



Final Determination

Application for authorisation
lodged by

Australian Screen Directors Authorship Collecting Society Ltd
in respect of

arrangements for the distribution of income arising from retransmission
of audio-visual work

Authorisation number: AA1000474

Date: 28 August 2020

Commissioners: Sims

Keogh

Rickard

Court

Ridgeway

Summary

The ACCC has decided to grant authorisation until 19 September 2025 to enable the Australian Screen Directors Authorship Collecting Society Ltd (ASDACS) to make its membership conditional upon directors assigning to it specific copyrights in relation to the retransmission of the films they direct (the Proposed Conduct).

Directors have a copyright ownership interest in the non-commissioned films they direct (the Relevant Rights), and they may assign the Relevant Rights, along with the entitlements to any related retransmission remuneration, to other parties.

Under the Proposed Conduct, the Relevant Rights of ASDACS members would be held by ASDACS and therefore could not be assigned by the director to any other party. Any producer that, as part of the terms of engagement of a director who is an ASDACS member, sought to have a share of the retransmission remuneration that would otherwise be allocated to the director would need to negotiate about this with ASDACS.

The ACCC considers that the Proposed Conduct is likely to result in improved negotiations regarding the Relevant Rights. ASDACS is likely to be better resourced and informed than individual directors in undertaking negotiations with producers and other industry bodies about the Relevant Rights.

The ACCC also considers that, by requiring its members to assign the Relevant Rights to it, ASDACS can reduce the transaction costs associated with claiming and distributing retransmission remuneration for each of its members on an individual basis. Further, the mandatory assignment of the Relevant Rights to ASDACS is likely to result in fewer resources being spent in determining who owns the Relevant Rights if such a dispute arises. The ACCC notes authorisation of the Proposed Conduct will not have any legal bearing on other aspects of the Relevant Rights aside from ownership, such as whether they exist for any particular film under the Copyright Act. This will remain a matter for the concerned parties to resolve.

The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriment. While the Proposed Conduct will require producers, including smaller producers, to negotiate with ASDACS, this is unlikely to significantly increase transaction costs because ASDACS intends to adopt a single position regarding the share of retransmission remuneration. Mandatory assignment of the Relevant Rights and ASDACS' single position may result in loss of choice for directors who are ASDACS members to negotiate directly with producers, and thereby reduce market flexibility, but it will provide certainty for the parties involved and has not been raised by directors as a concern. In addition, the terms of assignment of the Relevant Rights does not appear to be a significant source of competition between directors in seeking to be appointed by a producer to direct a film.

The ACCC has decided to grant authorisation for five years.

1. The application for authorisation

- 1.1. On 13 March 2020, the Australian Screen Directors Authorship Collecting Society Ltd (**ASDACS**) lodged application for authorisation AA1000474 with the Australian Competition and Consumer Commission (the **ACCC**). ASDACS is seeking authorisation to alter its constitution to make its membership conditional upon directors assigning to it all of the copyrights directors have in relation to the 'Retransmission Scheme', as set out in the *Copyright Act 1968* (Cth) (the **Copyright Act**).

- 1.2. Authorisation is sought on behalf of current and future members of ASDACS for five years.
- 1.3. This application for authorisation AA1000474 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.4. The ACCC can 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, ASDACS' director members may be in competition with each other, for example, to obtain contracts with film producers.

ASDACS

- 1.5. ASDACS administers and distributes to directors remuneration for audio-visual productions arising from any right conferred on screen directors by legislation in any country, including the Copyright Act. ASDACS manages domestic distributions for directors of monies received from the designated collecting society in Australia (Audio-Visual Copyright Society Limited, trading as **Screenrights**). ASDACS also receives from overseas collecting societies, and distributes to its director members, royalties payable under foreign legislation for the use of films shown in other countries.
- 1.6. ASDACS does not license the use of copyrighted films on behalf of members, or collect copyright fees directly from users of copyrighted films, nor is it involved in any way in negotiations with users of copyrighted films about the level or other terms of licence fees. ASDACS simply receives and distributes to its members monies remitted by Screenrights. In this way, ASDACS differs from some other copyright collecting societies. For example, collecting societies such as the Australasian Performing Right Association Ltd (**APRA**) issue licences for businesses to use their members' works, and charges fees for these licences – in the case of APRA, a licence for the business to play musical works of its members who are composers, songwriters and music publishers.
- 1.7. ASDACS also offers support and general advice on members' rights and entitlements and provides support to industry and its members through a cultural and charitable purpose fund. ASDACS may also institute or defend legal proceedings for the purpose of enforcing the rights of its members.
- 1.8. ASDACS submits that its membership base covers a significant proportion of audio-visual directors working within Australia. ASDACS advises that it is difficult to estimate the number of directors actively working in Australia. Employment in the industry is typically transient in nature, with many directors working on a freelance basis. Data compiled by Screen Australia shows that 1 129 people reported that, between 2006 and 2011, their primary occupation was as a director in film, television, stage or radio.¹ This suggests that ASDACS' current 1 172 members represents a significant cross-section of these audio-visual directors.

