



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation

lodged by

Screen Producers Australia

in respect of

collective negotiation of model terms of engagement
with the Australian Writers' Guild, the Media
Entertainment and Arts Alliance and the
Australian Directors Guild

Date: 16 July 2015

Authorisation numbers: A91484 & A91492

Commissioners:

Rickard
Schaper
Cifuentes
Court
Featherston
Walker

Summary

The ACCC proposes to grant authorisation to current and future members of Screen Producers Australia to collectively negotiate model terms of engagement with the Australian Directors Guild, the Australian Writers' Guild and the Media Entertainment and Arts Alliance and to give effect to those model terms when contracting with current and future members of these organisations.

The ACCC proposes to grant authorisation for five years

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

The applications for authorisation

1. On 23 March 2015 Screen Producers Australia (**SPA**) lodged application for authorisation A91484 with the ACCC. A related application for authorisation, A91492, was lodged on 13 April 2015.¹
2. SPA is seeking authorisation for five years for current and future members of SPA to:
 - a. collectively negotiate model terms of engagement with the Australian Writers' Guild (AWG), the Media Entertainment and Arts Alliance (MEAA) and the Australian Directors Guild (ADG), and
 - b. give effect to existing and future model terms of engagement when contracting with current and future members of the MEAA, ADG and AWG(the Proposed Conduct).
3. SPA states that the model terms of engagement may include, but are not limited to, provisions relating to:
 - a. with the AWG - rates and terms of pay, copyright and moral rights, rights of termination, dispute resolution and credits
 - b. with the ADG - rates and terms of pay, conditions of employment, accommodation, travel and transport, rights of termination, dispute resolution and credits, and
 - c. with the MEAA – rates and terms of pay, conditions of employment, accommodation, travel and transport, rights of termination, dispute resolution and credits.
4. Authorisation is sought for the SPA to negotiate model terms of engagement with the AWG, ADG and MEAA in relation to any and all matters relevant to negotiations between SPA members and members of these organisations.

¹ Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at www.accc.gov.au/publications/authorisation-guidelines-2013

5. The model terms of engagement will not be binding on SPA, AWG, ADG or MEAA members. Individual members of the SPA and individual members of the AWG, ADG and MEAA with whom they contract will remain free to adopt the model terms, negotiate variations on the model terms or negotiate contract terms without regard to the model terms.
6. Authorisation is sought both for agreements affecting competition or incorporating related cartel provisions (A91484) and exclusionary provisions and associated cartel provisions (A91492). In its letter dated 17 April 2015, SPA states that its application for authorisation in respect of exclusionary provisions and related cartel provisions relates solely to the circumstances of engagement and discussions between competing producers in preparation of the various model terms and the model terms themselves. SPA states that authorisation is not sought for any agreement or understanding outside the model terms themselves which could be regarded as collective action with the purpose of preventing, restricting or limiting acquisition and/or supply of services from or to particular people associated with the implementation of the terms.
7. To negotiate model terms of engagement, SPA will form committees which generally include two SPA employees and several SPA members. SPA states that the process of negotiation is inclusive of all SPA members and on average each agreement takes 9 to 12 months to negotiate. They also state that production companies not directly involved in the committee are given opportunities both at the start and towards the end of the process, to provide their input into the negotiations. In addition, SPA holds regular member meetings in each state at which industrial relations issues, among other things, are discussed and members can provide comments on the negotiations and model terms at these meetings.

