



# Draft Determination

Application for authorisation

lodged by

Screen Producers Australia

in respect of

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

Entertainment and Arts Alliance

Authorisation number: AA1000535

26/02/2021

Commissioners:

Court

Rickard

Keogh

Brakey

## Summary

The ACCC proposes to grant authorisation to the current and future members of Screen Producers Australia to collectively negotiate new 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 new and existing model terms of engagement when negotiating contracts to engage current and future members of these organisations.

This conduct was previously authorised on 4 September 2015, and this authorisation expired on 4 September 2020. The proposed conduct the subject of this application is not materially different to the previous authorisation.

The ACCC considers the proposed conduct will be likely to result in reduced transaction costs and improved input into model terms of engagement by producers which facilitates model terms of engagement which are likely to be mutually beneficial to producers, directors, writers, actors and technical crew.

The proposed conduct is unlikely to result in significant public detriment from reduced competition between producers to engage the services of directors, writers, actors and technical crew. This is because the model terms of engagement act as recommended minimum terms and do not prevent Screen Producers Australia members from negotiating individual agreements with directors, writers, actors and technical crew.

The Proposed Conduct may result in some secondary impacts in the acquisition of Australian content by content acquirers. However, any detriment that may arise from these secondary impacts is likely to be limited because producers will remain constrained by the commercial realities of the sale and acquisition of Australian content to content acquirers. The ACCC also considers that it is a matter for producers to decide what suite of rights they want to sell and to whom.

On 16 December 2020, the ACCC granted interim authorisation for a subset of the proposed conduct. Interim authorisation allows Screen Producers Australia to engage in the conduct for which it was previously authorised while the ACCC considers the substantive application.

The ACCC proposes to grant authorisation for 10 years. The ACCC invites interested parties to make submissions on the proposed length of authorisation.

The ACCC invites submissions in relation to this draft determination by 15 March 2021 before making its final decision.

## 1. The application for authorisation

- 1.1. On 18 November 2020, Screen Producers Australia (**SPA**) lodged an application for authorisation AA1000535 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. SPA has applied for authorisation on behalf of itself and its current and future members to collectively negotiate model terms of engagement with the Australian Directors' Guild (**ADG**), the Australian Writers' Guild (**AWG**), and the Media Entertainment and Arts Alliance (**MEAA**) and to give effect to existing and future model terms of engagement when negotiating contracts to engage current and future members of the ADG, AWG and MEAA. Authorisation is sought for ten years.

- 1.3. The ACCC previously authorised SPA to engage in substantively the same conduct under authorisations A91484 & A91492, granted 4 September 2015 and which expired on 4 September 2020. SPA advised that due to the impact on the industry and on the work of SPA from the COVID-19 pandemic the 2015 authorisation expired before a new application was lodged.
- 1.4. This application for authorisation AA1000535 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.5. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the competition law but are not harmful to competition and/or are likely to result in overall public benefits. In this instance, authorisation is sought because member producers who are independent contractors would likely be in competition with one another in negotiating to acquire services from the ADG, AWG and MEAA members. Without authorisation, collective negotiations and any model terms of engagement would risk breaching competition laws.

## The Applicant

- 1.6. SPA is an industry body that represents the interests of independent Australian film and television producers on issues affecting the commercial and creative aspects of screen production. SPA currently has approximately 400 members. SPA provides industrial advice and services to its members, including the negotiation of model terms of engagement with the ADG, AWG and MEAA. SPA members are typically small-to-medium sized enterprises involved in various types of audio visual projects including feature films, television, digital media, games, and interactive content.

## The Proposed Conduct

- 1.7. SPA is seeking authorisation for:
  - a) SPA, including current and future members of SPA, to collectively negotiate model terms of engagement with the ADG, AWG and MEAA,
  - b) SPA, including current members of SPA, to give effect to existing contracts or arrangements containing model terms of engagement already negotiated with the ADG, AWG and MEAA,
  - c) SPA, including current and future members of SPA, to create new contracts or arrangements with current and future members of the ADG, AWG and MEAA that contain existing model terms of engagement already negotiated with the ADG, AWG and MEAA, and to give effect to those new contracts or arrangements, and
  - d) SPA, including current and future members of SPA, to create new contracts or arrangements with current and future members of the ADG, AWG and MEAA that contain new model terms of engagement and to give effect to those new contracts or arrangements.