The Proposed Conduct

- 1.9. ASDACS seeks authorisation, on behalf of its current and future director members who are involved in directing films, documentaries, television programs, television serials or any other audio-visual production (all referred to herein as **films**), for a period of five years.

¹ Screen Australia, Employment Trends: Occupations, accessed 21 May 2020: <https://www.screenaustralia.gov.au/fact-finders/people-and-businesses/employment-trends/occupations>.

- 1.10. ASDACS is seeking authorisation to alter its constitution to provide that:
- (a) as a condition of membership, members must assign to ASDACS all future copyright, and any past or present copyrights they hold in relation to the 'Retransmission Scheme' (as set out in the Copyright Act)
 - (b) ASDACS will administer the collection and distribution of income attributable to director members under the Retransmission Scheme, and
 - (c) after a minimum period of 12 months and with a minimum of three months' notice, members may resign from ASDACS and require the reassignment of their copyrights from ASDACS
- (the **Proposed Conduct**).

No effect on when the Relevant Rights arise

- 1.11. In light of concerns raised by an interested party (discussed below from paragraph 3.8) that the authorisation may favour or lead to a broader interpretation of the circumstances in which directors have the Relevant Rights under the Copyright Act, the ACCC notes that authorisation of the Proposed Conduct has no bearing on whether the Relevant Rights do or do not exist for any particular film or class of films. This authorisation is not a legal instrument capable of confirming or denying the entitlement of a director to the Relevant Rights for any given film.
- 1.12. ASDACS has not sought authorisation for, and the Proposed Conduct does not cover, films that are commissioned within the meaning used in subsection 98(4) of the Copyright Act. Further, unless agreed otherwise, for films that are directed by a director pursuant to the terms of an employment agreement, the Relevant Rights do not exist and therefore the Proposed Conduct does not have any effect (subsection 98(5) of the Copyright Act).

2. Background

- 2.1. The entitlement that falls within the scope of the proposed assignment of rights from directors to ASDACS is comprised of any copyright ownership interest in a non-commissioned cinematograph film that a director has by virtue of section 98 of the Copyright Act (the **Relevant Rights**).
- 2.2. The scope of the Relevant Rights is limited and extends 'only so far as the copyright consists of the right to include the film in a retransmission of a free-to-air broadcast' (subsection 98(6) of the Copyright Act).
- 2.3. The Relevant Rights are only assignable to ASDACS under the Proposed Conduct for certain films. Under the Copyright Act, the Relevant Rights do not exist for directors, and therefore cannot be assigned, where the film was directed pursuant to the terms of an employment agreement (unless otherwise agreed) or commissioned within the meaning of subsection 98(4) of the Copyright Act (as opposed to independently produced).
- 2.4. The ACCC notes that this authorisation does not have a legal bearing on the interpretation of the Copyright Act. While the ACCC understands that industry bodies such as the Australian Directors' Guild (**ADG**) and Screen Producers Australia (**SPA**) may disagree about the circumstances in which a film is commissioned or non-commissioned, and therefore when the Relevant Rights exist for a director, ASDACS submits that, in practice, very few disputes have arisen on this topic.

