Suite 2, Level 1, 36 Fitzroy Street Surry Hills
NSW 2010 Australia
+ 61 2 9360 8988
screenproducersaustralia.org.au

Screen Producers Australia's submission on the Review of Unfair Contract Term Protections for Small Business

Screen Producers Australia welcomes the opportunity to provide a submission to Treasury's review of the Unfair Contract Term (**UCT**) Protections for Small Business.

For further information about this submission please contact Pravin Menon, Director of Government Relations & Operations (pravin.menon@screenproducers.org.au).

About SPA

Screen Producers Australia (**SPA**) was formed by the screen industry over 60 years ago to represent small, medium and large enterprises across a diverse production slate of feature film, television and interactive content. As the peak industry and trade body, we consult with a membership of more than 500 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and appointed Policy Working Group representatives. Our members employ hundreds of producers, thousands of related practitioners and drive more than $1.7 Billion worth of annual production activity from the independent sector as well as nearly $1 Billion in export earnings and tourism expenditure within the overall screen industry.

On behalf of these businesses we are focused on delivering a healthy commercial environment through ongoing engagement with elements of the labour force, including directors, writers, actors and crew, as well as with broadcasters, distributors and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

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Executive Summary

SPA recommends that Treasury undertake the following measures as part of its Review of the Unfair Contract Term Protections for Small Businesses:

Recommendation 1: Unfair contract terms should be declared illegal and not just voidable or unenforceable under the Australian Consumer Law.

Recommendation 2: Civil pecuniary penalties should be introduced for breach of unfair contract terms.

Recommendation 3: The term 'standard form contract' should be either defined in legislation or including an 'effects test' for certain sectors where structural features make it more likely that contracts are offered by parties with significant bargaining power on a 'take it or leave it' basis, as in the Australian content market.

Recommendation 4: The employee and value thresholds under unfair contract term legislation should be expanded to encompass a larger variety of small businesses and contracts, such as high cost and low margin sectors or those where employment of casuals is essential to production, such as in the Australian content market.

Recommendation 5: The Treasurer should direct the ACCC to utilise its compulsory information gathering powers relating to unfair contract terms to conduct an investigation into the prevalence of unfair contracts terms between broadcasters and independent producers (in particular, terms that limit broadcasters from paying for online rights).

Recommendation 6: The Treasurer and the Minister for Communications and the Arts should consider ways in which the regulation of broadcasters (including ABC and SBS charters) could be expanded to include additional protections for small businesses.

Introduction

1. Independent producers account for over 45% of screen content produced annually in Australia[1]. There are more than 3000 active film and video production and post-production businesses in Australia employing more than 17,000 people and generating income of more than $2.7 Billion[2]. The independent sector alone generates $1.2 billion in revenue and provides for nearly 20,000 jobs[3].

2. Small businesses play a critical role in generating this revenue, with more than 80% of SPA's members being consisted by businesses with less than 20 Full Time Equivalent (**FTE**) employees[4]. Further, almost 50% of SPA's members are sole traders. These individuals and businesses in turn employ hundreds of casual and full-time employees in the making of film and television projects, which are often run as stand-alone businesses under their own corporate entities.

3. There is a high degree of volatility in the market which, as noted in the recent *Inquiry into the Australian film and television industry*[5], results in significant issues for small businesses and workers including issues of job insecurity, mental health and other occupational health and safety issues.

4. The independent sector is the major contributor to the telling of new and original Australian stories which reflect contemporary Australian cultural identity. Accordingly, it is essential that there is a legislative and policy framework that ensures fair and certain businesses terms and limits any potential small business detriment. This is one of SPA's strategic priorities.

Structural features of the film and television market

5. In June 2018, SPA undertook an industry census of the independent sector in partnership with Deloitte. The report, *Screen Production in Australia*, highlighted "broadcaster bargaining power" as the number one challenge to independent producers[6].

6. In Australia, there is a relatively small number of broadcasters and content platforms by comparison with the number of independent content producers. This includes public broadcasters (ABC and SBS), commercial broadcasters (Channel 7, Channel 9 and Channel 10) and subscription television services like Foxtel.

7. More recently, Streaming Video On-Demand Services (**SVODs**) such as Netflix and Stan have entered the market, however as these services are currently not subject to content regulation, there are currently limited incentives to acquire content from Australian businesses.

