

Form B

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

1.

Applicant

- (a) Name of Applicant:
(Refer to direction 2)

A91587

INDEPENDENT CINEMAS AUSTRALIA INC ("ICA"), previously known as the Independent Cinema Association Of Australia Inc. ICA makes this application on behalf of itself, its current and future Australian members on the basis that any and all members have the right to 'opt out' of any specific collective bargaining activity conducted by ICA.

- (b) Short description of business carried on by applicant:
(Refer to direction 3)

ICA is a not for profit industry association representing members, many of whom are small to medium enterprises and family businesses, who own cinemas in Australia and New Zealand.



- (c) Address in Australia for service of documents on the applicant:

310 Rowe Street, EASTWOOD, NSW, 2122

2. Contract, arrangement or understanding

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:
(Refer to direction 4)

ICA seeks authorisation for certain collective bargaining activities in Australia under the Competition and Consumer Act 2010 ("the **Act**").

The proposed products and services which are the subject of this application for collective bargaining comprise screen content licensed for theatrical exhibition in a cinema or similar venue (eg drive-in) including but not limited to cinematographic films ("**films**").

ICA seeks authorisation, on behalf of itself and all its present and future members on a voluntary 'opt out' basis to make contracts and arrangements and arrive at understandings and to give effect to those contracts, arrangements or understandings pursuant to which ICA and its members may participate in:

- a. information exchange concerning the terms or proposed terms of film licensing agreements, and/or
- b. collective negotiation on behalf of ICA member exhibitors of terms and conditions of film licensing agreements, and/or
- c. collective negotiation on behalf of ICA member exhibitors of booking 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
- d. 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.

Terms and Conditions include, for example, but are not limited to:

- 1) the standard terms of agreements provided by each distributor to ICA member exhibitors;
- 2) the percentage share levels/tiers proposed by each distributor (including, for example, a negotiation to include adjustments for inflation);

- 3) the terms and application of proposed minimum guarantees, if any;
and
- 4) the proposed standard booking policy – sessions and seasons - required for certain classes of ICA members, for example, members who operate cinema outlets comprising from one to four screens.

The collective bargaining negotiations would be conducted with each Distributor separately. "Distributor" means all companies and individuals operating in Australia or overseas, licensing films to exhibitors for theatrical release in Australia including but not limited to those listed in Annexure A.

ICA seeks authorisation for a period of ten (10) years.

If Authorisation is granted, ICA will advise each of its members in writing of the terms of the Authorisation. Members may 'opt out' (either generally or for a specific collective bargaining negotiation) by providing written notice to ICA.

- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:
(Refer to direction 4)

See 2(a) above.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

Screen content licensed for theatrical exhibition in cinemas including, but not limited to, cinematographic films ("**films**").

- (d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

The authorisation is sought for a ten (10) year term.

3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

Distributors operating in Australia who are current Motion Picture Distributors Association of Australia (MPDAA) members and in respect of whom ICA seeks authorisation to collectively bargain include:

- Paramount Pictures Australia Pty,
- Sony Pictures Releasing Pty Limited,
- Twentieth Century Fox Film Distributors Pty Limited,
- Universal Pictures International Australasia Pty Limited,
- The Walt Disney Company (Australia) Pty Limited,
- Warner Bros Entertainment Australia Pty Limited

Distributors operating in Australia who are current Australian Independent Distributors Association (AIDA) members and in respect of whom ICA seeks authorisation to collectively bargain include:

- Becker Film Group Pty Ltd,
- Curious Films Pty Limited
- Entertainment One Films Australia Pty Ltd
- Icon Film Distribution Pty Ltd
- Madman Entertainment Pty Ltd,
- Palace Films (a business name of the Trustee for Palace Entertainment Trust ABN 93 833 958 293)
- Pinnacle Films Pty Ltd
- Potential Films Pty Ltd,
- Rialto Distribution Pty Ltd
- Natalie Miller Pty Limited trading as Sharmill Films
- Studiocanal Pty Ltd
- Umbrella Entertainment Pty Ltd

and **non-aligned distributors**, including:

- Roadshow Films Pty Ltd

- Transmission Films Pty Limited

See Annexure A for a confidential list of contact details for these companies.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:
(Refer to direction 5)

ICA Member cinema locations are listed on our website.
<http://www.independentcinemas.com.au/member-cinemas>

See Annexure B for a confidential list of contact details for ICA Member Exhibitors NOTE however that whilst this application is made on behalf of all current and future ICA members, any of these members may choose to opt out of any particular, or all proposed, collective bargaining activity from time to time by advising ICA in writing.

