



Dear Mr Bell

Independent Cinemas Australia application for authorisation A91587 – Interested party consultation

I refer to your letter of 22 June 2017.

The Walt Disney Company (Australia) Pty Ltd (**Disney Australia**) thanks the Australian Competition and Consumer Commission (**ACCC**) for the opportunity to comment on Independent Cinemas Australia's (**ICA**) application for authorisation in respect of certain collective bargaining activities (**Application**) and for the extension of time allowed to respond.

Executive Summary

Disney Australia has a number of concerns with the Application. In summary:

- Disney Australia does not agree with the ICA's assertion that small independent exhibitors are subject to film licensing terms and conditions imposed by distributors that are unfairly applied and discriminate in favour of major exhibitors. Indeed, the opposite is true – independent exhibitors, like rest of the Australian cinema industry, have the benefit of a long-standing voluntary code of conduct (the Film Exhibition and Distribution Code of Conduct (**Code**)) that is actively utilised and applied in good faith by Disney and, as far as can be seen, by the vast majority of industry participants to ensure no such abuses referenced by the ICA occur. The Code has functioned effectively for many years to the benefit of all parties.
- Contrary to the Application's suggestions, independent exhibitors feel free to raise concerns directly with Disney Australia outside of the Code's formal dispute resolution framework, as well as under it. Indeed, Disney Australia's long-standing experience working within the Code to resolve disputes, including one just recently resolved, supports our view that the Code remains an important and effective industry tool for all parties to resolve industry disputes fairly and appropriately. To permit the ICA to carry out collective negotiations and information sharing would only tip the scales away from a highly effective and fair process.
- The Application completely dismisses the competitive detriments that are associated with collective negotiations and "at large" information sharing, including the significant weakening of the Code that would arise. Moreover, the structure of the "opt out" arrangements raises a risk that the Application could encourage or facilitate anti-competitive boycott activity, which would be difficult to detect.
- Disney Australia is sceptical that collective negotiations will result in transaction cost savings and efficiencies claimed by the ICA, particularly given the number of "one-on-one" issues that are typically negotiated. Even if such savings were to occur, they would not outweigh the negative impact to the Code nor is it clear how they would produce tangible benefits for consumers.

- It is not clear what information will be shared between ICA members and in what context and therefore it is difficult to even respond substantively to this proposal by the ICA. The ACCC must obtain comprehensive details of the proposed information sharing arrangements before making any decision on the Application. To do otherwise would put any distributor at a distinct disadvantage when trying to negotiate commercial terms with an independent exhibitor. Disney Australia would be extremely concerned if the ACCC were to authorise the sharing of sensitive commercial data outside a true collective negotiation and appropriate regulatory oversight.
- Whilst Disney Australia submits the Application should not be granted in any form, it certainly considers the proposed 10-year term is too long. If authorisation is granted, it should be for no more than three years.

Background – Disney Australia

Disney Australia is the Australian subsidiary of a leading global diversified family entertainment and media enterprise. A key business segment for Disney Australia is the distribution of Disney¹ motion picture films and television content across Australia.²

The key distribution channels for Disney's films and television programming are via theatrical release, DVD & Blu-Ray on a retail and rental basis, free and pay television, VOD and EHV³, SVOD⁴ services. Disney Australia also licenses its characters, brands and other intellectual property for use in a range of consumer products, and creates a range of interactive family entertainment apps and websites. In addition, Disney Australia is the producer of various live stage musical performances and licenses other live events.

The Application suggests that the advent of new digital services and disruption to physical home entertainment revenues has caused distributors to come "...*under increasing pressure to appropriate a higher share of revenues from theatrical exhibition*". Disney Australia contends this is inaccurate and misunderstands the way in which distributors earn revenue through separate and successive distribution 'windows' in a film's distribution life-cycle. Such new services have in fact enabled Disney Australia to bring content to consumers in new ways and offered new revenue opportunities, in addition to the theatrical distribution channel. Indeed, market data shows that when all distribution platforms and 'windows' are factored in, the total content market is growing.⁵ Moreover, the theatrical exhibition market itself is also growing.