Retransmission Scheme

- 2.5. Copyrights in the retransmission of free-to-air broadcasts are dealt with under the Retransmission Scheme. Retransmission is the simultaneous or delayed transmission of a free-to-air broadcast, usually over a cable or satellite network. For example, Foxtel may retransmit free-to-air channels as part of its service package. However, the Retransmission Scheme does not apply to retransmissions taking place over the internet.
- 2.6. The Retransmission Scheme enables retransmitters to retransmit free-to-air broadcasts without breaching copyrights where they have given the relevant collecting society a 'remuneration notice' (that is, an undertaking to pay Retransmission Remuneration, or 'equitable remuneration', to the relevant collecting society for the underlying copyrights).
- 2.7. The Federal Government has declared Screenrights to be the relevant collecting society for the Retransmission Scheme. Screenrights is a not-for-profit membership organisation that provides rights and royalty management services to the screen industry. In the first instance, Screenrights negotiates the rates of Retransmission Remuneration with retransmitters, but where Screenrights and a retransmitter cannot agree on the rate, the Copyright Act provides for the Copyright Tribunal to determine the rate.
- 2.8. Screenrights then distributes any Retransmission Remuneration collected under the Retransmission Scheme to the owners of the Relevant Rights for films (as well as the owners of copyrights in the relevant music, scripts, recordings and artworks included in films). While section 98 of the Copyright Act expresses the Relevant Rights in terms of directors owning, for limited purposes, a part of the copyright in the film, the Relevant Rights are essentially only the right to receive a portion of the monies collected from retransmitters and distributed to the relevant copyright owners by Screenrights under the Retransmission Scheme.

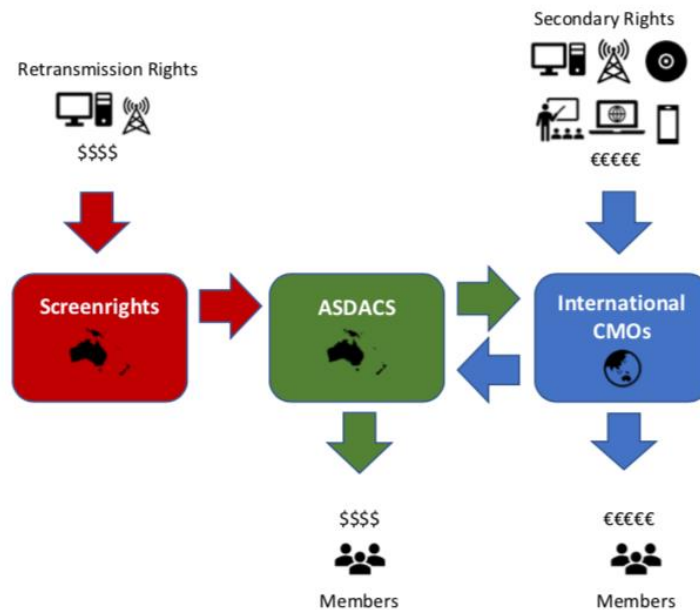
ASDACS' role in the Retransmission Scheme

- 2.9. Currently, ASDACS' director members may give their authority for ASDACS to receive on their behalf, in respect of some or all of their non-commissioned films, Retransmission Remuneration from Screenrights. Where one or more of the directors of a film are based overseas, ASDACS may also remit Retransmission Remuneration for a film to relevant overseas societies with which ASDACS has exclusive reciprocal arrangements.²
- 2.10. ASDACS is not involved in setting or negotiating the level of fees or equitable remuneration with retransmitters. As noted above, this role is undertaken by Screenrights. Rather, ASDACS receives Retransmission Remuneration from Screenrights under the Retransmission Scheme that would have otherwise been paid directly to the director, and distributes that money to its director members, and overseas collecting societies.
- 2.11. Under the Proposed Conduct, ASDACS' director members must assign all Relevant Rights to ASDACS upon membership. ASDACS will then, as the owner of the Relevant Rights, claim Retransmission Remuneration from Screenrights for any non-

² ASDACS currently has over 37 international collecting society partnership agreements primarily covering territories within Europe and South America and collects international royalties related to theatrical exhibition, non-theatrical exhibition, TV broadcasting, cable retransmission, communication, video sales and rental, on-demand online, private copying, educational and public lending rights.

commissioned films directed by its members and distribute it, in accordance with ASDACS' distribution rules, to relevant director members and overseas societies.

Table 1 – The relationships and relevant transactions.³



Rationale for the Proposed Conduct

2.12. ASDACS submits that in practice a director's ability to collect Retransmission Remuneration is limited. It submits that directors are more often than not presented with contracts under which they are required to assign all of their copyrights, including the Relevant Rights where they exist, to the producer engaging them to direct a film or face losing the work.

2.13. Under the Proposed Conduct, the Relevant Rights would be owned by ASDACS rather than the director, and therefore the director would be unable to assign the rights to the producer as part of the negotiations about the terms on which the director is engaged to direct a non-commissioned film.

