

Monday, 23 March 2015

via email: adjudication@acc.gov.au

Dr Richard Chadwick
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
23 Marcus Street Clarke Street
CANBERRA ACT 2601

Dear Dr Chadwick,

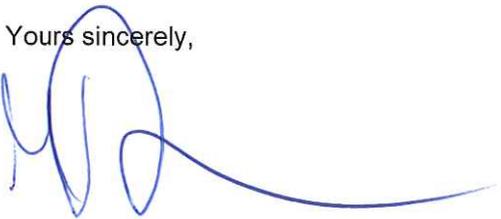
Re: Application for Authorisation by Screen Producers Australia

We attach our application for authorisation together with a submission in relation to the application.

We also attach a letter from the ACCC to Screen Producers Australia dated 2 February 2015, approving a fee waiver.

Please do not hesitate to contact us should you require any additional information.

Yours sincerely,



Mark Donaldson
Manager, Legal and Business Affairs

Form B

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of Applicant:
(Refer to direction 2)

A91484

Screen Producers Australia (SPA) on behalf of its members.

- (b) Short description of business carried on by applicant:
(Refer to direction 3)

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.

- (c) Address in Australia for service of documents on the applicant:

Screen Producers Australia, 34 Fitzroy Street, Surry Hills, NSW 2010

Attention: Mark Donaldson

2. Contract, arrangement or understanding

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:
(Refer to direction 4)

SPA seeks authorisation for:

- **current and future members of SPA to 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**
- **current and future members of SPA to give effect to existing and future model terms of engagement when contracting with current and future members of AWG, MEAA and ADG.**

Further information is set out in the attached submissions.

- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:
(Refer to direction 4)

SPA has, and will, negotiate model terms of engagement with AWG and MEAA for use by their members. SPA will negotiate model terms of engagement with ADG in the future for use by their members.

The model terms of engagement with AWG may include provisions relating to rates and terms of pay, copyright and moral rights, rights of termination, dispute resolution and credits.

The model terms of engagement with MEAA may include provisions relating to rates and terms of pay, conditions of employment, accommodation, travel and transport, rights of termination, dispute resolution and credits.

The model terms of engagement with ADG may include provisions relating to rate and terms of pay, conditions of employment, accommodation, travel and transport, rights of termination, dispute resolution and credits.

Further information is set out in the attached submissions.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

- **the supply of writing services in relation to television programs or film;**
- **the supply of acting services in relation to television programs or films;**
- **the supply of technical services in relation to films; and**

- **the supply of directing services in relation to television programs or films.**

(d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

Five years

3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

Name	Contact details
SPA members	SPA has 192 producer members at the date of this application. Therefore for practical reasons a full list of members has not been provided with this application. However a full list can be provided at the ACCC's request.
AWG members	<p>A full list of AWG's members can be obtained by contacting AWG, whose contact details are as follows:</p> <p>Australian Writers' Guild 5 Blackfriars Street Chippendale NSW 2008 Phone: (02) 9319 0339</p>
MEAA members	<p>A full list of MEAA members can be obtained by contacting MEAA, whose contact details are as follows:</p> <p>Media Entertainment and Arts Alliance 245 Chalmers Street Redfern NSW 2016 Phone: 1300 656 513</p>
ADG members	<p>A full list of ADG members can be obtained by contacting ADG, whose contact details are as follows:</p> <p>National Office PO Box 211 Rozelle NSW 2039 Phone: (02) 95557045</p>

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:
(Refer to direction 5)

Producers of film and television who are current and future members of SPA who are involved in negotiating future agreements or choose to rely on the terms of engagement collectively negotiated by SPA with AWG, MEAA and ADG.

4. Public benefit claims

- (a) Arguments in support of authorisation:
(Refer to direction 6)

Please see attached submissions.

- (b) Facts and evidence relied upon in support of these claims:

Please see attached submissions.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 7)

Please see attached submissions.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

(Refer to direction 8)

Please see attached submissions.

- (b) Facts and evidence relevant to these detriments:

Please see attached submissions.

7. Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?

Yes.

- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

(Refer to direction 9)

This application also relates to any future model terms of engagement that SPA negotiates with AWG, MEAA and ADG to which any current and future members of SPA choose to give effect.

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

n/a

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

The parties to the similar model terms of engagement are any current and future members of SPA, AWG, MEAA and ADG.

8. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

No.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

- (c) If so, by whom or on whose behalf are those other applications being made?

