



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Independent Cinemas Australia

in respect of

information sharing and collective bargaining

Date: 28 September 2017

Authorisation number: A91587

Commissioners: Schaper
Court
Featherston

Summary

The ACCC proposes to grant authorisation to Independent Cinemas Australia (ICA) and its current and future members for five years to make and give effect to contracts, arrangements or understandings pursuant to which they may participate in:

- information exchange concerning the terms, or proposed terms, of film licensing agreements, and/or
- collective negotiation on behalf of ICA member exhibitors of the terms and conditions of film licensing agreements, and/or
- collective negotiation on behalf of ICA member exhibitors of booking terms and other terms and policy for film licensing agreements applying to specific categories of members such as, but not limited to, regional cinemas or cinemas with four or less screens, and/or
- collective negotiation on behalf of ICA member exhibitors of booking terms and policy for film licensing agreements applying to specific titles from time to time if requested by a member or group of members.

Participation in collective bargaining is voluntary for exhibitors and distributors.

ICA has not applied for authorisation to engage in collective boycott conduct.

Authorisation provides protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010*. It does not protect parties from breach of confidentiality agreements.

The ACCC considers that the proposed conduct is likely to result in transaction cost savings and improved input into negotiations and limited public detriment. The likely public benefit will outweigh the likely public detriment from any reduction in competition between ICA members.

Next steps

The ACCC seeks submissions in relation to this draft determination before making its final decision.

The applicants and interested parties may also request the ACCC to hold a conference to allow oral submissions on the draft determination.

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The application for authorisation

1. On 13 June 2017, Independent Cinemas Australia Inc. (ICA) lodged application A91587 with the ACCC, under subsection 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the Act), seeking authorisation for 10 years to engage in information sharing among ICA members and to engage in collective bargaining with film distributors.
2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Act.¹ In this instance, ICA seeks authorisation of the proposed conduct as it may involve the making or giving effect to arrangements that contain a cartel provision and/or a provision that may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
3. Authorisation does not protect parties from breaches of other laws or contractual obligations including confidentiality agreements with other parties.

The proposed conduct

4. ICA seeks authorisation, on behalf of itself and its current and future members on a voluntary 'opt out' basis,² to make and give effect to contracts, arrangements and understandings pursuant to which the applicants may participate in:³
 - information exchange concerning the terms or proposed terms of film licensing agreements, and/or
 - collective negotiation on behalf of ICA member exhibitors of the terms and conditions of film licensing agreements, and/or
 - collective negotiation on behalf of ICA member exhibitors of booking terms and terms and policy for film licensing agreements applying to specific categories of members such as, but not limited to, regional cinemas or cinemas with four or less screens, and/or
 - collective negotiation on behalf of ICA member exhibitors of booking terms and policy for film licensing agreements applying to specific titles from time to time if requested by a member or group of members.
5. ICA does not seek authorisation to engage in collective boycott conduct.
6. ICA submits that the proposed conduct will take place in the context of the supply of films by distributors to exhibitors who will screen them in cinemas. Typically the contractual arrangements between a distributor and an exhibitor comprise:⁴
 - Standard terms and conditions for each contract – these typically deal with a wide range of issues including warranties, delivery of materials, general

¹ Detailed information about the authorisation process is contained in the ACCC's *Authorisation Guidelines* available: <https://www.accc.gov.au/publications/authorisation-guidelines-2013>

² ICA members will be able to opt out of collective bargaining conduct, either generally or for a specific collective bargaining negotiation, by providing written notice to ICA.

³ Independent Cinemas Australia Inc., *Form B, Application for Authorisation*, 8 June 2017, p. 2, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

⁴ Independent Cinemas Australia Inc., email to the ACCC, 14 August 2017.

licence conditions, accounting, payment and termination provisions which do not typically alter from film to film offered by a particular distributor.

- The season and sessions for a specific film – this specifies a distributor's requirement for the number of weeks a film will be screened and the number and times a film will be screened during the season.
 - Film hire terms, which specify the rental fee paid by the exhibitor to the distributor in respect of a particular film title.
7. The proposed conduct includes information sharing where ICA members and ICA can discuss the contractual arrangements and proposed changes to those arrangements as the need arises. Where necessary, ICA and its members will seek to collectively bargain with distributors to achieve a fair and equitable outcome.

The applicants

8. ICA is a not for profit industry association representing film exhibitors that operate independent film cinemas in Australia and New Zealand.
9. ICA members include exhibitors ranging from those operating several cinema complexes in metropolitan areas to single complex urban and regional cinemas.⁵
10. ICA has 84 cinema exhibitor members in Australia. ICA members include exhibitors operating several cinema complexes at different locations such as Reading Cinemas, Palace Cinemas and Dendy Cinemas, and single complex urban and regional cinemas.
11. ICA members accounted for approximately 29 per cent of the 2016 Australian box office revenue.⁶
12. Major film exhibitors such as Event Hospitality and Entertainment (including Event Cinemas, Greater Union Cinemas and Birch, Carol and Coyle Cinemas), Hoyts Cinemas and Village Cinemas are not ICA members.

The counterparties

13. In addition to seeking authorisation to share information among members about the terms and conditions of film supply, ICA is seeking authorisation to collectively bargain with Australian film distributors.
14. Major Australian film distributors include Paramount Pictures, Sony Pictures Releasing, Twentieth Century Fox Films, Universal Pictures International Australasia, the Walt Disney Company (Australia) and Warner Bros/Roadshow.
15. In addition ICA identifies as potential counterparties, 14 independent film distributors including Entertainment One Films Australia, Madman Entertainment, Studiocanal and Transmission Films.

⁵ Independent Cinemas Australia Inc., website, viewed 18 August 2017, available: <http://www.independentcinemas.com.au/>

⁶ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 10, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

16. ICA has clarified that it intends to engage in the proposed conduct with any distributor that offers a film for theatrical license in Australia including smaller distributors not named in ICA's application for authorisation.⁷

Background

Overview of the Australian feature film industry

17. In the 2016 calendar year, the Australian feature film gross box office revenue was \$1.3 billion.⁸
18. Feature films distributed by the six major distributors accounted for 85 per cent of the total box office revenue in the 2016 calendar year. Together, the remaining independent distributors accounted for 15 per cent of the total box office revenue during the same period.⁹
19. There are 498 cinema complexes in Australia.¹⁰
20. In the 10 year period from 2007 to 2016:¹¹
- the total number of screens in Australia (including digital screens) increased from 1941 to 2121 screens (an increase of 9 per cent)
 - the number of digital screens increased from 30 to 1195
 - the number of cinema seats fell from 457 000 to 440 000 (a decrease of 4 per cent).