Background

8. The television and film production sector in Australia includes a variety of producers including in-house television networks (Australian broadcasters), SPA members and non-SPA members. Not all Australian producers are members of SPA. Under the SPA membership eligibility criteria, producers that are also Australian broadcasters cannot become members of SPA. While they are not SPA members, Australian broadcasters are significant producers of television content in Australia, producing content in-house for broadcast and distribution. In addition, the Australia broadcasters also have a role as content acquirers, commissioning and/or acquiring content from other producers including from SPA members.
9. SPA members primarily produce television and film content. When producing television programs or films producers may engage writers, actors, directors and technical crew (e.g. brush hands, casting assistants, locations scouts, carpenters, art directors, set designers and camera assistants) on an employment or contractor basis. SPA submits that, although it varies on a case-by-case basis, production companies generally engage writers, actors and directors as independent contractors.
10. SPA is an industry body that represents the interests of independent Australian film and television producers on issues affecting the business and creative aspects of screen production. SPA states that it was formed by the screen industry to represent small-to-medium sized enterprises across various industries including feature films, television, games and interactive content. The SPA states that it is independent of television networks and major film studios (who both acquire content

from producers and produce their own content). SPA's members include around 300 production businesses, which employ hundreds of producers. As part of its service to members, SPA provides industrial advice at no cost above membership fees and levies. This includes SPA negotiating model terms of engagement with the ADG, MEAA and AWG for use by SPA members.

11. The ADG is an industry association that has represented the interests of screen directors since 1982. As at April 2015, the ADG had 845 members. Of those ADG members, approximately 55 percent are involved in directing television series and serials and there is overlap in members that direct for television series and serials and film. The ADG provides a range of services to its members, including an industrial and legal service (at no additional cost to its members above the membership fees) for one hour free consultation per year with one of the ADG's consulting law firms. ADG's services also include assisting individual members with the negotiation of their contracts with producers or resolving disputes under their contracts with producers.
12. The ACCC is also currently considering an application for authorisation lodged by the ADG for current and future members of ADG to collectively negotiate a model agreement with SPA for use by directors when contracting with producers of television for television series and serials². As with the proposed SPA model terms of engagement, this will be a model agreement that ADG members can choose to adopt in negotiations. In this respect, in so far as SPA's applications for authorisation relate to negotiating a model agreement with the ADG, the two applications complement each other. Concurrent with the release of this draft determination, the ACCC has released a draft determination proposing to grant authorisation to the ADG's arrangements.
13. MEAA is a trade union and professional organisation that covers media, entertainment, sports and arts industries. MEAA's membership of approximately 20,000 includes people working in television, radio, theatre and film. Relevantly for SPA's applications for authorisation, MEAA's membership includes actors and technical crew (such as brush hands, casting assistants, locations scouts, lighting assistants, wardrobe assistants, carpenters, art directors, set designers and camera assistants) involved in Australian television and film productions.
14. AWG is a national professional association for Australian performance writers including for film, television, theatre, radio and digital media. AWG has a number of membership levels for performance writers. Full members are performance writers who have produced work and are entitled to the full range of services provided by AWG. AWG offers associate membership for emerging writers and also has student, senior and overseas membership. As at 30 April 2015, AWG had a total of 2,242 members. Among its services to members the AWG provides an industrial and legal advisory service.
15. On 25 January 2012 the ACCC granted authorisation to AWG, on behalf of its current and future members, to collectively negotiate model terms and conditions of engagement with SPA for use by writers when contracting with film or television producers.³ This authorisation is still in place and, like the ADG application for authorisation, in so far as SPA's applications for authorisation relate to negotiating a model agreement with the AWG, the two applications complement each other. Given the AWG authorisation currently in place, SPA submits that, insofar as the

² See A91499 – Australian Directors Guild Limited.

³ See A91274 – Australian Writers' Guild Limited.

current applications for authorisation relate to the AWG, SPA makes its applications out of an abundance of caution.