9. Further information

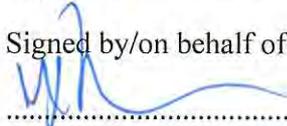
- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Mark Donaldson, Manager, Business and Legal Affairs

Screen Producers Australia, Suite 2, Level 1, 36 Fitzroy Street, Surry Hills, NSW 2010

Dated 23 March 2015

Signed by/on behalf of the applicant



(Signature)

MARK DONALDSON

(Full Name)

MANAGER, LEGAL AND BUSINESS AFFAIRS

(Position in Organisation)

DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing the application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions. Provide details of those provisions of the contract, arrangement or understanding that do, or would or might, substantially lessen competition.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
 8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.
 9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or

understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.



**Australian
Competition &
Consumer
Commission**

Contact Officer: Anna Giannakos
Contact Phone: 03 9290 6920

GPO Box 3131
Canberra ACT 2601
23 Marcus Clarke Street
Canberra ACT 2601
tel: (02) 6243 1111
fax: (02) 6243 1199
www.accc.gov.au

2 February 2015

Mark Donaldson
Manager, Business and Legal Affairs
Screen Producers Australia

By email: mark.donaldson@screenproducers.org.au

Dear Mr Donaldson

Fee waiver request

I refer to your letter of 7 January 2015 to the Australian Competition and Consumer Commission (ACCC) in respect of a proposed application for authorisation. In your letter you have requested that the ACCC grant a fee waiver in respect of the proposed arrangements.

In particular, you have requested that the fee to be paid in relation to an application for authorisation to be lodged by Screen Producers Australia (SPA) on behalf of its members be waived in whole or in part.

In support of your request, among other things, you submitted that:

- SPA is a not-for-profit organisation; and
- SPA's limited revenue means that payment of the fee for authorisation would divert funds away from other work of the organisation.

Having regard to the above, as a person authorised to assess fee waiver requests for and on behalf of the ACCC, I wish to advise that the application fee to be paid by SPA has been waived in full. No application fee will apply to the application for authorisation to be lodged by SPA on behalf of its members.

This decision will remain in force for a period of three months. The three month period will expire on 2 May 2015.

A copy of this letter should accompany the application for authorisation to be lodged by SPA. The cover letter to the application should mention that a letter from the ACCC regarding a fee waiver is enclosed with the application. The application together with this letter will be placed on the public register at that time.

If the application for authorisation is lodged by SPA after 2 May 2015, a full application fee of \$7500 will apply, unless a subsequent request for a fee waiver is made and ultimately approved by the ACCC.

Should you have any queries in relation to this matter, please do not hesitate to contact Anna Giannakos on (03) 9290 6920 or by email to adjudication@acc.gov.au.

Yours sincerely



Dr Richard Chadwick
General Manager
Adjudication Branch

Screen Producers Australia's Submissions in Support of Authorisation Application

1 Application

1.1 Purpose of the application

Screen Producers Australia (**SPA**) seeks authorisation to conduct collective negotiations for a period of five years, on behalf of SPA members.

SPA intends this application to be expressed according to s 88(10) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), so as to apply to any person who becomes a party to the proposed arrangements in the future (ie, any current or future member of SPA who chooses to rely on the model terms of engagement).

1.2 Analogous authorised conduct

In 2012 the ACCC granted authorisation until 2017 to the Australian Writers' Guild (**AWG**) to 'collectively bargain on behalf of its members in relation to the terms and conditions of model terms of engagement with the Screen Producers Association of Australia for use by writers when contracting with film or television producers.' The ACCC also granted authorisation for 'current and future members of AWG who choose to give effect to the model terms of engagement when contracting with producers of either film or television.'

While the ACCC did not explicitly grant authorisation to SPA members, SPA submits that under s 88(6) of the CCA, authorisation would extend to cover SPA members because they were listed in AWG's application as a proposed party to the arrangement. Therefore insofar as the current authorisation application relates to the AWG agreements to which authorisation has already been granted, SPA makes this authorisation application for an abundance of caution.

2 Background

Production companies may engage film and television writers, actors, directors and technical crew on an employment or contractor basis. Although it varies on a case-by-case basis, production companies generally engage writers, actors and directors as independent contractors. 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 AWG, the Media Entertainment and Arts Alliance (**MEAA**) and the Australian Directors Guild (**ADG**) for use by SPA members.