Film distribution and exhibition

21. The Australian film industry relies on a systematic model for the distribution and release of feature films. Most films are released for theatrical viewing for an exclusive window of 120 days. At the end of this period, films are released for home entertainment, via DVD, Blu-Ray or increasingly for online streaming directly into consumers' homes.¹²
22. For theatrical film release, distributors develop a distribution strategy for each film. The decision to offer to supply a particular film to an exhibitor depends on various criteria including the location of the exhibitor, the cinema's infrastructure and the

⁷ Independent Cinemas Australia Inc., personal communication, 12 September 2017.

⁸ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 10, available: <http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application> and Screen Australia, *Distributor box office share, 2003-2016*, viewed 26 August 2017, available: <https://www.screenaustralia.gov.au/fact-finders/cinema/industry-trends/box-office/distributor-market-share>

⁹ Screen Australia, *Distributor box office share, 2003-2016*, viewed 26 August 2017, available: <https://www.screenaustralia.gov.au/fact-finders/cinema/industry-trends/box-office/distributor-market-share>

¹⁰ Screen Australia, *Cinema industry trends, screens and theatres, Total screens, seating capacity and theatres in Australia, 1980-2016*, viewed 26 August 2017 available: <https://www.screenaustralia.gov.au/fact-finders/cinema/industry-trends/screens-and-theatres>

¹¹ Screen Australia, *Cinema industry trends, screens and theatres, Total screens, seating capacity and theatres in Australia, 1980-2016*, viewed 26 August 2017 available: <https://www.screenaustralia.gov.au/fact-finders/cinema/industry-trends/screens-and-theatres>

¹² Screen Australia, *Issues in feature film distribution*, July 2015, p.7 and p. 13, available: https://www.screenaustralia.gov.au/getmedia/1216e7e0-59a1-4e16-906a-8809b8b7be0c/IssuesInFeatureFilmDistribution_2015-07-30.pdf

expected return based on the exhibitor's previous returns. Other standard terms and conditions such as film hire rates, length of screening season, session requirements and guarantees are intended to be fairly negotiated between the distributor and exhibitor.¹³

Changes in the film distribution industry

23. Significant changes have occurred in the nature of feature film distribution. Until recently, distributors released 35mm prints or copies of films to exhibitors. Once the exhibitor's season for the film was over, the film reels would be returned to the distributor and then sent to another exhibitor.
24. Digital technology has changed the way films are supplied and screened. Many cinemas now use digital technology to screen films that arrive on a digital hard drive. In 2005 there were no digital cinema screens; in 2016, digital screens accounted for 56 per cent of all cinema screens.¹⁴
25. According to Screen Australia, digital film distribution is not only changing the way films are screened it is also altering how consumers view films. Transactional video on demand has added several new pathways for consumers to watch films that did not exist 10 years ago.¹⁵

The Code of Conduct for Film Distribution and Exhibition

26. The voluntary *Code of Conduct for Film Distribution and Exhibition* (the code of conduct)¹⁶ was developed in 1998 following a report on the cinema distribution and exhibition industry commissioned by the ACCC.¹⁷
27. As at November 2015 there were 255 signatories to the code of conduct.¹⁸
28. The objectives of the code of conduct include to:
 - provide a framework for fair and equitable dealing between all distributors and exhibitors
 - provide a timely, non-legalistic, cost-effective and commercially orientated means of avoiding and settling disputes
 - reduce the likelihood of litigation between parties to the code.
29. The code of conduct includes guidelines for various aspects of film distribution and exhibition including:

¹³ These arrangements are set out in the *Code of Conduct for Film Distribution and Exhibition* available online: <http://www.filmcode.info/>

¹⁴ Screen Australia, *Issues in feature film distribution*, July 2015, available: https://www.screenaustralia.gov.au/getmedia/1216e7e0-59a1-4e16-906a-8809b8b7be0c/IssuesInFeatureFilmDistribution_2015-07-30.pdf

¹⁵ Screen Australia, *Issues in feature film distribution*, July 2015, available: https://www.screenaustralia.gov.au/getmedia/1216e7e0-59a1-4e16-906a-8809b8b7be0c/IssuesInFeatureFilmDistribution_2015-07-30.pdf

¹⁶ The *Code of Conduct for Film Distribution and Exhibition* is available online: <http://www.filmcode.info/>

¹⁷ Jones, R., 1998, *Developments in the Cinema distribution and exhibition industry*, 31 March 1998, available: <https://www.accc.gov.au/publications/developments-in-the-cinema-distribution-exhibition-industry>

¹⁸ Film Exhibition and Distribution Code Administrative Committee, *List of signatories*, November 2015, available: <http://www.filmcode.info/>

- That each distributor and each exhibitor will engage on a fair and equitable basis and in the manner set out in the code.
 - Principles for flexibility of trading terms.
 - The development of terms of trade policies and guidelines.
 - Arrangements for information exchange between distributors and exhibitors.
30. The code of conduct states that each distributor decides if and when an exhibitor will be offered supply of a film. It acknowledges that a distributor can develop its own distribution strategy in relation to a film.¹⁹
31. The code of conduct also states that exhibitors acknowledge that the development of a film distribution strategy is '*...dependent upon the skill, experience, expert intuition and business judgment of the individuals responsible for such decisions within each distributor*'.²⁰
32. The code of conduct is administered by a code administration committee (CAC). The CAC includes representatives from major exhibitors, the Motion Picture Distributors Association of Australia,²¹ independent exhibitors²² and independent distributors. Where disputes between parties cannot be resolved under the informal dispute resolution procedures of the code of conduct, the CAC appoints an independent conciliator.

Submissions received by the ACCC

33. The ACCC tests the claims made by an applicant in support of an application for authorisation through an open and transparent public consultation process.
34. The ACCC sought submissions from 22 interested parties potentially affected by this application, including a range of film distributors and their industry associations.
35. The ACCC received 10 submissions. Icon Film Distribution supported authorisation. Nine submissions from distributors raised concerns about the proposed conduct.
36. All submissions have been considered by the ACCC. A brief summary of each public submission follows. Further discussion on specific issues outlined in public submissions is in the 'ACCC evaluation' section.
37. All public ICA and interested party submissions are available on the [ACCC public register](#).

