



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Australian Writers' Guild Limited

in respect of

collective bargaining with
Major Performing Arts Theatres

Date: 30 January 2013

Authorisation number: A91339

Commissioners: Sims
Rickard
Schaper
Court
Dimasi
Walker
Willett

Summary

The ACCC proposes to grant authorisation for ten years to the Australian Writers' Guild Limited to collectively negotiate the terms of engagement of freelance playwright members with the Major Performing Arts Board Theatres and any other major theatre company.

The application for authorisation

1. On 24 October 2012, the Australian Writers Guild Limited (AWG) lodged an application for authorisation (A91339) with the ACCC under sections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the **Act**).
2. AWG is seeking authorisation for five years to collectively bargain the terms of engagement of freelance playwrights (current and future members of AWG who expressly consent to AWG collectively bargaining on their behalf) (**Consenting Members**) with the Major Performing Arts Board (MPAB) Theatres – including Bell Shakespeare Company, Black Swan State Theatre Company, Company B (Belvoir), Malthouse Theatre, Melbourne Theatre Company, Queensland Theatre Company, Sydney Theatre Company, South Australian State Theatre Company and any other major theatre company (**the Targets**).
3. In particular, AWG proposes to negotiate with the Targets to standardise terms and conditions in relation to the following:
 - minimum rates of pay for commissions and royalties
 - minimum contractual terms in relation to:
 - i. copyright and moral rights
 - ii. rights of termination
 - iii. royalties
 - iv. dispute resolution and wages for Playwrights in Residence(the **Collective Bargaining**).

Background to the application

Australian Writers' Guild¹

4. AWG is a national professional organisation representing performance writers across the fields of film, television, theatre, radio and digital media. AWG currently has 2501 financial members. Of these, 775 are Full Members (produced writers²)

¹ Unless otherwise stated, information contained under this heading was provided in AWG's submission in support of its application for authorisation A91339, 5 November 2012, p.1.

² 'Produced writers' are those writers who have a certain amount of his/her performance writing produced. For film, the writer must have at least 50 minutes of produced work, while television writers must have at least 45 minutes of produced work.

and 1726 are Associate Members (unproduced writers³). The remaining membership is made up of student members and life members. There are currently 191 Full Members who are playwrights.

5. Membership of AWG is voluntary and not a pre-condition to being able to undertake work within the industry.
6. Among its services to members, AWG provides an industrial and legal advisory service to all Full Members for unlimited hours and to all Associate Members for 6 hours per year. The AWG legal advisory service assists individual members on a case-by-case basis to either negotiate the terms of the proposed contract of engagement or to resolve disputes in relation to concluded contracts. AWG submits that such an approach is both costly and inefficient and is likely to become increasingly so based on the growth in demand for such assistance from AWG over recent years, with membership having increased by 23 per cent since 2008.

Playwrights⁴

7. Playwrights provide writing, editing, consulting and related services including, amongst other things, script assessing, mentoring, judging and participating in development workshops.
8. Playwrights also exploit, usually by way of licence, the intellectual property rights contained within any literary and dramatic works produced either in their own time or during the course of the commission by a theatre or production company.
9. AWG submits that playwrights are by and large independent contractors commissioned on a freelance basis by theatres, production companies, educational institutions or community organisations. The services required are project specific and often time specific, with the limited exception of playwrights in residence. AWG advises that over 25 per cent of commissions fail to proceed to production, depriving members of licensing royalties.
10. AWG submits that the majority of playwrights do not have the contacts, access to public funding or expertise to secure resources to develop plays to production on their own. Consequently, when negotiating the terms of engagement with a theatre or production company, there is a significant power imbalance in favour of the producers who control the flow of money. As an example, AWG playwrights who are Full Members earn less than \$40,000 a year.
11. Associate Member playwrights must often resort to competitions and submitting unsolicited plays to theatres and production companies. AWG submits that most Associate Members have little experience with contractual matters and find it difficult to access the professional services offered by an agent (as agents select their clients on the basis of produced credits) or a lawyer.

³ 'Unproduced writers' are those who have not had any of their written work produced or their produced work is below the minimum stated for full members.

⁴ Unless otherwise stated, information contained under this heading was provided in AWG's submission in support of its application for authorisation A91339, 5 November 2012, pp 1-2.

