



# Draft Determination and interim authorisation

Application for authorisation AA1000556

lodged by

The Australian Directors' Guild

in respect of

collective negotiation of model terms of engagement with Screen  
Producers Australia

Authorisation number: AA1000556

Date: 14 July 2021

Commissioners: Keogh  
Rickard  
Brakey  
Ridgeway

## Summary

The ACCC proposes to grant authorisation to the Australian Directors' Guild (the ADG) and its current and future members to enable them to collectively negotiate model terms of engagement with Screen Producers Australia (SPA) for feature film, television series and television serials, and to create and give effect to contracts and arrangements which contain these model terms of engagement.

This conduct was previously authorised from 4 September 2015 until 4 September 2020. The proposed conduct the subject of the current application is not materially different to the previous authorisation. Under the previous authorisation the ADG and SPA commenced negotiations, however no model terms of engagement were finalised.

The ACCC considers the proposed conduct is likely to result in reduced transaction costs and provide the opportunity for improved input into model terms of engagement by directors, which facilitates contracts that are likely to be mutually beneficial to directors and producers.

The ACCC considers the proposed conduct is unlikely to result in significant public detriment from reduced competition between directors to provide services to producers. This is because the model terms of engagement operate as recommended minimum terms and do not prevent members of the ADG from negotiating individual agreements with producers.

The ACCC proposes to grant authorisation for 10 years.

The ACCC has also granted interim authorisation to enable the ADG to commence collective negotiations of model terms of engagement with SPA while the ACCC completes its assessment of the substantive application.

The ADG's application is complementary to a collective bargaining authorisation granted by the ACCC to SPA on 23 April 2021. Authorisation AA1000535 enables SPA to collectively negotiate model terms of engagement with the ADG and other organisations until 15 May 2031.

The ACCC invites submissions in relation to this draft determination by 4 August 2021 before making its final decision.

### 1. The application for authorisation

- 1.1. On 25 May 2021, the Australian Directors' Guild (the **ADG**) lodged application for authorisation AA1000556 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The ADG has applied for authorisation on behalf of itself and its current and future members to collectively negotiate model terms of engagement with Screen Producers Australia (**SPA**), and to create and give effect to new contracts or arrangements based on these model terms of engagement. Authorisation is sought for ten years.
- 1.3. The ACCC previously authorised the ADG to engage in substantively the same conduct under authorisation A91499 which expired on 4 September 2020. The ADG submits that it was significantly impacted by the COVID-19 pandemic, with significant changes to staffing and priorities reducing its capacity to engage with agreement

negotiations with SPA. The ADG submits that it and SPA are now in a position to recommence negotiations.

- 1.4. This application for authorisation AA1000556 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 protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits. In this instance, authorisation is sought because member directors, who are independent contractors, are likely to be in competition with one another to provide services to SPA members. Without authorisation, collective negotiations on model terms of engagement risk breaching the competition provisions in the Act.

## The Applicant

- 1.6. The ADG is a not-for-profit industry organisation that has represented the interests of screen directors (including film, television, streaming, and digital media directors) since 1982. It aims to improve professional standards, conditions and remuneration for Australian directors, to protect and advance the creative rights of its members, and to promote a cultural voice that is representative of Australia's innate diversity. As of September 2020, the ADG represented approximately 380 full (voting) members, and a total of approximately 1,200 members including full, honorary, and associate (non-voting) members, consisting of employees and contractors.

## The Proposed Conduct

- 1.7. The ADG is seeking authorisation to collectively negotiate on behalf of its current and future members, to create new contracts or arrangements with current and future members of Screen Producers Australia (SPA) that contain model terms of engagement for feature film, television series and television serials (**Screen Productions**) and give effect to those new contracts or arrangements.

(the **Proposed Conduct**)

## Interim authorisation

- 1.8. The ADG also requested interim authorisation to enable it to commence collective negotiations with SPA while the ACCC is considering the substantive application. The request for interim authorisation is discussed further in section 6.