¹⁹ Film Exhibition and Distribution Code Administration Committee, *Code of Conduct for Film Distribution and Exhibition*, 2013 version, Section 5.1, p. 4, available: <http://www.filmcode.info/>

²⁰ *ibid.*, Section 5.2, p. 4.

²¹ The six major distributors are members of the Motion Picture Distributors Association of Australia.

²² Independent exhibitors are represented by the ICA and Majestic Cinemas in NSW

Independent Cinemas Australia

38. ICA submits:²³

- Independent exhibitors have little bargaining power with film distributors.
- Collective bargaining is expected to create efficiencies and a more balanced negotiation, which may result in better film licence terms to the benefit of ICA member customers.²⁴
- Information sharing will assist in the collective bargaining process. From time to time ICA members may want to exchange information about the terms and conditions for film licences, developed as part of a distribution strategy and offered to individual exhibitors. ICA is concerned that doing so may place members at risk of breaching the Act.²⁵ From time to time distributors propose changes to their standard terms and conditions for a particular film after it has been released. These changes affect many ICA members but currently they are unable to exchange information about these changes or respond to the distributor as a group.²⁶
- Changes to standard terms and conditions of film licensing agreements and film screening season, sessions and rental fees can affect the viability of ICA members. The closure of the only cinema in a town or the closure of an independent cinema in a metropolitan area can reduce film diversity and have a negative impact on the local community. The proposed conduct may improve the viability of independent cinemas and therefore prevent or reduce the likelihood of cinema closure.²⁷

Interested parties

39. The views of interested parties are summarised below and considered in the evaluation chapter of this draft determination.

Icon Film Distribution

40. Icon Film Distribution is part of the Dendy Icon Group, comprising Icon Film Distribution, Dendy Cinemas and Dendy Direct (a video on demand service). Dendy Cinemas are members of ICA and a party to the application for authorisation.²⁸
41. Icon Film Distribution submits that collective bargaining is voluntary and information sharing between cinemas is not a concern because the distribution strategy is determined by the distributor. Information sharing will lead to better engagement between distributors and exhibitors on the planning that goes into a theatrical release.

²³ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017 available: <http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

²⁴ *ibid.*, p. 4.

²⁵ Independent Cinemas Australia Inc., *Form B, Application for Authorisation*, 8 June 2017, p. 5, available: <http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

²⁶ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 6, available: <http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

²⁷ *ibid.*, p. 8-9,

²⁸ Icon Film Distribution, *Submission on the application for authorisation*, 10 July 2017, available: <http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>
Icon Film Distribution

Australian Independent Distributors Association

42. The Australian Independent Distributors Association (AIDA) submits that each of its members represents less than five per cent of the total Australian film distribution market. Negotiations for smaller independent films should take place between individual distributors and individual exhibitors to give the small independent film market the best opportunity to survive. Collective bargaining with major distributors may be appropriate however AIDA and its members should not be part of the proposed conduct.²⁹

Entertainment One Films Australia

43. Entertainment One Films Australia (Entertainment One) acknowledges that the proposed conduct is voluntary for both distributors and exhibitors.³⁰
44. However, Entertainment One submits:
- If the proposed conduct is authorised it will result in an additional large stakeholder group comparable to each of the three major exhibitors.
 - Collective bargaining will introduce inefficiencies and hinder dealings and negotiations with each exhibitor. It will add an additional layer of bureaucracy in the process.
 - The code of conduct is an efficient and effective framework, which includes a dispute resolution process.

Paramount Pictures Australia

45. Paramount Pictures Australia submits that collective bargaining is unsuitable for the negotiation of terms and conditions for film distribution and exhibition. ICA members are a heterogeneous group of exhibitors. Individual exhibitor negotiations include consideration of the type of audience and the track record of the genre of the film to be shown, the expected revenue and geographical location.³¹
46. Paramount Pictures submits that if ICA members seek to negotiate collectively, Paramount Pictures will have little option but to engage on that basis or face the risk of a collective boycott of Paramount Pictures' films by ICA members.

Sony Pictures Releasing

47. Sony Pictures Releasing (Sony Pictures) currently works directly with exhibitors and is likely to continue to do so. Sony Pictures submits that it is not feasible or appropriate to negotiate with any trade industry body over film release dates, rental rates, session and season policies or other terms of its agreements with independent exhibitors.³²

²⁹ Australian Independent Distributors Association, *Submission on the application for authorisation*, 28 July 2017, Available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

³⁰ Entertainment One Films Australia, *Submission on the application for authorisation*, 3 August 2017, p. 4, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

³¹ Paramount Pictures Australia, *Submission on the application for authorisation*, 28 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

³² Sony Pictures Releasing, *Submission on the application for authorisation*, 21 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

48. Sony Pictures submits that the code of conduct is an effective and reliable means for ensuring mutually beneficial commercial dealings between Sony Pictures and all exhibitors and it would be concerned if authorisation impacted on the efficacy of the code of conduct.

Studiocanal

49. Studiocanal is a small independent distributor releasing approximately two per cent of films in the Australian cinema market annually.³³
50. Studiocanal negotiates film supply with each exhibitor to agree mutually acceptable terms, including the screening season, session times, start dates and film hire rates. These negotiations depend on the film and can vary greatly between exhibitors.
51. Studiocanal submits that ICA's proposed conduct could distort the competitive process in the market place and that market forces should be allowed to operate freely. The proposed conduct is likely to result in anti-competitive detriment, being parallel conduct and coordination by cinemas, and likely loss of content diversity.
52. Information sharing will lead to outcomes whereby Studiocanal will have to collectively bargain with ICA members or face the possibility of a collective boycott of its films by the bargaining group.

The Walt Disney Company (Australia)

53. The Walt Disney Company Australia (Disney) submits that if all ICA members participate in collective bargaining, the group would have a greater market share than any of the major exhibitors. Disney would be in a relatively weak bargaining position and is likely to feel compelled to collectively bargain.³⁴
54. The code of conduct has operated effectively for many years. Disney's experience is that independent exhibitors discuss their concerns directly with Disney and, where necessary, using the processes outlined in the code of conduct.
55. Disney is sceptical that collective bargaining will result in transaction cost savings and efficiencies given the number of one-on-one issues that typically need to be negotiated between distributors and exhibitors.

