

7 May 2020

Via email: [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

Contact officer: Miriam Kolacz

Dear Ms Kolacz,

**RE: AA1000474 – ASDACS – submission.**

We refer to the application by ASDACS for authorisation on behalf of its current and future screen director members to alter its constitution to provide that:

- members must assign their copyrights under the ‘retransmission scheme’ to ASDACS (that is, any copyrights in a film that is included in the retransmission of a free-to-air broadcast under the Copyright Act 1968 (Cth) (Copyright Act)), and
- ASDACS collect the money paid by retransmitters to Screenrights (the declared collecting society appointed under the Copyright Act) under the retransmission scheme, and distribute it to relevant directors and overseas collecting societies.

Screen Producers’ Australia (SPA) is the organisation that represents screen producers in Australia. Our member producers are also entitled to a share of retransmission royalties under the Copyright Act. Historically, it has not been unusual for producers and directors to enter negotiations over these rights and for producers to contractually acquire the director’s share of retransmission royalties as part of these negotiations.

Recently SPA has entered into negotiations with the Australian Directors Guild (ADG) for an agreement to cover directors of scripted television drama and comedy telemovies, mini-series and series (only). SPA has reached an in-principle agreement to share the retransmission royalty with directors of these programs on a 50/50 basis and SPA has agreed that our members will not claim the director’s share for these programs. We note that the ADG has a relationship with ASDACS whereby 4 ADG members sit on the board of ASDACS.

### **Rationale for the authorisation**

ASDACS claim at paragraph 5.4 of their application that a rationale is to remove the *current inequality of bargaining power between individual directors (who generally freelance) and producers who are generally large and well-resourced production companies*. They claim that *many ASDACS directors have experienced exploitation within the industry and have struggled to retain retransmission rights*.

We take issue with this claim in a general sense. The Australian screen production sector is predominately made up of smaller businesses. The 2019 Deloitte Survey of the sector [[linked here Deloitte survey](#)] summarises as follows:

*The industry is predominately made up of smaller businesses. Chart 1.1 shows that this is reflected in the survey, where about 44% of businesses responding reported an annual production revenue of less than \$1 million. Another 42% reported a revenue between \$1 and \$10 million, while 7% had an annual turnover of between \$10 and \$25 million. The remaining 7% an annual turnover more than \$25 million.*

*This was similar to last year, where most businesses responding had an annual turnover of either less than \$1 million (59%) or between \$1 and \$10 million (23%).*

We also note that according to our own data, about 70% of SPA membership has between 1-5 full-time employees.

SPA does not object to an authorisation granting ASDACS the right to act on behalf of directors collectively in relation to retransmission rights. However, any authorisation granted to ASDACS should continue to permit commercial negotiation between individual producers and individual directors of programs - other than scripted television drama and comedy telemovies, mini-series and series - where those parties wish to negotiate directly.

The effect of this authorisation would be to render unviable the option for a director that they negotiate on rights directly with the producer. This is because to negotiate directly, the director must resign from ASDACS and forfeit other rights.

### **Effect of the authorisation**

At paragraph 4.1 of the application, ASDACS seeks to amend its constitution as follows:

*..4.1 (c) Should a member decide that he or she no longer wants their copyrights administered by ASDACS, he or she are able to resign from ASDACS and require a reassignment of their copyrights:*

*i. On no less than three months' notice to take effect on either 1 January or 1 July in any year; and*

*ii. For a minimum period of 12 months (a Reassignment)*

*provided also that the Director acquires consent in writing from any co-directors (that is, from any other director engaged to direct the relevant audio-visual production together and on an equal basis with the Director).*

SPA does not object to an authorisation that enables ASDACS to ask its members to assign to it their share of retransmission rights and confers on ASDACS the authority to act on behalf of those directors that agree.

However, SPA does object to the terms of this application. The application, if granted, would impose such an onerous requirement on those directors who wish to negotiate directly with producers, that it is not a viable proposition for directors to opt out of the assignment of rights to ASDACS.

This is because the only way to opt out of assignment is to resign from the organisation. The consequence of resigning from ASDACS is that the director forfeits all royalties they would otherwise receive from secondary rights usage collected by international collecting societies and disbursed by ASDACS to its members only.

As outlined in the ASDACS application, revenue from these international CMOs is significant and increasing, in contrast to royalties available under the retransmission scheme.

The effect of this requirement is that the price of opting out becomes prohibitively high. It is unreasonable to set the price of opting out at the forfeiture of other rights. This would mean that, in a very real, practical way, negotiating directly on a commercial basis is no longer a genuine option for those who wish to do so. In our submission, this runs contrary to the schema of the legislation.

We also note that the resignation procedure proposed at paragraph 4.1 (set out above) is markedly more onerous than ASDACS' general resignation process.

At clause 6 of the ASDACS constitution, the general process for resigning is as follows:

*... any member may resign from membership by giving not less than one months' notice in writing to expire on a 30th June or a shorter period of notice expiring at another time as the Board may (either generally or in a particular case) determine, and membership will cease at the expiration of that notice period.*

In the interests of preserving competition and to enable commercial negotiations to occur directly if parties wish, the application should be amended to give directors the capacity to opt out of the rights assignment without resigning from the organisation.

The option for producers and directors to negotiate directly on rights should remain available and viable for directors of programs other than scripted television drama and comedy telemovies, mini-series, and series. To ensure the viability of this as an option, directors preferring not to assign retransmission rights to ASDACS, should not have to resign from ASDACS and forfeit other rights. The election to opt-out should also be available on a production specific basis rather than, as proposed, for a specified time.

In SPA's submission, a more commercially viable proposal that also confers authority on ASDACS to act collectively on behalf of directors would be as follows:

*Should a member decide they no longer want their copyrights under the 'retransmission scheme' administered by ASDACS, they are able to either*

- i. resign from ASDACS in accordance with the constitution;*
- ii. opt out from assignment on written notice in relation to a particular production.*

Yours sincerely,



Zoe Angus  
Director, Industry & Commercial  
**Screen Producers Australia**