

Director
Adjudication Branch
Australian Competition & Consumer Commission

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Dear Mr Channing

A91587 - Independent Cinemas Australia Inc. – Application for Authorisation - Submission

This submission is made on behalf of Paramount Pictures Australia Pty. (**Paramount**) in response to the abovementioned application filed by Independent Cinemas Australia Inc. (**ICA**) (the **Application**). Paramount thanks the ACCC for the opportunity to respond to the Application, which it respectfully opposes for the reasons outlined below.

Through its Application made pursuant to subsections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the **CCA**), the ICA seeks an authorisation (**Authorisation**) that would permit it and its members to engage in behavior otherwise prohibited under the CCA. Given that it is seeking special treatment under the law, the ICA bears the onus of establishing that (1) such exemption will benefit the public and (2) such public benefits will outweigh any resulting anti-competitive detriments. Paramount respectfully contends that the ICA submission fails to satisfy either of these criteria and, further, that:

- the ICA's submission greatly oversimplifies the market dynamics;
- the ICA's proposed system of collective bargaining is unworkable in practice;
- the class of persons to which the Authorisation would apply is uncertain;
- the proposed 'opt out' mechanism is unworkable;
- the operation proposed under the Authorisation is unclear; and
- the Authorisation will not confer the claimed benefits, and/or any benefits that might arise would be outweighed by the resulting anti-competitive impact of such dispensation.

1. Market Dynamics

The ICA membership is a heterogeneous group of exhibitors, which vary markedly in terms of many of their characteristics, including their size (number of screens operated) and respective market power relative to the many individual theatrical distributors including Paramount.

The significance of the individual characteristics of an exhibitor, and its specific site locations, has long been recognised in the Code of Conduct for Film Distribution (**Code**). Section 5 of the Code explicitly recognises that factors such as the following are relevant to and will affect negotiation with each individual exhibitor:

- the expected return from that exhibitor;
- the overall business relationship between that exhibitor and the distributor;
- the geographical location of the exhibitor;

- the condition and facilities of the cinema;
- the extent of any relevant marketing and promotional activities of the exhibitor;
- the nature and quality of the film; and
- the audience to which the film is likely to appeal.

These negotiations necessarily take place on a film by film basis.

It is important to note at the outset that the distributors are industry partners with, not competitors of, the ICA members; rather, ICA members compete with each other and with the major Australian exhibitor chains (Event/Greater Union, Hoyts/Wanda and Village).

In terms of market power, there are essentially three categories of ICA members. In "Category 1" regions, ICA members effectively enjoy monopoly status in areas of Australia where there is no practical substitute venue for consumers. In these regions, the ICA members enjoy not only a substantial market power vis a vis the consumer, they also have significant market power when dealing with distributors. Where a distributor wishes to release a particular film in such regions, the relevant ICA member is able to exercise substantial bargaining power commensurate with its position as the dominant exhibitor in the region.

In "Category 2" regions, such as Bathurst and Orange, the primary competitor of an ICA member may be another ICA member. While this introduces an element of competitive tension to the market, the proposed Authorisation would increase the already significant market power of ICA members in Category 2 regions vis a vis local distributors, by allowing information sharing and collective negotiation.

In "Category 3" regions, ICA members are competitors with other ICA members and/or major exhibitors.

In terms of supply, when the Code was originally established in 1998 there were a number of major distributor groupings which handled the film releases of the major Hollywood studios (Majors) accounting for a substantial share of exhibition content at that time. Those distribution groupings have since ceased joint operations in Australia, and today, each of the 6 Majors (including Paramount) independently handles the local theatrical release of its respective films.

ICA's submission identifies 20 different distributors currently supplying films into the Australian market. This reflects the increasing participation in the industry of second tier distributors which have substantially increased the total number of films available for theatrical exhibition beyond the output of the 6 Majors.

Collectively, these distributors each week deliver three to four wide release films in Australia with an additional one or two more limited release films, which traditionally also perform well in ICA members' cinemas.

Notwithstanding the growth of theatrical film output, the number of available exhibition screens remains limited and promotes keen competition among distributors for screen time. Access to screens at smaller cinemas may be especially competitive given their very limited screen capacity. Such limitations are even more pronounced in regional areas.

There is a significant degree of substitutability in terms of content that Australian exhibitors (including ICA members) are able to choose from. While the ICA submission refers to 'must have' films, it is unclear what films this term refers to, as what is a 'must have' film varies across the ICA membership. Films commonly known as 'blockbusters' are generally made available broadly across the market, and on a number of occasions, particular ICA members choose not to take up those films, or do so later in the film's run.

The distributors compete with each other to book their films with exhibitors, and to encourage exhibitors to extend the run of each film as long as possible; however, the typical length of a film's run has shortened markedly in recent years, as exhibitors choose to move more quickly to screen newer available releases, depending on the audience demand.

Just as there is a significant variation between the market positions of individual ICA members, there is a significant variation in market shares between the distributors, which does not solely

relate to numerical output. This variation is in fact more pronounced on a year to year basis among the distributors dependent upon the commercial success of their respective films during a given a period. By way of example, Paramount's share of the Australian theatrical market has, in the last five years, been as low as 6%.

The ICA submission greatly oversimplifies the market dynamics. It is inaccurate to represent that Paramount maintains significant market power, or that all ICA members maintain a relatively weak bargaining position. Paramount rejects any assertion or implication in the ICA's submission that its films are supplied on a 'take it or leave it' basis.

Paramount operates in a market where both the major exhibitors and ICA members hold significant bargaining power in their negotiations for the exhibition of Paramount's films.

