



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation of A91274
and the substitution of authorisation A91573

lodged by

Australian Writers' Guild

in respect of

collective bargaining

with film, television and digital media producers

Date: 31 May 2017

Authorisation number: A91573

Commissioners: Sims
Rickard
Schaper
Court
Featherston

Summary

The ACCC proposes to grant authorisation for 10 years to current and future members of Australian Writers' Guild to collectively negotiate model agreements with:

- current and future members of Screen Producers Australia
- current and future producers of film, television and digital media that receive a funding grant from Screen Australia or various state and territory funding bodies
- current and future producers of film, television and digital media that benefit from the producer offset tax rebate, which is administered by Screen Australia.

The ACCC will seek submissions in relation to this draft determination before making a final determination. The applicant and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

The application for authorisation

1. On 3 February 2017, Australian Writers' Guild (AWG) lodged an application for revocation of authorisation A91274 (the 2012 authorisation) and its substitution of authorisation A91573 (re-authorisation). AWG also sought interim authorisation as the 2012 authorisation was due to expire on 28 February 2017. The ACCC granted interim authorisation on 28 February 2017 (see paragraphs 51–54).
2. AWG is seeking re-authorisation for current and future members of AWG to collectively negotiate model agreements,¹ which can be used by current and future members of AWG when contracting with producers of film, television and digital media. AWG's application proposes to expand the conduct authorised in the 2012 authorisation.
3. 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 Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.²

¹ In the 2012 authorisation, the ACCC granted authorisation for AWG to collectively negotiate 'model terms of engagement' with certain producers of film or television. AWG now refers to these negotiated arrangements as 'model agreements'.

² Detailed information about the authorisation process is contained in the ACCC's *Authorisation Guidelines* available on the ACCC's website - <https://www.accc.gov.au/publications/authorisation-guidelines-2013>

The applicant

4. AWG is a not for profit company limited by guarantee representing performance writers in Australia across the fields of film, television, theatre, radio and digital media. AWG was established in 1962 and at the time of lodging its application for re-authorisation it had 2 235 financial members.³
5. Full members of AWG are writers who have had works produced and account for approximately 30 per cent of members. The remaining 70 per cent are associate members, who have not had works produced, students, senior members and overseas members.⁴
6. AWG aims to:⁵
 - a. improve professional standards, conditions and remuneration for Australian performance writers
 - b. protect and advance the creative rights of members
 - c. promote a diverse Australian cultural voice.

The conduct

7. The 2012 authorisation allowed members of AWG to engage in collective bargaining to negotiate model terms of engagement with Screen Producers Association of Australia (now known as Screen Producers Australia (SPA) ⁶) for use by AWG members when contracting with producers of film and television. The 2012 authorisation was granted for five years until 28 February 2017.
8. AWG is seeking re-authorisation to:
 - a. continue collective bargaining with SPA on behalf of their respective members
 - b. commence collective bargaining with current and future film, television and digital media producers that:
 - i. receive a funding grant from Screen Australia or the various state and territory funding bodies
 - ii. benefit from the 'producer offset' administered by Screen Australia, to negotiate model agreements (together, the 'expanded conduct').
9. AWG seeks re-authorisation for 10 years on the basis that consultation and negotiations for model agreements are generally lengthy and complex and the process for applying for authorisation is time consuming.⁷

³ Australian Competition and Consumer Commission, 2017, Public Register, *Australian Writer's Guild Limited application*, viewed 3 February 2017, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1200938/fromItemId/278039/display/application>

⁴ Australian Writers' Guild, 2017, viewed 28 April 2017 - <https://awg.com.au/about/>

⁵ *ibid.*

⁶ Screen Producers Australia is an industry body representing the interests of independent Australian film and television producers.

⁷ Australian Competition and Consumer Commission, 2017, Public Register, *Australian Writer's Guild Limited application*, published 3 February 2017, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1200938/fromItemId/278039/display/application>

The 2012 authorisation

10. The model agreements negotiated between AWG and SPA under the 2012 authorisation included minimum rates of pay and terms and a range of minimum contractual arrangements for copyright and moral rights, termination of contracts and dispute resolution.
11. The agreements relate to writing services for television series and serials, mini-series and telemovies and children's television.

Screen Producers Australia authorisation

12. On 13 August 2015 the ACCC granted authorisation to current and future members of SPA to collectively negotiate model terms of engagement with AWG, the Australian Directors 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.⁸
13. In its application for revocation and substitution of authorisation AWG acknowledged that the SPA authorisation also provides protection for AWG members. However it has sought re-authorisation to ensure continued protection from legal action under the Act and to extend authorisation to include negotiation of model agreements with other parties and for a longer term.