Film distribution & theatrical exhibition in Australia

For Disney Australia, the film hire process involves a number of steps that ensure regular engagement with exhibitors. The framework for this process includes certain documents:

- *Booking Confirmation Letter (BCL)* – the BCL includes the rental fee the exhibitor will pay to Disney Australia for screening the Disney film on its premises, together with screening days and session details agreed between Disney Australia and the exhibitor for that film. Disney

¹ Reference to "Disney" refers to the parent company, The Walt Disney Company, and includes its affiliate studios such as Walt Disney Animation, Marvel, Pixar and Lucasfilm.

² In addition to the distribution of Disney film and television content, other Disney Australia divisions produce and broadcast three Disney-branded pay television channels.

³ **Video On-Demand / Electronic Home Video**, films and television programming available respectively for rental or purchase from digital stores such as iTunes and Google Play, Telstra BigPond Movies, Sony PlayStation and Microsoft Xbox.

⁴ **Subscription Video On-demand** streaming services like Netflix, Amazon and Stan.

⁵ For example, see data for June 2014 – 2016 available from Retail Tracking GfK Q2 2016

Australia has in place with each exhibitor pre-agreed scaled rental rates that apply film to film, setting out the pricing structure to apply in each week of a film's release (i.e. the rental fee). Therefore, Disney Australia and the exhibitor know in advance the terms that will apply in determining the rental fee for each film without the need to re-negotiate them each time.

- *Standard terms and conditions* – Disney Australia's standard terms and conditions set out commercial terms such as warranty, accounting and payment and termination provisions, and apply to each film licence. These standard terms and conditions were last revised in 2009.

The process is also conducted in compliance with the Code, to which Disney Australia is a signatory. More information in relation to the Code is provided in the section below.

Against this background, when an exhibitor wishes to screen a Disney feature film, it enters into a film rental agreement with Disney Australia whereby Disney Australia grants the exhibitor a non-exclusive license to screen the film for a period of time negotiated between the parties. Prior to release of each film, Disney Australia and each exhibitor (including independent exhibitors) will discuss all relevant commercial matters, such as: the session and screen requirements, the film's length of season, group booking policy, file format for the film (e.g. 2D, 3D, sound spec), release date, and any marketing support that might be agreed. This is entirely necessary given the unique circumstances of each exhibitor including the number of screens they operate, the particular film, time of year, target audience for the exhibitor (e.g. arthouse or mainstream), location, and other films being released at that time.

Shortly before each film's release, Disney Australia issues a BCL to the exhibitor which sets out the negotiated terms for that film (in conjunction with the standard terms and conditions).

In broad terms, exhibitors derive their revenue from a range of sources that include ticket sales, food and beverage sales (such as the candy bar), and screen advertising. Unsurprisingly, Disney Australia has observed that exhibitors adopt a range of approaches when seeking to maximise overall revenue.

The Film Exhibition and Distribution Code of Conduct (Code)

The Code was launched by the ACCC on 13 August 1998 as a voluntary code of practice and dispute resolution mechanism to foster self-regulation in the cinema industry.⁶

At present there are more than 150 signatories to the Code⁷, including major distributors and exhibitors such as Disney Australia, Universal Pictures International Australasia, Village Cinemas and Hoyts. The Code is administered by a Code Administration Committee (**CAC**), which comprises representatives from major and independent distributors and exhibitors, including the ICA. The CAC currently meets three times per year in February, July and October.

The CAC appoints an independent Code Secretariat and conciliator. Currently the Code Secretariat function is performed by The Accord Group (an international dispute resolution firm)⁸ and the independent conciliator is Ms Nina Harding. The CAC also has an independent Chairman. Since the commencement of the Code until July 2017 this position has been filled by Mr John Dickie, with Ms Katherine Sainty taking on the role going forward.

The Code represents the outcome of an ACCC enquiry into business practices in cinema exhibition and distribution. The enquiry arose following complaints from small film exhibitors about the supply and

⁶ <https://www.accc.gov.au/media-release/film-distribution-and-exhibition-code-of-conduct>

⁷ <http://www.filmcode.info/List%20of%20Signatories%202015%20updated.pdf>

⁸ <http://www.accordgroup.com.au/>

conditions of supply of films, particularly first release features. It is noteworthy that in its final report, the ACCC identified:⁹

"It is the refusal by distributors to supply prints to certain cinemas and the terms and conditions of supply which generate most of the complaints to the ACCC ... The general thrust of these complaints is that the policies of the two major distributors advantage the major exhibitors, Hoyts, Greater Union and Village."