## 2. Background

### Model terms of engagement

- 2.1. Production companies producing Screen Productions generally engage directors, writers, actors, and technical crew as employees or independent contractors. The ADG submits that directors are generally independent contractors commissioned on a freelance basis by production companies and broadcast networks. These production companies range in size from the Australian representatives of multi-national corporations (such as NBC Universal, Netflix and Studio Canal) to local independent production companies and broadcast networks (such as Madman, Channel 7 and the ABC).

- 2.2. Model terms of engagement enable production companies to engage employees and independent contractors on recommended minimum terms. The model terms of engagement to be negotiated between the ADG and SPA may include the rates and terms of pay, copyright and moral rights, credits, royalty and residual payments, conditions of employment, accommodation, travel and transport, rights of termination and dispute resolution. While the parties have previously had authorisation to collectively negotiate, the ADG and SPA are yet to agree any model terms of engagement.
- 2.3. When negotiating model terms of engagement, the ADG forms specialised committees of Australian directors chaired by an ADG Board Member Director. The committees are composed of up to eight member directors, who are full members of the ADG, and are currently directing Screen Productions. The ADG submits that the committee will enable a full spectrum of directors to participate and provide input into negotiations. Negotiations with SPA for a TV Series and Serials Agreement (Scripted) commenced several years ago, however the ADG has not finalised this, or any other model terms of engagement with SPA or any other parties.
- 2.4. The ADG submits that the model terms of engagement are not binding on members of the ADG or SPA and do not preclude negotiations between individual ADG members and producers for variations on the model terms of engagement, or their own agreements. The model terms of engagement serve as recommended minimum terms that can be negotiated above, varied, or added to on a case by case basis. For example, wage rates may be dependent on the experience and standing of the director or the budget of the Screen Production.

## Screen Producers Australia

- 2.5. 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, the Australian Writers' Guild (the **AWG**) and the Media Entertainment and Arts Alliance (the **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.
- 2.6. On 23 April 2021, the ACCC granted authorisation AA1000535 to SPA to enable it to collectively negotiate model terms of engagement with the ADG, the AWG, and the MEAA until 15 May 2031. To the extent that SPA's authorisation relates to negotiating model terms of engagement with the ADG, the ADG's application for authorisation is complementary.

## 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 SPA, the AWG and the MEAA (both also maintain model terms of engagement with SPA), Screen Australia, the Australian Communications and Media Authority (**ACMA**),

free-to-air and subscription broadcasters, subscription video on demand services (such as Netflix and Amazon Prime), and production companies.<sup>1</sup>

- 3.3. The ACCC received a submission from SPA in support of the application. SPA notes that granting ADG's application would also enable SPA to capture the full benefits of its authorisation by enabling both parties to collectively bargain.
- 3.4. The public submissions by the ADG and SPA are on the Public Register for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's has assessed the Proposed Conduct in accordance with the relevant authorisation test contained in the Act.
- 4.2. The ADG 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 and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with 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 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 (authorisation test).

### Relevant areas of Competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.4. The ADG submits that the application for authorisation relates to the supply of directing services for Screen Productions to producers as well as any intellectual property and goods provided in connection with such services.
- 4.5. The ACCC considers that the relevant areas of competition are likely to be competition between directors for the supply of directing services for Screen Productions to 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, the ADG (on behalf of current and future members) will negotiate model terms of engagement with SPA, and the members of the ADG and SPA will form agreements that give effect to these model terms of engagement.
- 4.8. The ACCC considers that in the future without the Proposed Conduct, members of the ADG are likely to individually negotiate with members of SPA without reference to model terms of engagement.

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<sup>1</sup> A list of the parties consulted and the public submissions received is available from [the ACCC's public register](#).