2.14. ASDACS submits that the rationale for the Proposed Conduct is to:

- ensure that directors benefit from their statutory entitlements under the Retransmission Scheme through more consistently being able to receive the Retransmission Remuneration in circumstances where they may individually have little bargaining power in contract negotiations with producers, and
- reduce the overall costs of claiming and distributing the Retransmission Remuneration, including by reducing ASDACS' administrative costs and the resources spent by individual directors, ASDACS and producers in settling disputes over Retransmission Remuneration.

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 Application for authorisation AA1000474, para 3.22.

- 3.2. The ACCC invited submissions from a range of potentially interested parties including relevant industry associations, independent directors, production companies and broadcasters.
- 3.3. The ACCC received submissions from three interested parties in response to ASDACS' application for authorisation. Public submissions from ASDACS and interested parties are on the Public Register for this matter:
<https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australian-screen-directors-authorship-collecting-society-ltd-asdacs>.

Submissions before the draft determination

- 3.4. In summary, interested parties generally consider the Proposed Conduct will decrease the administrative load for directors. In particular, Piccolo Films (whose joint company director has worked as both an independent producer, director and former president of the Australian Directors' Guild (**ADG**)) submitted that having an entity like ASDACS administer secondary income for directors would give certainty and continuity to agreements, and reduce administrative load and legal fees when negotiating agreements. In addition, Piccolo Films submitted that having ASDACS represent directors would contribute to better working relationships with production companies and less stress around the making of a film, leaving directors free to focus on their creative work.
- 3.5. The ADG provided a submission in support of the Proposed Conduct. The ADG is a close affiliate of ASDACS and is an industry guild representing the interests of over 700 directors across Australia who work in the film, television, online, arts and entertainment, music video, animation, commercial advertising and related industries. The ADG submitted that working directors predominantly work as contractors and in practice are pressured to assign the Relevant Rights to producers without receiving any compensation for the transfer. The ADG submitted that secondary royalty income (such as Retransmission Remuneration) serves as an important supplementary source of income for directors, and that mandatory assignment of the Relevant Rights to ASDACS as a condition of membership will ensure that directors receive their share of the Retransmission Remuneration and greatly reduce the administrative burden (assessing and presenting contracts) currently associated with providing proof on a case-by-case basis that the Relevant Rights have been retained.
- 3.6. One interested party provided submissions that did not support aspects of the Proposed Conduct. Screen Producers Australia (**SPA**, formerly, the Screen Producers' Association of Australia) submitted that the authorisation should allow directors to opt out of assigning the Relevant Rights to ASDACS without being required to resign from ASDACS. This issue is discussed in further detail below.

Submissions after the draft determination

- 3.7. On 17 June 2020, the ACCC issued a draft determination proposing to grant authorisation for five years. A pre-decision conference was not requested following the draft determination.
- 3.8. In response to the Draft Determination, SPA submitted that authorisation should not be granted because it would effectively confer validity on an interpretation of section 98 of the Copyright Act held by ASDACS that is the subject of a long standing disagreement between SPA, ASDACS and the ADG. SPA submitted that it and the ADG have been in long standing disagreement as to what constitutes a 'commissioned film' (as referred to in subsection 98(3) of the Copyright Act) as opposed to a non-

commissioned film under subsection 98(4), and thereby whether or not a director is a copyright owner for the purposes of the right to claim royalties for the retransmission of free-to-air broadcasts in Australia under the Retransmission Scheme.

- 3.9. In response, ASDACS submitted that the issue raised by SPA is not relevant to the authorisation as commissioned films are excluded from the scope of the Relevant Rights and therefore excluded from the Proposed Conduct. ASDACS notes that the Proposed Conduct only applies where a director would own the Relevant Rights under the Copyright Act. ASDACS further submitted that, in practice, only two or three out of 2 223 claims lodged with Screenrights over the past five and a half years have involved a dispute regarding whether the film was a commissioned film.
- 3.10. The ACCC notes that, as the Relevant Rights by definition only include those rights that are conferred on directors under section 98 of the Copyright Act, the Proposed Conduct does not extend to commissioned films. Where the relevant parties are in dispute as to whether a film is a 'commissioned film' for the purposes of the Copyright Act, the dispute remains private and a matter for the relevant parties to resolve. The Proposed Conduct has no legal bearing on the interpretation of what is or is not a commissioned film.
- 3.11. Additionally, SPA submitted that the Proposed Conduct would increase transaction costs, shift the balance of bargaining power away from small production companies toward ASDACS and reduce market flexibility. These submissions are discussed further below.

