



Draft Determination

Application for authorisation

lodged by

Australian Writers' Guild Authorship Collecting Society Limited

in respect of

Amending its constitution to receive members' secondary royalties.

Authorisation number: AA1000642

Date 19 October 2023

Commissioners: Keogh

Lowe

Brakey

Summary

The ACCC proposes to grant authorisation to enable the Australian Writers' Guild Authorship Collecting Society to amend its constitution and require all current and future members, as a condition of their membership, to assign their rights to receive Secondary Royalties to the Australian Writers' Guild Authorship Collecting Society.

The ACCC proposes to grant authorisation for ten years.

The ACCC considers that the proposed conduct will likely result in better remuneration for scriptwriters, by way of less complicated and less time-consuming avenues for scriptwriters to obtain remuneration, by greater input into negotiations, by reducing the number of competing claims between its members and other parties, and more limited instances of unintentional or purported assignment of members' rights of remuneration, especially in cases where industry template agreements are not used. The ACCC considers that this, in turn, will likely result in some limited public benefit by way of assisting to retain and attract talent to the industry.

The ACCC considers that the proposed conduct is likely to result in public benefit by reducing transaction costs for both scriptwriters and the applicant when retrieving remuneration for script works, and due to likely reduced competing claims.

The ACCC notes that the proposed authorisation will not have any legal bearing on whether or with whom the right to receive Secondary Royalties exists for any piece of script work under the Copyright Act. This will remain a matter for the concerned parties to resolve.

The ACCC considers that any public detriments are likely to be minimal, considering membership to the Australian Writers' Guild Authorship Collecting Society is voluntary, and scriptwriters have the option to collect secondary royalties directly from Screenrights if they choose, by cancelling membership with the Writers' Guild Authorship Collecting Society. The ACCC is however seeking further submissions in relation to the value placed by members on access to other services offered by the Australian Writers' Guild Authorship Collecting Society, such as industry support and advice.

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

The application for authorisation

- 1.1. On 25 May 2023, the Australian Writers' Guild Authorship Collecting Society Limited (**AWGACS**) lodged an application for authorisation A1000642 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. AWGACS is seeking authorisation to amend its constitution to require members to assign their rights to receive Secondary Royalties to AWGACS as a condition of their membership. AWGACS is seeking authorisation for 10 years.
- 1.3. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides

businesses with protection from legal action under the competition provisions in Part IV of the Act. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the conduct would result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).

The Applicant - AWGACS

- 1.4. The Applicant is the Australian Writers' Guild Authorship Collecting Society (**AWGACS**), an industry representative body for writers. AWGACS currently acts on behalf of around 2300 members. AWGACS submits that it currently collects Secondary Royalties on behalf of approximately 400 members, which it submits represents a significant proportion of active members who are eligible to collect in practice.¹
- 1.5. AWGACS was established by the Australian Writers' Guild in 1996 as a not-for-profit organisation with the purposes of collecting and distributing secondary royalties to Australian and New Zealand writers of scripts and/or screenplays for film, TV or any other audio-visual production (**Writer Members**). AWGACS requires Writer Members to represent and warrant that they are the authors of the applicable works before collecting any royalties on their behalf. AWGACS has collected and distributed more than \$25 million² on behalf of Writer Members and \$2.4 Million in 2022.
- 1.6. AWGACS primarily collects and distributes to its members Australian Statutory Royalties and International Royalties (collectively, **Secondary Royalties**), from Australia and around the world. However, AWGACS also provides services including providing general support and advice to its members regarding Secondary Royalties and related rights and obligations, reviewing contracts, and providing the correct clauses used to retain the right to Secondary Royalties in Australia. Other services also include assisting its members with professional development, facilitating industry networking events, and internship opportunities. Writer Members are not required to pay a registration fee or periodic membership fee to be an AWGACS member. AWGACS retains a percentage of funds from royalties collected, to cover its operating costs (**Retained Revenue**).
- 1.7. In relation to international works, AWGACS and other Confederation of Societies of Authors and Composers (**CISAC**) members either use shared CISAC databases or communicate via email to register Writer Members' works. AWGACS is rarely involved in disputes regarding international royalties.

2. Background

Statutory Royalties

- 2.1. The Copyright Act 1968 (Cth) (**Copyright Act**) establishes a statutory scheme which allows third parties to use an author's copyright material for certain purposes prescribed by the legislation in exchange for payment of equitable remuneration to the relevant collecting society. The Copyright Act does not specify what an equitable level of remuneration would be.

¹ AWGACS submits that only approximately 50% of all members ever become eligible to receive any royalties and a portion of these will not reach the de minimis threshold required for distribution.

² As at 31 May 2022.