Transmission Films

56. Transmission Films submits that as one of the few independent Australian film distributors, exhibitors rely on Transmission Films to supply content that global distributors tend not to supply. The impact of an independent cinema monopoly will further erode the sustainability of the independent film model.³⁵
57. The code of conduct has been a successful way to resolve conflict and there has been no evidence provided that demonstrates it is not working for the benefit of both distributors and exhibitors.

³³ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

³⁴ The Walt Disney Company Australia, *Submission on the application for authorisation*, published on 3 August 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

³⁵ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

58. Transmission Films submits that exhibitors may opt out of collective bargaining and continue to use the information gathered via information sharing, resulting in a collective boycott.

Twentieth Century Fox Film Distributors

59. Twentieth Century Fox Film Distribution (Twentieth Century Fox) submits that the Australian cinema industry is strong. Independent cinemas have invested in new sites and increased the number of screens in Australia and some independent exhibitors, such as those in regional areas, already have bargaining power.³⁶
60. The proposed conduct is broad, anti-competitive and may lead to collective boycott.
61. Twentieth Century Fox submits that there is no evidence that film distributors are offering uncommercial terms to independent cinemas. Independent cinemas are not disadvantaged. If exhibitors believe they are offered unreasonable commercial terms they have a number of mechanisms to resolve issues including the code of conduct and the unfair contract terms regime in the Australian Consumer Law.
62. Twentieth Century Fox submits that ICA does not indicate that film ticket prices will fall. Any reduced prices that ICA can negotiate for its members will result in a transfer of wealth from distributors to independent exhibitors. There is no evidence that, absent authorisation, prices will rise.

Universal Pictures International Australasia

63. Universal Pictures International Australasia (Universal Pictures) submits that ICA's application is unclear about the proposed information exchange process, which appears to be broad and open ended. There is significant risk that the conduct will lead to anticompetitive outcomes, to the detriment of consumers.³⁷
64. Authorisation will facilitate information sharing amongst ICA members without any meaningful restrictions or safeguards in relation to commercially sensitive information.
65. The code of conduct exists to resolve common industry issues in complex arrangements and distributors and exhibitors have used it to that end.
66. Universal Pictures submits that to ameliorate the anticompetitive detriment of the proposed information exchange between ICA members, information sharing should not be permitted unless a distributor agrees to participate in collective bargaining. In agreeing to collective bargaining, the distributor would be giving consent to the information sharing arrangement as well.

³⁶ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

³⁷ Universal Pictures International Australasia, *Submission on the application for authorisation*, published on 27 July 2017, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

Independent Cinemas Australia submissions in response to interested party submissions

67. ICA made two submissions in response to interested party submissions.
68. ICA submits:³⁸
- It expects most of its members will want to share information concerning proposed terms and conditions to better understand and assess the terms and conditions being offered to them.³⁹
 - Some ICA members have expressed interest in collective bargaining to negotiate more appropriate terms of supply.
 - Some of ICA's largest members are likely to continue dealing directly with distributors and are therefore likely to opt out of collective bargaining.
69. ICA further submits:⁴⁰
- ICA will share information with all exhibitor members 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 proposed conduct.
70. ICA submits that the small number of complaints made about distributors under the code of conduct does not necessarily mean that the code has been successful in ensuring a fair and equitable outcome for ICA members. The lack of complaints being referred to the code secretariat suggests that exhibitors are reluctant to raise concerns with the secretariat because they fear jeopardising their relationship with distributors. ICA submits that the procedures for dispute resolution are disproportionately expensive and unduly cumbersome.⁴¹
71. ICA submits the lack of transparency on price information has the effect of requiring exhibitors to accept film licensing on a 'take it or leave it' basis. In the absence of authorisation to share information, exhibitors are unable to assess whether the proposed licence terms and rental fee are fair.⁴²
72. ICA submits that independent distributors are likely to achieve transaction cost savings by collectively bargaining (for example it is likely to be more efficient to resolve disputes and misunderstandings on a collective, rather than individual basis) and cost savings for ICA members are likely to be reinvested into ICA businesses to the benefit of the community.⁴³

³⁸ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p.1, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

³⁹ In its application for authorisation, ICA submits that presently it risks breach of the Act if it and its members engage in unauthorised information sharing.

⁴⁰ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p.2, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁴¹ *ibid.*, p.5.

⁴² *ibid.*, pp. 6-7.

⁴³ Independent Cinemas Australia Inc., *Supplementary response to public submissions made by interested parties*, 31 August 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

ACCC evaluation

73. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests⁴⁴ contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
74. The ACCC is often asked to authorise collective bargaining arrangements. Collective bargaining refers to an arrangement under which two or more competitors come together to negotiate terms and conditions, which can include price, with a supplier or a customer. Information sharing can facilitate effective collective bargaining.
75. Under the Act, except in certain limited circumstances, businesses are required to act independently of their competitors when making decisions about pricing and other terms and conditions of business, so information sharing and collective bargaining conduct may breach the Act.
76. However information sharing and bargaining collectively, rather than on an individual basis, can generate public benefits by improving the efficiency of the bargaining process and negotiated arrangements. These benefits are achieved by lowering the transaction costs associated with putting supply arrangements in place, increasing input into contracts, and reducing information asymmetries.

The relevant area of competition

77. The ACCC considers that the relevant area of competition for assessing ICA's application for authorisation is the supply of films for exhibition in cinemas. This is the area of activity where ICA intends to focus its proposed collective bargaining and information sharing. The ACCC notes that exhibitors use those films (along with physical characteristics of the cinema, such as cinema infrastructure) to supply cinema exhibition services to consumers, and therefore this is also likely to be a relevant area of competition.
78. The ACCC notes that these areas of competition are likely to have both local and national dimensions. Exhibitors, particularly small independents in regional locations, are likely to see their market as being local. National exhibitors may see their market as both local and national.
79. Distributors' behaviour suggests that they see markets from both a national and local level. Films are generally released on a national level on the same day across the country. However, distributors also develop a distribution strategy for each film which is likely to include a consideration of the characteristics of a particular local geographic market.

⁴⁴ Subsections 90(5A), 90(5B), 90(6) and 90(7) of the Act. The relevant tests are set out in Attachment A of this draft determination.