2. The proposed system of collective bargaining would not work in practice

When considering terms such as the licence fee, the sessions and the period for which a particular film will be shown by an exhibitor, Paramount takes into account factors such as:

1. the status of the individual exhibitor's account (it being reasonable to decline to take bookings until an account has been brought up to date);
2. the audience type and track record of the cinema with the particular genre of the relevant film (different genres such as horror and/or documentary will have quite different runs in different cinemas);
3. what revenue a particular cinema is likely to generate from the film; and
4. the geographical location of the cinema, which may be relevant to securing coverage in regional areas for Paramount's films to reach regional audiences.

When negotiating the length of the run for a film, which is typically renegotiated over the period of its screening, Paramount and the exhibitor will consider the continuing demand being experienced by that exhibitor at its cinemas for the particular film.

Because these are all considerations individual to the particular film and to the particular exhibitor and its cinemas, they are incompatible with collective negotiation by the ICA on behalf of its members. Likewise, information exchange between its members is likely to be of little benefit or relevance to the circumstances of each individual member and their negotiations with Paramount.

Terms are set on the basis of an individual risk profile, which does not lend itself to collective bargaining in practice.

3. The class of persons to which the Authorisation will apply is uncertain

It is unknown which (and what proportion) of the ICA members support the making of the Application, and for whose benefit it is actually being made. Indeed, Paramount is aware of at least one prominent member of the ICA that has indicated that it does not support the Application.

Given that the Application seeks the Authorisation on behalf of current and future members, the class of persons to which the Authorisation will apply is inherently uncertain. There is no basis to assume that the same factors claimed to apply in respect of current members will apply to future members of the ICA, particularly over a period as long as 10 years. The ICA does not propose any limitation on scale, market share, ownership or any other objective qualification for membership and the benefits it would seek to have conferred on potential members.

Further, the Application expressly contemplates that if the Authorisation is granted, its members may subsequently 'opt out' either generally or for a specific collective bargaining negotiation, by providing written notice to ICA. It is therefore uncertain which ICA members will be included in the class of persons protected by the Authorisation in respect of any particular negotiation or provision of information.

4. The proposed 'opt out' mechanism is unworkable

Allowing ICA members to 'opt out' at any time by notice in writing to the ICA, and on a case by case basis, would be unfair, would permit anti-competitive practices and would be unworkable in practice.

ICA members would be free to avail themselves of the benefits of information sharing (including presumably as to pricing and supply related information between competitor exhibitors) and collective bargaining, and then armed with that information subsequently 'opt out' of the collective bargaining so as to engage in individual negotiations bringing to bear the factors of an individual nature referred to in section 1 of these submissions.

With respect to each of its dealings with each ICA member, Paramount will not be certain whether or not such dealings will be subject to collective bargaining or information sharing.

There would also be continuing uncertainty as to which ICA members might 'opt out' of future collective bargaining attempts.

5. The operation proposed under the Authorisation is unclear

The Application asserts that neither ICA members nor any film distributors will be compelled to engage in the proposed collective bargaining if the Authorisation is granted.

If the Authorisation is granted, then to the extent that ICA members consider it to be in their individual interests to collectively bargain, and to appropriate the market power of individual members for the benefit of all members, then Paramount would effectively be forced to engage in collective bargaining or face having its films boycotted by the ICA. In those circumstances, it is unclear what is meant by ICA's assertion that film distributors will not be compelled to engage in the proposed collective bargaining.

To the extent that individual ICA members consider it is in their best interest to negotiate individually with Paramount, this will significantly reduce the relevance of any collective negotiation by the ICA. This is particularly so because it is likely that those ICA members which will opt out will presumably be those which objectively have a better bargaining position on the aforementioned individual factors than the remaining 'body' of the ICA membership.

Paragraph 2.6 of the ICA's submission states that the ICA is not proposing to book individual films for members who remain in (i.e. who have not 'opted out'). Given that negotiations generally occur on a film by film basis, it is unclear what the ICA would in fact be attempting to negotiate.

6. The Authorisation will not confer the claimed benefits

The proposed collective negotiation is unlikely to be effective, or to provide the claimed public benefits for a number of reasons.

Negotiations in relation to many of the matters of significance are intimately related to individual circumstances of individual exhibitors and their cinemas.

Collective bargaining may discourage Paramount from offering specific conditions relevant to an individual ICA member based on considerations and criteria specifically relevant to that exhibitor, where those conditions are not warranted across the entire ICA membership.

ICA makes no attempt to support its claim that negotiations are 'lengthy' or 'time consuming.' While there are a number of individual factors at play, Paramount's experience has been that negotiations for film bookings with ICA members have rarely been lengthy or time consuming for either party. The economic benefits claimed in relation to reducing the cost of negotiations would not arise.

Whatever information sharing would occur, it could only be between ICA members. To the extent that the real concern of ICA members is how the deals that they receive stand by comparison to the

deals made by distributors with the major exhibitors, the Authorisation, if granted, would not address that issue.

There does not seem to be any public benefit to balance the anti-competitive aspects inherent in information sharing. Because of the individual nature of the considerations which drive the negotiations, information sharing is unlikely to be helpful.

In Category 1 and Category 2 regions, there would be no increase in competitive tension.

In Category 3 regions, ICA members' ticket prices are, on average, already lower than the competitor major exhibitors.

In conclusion, for the reasons outlined above, and because the ICA's submission fails to meet the burden required to justify an exemption allowing it and its members to engage in behavior otherwise prohibited under the CCA, Paramount respectfully submits that the Application should be denied.

Please feel free to contact me if you should wish to discuss further any aspect of this submission.

Yours sincerely
DibbsBarker



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