- 2.2. “Secondary royalties” are payments made where a third party uses a piece of work that has already been distributed to the public, as “secondary use”, in contrast to primary royalties, –paid when the work is initially broadcast.
- 2.3. A proportion of these Secondary Royalties comprise Australian statutory royalties, or equitable remuneration arising from the following statutory licences set out in the Copyright Act:
- i) cable and satellite retransmission rights under Part VC of the Copyright Act (Retransmission Royalties);
 - ii) copying and communicating works and broadcasts by educational institutions under Division 4, Part IVA of the Copyright Act (Educational Use Royalties); and
 - iii) use and reproduction by government agencies of previously broadcasted material under section 183 of the Copyright Act (Government Use Royalties),
- (collectively, “**Australian Statutory Royalties**”).
- 2.4. The 3 categories of entities which routinely use copyright material in exchange for mandatory payment of equitable remuneration are government organisations, educational institutions, and audio-visual service providers.³
- 2.5. In addition to collecting and distributing Australian Statutory Royalties, AWGACS has reciprocal arrangements with 33 international collecting societies for the collection and distribution of Secondary Royalties arising from the use of copyright material in foreign jurisdictions (International Royalties). This does not preclude scriptwriters from approaching international collecting societies directly.

Screenrights

- 2.6. Audio-Visual Copyright Society Ltd trading as Screenrights (**Screenrights**) is the designated royalty collecting society for audio-visual material under the Copyright Act.⁴
- 2.7. In or around 2000, Screenrights started to distribute “script” royalties to the scriptwriter(s) of the audio-visual works based on the contractual position of the parties. If the contract between the scriptwriter and the producer was silent in respect of royalties, no claim could be made by the scriptwriter and in most cases, the “script” royalties would be paid to the producer.
- 2.8. Following broad industry discussion, industry template agreements (e.g. the Series and Serials Agreement 2008 and the Miniseries and Telemovie Agreement 2010) included clauses that expressly reserve defined proportions of Secondary Royalties to the scriptwriter. This rate is currently 22.1% for audio-visual products as the “script” portion. However, AWGACS submits that these agreements are not always used.
- 2.9. The rate of 22.1% for literary & dramatic works is based on an initial Scheme of Allocation created by the ‘Copyright Interests Committee’ (a working group of representative bodies) in 1989. Both the Australian Writers Guild and Screen Producers Australia were members of the Copyright Interest Committee.

³ Those entities which have the right to retransmit free-to-air broadcasts.

⁴ Section 135ZZT of the Copyright Act.

Current Collection Agreement

- 2.10. The Proposed Conduct would replace the current practice of Writer Members being able to “opt in” to the current collection agreement with AWGACS.
- 2.11. AWGACS submits that Writer Members frequently elect to become a party to AWGACS’ Collection Agreement for Secondary Royalties (**Collection Agreement**). Approximately 400 Writer Members have signed the Collection Agreement. AWGACS submits that this represents a significant proportion of active Writer Members who are eligible to collect secondary royalties in practice.⁵
- 2.12. AWGACS membership is not currently conditional on Writer Members signing the Collection Agreement. In most cases, where AWGACS is actively collecting distributable royalties on behalf of a Writer Member, that member is a party to the Collection Agreement and such collection and distribution is performed by AWGACS pursuant to the terms of that agreement.
- 2.13. AWGACS submits that it has been contemplating replacing the framework established by the Collection Agreement with the Proposed Conduct for some time and has therefore not been actively encouraging Writer Members to sign up to the Collection Agreement.
- 2.14. The key provisions of the Collection Agreement are as follows:
- i) Writer Members licence the rights to administer their Australian Statutory Royalties and International Royalties (Licence) to AWGACS;
 - ii) the Licence is an exclusive licence;
 - iii) the Licence expressly permits AWGACS to collect Australian Statutory Royalties from Screenrights on behalf of its Writer Members;
 - iv) producers may still exploit primary rights in the Writer Members’ works, in accordance with the terms of any contract or assignment deed between a Writer Member and the relevant producer;
 - v) the Licence extends to capture any future secondary royalties in circumstances where collective management is the most appropriate mechanism for effectively collecting and distributing those royalties; and the Collection Agreement may be terminated by either AWGACS or the Writer Member by giving no less than 6 months’ notice.

Industry Agreements

- 2.15. Screen Producers Australia (**Screen Producers**)⁶ and the Australian Writers Guild, the establishing body of AWGACS, have negotiated 3 agreements which apply to select forms of scripted dramatic content, being:
- i) Miniseries & Telemovie Agreement; and
 - ii) Series and Serials Agreement; and
 - iii) Children’s Television Agreement.⁷

⁵ AWGACS submits that approximately 50% of all members ever become eligible to receive any royalties and a portion of these will not reach the de minimis threshold required for distribution.

⁶ The representative body for producers and production companies.