Consultation

16. The ACCC invited submissions from 12 potentially interested parties including the AWG, ADG and MEAA, Screen Australia, the Australian Communications and Media Authority and the Australian broadcasters.⁴ In response the ACCC received submissions from four parties: two expressing qualified support or in support of the applications and two expressing concerns about the applications.
17. The ADG submits that it does not oppose SPA's applications and it agrees with the proposition that the model terms of engagement to be negotiated between SPA and ADG will provide an important industry benchmark. However, the ADG submits that the scope of the model terms to be included in negotiations with it, as described at paragraph 3 of this draft determination, should also include terms relating to copyright and moral rights.
18. The AWG submits that it does not object in principal to SPA's applications. However, the AWG states that the ACCC should consider how the time period of authorisation under the existing AWG authorisation and the SPA proposed authorisation (if granted) could be aligned (preferably by extending the term of the existing AWG authorisation). The AWG also notes that the scope of matters identified in its application that it proposed to bargain over is broader than those listed in the SPA's application, as described at paragraph 3. The AWG requests harmonisation of the scope of the negotiations allowed under both authorisations. The AWG further states that international production companies operating in Australia should also be authorised to participate in negotiation of model terms of engagement as they constitute the bulk of employment of AWG members.
19. Nine Network Australia Pty Ltd (Nine) submits that it is concerned that agreements between producers and the writers, actors, directors and technical crews they employ often have a detrimental impact on the cost of production and Nine's ability to effectively broadcast and distribute content. It contended that this is because, when acquiring content from producers that are members of SPA, the producer must pass onto Nine those model terms of engagement (including, for example, rights negotiated between the producer and members of AWG, MEAA and ADG about how often and on what platforms the content created can be broadcast and residuals payable to them). Additionally, Nine submits that such model terms become the framework upon which it engages actors, writers and directors for its in-house drama productions. Nine contends that this compromises its ability to fund new productions and access content.
20. Seven West Media Limited (Seven) provided an initial submission on 15 May 2015 and a supplementary submission on 26 June 2015. Seven submits that it accepts that the use of model terms of engagement may deliver efficiencies to the production sector. However, Seven submits that the Proposed Conduct raises a number of issues for broadcasters, both in their capacity as content acquirers (acquiring content from producers who are members of SPA and non-SPA member producers) and as significant producers of television content in Australia in their own right.

⁴ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

21. Seven is concerned that, should authorisation be granted, SPA's model terms would, in effect, be imposed on other producers by the relevant unions and guilds (i.e. the MEAA, ADG and AWG). The use of the model terms of engagement in this way, as a quasi-industry standard, could limit the ability for producers who are not members of SPA (including Seven) to negotiate different agreements when Seven employs MEAA, ADG and AWG members directly and for any party to negotiate bespoke agreements on a program-by-program basis. Seven is concerned that it will be bound by the model terms negotiated without having had input into their development. Seven further submits that even to the extent that it could negotiate different agreements it would be inefficient to do so outside of the collective process for negotiating model terms.
22. Seven submits that, in relation to the its direct negotiation with actors, well-known and highly regarded actors are able to leverage their reputation and consequent employment mobility against producers in negotiations and less well-known actors also wield bargaining power in negotiations. Seven also submits that writers hold a degree of market power.
23. Similarly to the Nine Network, in its capacity as a content acquirer (i.e. as an acquirer of programs produced by SPA members), Seven argued that SPA members are able to pass through to acquirers like Seven terms negotiated with writers, directors and actors which affect broadcasters' commercial outcomes.
24. Seven submits that where it commissions programs from producers (and in some cases fully funds them), it should be fully consulted on the terms of industrial agreements which will impact on the terms of its acquisition such as rates of pay, hours of work and other terms dealing with issues such as publicity/promotion and credits. Seven submits that these terms impact on its ability, as the acquirer of the content, to exploit programs to their maximum potential. Seven is particularly concerned about terms relating to the nature and scope of pre-purchased rights and exploitation periods (how often and for how long the acquirer can broadcast the program and the distribution platforms it can acquire rights to) and residuals/repeat fees. Seven submits that television broadcasters are expected to fully fund production costs notwithstanding that restrictions on license duration and number of repeats may be built into agreements between the producer and actors, writers and directors.
25. Seven notes that the industry environment has changed substantially as a result of the development of new technologies and platforms such as SVOD (subscription video on demand), TVOD (transactional video on demand) and other new media. These new digital platforms are impacting the revenues of the free-to-air broadcasters. Seven submits that producers still expect broadcasters to fully fund the costs of production notwithstanding these other distribution platforms. Seven submits that as a result of this increased competition, producers are no longer subject to a level of countervailing buyer power which incentivises them to negotiate terms that are acceptable to broadcasters. Seven submits that this increased competition exposes broadcasters to increased costs and fewer and shorter rights.
26. Seven considers that content acquirers which distribute through a range of emerging and traditional platforms, such as itself, are in a better position to evaluate the need for flexibility in the rights to take into account the impact of new technologies. In Seven's view, independent producers are not best-placed, without input from content acquirers, to make these assessments, particularly given the likelihood of pass through which reduces producers' incentives to take account of broadcasters' interests.