4. Public benefit claims

- (a) and (b) Arguments, facts and evidence in support of authorisation.

See the Supporting Submission.

5.

Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 7)

This application refers to the national market in which licences of films for theatrical exhibition are supplied and acquired; and to the regional markets in which films are exhibited in cinemas, drive-ins and other like places to members of the public.

6.

Public detriments

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

(Refer to direction 8)

ICA does not envisage any likely detriments to the public from the Authorisation, especially as neither ICA members nor any film distributors will be compelled to engage in the proposed collective bargaining if Authorisation is granted.

- (b) Facts and evidence relevant to these detriments: **None foreseen.**

7. Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?

AS ABOVE

- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

(Refer to direction 9)

AS ABOVE

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

AS ABOVE

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

Theatrical film distribution businesses operating to grant a licence or licences for exhibition of films in Australia during the term of the Authorisation.

8.

Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

NOT APPLICABLE

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

NOT APPLICABLE

- (c) If so, by whom or on whose behalf are those other applications being made?

NOT APPLICABLE

9.

Further information

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

ADRIANNE PECOTIC,

CEO

INDEPENDENT CINEMAS AUSTRALIA INC

ADDRESS: 8 RAE STREET RANDWICK.

PHONE: 0414664566

Dated 8 JUNE 2017

Signed by/on behalf of the applicant

.....
(Signature)

ADRIANNE HELEN FRANCES PECOTIC
.....
(Full Name)

CEO
.....
(Position in Organisation)

DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing the application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions. Provide details of those provisions of the contract, arrangement or understanding that do, or would or might, substantially lessen competition.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
 8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.

9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

SUPPORTING SUBMISSION – FORM B APPLICATION FOR AUTHORISATION

INDEPENDENT CINEMAS ASSOCIATION INC

8 JUNE 2017

SECTION 1. APPLICANT

1.1 INDEPENDENT CINEMAS AUSTRALIA INC (“ICA”), previously known as the Independent Cinema Association Of Australia Inc. ICA makes this supplementary submission on behalf of itself, its current and future Australian members on the basis that any and all members have the right to ‘opt out’ of any specific collective bargaining activity conducted by ICA.

1.2 Together, ICA’s 82 cinema exhibitor members in Australia comprise 25%-30% of the theatrical exhibition sector (depending on whether you count screen numbers, individual cinema locations or share of overall gross box office) but they individually have very little bargaining power compared to the major cinema operators and in their dealings with the suppliers of film content in Australia.

SECTION 2. CONTRACT, ARRANGEMENT OR UNDERSTANDING

2.1 ICA requests that the Authorisation permits ICA to negotiate with each distributor operating in Australia, including, but not limited to, members of the Motion Picture Distributors Association of Australia (“MPDAA”) and the Australian Independent Distributors Association Incorporated (“AIDA”), from time to time and including but not limited to those distributors listed in Form B with commercial in confidence contact details in Annexure A.

2.2 ICA seeks authorisation for a period of ten (10) years. ICA understands this is consistent with other authorisations granted by the ACCC, which are usually granted for a specific term.

2.3 Most of ICA’s members are signatories to the Code of Conduct for Film Distribution and Exhibition (“the **Code of Conduct**”), a voluntary code of conduct between film distributors and exhibitors in Australia established under the auspices of the ACCC in 1998.

2.4 Whilst ICA’s individual members are not always willing to take action under the Code of Conduct, it does operate as a framework to manage conduct and

resolve disputes between Australian film exhibitors and distributors, most of whom are signatories. ICA will abide by the spirit and terms of the Code of Conduct in its authorised dealings with distributors during the term of the Authorisation.

2.5 If Authorisation is granted, ICA will advise each of its members in writing of the terms of the Authorisation. Members may 'opt out' (either generally or for a specific collective bargaining negotiation) by providing written notice to ICA.

2.6 ICA is not proposing to book individual film titles for the members who remain in. Rather, ICA will respond to (or request) changes in the proposed overarching terms and conditions offered by each distributor and, as it does now, will assist individual members with misunderstandings or disputes on their booking of specific titles from time to time including through the Code of Conduct procedures.