(the **Proposed Conduct**)

- 1.8. The model terms of engagement to be negotiated between SPA, AWG, MEAA and ADG include minimum rates of pay, terms and conditions of engagement, minimum contractual arrangements dealing with copyright, moral rights and credit and termination provisions and dispute resolution procedures. The model terms of

engagement are not binding on SPA members who can negotiate and adopt different terms when negotiating contracts to engage AWG, ADG and MEAA members, and as submitted in SPA's application, 'the model terms of engagement do not provide for collective boycott activity'.

## Interim authorisation

- 1.9. SPA requested interim authorisation to enable itself and its members to engage in a subset of the Proposed Conduct while the ACCC is considering the substantive application.
- 1.10. On 16 December 2020, the ACCC granted interim authorisation in respect of paragraphs 1.7 (a) to (c) of the Proposed Conduct, which effectively enables SPA and its members to continue to engage in the conduct for which it was previously authorised under authorisations A91484 & A91492.

## 2. Background

### Model terms of engagement

- 2.1. Production companies producing audio visual content generally engage directors, writers, actors, and technical crew as employees or independent contractors. As part of this engagement, producers generally acquire the limited broadcasting rights for the intellectual property of the directors, writers, and actors. These rights form an essential component of the production bundle, and are included in the sale of the production to content acquirers.
- 2.2. Model terms of engagement enable producers to engage these employees and independent contractors on recommended minimum terms. These model terms of engagement cover matters such as rates and terms of pay, model conditions of employment, travel and transport requirements, termination and dispute resolution procedures and where relevant, arrangements for dealing with the intellectual property rights of the parties, including copyright, moral rights and crediting requirements.
- 2.3. Model terms of engagement also offer fixed terms and rates that directors, writers, and actors are entitled to receive for a variety of uses for their audio visual content. As an example, the Australian Television Repeats and Residuals Agreement 2016 (ATRRRA 2016), one of the model terms of engagement between SPA and the MEAA, has standard licensing terms that detail the method for determining additional rates owed to actors per repeat, and the set terms that are available to be purchased by producers from actors upfront. This limits the number of repeats and broadcast that can be purchased from actors by producers upfront to eight plays across three years, which in turn limits the overall repeat rights that producers can sell to content acquirers.
- 2.4. When negotiating model terms of engagement, SPA forms a committee composed of an SPA employee and representatives of SPA member businesses, who consult with SPA members broadly throughout negotiations. These negotiations can take from a few weeks to several years depending on their complexity. SPA currently maintains three separate model terms of engagement with AWG, seven model terms of engagement and memoranda of understanding with MEAA that cover both actors and crew, and is in the process of negotiating model terms of engagement with ADG.
- 2.5. SPA submits that the model terms of engagement are not binding on any of the parties' members, and that they instead serve as recommended minimum terms that can be negotiated above, for example, according to the experience, profile and market

position of the individual writer, actor or director that a producer seeks to engage. In this way, a producer may use the model terms of engagement as a starting point for negotiations and adjust the terms according to the outcome of those negotiations.

## The AWG, ADG and MEAA

- 2.6. The ADG is an industry organisation that has represented the interests of screen directors since 1982, representing approximately 700 members as of April 2020.<sup>1</sup> The ADG provides a range of services to its members, including advocacy, industrial and legal services.
- 2.7. The AWG is a national professional association for Australian performance writers of film, television, theatre, radio, and digital media. As of 2017, the AWG represented 2,235 members, and offers industrial and legal advisory services to its members.<sup>2</sup> The AWG also operates the AWG Authorship Collecting Society, responsible for collecting and distributing royalties for the additional uses of members' work.
- 2.8. The ADG and the AWG have at stages held separate authorisations enabling themselves individually to negotiate and give effect to model terms of engagement with SPA members, and other producers for funding grants or particular tax rebates managed by Screen Australia. The ADG's authorisation was granted in 2015 and expired on 4 September 2020,<sup>3</sup> while the AWG's current authorisation was granted in 2017, and will continue until 30 June 2027.<sup>4</sup>
- 2.9. MEAA is a trade union and professional organisation representing around 15,494 members across media, entertainment, sports and arts industries.<sup>5</sup> MEAA represents 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.