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[1] ABS Data: 8679.0 - Film, Television and Digital Games, Australia, 2015-16.
[2] *Film, Television and Digital Games, Australia, 2015-6,* Australian Bureau of Statistics, released June 2017
[3] *Screen Production in Australia*, Deloitte Access Economics, June 2018
[4] Screen Producers Australia Industry Pack, July 2018.
[5] *Inquiry into the Australian film and television industry*, House Standing Committee on the Communications and the Arts, December 2017.
[6] *Screen Production in Australia*, Deloitte Access Economics, June 2018

8. Further, the majority of these businesses (including streaming platforms) are vertically integrated and/or house their own internal production units. This trend is increasing, with the most recent ABS data showing that in-house production costs for broadcasters have risen from 44% in 2011-12 to 55% in 2015-16. This causes such broadcasters and platforms to directly compete downstream with content producers, raising issues of vertical foreclosure with downstream competitors and exacerbating issues of market power and bargaining power and unfair dealing.

9. The effect of these structural features is an oligopsony market in which there are few buyers and many sellers. This has resulted imperfect competition and an increased risk of consumer detriment by limiting the availability, diversity and quality of Australian content. It has also increased the likelihood of broadcasters dictating terms and extracting "more for less" from content producers and small businesses which, as a result, results in independent producers having little to no power in contract negotiations.

The rise of digital platforms

10. The rise of SVODs like Netflix and Stan in recent years has significantly changed market dynamics within the Australian audio-visual sector. Recent figures show that nearly a third of Australian households now have a SVOD subscription[7]. As at 30 June 2018, Netflix Australia is estimated to have 3.9 million subscribers[8], which has almost doubled over a year period (2.2 million at 30 June 2017). This is followed by Stan with close to 1 Million subscribers[9]. Despite significant market share, such streaming services have invested less than $30 Million in Australian content on a combined basis[10], demonstrating a significant distortion in the regulatory environment designed to encourage the production of Australian content.

11. SVODs are currently not subject to Australian content obligations and until relatively recently, were not subject to taxation requirements either[11]. Part of imposing GST requirements to digital products and services imported by consumers in 2015 was to ensure that GST revenue from streaming services was not forgone and to address the tax disadvantages to Australian businesses compared to overseas businesses.

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[7] Screen Production in Australia, Deloitte Access Economics, June 2018
[8] SVOD feeds Australians' insatiable appetite for streaming content, Telsyte, June 2018
[9] Communications Report 2016-7, ACMA, December 2017
[10] Drama Report 2017-8, Screen Australia, October 2018
[11] Budget Review 2015-6: Applying GST to digital products and services imported by consumers

The effect of digital platforms on broadcasters' bargaining power

12. Traditional broadcasters retain significant bargaining power in the content and media and advertising market, however new market entrants (most notably Google and Facebook) who are not subject to the same regulations and more easily able to displace advertising market spend from "traditional" media into "digital". By way of example, television advertising expenditure remained relatively stable (3% decline) between 2009 and 2016, online advertising expenditure increased by 23% over this period[12].This effect is exacerbated by online streaming services such as Netflix, who are currently unregulated and therefore able to operate with the current competitive advantage of being advertising-free in attracting audience share[13].

13. The competition between broadcasters and online streaming services / platforms in the media and advertising services market has significant downstream effects. When advertising revenues become stagnant, broadcasters seek cost savings elsewhere, such as increasing the extent of their in-house production or engaging in more onerous contractual terms and rights deals with the independent sector.

14. Public broadcasters also retain significant bargaining power in the Australian content market. The impact of digital platforms on audiences combined with significant cuts in funding from the Government has resulted in such broadcasters including more onerous terms in contracts regarding digital rights without offering adequate financial consideration, if at all. This was highlighted recently in *Report of the Expert Panel into the Inquiry into Competitive Neutrality* which recommended greater transparency and good business practice of public broadcasters, including recommendations the commercial arms of public broadcaster (e.g. ABC Commercial) must observe best practice business negotiations in collaboration with smaller companies to avoid the appearance of unfair competition[14].

Examples of UCT between broadcasters and independent producers

15. As the independent sector is largely made up of small businesses, the significant imbalance of bargaining power and delimiting of opportunities to sell content on streaming and online has made it commercially unviable for many producers to operate, which in turn diminishes their capacity for innovation and the quality and diversity of Australian content.

16. In general terms, most dealings between independent producers and broadcasters are progressed by the use of a 'term sheet'. Given the industry dynamics and market volatility, such term sheets are rarely able to be changed

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[12] *Communications Report 2016-17*, ACMA, released April 2018
[13] *Netflix is testing ads for its original content that will play while you binge watch, and users are not pleased*, Business Insider, August 2018
[14] *See* Chapter 8 of *Inquiry into the Competitive Neutrality of the National Broadcasters—report by the Expert Panel*, Department of Communications and the Arts, September 2018

and therefore have the effect of being offered on a ‘take it or leave it’ or ‘standard form contract’ basis.