27. Therefore, Seven submits that, given the material effects on broadcasters and other independent producers potentially arising from the model terms of engagement, broadcasters should be given a right to participate in the negotiation of model terms of engagement by the SPA with the ADG, AWG and MEAA by either:
- a. an amendment to the SPA authorisation application to allow Seven and other interested parties to participate in the process, or
 - b. the ACCC granting authorisation conditional on SPA providing interested parties which may be materially affected by the model terms of engagement the right to participate in the negotiating process.
28. The submissions by SPA and interested parties are considered as part of the ACCC's assessment of the applications for authorisation. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC assessment

29. The ACCC's assessment of the Proposed Conduct is in accordance with the relevant net public benefits tests⁵ contained in the *Competition and Consumer Act 2010* (the **CCA**). The ACCC may grant authorisation if it is satisfied that the proposed conduct would be likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition.
30. In its assessment of the applications the ACCC has taken into account:
- a. the applications and submissions received from SPA and interested parties
 - b. other relevant information available to the ACCC, including information from consideration of related matters⁶
 - c. the likely future without the conduct for which authorisation is sought.⁷ In particular, the ACCC considers that, absent the conduct for which authorisation is sought, individual SPA members are likely to negotiate terms of engagement with individual members of the MEAA and ADG without reference to the model terms of engagement proposed to be negotiated by SPA with the MEAA and ADG. In relation to the AWG the ACCC notes the existing authorisation in place which provides a mechanism for the collective negotiation of model terms of engagement
 - d. the relevant areas of competition likely to be affected by the Proposed Conduct, particularly the supply of writing, acting, directing and technical services to film and television producers
 - e. that the proposed model terms of engagement are not binding and do not prevent individual SPA members from negotiating their own agreements with members of the MEAA, ADG and AWG

⁵ Subsections 90(5A), 90(5B), 90(6), 90(7) 90(8) of the CCA.

⁶ See, for example, application for authorisation 91274 lodged by the Australian Writers' Guild Limited and granted by the ACCC and application for authorisation A91499 lodged by Australian Directors Guild Limited which is currently being considered by the ACCC.

⁷ For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

- f. that the MEAA, ADG and AWG are supportive of, or do not object to, the collective bargaining, and
- g. that no collective boycott activity is proposed and utilisation of the proposed model agreement is voluntary for all parties.

Public benefit

31. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of transaction cost savings and improved input into contracts.

Transaction cost savings

32. SPA submits that there are transaction costs associated with each contractual negotiation between producers and writers, actors, directors and technical crew, which may include costs associated with negotiations, drafting contracts and obtaining legal and professional advice. SPA submits that individual contract negotiation is particularly inefficient because agreements need to be drafted and renegotiated for each transaction. SPA submits that the use of model terms would assist in reducing these costs, not just for producers, but also for writers, actors, directors and technical crew, and would reduce the costs of maintaining SPA's, AWG's, MEAA's and ADG's industrial and legal advisory services.
33. The ACCC considers that an individual producer negotiating with writers, directors, actors and technical crew will incur transaction costs (such as legal and expert advice, and the time taken to negotiate). The writers, directors, actors and crew will also incur transactions costs in negotiating with individual producers. Individual negotiations will stop when the costs of continued negotiation outweigh the expected benefits to be realised for either party. At this point, it is likely that the contract will not fully capture the potential mutual benefits from trade. To the extent that the model agreements proposed to be negotiated meet the needs of SPA, AWG, ADG and MEAA members and are utilised by such members in their contracts, this is likely to result in public benefits from transaction cost savings, including the sharing of legal and expert advisor costs. By reducing the costs of negotiating for all parties, it is likely that more contractual issues will be able to be addressed, because each party can obtain the benefit from negotiating these issues at less cost to themselves, resulting in more comprehensive and efficient contracts of greater benefit to all parties.
34. To the extent that members use industrial and legal advisory services offered by the SPA, AWG, ADG and MEAA and receive assistance with negotiating their contracts, the Proposed Conduct is also likely to reduce transaction costs for the SPA and the AWG, ADG and MEAA by decreasing the demand for some of their member services, allowing their resources to be directed to other projects.