As a direct response to such complaints, the Code provides that each distributor who has voluntarily signed up to the Code will deal with exhibitors on a fair and equitable basis in relation to the marketing and supply of theatrical films in Australia. Indeed, the Code's main objectives are to provide a framework for "fair and equitable dealing" between all distributors and exhibitors and to provide a timely, non-legalistic and commercially oriented means of avoiding and settling disputes. Guidance on what constitutes "fair and equitable" is set out in clause 4.2 of the Code.

The tangible benefits the Code delivers to small independent exhibitors are clear:

- Small independent exhibitors are not subject to film licensing terms and conditions imposed by distributors that are unfairly applied and unfairly discriminate in favour of major exhibitors. Indeed, the Application partially acknowledges this:¹⁰ *"Distributors determine to whom they will offer licences for each film within the provisions of the Code ICA exhibitors currently have the expectation of being offered a film on the first national release date..."* (i.e. the same release date as major exhibitors).
- Contrary to the Application's assertion, the Code creates an environment in which independent exhibitors are regularly given the opportunity to negotiate terms for content and where appropriate, the bargaining outcomes can potentially be made available to exhibitors generally. Indeed, Disney Australia's own experience is that its sales team enjoys close working relationships with independent exhibitors, such that the exhibitors feel comfortable raising any concerns directly with Disney Australia.

This is in stark and direct contrast to the Application's assertion that without the requested authorisation small independent exhibitors will remain subject to unfair film licensing terms and conditions, because while small exhibitors are provided content on "a 'take it or leave it' basis", larger exhibitors "hold sufficient individual bargaining power to issue counter proposals and to negotiate, bargain and, if desired, reject proposals on a case-by-case basis".¹¹ This inaccurate assertion has also been repeated in media coverage of the Application.¹²

Code administration

The Code is an active framework that Disney Australia submits is generally working well. The CAC receive approximately 4 – 5 dispute inquiries under the Code per year and as at 30 June 2016, had received 219 dispute enquiries in total since the Code was established in 1998.¹³ These relate to subjects such as non-supply of movies, co-bundling movies from different distributors and terms of trade.

⁹ *Developments in the cinema distribution and exhibition industry* (Report to the ACCC by Ross Jones, March 1998)

¹⁰ Application at para. 11.5

¹¹ Application at para. 2.7 and 4.3

¹² See "Australia's small cinemas want cartel exemption to negotiate better film deals", SMH 12.07.17 at <http://www.smh.com.au/business/media-and-marketing/australias-small-cinemas-want-cartel-exemption-to-negotiate-better-film-deals-20170711-gx8vh0.html>

¹³ Code Conciliator's Annual Report 1 July 2015 – 30 June 2016 at p. 1: http://www.filmcode.info/cr_15_16.pdf

In recent years, Disney Australia understands almost all matters have been resolved using the Code's informal dispute resolution process. The CAC describes its own administration in the following way:¹⁴

"Under the early intervention procedures the Code Secretariat plays an active role in facilitating communication and in resolving the problem by encouraging the complainant to take the matter up directly with the Managing Director of the other side and (if that does not solve the problem) by the Secretariat telephoning the Managing Director. This approach can lead to a quick resolution to the problem at no cost to the parties, unlike formal conciliation.

The Code Secretariat plays an important role in allowing complainants to register their concerns, to explain the available alternatives and to facilitate agreement. Sometimes complainants simply wish to discuss the problem with the Secretariat and express their concerns as part of their decision-making process whether to progress the matter under the Code. Often enquirers wish to express some dissatisfaction with how the industry operates without wanting to commence the dispute resolution process. The Secretariat provides an effective and helpful point through which such issues can be registered and communicated to the Committee. It provides an effective hearing of concerns even if the enquirer does not wish to pursue the matter further."