An overview of the context for ICA's application follows:

2.7 The Code of Conduct acknowledges that film exhibitors and distributors should engage in fair negotiation of terms of supply for film content. However, there are significant practical limitations on how many independent exhibitors are offered an opportunity to negotiate terms for content, either on a weekly basis or at all. The volume of content and the market conditions mean films are often supplied on a 'take it or leave it' basis.

2.8 The collapse in physical home entertainment revenues (DVDs and Blu-ray) and disruptive changes in digital content and marketing have resulted in theatrical distributors coming under increasing pressure to appropriate a higher share of revenues from theatrical exhibition and, consequently, changing customary contractual practice to do so.

2.9 This has a disproportionately high negative impact on ICA member exhibitors who are not able to negotiate either the individual films or the standard terms of supply, especially if the films offered are 'must have' for the commercial survival of the cinema.

2.10 This may directly impact consumers by reducing the diversity of films and other content available to screen at their local cinema and by increasing the price that exhibitors must charge to incorporate distributor requirements and still operate a sustainable local cinema business;

and in the worst case, can cause the local cinema business to become unsustainable and lost to the community.

- 2.11 Sharing information about film terms may not be prohibited under the law but it depends on the circumstances and ICA's members, CEO and Board are at risk of costly legal actions or ACCC investigation and, possibly, prosecution.
- 2.12 Authorisation would protect ICA's members, CEO and Board from liability for authorised conduct.
- 2.13 While the Code of Conduct has been broadly successful in resolving disputes between exhibitors and distributors, ICA is aware that many of its member exhibitors do not feel able to approach the Code of Conduct Secretariat with an individual dispute for fear of diminishing their relationship with the distributor and future terms of supply of films essential to their businesses, notwithstanding that there is provision in the Code of Conduct prohibiting retaliatory conduct.
- 2.14 Authorisation would mean that participating ICA members could both share information and seek to collectively negotiate particular issues with each distributor as needed from time to time.
- 2.15 Any information sharing and collective negotiation would be entirely voluntary on the part of the members participating.
- 2.16 Authorisation would ensure that a distributor who chooses to negotiate collectively with ICA will have no doubt that collective negotiation with ICA on behalf of participating ICA members is legally authorised under the Act.
- 2.17 ICA is not proposing to book films for member cinemas or to negotiate terms for members who choose to 'opt out' but, with the benefit of authorisation, ICA will be able to efficiently and fairly manage issues that arise with a distributor, such as material changes in standard terms and conditions, and will be able to help benchmark terms and conditions for categories of cinemas, such as those with four or less screens:

2.18 Authorisation is sought for a ten (10) year term and, if considered appropriate or necessary, ICA requests the ACCC to assist ICA and the theatrical sector to adapt the industry guidelines specified in the Code of Conduct to ensure the fair and equitable conduct of authorised activity.

2.19 Whilst many of ICA's members operate in separate geographic markets to each other, a proportion of our members operate cinemas within the same geographic market, usually metropolitan sites in capital cities. ICA does not propose to engage in any cartel behaviour of detriment to the public. However, the sharing of information, collective decision making concerning film licence terms and collective negotiation of proposed terms create a risk of apparent contravention of provisions in Part IV of the Competition and Consumer Act. In most instances ICA's members have significantly less bargaining power than their film distributor suppliers and collective bargaining can be expected to create efficiencies and more balanced negotiation which may result in film licence terms of more benefit to the customers of ICA members' cinemas.

2.20 The authorisation is sought for a ten (10) year term. Application for authorisation is an expensive process and ICA submits that it is both cost effective and consistent with other applications granted by the ACCC to seek a term of 10 years for the proposed collective bargaining activity. In addition ICA submits that a 10 year term is appropriate on the basis that all parties and their respective industry associations are well known to each other and have been operating under the Code of Conduct for nearly 20 years. ICA believes that any issues or concerns that arise in respect of authorised activities could be successfully resolved using the Code of Conduct processes during the term of the Authorisation, as well as being supervised by the ACCC in the normal manner. ICA may seek renewal of the Authorisation after that term expires.

SECTION 4 - PUBLIC BENEFIT CLAIMS

Authorisation will deliver benefits to Australian film exhibition and to the public as follows:

3.1 Enhance Efficiency through the avoidance of duplicated negotiations concerning substantially the same subject matter.