## Content acquirers

- 2.10. Television content in Australia is acquired by three main groups: free-to-air broadcasters (including national broadcasters ABC and SBS, and commercial broadcasters Seven, Nine and 10), subscription television broadcasters (such as Foxtel), and subscription video on demand (**SVOD**) services (such as Netflix, Stan, Disney+, Amazon Prime, and Binge).
- 2.11. Commercial broadcasters (and to a lesser extent subscription television broadcasters) are subject to content quotas that require a minimum amount of Australian content to be broadcast annually, subject to certain requirements. Currently, national broadcasters and SVOD services are not subject to content quotas. The content quota system is maintained by the Australian Communications and Media Authority (**ACMA**) and, as discussed later at 4.42, is currently undergoing review.
- 2.12. Free-to-air broadcasters are themselves producers of television content in Australia and produce content in-house for broadcast and distribution. Australian broadcasters

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<sup>1</sup> ADG response to ASDACS' request for ACCC Authorisation, 15 April 2020 - <https://www.accc.gov.au/system/files/public-registers/documents/Submission%20by%20Australian%20Directors%27%20Guild%20-%2015.04.20%20-%20PR%20VERSION%20-%20AA1000474%20ASDACS.pdf>

<sup>2</sup> Australian Writers Guild Limited, *Application Received*, 3 February 2017 - <https://www.accc.gov.au/system/files/public-registers/documents/D17%2B15199.pdf>

<sup>3</sup> See [A91499 – Australian Directors' Guild](#)

<sup>4</sup> See [A91573 – Australian Writers' Guild](#)

<sup>5</sup> MEAA Annual Report 2019-20 - <https://www.meaa.org/download/meaa-annual-report-2019-20/>

are also content acquirers, and commission or acquire content from other producers including SPA members.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including the ADG, AWG and MEAA, Screen Australia, ACMA, the free-to-air and subscription broadcasters, and SVOD services.<sup>6</sup> The ACCC received four submissions from interested parties in relation to the application from AWG, ADG, Nine Entertainment Co.Pty Ltd (including a confidential version of Nine's Submission) and Stan Entertainment Pty Ltd.
- 3.3. The AWG submits that it does not object to SPA's application.
- 3.4. The ADG submits that it does not object to SPA's application, however submits that the scope of the Proposed Conduct should include copyright and moral rights analogous to the conduct for which SPA sought authorisation for in 2015. SPA submits that the Proposed Conduct includes collective negotiations on model terms of engagement which includes recommended minimum contractual arrangements dealing with copyright, moral rights and credit, and that no amendments to the application for authorisation are required.
- 3.5. Nine Entertainment Co. Pty Ltd (**Nine**) submitted that the authorisation has been beneficial in reducing transaction costs associated with negotiations, and increased certainty in remuneration for directors, writers, actors, and technical crew. However, Nine submits that the authorisation period should be limited to five years citing the growth of SVOD providers and international entry in the last five years, and the anticipated technological, structural and impending regulatory changes that are likely to occur in the industry over the coming years. Nine also submits that there is a risk the model terms of engagement that are negotiated will become outdated over the period and not reflect current needs of content acquirers.
- 3.6. Nine submits that SPA should be required as a condition of authorisation to engage in consultation with acquirers of content. Nine notes that it can only participate if invited, that these agreements have a significant downstream effect on content acquirers who are unable to negotiate terms more favourable to themselves, and that should it produce drama in-house in the future, the model terms of engagement would be the framework on which it engages directors, writers, actors, and technical crew. Nine submits that it is therefore impacted by the model terms of engagement as Australian Government content quotas require it to acquire Australian content which is a less attractive commercial option than high quality, but less expensive, international content that offers similar revenue and viewership.
- 3.7. Stan Entertainment Pty Ltd (**Stan**), a subsidiary of Nine, also recommended a five year authorisation period, and imposing as a condition of authorisation consultation requirements with content acquirers. Stan submits that it is not involved in most consultations, and that agreements such as ATRRA 2016 have a significant impact on its capacity to negotiate commercial outcomes. Stan submits that the licence period limitation changes under ATRRA 2016 from seven years to three years is 'not

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<sup>6</sup> The public submissions received, including SPA's response to submissions, are available from [the ACCC's public register](#).



compatible with an SVOD business model' as it seeks to use the content over a longer period of time. Stan submits that it is unable to negotiate a longer licensing period due to ATRRA, and that it is unable to negotiate a lower licensing cost due to Screen Australia's requirement that projects it offers funding for are licensed for at least \$440,000 per broadcast hour.

