

RESPONSE TO PUBLIC SUBMISSIONS MADE BY INTERESTED PARTIES ON INDEPENDENT CINEMA AUSTRALIA'S APPLICATION FOR AUTHORISATION

1. INTRODUCTION

Independent Cinemas Australia (**ICA**) makes this submission in response to submissions from interested parties during the consultation process on ICA's application for authorisation dated 8 June 2017 (application number A91587).

ICA has not sought to respond to every submission made by interested parties, but has sought to address the key issues that have been raised during the consultation process.

2. SCOPE OF THE AUTHORISATION

Who the authorisation will cover

Several interested parties have expressed the view that ICA's authorisation does not clearly state who the authorisation will apply to, and that there is uncertainty around the size and composition of the collective negotiation group.

ICA currently has 84 exhibitor members, a list of which can be found on ICA's website.¹ ICA has not yet formally requested its members to state their intentions concerning involvement in any proposed authorised activity and so is unable to provide a definitive list of who the authorisation will apply to. ICA anticipates giving specific notice of proposed activity to its members once authorisation is granted and then noting all member exhibitors who elect to opt out of each activity at that time. ICA will maintain a list of each exhibitor who participates in a collective negotiation and/or information exchange, and those who have opted out, once the authorisation has been granted. This will necessarily clarify any uncertainty there may currently be concerning the composition of the negotiation group for any particular issue on which collective negotiation is proposed from time to time.

ICA anticipates that most of its members will wish to share information concerning proposed terms and conditions to better understand and assess the fairness of terms available to their business. Some members have also expressed interest in participating in collective bargaining for more appropriate terms of supply for exhibitors with similar businesses, for example, certain regional sites, or sites with up to 4 screens.

ICA also anticipates that some of its largest members will continue dealing directly on a one on one basis with each distributor and therefore opt out of collective negotiation especially regarding individual film booking terms..

Some of ICA's largest members may however choose not to opt out of collective negotiation of a particular issue of common concern that they consider an issue

¹ ICA membership changes from time to time.

more appropriately dealt with through ICA on behalf of all or a group of affected members.

For clarity,

- ICA will share information with all exhibitor members² other than those who have elected to opt out of authorised information sharing.
- ICA does not propose to share information about specific collective negotiations with members once they have opted out of the conduct which is the subject of the authorisation.

Conduct that the authorisation will cover

Interested parties have also expressed the view that ICA's application does not clearly state which conduct the authorisation will apply to, or that the conduct when described is broad and uncertain.

ICA submits that its application for authorisation and supporting submission clearly describe the conduct sought to be authorised, which includes the exchange of information and the collective negotiation of terms on which films are licensed to its members by distributors.

Need for the authorisation

Interested parties have expressed the view that there is no need for the authorisation to be granted and that the film industry in Australia is not suffering from any form of market failure. ICA submits that our application for authorisation does not arise out of a major market failure but the likelihood based on current experience that digital disruption in the industry is exacerbating an existing imbalance in market power that disadvantages independent exhibitors and can be appropriately redressed by authorisation of the activities requested.

ICA has specifically sought authorisation in response to a recent significant change in custom and practice and anticipated likely changes such as to the exclusive theatrical release window. We are seeking separate authorisation for information sharing activity and for collective negotiation activity due to our observation that independent exhibitors are not being included in negotiations, or being provided transparent information concerning matters affecting every member exhibitor such as changes to the exclusive theatrical release window on film titles and digital delivery and marketing practices.

3. CREATION OF EFFICIENCIES

Imposition of a "layer of bureaucracy"

A number of interested parties have expressed reservations that the authorisation, if granted, will create a "layer of bureaucracy" that will frustrate both sides by inserting

² Subject to our later comments concerning vertically integrated exhibitor/distributors

a third party body between distributors and exhibitors. The interested parties allege that this will create inefficiencies and protract negotiations between distributors and exhibitors.

ICA already negotiates with distributors on behalf of individual exhibitors. The purpose of the authorisation of information sharing activity and separately of collective bargaining activity is to enable it to do so on behalf of a group of exhibitors, where exhibitors have voluntarily agreed to be a part of collective negotiation of a particular issue. ICA does not anticipate being routinely involved in booking individual film titles however some negotiations may affect the terms of individual bookings.

ICA submits that the authorisation will not introduce a new and time consuming component to negotiations between distributors and exhibitors, or a "layer of bureaucracy", given that ICA is already involved in negotiations with distributors on behalf of members on an individual basis from time to time. ICA maintains that a successful authorisation application will in fact create efficiencies for those parties who would otherwise have to negotiate separately on substantially the same subject matter.

Significance of differences between ICA members

Interested parties have expressed the view that ICA's application is incompatible with the commercial necessity for negotiations between distributors and exhibitors to be had on a case by case basis, given that ICA members are a heterogeneous group of exhibitors which vary in terms of their characteristics.

