



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Australian Directors Guild Limited

in respect of

collective negotiation of a model agreement to be
used when contracting with producers of television for
television series and serials

Date: 16 July 2015

Authorisation number: A91499

Commissioners:

Rickard
Schaper
Cifuentes
Court
Featherston
Walker

Summary

The ACCC proposes to grant authorisation to current and future members of Australian Directors Guild Limited (ADG) to collectively negotiate and give effect to a model agreement which can be used by ADG members when contracting with producers of television for television series and serials.

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 application for authorisation

1. On 20 May 2015 Australian Directors Guild Limited (the **ADG**) (the **Applicant**) lodged an application for authorisation¹ (A91499) with the ACCC. The Applicant is seeking authorisation, on behalf of its current and future members, to collectively negotiate a model agreement with Screen Producers Australia (**SPA**) for use by directors when contracting with producers of television for television series and serials (the **Proposed Conduct**). The ADG is seeking authorisation for five years.
2. The ADG intends the model agreement to be used by current and future ADG members when contracting with producers of television for television series and serials, including:
 - current and future members of SPA
 - current and future television producers who receive a funding grant(s) from Screen Australia, and
 - current and future television producers who benefit from the Producer Offset Tax Rebate, administered by Screen Australia.
3. The model agreement may include provisions relating to the rates and terms of pay, copyright and moral rights, credits, conditions of employment, accommodation, travel and transport, rights of termination and dispute resolution.
4. The model agreement will not be binding on ADG or SPA members. Individual ADG members and SPA members contracting with each other will remain free to adopt the model agreement, negotiate variations on the model agreement or negotiate contract terms without regard to the model agreement.
5. To facilitate the development of the model agreement the ADG has set up a special committee of Australian directors of television series and serials. This committee is made up of eight television drama directors who are full members of the ADG and are currently directing television drama and serials across all Australian television networks. The ADG submits that the committee will enable a full spectrum of

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

directors to participate and input into the negotiation of the proposed model agreement with SPA.

Background

6. According to the ADG, television directors generally work individually and compete against a number of other television directors for engagement by production companies and networks for television and film productions. The ADG submits that there are around 500 full time directors in Australia and at least 350 part time or trainee directors. The ADG states that in 2014/15, 50 percent of its director members earned less than \$25,000.
7. Television directors are generally independent contractors commissioned on a freelance basis by production companies (ranging in size from the Australian representatives of multi-national corporations such as Warner Bros., NBC Universal and Shine, to local independent production companies like Jonathan M. Productions) and broadcast networks.
8. 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. The ADG estimates that approximately 50 percent of its staff's time (two full-time employees) is spent in the provision of the industrial and legal service to its members.
9. 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 was formed by the screen industry to represent small-to-medium sized enterprises across various industries including feature films, television, games and interactive content. SPA's members include around 300 production businesses, which employ hundreds of producers (and thousands of other practitioners). As part of its service to members, SPA provides industrial advice at no cost above membership fees and levies. Membership of SPA is voluntary for producers; however the majority of producers who negotiate with ADG members are members of SPA.
10. The ACCC is also currently considering applications for authorisation lodged by SPA for current and future members of SPA to collectively negotiate model terms of engagement with the ADG, the Australian Writers' Guild (**AWG**) and the Media Entertainment and Arts Alliance². As with the proposed ADG model agreement these will be model agreements that SPA members can choose to adopt in negotiations. In this respect, in so far as the SPA's application for authorisation relates 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 SPA's arrangements.

² See A91484 & A91492 – Screen Producers Australia.

11. The ACCC has also previously granted authorisation for the AWG to negotiate model terms with SPA.³

Consultation

12. The ACCC invited submissions from ten potentially interested parties, including SPA, Screen Australia, the Australian Communications and Media Authority and the broadcast networks.⁴ The ACCC did not receive any submissions in response.

ACCC assessment

13. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant net public benefit 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.

14. In its assessment of the application the ACCC has taken into account:

- the application and submissions received from the Applicant
- other relevant information available to the ACCC, including information from consideration of related matters⁶
- the likely future without the conduct for which authorisation is sought.⁷ In particular, the ACCC considers that absent authorisation it is likely that ADG Members would negotiate terms of engagement with producers of television for television series and serials on an individual basis without reference to the model agreement proposed to be negotiated by the ADG with SPA
- the relevant areas of competition likely to be affected by the application, particularly competition between directors for the supply of directing services for television series and serials to producers
- the five year authorisation period requested, and
- that no collective boycott activity is proposed and utilisation of the proposed model agreement will be voluntary for both directors and producers.

Public benefit

15. 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.

³ See A91274 – Australian Writers Guild Limited, 25 January 2012

⁴ Please see the ACCC's Public Register for more details, including a list of parties consulted.