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. ASDACS has sought authorisation for 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 (authorisation test).
- 4.3. To assist with the assessment of the Proposed Conduct, the ACCC considers that:
 - the relevant areas of competition are likely to be in relation to competition:
 - amongst freelance directors to be appointed by producers to direct films, and
 - between ASDACS and other entities for the administration and distribution of Retransmission Remuneration, and
 - the likely future without the Proposed Conduct is the status quo, in which ASDACS members would retain the Relevant Rights and negotiate with producers individually in relation to those rights, and be free to choose whether to authorise ASDACS to manage Retransmission Remuneration on their behalf in relation to some or all of their films.

Public benefits

- 4.4. 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.*⁴

4.5. The ACCC has considered the following public benefits:

- improved input into negotiations about the Relevant Rights
- transaction cost savings in negotiating ownership of the Relevant Rights and administering and distributing Retransmission Remuneration, and
- improved bargaining power for directors.

Improved input into negotiations about the Relevant Rights

4.6. ASDACS submits that directors are largely unaware of their retransmission rights and entitlements prior to joining ASDACS. ASDACS dedicates resources specifically to making directors aware of their rights and raising awareness, including seminars, events and e-news to educate their members and directors more generally. ASDACS submits that in a number of cases, its members had negotiated what they thought was ASDACS' standard retransmission clause, but the clause had been re-worded by the production company in a way that undermined the directors' ability to retain the Relevant Rights.

4.7. The ACCC considers that that Proposed Conduct is likely to result in improved negotiations regarding the Relevant Rights. ASDACS is likely to be better resourced and informed compared to individual directors undertaking negotiations with producers in relation to the Relevant Rights. Therefore, the problem of information asymmetry in any negotiations between directors and producers (directors not being fully informed to make decisions about agreements in relation to these rights) is likely to be addressed by substituting ASDACS for directors in these negotiations.

4.8. The ACCC understands that the Relevant Rights usually form a relatively small proportion of the overall value of contracts negotiated between producers and directors. In contrast, educational copying and communication royalties and government copying royalties may form a more significant portion of the value of the contract. These royalties will not be affected by the Proposed Conduct and would still be able to be negotiated between the parties.

Transaction cost savings

4.9. ASDACS submits that the Proposed Conduct will reduce the overall costs of negotiating and distributing Retransmission Remuneration. These cost savings include reducing administrative costs associated with claiming Retransmission Remuneration from Screenrights and the resources spent by individual directors, ASDACS and producers in settling disputes in relation to ownership of the Relevant Rights. A dispute about 'ownership' in this context refers to whether or not the director has, for example, assigned the Relevant Rights to a producer in a contract negotiation; 'ownership' does not relate to disputes about whether or not the director has an entitlement under the Copyright Act in the first instance. Such disputes will continue to be a matter of negotiation between the relevant parties.

⁴ 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.

- 4.10. ASDACS submits that each competing claim for the Retransmission Remuneration arising from any given film takes considerable time and resources to resolve, with claims potentially remaining in dispute for years. If the parties do not agree to resolve the claim by way of withdrawal or agreeing to a percentage share, the royalties are forfeited and go back into the broader Screenrights distribution pool. Mandatory assignment of the Relevant Rights to ASDACS where they exist for non-commissioned films will enable ASDACS, on behalf of its director members, to streamline claims to Screenrights for any Retransmission Remuneration.
- 4.11. The ACCC considers that the Proposed Conduct is likely to result in transaction cost savings due to a reduction in the administration involved for ASDACS in claiming Retransmission Remuneration from Screenrights. ASDACS will not need to review each contract individually, and will not need to check the membership of a director, to determine whether the Relevant Rights have been assigned by the director to another party.
- 4.12. The ACCC notes the Proposed Conduct would remove one element of the negotiations between producers and directors. Because ASDACS' members will have assigned the Relevant Rights to ASDACS upon membership, these rights will not be subject to negotiation between producers and directors in relation to individual contracts. If such negotiations are replaced by a standard form approach over the split of these rights with the producer, this is likely to reduce transaction costs in negotiations about the split of these rights.
- 4.13. In this respect, ASDACS notes the recently negotiated 50/50 in-principle agreement reached between SPA and the ADG and states that authorisation would permit ASDACS to extend the position agreed in one major sector of the industry across to all films created by its members, thereby enabling the Relevant Rights to be effectively and efficiently administered on its members' behalf.
- 4.14. SPA submits that the Proposed Conduct is likely to increase transaction costs for producers by requiring them to deal with both directors and ASDACS when negotiating a contract. ASDACS submits that it would adopt a singular position regarding the Relevant Rights (that is, a 50 per cent share in most cases), which would become an industry standard and minimise the additional transaction cost for producers.
- 4.15. The ACCC considers that, where the Relevant Rights exist and are therefore the subject of contract negotiations, the Proposed Conduct is likely to result in some additional transaction costs for producers, but these are likely to be minimised by ASDACS adopting a single position regarding the share of the Relevant Rights.
- 4.16. Where ownership of the Relevant Rights may otherwise be the subject of a dispute between producers and ASDACS' member directors, mandatory assignment of the Relevant Rights to ASDACS is likely to reduce the overall resources spent in determining who owns the Relevant Rights if such a dispute arises. However, authorisation of the Proposed Conduct will not have any legal bearing on disputes concerning aspects of the Relevant Rights aside from ownership, such as whether they exist for any particular film under the Copyright Act. As noted above, this will remain a matter for the concerned parties to resolve.