⁷ Screen Producers Australia submission, 30 August 2023, page 2.

2.16. Screen Producers submits that these agreements set the minimum rates and conditions on which a Screen Producers member is expected to engage writers when producing these forms of programs. Both the Miniseries & Telemovie Agreement and Series and Serials Agreement contain an operating clause regarding Secondary Royalties,⁸ in which it was agreed that the writers were entitled to the Secondary Script Royalties as prescribed by Screenrights. These clauses are extracted below:

...The Producer agrees that the Producer will not claim:

- a) *in relation to any copyright in the Script solely created by the writer pursuant to this Agreement, educational copying and communication royalties under Parts VA and VB and government copying royalties under section 183 of the Copyright Act, currently 22.1% of the total royalties payable by Screenrights or the rate as amended by Screenrights, retransmission royalties in Australia under Part VC of the Copyright Act, currently 22.1% of the total royalties payable by Screenrights or any alteration of the rate as amended by Screenrights; and*
- b) *payments in relation to the Script made under any other statutory or voluntary licensing scheme or under collective or reciprocal Agreements negotiated by collecting societies, including but not limited to the AWGACS, either in Australia under Australian law or in other countries under the law of those countries.*

2.17. Screen Producers submits that as far as it is aware, these contractual provisions are upheld, and the writers of the programs claim the Secondary Royalties either through AWGACS or directly from Screenrights.

2.18. Screen Producers submits that the Children's Television Agreement, on the other hand, is silent about Secondary Royalties. Under the Children's Television Agreement, writers and producers are free to negotiate who receives Secondary Script Royalties. Additionally, there are no agreements between Screen Producers and the Australian Writers Guild that cover feature films, documentaries, or any other form of production outside of the Miniseries & Telemovie Agreement, Series and Serials Agreement and Children's Television Agreement. For these productions, like the Children's Television Agreement, it is a commercial negotiation between the parties. Screen Producers understands that the Secondary Royalties, including the Secondary Script Royalties, for these productions are mostly claimed by the producer.

2.19. Screen Producers notes however that agreements between Screen Producers and the Australian Writers Guild inform standard industry practice and both organisations recommend their usage by members.

2.20. AWGACS submits that although industry template agreements contain clauses that expressly reserve Secondary Royalties to the scriptwriter, these agreements are not always used. Many production companies, free-to-air broadcasters, and international media companies have their own internal templates. It submits that an inequality in bargaining power often results in scriptwriters "signing away" their entitlement to Secondary Royalties.

The Proposed Conduct

2.21. AWGACS is seeking authorisation to amend its constitution to require members to assign their rights to receive Secondary Royalties to AWGACS as a condition of their membership.

⁸ Clause 21 of the Miniseries & Telemovie Agreement and clause 26 of the Series and Serials Agreement.

- 2.22. The proposed conduct would relate to all current and future AWGACS members who write, or may write, either a script or screenplay for a film, television program or any other audio visual production, which would thereby entitle them to receive Secondary Royalties (the **Proposed Conduct**).
- 2.23. Under the Proposed Conduct, AWGACS will amend its constitution to:
- i) require all prospective Writer Members to complete the Rights Assignment as a condition of their membership application being approved;
 - ii) require all existing Writer Members to either complete the Rights Assignment or resign as a member (subject to limited exceptions); and
 - iii) make the necessary ancillary amendments required to implement the Rights Assignment,
- (collectively, **Constitutional Amendments**).
- 2.24. 'Limited exceptions' at paragraph 2.23 (ii) above may be exercised at the discretion of the Board of AWGACS, and could be exercised in relation to, for example, deceased members estates or student members.
- 2.25. Under the Proposed Conduct, the right to receive Secondary Royalties would be assigned to AWGACS rather than being held by the Writer Member, and therefore the Writer Member would be unable to assign their copyright to a producer as part of negotiations about the terms on which the scriptwriter is engaged. AWGACS, as the representative for its members, will aim to ensure that industry template agreements are broadly used, equitable remuneration is paid to its members as intended by legislation, and that it raises awareness and provides education to its members (and production companies) on the rights of scriptwriters under the Copyright Act.
- 2.26. The Constitutional Amendments will replace the current practice of Writer Members being able to "opt in" to the current Collection Agreement (see paragraph 2.10 – 2.14 above).
- 2.27. AWGACS submits that any Writer Member who wishes to collect Secondary Royalties directly is free to do so. AWGACS membership is voluntary, and Writer Members are not prevented or impeded from receiving their minimum equitable remuneration⁹ by not signing up as a member.
- 2.28. AWGACS submits that the rationale for the Proposed Conduct is to:
- i) ensure scriptwriters are, more often than not, equitably remunerated for secondary uses of their works as intended by the legislation and Screenrights' policy;
 - ii) reduce the number and complexity of competing claims and the associated administrative burden and costs of handling these claims; and
 - iii) streamline processes and reduce the administrative costs associated with collecting and distributing Secondary Royalties in Australia.