Historically, there has been little publicly available information regarding what constitutes minimum standards of remuneration and working conditions for writers, actors, directors and technical crew in the industry. The model terms of engagement negotiated between SPA, AWG, MEAA have therefore provided a valuable benchmark. Similarly, the model terms of engagement to be negotiated between SPA and ADG will also provide an important benchmark. These benchmarks are important not only on an individual level to ensure that SPA, AWG, MEAA and ADG members are aware of minimum standards when they negotiate further terms of their own agreements, but on a broader industry-wide level, to ensure that minimum conditions of pay and employment are maintained. When Fair Work Australia (formerly the Industrial Relations Commission) developed the Broadcasting and Recorded Entertainment Award in 2010 covering performers and technical crew in the film and television industry the terms and conditions of the Award were substantially based on the benchmark agreements negotiated by SPA.

The vast majority of film and television industry employers are small to medium enterprises without the resources to continually negotiate their own agreements for each production. In this context, collective participation in model term agreements is important for the sustainability of the industry.

Without the capacity to contribute as a group to model term agreements, the industry would be dominated by a small number of large businesses, which could ultimately result in less competition and less diversity in program content.

When conducting negotiations, SPA forms a committee which generally includes two SPA employees and several SPA members. The process of negotiation is inclusive of all SPA members and on average each agreement takes between 9 and 12 months to negotiate.

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.

The model terms of engagement are not binding under industrial law and are in principle minimum term in nature but do not preclude negotiations between the parties for variations on the model terms. The model terms do not in any way prevent non-member producers from negotiating their own agreements with the same organisations or with employees and contractors.

3 Relevant Parties

3.1 Screen Producers Australia

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. Independent in this context means producers independent of television networks and of major film studios. The production sector in Australia includes a variety of producers including in house television networks, SPA members and non-SPA members. SPA does not represent all of the independent producers in Australia.

SPA's members include around 300 production businesses, who employ hundreds of producers (and thousands of other practitioners).¹ It offers the following levels of membership:

- producer: for established producers or production companies with at least one producer credit (credits must have received a broadcast, theatrical or online release);
- associate: for people who have recently embarked on a career as a producer, but have not yet earned a producer credit;
- affiliate: for businesses seeking to participate in the wider screen industry; and
- service and facility business: for businesses that provide services that directly contribute to the production of screen content (eg, lawyers, accountants, insurance companies, film distributors).

¹ Screen Producers Response to Screen Australia's Draft Documentary Guidelines, 17 July 2014, p 1.

3.2 Media Entertainment and Arts Alliance

MEAA is a trade union and professional organisation that covers media, entertainment, sports and arts industries. MEAA's membership includes people working in TV, radio, theatre and film.

3.3 Australian Writers' Guild

AWG is the 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. AWG also has student, senior and overseas membership. AWG's highest level of membership is Life membership. It currently has 28 Life members, many of whom are founding members of AWG.

3.4 Australian Directors Guild

ADG is an industry association that represents the interests of film, television and digital media directors. Its membership is comprised of directors of feature film, television, documentary, animation, commercials, music videos, shorts, light entertainment, reality and all digital media.

ADG has several membership levels for directors. Full membership is open to any screen director or independent producer with a minimum of twenty minutes of credited screen time, in any medium. Associate membership is open to all industry professionals who work in any area of film and television production and to those supportive of the aims and objectives of ADG (which includes writers, composers, etc). Emerging filmmakers who have not yet acquired their 20-minute screen time can also become associate members. These members are eligible for all membership benefits, except industrial and legal advice, participation on policy subcommittees and voting rights. ADG also offers student membership for full-time students.

4 Proposed Conduct

The arrangement that is the subject of this application involves SPA's producer members, who potentially compete with each other for the acquisition of acting, writing, directing and technical services, discussing model terms and conditions of employment for various classes of actors, writers, directors and technical crew. These model terms cover matters such as rates of pay and terms and conditions of employment.

SPA seeks authorisation for:

- SPA to collectively negotiate, on behalf of its current and future members, model terms of engagement with AWG, MEAA and ADG; and
- SPA's current and future members to give effect to existing and future model terms of engagement when contracting with current and future members of AWG, MEAA and ADG.

Authorisation is sought for five years 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). In its 2012 AWG authorisation decision, the ACCC authorised the arrangements between AWG and SPA for five years.²

² ACCC, Determination of Australian Writers' Guild Limited's application for authorisation, 25 January 2012, [4.74.]

5 Model Terms of Engagement

5.1 AWG members

SPA has negotiated model terms of engagement with AWG which set out recommended terms of engagement of AWG members by SPA members. The model terms relate to services provided in relation to:

- television series and serials³;
- miniseries and telemovies⁴; and
- children's television⁵

(collectively, ***AWG model terms of engagement***).