The future with and without

80. To assist in its assessment of the conduct against the authorisation tests, the ACCC compares the likely future with the conduct that is the subject of the authorisation, to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs, against the future in which the conduct does not occur.
81. The ACCC considers that without the proposed conduct, the existing model for the distribution and release of feature films will continue. That is, distributors will develop a distribution strategy for each film and engage individually with exhibitors. ICA will continue to negotiate with distributors on behalf of individual members from time to time. As they do now, ICA and its members would need to assess whether the sharing of any information about film terms is likely to raise competition concerns under the Act.
82. The ACCC notes that with or without the proposed conduct, the code of conduct will continue to operate. The possible impact of the proposed conduct on the code is discussed in the next section.

Proposed conduct and the code of conduct

83. ICA submits that the code of conduct sets out that film exhibitors and distributors should engage in fair negotiation of terms of supply for films; however the opportunity to negotiate terms may be limited. The volume of content and the market conditions means films are often supplied on a 'take it or leave it' basis.⁴⁵
84. ICA submits that its members are sometimes unwilling to take action against a distributor under the dispute resolution sections of the code for fear they will damage the relationship and it will affect future film supply.⁴⁶ Further, the code of conduct's objective of providing a fair and equitable framework for both distributors and exhibitors is impeded by information asymmetry which can be remedied by the proposed information sharing.
85. ICA submits that the code of conduct is an important and useful tool and that if the proposed conduct is authorised, ICA and its members will continue to abide by the spirit and terms of the code.⁴⁷
86. Entertainment One, Sony Pictures, Studiocanal, Disney, Transmission Films, Twentieth Century Fox and Universal Pictures submit that the code of conduct is an efficient and effective framework for ensuring mutually beneficial commercial dealings and they would be concerned if authorisation impacted on the efficacy of the code.^{48 49 50 51 52 53 54}

⁴⁵ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 2, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

⁴⁶ *ibid.*, pp 1-3.

⁴⁷ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p. 4, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁴⁸ Entertainment One Films Australia, *Submission on the application for authorisation*, 3 August 2017, p. 4, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

ACCC view

87. The ACCC notes ICA's submission that, if granted, authorisation will not replace the code of conduct. Rather, authorised information sharing will enable exhibitors to gain a better understanding of the individual film terms and conditions being offered to other exhibitors (including changes to film terms and conditions) to assist them understand if the terms and conditions being offered to them are fair and reasonable.
88. The ACCC accepts that some exhibitors, particularly small exhibitors, may be concerned that taking a complaint to the code secretariat will damage their relationship with the other party and will therefore be reluctant to do so. Information sharing, to understand if other exhibitors have similar concerns and the ability to work together to resolve disputes, is consistent with the objectives of the code of conduct.
89. The ACCC's assessment of the likely benefits and detriments arising from the proposed conduct follows.

Public benefit

90. Public benefit is not defined in the Act. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:⁵⁵

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.

Transaction cost savings

91. ICA submits that the proposed conduct is likely to result in lower costs, such as costs to engage accountants and lawyers, for its members and the more efficient use of members' time and resources.⁵⁶ The benefits arising from transaction cost savings are likely to be reinvested in the business, delivering consumers a better experience at their local cinema.⁵⁷

⁴⁹ Sony Pictures Releasing, *Submission on the application for authorisation*, 21 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁵⁰ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁵¹ The Walt Disney Company Australia, *Submission on the application for authorisation*, published on 3 August 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁵² Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁵³ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁵⁴ Universal Pictures International Australasia, *Submission on the application for authorisation*, published on 27 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁵⁵ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

⁵⁶ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 5, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

⁵⁷ Independent Cinemas Australia Inc., *Supplementary response to public submissions made by interested parties*, 31 August 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

92. Further, ICA submits that in the event of a dispute with ICA members, distributors' dispute resolution costs are likely to fall because they will be able to collectively, rather than individually negotiate disputes with ICA members. This is likely to be more significant for relatively under resourced independent distributors.⁵⁸
93. Icon Film Distribution submits that helping independent exhibitors improve business practices between themselves and distributors creates time and cost efficiencies.⁵⁹
94. Studiocanal submits that there are few, if any, public benefits arising from the proposed conduct, and reducing individual exhibitor costs is not a public benefit and would not be passed on to consumers.⁶⁰
95. Twentieth Century Fox submits that the proposed conduct will not benefit consumers and there is no evidence that, absent authorisation, prices will rise. Further, ICA does not indicate that prices will fall if the proposed conduct is authorised.⁶¹
96. Entertainment One, Sony Pictures and Transmission Films submit it is not feasible to negotiate with an industry or trade body such as ICA and doing so will add an additional layer of bureaucracy to the negotiation process and therefore create inefficiency.^{62 63 64}

ACCC view

97. The ACCC accepts that each ICA member individually negotiating with distributors will incur transaction costs, such as the time taken to negotiate and legal or other expert advice costs. Distributors will also incur transaction costs in negotiating with multiple individual exhibitors.
98. While some exhibitors raise concerns that the proposed conduct would be inefficient as it would introduce another layer of bureaucracy in the process, the ACCC understands that ICA is not proposing to negotiate the standard terms and conditions for film supply or the initial season, sessions and film rental fee. ICA acknowledges that these arrangements are determined by distributors. However, ICA does wish to collectively negotiate with distributors on behalf of exhibitors, or a subset of exhibitors, on certain common issues such as where there are material changes in terms and conditions for a particular film.
99. Without the proposed conduct, exhibitors seeking variations to their agreement would need to individually negotiate with a distributor. In these circumstances, the ACCC considers that the proposed conduct is likely to result in transaction cost savings for exhibitors by allowing for the sharing of adviser costs and removing duplication of processes undertaken by individual ICA members.

⁵⁸ *ibid.*

⁵⁹ Icon Film Distribution, *Submission on application for authorisation*, 10 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁶⁰ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, pp. 5-8, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁶¹ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁶² Entertainment One Films Australia, *Submission on the application for authorisation*, 3 August 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁶³ Sony Pictures Releasing, *Submission on the application for authorisation*, 21 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁶⁴ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

100. The ACCC notes ICA's submission that cost savings resulting from the proposed conduct will likely be reinvested in the business and deliver consumers a better experience at their local cinema. Alternatively, a number of distributors submit that the proposed conduct will not result in reduced film prices to consumers.
101. Any cost reductions and improved terms from collective bargaining may help the viability of small cinemas, and allow them to reinvest into their cinemas, creating a better experience for consumers.
102. The ACCC considers that the proposed conduct is also likely to result in some transaction cost savings for distributors since they will not always need to engage with exhibitors individually, for example where ICA negotiates on behalf of a group of exhibitors.
103. By reducing the costs of negotiating for all parties, it is likely that more contractual issues can be addressed, because each party can obtain the benefit from negotiating these issues at less cost to itself, resulting in more comprehensive and efficient negotiation of greater benefit to all parties.