⁹ Equitable remuneration payable under Part VA, VB or VC of the Copyright Act.

Reassignment of rights

- 2.29. A resigning Writer Member will receive a reassignment of rights relating to the collection and distribution of Secondary Royalties, which were previously assigned by the Writer Member to AWGACS. Each reassignment will be on terms which include:
- i) acknowledgement that there is a minimum 12 months' period during which the resigning Writer Member will not be able to re-register as an AWGACS member (unless the Board exercises its discretion to permit the application to be registered); and
 - ii) a delayed effective date which coincides with AWGACS' reporting periods (i.e. either 1 January or 30 June of the relevant year).

3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties including Screenrights Australia, Media Entertainment & Arts Alliance, Australian Communications and Media Authority, Australian Directors Guild, Screen Producers Australia, Screen Australia, Government agencies, and major free to air and subscription broadcasters.¹⁰
- 3.2. The ACCC has received a late submission from Screen Producers Australia (Screen Producers) in relation to this application. Screen Producers represents independent producers of audio-visual content in Australia.
- 3.3. Screen Producers objects to the application for authorisation on the following grounds:
- i) There remains uncertainty within the screen industry as to who is entitled to receive the literary portion of the Secondary Royalties collected with regard to a cinematographic film. As such it is inappropriate for the ACCC to be asked to determine that writers are the sole intended beneficiary of the secondary script royalties.
 - ii) Approval of the authorisation would:
 - (1) impose an onerous requirement on writers who wish to negotiate the Statutory Royalty directly with producers. In order to do so, the writer must resign from AWGACS and forego any secondary royalties arising from the use of copyright material in foreign jurisdictions.
 - (2) potentially give rise to more disputes of "competing claims" as there will be further confusion as to who is entitled to receive the statutory royalties.
- 3.4. AWGACS has responded to Screen Producers' submission and submits that Screen Producers, as the national industry body representing producers, has an obvious interest in maintaining a status quo which has historically benefitted its producer members to the detriment of writers and directors.
- 3.5. AWGACS submits that Scriptwriters who opt out of the Rights Assignment (and therefore, AWGACS membership) would not be barred from receiving Secondary Royalties. They would be able to obtain both Australian Statutory Royalties and International Statutory Royalties either directly or by becoming a member of an international collecting society.

¹⁰ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- 3.6. AWGACS does not agree that the Proposed Conduct is likely to cause “further confusion as to who is entitled to receive the Statutory Royalties”. It considers that the current system generates confusion and encourages departure from the statutory regime, by allowing producers to use their disproportionately strong bargaining power to claim their statutory percentage as well as that of writers. Conversely, a core purpose of the Proposed Conduct is to reduce confusion by reducing the number of potentialities of any Competing Claim.
- 3.7. These submissions are discussed further in the ACCC’s assessment below.

4. ACCC assessment

- 4.1. AWGACS 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 and 47 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.

Relevant areas of Competition

- 4.2. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.3. AWGACS submits that it operates exclusively for the benefit of its members and has no direct competitors. There are no other Australian organisations that offer or provide similar services to writers. Screenrights is the closest comparable organisation.
- 4.4. The ACCC considers that the relevant area of competition is likely to be the acquisition and supply of an author’s copyright material for certain purposes prescribed by legislation in exchange for payment of equitable remuneration, where authors include Australian and New Zealand writers of scripts and/or screenplays for film, TV or any other audio-visual production.
- 4.5. The ACCC considers that the Proposed Conduct may also impact the acquisition and supply of audio-visual content.

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 application for authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.7. With the Proposed Conduct, AWGACS members will assign their rights to receive Secondary Royalties to AWGACS as a condition of their membership. An AWGACS member will not have the choice to collect Secondary Royalties directly from Screenrights, unless they resign as an AWGACS member.
- 4.8. The ACCC considers that, in the absence of the Proposed Conduct, AWGACS members will continue with current practice, and have the option to sign the AWGACS Collection Agreement and assign the rights of collection of the Secondary Royalties to AWGACS. However, signing the Collection Agreement will not be mandatory on becoming a member of AWGACS. Without the Proposed Conduct, Writer Members will have the choice to collect Secondary Royalties directly from Screenrights, if they choose, while still remaining a member of AWGACS and concurrently benefiting from other services provided by AWGACS.

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 in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as 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.*¹¹

4.10. The ACCC has considered the following potential public benefits:

- Improved retention and attraction of talent to the industry as a result of better remuneration for Writer Members through improved input into negotiations, and
- a reduction in competing claims with reduced transaction costs for Writer Members.