- 3.8. SPA's response to the issues raised by interested parties is discussed below.
- 3.9. Public submissions by SPA and interested parties are on the Public Register for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. SPA has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act, may substantially lessen competition or be a concerted practice within the meaning of section 45 of the Act, or may be exclusive dealing within the meaning of section 47 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result from the proposed conduct (authorisation test).

### Relevant areas of Competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. SPA submits that the application for authorisation relates to the four main areas of supply of writing, acting, directing, and technical services to audio-visual producers.
- 4.5. The ACCC considers that the relevant areas of competition are likely to be:
  - the acquisition by producers of writing, acting, directing and technical services for producing audio visual content; and
  - the acquisition (including by free-to-air and video-on-demand content acquirers) and supply of audio visual content (including by producers).

### Future with and without the Proposed Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.7. The ACCC considers that in the future with the Proposed Conduct, SPA (on behalf of current and future members) will negotiate model terms of engagement with the ADG, AWG and MEAA, and the members of these organisations will continue to form agreements with SPA members that give effect to these model terms of engagement.
- 4.8. The ACCC considers that in the future without the Proposed Conduct, SPA members are likely to each negotiate with members of the ADG, AWG and MEAA.<sup>7</sup>

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<sup>7</sup> See [A91573 – Australian Writers' Guild](#)

## Public benefits

4.9. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>8</sup>

4.10. The ACCC has considered the following public benefits :

- Reduced transaction costs
- Improved input into contracts.

### Reduced Transaction Costs

4.11. SPA submits that the model terms of engagement have reduced the transaction costs associated with contractual negotiations between producers and directors, writers, actors, and technical crew. SPA submits that in the absence of the Proposed Conduct higher transaction costs would be incurred by all parties, and that it would increase demand and costs of SPA and the ADG, AWG and MEAA's separate industrial and legal advisory services. SPA state that this would reduce the ability for these organisations to offer other services to their members.

4.12. The ACCC considers that individual producers incur transaction costs in the form of legal advice, expert advice and time when negotiating with directors, writers, actors and technical crew. The directors, writers, actors, and technical crew will also incur transaction costs in negotiating with individual producers. Should these transaction costs outweigh the perceived benefit of these negotiations, most parties will likely avoid negotiation and default to minimally negotiated contracts that do not accurately capture the potential mutual benefits of trade.

4.13. The ACCC considers that the Proposed Conduct is likely to result in a public benefit in the form of reduced transaction costs. Reduced transaction costs are likely to arise through sharing the costs of negotiation across multiple parties, enabling the negotiating organisations to negotiate comprehensively and reach more beneficial and efficient agreements. This is because it is more likely that more contractual issues will be able to be addressed, because each party can obtain the benefit from negotiating contractual issues at a lower cost.

### Improved input into contracts

4.14. SPA submits that directors, writers, actors, and technical crew generally have less bargaining power in negotiations with producers. SPA submits that the model terms of engagement have resulted in consistency and certainty around terms and conditions for directors, writers, actors, and technical crew. SPA considers that the negotiation of the model terms of engagement has resulted in terms that better reflect the input from directors, writers, actors, and technical crew and also better reflect market forces in the production of audio visual content.

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<sup>8</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.



- 4.15. SPA submits that directors, writers, actors, and technical crew have limited access to resources (for example professional advice) and information on market conditions (for example, rates of remuneration and terms and conditions) when compared to producers.
- 4.16. SPA submits that the negotiations for the model terms of engagement have improved the flow of information sharing and access to professional services, leading to model terms of engagement that better reflect the input from the members of SPA, AWG, ADG and MEAA, and also better reflect contemporary market forces in the industry. SPA notes that AWG, ADG, MEAA and itself publish to members summaries of the model terms of engagement, which means individuals are better informed in their negotiations as to possible terms.
- 4.17. The Proposed Conduct will allow SPA on behalf of its members to continue to develop model terms of engagement with the ADG, AWG, and the MEAA and allow SPA members to utilise the existing model terms of engagement in individual negotiations. The ACCC considers that the information shared through the course of negotiations is likely to inform members of SPA on what constitutes appropriate standards on remuneration and working conditions, and likely to improve input into contractual negotiations with ADG, AWG and MEAA to achieve more efficient outcomes and result in a public benefit. The ACCC also considers that the model terms of engagement enable more effective one on one negotiations by giving parties greater opportunity to identify and negotiate terms that are more relevant to themselves and their commercial circumstances.