A successful Authorisation application will create efficiencies for all those parties who would otherwise have to negotiate separately for film licence terms on substantially the same subject matter. Authorised collective bargaining would mean that the ICA CEO may not only be able to assist a particular member to achieve a negotiated outcome with a particular distributor, a collective negotiation will mean the time, resource and discussions will be more efficiently invested in a negotiated outcome shared across all other participating ICA members and the distributor on the same subject. Collective negotiations could be legitimately and efficiently conducted by both ICA AND the distributor to the benefit of everyone participating and would assure the distributor that ICA is legally permitted to negotiate with the distributor under the Act. Without authorisation, individual exhibitors and distributors would face higher costs of negotiation including employing lawyers and accountants to analyse and submit individual proposals which if collectively addressed through ICA could be conducted far more quickly, efficiently and with minimum duplication or waste of resources across individual exhibitors and distributors.

3.2 Reduce Current Risk & Enable Information Sharing

ICA recognises that, from time to time, its members may wish to engage in an exchange of information concerning 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. Whilst such an exchange of information may not necessarily be a breach of the law, there is a real risk that needs to be managed. Such exchanges could be referred to the ACCC for investigation and, possibly, become the subject of legal action against ICA, its Board or members by the ACCC or a third party. The act of information exchange by email or by verbal exchange creates a real risk of triggering legal action or an ACCC investigation into

3.2.1 the Act being breached (albeit inadvertently) by leading to parallel conduct across a number of members, and/or

3.2.2 the appearance of ICA's members, officers or Board having breached the Act.

3.3 Actions for anti-competitive conduct and investigations by the ACCC, whilst not anticipated by ICA, are nevertheless very costly for all parties involved and are risks that ICA believes should be managed by seeking Authorisation.

4 Enable Collective Negotiation Of Standard Terms

4.1 ICA also recognises that from time to time a distributor may propose alterations to their standard terms and conditions which are issued to all ICA members.

Recent examples are provided commercial in confidence in Annexure C.

4.2 Unfortunately however, ICA's members are presently unable to respond as a group with counter proposals or requests for clarification, and individually they hold insufficient bargaining power to effectively negotiate the proposal. Each ICA member can only individually accept or reject the terms and, as they need the films to sustain their business, in most cases they are forced to accept whatever deal is proposed by the distributor.

4.3 By contrast each of the major exhibitors in Australia, being the following operators of cinema complexes in Australia, namely:

- Event Hospitality and Entertainment Ltd, including Greater Union and Birch Carroll and Coyle "**Event/GU/BCC**";
- The Hoyts Corporation Pty Ltd and Hoyts Digital Cinemas Pty Ltd ("**Hoyts**"); and
- Village Cinemas Australia Pty Ltd ("**Village**"),

hold sufficient individual market power to issue counter proposals and to negotiate, bargain and, if desired, reject proposals on a case by case basis.

4.4 Currently the ICA CEO can assist individual members with distributor negotiations and assist individual members with disputes under the Code of Conduct. However the time involved in assisting many members individually is prohibitive and the inefficiency in not having authorisation to share information or collectively negotiate means that any successful outcome may not be disclosed and does not necessarily benefit any other member.

4.5 Similarly, the capacity in both time and personnel required for each distributor to negotiate standard terms and conditions with each individual exhibitor is prohibitive and tends to deter the distributor from encouraging or accommodating requests for individual negotiation of terms beyond the mere acceptance or rejection of the film licence. Authorisation would enable ICA to efficiently and effectively conduct collective negotiations on behalf of all participating members.

4.6 If granted, Authorisation would enable ICA to:

- 4.6.1 share information and canvas new proposals with its members and within the ICA Board;
- 4.6.2 through collective negotiation submit both new proposals and counter proposals to the distributor/s on behalf of participating members; and
- 4.6.3 help exhibitors to manage the negative impact of film licence agreement terms on the cost and availability of filmed content to the public in local independent cinemas.

5 No Negative Impact On Members Who Do Not Choose To Participate

Members who wish to 'opt out' of the collective bargaining negotiations would remain free to negotiate their own terms with the distributor.

6 No Negative Impact On Distributors Who Do Not Choose To Participate

Whilst ICA hopes that all distributors doing business in Australia would see the benefit of participating in an authorised collective negotiation through ICA from time to time, ICA appreciates that a particular distributor may choose not to collectively bargain with ICA and that the granting of Authorisation to ICA will have no negative impact on any such distributor.