Improved retention and attraction of talent to the industry as a result of better remuneration for Writer Members through improved input to negotiations

4.11. AWGACS submits that Secondary Royalties are typically derived from use of the copyright material across a number of platforms. This means that it is administratively impractical and often substantively difficult for individual Writer Members to monitor and collect these royalty amounts.¹²

4.12. AWGACS submits that it is in the public interest if the parties to the development of creative projects are fairly remunerated for their skills, personal exertion and artistry. And if so, the industry will continue to attract talent to perform the various roles making up that industry (i.e. screenwriters, directors, producers, musicians etc.).

ACCC View

4.13. The ACCC considers that the Proposed Conduct is likely to provide a less complicated and less time-consuming avenue for Writer Members to obtain remuneration that they are entitled to, as opposed to scriptwriters individually monitoring and collecting royalties owing. The Proposed Conduct is also likely to increase the amount of royalties obtained by scriptwriters, who may otherwise forego remuneration due to the perceived length and complexity of the recovery process.

4.14. The ACCC is of the view that AWGACS, as the party that would be collecting the Secondary Royalties for all of its Writer Members under the Proposed Conduct, is likely to have a more informed understanding of the rights of its members under the Copyright Act, and the relevant processes. It will also be better resourced and more informed than individual scriptwriters, which will reduce any information asymmetry during negotiations with producers in relation to Secondary Royalties. This is likely to

¹¹ 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.

¹² AWGACS, Application for authorisation, 25 May 2023, page 2.

result in outcomes from these negotiations that better reflect the contribution each party makes.

- 4.15. This is likely to increase and/or expedite appropriate remuneration to its members. It is also likely that any unintentional or purported assignment of members' rights of remuneration, especially in cases where industry template agreements are not used by producers, will be reduced. To the extent that the Proposed Conduct prevents an under-investment in writing, this would be a public benefit, assisting to retain and attract talent into the industry. The ACCC notes that the right to receive Secondary Royalties for any piece of script work under the Copyright Act will remain a matter to be determined by the concerned parties.

A reduction in competing claims with reduced transaction costs for Writer Members

- 4.16. AWGACS submits that it is frequently involved in resolving lengthy disputes between its members who are the original authors of scripts, and production companies, which have purchased copyright in the scripts, regarding the lack of agreement in relation to which one of them is entitled to the script portion of Secondary Royalties (**Competing Claims**).
- 4.17. AWGACS submits that it had 1291 Competing Claims under management for the year 2022/2023, which were due to expire in June 2023, and a further 449 cases which are likely Competing Claims, pending lodgement of the formal documentation. If these Competing Claims are not able to be resolved before they expire, the amounts representing the Secondary Royalties which are the subjects of the Competing Claims will not be distributed to any of the parties to the Competing Claims and will instead revert to a fund which is maintained by Screenrights for this purpose. The total amount which was due to expire in June 2023 was \$135,205.41 (**Expiring Royalties**). Of this, approximately \$17,159.13 was expected to be recouped by the Writers' Guild.
- 4.18. AWGACS submits that reducing the number of Competing Claims would, in turn, result in a greater proportion of the Expiring Royalties being distributed to parties involved in the underlying projects, rather than expiring and not being able to be distributed to any of the stakeholder parties.
- 4.19. AWGACS submits that the Proposed Conduct would reduce the number of Competing Claims by establishing a strong presumption that AWGACS (and ultimately, the relevant Writer Member), is the party rightfully entitled to receive Secondary Royalties from Screenrights on behalf of all its members, for the script portion of works. Any subsequent purported assignment of those rights to a third-party producer, for example, while the writer is a Writer Member, would be ineffective.

Screen Producers submission

- 4.20. Screen Producers submits that the majority of claims for Secondary Royalties are made by producers. This indicates that producers believe they, as the owner of copyright in an audio-visual work, are rightfully entitled to the Statutory Royalties. If authorisation is approved, this is unlikely to change. Producers, used to claiming all Secondary Royalties, will likely continue to make claims for Secondary Royalties, as the copyright owner, leading to continued or increased disputed claims.
- 4.21. Further, Screen Producers submits that the Proposed Conduct may give rise to further disputed claims particularly in scenarios when the Scriptwriter has not informed the producer they are a member of AWGACS.
- 4.22. Screen Producers submits that it is an established contracting practice in the screen industry to include standard warranties with all creators engaged on a production

(writer, director, etc.). These warranties include that the Scriptwriter has not dealt with or encumbered the assigned rights in any way that would inhibit or restrict the producer's exploitation of them.