This appears inconsistent with the assertion (devoid of any supporting evidence) made in the Application, which Disney Australia disputes, that many ICA members "... do not feel able to approach the Code Secretariat with an individual fear of diminishing their relationship with the distributor and future terms of supply of films essential to their businesses...".¹⁵

Moreover, Disney Australia's own experience is directly contrary to that assertion. Independent exhibitors are comfortable raising concerns directly with Disney Australia outside of the Code's formal dispute resolution framework, as well as under it and Disney Australia's recent experience working within the Code to resolve a particular dispute supports our view the Code remains an important and useful industry tool.

Collective negotiations – anti-competitive detriments

Disney Australia acknowledges that any collective negotiation by the ICA will be voluntary and that this will, to some extent, limit the anti-competitive detriment.

However, as the Application concedes, the aggregate of its cinema exhibitor members in Australia comprise 25% - 30% of the theatrical exhibition sector. As a result, if the ICA were to conduct collective negotiations in which all ICA members participated, then it would represent a group that is larger than each of Event (Greater Union and Birch Carroll & Coyle), Hoyts or Village, the three largest exhibitors in Australia. In that context, in any true collective negotiation, Disney Australia anticipates it could find itself in a relatively weak bargaining position. Indeed, while notionally voluntary, Disney Australia may find itself commercially compelled to negotiate collectively with the ICA.

The structure of the proposed arrangement, which involves ICA members being able to "opt out" of collective bargaining at any time by providing written notice to the ICA, also raises an unacknowledged anti-competitive detriment associated with greater engagement between ICA members. Under this arrangement, an ICA member may share information with competitors for the purpose of a joint negotiation but then "opt out" of the process at a later stage, taking with it all the confidential information that has been shared. This raises a risk that the Application could encourage or facilitate anti-competitive boycott activity, which would be difficult to detect, outside legitimate collective dealings.

¹⁴ Code Conciliator's Annual Report 1 July 2015 – 30 June 2016 at pp. 1 – 2: http://www.filmcode.info/cr_15_16.pdf

¹⁵ Application at para. 2.13

The Application also asserts at various points that ICA members operate at a disadvantage to the major exhibitors because “*they hold insufficient bargaining power to effectively negotiate*” and “*are forced to accept whatever deal is proposed by the distributor*”. Moreover, any successful outcome the ICA CEO is able to negotiate for an individual exhibitor “... *may not be disclosed and does not necessarily benefit any other member*”.

Disney Australia submits these claims intentionally overlook or downplay the operation of the Code, which has underpinned the dissemination of benefits associated with major exhibitor / distributor negotiations for over 15 years. Indeed, the ACCC should take into account the significant detriment associated with the inevitable weakening of this voluntary Code - both in terms of (possible) withdrawal of membership and commitment to its principles – that would result from authorising the Application in its current form.

Collective negotiations – claimed public benefits

Disney Australia accepts that, in principle, collective negotiations are capable of resulting in transaction cost savings and efficiencies that are appropriately described as public benefits. However, in this case, Disney Australia submits that the claimed benefits are at best grossly overstated and at worst illusory. Indeed, some claimed benefits are in fact detriments. In particular:

- **(Cost savings and efficiencies)** Disney Australia is sceptical that collective negotiations will actually result in the cost savings and efficiencies claimed as public benefits in the Application, relative to the existing operation of the Code.

The ACCC should take into account that the ICA members are not homogenous and there are a number of issues on which it will remain necessary for a single cinema or group of cinemas to agree “one-on-one” with a distributor. Indeed, different outcomes may be necessary for each cinema within a group operated by the same exhibitor. Often this will be due to individual cinema requirements or expectations, with issues including the marketing support being provided for the particular film, group booking policy, file format for the film (e.g. 2D, 3D, sound spec), release date and details regarding any advance screenings.¹⁶

By way of illustration, Disney Australia is increasingly formulating bespoke marketing and promotional activity and content with individual independent exhibitors. This has included recent in-cinema activity in a Perth cinema for the *Cars 3* release and with specific drive-in cinemas, as well as bespoke promotional activity for independent exhibitors to support the release of *Beauty and the Beast*. That is only possible as the result of individual negotiation and agreement with exhibitors. A collective bargaining arrangement would jeopardise that bespoke support.