7 Enable Negotiations For Specific Categories Of Members If Needed

ICA recognises that some categories of members may have a legitimate basis for special arrangements when negotiating film exhibition terms with distributors. The Code of Conduct specifically recognises the special importance of flexibility in the negotiations between distributors on the one hand and exhibitors in respect of

regional and country cinemas and directs distributors to establish terms of trade which incorporate its policies and/or guidelines in relation to, amongst other things, the length of seasons, including minimum seasons applicable to exhibitors with four (4) screens or less. While ICA would not purport to book individual film titles for specific members, ICA submits that it would be beneficial for the Authorisation to include the negotiation of general booking policy – sessions and seasons – standardised for certain classes of ICA members from time to time, for example, members with four (4) screens or less. Currently, this is often undertaken by ICA's CEO on a case by case basis for individual members at their request, however, the investment in time and resources is costly for both ICA and the distributor when the benefit of that negotiation does not translate to other affected members. Local communities in regional areas are very reliant on the services provided by their local cinema for social, cultural and community benefits. ICA can more effectively and efficiently represent the interests of regional, and metro small screen cinemas and their communities if granted authorisation to do so by the ACCC.

8 Protect community and consumer interests in having a local cinema with a diversity of content and services available at affordable prices.

Deakin University research has shown that independent cinemas in Australia screen more diverse content and have more affordable pricing than the major cinema chains.* This community benefit is directly threatened by disruptive changes in the media, entertainment and online environment and the actual and likely business responses to these changes within the global theatrical exhibition and distribution industry. Changes to standard terms and conditions of theatrical film licensing agreements and the terms of season, session and policy offered to Australian independent exhibitors by film distributors can have major unintended consequences. In the absence of a capacity to negotiate fairly and effectively, these changes negatively impact our members' capacity to operate sustainable independent cinema businesses both in regional communities and in larger and more competitive metropolitan locations. The closure of the only cinema in town, or in some instances the closure of an independent cinema in a larger metropolitan area will decrease the amenity of the local community and the

diversity of content offered in a social community setting. Contract negotiation can still significantly impact the cinemas capacity to offer diversity in content and pricing even if they manage to keep the business open. **Content diversity, price differentiation and locations for shared community events and social outings are important social and cultural benefits valued by local communities. ICA submits that Authorisation will enable ICA to assist preserve these important community and consumer benefits.**

SECTION 5 - MARKETS

9 Additional Information Concerning the Relevant Markets

THE FILM EXHIBITION INDUSTRY IN AUSTRALIA – CINEMAS

9.1 Dominance of Major Exhibitors (by screen count):

Film exhibition in Australia is dominated by the three major exhibitor groups:

Event/GU/BCC	26% up from 24% in 2012;
Hoyts	16%; and
Village	10%.

The most recent report from Screen Australia states that the three major exhibitor groups “together account for more than 1,000 screens or over half the national total” (2015 figures).

9.2 ‘Independent’ cinemas are those that are not owned and controlled by the three major exhibitor groups.

9.3 Distribution of screens;

Total number of cinema screens in Australia in 2015	2084
Total number of screens operated by the 3 majors	1077
Total number of screens operated by all independents	1007
Total number of screens operated by ICAA members	674

9.4 Independent Cinemas: See confidential information in Annexure C which provides a commercial in confidence breakdown of the size, character and respective influence of ICA member exhibitors in Australia.

FILM RELEASES AND GROSS BOX OFFICE REVENUES IN AUSTRALIA

9.5 Five hundred and five (505) films were released theatrically in Australia in 2015.

However, the top grossing films play a critical role in the sustainability of independent exhibition businesses as a small proportion of films generate the vast majority of the box office revenue. The top ten films in 2015 – that is, 2% of the films released, delivered 31.18% of the box office revenues.

9.6 Numero, the aggregated box office reporting platform, calculated the Australian box office in 2016 at \$1,259 million, which was an increase of 2.69% on 2015.

The total market share of all films was as follows:

Major Exhibitors	66.2%
ICA Member's Independent Cinemas	28.8%
Other Independent Cinemas	5.0%

ECONOMIC CONTRIBUTION OF EXHIBITION INDUSTRY IN AUSTRALIA

10 In its report “The Economic Contribution of the Film and Television Industry 2011”, Access Economics estimated the cinema industry’s economic contribution in 2011 was:

\$177.5 million in gross operating surplus;

\$212.5 million in labour income; and

6,305 full time equivalent persons employed by cinema operators in Australia in 2011.

