



Conference Record

Application for Authorisation - A91587

Lodged by Independent Cinemas Australia Inc.

12:00pm AEDT

8 November 2017

**Level 3, 175 Pitt Street,
Sydney NSW 2000**

The information and submissions contained in this conference record are not intended to be a verbatim record of the conference but a summary of the matters raised. A copy of this document will be emailed to each of the interested parties who attended the conference.

Attendees

Australian Competition and Consumer Commission

- Sarah Court, Commissioner (Chair of conference)
- Jeanne Pratt, Executive General Manager, Mergers and Authorisation Review Division
- David Jones, General Manager, Adjudication
- Linley Johnson, A/g General Manager Economic Group
- Darrell Channing, Director, Adjudication
- Jana Shearer, Principal Lawyer, Mergers and Authorisation Law Unit
- Yuelan Chen, Principal Economist, Economic Group.
- Simon Bell, Assistant Director, Adjudication

The Applicant

Independent Cinemas Australia (ICA)

- Adrienne Pecotic, Chief Executive Officer
- Peter Armitage, Lawyer, Ashurst Solicitors

Interested Parties

Australian Independent Distributors Association

- Elizabeth Trotman, Vice President of AIDA and CEO Studiocanal.
- Paul Wiegard, Managing Director, Madman Entertainment

Digital Cinema Network

- Martin Gardiner, Director

Entertainment One

- Jason Hernandez

Film Exhibition and Distribution Code Administration Committee (FEDCAC)

- Katherine Sainty, Chair

Motion Picture Distributors Association of Australia (MPDAA)

- Lori Flekser, General Manager

Paramount Pictures

- Brian Pritchett, Managing Director
- Daniel Titmus, Sales Director
- Spiro Hronis, Finance Director
- Scott Sloan, Lawyer, Dibbs Barker

Sony Pictures Releasing (Sony)

- Stephen Basil-Jones, Executive Vice President – Australia and New Zealand
- Alison Webster, Finance Director
- Angus Clunies-Ross
- Hayden Flack, Lawyer, Minter Ellison

Studiocanal

- Greg Denning

The Walt Disney Company (Australia) Pty Ltd (Disney)

- Jo Bladen, General Manager Studios (Australia and New Zealand)
- James O’Sullivan, Principal Counsel
- Michele Laidlaw, Lawyer, Johnson Winter Slattery

Transmission Films

- Matthew Soulos, Head of Sales, Theatrical

Twentieth Century Fox Film Distribution (FOX)

- Marc Wooldridge Spokesperson
- Jacqueline Downes, Lawyer, Allens Linklaters

Universal Pictures International (Universal)

- David Collins, Australian Sales Director
- Dave Poddar, Lawyer, Clifford Chance

Conference commenced: 12:00pm AEDT

Introduction

Commissioner Court welcomed the attendees, introduced ACCC staff present, made some introductory remarks outlining the purpose of the conference, provided an overview of how the conference would be conducted and then opened the conference for discussion.

Opening statements

Commissioner Court invited the two parties that requested the conference to make a statement.

Australian Independent Distributors Association (AIDA)

Mr Paul Wiegard read from a written submission, which is available on the [ACCC public register](#). Key points include:

- the proposed conduct is likely to have a disproportionately large negative impact on Australian independent distributors, because these distributors rely on ICA members as exhibitors; ICA’s market share for AIDA distributed films (42.65 per cent) is much higher than ICA’s share for all films (22.20 per cent).

- The market is functioning well now; the negotiation process is evenly balanced and efficient.
- ICA negotiating on behalf of its members is likely to create a barrier between distributors and exhibitors.
- Paragraph 98 of the draft determination is ambiguous and inconsistent with other parts of the draft determination.
- AIDA members hold the rights to fewer 'must have films' than the major distributors. ICA members have the upper hand in peak times, such as school holiday periods, when distributors are vying for access to screens.
- If AIDA members decide to opt out of collective bargaining, AIDA fears ICA members may decline an offer to show a film or AIDA members may accept an unfavourable deal to have their film shown.

Commissioner Court asked Mr Wiegard to explain how information sharing will have a long-lasting impact on the independent distribution model.

Mr Wiegard submitted that information sharing could change the independent distribution model and once changed, it would be hard to return. Information sharing will mean that all independent exhibitors will want the 'best' deal but it is unlikely that AIDA members will be able to make the same offer to all exhibitors given the variety of individual circumstances involved.