⁵ Subsections 90(5A), 90(5B), 90(6) and 90(7).

⁶ See, for example, application for authorisation A91274 lodged by the Australian Writers Guild Limited and granted by the ACCC and applications for authorisation A91484 & 91492 lodged by Screen Producers Australia which are currently being considered by the ACCC.

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

Transaction cost savings

16. The ADG submits that its members, who are generally sole contractors with limited time and resources, do not have the financial and other resources to strongly negotiate their own agreements for television series and serials. They submit that each time directors and producers negotiate for television series and serials (usually on a specific project-by-project basis) there are substantial transaction costs.
17. The ACCC considers that an individual director negotiating with a producer will incur transaction costs (such as legal and expert advice, and the time taken to negotiate). The ADG submits that in some cases up to 10 percent of the directors fee can be expended on legal negotiations. The producer will also incur transactions costs in negotiating with individual directors. 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 agreement proposed to be negotiated meet the needs of ADG members and are utilised by such members in their contracts with producers, this is likely to result in public benefits from transaction cost savings, including the sharing of legal and expert advisor costs for directors. 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.
18. To the extent that ADG members use the ADG's support services and receive assistance with negotiating their contracts with producers, the Proposed Conduct is also likely to reduce transaction costs for the ADG by decreasing demand for some of its services, allowing its resources to be directed to other projects.

Improved input into contracts

19. The ADG submits that there is a significant power imbalance in favour of producers and networks given the size and the number of television series and serials that they are likely to commission in a year and their experience in dealing with contractual matters and negotiations. In contrast, the majority of Australian directors have limited access to resources and information on market conditions and generally do not have lawyers or other professionals that are able to provide them with advice on negotiations and contractual matters.
20. The ADG submits that the engagement process for the model agreement put in place by the ADG will enable directors to work collectively through the ADG to provide greater input into the terms and conditions of the model agreement. The ADG submits that this increased input may better reflect ADG members collective circumstances and may also benefit SPA members by providing a forum through which more innovative contractual solutions and options can be discussed and explored.
21. The ACCC accepts that when negotiating with larger businesses, small counterparties such as directors who operate as sole contractors can be at a disadvantage in terms of resources and experience of negotiating in complex commercial environments. One way to redress such disadvantage is through collective input into model agreements. The Proposed Conduct will allow the ADG, on behalf of its members, to collectively negotiate with the SPA to develop model agreements. Individual ADG and SPA members can then choose whether to utilise these model agreements in their individual contractual negotiations. Development of

these model agreements 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 agreements. Developing a model agreement is also likely to enable members of the ADG 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

22. The ADG submits that the Proposed Conduct will not result in any public detriment, particularly because:

- the model agreement is voluntary and does not prevent directors and producers from negotiating their own agreements for television series and serials or from negotiating on other terms that are not included within the scope of the model agreement
- given the degree of competition between directors, which is based on their reputation and history of work, it is likely that they will continue to vigorously compete for engagement for television series and serials, and
- the proposed model agreement does not provide for collective boycott activity.

23. 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 agreement will presumably elect not to do so) and the absence of any boycott activity.

24. 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 agreement is voluntary, producers and directors when engaging in individual negotiations can elect to use the model agreement, negotiate variations on the model agreement or negotiate without regard to the model agreement as best reflects their circumstances.

25. The ACCC therefore considers that minimal detriment is likely to result from the Proposed Conduct.

Balance of public benefit and detriment

26. For the reasons outlined in this draft determination, on balance, the ACCC considers that the Proposed Conduct is likely to result in public benefit that would outweigh any public detriment, including from any lessening of competition. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

Length of authorisation

27. The ADG seeks authorisation for five years. The ADG submits that this time period is appropriate as the engagement, consultation and negotiations involved in concluding a model agreement are likely to be lengthy, complex and resource dependant.

28. 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 application

29. Application A91499 was made using a Form B, under subsection 88(1) and (1A) of the CCA. Authorisation is sought for members of Australian Directors Guild Limited to collectively negotiate and give effect to a model agreement which can be used when contracting with producers of television for television series and serials.
30. Authorisation is sought as the proposed conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.
31. 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

32. 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.

Conduct which the ACCC proposes to authorise

33. The ACCC proposes to grant authorisation A91499 to the ADG for members of the ADG to collectively negotiate and give effect to a model agreement which can be used when contracting with producers of television for television series and serials.
34. The ACCC proposes to grant authorisation A91499 for five years.
35. Under section 88(10) of the CCA, the ACCC proposes to extend the authorisation to future members of the ADG who choose to give effect to the model agreement(s) negotiated by the ADG with SPA.
36. This draft determination is made on 16 July 2015.

Next steps

37. 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.