Improved input into contracts

35. SPA submits that writers, actors, directors and technical crew are generally constrained in their negotiations with producers through their lack of individual bargaining power. It submits that, through the collective negotiation process there will be increased input into contractual terms and conditions (the model terms of engagement) which may result in terms and conditions that better reflect input from writers, actors, directors or technical crew and producers.

36. SPA further submits that there is very little publicly available information regarding what constitutes appropriate minimum working conditions for film and television writers, actors, directors and technical crew. The model terms of engagement will improve the scope and quality of information available to these people during negotiations about what constitutes minimum industry standards of engagement.
37. The ACCC has previously accepted that producers generally have better access to resources and market information than individual writers and that unproduced writers often find it difficult to access the professional services offered by an agent or lawyer and have very limited experience with contractual matters themselves.⁸ Similarly, the ACCC accepts that technical crew and many actors and directors may find it difficult to access industrial or employment-related services or information regarding what constitutes appropriate minimum working conditions.
38. The ACCC accepts that when negotiating with larger businesses, small counterparties such as writers, directors, actors and technical crew (often operating as sole contractors) can be at a disadvantage in terms of resources and experience of negotiating in complex commercial environments. The Proposed Conduct will allow the SPA, on behalf of its members, to collectively negotiate with the AWG, ADG and MEAA (who will represent the interests of, and advocate for, writers, directors, actors and technical crew in their respective negotiation processes) to develop model terms of engagement. Individual SPA members and AWG, ADG and MEAA members can then choose whether to utilise the model terms in their individual contractual negotiations. The development of these model terms of engagement may therefore allow for more effective one on one negotiation, where the negotiating parties have a greater opportunity to identify and achieve business efficiencies that better reflect their circumstances by reference to the model terms. Developing model terms of engagement is also likely to enable members of SPA and the ADG, AWG and MEAA to become better informed of relevant market conditions and of what constitutes appropriate minimum standards of remuneration, rights and working conditions, which is likely to improve their input into contractual negotiations with producers to achieve more efficient outcomes.

Public detriment

39. SPA submits that no public detriments will arise as a result of the Proposed Conduct because:
- a. without the capacity for SPA to collectively represent its members, the industry voice would be dominated by a small number of large businesses, which could ultimately result in less competition and less diversity in program content
 - b. the model terms do not prevent producers from negotiating their own agreements with the same organisations or with employees and contractors, but merely serve as a benchmark for minimum standards
 - c. the model terms of engagement allow the parties to negotiate other terms not provided for by the negotiated terms. There are many variables (e.g. above minimum wage rates, budget, experience of the writer, actor, technical crew member) which may affect an agreement with a producer

⁸ See A91274 – Australian Writers’ Guild Limited, paragraph 4.28.

- d. the model terms of engagement do not provide for collective boycott activity, and
 - e. writers, actors, directors and technical crew compete strongly with each other to be commissioned by a producer, and their selection by the producer is largely based on the quality of their work and reputation, factors which are separate to the implementation of model terms of engagement.
40. The ACCC considers that any detriment resulting from the Proposed Conduct is likely to be limited by its voluntary nature (parties who do not anticipate a benefit from utilising the model terms of engagement will presumably elect not to do so) and the absence of any boycott activity.
41. The ACCC notes that any bargaining group is unlikely to be homogenous in composition and the application of a 'one size fits all' collectively negotiated contract could lead to inefficient outcomes. However, because utilisation of the model terms of engagement is voluntary, producers and writers, directors, actors and technical crew when engaging in individual negotiations can elect to use the model terms, negotiate variations on the model terms or negotiate without regard to the model terms as best reflects their circumstances.