As mentioned above, the AWG model terms of engagement were the subject of a successful authorisation application by AWG in January 2012.

The AWG model terms of engagement include the following contractual terms:

- minimum rates and terms of pay;
- terms in relation to copyright and moral rights;
- terms in relation to rights of termination;
- terms in relation to dispute resolution;
- terms in relation to credits;
- terms in relation to travel, accommodation and per diems;

Copies of the AWG model terms of engagement are set out at Attachment A to this submission.

5.2 MEAA members

SPA has also negotiated model terms of engagement with MEAA which set out recommended terms of engagement of MEAA members by SPA members. Two of the model terms of engagement relate to actors' services provided in relation to:

- Australian feature films⁶; and
- television programs⁷

(collectively, ***MEAA Actor model terms of engagement***).

The MEAA Actor model terms of engagement include the following contractual terms:

- minimum rates and terms of pay (including of residual fees);
- conditions of employment, such as hours of work, breaks between work periods, leave, provision of studio and location facilities;
- terms in relation to travel, accommodation and transport;
- terms in relation to safety and insurance compensation;

³ Series and Serials Agreement, 2008.

⁴ Miniseries and Telemovie Agreement, 2010.

⁵ Children's Television Agreement, 2011.

⁶ Actors Feature Film Agreement, 2012.

⁷ Actors Television Programs Agreement, 2013.

- terms in relation to superannuation;
- terms in relation to rights of termination;
- terms in relation to dispute resolution; and
- terms in relation to credits.

There are also model terms between SPA and MEAA⁸ which set out the time and salary unit method calculation for pro rata residual calculations for actors (**MEAA Residuals model terms**).

Finally, there are model terms of engagement between SPA and MEAA⁹ that relate to technical crew services provided in relation to motion pictures (**MEAA Crew model terms of engagement**). The MEAA Crew model terms of engagement includes the following contractual terms:

- minimum rates of pay depending on the role being performed (eg, brush hand, casting assistant, clapper loader, art director, camera operator);
- conditions of employment, such as hours of work, penalty rates, overtime, breaks between work periods, leave and cancellation fees;
- terms in relation to superannuation;
- terms in relation to travel, accommodation and transport;
- terms in relation to safety; and
- terms in relation to dispute resolution.

Copies of the MEAA Actor model terms of engagement, MEAA Residuals model terms and MEAA Crew model terms of engagement are set out at Attachment B to this submission.

5.3 ADG members

SPA will negotiate model terms of engagement with ADG which set out recommended terms of engagement of ADG members by SPA members.

6 Market Definition

6.1 Services offered

SPA submits that there are four relevant markets for the purpose of this application:

(a) The supply of writing services to film and television producers

In its 2012 decision authorising AWG to collectively negotiate model terms of engagement with SPA, the ACCC noted that while it was not necessary to precisely define the relevant market, there was substitutability between writing services provided for film and television, and between genres. SPA therefore submits that there is a market for the supply of writing services to both film and television producers, and associated intellectual property rights by way of license or assignment.

(b) The supply of acting services to film and television producers

Similarly it is likely that the supply of acting services for film is substitutable with the supply of acting services for television. SPA submits that there is a single market for the supply of these services to film and television producers.

⁸ Australian Television Repeats and Residuals Agreement 2004; Australian Television Repeats and Residuals Agreement 2000.

⁹ Motion Pictures Production Collective Agreement, 2010.

(c) The supply of directing services to film and television producers

The supply of directing services for film is substitutable with the supply of directing services for television. SPA submits that there is a single market for the supply of these services to film and television producers.

(d) The supply of technical services to film producers

The term 'technical crew' encompasses a range of roles provided to film producers, such as brush hands, casting assistants, location scouts, carpenters, nurses, hairdressers, art directors, set designers and camera assistants. A list of the vast majority of these roles is contained in the agreement at Attachment B. People providing these services have different skills, and their rate of pay is determined according to their role. For example, under the Motion Pictures Production Collective Agreement, a brush hand's rate per week in 2012 was \$710, whereas an art director's rate per week was \$1,077.

6.2 Geographic market

SPA submits that the geographic market for the supply of writing services to producers is national. The ACCC has previously accepted that writers provide their services nationally regardless of where they are located.¹⁰

Similarly, the provision of acting, directing and technical services to producers may be characterised as national markets. Actors, directors and technical crew can and do travel across Australia to provide their services, particularly given the competitive nature of the film and television industry. The model terms of engagement negotiated by SPA all apply to services provided across Australia and the terms do not differ between states or regions.