SUPPLY OF THEATRICAL SCREEN CONTENT AND MARKETS

11 Theatrical screen content [“film”] is generally offered for theatrical license to exhibitors who operate projection equipment in their cinemas which is “DCI Compliant” - that is, which complies with the internationally recognised specifications of Digital Cinema Initiatives, LLC. Films are generally offered on a national basis either as ‘wide release’ or ‘limited release’ product and the terms on which films are supplied by distributors to exhibitors for release in cinemas are governed by individual film licence agreements, often in the form of specific negotiated (or intended to be negotiated) agreements on terms and policy for the particular film – in particular, film hire rates, minimum season and sessions – and otherwise using the distributor’s standard terms of and conditions, and not

necessarily recorded in the form of a full executed licence agreement for each film. Underpinning these specific film-by-film agreements is the Code of Conduct.

11.1 Major films, generally released by the major US studios and commonly known as 'blockbusters', are not easily [or at all] able to be 'substituted' for other product in the market and are considered commercially essential to their viability by exhibitors, especially when they are in a location competing with other nearby cinemas. Of over 500 films released in Australia in 2015 and 2016 the top ten films grossed a substantial proportion of the box office revenues.

11.2 In the case of so-called 'art-house' cinemas, 'blockbuster' films will have less bearing on their revenues than the availability of popular art-house titles (which are more commonly licensed as limited release films to a smaller group of cinema sites or, in some cases exclusively, to only one or two cinema sites). However, the availability of art-house films and the terms on which they are offered by distributors to exhibitors is of significant commercial impact on a cinema site seeking to specialise in this type of content.

11.3 In larger metropolitan areas the available consumer 'market' for an exhibitor [non-art-house] is generally regarded as 15 minutes' drive from the venue, and in regional areas the market can encompass a 1 to 2 hour drive radius. The 'market' for art-house cinemas is more difficult to determine but, as art-house cinemas are generally located within the larger metropolitan areas, the market for art-house cinemas competing with other art-house cinemas would encompass a 30-45 minute drive radius (noting that art-house cinemas also compete for patronage with non-art house cinemas). For film exhibitors, the competitors in each market are the cinemas operating within that market area.

11.4 Whilst the outcomes of some of the collective negotiations intended to be the subject of the authorisations sought under this application may be regarded as affecting cinemas generally

throughout Australia, the principal 'market' for assessing any potential competitive impact of those outcomes is each of the markets described above.

11.5 Generally, each distributor has the exclusive right to licence each individual film for theatrical release. Distributors determine to whom they will offer licenses for each film within the provisions of the Code of Conduct. Based on custom and practice in Australia, ICA member exhibitors currently have the expectation of being offered a film on the first national release date, unless the film is an 'art-house' film or the cinema has outstanding distributor debts or is not DCI compliant at their cinema location. However, exhibitors who are unwilling or unable to accept the licence terms offered by distributors in order to have the film available for release in their cinema on the first national release date may negotiate to licence the film on a so-called 'sub-run' basis – that is, the film is not first made available to the cinema until some weeks after the first national release date. This is a major issue in larger metropolitan areas, and increasingly in regional areas, as generally the film is not first made available on a 'sub-run' basis until more than three weeks after the first national release date, and over 80% of the lifetime theatrical box office revenue of the majority of films is earned by cinemas exhibiting the films in the three weeks from the first national release.

CONCLUSION

12. For the reasons outlined above ICA requests authorisation to collectively bargain and submits that significant public benefit will result from the granting of our application which will also be of benefit to and protection of ICA, its member exhibitors, CEO and Board.

12.1 The ACCC Guidelines state:

The Act operates to promote competition and protect consumers. This is reflected in the object of the Act which is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The promotion of competition is not an end in itself; rather competitive markets are generally viewed as the best way to enhance the welfare of Australians through ensuring that the goods and services that consumers want are developed and

supplied at the lowest possible cost. A market which does this is said to be economically efficient.

Public benefit is not defined in the Act. However, the ACCC has traditionally given it a broad meaning. As noted by the Tribunal it includes: ... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress". Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass "progress"; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.

ICA submits that authorisation of our capacity to share information and collectively bargain with film distributors is consistent with these objectives. Authorisation will enhance our industry's capacity to manage negotiations and costs more efficiently and assist us to maintain lower consumer prices at the cinema.

12.2 Authorisation will enhance behaviour and communications between a distributor and independent exhibitors by making film licensing terms and conditions more transparent, more fairly applied and less likely to be misused in cases of significant inequality in bargaining power.