Improved bargaining power for directors

- 4.17. ASDACS submits that the Proposed Conduct will reduce the current inequality of bargaining power in relation to the Relevant Rights between directors who generally

freelance⁵ and producers who are usually large and well-resourced production companies. ASDACS submits that directors are generally unable to effectively negotiate contracts for the films they direct to retain the Relevant Rights or receive compensation for the assignment of the Relevant Rights, and this results in directors not sharing in the ongoing financial success of their films and ultimately disincentivises directors from creating new projects.

- 4.18. SPA disputes ASDACS' claim that producers are generally large and well-resourced companies. SPA submits that the sector is predominantly made up of small businesses. In this regard, ASDACS submits that, irrespective of the size of the producers involved, freelance directors are often in relatively weak negotiating positions because, as the director was not commissioned to do the work, the producer is able to walk away from the agreement (i.e. seek out a different director). As such, directors are often presented with contracts under which they are required to assign the Relevant Rights to the producer or risk losing the contract.
- 4.19. The ACCC does not consider that changes in the relative bargaining power of parties to negotiations in and of itself constitutes a public benefit. Rather, the focus of the ACCC's assessment is on the outcome of any changes in relative bargaining power and efficiencies that are likely to be achieved.
- 4.20. The ACCC notes SPA's submission that the Proposed Conduct would result in additional negotiations, between ASDACS and producers, some of which are likely to be in relatively weaker bargaining positions compared to ASDACS. In response, ASDACS submits that it is likely to adopt a single position regarding the share of Retransmission Remuneration irrespective of the size of the producer involved.
- 4.21. However, in any event, in this case the ACCC does not consider that the respective bargaining positions of directors and producers is likely to change as a result of the Proposed Conduct. The Proposed Conduct will prevent directors from negotiating about assignment of the Relevant Rights with producers in contract negotiations as these rights will now be held by ASDACS. However, negotiations with producers about engaging a director to direct a film will still occur on an individual basis, in the context where the director will be competing with other directors to be contracted by the producer. Further, the ACCC considers that the additional negotiations between ASDACS and producers about the Relevant Rights, where they exist, is unlikely to result in any significant public detriments due to ASDACS adopting a single position.
- 4.22. The ACCC also considers that the Proposed Conduct is likely to result in ASDACS holding a greater proportion of Australian directors' Relevant Rights than would otherwise be the case. This will likely make ASDACS a better advocate in negotiations with producers about, for example, pro forma arrangements for the distribution of monies received from Screenrights pursuant to the Relevant Rights. However, these rights constitute only one element of negotiations between producers and directors that would otherwise still occur on an individual basis.
- 4.23. Further, as noted by ASDACS in its submission, ASDACS holding these rights would not have any material impact on producers as they can incorporate this reduced ability to negotiate to obtain the Relevant Rights into the contract price reached with directors through these one-on-one negotiations.

⁵ The Retransmission Scheme only deals with freelance directors, which does not include directors of commissioned films or films made pursuant to an employment agreement.

ACCC conclusion on public benefit

4.24. The ACCC considers that the Proposed Conduct is likely to result in a public benefit in the form of ASDACS providing improved input into negotiations in relation to the Relevant Rights. The ACCC also considers that the Proposed Conduct is likely to result in a public benefit from transaction cost savings (primarily due to the mandatory assignment of the Relevant Rights, where they exist, to ASDACS from its member directors).

Public detriments

4.25. 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.⁶

4.26. The ACCC has considered the following public detriments:

- potential lessening of competition amongst freelance directors,
- loss of choice for ASDACS members to negotiate directly with producers about the Relevant Rights, and
- increased barriers to entry for the administration and distribution of Retransmission Remuneration.