Improved input into negotiations

104. ICA submits:
 - Information sharing is likely to reduce information asymmetry. ICA members are not always provided information about matters that affect their business, such as changes to the 120 day exclusive theatrical window, digital delivery and marketing practices.⁶⁵
 - ICA members currently feel they have insufficient bargaining power to oppose proposed amendments to film licence conditions. Collective bargaining is likely to improve this situation.⁶⁶
 - ICA provided an example of a change in pricing methodology, which created hardship for some exhibitors and resulted in an increase in ticket prices at some cinemas. Information sharing and then collectively bargaining on the proposed changes is likely to result in the timely resolution of these types of issues.⁶⁷
 - Greater transparency and more effective negotiations will assist ICA exhibitors to continue to offer and to increase the range of films offered to meet the diverse needs of the people in their local communities.⁶⁸
105. ICA submits that 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, terms and

⁶⁵ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p.1, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁶⁶ Independent Cinemas Australia Inc., *Supporting submission*, 8 June 2017, p. 6, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

⁶⁷ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p. 4, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission> and

Independent Cinemas Australia Inc., *Supplementary response to public submissions made by interested parties*, 31 August 2017, p.1, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁶⁸ Independent Cinemas Australia Inc., *Supplementary response to public submissions made by interested parties*, 31 August 2017, p.2, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

conditions regarding the delivery and return of materials have a greater impact on exhibitors operating in remote locations.⁶⁹

106. Icon Film Distribution submits that the proposed conduct will simplify terms and negotiations with the independent exhibitor sector and increase the speed and efficiency of dispute resolution between distributors and exhibitors.⁷⁰

ACCC view

107. The majority of ICA's members are small businesses. The ACCC accepts that, when negotiating with large counterparties, small businesses can be at a disadvantage in terms of resources and experience of negotiating.
108. One way in which small businesses can seek to redress such disadvantage is to bargain collectively. In this case, information sharing is also likely to identify issues of concern to several ICA members and collective bargaining may allow for more effective negotiation between ICA members and distributors. For example, where an exhibitor notices a departure from the usual terms for film season, sessions and rental fee, it can alert ICA who can contact other members to determine if they are also affected. ICA can then attempt to collectively bargain with the distributor on behalf of relevant members.
109. The ACCC considers that information sharing is also likely to enable ICA members to become better informed of relevant market conditions and developments. Reducing this information asymmetry is likely to improve the input that ICA members have in negotiations with distributors to identify and achieve more efficient outcomes and therefore to negotiate improved terms and conditions for individual films.
110. Information sharing can play an important role in improving the effectiveness of collective bargaining. Information sharing is implicit in many collective bargaining groups. Bargaining groups share information and then set about negotiating better outcomes than they can achieve on their own.
111. The proposed conduct provides distributors with the opportunity to collectively negotiate with specific groups of exhibitors. For example, where specific groups of exhibitors, such as regional or smaller exhibitors, have common needs or requests regarding the terms of supply for a particular film (or changes to those terms during the screening season), it may be more efficient for both the exhibitors and the distributor to collectively negotiate a resolution.
112. Collective bargaining and information sharing may provide the opportunity for ICA members to have better input into contracts.

Public detriments

113. Public detriment is not defined in the Act but the Australian Competition Tribunal has given the concept a wide ambit, including:

⁶⁹ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p.4, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁷⁰ Icon Film Distribution, *Submission on application for authorisation*, 10 July 2017, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁷¹

114. The ACCC considers that in some cases collective bargaining could lessen competition because it involves competitors agreeing on terms. Information sharing can also lessen competition.
115. ICA submits that the proposed conduct is unlikely to result in public detriment.⁷²
116. Several interested parties are concerned that the proposed conduct is likely to result in public detriment. These concerns are discussed below.

Potential for reduced competition between independent cinemas

117. AIDA submits that the proposed conduct will have a negative effect on competition because ICA members, who are competitors, will be able to share information about the terms and conditions of the supply of films. AIDA is concerned that its members will need to negotiate the same terms of supply with independent exhibitors regardless of the individual characteristics of an exhibitor, which influence individual negotiations now.⁷³
118. AIDA, Disney, Studiocanal and Universal Pictures submit that ICA members are competitors for films and sharing information about film offers is likely to be anticompetitive.^{74 75 76 77}
119. Studiocanal submits that this anticompetitive detriment is likely to lead to loss of content diversity and market forces should be allowed to operate freely.⁷⁸
120. Paramount Pictures and Disney submit that ICA members may share information about what various distributors are offering exhibitors, then opt out of collective bargaining and continue to use the information during individual negotiations.^{79 80}
121. Twentieth Century Fox submits that individual ICA members may use the information gathered from other ICA members in individual negotiations with distributors. ICA may use information to lobby its members to not accept an offer

⁷¹ See *7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

⁷² Independent Cinemas Australia Inc., *Supporting submission*, 13 June 2017, p. 6 available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

⁷³ Australian Independent Distributors Association, *Submission on the application for authorisation*, 28 July 2017, Available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁷⁴ *ibid.*

⁷⁵ The Walt Disney Company Australia, *Submission on the application for authorisation*, published on 3 August 2017, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁷⁶ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, pp. 5-8, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁷⁷ Universal Pictures International Australasia, *Submission on the application for authorisation*, 27 July 2017, p.1, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁷⁸ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, pp. 5-8, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁷⁹ The Walt Disney Company Australia, *Submission on the application for authorisation*, published on 3 August 2017, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁸⁰ Paramount Pictures Australia, *Submission on the application for authorisation*, 28 July 2017, p. 2, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

and advise exhibitors that another exhibitor has rejected an offer. Information sharing may lead to explicit or tacit collusion.⁸¹

122. Universal Pictures submits that information sharing without appropriate restrictions or safeguards is likely to lead to sharing commercially sensitive information where ICA members may be competitors for films and consumers.⁸²
123. Entertainment One submits that authorisation will result in a large market participant with a virtual monopoly of independent exhibitors resulting in a reduction in competition.⁸³

ACCC view

124. Many of the interested party concerns relate to the use of information which may be shared among ICA members.
125. The ACCC notes that authorisation provides protection from legal action for conduct that might otherwise breach the Act. It does not protect parties from breaches of other laws or contractual obligations, including confidentiality agreements with other parties. Consequently, ICA and its members will need to ensure that any authorised information sharing does not breach confidentiality agreements with distributors.
126. The ACCC notes that distributors' participation in collective bargaining is voluntary under the conduct for which authorisation is sought. Distributors do not have to negotiate with a collective bargaining group unless they wish to do so. This reduces the risk of detriment from collective bargaining since distributors will participate where it is in their interest.
127. Distributors will retain the ability to develop a distribution strategy for each film, taking into account the individual characteristics of each exhibitor.
128. The ACCC also notes that in 2016, ICA's 84 members collectively accounted for approximately 29 per cent of the 2016 national box office compared to the three major exhibitors with 66 per cent. The actions of ICA members will be constrained by competition from the major exhibitors.
129. Accordingly, the ACCC considers that the proposed conduct is likely to result in limited public detriment through any impact on competition.