- **(Redressing insufficient bargaining power)** This claimed benefit is closely aligned to an assertion in the Application that distributors have disproportionate market / bargaining power in their dealings with exhibitors. However, this claim is factually inaccurate given the market presence of at least 6 major distributors, including Universal, Roadshow/Warner Brothers, Fox, Paramount and Sony and the variability of market share between distributors on a year to year basis. For example, in 2017 Disney Australia’s market share was estimated to be only 21.7% on an annualised basis whereas in 2015 it was 17.35%.

¹⁶ See the further details of matters negotiated individually and directly with each exhibitor on p. 3 of this submissions.

See below further details of the estimated market shares for distributors in Australia:¹⁷

	CY15	CY16	CY17*
Universal	22.82%	13.49%	16.63%
Roadshow (with Warner Bros)	21.25%	21.22%	15.86%
Fox (with DreamWorks)	16.78%	15.59%	17.61%
Disney	17.35%	22.29%	21.70%
Paramount	4.30%	5.33%	6.00%
Sony	6.49%	7.06%	3.17%

* CY17 is year to date.

- **(Reducing risk of ACCC action)** Disney Australia submits this is not a 'public benefit' in the sense that term is interpreted by case law and the ACCC to include "... anything of value to the community generally". Indeed, unless the allegation is that the ACCC's investigations are wasteful, this is a detriment.

Information sharing

Separately to the matters raised above and quite significantly, the Application appears to seek authorisation for the unfettered sharing of information between ICA members at any time. Disney Australia accepts that some information sharing between ICA members would be necessary to conduct a true collective negotiation. However, Disney Australia has the following concerns in relation to information sharing.

- **(Scope)** It is not clear precisely what information is proposed to be shared; the Application refers only to "*the terms or proposed terms of film licensing agreements*" and then "*the general terms sought by distributors for film licences and/or the specific booking terms and policy sought by distributors for particular film titles from time to time*". For Disney Australia to make informed submissions on information sharing, it is critical that the ICA disclose significantly more detail about precisely what information will be shared.¹⁸
- **(Information sharing outside collective negotiations)** It seems clear from the Application that the ICA wishes to promote the exchange of information amongst its members "*from time to time*" without restriction and outside the context of collective negotiations. It is critically important to Disney Australia that there be complete clarity about how any information sharing will operate in practice.

Disney Australia would be extremely concerned if ICA members were able to share price, margin, cost or the conditions of distribution – each of which is highly sensitive – outside a true collective negotiation. The competition implications of this are identified by the ICA itself, when it notes that some of its members operate in the same geographic area and information exchange "*creates a real risk of triggering legal action or an ACCC investigation.*"¹⁹ Disney Australia submits that the ICA should publicly disclose the particular members and regions of overlap, so Disney Australia can make informed submissions regarding the extent of this potential competitive detriment.

¹⁷ Data from Rentrak/ComScore.

¹⁸ For example, in the Form B the ICA offers only 'examples' of what 'terms and conditions' might include. Indeed, it specifies that its request is not limited to those examples.

¹⁹ Application at para. 3.2

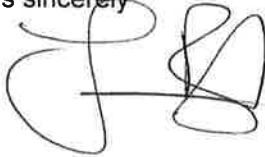
Term

Finally, the Application seeks an authorisation term of 10 years. Disney Australia submits this term is too long and a term of no longer than 3 years would be more appropriate for the following reasons:

- the conduct for which authorisation is sought represents a radical departure from current arrangements in Australia theatrical film distribution and exhibition and therefore should be closely monitored; and
- consumer habits, and therefore film distribution generally, are evolving rapidly with the advent and growth of digital technologies and services, which is highlighted by the Application itself.

If you have any queries about this letter or would like to add additional information, please let me know. Disney Australia would be pleased to assist the ACCC further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jo Bladen', with a horizontal line extending from the middle of the signature.

Jo Bladen

General Manager – Studios, Australia & New Zealand
The Walt Disney Company (Australia) Pty Limited