AIDA members negotiate directly with exhibitors.

Commissioner Court asked if it would be beneficial for subsets of independent cinemas to collectively bargain.

Mr Wiegard indicated that AIDA would be concerned about whether any information shared within that subset actually remains in that subset.

Mr Greg Denning (Studiocanal) stated that it is important to distributors to clarify the scope of the conduct as set out in paragraph 98 of the draft determination.

Mr Martin Gardiner (Digital Cinema Network) noted that Mr Bob Parr negotiates on behalf of small cinemas and it seems to work well. Mr Parr books films on behalf of cinemas.

Mr Matt Soulos (Transmission Films) submitted that Mr Parr books films for Wallis Cinemas and takes account of cinemas' individual circumstances.

Mr Marc Wooldridge (FOX) submitted that when negotiating terms and conditions a 'one size fits all' approach is unsuitable.

The Walt Disney Company (Australia)

Ms Jo Bladen thanked the ACCC for the opportunity to make an oral submission at the conference and submitted:

- The code of conduct provides a robust process for negotiation between distributors and exhibitors. Disney engages with exhibitors in accordance with the code of conduct and it works well.
- Exhibitors are comfortable raising concerns directly with Disney or referring issues to the code of conduct administrative committee. There is no cost to either party if an issue is informally referred to the code of conduct administrative committee. Costs associated with formal referrals are split 50/50 between the parties.

- The Disney sales team speak with exhibitors regularly and they have a good relationship with exhibitors.
- Authorisation puts the code of conduct at risk. Authorisation may lead people to believe that the code of conduct is broken.
- Paragraph 98 of the draft determination is ambiguous and inconsistent with other parts of the draft determination.
- Asked the ACCC to reconsider its draft determination.

Commissioner Court said that the ACCC is not making a determination on the efficacy of the code of conduct, however the ACCC will further consider the impact of authorisation on the code of conduct and will review paragraph 98 of the draft determination and provide clarity on it.

Ms Adrienne Pecotic (ICA) declined Commissioner Court's invitation to make an oral submission.

Other statements

Commissioner Court offered other interested parties the opportunity to make oral submissions.

Mr Matt Soulos (Transmission Films) read from a written submission in response to paragraph 140 of the draft determination, which discussed the bargaining power associated with a 'must have' film, such as Transmission Film's film LION. The submission is available on the [ACCC public register](#) and the key points include:

- The success of LION did not give Transmission Films additional market power when negotiating with ICA members.
- A small group of ICA members took issue with the proposed terms for LION. These parties negotiated in a manner that Transmission Films considered unacceptable, and Transmission Films would be concerned if the proposed conduct led to similar negotiations on behalf of all ICA members in future.
- Transmission Films needs the flexibility to set individual terms, particularly where exhibitors have a track record of terminating or under-programming films or those exhibitors who have account issues.
- Collective bargaining will solidify Transmission Films position at the bottom of the food chain.

Mr Marc Wooldridge (FOX) submitted that:

- FOX opposes authorisation
- The benefits of authorisation outlined in the draft determination will not be realised. There is no evidence that any benefit from authorisation will be passed on by exhibitors. There are minimal efficiency gains from collective bargaining. Negotiation should take place individually between a distributor and an exhibitor.
- Material changes to terms and conditions occur infrequently.
- There is a risk that the proposed conduct is likely to lead to collective boycott. It is more likely that smaller titles will be boycotted.
- FOX is open to working with ICA to improve the code of conduct and to understand any concerns exhibitors have about taking complaints to the code of conduct administrative committee.

- While either party may decide not to engage in collective bargaining, authorisation would allow exhibitors to share information even if distributors choose not to engage in collective bargaining.

Mr David Collins (Universal) submitted that:

- Universal had provided a written submission to the ACCC and would therefore not read it at the conference.
- The code of conduct is working well and Universal supported the comments made by Ms Bladen (Disney) on the code of conduct.
- The ACCC should not accept ICA's comments on the code of conduct and it should ensure authorisation does not undermine the code of conduct.

