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**To:** ACCC Adjudications  
**From:** Entertainment One Films Australia Pty Ltd. ("eOne")  
**Subject:** A91587 – Independent Cinemas Australia Inc. – Submission  
**Date:** 3 August 2017

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### **Executive Summary**

eOne thank the Australian Competition & Consumer Commission (**ACCC**) for the opportunity to comment on the Independent Cinema Australia (**ICA**) application for authorisation on behalf of itself and current and future members to collectively bargain with film distributors to negotiate various terms, conditions and policies for film licensing agreements.

eOne, based in Sydney, was started in 2002 as Hopscotch Films. Joining the eOne family in 2011, it has established itself as one of the leading independent content and distribution businesses across Australia with interests in film, television and production. In preparing this submission, consideration was given to the ACCC's primary responsibility of ensuring that individuals and businesses comply with Australian competition, fair trading, and consumer protection laws - in particular the *Competition and Consumer Act 2010* (Cth).

eOne acknowledges that ICA propose that any information sharing and collective negotiation would be entirely voluntary on an opt-out basis for ICA members; and that a particular distributor may choose not to collectively bargain with ICA. However in seeking this authorisation from the ACCC on behalf of its current and future members, ICA are potentially claiming the largest share of the exhibition market and a virtual monopoly in respect of theatrical exhibition rights licenses in Australian cinemas which are not controlled by the three major exhibitor groups. Hence, the potential for significant detrimental impact that an ICA authorisation may have on both competition and fair trade between industry and consumers should be closely examined.

eOne believe that the conclusions of the '*Developments in the Cinema Distribution and Exhibition Industry Report*' commissioned by the ACCC in 1997 regarding the public benefit and detriment arising from any form of mandatory terms which would limit the length and/or breadth of film exhibition seasons a distributor can project remain valid today i.e. terms of this kind are likely to alter distributors' commercial strategies which we believe will be detrimental to consumers and all industry stakeholders.

Similarly eOne believes that the Code of Conduct for Film Exhibition and Distribution (the **Code**) established in 1998, and later reviewed in 2001, under the auspices of the ACCC has demonstrably proven to be an efficient and effective framework for:

- I. Fair, equitable and transparent dealings between all distributors and exhibitors;
- II. Non-legal, low cost and commercially oriented means of avoiding and settling disputes; and
- III. Reducing the likelihood of litigation between parties of the Code.

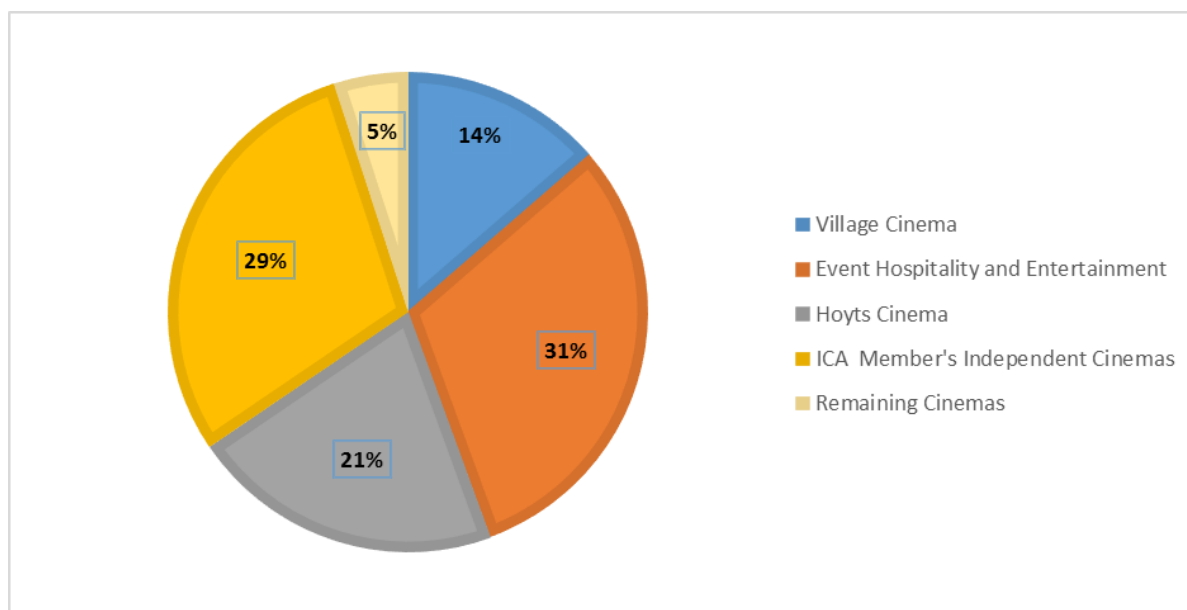
In this submission, eOne will limit its comments to the following aspects of ICA'S submission for authorisation:

- Inaccurate Market Share Definition
- Effects of Contract Negotiation Process on Market Function
- Code of Conduct

### **Inaccurate Market Share Definition**

As illustrated in **Table One** below ICA members collectively command a market share of approximately 29% of the theatrical exhibition sector. However, it is important to note that in its application for authorisation, ICA defines 'Independent Cinemas' as those that are not owned and controlled by the three major exhibitor groups that operate in Australia i.e. Event Hospitality and Entertainment, Hoyts Cinema and Village Cinema. Meaning, for the purposes of giving due consideration to the application for authorisation before us, eOne believes that the remaining cinemas should be considered the ICA's market growth potential.

**TABLE ONE: Market share of Exhibitors based on estimated Box Office takings (2016)**



Therefore granting the ICA authorisation would not only introduce a new player in the sector, but also provide capacity for the ICA to:

- I. Rapidly increase its market share by 5% to 34%;
- II. Claim the largest share of the Australian exhibition market; and
- III. Control a virtual monopoly of theatrical exhibition rights licenses in Australian cinemas which are not controlled by the three major exhibitor groups.

eOne envisages that the consequences of an ICA authorisation with this type of capacity will be wide and far reaching, namely:

- I. The state of competition between exhibitors will diminish;
- II. The ability to freely negotiate with individual cinemas will be eliminated, with ensuing negative impact on the diversity of content available to consumers; and
- III. An imbalance of bargaining power will be created between ICA group of exhibitors and independent film distributors such as eOne which makes up 3% - 5% market share of Australian box office.

### **Effects of Contract Negotiation Process on Market Function**

eOne's dealings and negotiations with cinemas are managed on a film-by-film basis, taking into consideration a number of factors including, but not limited to, the:

- Marketability of the film e.g. whether it will command a wide or limited release;
- Target audience of the film and the core customer demographics of each cinema;
- Geographical location of cinema to ensure market coverage based on release plan;
- Estimated box office return from cinema; and
- Advertising for the film

Current practices involve vigorous, competitive and flexible negotiation which has allowed eOne to work collaboratively with exhibitors to program an extensive and diverse annual schedule of new releases; and to fulfil its obligations to consumers and films creators in a way which is consistent with good business judgment and sound commercial practice.

As the above mentioned factors are applied individually to each film release and to each individual cinema, the concept of collective bargaining would not allow eOne to take these factors into consideration.

Collectively bargaining, as described in the ICA application, will also create inefficiencies and hinder our future dealings and negotiations with each exhibitor by placing the ICA in the role of an intermediary, thereby introducing a layer of bureaucracy that currently does not exist.

eOne considers these to be best practice approaches and arguably key factors to Australia developing one of the world's best-functioning theatrical exhibition markets within which consumer confidence – measured with reference to how often consumers attend the cinema and the amount of cinema screens in operation to meet consumer demand – is comparatively high. This is substantiated by the figures sourced from *IHS Markit: Cinema Intelligence Service* and included in the **Table Two** below which indicate that Australia has seen more admissions per person than any other major territory annually since 2006, with the exception of the USA.