ICA agrees that its members are not a homogeneous group, and necessarily have different characteristics which impact certain elements of their agreements with distributors. The differences do not mean, however, that no benefit can be derived from the authorisation of information sharing or from collective negotiation.

This concern about the different characteristics of exhibitors misconceives the nature of the proposed authorised conduct. Collective negotiation, if authorised, will be tailored to circumstances which may include:

- A contractual term or changed term which generally affects exhibitors for which a common outcome may be appropriate;
- A contractual term or changed term which affects a sub-set, or sub-sets, of exhibitors in different ways for which outcomes would be tailored to their circumstances.

Examples of the different circumstances are set out below and confidential examples are provided to the ACCC separate to this submission.

Much of the conduct of distributors affects many members of ICA in similar ways and can appropriately be the subject of collective negotiation on their behalf. An example of such conduct is the frequent late notification by distributors of the terms of the booking season and sessions for particular films. Conduct such as this which places many members at a serious commercial disadvantage can usefully be the subject of collective negotiation.

The authorised conduct is not, however, limited to negotiation on behalf of all or substantially all members leading to standard outcomes for all or substantially all members. It is likely that some issues will be negotiated on behalf of similarly situated exhibitors, for example those operating cinemas with four or less screens or those operating in remote locations. For example a recent proposed change in a distributor's standard terms and conditions concerning delivery and return of materials would result in a significantly harsher impact on more remote locations than may have been anticipated or intended by that distributor.

There also appears to be a misconception that collective negotiation concerning, for example, a unilateral change in a distributor's pricing would result in an identical outcome for all exhibitors. Negotiations in such circumstances may be on behalf of a sub-set of exhibitors who are adversely impacted by the particular change because of their particular business model. An example of this, of which the ACCC is aware, is the hardship likely to have been caused for some exhibitors by the fundamental change in pricing methodology introduced by a major Studio in July 2016. Collective negotiation, had it been authorised at the time, could have been proposed by ICA on behalf of those exhibitors particularly affected by the change.

Finally, the authorisation of information sharing will be a significant factor in providing the transparency necessary for an exhibitor to make a fair and equitable bargain with distributors for each film title.

ICA acknowledges that different factors unique to particular exhibitors inform the terms on which that exhibitor can licence different film titles. However if there is no visibility around the key terms of supply and the reasoning that different exhibitors achieve particular outcomes there can be no real negotiation and little capacity to arbitrate unfair or inequitable dealing through the industry Code of Conduct.

4. **THE CODE OF CONDUCT**

Several interested parties have expressed the view that the existing Code of Conduct for Film Distribution and Exhibition 2013 (**Code**) is sufficient to govern negotiations between exhibitors and distributors, and that to the extent that there are any concerns, these should be addressed through improvements to the Code and not through the proposed authorisation.

ICA acknowledges that the Code is an important and useful tool and it and ICA members will abide by the spirit and terms of the Code in their dealings with distributors during the term of the authorisation.

However, the Code does not adequately address the issues that ICA members face in their dealings with distributors. The Code's objective of providing a framework for fair and equitable dealing between distributors and exhibitors is not achieved because exhibitors are unable to make any informed assessment of the fairness and equality of a distributor's dealing with it. The information sharing, if authorised, will assist in achieving this objective because an exhibitor can then make a more informed assessment of fairness and equity and will enhance the effectiveness of the Code.

The intention of the authorisation is to address areas which the Code currently does not, and to operate alongside the Code to provide independent exhibitors with necessary information and support in negotiations with distributors.

The Code's dispute resolution procedure makes it unusable for many of the issues which arise. The Code has no provision for dispute resolution other than for a dispute to be resolved individually between an exhibitor and a distributor. Section 15 of the Code sets out the 'informal' dispute resolution process which contains a series of steps for the complainant to take in seeking to resolve a dispute, the culmination of which is for the Code Secretariat to discuss the dispute with the Managing Director of the other party with a view to reaching an amicable resolution. Failing resolution, the complainant can engage the more formal dispute resolution procedures in section 16 'Dispute Resolution Procedures – Conciliation' and section 17, 'Conciliation Proceedings'. These resolution procedures can be protracted, lengthy and expensive for individual exhibitors, and by the time that such procedures have been utilised, exhibitors find that the subject of the dispute (for example, a film release date) will have passed and the resolution may be redundant.