## Public detriments

- 4.18. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>9</sup>*

- 4.19. SPA submits the Proposed Conduct is likely to result in no public detriments because:

- the model terms of engagement are not binding on the members of SPA or the ADG, AWG and MEAA as they serve as a benchmark for industry minimums and do not prevent producers or directors, writers, actors, and technical crew from negotiating their own terms;
- without the Proposed Conduct, industry agreements would be dominated by a small number of larger production business and lead to less competition in the market;
- the engagement of directors, writers, actors, and technical crew is based on factors such as the quality of their prior work, reputation, and experience, and that the Proposed Conduct will not undermine competition on these grounds; and
- the model terms of engagement do not provide for collective boycott activity.

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<sup>9</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

## **Reduction in competition between producers to engage writing, director, actor and technical crew services for producing audio visual content**

4.20. The ACCC considers that there is potential for the Proposed Conduct to result in a public detriment as a result of members of SPA collectively agreeing the price and terms (in the form of the model terms of engagement) on which they will acquire services from directors, writers, actors, and technical crew.

4.21. However, the ACCC considers that the reduction in competition is limited because:

- the model terms of engagement are not binding on SPA, AWG, ADG or MEAA members. The model terms of engagement act as recommended minimum terms and they do not prevent producers from negotiating their own agreements with directors, writers, actors, and technical crew. SPA submits that the relevant market rates tend to be above what is prescribed by the model terms of engagement;
- producers will continue to compete against each other to engage directors, writers, actors, and technical crew based on a range of factors beyond the model terms of engagement, such as experience, reputation, competence and track record; and
- the proposed authorisation does not extend to enabling SPA and its members to engage in collective boycott activity.

## **Secondary impacts on the acquisition of Australian content**

4.22. The model terms of engagement include terms and conditions that impact how content acquirers acquire audio visual content from producers. SPA may negotiate model terms of engagement with AWG, ADG and MEAA that may be in conflict with the interests of content acquirers. While content acquirers have an interest in, and are affected by, the outcome of the negotiated model terms of engagement, their interests may not always be factored into the negotiation of the model terms, given that SPA, ADG, AWG and MEAA are likely to be focused on achieving outcomes that are most beneficial to their respective members (noting however, that achieving outcomes that are in the interests of content acquirers and SPA, ADG, MEAA and AWG members will not always be mutually exclusive). This misalignment of interests may result in inefficiencies and outcomes that are not as suitable for all parties with an interest in the outcome of the model terms of engagement.

4.23. Stan and Nine have both submitted that the model terms of engagement have the capacity to inadvertently impact the price and overall commercial viability of acquiring Australian content, and that the ACCC should impose a condition requiring SPA and the ADG, AWG and MEAA to undertake genuine consultation with content acquirers when negotiating model terms of engagement. Stan refers to the process in negotiating the ATRRA 2016 model terms of engagement, stating that as a new entrant it was not directly consulted during the process, and that the changes were not compatible with the SVOD business model, and showed a limited understanding of how the underlying business models that finance productions on digital platforms actually work. Similarly, Nine states that SPA has no real incentive to resist increased input costs and SPA is not incentivised to ensure that the model terms it is negotiating (including rights) cater to the needs of broadcasters.

4.24. SPA submits that it engages in consultation with industry participants during the development of model terms of engagement. It states that it is not resistant to conducting discussions with Stan and Nine and recognises consultation is desirable. For example, during the development of the ATRRA 2016, SPA consulted with

commercial broadcasters both during the development of the model terms of engagement, and with some commercial broadcasters in 2019 and 2020 to review the impacts of the model terms of engagement. SPA submits that adding formal consultation requirements in the form of a condition of authorisation would be overly burdensome, and that requirements would increase operating costs and result in SPA becoming the de facto convenor of an all-of-industry industrial relations forum.