- 4.23. Screen Producers submits that, in this scenario, the Scriptwriter would be in breach of this warranty as they have already dealt with the assigned rights in a way that would prohibit the producer benefit – they have assigned the right to receive Statutory Royalties to AWGACS, allowing AWGACS to claim on their behalf. This creates more instances where AWGACS, on behalf of the Scriptwriter, and the producer are entering competing claims for the script portion of the Statutory Royalties.
- 4.24. If Screenrights is required to change its presumptions when handling disputed claims, as a result of authorisation, this scenario may escalate to a contract law dispute. Under the arrangement being proposed, there may be a presumption that the writer, through AWGACS, would receive the Secondary Royalties, in contradiction of their contract with the producer. Screen Producers fears such disputes would only be resolved through the legal system.

AWGACS' response

- 4.25. Regarding the potential breach of contractual warranties and an increase in contract law disputes, AWGACS submits that Writer Members and producers should be educated and/or advised by their relevant industry membership bodies and, if required, their lawyers in relation to the purpose and effect of the "standard warranty" in creators' contracts (with a production company being more likely to have the resources to seek advice). Providing such advice would be straightforward if the Proposed Conduct is approved, and it follows that the parties who are contracting with each other are in agreement about the meaning and effect of the terms which they agree to. In respect of any warranty which relates to prior dealings and encumbrances, the drafting of such a clause in the contract could easily further clarify, where not already sufficiently apparent, that the retention of Secondary Royalties by a scriptwriter does not inhibit or restrict the producer's right to commercially exploit any assigned copyright in underlying works, which is the parcel of assigned rights which is typically of principal interest to producers.
- 4.26. AWGACS also submits that Screenrights has a process for resolving disputes involving producers and writers about who is entitled to the Secondary Royalties. This Competing Claims Resolution Procedure provides a framework that assists competing parties to communicate with each other, to encourage a timely resolution, as opposed to writers and producers going to litigation in the first instance. Further, the amounts in question are generally very modest (e.g. most claims are below \$1000) and well below the threshold for litigation.

ACCC View

- 4.27. The ACCC considers that the Proposed Conduct is likely to result in transaction cost savings for AWGACS, due to a reduction in the administration involved for AWGACS in claiming Secondary Royalties from Screenrights. AWGACS will not need to review each contract individually and determine whether in each case the right to receive Secondary Royalties may have been inadvertently or purported to have been assigned by the scriptwriter to another party.
- 4.28. The ACCC understands that writers incur transaction costs in the form of administrative costs, legal and expert advice, and time when negotiating the distribution of Secondary Royalties with producers, especially if industry template agreements are not used. Costs are also incurred in recouping Secondary Royalties from Screenrights, and in potential Competing Claims processes.

- 4.29. The ACCC considers that the likelihood of additional Writer Members assigning their rights to receive Secondary Royalties to AWGACS under the Proposed Conduct is likely to result in a public benefit in the form of reduced transaction costs.
- 4.30. The ACCC accepts that the number of current Competing Claims, and as a result, the amount of Expiring Royalties that often do not get dispersed to scriptwriters, is a significant loss to the industry and its members.
- 4.31. The ACCC considers that the Proposed Conduct is likely to establish a stronger presumption for Screenrights and Producers that all AWGACS members have assigned it as the party entitled to receive Secondary Royalties on their behalf. While there may be a short period of transition as producers come to understand this new approach, this is likely in turn to reduce the number of Competing Claims between Writer Members and Producers.
- 4.32. The likely reduction in Competing Claims between Writer Members and producers under the Proposed Conduct would result in public benefit by reducing the administrative costs and burden to Writer Members in engaging in such Competing Claims with producers and/or Screenrights. The ACCC also considers that the Proposed Conduct is likely to result in reduced administrative costs associated with Competing Claims over the course of the period of authorisation.
- 4.33. Without the Proposed Conduct, and with potentially more Competing Claims to be independently defended by scriptwriters, transaction costs may outweigh the perceived benefit of such a process, and screenwriters may choose to avoid the process and/or negotiation and forego fair remuneration for their work.
- 4.34. Writer Members not currently signed up to the Collection Agreement are not required to pay a registration fee or periodic membership fee to be an AWGACS member. Under the Proposed Conduct, AWGACS will retain a percentage of funds from royalties collected, to cover its operating costs from all Writer Members. Non-members who retrieve Secondary Royalties directly from Screenrights would not be paying this amount from the Secondary Royalties (see paragraph 1.6 above). As a result, the extent of this public benefit will be reduced somewhat by the proportion of funds from royalties collected that is retained by AWGACS to cover its operating costs.
- 4.35. The ACCC also notes that the number of Writer Members that have already signed the Collection Agreement represents a significant proportion of active Writer Members who are eligible to collect Secondary Royalties in practice. Therefore, the transaction cost savings to be achieved by the remaining Writer Members eligible to collect Secondary Royalties is not likely to be substantial.