The Universal submission made the following points (the submission is available on the [ACCC public register](#)):

- Not all ICA members are small and the ACCC has not given sufficient consideration of Universal's submissions on this.
- Distributors bear the risk of producing movie content and therefore have a commercial interest in ensuring exhibitors screen movies in an environment that is attractive to consumers.
- Distributors are not a homogenous group; there is no reason in terms of bargaining power why exhibitors should be provided with information about distributors' terms for film supply to other exhibitors.
- Sharing information with the vertically integrated Dendy Icon Group could have significant anticompetitive outcomes for distributors and exhibitors.
- The ACCC's conclusion that concerns about information sharing may be addressed by confidentiality undertakings does not recognise commercial constraints; it is difficult to determine when a confidentiality agreement has been breached and it is even more difficult to obtain a satisfactory remedy.
- There is no evidence that exhibitors are currently unable to negotiate favourable arrangements; in other words, there is no evidence that there would be any benefits arising from granting authorisation.
- Issues between distributors and exhibitors can be dealt with under the code of conduct and ICA has not provided evidence that this is not happening now.

Commissioner Court noted distributors' submissions that the code of conduct works well, as well as ICA's submission that members are not always willing to take action under the code of conduct, so it is difficult for us to be sure about how well the code of conduct is working. However, the ACCC is not adjudicating on whether the code of conduct works well or not.

Mr Marc Wooldridge (FOX) said exhibitors have an opportunity to raise concerns and the code of conduct administrative committee meets four times a year.

Ms Elizabeth Trotman (AIDA) said the ACCC should read the minutes from FEDCAC to gain a better understanding of what issues are raised with the code of conduct administrative committee.

Commissioner Court noted there had been a lot of discussion on the code of conduct and was keen to explore the issues around information sharing and collective bargaining.

Mr Stephen Basil-Jones (Sony) submitted that:

- Sony does not adopt a ‘take it or leave it’ approach to negotiating with exhibitors. Sony’s success is linked to the success of the exhibitors.
- Sony works well with all exhibitors, including regional exhibitors. The facts do not support ICA’s submission that Sony offers unreasonable terms to exhibitors.
- ICA members include vertically integrated distributors/exhibitors, large independent exhibitors and small urban and regional exhibitors.
- The code of conduct provides a commercial framework for negotiation with a process for dispute resolution.
- ICA’s claimed benefits of authorisation are fictitious and the ACCC has not properly tested these claims. Advisors are not used in negotiations, so the suggestion that collective bargaining would allow exhibitors to share the cost of an advisor should not be accepted.
- The proposed conduct will increase time to negotiate and reduce efficiency. It is likely to increase costs for Sony.
- The ACCC should not grant authorisation because there is insufficient evidence to conclude the conduct will result in a net benefit. Authorisation will facilitate un-fettered information sharing and only benefit ICA.
- Sony will continue to work with individual exhibitors.

Mr Brian Pritchett (Paramount Pictures) read from a written submission, which is available on the [ACCC public register](#), emphasising four points:

- There is no evidence of market power – Paramount has very little market share.
- ICA’s proposal is unworkable in practice.
- There have been no changes to standard terms and conditions over the last 10 years.
- Negotiations between distributors and exhibitors do not involve substantial transaction costs (and in particular, no adviser costs) so the proposal simply adds another layer of bureaucracy.

Martin Gardiner (Digital Cinema Network) submitted that:

- It is the only exhibitor present at the conference and it does not support authorisation.
- There are approximately 200 exhibitors that are not members of ICA and they represent a small percentage of the total box office. Mr Gardiner is concerned about what will happen to these exhibitors if ICA’s proposed conduct is authorised.
- Exhibitors do not take issues to the code of conduct administration committee because they are concerned there will be ramifications if they do. More effort could be put into educating exhibitors about the benefits of taking issues to the code of conduct administrative committee.
- It has difficulties obtaining supply of films despite having a good relationship with distributors’ staff.
- It has never been provided with distributors’ policy despite the code of conduct saying it should.

Mr Dave Poddar (Clifford Chance on behalf of Universal) supported comments made by Mr Wooldridge regarding the code of conduct. Mr Poddar read paragraph four from Universal’s submission (available on the [ACCC public register](#)) and emphasised that ICA represents some exhibitors with significant businesses.

Ms Elizabeth Trotman (AIDA) submitted that:

- The code of conduct administration committee has copies of the terms and conditions of all distributors.
- AIDA members hold a small percentage of the box office and therefore have no market power.

Concluding remarks

Commissioner Court invited interested parties who wish to provide further submissions to do so by **20 November 2017**. Commissioner Court explained that the ACCC will consider the matters raised at the conference and any further submissions before deciding whether or not to grant authorisation and on what terms.

Conference ended 1:45pm AEDT.