Possible boycott activity

130. Disney, Paramount Pictures, Studiocanal and Twentieth Century Fox submit that the proposed conduct may encourage or facilitate boycott activity by exhibitors.⁸⁴
⁸⁵ ⁸⁶ ⁸⁷

⁸¹ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, available: <http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁸² Universal Pictures International Australasia, *Submission on the application for authorisation*, 27 July 2017, p.1, available: <http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁸³ Entertainment One Films Australia, *Submission on the application for authorisation*, 3 August 2017, available: <http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁸⁴ The Walt Disney Company Australia, *Submission on the application for authorisation*, published on 3 August 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>
⁸⁵ Paramount Pictures Australia, *Submission on the application for authorisation*, 28 July 2017, p. 2, available: <http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

131. Transmission Films submits that if collective boycotts occur they are more likely to occur on a small release that may be perceived not to be critical to the profitability of exhibitors.

132. ICA submits that:⁸⁸

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.

ACCC view

133. The ACCC has granted authorisation to many different groups of businesses seeking to collectively bargain with other businesses. In most instances, parties have not sought, nor have they been granted authorisation, to engage in collective boycott activity.

134. ICA did not apply for, and the ACCC does not propose to grant, authorisation to engage in collective boycott conduct.

135. Based on its response to interested party submissions, ICA appears to be well aware of the risks to it and its members if they seek to engage in unauthorised collective boycott conduct.⁸⁹

136. If distributors have evidence that a boycott is occurring, in breach of the Act, they can raise this with the ACCC.

Possible negative impact on small distributors

137. AIDA submits that the proposed conduct will significantly affect its members' current small bargaining power (compared to the major distributors) and as a result, independent distributors may be unable to afford to continue to acquire the Australian rights for foreign, documentary, art house or other diverse films for release in Australian cinemas.⁹⁰

138. Transmission Films, submits that if authorisation is granted, then ICA and its members will become a major player representing approximately 28 per cent of the national cinema box office. Transmission Films represents on average 1.5 to 2.5 per cent of the box office. Independent distributors will have significantly less bargaining power than ICA and its members.⁹¹

139. ICA submits that it cannot represent the bargaining power of 30 per cent of the industry because ICA cannot collectively boycott any distributor.⁹² That is, while

⁸⁶ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, pp. 5-8, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁸⁷ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁸⁸ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁸⁹ *ibid.*, pp. 7-8.

⁹⁰ Australian Independent Distributors Association, *Submission on the application for authorisation*, 28 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁹¹ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁹² Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

ICA may represent its members in negotiations, without authorisation to collectively boycott, ICA and its members do not have significant bargaining power.

140. ICA submits that independent distributors have bargaining power.⁹³ Control of a successful film confers significant, if transient bargaining power. On this measure independent distributors can exert comparable bargaining power to a major distributor. ICA provided the example of the film ‘*Lion*’, distributed by Transmission Films. *Lion* was the fifth most successful Australian film of all time at the Australian box office.

ACCC view

141. The ACCC accepts that exhibitors have a strong incentive to negotiate with distributors to ensure they are supplied with films that are suitable and attractive to their audience. This is particularly the case with successful (‘must have’) films. Any distributor holding the distribution rights for one of these films has bargaining power.
142. The ACCC also accepts that in some circumstances individual exhibitors are important for independent distributors as without them the film may not be available to a particular audience and/or region.
143. While ICA can potentially negotiate on behalf of 29 per cent of the national cinema box office, taking into account ICA’s diverse membership, it is unlikely all members will collectively bargain on all issues at the same time.
144. Further, as noted, participation in the proposed conduct is voluntary for both distributors and exhibitors and therefore both sides will not participate unless it is in their interest to do so.
145. For these reasons, the ACCC considers it unlikely that the proposed conduct will result in significant public detriment in the form of a significant negative impact on independent distributors.

Possible competitive advantages to vertically integrated exhibitors/distributors

146. Sony Pictures submit that some exhibitors are also distributors.⁹⁴ Transmission Films and StudioCanal raised concerns about vertically integrated exhibitors/distributors having access to information shared amongst ICA members.^{95 96}
147. Transmission Films submit that sharing information across these ICA members will give these exhibitor/distributor businesses an unfair advantage as the

⁹³ Independent Cinemas Australia Inc., *Supplementary response to public submissions made by interested parties*, 31 August 2017, p. 3, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁹⁴ Sony Pictures Releasing, *Submission on the application for authorisation*, 21 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁹⁵ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁹⁶ StudioCanal, *Submission on application for authorisation*, published on 27 July 2017, available:

<http://registers.acc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

distribution side of the business will be competing for screen space with Transmission Films.⁹⁷

148. Studiocanal submits sharing of commercially sensitive information will give a particular advantage to vertically integrated businesses because the distribution side of the business will have access to the information shared with the exhibition business. Some of these distributors are competitors of Studiocanal.⁹⁸
149. ICA disagrees with these concerns⁹⁹ and notes that each distributor discloses its terms of supply to an exhibitor regardless of whether the exhibitor is also a distributor and there is no suggestion that this disclosure confers an unfair advantage for vertically integrated exhibitors/distributors.¹⁰⁰ However, ICA submits that it would accept the ACCC including a condition of authorisation that exhibitors, which are also distributors, will not participate in information sharing and collective bargaining unless they undertake in writing not to share information with their distribution division executives.¹⁰¹

ACCC view

150. The ACCC notes Transmission Films' and Studiocanal's concerns about vertically integrated exhibitors/distributors having access to information shared amongst ICA members. The ACCC is aware of three vertically integrated ICA members – Icon Film Distribution (Dendy Cinemas), Palace Films (Palace Cinemas) and Sharmill Films (Nova Cinemas).¹⁰²
151. As noted, authorisation does not provide ICA or its members with legal protection against breaches of any confidentiality agreements with distributors.
152. Exhibitors with vertically integrated distribution businesses are currently offered the supply of a range of films, giving them access to certain information about the terms on which those films are supplied to them. The ACCC's preliminary view is that any sharing of non-confidential information from other exhibitors with those ICA members that are also distributors is unlikely to confer any significant advantage to those members.
153. Accordingly, the ACCC does not consider that the imposition of a condition is warranted (and in any event it appears likely that a condition of the kind proposed would involve some difficulties in relation to implementation and enforcement).