Exhibitors also do not have access to transparent information which would allow them to judge whether or not the terms offered to them by distributors are fair and equitable, in order to determine whether it would be appropriate for them to activate the Code's dispute resolution procedures. This means that the matters that are most likely to be referred through the Code are the denial of film supply by a distributor or terms of film supply that on their face are patently unacceptable to the exhibitor, and not the more nuanced and frequent cases where exhibitors are concerned as to the fairness of the terms offered to them, but are not confident enough in their position to embark on the Code's dispute resolution procedures. This is especially the case where, as noted in ICA's supporting submission at section 2.13, exhibitors are reluctant to refer complaints to the Code Secretariat for fear of jeopardising their relationship with a distributor.

It cannot be inferred, as has been submitted by interested parties, that because there have been few complaints brought against individual distributors under the Code, it follows that the Code is successful in ensuring that the terms offered ICA members are fair and equitable. The lack of complaints being brought under the Code is, in fact, referable to reluctance of exhibitors to use the Code as a complaints mechanism for fear of jeopardising their relationship with distributors and to the fact that the procedures are disproportionately expensive and unduly cumbersome.

ICA is seeking to redress these limitations of the Code: ICA proposes to enhance the Code's operation by permitting collective complaints to be dealt with under the framework of the Code. This will in part counter the reluctance of exhibitors to identify themselves as raising a complaint.

ICA submits that the grant of authorisation, and associated necessary amendments to the Code, would enhance the operation of the Code while generating cost and time savings for exhibitors and distributors invoking the Code processes, given that individual disputes dealing with the same issue would not need to be addressed as entirely separate complaints.

In addition to proposed amendments currently before the Code Review Committee and highlighted in the attached draft³, ICA proposes that the Code be amended to extend to collective negotiation proposed under the authorisation. ICA proposes suggested amendments to the following effect in the Code:

3. Scope

3.1 This Code applies to each distributor and exhibitor who is a signatory to this Code in their dealings with each other, and to Independent Cinemas Australia Incorporated in their dealings with distributors on behalf of one or more exhibitor, as authorised under authorisation A91587 granted under subsections 88 (1A)/88 (1) of the Competition and Consumer Act 2010.

GUIDELINES

4. The Overriding Principle and Film Piracy Commitment

4.1 Each distributor and each exhibitor will deal with the other on a fair and equitable basis at arms length and in the manner set out in this Code.

4.1.2 Where Independent Cinemas Australia Incorporated deals with a distributor on behalf of one or more exhibitors, as authorised under authorisation A91587 granted under subsections 88 (1A)/88 (1) of the Competition and Consumer Act 2010, Independent Cinemas Australia Incorporated and each distributor will deal with each other on a fair and equitable basis.

4.2 In addition to compliance with the requirements of this Code, regard should be had to the following in determining what constitutes dealing "on a fair and equitable basis":

5. EXCHANGE OF INFORMATION

A number of submissions express the view that the exchange of information proposed by the authorisation between ICA members could result in an unfair advantage to ICA members over film distributors, and express concern that there is a lack of control or safeguards over the exchange of information which redress these perceived issues.

ICA submits the lack of transparency on price information has the effect of requiring exhibitors to accept licence of a film title from a distributor on a 'take it or leave it' basis. In the absence of authorisation of exchange of information, exhibitors are unable to fairly assess the proposed licence terms and price, while the lack of transparency means distributors may unfairly discriminate between like customers without exhibitors having the capacity to challenge inequitable dealings through the Code of Conduct.

ICA submits the submissions have not demonstrated any reason why transparency around the price of a film title would give an unfair advantage to ICA members, or

³ And the amendment proposed in section 5 below

disadvantage distributors or why a distributor would seek to hide differences in offers to certain exhibitors or classes of exhibitor if based on legitimate market reasons.

The nature of information proposed to be shared

The information exchange proposed by the authorisation will concern 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, particularly if the terms involve a material departure from previous terms offered by that distributor. The exact kinds of information that fall within this ambit will necessarily depend on specific issues in relation to a distributor's terms and proposed changes to them that arise from time to time.

By way of example, distributors are obliged to provide exhibitors with a booking season and session notification in respect of a specific movie title – this specifies a distributor's requirements as to the number and timing of screenings with which an exhibitor is obliged to comply.

Such notification of terms by a distributor to an exhibitor often occurs after the film has been booked by exhibitors. In circumstances where the information provided is unsatisfactory to the exhibitor or materially impacts the exhibitor's release strategy, the exhibitor is unable to negotiate terms, having already booked the film.

The authorisation would enable ICA, on behalf of members who have not opted out, to seek to redress the disparity in bargaining strength which results from the late provision of information from distributors to exhibitors. First, ICA would seek to negotiate with a distributor, on behalf of exhibitors which have not opted out, the distributor's obligations concerning the timing of disclosure to exhibitors of its season and session requirements. Secondly, if ICA and exhibitors were authorised to share information (which had been disclosed by the distributor in a timely fashion), the requirements and, more particularly changes to them, could be brought to the attention of exhibitors. This would enable exhibitors to consider them on a better informed basis and, if appropriate, request ICA to make representations to the distributor on their behalf.