Concerns raised by Seven and Nine

42. As discussed at paragraphs 19 to 27, Seven and Nine have raised concerns about the Proposed Conduct both from their positions as non-SPA member producers and as content acquirers.

Producing content

43. As producers of content, Seven and Nine are concerned that directors, writers, actors and technical crew will pass on the model terms negotiated with SPA to Seven and Nine when they engage them for in-house productions without Seven and Nine having had any input into the negotiation of those terms.
44. The ACCC accepts that some well-known and/or skilled and experienced actors, writers and directors may have a degree of bargaining power in negotiations with television broadcasters. However, more generally, the ACCC does not consider that there is a significant imbalance in bargaining power in favour of directors, writers, actors and technical crew in negotiations with television broadcasters. The range of options available to a television broadcaster in employing actors, writers, directors and crew will generally be far greater than the opportunities available to the actors, writers, directors and crew to participate in television productions.
45. Further to the extent that any actor, writer or director does have significant bargaining power as a consequence of their popularity, skill or experience, television broadcasters participating in the negotiation of model terms of engagement will not change this. Indeed, if any of these parties do have bargaining power in negotiations with television broadcasters they will likely seek favourable variations to any model terms reflecting their popularity, skill or experience. In this respect, the proposed model terms of engagement are intended to be minimum standards, and even then, they are not minimum standards that any party would be required to adopt.
46. The ACCC does not consider that the establishment of model terms of engagement between the SPA and the ADG, AWG and MEAA, impinges on the ability of

television broadcasters to negotiate different terms reflecting the context in which they seek to engage actors, writers, directors and crew.

Acquiring rights

47. As a downstream acquirer of content produced by SPA members, Seven submits that it should be able to have input into the terms of contracts between producers and the writers, directors, actors and technical crew engaged to produce the content. Seven is concerned that without such involvement, SPA members will pass through terms which affect broadcasters' commercial position. For example, a producer may agree to terms with an actor that limit the duration or number of repeats or the platforms through which the content can be distributed. This in turn limits the suite of rights that the producer is able to offer for sale to the broadcaster.
48. The ACCC considers that it is a matter for the content owner (the producer) to decide what suite of rights they want to sell and to whom. Similarly, the terms of a producer's agreement with writers, directors, actors and technical crew are a matter for those parties. If, for example, a producer agrees to terms with an actor that devalue the rights they are on-selling (such as a shorter license period) then that will be reflected in the price that content acquirers will pay for those rights. Producers will be aware of this when conducting negotiations with the actor and will set remuneration accordingly. However, in this respect, the ACCC notes that content acquirers are not a homogenous group and different content acquirers, particularly those operating different distribution platforms, are likely to value different suites of rights.
49. If television broadcasters were to be involved in the upstream negotiation of model terms of engagement, and successfully influence terms such as license terms, the number of content runs and distribution platform, this would likely be to the advantage of television broadcasters at the expense of other competing acquirers of content. Alternatively, all downstream acquirers of content could be involved in negotiation of the model terms. However, this would likely be very unwieldy and the disparate nature of the downstream acquirers of content would make successful negotiation of model terms of engagement unlikely.
50. The ACCC accepts that in some cases producers will have bargaining power in their negotiations with television broadcasters because of the potential popularity of the content they are selling the rights to. However—as with actors, writers and directors with whom television broadcasters negotiate directly—television broadcasters' participation in negotiation of model terms of engagement will not change this. The source of any bargaining power that a producer has in selling content is demand for the content among competing acquirers, including the new content acquirers identified by Seven for platforms such as SVOD and TVOD and other new media.
51. More generally, while television broadcasters need content they do not necessarily need any individual piece of content. Television broadcasters have a range of options available to them in acquiring content including other SPA members, non-SPA members, acquiring content from overseas producers (subject to meeting the quotas for Australian content) and producing content in-house. The producer on the other hand will only have a limited range, and often only one piece of content, at any one time, to sell.
52. In summary, the ACCC considers that the extent to which SPA members and members of the AWG, AWD and MEAAA wish to involve downstream acquirers of content such as television broadcasters in the negotiation of model terms is a matter for them to consider.