The Australian Theatre Industry

12. AWG submits that without government investment of public funds, theatres could not sustain their operations. Government subsidies range from 10 to 42 per cent of MPAB theatres' overall budgets. In 2010, AWG submits that the MPAB theatres received more government investment than all other theatres combined, making them key sources of potential commissions. AWG submits that mid tier and regional theatres look to MPAB theatres for support in co-productions, taking plays on the road and investment in productions.

ACCC evaluation

13. The ACCC may authorise potentially anti-competitive conduct such as collective bargaining if it is satisfied that the likely public benefits of the conduct will outweigh the likely public detriments.⁵
14. In its evaluation of authorisation application A91339 the ACCC has taken into account:
 - that no submissions objecting to the application for authorisation were received⁶
 - information available to the ACCC regarding similar previous matters⁷
 - the likely future if authorisation is not granted.⁸ In particular, the ACCC considers that, absent authorisation, playwrights are likely to negotiate on an individual basis where they have limited input into engagement contracts from theatre companies and/or accept contracts on a take it or leave it basis
 - that participation is voluntary for all parties (that is members of AWG and the Targets)
 - that the Targets are supportive of, or do not object to, the Collective Bargaining and
 - AWG is not seeking to engage in collective boycott activity.

Public benefits and public detriments

Benefits

15. The ACCC considers that compared to a scenario of freelance playwrights negotiating individually with theatre companies the proposed Collective Bargaining is likely to result in public benefits from:

⁵ The statutory tests for granting authorisation are outlined at Attachment A. The ACCC's Guide to Authorisation 2007 (available from the ACCC website) has more details regarding the ACCC's authorisation process.

⁶ Please see the ACCC's Public Register for more details, including a list of parties consulted.

⁷ Australian Writers' Guild Limited A91274 (Screen Writers); Media Entertainment and Arts Alliance A91204.

⁸ For more discussion see paragraphs 5.38-5.40 of the ACCC's Guide to Authorisation 2007.

- transaction cost savings - for playwrights and the Targets due to fewer negotiations. To the extent that playwrights would otherwise individually negotiate terms of engagement and receive assistance from AWG in doing so, collective bargaining is also likely to reduce transaction costs for AWG by decreasing the demand for some of its services, allowing its resources to be directed to other projects and
- improved quality of information to playwrights during negotiations. Improved access to information for playwrights is likely to provide them with a greater opportunity for input into contracts resulting in more efficient bargaining outcomes.

Detriments

16. The ACCC considers that the Collective Bargaining is likely to result in little if any public detriment as:

- participation in the Collective Bargaining is voluntary for all parties
- there is no proposed boycott activity and
- competition amongst playwrights for commissions to create work is unlikely to be significantly affected.

17. The ACCC also notes that in the absence of authorisation, playwrights, particularly those who are unproduced, are likely to have limited input into engagement contracts, or accept contracts from theatre companies on a take it or leave it basis.

Balance of benefits and detriments

18. On balance, the ACCC considers that the Collective Bargaining is likely to result in a benefit to the public and that this benefit would outweigh the detriment to the public due to any lessening of competition that is likely to result from the Collective Bargaining.

Length of authorisation

19. The ACCC notes that AWG has sought authorisation for five years. The ACCC has previously authorised AWG to engage in similar conduct with the Screen Producers Association of Australia⁹. Given the benefits are likely to continue to outweigh any detriments over an extended period and that interested parties have not objected to the proposed conduct, the ACCC proposes to grant authorisation for ten years.

20. The ACCC seeks submissions from interested parties about this draft determination and in particular, the ACCC's proposal to grant authorisation for 10 years.

⁹ Australian Writers' Guild Limited A91274, 25 January 2012.

Draft determination

21. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination. For the reasons set out in this draft determination, the ACCC is satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) of the Act are met¹⁰. Accordingly, under sections 88(1A) and 88(1) of the Act, the ACCC proposes to grant authorisation A91339 to AWG for ten years to enable it to collectively bargain with the Targets in relation to the following terms of engagement for freelance playwright members:
- minimum rates of pay for commissions and royalties
 - minimum contractual terms in relation to:
 - i. copyright and moral rights
 - ii. rights of termination
 - iii. royalties
 - iv. dispute resolution and wages for Playwrights in Residence.
22. Under section 88(10) of the Act, the ACCC proposes to extend the authorisation to future playwright members of AWG.
23. The proposed authorisation does not extend to AWG engaging in boycott activity.

¹⁰ See Attachment A.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.