ACCC conclusion on public benefit

- 4.36. The ACCC considers that the Proposed Conduct is likely to result in public benefit by increasing remuneration to Writer Members through improved input into negotiations with producers in relation to the Secondary Royalties, (especially reducing cases of unintentional or purported assignment of members' rights of remuneration, where industry template agreements are not implemented by producers). This is likely to increase and/or expedite remuneration to AWGACS members. To the extent that the Proposed Conduct prevents an under-investment in writing, this would be a public benefit, assisting to retain and attract talent into the industry.
- 4.37. The ACCC also considers that the Proposed Conduct will result in a reduction of Competing Claims leading to reduced transaction costs for AWGACS, due to a reduction in the administration involved for AWGACS in claiming Secondary Royalties from Screenrights. There will be some further transaction cost savings to AWGACS as it will not need to review each contract individually in claiming Secondary Royalties.

4.38. The ACCC considers that the Proposed Conduct is likely to result in some transaction cost savings to AWGACS' members. However, this benefit may not be substantial, depending on the number of new writers that AWGACS would then represent and the percentage of funds from the Secondary Royalties collected by AWGACS, to cover its operating costs.

Public detriments

4.39. 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.*¹³

4.40. AWGACS does not consider that the Proposed Conduct will result in any public detriment.

4.41. The ACCC notes the submission by AWGACS that membership to AWGACS is voluntary, and script writers have the option to collect royalties directly from Screenrights if they choose, by not becoming members of AWGACS, or discontinuing their membership with AWGACS.

4.42. The ACCC considers however that the Proposed Conduct is likely to result in some public detriment, outlined below.

Access to AWGACS services

4.43. Under the Proposed Conduct, scriptwriters who would like to collect royalties directly from Screenrights, while concurrently benefitting from services offered by AWGACS, such as industry support and advice, would no longer be able to take advantage of these services unless they assign their rights to collect Secondary Royalties to AWGACS. By assigning these rights, fees would then be payable to AWGACS (to cover operating costs) that would not have previously been paid by the scriptwriter (see paragraph 1.6 above).

4.44. AWGACS submits that of its approximately 2100 members, around 400 Writer Members have already signed the current Collection Agreement, which represents a significant portion of active Writer Members eligible to collect Secondary Royalties.

4.45. Further, the ACCC understands that scriptwriters that are not members of AWGACS have the option to join the Australian Writers' Guild, New Zealand Writers Guild or approach external legal counsel to seek advice about their contracts and rights. AWGACS also provides general information to anyone who wants to understand the nature of Secondary Royalties, regardless of membership.

4.46. The ACCC therefore considers that this detriment is likely to be minimal. However, the ACCC is seeking the views of interested parties, particularly Writer Members, on any potential detriments they may foresee from the Proposed Conduct, including:

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

- i) Whether and what proportion of Writer Members would be likely to cancel their membership with AWGACS, and why.
- ii) If Writer Members choose to cancel their membership, their views on no longer having access to services offered by AWGACS.

Uncertainty from authorisation

- 4.47. Screen Producers submits that currently there is uncertainty within the industry as to whether the Australian Statutory Royalty scheme was designed to entitle the original authors of literary works (the script) in a cinematographic film, or the owner of the copyright in the cinematographic film at the time the Statutory Royalty becomes payable, to claim the Secondary Royalties.
- 4.48. In light of this uncertainty, Screen Producers submits that it is inappropriate for the ACCC to be asked to determine the intent of the legislation by granting this authorisation. An approval allowing AWGACS to amend its constitution would set a profound precedent in relation to who is entitled to receive these royalties.
- 4.49. Screen Producers submits that until the uncertainty is resolved, Screen Producers would not object to an amendment to AWGACS' constitution which allowed for the automatic assignment of the right to collect Secondary Royalties on behalf of the scriptwriter, for projects where the scriptwriter has negotiated that entitlement with the producer.
- 4.50. AWGACS does not agree that the Proposed Conduct is likely to cause further confusion as to who is entitled to receive the Statutory Royalties.
- 4.51. AWGACS submits that the current system generates confusion and encourages departure from the statutory regime, by allowing producers to use their disproportionately strong bargaining power to claim their statutory percentage as well as that of writers. Conversely, a core purpose of the Proposed Conduct is to reduce confusion by reducing the number of Competing Claims where the matter is to be assessed on a contract-by-contract basis to determine whether the Writer Member has assigned their rights to receive Secondary Royalties to a producer (or any third party).
- 4.52. The ACCC notes concerns raised by Screen Producers that the authorisation may lead to the interpretation of the Proposed Conduct that scriptwriters are the entitled beneficiaries of Secondary Royalties under the Copyright Act.
- 4.53. However, the ACCC considers that the Proposed Conduct sought under the application for authorisation is limited to an assignment of rights to AWGACS to undertake the collection and distribution of Secondary Royalties on behalf of Writer Members, in instances where the Writer Member is eligible to collect secondary royalties pursuant to the Copyright Act and contractual law. Authorisation of the Proposed Conduct does not have a legal bearing on the interpretation of the Copyright Act or legal ownership of Secondary Royalties. It is not a legal instrument capable of confirming or denying the entitlement of Secondary Royalties for any given script. This will remain a matter for the concerned parties to resolve.