## 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>2</sup>

4.10. The ACCC has considered the following public benefits:

- Reduced transaction costs
- Improved input into contracts

### Reduced transaction costs

4.11. The ADG submits that model terms of engagement have the potential to reduce transaction costs associated with contractual negotiations between directors and producers. It submits that its members, who are generally sole contractors with limited time and resources, do not have the financial and other resources to strongly negotiate their own agreements. It submits that there are substantial transaction costs involved. Negotiation costs on a project-by-project basis can reach up to 10% of the director's fee. It also submits that as it supports members in these contractual disputes, the model terms of engagement have the capacity to reduce the organisation's costs in providing these services.

4.12. The ACCC considers that individual directors may incur transaction costs in the form of obtaining legal advice, expert advice and time taken to negotiate with producers. The producers will also incur transaction costs in negotiating with individual directors. 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 potential mutual benefits from negotiation.

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 common costs of negotiating model terms of engagement across multiple parties, enabling the negotiating organisations to negotiate comprehensively and reach more beneficial and efficient agreements. This is because it is likely that more contractual issues will be able to be addressed, because each party can obtain the benefit from collectively negotiating shared contractual issues at a lower cost. Individual directors that choose to substantially rely on model terms of engagement would likely have significant transaction cost savings. Individual directors who choose to negotiate above these terms will likely still have transaction cost savings, however the extent of savings would be lower for directors who undertake significant additional negotiations.

4.14. To the extent that members of the ADG use its support services and receive assistance when negotiating with producers, the Proposed Conduct is also likely to reduce transaction costs for the ADG by decreasing demand for some of its services, allowing its resources to focus on other projects.

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<sup>2</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.

## Improved input into contracts

- 4.15. The ADG submits that there is a significant power imbalance in favour of producers, networks and studios given their size and the number of productions they are likely to commission in a year. It submits that the majority of Australian directors have limited access to resources and information on market conditions, and in contrast to producers, generally do not have lawyers and other professionals that are able to provide them with advice on negotiations and contractual matters. Further, in contrast to others working in the industry (for example, writers and crew) who are generally employees and covered by awards, there is little information on what constitutes recommended minimum standards of remuneration, rights, and working conditions for directors, who are often independent contractors.
- 4.16. The ADG submits that the member engagement process for the model terms of engagement will enable directors to collectively work through the ADG to provide greater input into the terms and conditions of the model terms of engagement. It submits this increased input may better reflect its members' collective circumstances than contracts offered by producers or negotiated individually, and may also benefit SPA's members by providing a forum through which more innovative contractual solutions and options can be discussed and explored.
- 4.17. The ADG submits that under the previous authorisation, negotiations for model terms of engagement included the exchange of significant and highly relevant information that enabled ADG and SPA members to develop a more informed and relevant view on appropriate standards, with a number of critical points agreed to in early 2020.
- 4.18. The Proposed Conduct will allow the ADG on behalf of its members to develop model terms of engagement with SPA. Individual members of the ADG and SPA can then choose whether to use these model agreements in their individual contractual negotiations. The ACCC considers that the information shared through the course of negotiations is likely to inform members of the ADG on what constitutes appropriate standards on remuneration and working conditions, and is likely to improve input into contractual negotiations with the SPA to achieve more efficient outcomes and result in a public benefit. Further, as the model terms of engagement are not binding, where there are individual negotiations the model terms still provide the parties with a greater opportunity to identify and negotiate terms that are more relevant to themselves and their commercial circumstances.

## Public detriments

- 4.19. 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>3</sup>*

- 4.20. The ADG submits that the Proposed Conduct is likely to result in no public detriments because:

- the model terms of engagement will not be binding on members of either the ADG or SPA and do not preclude negotiations between individual ADG members and producers for variations on model terms of engagement or their own agreements;

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3 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- competition between directors is based on their reputation and history of work, and it is likely that directors will continue to vigorously compete for engagement on Screen Productions on factors outside the model terms of engagement; and
- the proposed model terms of engagement do not provide for collective boycott activity.

