

# **FILM EXHIBITION AND DISTRIBUTION CODE OF CONDUCT**

## **CHAIRMAN'S REPORT**

2017

## **The Code 2017**

At this stage of its existence, it is important to consider where we have got to in dealing with one of the more contentious aspects of the Code – that of conciliation.

The industry at that time was seeking an effective means of dealing with disputes which were arising within the industry. It was one of the most important issues leading to the Code's formation.

Disagreements about terms and condition of film hire and the unreasonableness of some of the conditions prompted an inquiry by Ross Jones, then a senior member of the ACCC. Among other things in a fairly tough report, he recommended the establishment of a voluntary code of conduct to bring some order into the industry.

The language from the Government at the time was a little more direct. Complaints were being made to the ACCC and more directly to senior members of the Government.

Consequently the Government called together the leaders of the four segments of the industry and the blunt message was to establish a voluntary code of conduct to address the issue or the Government would do it for them by making a mandatory code. Reason prevailed somewhat reluctantly and after several drafts the essential of the present code were agreed to by all four parties to the code.

Why much of the earlier part of the Code spelt out the framework for the way business should be conducted fairly and equitably among the code signatories, a large segment was devoted to dispute resolution and how that might be addressed.

The early drafts and the initial code drew heavily from the other codes existing at the time, on precise timelines, on formal notification procedures with not much emphasis on urgency.

As it began to be implemented it was clear that some of the requirements which had been borrowed from other codes were lacking the urgency required in the distribution and exhibition segments when disputes arose.

Disputes needed to be dealt with quickly given the time constraints, assessing the film and the looming date for the film's release.

This was further complicated by many independent exhibitors who believed that if they became entangled with a distributor over issues of disagreements that there would be retributive consequences.

Possible retribution as a result of a dispute was frequently raised at the Administration Committee meetings. Distributors who may have been heavy handed in the past assured the Committee that retribution was not part of the weaponry now that the code was in place.

The Administration Committee formalised its position by adding an additional clause to the Code which spelt out that any retributive conduct would itself be regarded as a breach of the code.

This addition to the Code was supplemented by the inclusion of the early intervention procedures when disputes look like occurring. These measures were an amalgamation of some of the procedures used by the Banking Ombudsman and the requirements for urgency particular to the cinema industry.

The significance of these changes meant that the formal timelines could be side stepped with the consent of both parties and the matter in dispute could be addressed and hopefully resolved quickly and satisfactorily.

Concerns about power imbalance in these circumstances were addressed in two ways. If a dispute arose over the terms and conditions of the hire of a particular film, the exhibitor would be able to take the matter to the person next rung up the ladder in the distributor's network.

If the matter could not be resolved at that level, the exhibitor would be able to ring the secretariat and the matter would be taken up by the secretariat on behalf of the exhibitor with the managing director.

In practice the early dispute resolution procedures drastically changed the emphasis in the Code from the formal procedures with the unrealistic timelines to one where the matter was speedily dealt with.

Since that time, well over a decade ago, virtually all of the disputes have been resolved quickly and satisfactorily to both sides.

## **Conciliation**

I have dealt in some detail with the history of the conciliation aspect of the code for two reasons.

The first deals with the foundation Code Conciliator, David Newton, and the contribution he made in this area of the code's development. David was appointed as Code Conciliator at the first meeting of the Administration Committee. His company, The Accord Group, was also been appointed to perform the secretariat work for the new code.

He was one of the leaders of a group of lawyers who advocated mediation as a dispute resolution process rather than the adversarial procedures used in the courts. David, as the Code Conciliator, was able to steer the through those early days of suspicion which in some cases lingered on.

He was able to use his skills not only in dealing with signatories but also with members of the Administration Committee. His counsel was one of the contributing factors which brought about the constructive view of the code which is evident today.

He was instrumental in bringing about the early intervention proceedings which almost completely reshaped the operation of the code in the operation of dispute resolution.

He was assisted in this by members of the Accord Group who developed an expertise in dealing with the early interventions.

David died last year. He was acknowledged by the legal profession for his work in promoting mediation as a legitimate alternative to the formal adversarial procedures in the courts.

His contribution to the success of the code cannot be underestimated.

We have also been lucky in the appointment of his successor, Ms Nina Harding. Nina was also one of the founding members of The Accord Group. She is a Master of Laws and has conducted her own business for 20 years in resolving disputes and is also a member of several mediation panels.

The importance to the Committee of her appointment is that almost at the time of her arrival she was presented with a dispute which many thought was intractable. However after several meetings and formal sessions, the matter was resolved to the satisfaction of all of the parties.

Assessing the success of dispute resolution over many years I should also acknowledge the highly successful work of Nathalie Birt, who was the anchor at the Accord Group in recent years and Cecily Zhu, the present occupant.

## **Review of the Code**

The Committee agreed that the Code should be reviewed on the basis of keeping it relevant and in line with other voluntary codes of conduct.

A sub-committee met last December to consider any suggestions for amendments to the Code but did not receive any substantive suggestions. At the Administration Committee meeting in February, it was suggested that two other items, theatrical windows and conciliation time frames should also be considered.

The subcommittee has not yet been able to suggest any appropriate wording for any proposed amendments. The issues are substantial and will obviously require consideration and agreement by the Administration Committee before any changes are in sufficient form to be included in the Code.

## **Terms of Trade**

The Committee has discussed several times the issue of a simplified document setting out the “terms of trade” for film hire. The aim of the project is to provide a document which makes it easier for exhibitors to understand exactly what is involved when signing up for the hire of a film. Initially it was hoped that there could be a standard document.

There have been substantial difficulties with the production of such a document including whether it is possible to set out the issues in one document. It is a project worthy of pursuing but the urgency will determine how it progresses.

## **Classification Issues**

The Classification Branch – now in the Department of Communications – continues to consult with FEDCAC on a range of issues. These include a degree of self-regulation and changing the rules for commensurate trailing for films which have not yet been classified.

## **Administration**

The administrative support for the Committee has been continued by the Accord Group. David Newton's death has placed a strain on the resources of the group but the Committee has been well served by Cecily Zhu who has taken over the running of the group.

Cecily is a highly qualified lawyer, conciliator and mediator and has been able to continue the administrative support to its usual high standard.

The secretariat work of the code has always been a major importance to the Code and Cecily has been able to maintain those standards through a very difficult period.

## **Final Report**

This is my last report as Chairman of the Code. I have been in a privileged position since it began in 1998 as the foundation chairman.

In earlier reports to the Committee during this last year, I have outlined the development of the code and indications of where the code has come to in 2017.

I have always enjoyed the support of the Administration Committee and the many members who have served on the Committee over these past 19 years. I don't think

there are any members of the Committee now who were there when the Code began. I thank all of them over the years for their friendship, their desire to do what was best for the cinema industry and for the success the code has turned out to be.

It was pleasing some years ago when one of the experts on the operation of voluntary codes in Australia, Mr Neill Buck, singled out the Film Code as an example of how voluntary codes should operate.

As well as the Committee I have always had the support and encouragement from The Accord Group – from David Newton in particular, from Nathalie Birt for many years and now from Cecily Zhu.

I would also like to thank the Code Signatories. Meeting with the Signatories tended to be annual events either at the Movie Convention or at the ICA convention. It was always important in my view that the Code should be upfront at these conventions.

The Code is an integral part of the cinema industry and should be visible and active at these important meetings.

To all in the cinema industry I wish you well and hope the industry continues to prosper in the premier position it holds with the Australian community.

I shall watch with interest from the sidelines.

*John Dickie*

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Chairman

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