17. There are also many examples of SVODs requiring local producers to sign-away ‘rest of the world’ rights, as well as digital rights ‘in perpetuity’, which significantly limits export opportunities and Australian businesses’ ability to make sufficient return on investment of their IP[15] and may constitute unfair contract terms.

18. Further, commercial broadcasters and independent producers include a “first right of refusal” clause. This has the effect of dissuading small business producers from negotiating with other broadcasters, lowering the price at which they can sell their goods.

19. Most critically, there are many examples of broadcasters only agreeing to terms which allow them to maintain the benefits of as many broadcast rights as possible, including online rights to compete with SVOD. There is often little to no consideration for these rights. This is a clear example of exploitation of their bargaining power, which has the effect of limiting the availability of Australian content to a wider Australian audience at a lower cost.

20. As noted above, SPA advocates strongly for more certain and fair conditions for small businesses as a strategic priority. This includes facilitating dialogue between broadcasters and independent producers to ensure that broader, systemic contractual issues can be addressed in an open forum (e.g. roundtables with the ABC).

21. More recently, SPA recently issued its *Trading Term Guidelines*, which are intended to be used as a guide for producers during their negotiations with commissioning entities, including SVODs. Given the structural features of the market outlined above, SPA also routinely undertakes surveys its members to monitor any issues in unfair dealing or misuse of market power.

The need to investigate UCT between broadcasters and producers

22. In November and December 2018, SPA set up an anonymous survey to obtain information on non-standard deal terms with Australian broadcasters. Based on the feedback received, SPA has identified the following key issues with commissioning deals during the past 12 months:

    - Broadcasters are increasingly requesting enhanced online rights packages (e.g. exclusive Adverting Video On-Demand (**AVOD**), SVOD and Transactional Video On-Demand (**TVOD**) rights) without necessarily paying additional licence fees for such enhanced rights;

    - Broadcasters are requesting licence periods outside the licence periods permitted under the terms of the Australian Television Repeats and Residuals

[15] *FreeTV submission to Digital Platforms Inquiry*, FreeTV, May 2018, p.5

Agreement (**ATTRA**). This in effect, puts pressure on producers to breach their obligations under agreements with the Media Entertainment and Arts Alliance;

- the expansion of ‘holdbacks’ across most non-licenced rights and enhanced first and last matching rights. This has effect of restricting the ability of producers exploiting their IP to obtain other sources of revenue;

- unreasonable requests from broadcasters to share in tax incentives specifically designed to support the independent production sector (e.g. the Producer Offset) and other forms of revenue; and

- Pressure to recharacterise licence fees as equity contributions. This has the effect of reducing long term incentives for content creation, which discourages innovation and risk-taking amongst small businesses.

Conclusion

23. SPA is deeply concerned by these findings and the potential for each of these contractual issues to fall foul of legislative protections for small businesses against unfair contract terms. Accordingly, SPA recommends that the Treasurer direct the ACCC to utilise its compulsory information gathering powers relating to unfair contract terms to conduct an investigation into the prevalence of unfair contracts terms between broadcasters and independent producers.

24. SPA notes Recommendation 11 of the ACCC’s *Digital Platforms Inquiry – Preliminary Report*[16] to expand the operation of unfair contract terms to digital platforms, to more effectively deter digital platforms, as well as other businesses, from leveraging their bargaining power over consumers by using unfair contract terms. In line with this recommendation, SPA considers that the small business protections under unfair contract term legislation should be expanded to digital platforms (e.g. Netflix) and other businesses with an online presence (e.g. ABC) as well.

25. SPA considers that one way this could be achieved is for the ABC and SBS charters to be expanded to include protections for their commercial dealings with small businesses (i.e. Australian content producers). Accordingly, SPA recommends that the Treasurer and the Minister for Communications and the Arts should consider ways in which the regulation of broadcasters (including ABC and SBS charters) could be expanded to include additional protections for small businesses.

26. The independent sector is the major contributor to the telling of new and original Australian stories which reflect contemporary Australian cultural identity. Fair contracting processes and enhance unfair contract term legislation is essential to ensuring its ongoing viability.

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[16] *Digital Platforms Inquiry – Preliminary Report*, ACCC, December 2018