Potential lessening of competition amongst freelance directors

4.27. The ACCC considers that the terms of assignment of the Relevant Rights in negotiations with producers does not appear to be a significant source of competition amongst freelance directors. The Relevant Rights constitute only one element in the broader negotiation of a contract for a film, and Retransmission Remuneration typically represents only a small amount of the value of the overall contract.

4.28. More generally, as discussed above, the bargaining power of individual directors in their negotiations with producers to be engaged to direct a film is unlikely to change as a result of the Proposed Conduct.

4.29. The ACCC therefore considers that it is unlikely that the Proposed Conduct will result in public detriment in the form of lessening of competition amongst directors to be engaged by producers to direct films.

Loss of choice for ASDACS members to negotiate directly with producers about the Relevant Rights

4.30. SPA submits that the Proposed Conduct would result in reduced market flexibility and lessen the ability of negotiating parties to maximise production as ASDACS would adopt a single position in negotiations. The ACCC accepts that there is likely to be less flexibility in negotiations between directors and producers in respect of the Relevant Rights and that this is likely to result in some detriment where the parties would otherwise have enjoyed greater freedom to negotiate. However, producers and directors will continue to be able to negotiate directly in respect of other rights, for example educational copying rights. Further, nothing in the Proposed Conduct

⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

prevents producers and directors from structuring other aspects of the contract to compensate for the fact that the director cannot agree to assign the Relevant Rights to the producer.

- 4.31. In addition, the ACCC notes ADG and SPA have reached an in-principle agreement to take a similarly streamlined approach to contract negotiations in respect of specific films by carving out a portion of the royalties for directors that producers and other parties will not claim (subject to each party reserving their rights to their respective interpretation of the Copyright Act). Similarly, ASDACS has expressed its intention to claim only a standard portion (that is, 50 per cent) of the Retransmission Remuneration for the large majority of films unless a director successfully negotiates a larger share.
- 4.32. SPA further submits that any authorisation granted to ASDACS should continue to permit commercial negotiations between individual producers and individual directors, where the parties wish to negotiate directly. SPA submits that the authorisation would impose an onerous requirement on those directors who wish to negotiate directly with producers, as it is not a viable proposition for a director to entirely resign from ASDACS. SPA submits that directors would forfeit their international royalties that would otherwise have been distributed to them through ASDACS from foreign collecting societies.
- 4.33. ASDACS submits that it is appropriate that should a member not want ASDACS to own the Relevant Rights for the benefit of that member, then the member should resign from ASDACS. ASDACS notes that directors who resign from ASDACS may become a member of a foreign collecting society for the purposes of international royalty collection and that there are no barriers to doing so due to the International Confederation of Societies of Authors and Composers (**CISAC**) Professional Rules for dramatic, literary and audiovisual societies, which state that all societies must remain open to creators of all nationalities.⁷
- 4.34. ASDACS submits that if a director were entitled to remain a member while either managing all or some Relevant Rights themselves or having assigned all or some of their Relevant Rights to the various producers of films they have directed, ASDACS would have to continue with the current resource-intensive system of reviewing each contract to determine whether the Relevant Rights have been assigned to another party. ASDACS submits that, as a result, directors, producers, Screenrights and ASDACS would not gain the benefit of the efficiencies and transparency that the Proposed Conduct seeks to achieve.
- 4.35. ASDACS further submits that, within the industry, directors seek to maintain good relationships with producers and would rarely raise a dispute with producers over Retransmission Remuneration. Piccolo Films also noted that having organisations like ASDACS represent directors contributes to better working relationships with the production companies and less stress around a job during negotiations. Piccolo Films further submitted that the work of screen directors is intense and concentrated, particularly during pre-production, such that having an independent body paying attention to the director's long-term needs would allow them to concentrate on their creative work.
- 4.36. The ACCC considers that there may be some detriment to individual directors who wish to remain members of ASDACS, but want to retain the ability to negotiate directly with producers regarding the Relevant Rights, for all or some of their work. These

⁷ CISAC, Professional Rules for dramatic, literary and audiovisual societies, 2019, rule 5: <https://members.cisac.org/CisacPortal/initConsultDoc.do?idDoc=34448>.

directors would be required to either forgo these opportunities or lose the other benefits of ASDACS membership such as access to seminars, events and educational resources. However, the ACCC understands that directors could access similar professional development opportunities and events and other resources through membership of the ADG.