**TABLE TWO: Admissions per person in major film territories, 2006-2015 (ranked by 2015 admissions)**

	USA	Australia	France	UK	Spain	Germany	Italy
2006	4.3	4.0	3.2	<b>2.6</b>	2.7	1.7	1.6
2007	4.3	4.0	3.0	<b>2.7</b>	2.6	1.5	1.7
2008	4.1	3.9	3.2	<b>2.7</b>	2.3	1.6	1.7
2009	4.2	4.1	3.4	<b>2.8</b>	2.4	1.8	1.6
2010	4.0	4.1	3.5	<b>2.7</b>	2.2	1.5	1.8
2011	3.8	3.8	3.6	<b>2.7</b>	2.1	1.6	1.7
2012	3.9	3.7	3.4	<b>2.7</b>	2.0	1.7	1.5
2013	3.8	3.7	3.2	<b>2.6</b>	1.7	1.6	1.6
2014	3.6	3.3	3.1	<b>2.4</b>	1.9	1.5	1.5
2015	3.9	3.6	3.1	<b>2.6</b>	2.0	1.7	1.6

Another standard way to gauge how well-functioning an exhibition market is performing is by 'screen density', i.e. the number of screens per unit of population. In 2015 *IHS Markit: Cinema Intelligence Service* reported that the Australian figure was 8.6 screens per 100,000 people. This

level of access to screens is above Spain (7.4), Italy (6.5), UK (6.3) and Germany (5.7), and only falls short of the numbers USA (12.6) and France (8.7).

### **Code of Conduct for Film Distribution and Exhibition**

eOne is of the strong opinion that the Code has demonstrably proven to be an effective tool in achieving compliance with the *Trade Practices Act 1974* (CTH), prompting better working relationships between the Code signatories, an increase in the transparency of transactions and a successful mechanism for the resolving of disputes. This is supported by an analysis of the statistics contained in the Annual Reports released by the Code Conciliator, which reveal that:

- Of the 219 dispute enquiries received since the establishment of the Code in 1998, nine have been formally conciliated so far, eight of which have resulted in an agreement;
- Of the 210 that did not go to conciliation approximately 85% were successfully resolved using the Codes informal dispute resolution procedures, which focus on negotiating a satisfactory solution to the dispute with the assistance of the Secretariat as required, and the remaining matters were enquiries about the Code rather than specific dispute enquiries;
- Out of the nine conciliations at least four conciliations involved major exhibitors; and
- The average cost of conciliation for a small exhibitor is around \$1000, depending on the complexity of the matter.

In the Code Conciliators commentary on the operation of the Code, it is repeatedly stated that:

*"It is very pleasing to see the high level of co-operation which exists between the industry representative associations. This is evidenced by the constructive way in which participants now discuss matters of mutual interest.*

*There is no doubt that the Code has played a pivotal role in the improvement of understanding, behaviour and relationships between industry participants. The Code has improved systems and attitudes in participant companies so that internal processes are resolving matters quickly without the need to have recourse to the Secretariat. The Code has improved communication and relationships in the sector and this has been its main benefit."*

Moreover, in addition to the provisions for informal dispute resolution and conciliation the Code includes numerous safeguards that eOne believes adequately remedy any real or perceived market failures which impede independent exhibitors' reliance on the code including:

- Retaliatory Conduct Prohibitions which state that no distributor may engage in retaliatory conduct against an exhibitor because the exhibitor has invoked the provisions of the Code (including, without limitation, the conciliation procedures) to challenge the conduct of the distributor; and
- Provisions for equivalent representation on Film Exhibition and Distribution Code Administration Committee (**FEDCAC**) - the body charged with the authority to administer the Code – which state that FEDCAC shall be comprised of a representative of each of the major exhibitors to a maximum of three in total with up to an equal number of representatives from each of the Motion Picture Distributors Association of Australia, independent distributors and independent exhibitors.

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Thus eOne considers claims by ICA that exhibitors are '*unwilling*' to exercise rights under the Code - '*fear[ful]* of diminishing their relationship with the distributor and future terms of supply of films essential to their businesses' to be without basis and unduly apocalyptic.

However, to the extent that ACCC determines that these voluntary measures do not resolve the ICA's concerns, then eOne suggests that the ACCC recommends that the Minister for Regulation and Financial Services consider prescribing the Code as an alternative to granting the ICA with the authorisation it has applied for.