⁹⁷ Transmission Films, *Submission on the application for authorisation*, 1 July 2017, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁹⁸ Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, p. 3, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

⁹⁹ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p. 8, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

¹⁰⁰ Independent Cinemas Australia Inc. Personal communication, 12 September 2017.

¹⁰¹ Independent Cinemas Australia Inc., *Response to public submissions made by interested parties*, 30 August 2017, p. 8, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

¹⁰² Studiocanal, *Submission on application for authorisation*, published on 27 July 2017, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission> and

Screen Australia *Issues in Feature Film Distribution*, p. 26 available:
https://www.screenaustralia.gov.au/getmedia/1216e7e0-59a1-4e16-906a-8809b8b7be0c/IssuesInFeatureFilmDistribution_2015-07-30.pdf

Balance of public benefit and detriment

154. As outlined above the ACCC considers the proposed conduct is likely to result in the following public benefits:
- Transaction cost savings.
 - Improved input into negotiations.
155. In some cases information sharing and collective bargaining may lessen competition and efficiency because it involves competitors agreeing on terms of supply. However, in this case the ACCC considers that the proposed conduct is likely to result in limited public detriment because:
- Collective bargaining is voluntary for both ICA members and distributors and a collective boycott is not part of the proposed conduct.
 - ICA members account for 29 per cent of the market, while major exhibitors account for 66 per cent.
 - Authorisation does not protect parties from breaching confidentiality agreements. This means that the only impact of the information sharing is to allow sharing of information that is not the subject of a confidentiality agreement.
156. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public would outweigh the likely detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.
157. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

Length of authorisation

158. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁰³ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the likely public detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
159. ICA submits that a 10 year authorisation period is appropriate; applying for authorisation is expensive and it is cost effective to apply for a 10 year period, which is consistent with other authorisation determinations.¹⁰⁴
160. Universal Pictures submits that a 10 year authorisation period, is a long time period in an environment of changing technology and customer preferences. Therefore it will be difficult for the ACCC to conclude that the likely benefit will outweigh the likely detriment.¹⁰⁵

¹⁰³ Subsection 91(1) of the Act.

¹⁰⁴ Independent Cinemas Australia Inc., *Form B, Application for Authorisation*, 8 June 2017, p. 4, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

¹⁰⁵ Universal Pictures International Australasia, *Submission on the application for authorisation*, 27 July 2017, p.1, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

161. Twentieth Century submits that if authorisation is granted, it should be for a maximum of five years. The film industry is subject to significant change and it is impossible to predict the state of the industry in five years' time.¹⁰⁶
162. Disney submits that the proposed conduct is a radical departure from current arrangements. Given the dynamic nature of the industry, a 10 year authorisation period is too long. Disney submits that a three-year authorisation period is more appropriate.

ACCC view

163. The ACCC notes that the proposed conduct represents a potentially significant change from current arrangements, in an industry subject to changing technology and customer preferences.
164. The ACCC is more likely to grant longer authorisations where it is being asked to reauthorise previously authorised conduct, there is evidence that anticipated benefits have been delivered, relevant parties continue to support the arrangements and market conditions are stable.
165. For these reasons, the ACCC proposes to grant authorisation for the proposed conduct for five years rather than the 10 years sought by the applicants.

Draft determination

The application

166. On 13 June 2017, Independent Cinemas Australia Inc. (ICA) lodged application A91587 with the ACCC, under subsection 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the Act), seeking authorisation to engage in information sharing amongst ICA members and to engage in collective bargaining with film distributors.
167. ICA seeks authorisation, on behalf of itself and its current and future members on a voluntary 'opt out' basis, to make and give effect to contracts, arrangements and understandings pursuant to which the applicants may participate in:¹⁰⁷
- information exchange concerning the terms or proposed terms of film licensing agreements, and/or
 - collective negotiation on behalf of ICA member exhibitors of the terms and conditions of film licensing agreements, and/or
 - collective negotiation on behalf of ICA member exhibitors of booking terms and terms and policy for film licensing agreements applying to specific categories of members such as, but not limited to, regional cinemas or cinemas with four or less screens, and/or

¹⁰⁶ Twentieth Century Fox Film Distributors, *Submission on application for authorisation*, 31 July 2017, p. 11, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/submission>

¹⁰⁷ Independent Cinemas Australia Inc., *Form B, Application for Authorisation*, 8 June 2017, p. 2, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1202578/fromItemId/278039/display/application>

- collective negotiation on behalf of ICA member exhibitors of booking terms and policy for film licensing agreements applying to specific titles from time to time if requested by a member or group of members.
168. ICA seeks authorisation of these arrangements as they may contain a cartel provision and/or a provision that may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
169. Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

170. For the reasons outlined in this draft determination the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the Act, that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

Conduct for which the ACCC proposes to grant authorisation

171. The ACCC proposes to grant authorisation to ICA and its current and future members for five years to make and give effect to contracts, arrangements or understandings pursuant to which they may participate in:
- information sharing concerning the terms or proposed terms of film licensing agreements, and/or
 - collective negotiation on behalf of ICA member exhibitors of the terms and conditions of film licensing agreements, and/or
 - collective negotiation on behalf of ICA member exhibitors of booking terms and other terms and policy for film licensing agreements applying to specific categories of members such as, but not limited to, regional cinemas or cinemas with four or less screens, and/or
 - collective negotiation on behalf of ICA member exhibitors of booking terms and policy for film licensing agreements applying to specific titles from time to time if requested by a member or group of members.
172. This draft determination is made on 28 September 2017.

Further submissions

The ACCC will now seek further submissions from the applicant and interested parties. In addition, the applicant or interested parties may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.