledge with the major cinema chain. How can this be effectively policed?
27. The application is made on the basis that there is a national market for distribution of films to cinemas and regional markets for supply of cinema services to consumers (see application, paragraph 5). The supporting submission states that many of ICA's members operate in separate geographic markets to each other (see paragraph 2.19).
28. STUDIOCANAL notes that even if some cinemas are not competitors in the supply of services to consumers in different geographic locations, they nevertheless are competitors in the acquisition of film distribution services from STUDIOCANAL. STUDIOCANAL has a commercial incentive to maximise the distribution of its films throughout geographic areas and does not approach its Film Bookings negotiations simply on the basis of geographic segmentation. STUDIOCANAL does not consider it to be an answer to the competition concerns raised in this submission (in the wholesale market for distribution of films to cinemas, with potential consequences in downstream markets) that some cinemas are located in different geographic areas and so are not likely to compete with each other in the supply of cinema services to consumers.
29. STUDIOCANAL is also concerned that if the cartel conduct is authorised and the ACCC imposes any conditions or limitations, there will be no mechanism for adequately policing or ensuring compliance.

27th July 2017