53. The ACCC also considers that the terms on which content is made available to television broadcasters and others reflects competition between providers of content (producers) and acquirers of content (including television broadcasters).

Issues raised by the AWG and ADG

54. The ADG and AWG both submit that the model terms of engagement to be negotiated should be broader in scope than the provisions identified by SPA in their application and described at paragraph 3.

55. The ACCC notes that the provisions identified by SPA are indicative provisions that may be included in negotiations. It is open to the parties to negotiate about any matter that they see fit, including the additional matters identified by the AWG and ADG.

56. The AWG also submits that the term of the authorisation granted to it should be consistent with the term of any authorisation granted to SPA, and that preferably this should be achieved by extending the term of the AWG's existing authorisation. The ACCC notes that if the AWG wishes to harmonise the term of the authorisation granted to it with that granted to the SPA it is able to lodge an application for revocation and substitution to extend the term of its authorisation. However, the ACCC cannot otherwise extend the term of the AWG's authorisation.

57. Further, the AWG submits that as the bulk of its members are employed by international production companies these companies should also be authorised to participate in the negotiation of the model terms.

58. SPA is able to seek to vary its applications to include international production companies who are not SPA members—or for that matter any other party, including television broadcasters—in negotiations should it wish to do so.

Balance of public benefit and detriment

59. For the reasons outlined in this draft determination, on balance, the ACCC considers, pursuant to subsections 90(6), 90(7), 90(5A) and 90(5B), that in all the circumstances the 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 proposed conduct. The ACCC is also satisfied, pursuant to subsection 90(8), that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.

Length of authorisation

60. SPA seeks authorisation for five years. SPA submits that this time period is appropriate because the consultations and negotiations involved in agreeing upon the model terms of engagement are generally lengthy and complex (on average between 9 and 12 months).

61. Given the ACCC's conclusion on the balance of public benefits and public detriments, the ACCC is proposing to grant authorisation for five years.

Draft determination

The applications

62. Application A91484 was made using a Form B, under subsection 88(1) and (1A) of the CCA. Application A91492 was made using a Form A, under subsection 88(1) and (1A) of the CCA.
63. Authorisation is sought as the proposed conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition or be an exclusionary provision within the meaning of section 45 of the CCA.
64. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

65. 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 CCA, that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the proposed conduct.
66. The ACCC is also satisfied, pursuant to section 90(8), that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the proposed conduct should be allowed to take place.

Conduct which the ACCC proposes to authorise

67. The ACCC proposes to grant authorisations A91484 to SPA for current and future SPA members to collectively negotiate model terms of engagement with the ADG, the AWG and the MEAA and to give effect to existing and future model terms when contracting with current and future members of the ADG, AWG and MEAA.
68. The ACCC proposes to grant authorisation A91492 to SPA for engagement and discussion between SPA members in preparation of the various model terms and the model terms themselves
69. The ACCC proposes to grant authorisation for five years.
70. Under section 88(10) of the CCA, the ACCC proposes to extend the authorisation to future parties to the Proposed Conduct.
71. This draft determination is made on 16 July 2015.

Conduct which the ACCC proposes not to authorise

72. The proposed authorisation A91492 does not extend to SPA's current or future members engaging in any conduct with the purpose of preventing, restricting or limiting the supply or acquisition of goods or services to or from particular persons or classes of persons associated with the implementation of the model terms. As such, any collective boycott activity would not be protected from legal action under the CCA.

Next steps

The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.