Collective boycott concerns

A number of submissions express the view that there is an inherent risk that the conduct that is the subject of the authorisation will lead to a collective boycott of distributor's film offers through the sharing of information by exhibitors. It is alleged that the sharing of information creates opportunities for explicit or tacit collusion between exhibitors.

These are merely assertions without any basis. Speculation that ICA and its members will use the authorisation to engage in unlawful conduct is entirely misplaced. If ICA and its members intended to engage in collective boycotts, they would have sought authorisation for such arrangements and conduct.

ICA is unlikely to know the decision of one exhibitor as to whether it will accept a collectively negotiated term and, in any event, ICA will not be communicating that to any other exhibitor. Authorisation of collective negotiation does not permit ICA to seek to persuade members to accept no other terms.

Furthermore ICA will not persuade, encourage or assist members to engage in collective boycott behaviour or any other illegal conduct.

ICA member exhibitors who are also distributors

A number of parties have expressed concern that ICA members which are also distributors could obtain an unfair advantage through the sharing of information.

ICA does not accept the proposition but would consent to it being a condition of authorisation that exhibitors which are also distributors will not participate in the information sharing and collective bargaining proposed in the application unless they undertake in writing not to share that information with their distribution division executives. This is comparable to the basis on which we understand that vertically integrated distributors have access to site by site Box Office information of competing distributors and are required not to share that information with their exhibition divisions.

Commercial confidentiality provisions

Individual ICA members presently share commercial confidential information with ICA office holders under the auspices of the Code of Conduct to enable ICA to assist members understand and comply with their obligations to distributors and to assist members resolve disputes with distributors under the framework of the Code of Conduct

ICA acknowledges that the authorisation does not itself override commercial confidentiality provisions between exhibitors.

In addition to the amendments mentioned in Section 4 above, ICA proposes the introduction of a term in the Code of Conduct that permits ICA member exhibitors to share commercial in confidence information pertaining to the price and terms of supply of film titles with other ICA member exhibitors for the purpose of assessing whether a common complaint should be brought under the framework of the Code of Conduct.

In order to give efficacy to the authorised conduct on other matters, ICA proposes to negotiate changes to confidentiality provisions with distributors so as to permit the authorised conduct to take place and to achieve the benefits of improved efficiency in the negotiation of terms of supply and the fairness of outcomes.

6. IMPACT ON COMPETITION

A number of submissions express the view that the authorisation will reduce competition in the film exhibition and distribution industries. It is alleged that the authorisation would create a new player in the market with an equivalent market share to one of the major exhibitors. However these submissions fail to recognise that ICA cannot on any analysis actually represent the bargaining power of 30% of the industry because ICA cannot collectively boycott any distributor (irrespective of its size) and has not sought authorisation to collectively boycott any distributor.

It is implicit in a concern about market share that those industry participants which already actually possess substantial market power secure materially better terms. If

that were not the case, a concern about increased market share would be without substance.

This concern is also another version of the concern about the increased risk of boycotts which has been addressed above. The members of ICA will not, as a result of the authorisation be able to behave as though they had all merged and formed a single entity which could lawfully threaten to refuse to deal with a major distributor.

Furthermore, ICA submits that this position fundamentally mischaracterises the nature of the conduct which is sought to be authorised. ICA seeks to facilitate the exchange of information concerning the terms or proposed terms of film licensing agreements and, if requested, collectively negotiate on behalf of ICA members. The authorisation cannot be characterised as an elimination of actual or potential competition, but rather it reflects the continuation and enhancement of the arrangements between ICA and individual exhibitors which are already in place.

The proposition that the authorisation will result in the reduction of competition in the film exhibition industry, and lessen the imperative to innovate and develop consumer benefits ignores the substantial imbalance in bargaining power.

No amount of collective negotiation will alter the fact that for a cinema operator, having access to a successful film is essential to their business. Any distributor regardless of whether it is a small independent or a major Studio could have a film that exhibitors need to licence to remain commercially viable. It is not a factor of the size of the distributor, although it is likely that larger distributors have more film titles to offer that are more commercially successful. To survive, a small cinema in regional centres or the suburbs must have access to a wide range of films. On the other hand a distributor's survival does not depend on whether its film is exhibited in any particular country town for example.

There will be no lessening of competition – the fundamental imbalance in bargaining power will remain but the dealings between a distributor and participating ICA members will be more efficient and the outcomes should be fairer.

7. PERIOD OF THE AUTHORISATION

The ICA has sought a ten year authorisation, for the reasons set out in its primary submission. Most of the interested parties suggest a shorter period would be more appropriate.

The ICA maintains that a 10 year term is appropriate, in light of the reasons outlined in its primary submission in section 2.20.