

Friday, 16 June 2017

Via email: adjudication@accc.gov.au

Darrell Channing
Director
Adjudication Branch
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra
ACT 2601

Dear Mr Channing

The Australian Writers' Guild authorisation application A91573

Thank you for forwarding the ACCC's draft determination for the above matter.

We acknowledge that the ACCC proposes to grant authorisation for 10 years to current and future members of the Australian Writers' Guild (AWG) to collectively negotiate model agreements with:

1. current and future members of Screen Producers Australia (SPA);
2. 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; and
3. current and future producers of film, television and digital media that benefit from the producer offset tax rebate, which is administered by Screen Australia.

In 2012 the ACCC granted authorisation for the AWG to collectively negotiate, on behalf of its members, model agreements with SPA. The AWG's current authorisation application seeks to expand the conduct authorised in the 2012 authorisation to allow the AWG to also negotiate on behalf of its members model agreements with non-SPA screen producers (i.e. the producers referred to at paragraphs 2 and 3 above).

SPA does not object to the expanded conduct. However SPA is concerned that when the AWG negotiates with non-SPA producers, there is potential for the AWG to make inappropriate use of the existing model agreements negotiated between SPA and the AWG. SPA considers that this may:

1. breach SPA's copyright in the agreements;
2. result in significant detriment to SPA and its members; and
3. undermine the public benefits of SPA being granted authorisation to collectively negotiate model agreements with the AWG on behalf of their respective members.

To mitigate this risk, SPA requests that the ACCC make it a condition of authorisation of the AWG's proposed conduct that in negotiations with non-SPA members, the AWG does not provide or use copies or extracts of any part of the existing or future model agreements negotiated between SPA and the AWG.

Background

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. It was formed by the industry to represent small-to-medium sized enterprises across various industries including feature films, television, games and interactive content. SPA 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. These services include SPA negotiating model terms of engagement with the AWG for use by SPA members.

In 2012 the ACCC granted authorisation to the 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. In 2015 the ACCC granted authorisation to current and future members of SPA to collectively negotiate model terms of engagement with the AWG and to give effect to those model terms when contracting with current and future members of the AWG.

SPA and the AWG have negotiated model terms of engagement between them including the Series and Serials Agreement 2008, the Miniseries and Telemovies Agreement 2010 and the Children's Television Agreement 2011 (the Agreements).

Concerns with the AWG's proposed expanded conduct

The AWG is seeking authorisation to collectively negotiate model agreements not only with SPA but also with non-SPA members. SPA does not object to this proposed conduct. However SPA is concerned that when the AWG negotiates with non-SPA producers, there is potential for the AWG to make inappropriate use of the Agreements. In particular SPA is concerned that the AWG may use the Agreements in negotiating and entering into arrangements with non-SPA members.

The Agreements are the product of lengthy negotiations between SPA and the AWG, and reflect input from a number of stakeholders including a range of screen producer members of SPA. The Agreements are recognised in the industry as setting a valuable benchmark. Although the Agreements are not binding and do not prevent individual SPA members or members of the AWG negotiating their own agreements, the Agreements are used for all forms of scripted television commissioned in Australia.

In SPA's view, the Agreements have met the needs of both SPA members and members of the AWG. In fact, in its submissions to the ACCC the AWG stated that under the existing model terms writers enjoy higher remuneration and better entitlements as well as payment of secondary royalties. Writers in Australia are amongst the highest paid contractors in the television industry in Australia, earning at least \$30,000 for a 43 page script that takes an average of 6 weeks to write. This is notwithstanding the fact that the industry as a whole is finding it increasingly difficult to secure finance. The Agreements also provide members of SPA certainty around the key terms and conditions in transactions for television script writing work.

In SPA's view, the Agreements have provided industrial stability and harmony. In the years that SPA has been negotiating industry wide agreements with the AWG, there has never been a writers' strike. By contrast, in the United States there have been numerous strikes by the Writers Guild of America which have at times effectively shut down production.

Both SPA and the AWG contributed significant resources to the development of the Agreements and jointly drafted and negotiated the Agreements. Accordingly, SPA and the AWG jointly own the copyright in the Agreements. SPA makes the Agreements available only to its members (see <http://www.screenproducers.org.au/industry/>) and SPA has agreed to the AWG making the Agreements available to the AWG's members. The exclusive use of the Agreements by members means that resources continue to be contributed to SPA to ensure that the needs of writers, producers and commissioners of content are met in a constantly changing industry.

In SPA's view, the public benefits the ACCC identified in 2015 when it authorised SPA to collectively negotiate on behalf of its members with the AWG, and equally the public benefits the ACCC has identified in its draft determination in respect of the AWG's current authorisation application, would be compromised if SPA lost the ability to control its IP in the Agreements.

Both the 2015 authorisation and the draft determination refer to the following public benefits that arise from SPA and the AWG collectively negotiating on behalf of their members model agreements:

1. transaction cost savings – by reducing the cost of negotiating for all parties, more contractual issues are 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; and
2. improved input into contracts – collective bargaining between SPA and AWG enables smaller businesses and counterparties to have more effective one on one negotiation. It also enables members of SPA to become better informed of 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 to achieve more efficient outcomes.

SPA is concerned that if the AWG were to use the Agreements in non-SPA member negotiations without SPA's permission, both of these public benefits could be significantly undermined going forward. If the Agreements were made available to non-SPA producers, there would be less incentive for producers to be members of, and pay membership fees to, SPA. If SPA's membership were significantly reduced, there would be a smaller range of producers contributing to the development of the model agreements.

Any future model agreements negotiated between SPA and the AWG may then carry less weight amongst producers and producers may therefore be less inclined to use the model agreements. This would lead to lower transaction cost savings, as more producers preference negotiating one on one with individual writers. It may also result in less favourable terms for writers in Australia and potentially reduced industrial stability.

Accordingly, SPA considers it essential to achieving the identified public benefits associated with the collective bargaining arrangements that the AWG does not breach SPA's copyright in the Agreements. SPA therefore submits that if the ACCC intends to approve the AWG's authorisation application, it does so subject to the condition that in negotiations with non-SPA members, the AWG does not provide or use copies or extracts of any part of the existing or future model agreements negotiated between SPA and the AWG.

Please do not hesitate to contact me should you require any further information.

Yours sincerely,



Mark Donaldson

Director, Legal and Business Affairs