Submissions

14. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
15. AWG submits that the 2012 authorisation has delivered the following public benefits, which are likely to continue if the conduct is re-authorised:⁹
 - a. Writers under the model terms enjoy higher remuneration and better entitlements as well as payment of secondary royalties.
 - b. Individual writers do not need the services of a lawyer or agent, or to assess contracts themselves, because producers are using existing negotiated agreements.
 - c. Producers are able to better estimate production budget by using negotiated rates.
 - d. Producers and writers have a common understanding on fair and reasonable terms of engagement.
16. AWG submits there has been no lessening of competition and that competition has increased because improved working conditions have encouraged new writers to

⁸ Australian Competition and Consumer Commission, 2017, Public Register, *Screen Producers Australia – Authorisation – A91484 & A91492*, Determination, published 16 August 2015, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1185386/fromItemId/401858/display/acccDecision>

⁹ Australian Competition and Consumer Commission, 2017, Public Register, *Australian Writer's Guild Limited application, Attachment A*, pp. 4-6, published 3 February 2017, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1200938/fromItemId/278039/display/application>

enter the industry and existing writers to stay in the industry. AWG considers there has been no public detriment.¹⁰

17. The ACCC sought submissions from a number of interested parties potentially affected by the application for re-authorisation.
18. One submission was received from SPA.
19. SPA opposed interim authorisation for the expanded conduct and raised concerns about AWG's reasons and purpose for this proposed expansion. SPA requested additional time to consult with its membership, AWG, other industry stakeholders and to obtain legal advice prior to making another submission on the application.¹¹
20. SPA did not make another submission but has advised the ACCC that it may provide further comment on the draft determination.
21. If the applicant or interested parties have concerns about the use of existing model agreements, they should discuss those concerns with the affected parties. The ACCC notes that this issue is only relevant to the assessment of the proposed conduct insofar as it affects the net public benefit test.

ACCC assessment

22. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests¹² contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would, or is likely to outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
23. In order to assess the effect of the proposed conduct and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.
24. The ACCC has taken into account:
 - a. The information received from the applicants, including evidence about any benefits and detriments that have arisen under the 2012 authorisation.
 - b. Information available to the ACCC from its consideration of previous collective bargaining matters.
 - c. The likely future without the conduct for which authorisation is sought.¹³ The SPA authorisation provides AWG members with protection to collectively negotiate with producers who are members of SPA until 4 September 2020. In relation to producers who are not members of SPA, AWG members would need to negotiate contract terms on an individual basis with these parties.

¹⁰ Australian Competition and Consumer Commission, 2017, Public Register, *Australian Writer's Guild Limited application, Attachment A*, p. 8, published 3 February 2017, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1200938/fromItemId/278039/display/application>

¹¹ Australian Competition and Consumer Commission, 2017, Public Register, *Screen Producers Australia submission*, published 22 February 2017, available:

<http://registers.accc.gov.au/content/index.phtml/itemId/1200938/fromItemId/278039/display/submission>

¹² Subsections 90(6), 90(7), 90(5A) and 90(5B) of the Act.

¹³ For more discussion, see paragraphs 5.20-5.23 of the ACCC's *Authorisation Guidelines*, available on the ACCC website - <https://www.accc.gov.au/publications/authorisation-guidelines-2013>

- d. The relevant areas of competition likely to be impacted by the conduct, in this case the supply of professional writing services to film, television and digital media producers and associated intellectual property rights by assignment or licence.
 - e. Writers can decide whether or not to participate in the conduct at any time (*i.e.* collective bargaining is voluntary such that parties can choose not to participate in collective bargaining unless they wish to do so).
 - f. The applicants have requested re-authorisation for 10 years.
25. In light of the likely future without the conduct for which authorisation is sought set out in paragraph 24c above, the main focus of the ACCC's assessment is on the expanded conduct.

Public benefits

26. The ACCC's assessment of the likely public benefits from the conduct follows.

Transaction cost savings

27. An individual writer negotiating agreements with a producer will incur transaction costs, such as the time taken to negotiate and any legal or other expert advice costs. Producers will also incur transaction costs in negotiating agreements with writers.
28. The ACCC accepts AWG's submission¹⁴ that as a result of the 2012 authorisation individual writers contracting with SPA members have not needed to separately engage the services of a lawyer or agent because they can use the existing model terms of engagement. This is also likely to be the case for writers contracting with non-members of SPA if the proposed conduct is authorised.
29. The ACCC considers that the conduct authorised in the 2012 authorisation has resulted, and is likely to continue to result, in public benefits in the form of transaction cost savings, including the sharing of advisor costs, for AWG's members and producers that are members of SPA. By reducing the costs of negotiating for all parties, it is likely that more contractual issues can be addressed, because each party can obtain the benefit from negotiating these issues at less cost to itself, resulting in more comprehensive and efficient contracts of greater benefit to all parties.
30. The ACCC considers expanding the conduct beyond the SPA to include negotiations with current and future film, television and digital media producers is likely to result in similar public benefits.

Improved input into contracts

31. The majority of film, television and digital media writers are individual contractors. The ACCC accepts that, when negotiating with large counterparties, individual contractors can be at a disadvantage in terms of resources and negotiating experience.