- 4.25. SPA notes that, if a condition of authorisation was imposed, it could only apply to the negotiations that relate to contractors rather than employees. SPA submits that the practical effect of this is that SPA would need to conduct two parallel but discrete sets of negotiations which would cover the same subject matter (minimum terms of engagement for writers, actors, directors and technical crew) but be separate to take into account the procedural requirement to consult content acquirers.
- 4.26. SPA submits that commercial broadcasters already have significant bargaining power when acquiring content, and that should Nine choose to produce Australian drama in-house, it has the capacity to negotiate its own agreements. SPA notes that Seven, in producing its own content, has negotiated three agreements with MEAA. SPA also understands that the ABC negotiates with MEAA and CPSU over the minimum terms and conditions of engagement for crew on their in-house productions.
- 4.27. The ACCC considers that it is a matter for producers to decide what suite of rights they want to sell and to whom. Similarly, the terms of a producer's agreement with directors, writers, actors, and technical crew are a matter for those parties.
- 4.28. The ACCC considers that SPA and the ADG, AWG and MEAA are constrained by the commercial realities of selling Australian content to content acquirers, particularly those who are not bound by content quotas. Additionally, producers may run the risk of content acquirers deciding to increase in-house production capacity and instead negotiate directly with directors, writers, actors, and technical crew for more suitable terms.
- 4.29. Content acquirers are not a homogenous group and different content acquirers are likely to value different suites of rights. The ACCC considers that introducing a requirement that content acquirers be part of the negotiation of model terms of engagement is likely to make the negotiation process unwieldy and complex, and reduce the overall efficiency and likely public benefits to arise from the Proposed Conduct.
- 4.30. The ACCC considers that the extent to which SPA and its members wish to involve content acquirers in the negotiation of model terms of engagement is a matter for them to consider. The ACCC also considers that the terms on which content is made available to content acquirers reflects market dynamics between producers and the acquirers of content.
- 4.31. The ACCC recognises that the Proposed Conduct may result in some secondary impacts in the acquisition of Australian content by content acquirers. However, any detriment that may arise from these secondary impacts is likely to be limited because producers will remain constrained by the commercial realities of the sale and acquisition of Australian content to content acquirers. The ACCC also considers that it is a matter for producers to decide what suite of rights they want to sell and to whom.

## Balance of public benefit and detriment

- 4.32. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

- reduced transaction costs for producers, directors, writers, actors and technical crew due to the collective negotiations on model terms of engagement; and
  - improved input into model terms of engagement by producers which results in model terms of engagement that are likely to be mutually beneficial to producers, directors, writers, actors and technical crew.
- 4.33. The ACCC considers that the Proposed Conduct is unlikely to result in public detriment from reduced competition between producers for the acquisition of services from directors, writers, actors, and technical crew. This is because the model terms of engagement act as recommended minimum terms and do not prevent SPA members from negotiating their own agreements with directors, writers, actors and technical crew.
- 4.34. The ACCC recognises that the Proposed Conduct may result in some secondary impacts in the acquisition of Australian content by content acquirers. However, any detriment that may arise from these secondary impacts is likely to be limited because producers will remain constrained by the commercial realities of the sale and acquisition of Australian content to content acquirers. The ACCC also considers that it is a matter for producers to decide what suite of rights they want to sell and to whom.
- 4.35. Therefore, based on all the information received, including confidential information, and for the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public resulting from the Proposed Conduct.

## Length of authorisation

- 4.36. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>10</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the 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.
- 4.37. SPA seeks authorisation for 10 years on the basis that consultation and negotiations for model terms of engagement are lengthy and complex, citing extensive consultation on each side of the agreement, data analysis, comparative research, and lengthy and often protracted negotiations. For example, SPA noted that the ATRRA 2016, which is a new agreement on actor residual to address changes in technology and digital disruption in the screen industry took five years to negotiate. The TV Animation Voice Over Agreement 2018 was a complex agreement and involved high levels of consultation on both sides, taking over three years to conclude.
- 4.38. SPA submit that most model term agreements contain ‘grandfathering provisions’. This means that while the model term agreement operates prospectively, they do not apply for a transition period or to pre-existing productions or to subsequent seasons of the same production. SPA submits this means there is a delay before SPA members are able to integrate new model terms of engagement.
- 4.39. SPA state that the model terms of engagement commonly include review clauses after two or more years. Taking into account the length of time required to reach agreement, the phased in implementation of the model terms of engagement, SPA considers that a five year term of authorisation is insufficient.