7 Grounds for Authorisation

This application is made pursuant to s 88 of the CCA in respect of the making and giving effect or a contract, arrangement or understanding that:

- may be a cartel provision within the meaning of s 44ZZRD(2) of the CCA;
- may have the purpose or effect of substantially lessening competition within the meaning of s 45 of the CCA; or
- may be an exclusionary provision within the meaning of ss 45 and 4D of the CCA.

To grant authorisation under s 88 of the CCA the ACCC must be satisfied that in all the circumstances the proposed contract or arrangement would result in or is likely to result in a benefit to the public, which would outweigh the detriment to the public constituted by any lessening of competition as a result or likely result of the contract or arrangement being given effect to.

SPA submits that no public detriments will arise as a result of the proposed conduct because:

- 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;
- 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;

¹⁰ ACCC, Determination of Australian Writers' Guild Limited's application for authorisation, 25 January 2012, [4.6].

- the model terms of engagement allow the parties to negotiate other terms not provided for by the negotiated terms. There are many variables (eg, above minimum wage rates, budget, experience of writer, actor, technical crew member) which may affect an agreement with a producer;
- the model terms of engagement do not provide for collective boycott activity; and
- 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.

7.1 Public benefits

SPA submits that the following public benefits arise from the collective negotiations between SPA and AWG, MEAA and ADG and the use of the model terms of engagement by their members:

(a) Greater diversity in business types and program content

As mentioned above, the collective representation and bargaining capacity allows for smaller businesses to be viable and produce a range of different kinds of content. Without this assistance to compete, the production sector would be dominated by bigger businesses which may be more likely to produce a narrower range of film, television and interactive programs.

(b) Reduced transactions costs for SPA, AWG MEAA and ADG members

There are transaction costs associated with each contractual negotiation between producers and writers, actors, directors and technical crew. These may include costs associated with negotiations, drafting contracts, and obtaining legal and professional advice. Individual contract negotiation is particularly inefficient because agreements need to be drafted and renegotiated for each transaction. Use of the model terms would assist in reducing these costs, not just for producers, but also for writers, actors, directors and technical crew.

In addition, the model terms of engagement reduce the costs of maintaining SPA's, AWG's, MEAA's and ADG's industrial and legal advisory services.

(c) Greater input from writers, actors, directors and technical crew in contractual negotiations

Film and television writers, actors, directors and technical crew are generally constrained in their negotiations with producers including through their lack of individual bargaining power.

The model terms the subject of this application set out generally accepted industry standards, into which various members of SPA, AWG, MEAA and ADG have provided their input. The model terms therefore establish appropriate minimum terms of engagement, which is beneficial to all parties, particularly those with lower bargaining power.

Increased input into contractual terms and conditions may result in terms and conditions that better reflect an equal input from writers, actors, directors or technical crew and producers.

(d) Better access to resources and information for writers, actors, directors and technical crew

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 provide information for writers, actors, directors and technical crew and for producers about what constitutes minimum industry standards of engagement.

In its decision granting authorisation to AWG, the ACCC stated that producers generally have better access to resources and market information than individual writers. It further noted 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.¹¹ Similarly, technical crew and many actors and directors do not have agents, and therefore find it difficult to access industrial or employment-related services.

SPA submits that the model terms of engagement the subject of this application improve the scope and quality of information available to writers, actors, directors and technical crew during negotiations. The model terms have been developed with legal and industry expert assistance, and are available to SPA, AWG, MEAA and ADG members who would otherwise be unlikely to have access to information of this kind. SPA also offers producers who are not currently members, the ability to licence the model term agreements.

(e) Guidance for Screen Australia as to what constitutes 'fair and reasonable' conduct when public funding recipients engage writers

Producers who apply for funding from Screen Australia (the federal government's major agency for the support of the film, television and interactive industries) must comply with the Screen Australia Terms of Trade. These Terms of Trade require producers to act fairly and reasonably in relation to third parties involved in the funded projects. The Terms of Trade state that fairness and reasonableness includes paying at least the award minimum rates or any minimum rate agreed between the relevant guilds, and respecting the intellectual property rights of third parties. Third parties include writers, actors, directors and technical crew.

Model terms of engagement between SPA and AWG, MEAA and ADG will provide guidance to Screen Australia as to what constitutes fair and reasonable conduct in relation to writers, actors, directors and technical crew, and reduce Screen Australia's costs in analysing what fair and reasonable conduct amounts to.

¹¹ ACCC, Determination of Australian Writers' Guild Limited's application for authorisation, 25 January 2012, [4.28].