¹⁴ Australian Competition and Consumer Commission, 2017, Public Register, *Australian Writer's Guild Limited application*, Attachment A, pp. 4-6, published 3 February 2017, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1200938/fromItemId/278039/display/application>

32. 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.¹⁵
33. The ACCC considers that enabling AWG to collectively bargain model agreements on behalf of its members with producers is likely to allow for more effective negotiation between parties. Collective bargaining enables members of the bargaining group to become better informed of relevant market conditions, which is likely to improve the input that writers have in contractual negotiations with producers to identify and achieve more efficient outcomes and therefore to negotiate improved contracts.
34. This is reflected in AWG's submission that writers currently contracting with SPA member producers using the negotiated model terms of engagement enjoy higher remuneration and better entitlements while producers are better able to estimate production budgets because they know what terms to apply.¹⁶
35. The ACCC notes that SPA considers that the model terms of engagement negotiated between SPA, AWG and other key industry stakeholders provide a valuable benchmark for minimum standards of remuneration and working conditions for writers, actors, directors and technical crew in the industry.¹⁷
36. The ACCC considers that re-authorising the collective bargaining arrangements between AWG and SPA provides for these benefits to continue, and that further public benefits from improved input into contracts are likely to result if the conduct is extended to enable AWG to negotiate with other producers who are not members of SPA.

Public detriments

37. In some cases collective bargaining may lessen competition and efficiency because it involves competitors agreeing on terms of supply. However, in this case the ACCC considers that collective bargaining is likely to result in limited public detriment because:
- a. the model terms do not prevent writers from negotiating their own agreements with the same organisations, but merely serve as a benchmark for minimum standards
 - b. writers compete 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

¹⁵ Australian Competition and Consumer Commission, 2017, Public Register, *Screen Producers Australia – Authorisation – A91484 & A91492*, Determination, p. 8, published 16 August 2015, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1185386/fromItemId/401858/display/acccDecision> and Australian Competition and Consumer Commission, 2017, Public Register, *Australian Writers' Guild – Authorisation A91274*, Determination, p. 12, published 25 January 2012, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1006639/fromItemId/401858>.

¹⁶ Australian Competition and Consumer Commission, 2017, Public Register, *Australian Writer's Guild Limited application*, Attachment A, pp. 4-6, published 3 February 2017, available: <http://registers.accc.gov.au/content/index.phtml/itemId/1200938/fromItemId/278039/display/application>.

¹⁷ Screen Producers Australia, 2017, *Submission to the Standing Committee on Communications and the Arts Inquiry into Factors Contributing to the Growth and Sustainability of the Australian Film and Television Industry*, Submission 86, viewed 10 May 2017, available: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Communications/AustralianfilmandTV/Submissions

reputation, factors which are separate to the implementation of model agreements

- c. producers are not compelled to negotiate with AWG and its members as a group
- d. there is no evidence before the ACCC to suggest that public detriments have arisen from collective bargaining under the 2012 authorisation
- e. expanding the conduct beyond the SPA to include negotiations with current and future film, television and digital media producers appears unlikely to result in any lessening of competition or other detriments.

Balance of public benefit and detriment

38. For the reasons outlined in this draft determination, the ACCC is satisfied that the conduct is likely to result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition likely to result.

39. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met and the ACCC proposes to grant authorisation for the conduct.

Length of authorisation

40. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁸ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the likely public detriment for the period of authorisation. It also enables the ACCC to review the authorisation and the public benefits and detriments that have resulted, after an appropriate period.

41. The applicant seeks authorisation for 10 years.

42. The ACCC did not receive any submissions on the length of authorisation.

43. The ACCC proposes to grant authorisation for 10 years. The ACCC notes that the 2012 authorisation was granted for five years and has been operating effectively. The ACCC also notes AWG's submission that consultation and negotiations for model agreements are generally lengthy and complex and its experience that the process for applying for authorisation is time consuming.

Draft determination

The application

44. On 3 February 2017, Australian Writers' Guild (AWG) lodged an application for revocation of authorisation A91274 (the 2012 authorisation) and its substitution of authorisation A91573 (re-authorisation).

45. AWG is seeking re-authorisation for current and future members of AWG to collectively negotiate model agreements, which can be used by current and future

¹⁸ Subsection 91(1).

members of AWG when contracting with producers of film, television and digital media.

46. The applicants seek authorisation of these arrangements as they may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.
47. Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

48. 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 Act, that in all the circumstances the proposed 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 conduct.

Conduct for which the ACCC proposes to grant authorisation

49. The ACCC proposes to grant authorisation for 10 years to current and future members of AWG to collectively negotiate model agreements with:
 - a. current and future members of Screen Producers Australia
 - b. current and future producers of film, television and digital media that receive a funding grant from Screen Australia or various state and territory funding bodies
 - c. current and future producers of film, television and digital media that benefit from the producer offset tax rebate, which is administered by Screen Australia.
50. This draft determination is made on 31 May 2017.

Interim authorisation

51. On 28 February 2017, pursuant to section 91 of the Act, the ACCC granted interim authorisation in respect of the application for authorisation lodged by AWG on 3 February 2017.
52. Interim authorisation was granted to enable current and future members of AWG to continue to collectively bargain in relation to the terms and conditions of model terms of engagement with SPA for use by writers when contracting with film or television producers.
53. Interim authorisation did not extend to negotiations between AWG members and film or television producers who are not members of SPA.
54. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

55. The ACCC will now seek further submissions from the applicant and interested parties. In addition, the applicant or interested parties may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.