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<sup>10</sup> Subsection 91(1)

- 4.40. Stan and Nine submit that the authorisation should be limited to five years as the regulatory and market environment are uncertain over the longer term. Nine submits that over the previous five years a number of competing SVOD services have entered the market and that when combined with a growing number of Australian SVOD subscriptions it has resulted in a greater level of competition between content acquirers. Similarly, Stan notes that two competing SVOD services, Binge and BritBox, have entered the market in the past six months. Nine argues that this shows that the media landscape is subject to rapid and continuing change, and that it is not possible to assess the public benefits and detriments of the Proposed Conduct over a 10 year horizon with any certainty.
- 4.41. SPA submit in response to the submissions made by Nine and Stan that the rapid and constant industry change is a factor supporting a longer term of authorisation, and that a longer authorisation period will enable ongoing negotiations for continuous improvement of agreements like ATRRA 2016. SPA also submit that digital disruption commenced more than a decade ago, and that the mere fact of constant change is not a sufficient argument to restrict the authorisation to a shorter term.
- 4.42. The ACCC acknowledges that the regulatory context of content acquirers is currently undergoing review. The ACCC notes that the Department of Infrastructure, Transport, Regional Development and Communications have issued a green paper on proposed changes to the broadcast licencing scheme, and have raised potential Australian content investment obligations on SVOD services. Additionally, as of 1 January 2021 ACMA introduced reduced content quota obligations on free to air broadcasters.
- 4.43. The ACCC notes SPA has in the past negotiated updates to agreements in response to technological change (such as the ATRRA 2016), and has incorporated and uses the review mechanisms within model terms of engagement. SPA submitted in their application that negotiations for updated agreements with MEAA have commenced and that the ATTRA Animation Voice Over MOU is due for review in light of recent content quota changes. In light of this, the ACCC considers that SPA has the capacity to undertake negotiations for updated model terms of engagement should either regulatory or market changes make any current model terms of engagement no longer economically viable.
- 4.44. Although it is apparent that there have been and continue to be changes to the regulatory and market environments, the ACCC considers that based on the current information these changes are unlikely to impact the public benefits and public detriments arising from allowing SPA and its members to collectively negotiate and adopt model terms of engagement.
- 4.45. The ACCC notes that the overall cost and demand for Australian television and film content is impacted by a number of factors, including funding guidelines and Australian content quotas set by the Australian Government. Should policy changes significantly impact these factors, this may be considered a material change in circumstances that could provide grounds for the ACCC to review the authorisation.
- 4.46. The ACCC therefore proposes to grant authorisation for 10 years. The ACCC invites interested parties to make submissions on the proposed length of authorisation.

## 5. Draft determination

### The application

- 5.1. On 18 November 2020, SPA lodged application AA1000535 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. SPA seeks authorisation for the Proposed Conduct as described at paragraph 1.7 above. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination and based on the information before it, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000535 to enable SPA and its current and future SPA members to collectively negotiate model terms of engagement with the ADG, AWG and MEAA and to give effect to existing and future model terms of engagement when negotiating contracts to engage current and future members of the ADG, AWG and MEAA. Specifically, the ACCC proposes to grant authorisation to SPA and its current and future members to:
  - a) collectively negotiate model terms of engagement with the ADG, AWG and MEAA,
  - b) give effect to existing contracts or arrangements containing model terms of engagement already negotiated with the ADG, AWG and MEAA,
  - c) create new contracts or arrangements with current and future members of the ADG, AWG and MEAA that contain existing model terms of engagement already negotiated with the ADG, AWG and MEAA, and to give effect to those new contracts or arrangements, and
  - d) create new contracts or arrangements with current and future members of the ADG, AWG and MEAA that contain new model terms of engagement and to give effect to those new contracts or arrangements.
- 5.7. The proposed authorisation does not extend to enabling SPA and its current and future members to engage in collective boycott activity.
- 5.8. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act, may have the purpose or effect of substantially lessening



competition or be a concerted practice within the meaning of section 45 of the Act, or may constitute exclusive dealing within the meaning of section 47 of the Act.

5.9. The ACCC proposes to grant authorisation AA1000535 for 10 years.

5.10. This draft determination is made on 26 February 2021.

## 6. Next steps

6.1. The ACCC now invites submissions in response to this draft determination by 15 March 2021. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.