4.21. The ACCC considers that while there is potential for the Proposed Conduct to result in a public detriment as a result of members of the ADG collectively agreeing the price and terms (in the form of the model terms of engagement) on which they will supply services to producers this detriment is limited for the reasons outlined by the ADG.

4.22. The ACCC therefore considers it likely that minimal public detriment will result from the Proposed Conduct.

### Balance of public benefit and detriment

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

- reduced transaction costs for directors and producers due to the collective negotiations on model terms of engagement; and
- improved input into model terms of engagement by directors which results in model terms of engagement that are likely to be mutually beneficial to directors and producers.

4.24. The ACCC considers that the Proposed Conduct is unlikely to result in public detriment from reduced competition between producers for the supply of services to producers. This is because model terms of engagement act only as recommended minimum terms and do not prevent members of the ADG from negotiating their own agreements with producers.

4.25. Therefore, 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 from the Proposed Conduct.

### Length of authorisation

4.26. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>4</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.

4.27. The ADG seeks authorisation for 10 years. The ADG submits that this is appropriate as the engagement, consultation, and negotiations involved in concluding model terms of engagement are likely to be detailed, lengthy, complex, and requiring the expenditure of significant ADG resources. The ADG also submits that 10 years is consistent with the ACCC's determinations for AWG in 2017 and SPA in 2021.

4.28. Given the ACCC's net public benefit assessment set out above, and the ADG's submission that consultation and negotiations for model terms of engagement are

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<sup>4</sup> Subsection 91(1)



likely to be lengthy and complex, the ACCC proposes to grant authorisation for 10 years.

## 5. Draft determination

### The application

- 5.1. On 25 May 2021, the ADG lodged application AA1000556 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The ADG seeks authorisation for the Proposed Conduct described at paragraph 1.7. 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, 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 AA1000556 to enable the ADG and its current and future members to collectively negotiate model terms of engagement with SPA and its current and future members for feature film, television series and television serials, and to make or give effect to contracts or arrangements that contain these model terms of engagement.
- 5.7. The proposed authorisation does not extend to enabling ADG and its current and future members to engage in collective boycott activity.
- 5.8. The conduct described at paragraph 5.6 may involve a cartel provision within the meaning of Division 1 of Part IV of the Act, or may have the purpose or effect of substantially lessening competition or be a concerted practice within the within the meaning of section 45 of the Act.
- 5.9. The ACCC proposes to grant authorisation AA1000556 for 10 years.
- 5.10. This draft determination is made on 14 June 2021.

## 6. Interim authorisation

- 6.1. At the time of lodging the application for authorisation the ADG requested interim authorisation to enable it to collectively negotiate model terms of engagement with SPA while the ACCC is considering the substantive application.

- 6.2. The ADG submits that negotiations with SPA for a new TV Series and Serials Agreement (Scripted) commenced several years ago under the previous authorisation, and a number of critical deal points were agreed to in early 2020. Discussions were suspended due to the COVID-19 Pandemic. The ADG submits that it and SPA are now in a position to recommence negotiations and finalise this model agreement and commence negotiating on subsequent agreements, and that it would be detrimental for an agreement to be delayed further. SPA submits that as a matter of clarification, the collective agreement under negotiation does not apply to Serials.
- 6.3. The ACCC has decided to grant interim authorisation to the conduct described at paragraph 5.6.
- 6.4. In granting interim authorisation, the ACCC has taken into account:
- interim authorisation will enable the parties to recommence collective negotiations with SPA, including on the model terms of engagement which commenced under the previous authorisation, while the ACCC completes its assessment of this application for authorisation;
  - the Proposed Conduct is substantially similar to the conduct authorised in 2015. In 2015, the ACCC concluded that the likely public benefits outweighed the likely public detriments.
- 6.5. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or the application for authorisation is withdrawn.

## 7. Next steps

- 7.1. The ACCC invites submissions in response to this draft determination by 4 August 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.