International royalties

- 4.54. Screen Producers submits that the consequence of resigning or being excluded from membership of AWGACS is that writers would forfeit all secondary royalties that they would have otherwise received from usage of their script work in foreign jurisdictions, collected by international collecting societies and disbursed by AWGACS to its members.

- 4.55. Screen Producers submits that through negotiated partnerships with foreign collecting societies, AWGACS is the only body approved to receive international Secondary Royalties. The majority of these partnerships are with European countries due to the fact that their copyright laws, as opposed to Australia's, often acknowledge that authors' entitlements to secondary royalties are an important passive income stream that cannot be given away. A member who has resigned or is excluded from AWGACS membership will be unable to receive international secondary royalties for works they have written. The price of opting out becomes prohibitively high.
- 4.56. In response, AWGACS has confirmed that scriptwriters who opt out of the Rights Assignment (and therefore, membership) would not be barred from receiving Secondary Royalties. They would be able to obtain both Australian Statutory Royalties and International Statutory Royalties either directly or by becoming a member of another international collecting society.

ACCC conclusion on public detriment

- 4.57. The ACCC considers that it is possible that the Proposed Conduct may result in some detriment to individual Writer Members who wish to remain members of AWGACS, and benefit from its resources and services, but want to retain the ability to negotiate directly with producers regarding Statutory Royalties, for some or all of their script work. These Writer Members would be required to either forgo the opportunity to negotiate Secondary Royalties directly or lose the other benefits of AWGACS membership such as access to seminars, events and educational resources.
- 4.58. However, the ACCC understands that scriptwriters could access similar professional development opportunities and resources through membership to the Australian Writers' Guild (AWGACS' parent body), and could access international Secondary Royalties through international collecting societies, (although joining international collecting societies may further increase costs to the scriptwriter).
- 4.59. The ACCC therefore considers that any such public detriment is likely to be small, and notes that no scriptwriters have raised concerns about the Proposed Conduct. Further, the ACCC notes that the Proposed Conduct relates only to Secondary Royalties, and does not prevent scriptwriters and producers from negotiating directly about the majority of their (primary) contractual rights.
- 4.60. The ACCC does not consider that the Proposed Conduct is likely to result in significant detriment by increasing uncertainty in determining who is entitled to receive Secondary Royalties. The proposed authorisation will not have any legal bearing on whether or with whom the right to receive Secondary Royalties exists for any piece of script work under the Copyright Act. This will remain a matter for the concerned parties to resolve.

Balance of public benefit and detriment

- 4.61. 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.
- 4.62. The ACCC is however seeking views from interested parties, particularly script writers, on issues raised in the draft determination, to inform the ACCC's final decision.

Length of authorisation

- 4.63. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁴ 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.
- 4.64. In this instance, AWGACS seeks authorisation for 10 years.
- 4.65. Given the ACCC's conclusion on the balance of public benefits and detriments, the ACCC considers that 10 years is an appropriate period for authorisation. The ACCC notes that if there is a material change in circumstances such that the proposed conduct were no longer resulting in a net public benefit, the ACCC could review the authorisation during that period.

5. Draft determination

The application

- 5.1. On 25 May 2023, the Australian Writers' Guild Authorship Collecting Society Limited (**AWGACS**) lodged an application for authorisation AA1000642 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicant seeks authorisation for Proposed Conduct. 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 would or 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 AA1000642 to AWGACS to amend its constitution to require members to assign their rights to receive Secondary Royalties to AWGACS as a condition of their membership with AWGACS.
- 5.7. The proposed conduct would relate to all current and future AWGACS members who write, or may write, either a script or screenplay for a film, television program or any

¹⁴ Subsection 91(1) of the Act.

other audio-visual production, which would thereby entitle them to receive Secondary Royalties.

- 5.8. Under the proposed conduct, AWGACS will amend its constitution to:
- i) require all prospective Writer Members to complete the Rights Assignment as a condition of their Writers' Guild membership application being approved;
 - ii) require all existing Writer Members to either complete the Rights Assignment or resign as a Writers' Guild member (subject to limited exceptions); and
 - iii) make the necessary ancillary amendments required to implement the Rights Assignment.
- 5.9. The Proposed Conduct 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 within the meaning of section 45 and 47 of the Act.
- 5.10. The ACCC proposes to grant authorisation AA1000642 for ten years.
- 5.11. This draft determination is made on 19 October 2023.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. 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.