4.37. The ACCC considers that this is unlikely to result in a significant public detriment and notes that it did not receive any submissions from directors raising concerns about the proposed requirement to assign the Relevant Rights to ASDACS as a condition of membership. The ACCC also notes the submission from the ADG, which is a close affiliate of ASDACS. The ADG submission strongly supports the Proposed Conduct and states that mandatory assignment will ensure that directors receive their share of the retransmission royalties.

Impact on competition between rights administrators

4.38. The ACCC has considered whether the Proposed Conduct may raise barriers to entry for another entity, in competition with ASDACS, to administer and distribute Retransmission Remuneration to Australian directors.

4.39. Under the Proposed Conduct, Australian directors will remain able to choose whether to:

- assign the Relevant Rights to ASDACS
- retain the Relevant Rights and administer the rights themselves or appoint another third party to do so, or
- assign the Relevant Rights to a third party other than ASDACS.

4.40. The only change as a result of the Proposed Conduct is that under the second and third of these options the director would lose the benefits of ASDACS membership. As discussed above, the ACCC does not consider that the loss of these benefits, other than in relation to the administration of the Relevant Rights, is likely to be a significant determining factor in directors deciding how their Relevant Rights are assigned and/or managed.

4.41. However, as also discussed above, the Proposed Conduct is likely to make ASDACS a better advocate in negotiations with producers about arrangements for the distribution of Retransmission Remuneration. This in turn is likely to attract more directors to be members of ASDACS (i.e. to assign the Relevant Rights to ASDACS). For example, ASDACS may be able to negotiate more favourable arrangements with producers about the split of the Relevant Rights than those offered to non-members. That is, this potential benefit of ASDACS membership is likely to be greater with the Proposed Conduct than without the Proposed Conduct.

4.42. However, the ACCC does not consider that barriers to entry for another organisation seeking to compete to administer the Relevant Rights are likely to be significantly increased by the Proposed Conduct. Establishment costs do not appear to be significant and the only barrier to directors appointing an alternative organisation to manage their rights is the 12 month minimum term and three month notice period that ASDACS requires.

ACCC conclusion on public detriment

4.43. The ACCC considers that the Proposed Conduct is unlikely to result in public detriments in the form of reduced competition amongst directors to be engaged by

producers to direct films as the assignment of the Relevant Rights in negotiations with producers does not appear to be a significant source of competitive tension between directors.

- 4.44. The ACCC considers it is possible the Proposed Conduct may result in some detriment to directors who wish to retain ASDACS membership but not assign all or some of the Relevant Rights to ASDACS. However, the ACCC considers that any such public detriment is likely to be limited and notes no directors raised concerns about the Proposed Conduct. The ACCC also considers that the Proposed Conduct may result in some detriment due to the reduced ability of contracting parties to negotiate freely. However, again, the ACCC considers that any such public detriment is likely to be limited. The Proposed Conduct does not prevent producers and directors from negotiating directly about other rights, or from structuring the contract to compensate for the director being unable to agree to assign the Relevant Rights to the producer.
- 4.45. The ACCC considers that the Proposed Conduct is unlikely to result in public detriment in the form of significantly increased barriers to entry for another entity to administer the Relevant Rights in competition with ASDACS.

Balance of public benefit and detriment

- 4.46. For the reasons outlined in this 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.

5. Determination

The application

- 5.1. On 13 March 2020, ASDACS lodged application AA1000474 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

The authorisation test

- 5.2. 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.
- 5.3. For the reasons outlined in this determination, the ACCC is satisfied that, in all the circumstances, 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.
- 5.4. Accordingly, the ACCC has decided to grant authorisation.

Conduct which the ACCC authorises

- 5.5. The ACCC has decided to grant authorisation AA1000474 to enable ASDACS to alter its constitution to require the assignment of its members' copyrights to it for the purpose of distributing remuneration arising from the retransmission of films as described in paragraphs 1.9 to 1.10 and defined as the Proposed Conduct. The authorisation applies to current and future members of ASDACS.

- 5.6. 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.
- 5.7. The ACCC has decided to grant authorisation AA1000474 for a period of five years until 19 September 2025.
- 5.8. The authorisation is in respect of the arrangement as it stands at the time authorisation is granted. Any changes to the arrangement during the term of the authorisation would not be covered by the authorisation.

6. Date authorisation comes into effect

- 6.1. This determination is made on 28 August 2020. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 19 September 2020.