

**28 February 2023**

## **Screen Producers Australia's submission to the Inquiry into international digital platforms operated by Big Tech companies**

### About Screen Producers Australia

Screen Producers Australia (SPA) was formed by the screen industry businesses representing large and small enterprises across a diverse production all forms and formats of screen content.

As the peak industry and trade body, we consult with a membership of more than 600 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and members. Our members employ hundreds of producers, thousands of related industry practitioners and drive between \$1 billion and \$2 billion worth of annual production activity from the independent sector.

SPA's members are drawn from all elements of the Australian production ecosystem, including emerging and established producers, production businesses, services and facilities. Our members vary in size from large internationally owned entities, to partnerships, to sole traders and other corporate entities, and are found in every region, state and territory of Australia.

On behalf of these businesses, we are focused on delivering a healthy commercial environment for the entire screen industry 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.

Screen Producers Australia welcomes the opportunity to make a submission to the Senate Economics References Committee Inquiry into international digital platforms operated by Big Tech companies.

For further information about this submission please contact Jane Mulligan, Director of Policy ([jane.mulligan@screenproducers.org.au](mailto:jane.mulligan@screenproducers.org.au))

## EXECUTIVE SUMMARY

- SPA wishes to draw the Committee's attention to the impact of streaming platforms on the Australian screen industry which is characterised by a large number of SME production businesses, spread across Australia and between urban and regional locations.
- Issues described in the Inquiry's Terms of Reference are not confined to the five large US tech companies operating in Australia that were identified in the Inquiry's Issues Paper.
- SPA has identified detrimental business practices being increasingly applied in Australia in commercial commissioning contracts by global streaming platforms (SVODs).
- SVODs are highly successful global technology businesses with rapidly increasing revenues and audiences and which are increasingly replacing more traditional platforms as the predominant place Australians seek screen entertainment.
- The rise in prominence of streamers in the screen production sector is also characterised by the changed dynamics in bargaining power between Australian content producers (most commonly SMEs) and global streaming businesses.
- With negotiating power largely in the hands of streaming services, Australian producers and creative contributors are increasingly expected to sign away a full suite of proprietary rights over a longer – sometimes indefinite time period.
- This relationship, discussed in more detail below, affects the risk/reward proposition for Australian producers.
- The result of this is the accelerating loss of Australian intellectual property and business autonomy for Australian screen producers.
- This situation is an example of market failure in the sector and is being experienced and responded to in other jurisdictions around the world – but not yet in Australia.
- With the prospect of new government regulation to increase the level of spending by streaming platforms on Australian content, the issue of ownership of intellectual property in these stories is of great concern to SPA members and should be addressed through government regulatory measures as a matter of priority.

## BACKGROUND

### Need for Regulation in other Digital Platforms

SPA understands that the terms of reference for this inquiry are centred on Big Tech. However, we believe that many of the issues that will be canvassed in this inquiry are relevant to the market dynamics and customer experiences of streaming video on demand services (SVODs), particularly regarding:

- the adequacy and effectiveness of recent attempts, in Australia and internationally, to regulate the activities of such international digital platforms;
- broader impacts of concentration of market power on consumers, competition and macro-economic performance, and potential solutions.

Global streaming services derive a substantial benefit from operating in Australia, but unfortunately, government regulation has been slow to adapt to the new sector dynamics.

According to the ACMA, Australians are now more likely to have watched an online subscription service than live or recorded FTA TV in the previous 7 days<sup>1</sup>. Streaming services are fast becoming the preferred destination for Australians to access content.

While there is no published data for SVOD revenue in Australia, in 2021 PwC estimated<sup>2</sup> that revenue from SVOD services would be \$2.5 billion per year in the Australian market, and projected to grow markedly in the coming years. It is also relevant to note that these businesses rely on the publicly funded National Broadband Network for distribution.

### Past reviews

Screen Producers Australia has actively engaged in the Australian Government's review of digital and media platform regulation since the 2011 Convergence Review.

In the past decade, there have been a number of subsequent inquiries and reviews to examine how regulatory settings should adapt to new digital platforms and SPA has regularly engaged in this process.

For example, in 2021, the Australian Government produced a [Media Reform Green Paper](#) in 2021. In its [submission](#) to the Media Reform Green Paper, SPA detailed how one of the foundations to the sustainability of independent screen businesses is their ability to secure fair and equitable terms during deal-making with commissioning platforms.

The submission explained that at present, there is a failure of the market to provide fair and equitable terms in deal making, due to the oligopsonic market structure, in which power resides with the small number of buyers in the market (commissioning platforms), to the detriment of the large number of sellers (independent producers).

In 2022, the Australian Government proposed a new framework, the [Streaming Services Reporting and Investment Scheme](#), to which SPA made a [submission](#) on similar grounds. These issues were also raised by SPA in our [submission](#) to the National Cultural Policy in 2022.

SPA notes that the National Cultural Policy refers to the importance of intellectual property for creative industries but does not specifically address the issues that SPA has raised regarding the loss of Australian cultural intellectual property as the result of the unfair contracting practices of SVODs.

Given the importance of this issue to the economic sustainability and vitality of the independent production sector, and the role that sustainability plays in underpinning the creation of high quality, diverse, relevant, and compelling Australian content, the ongoing absence of any consideration of this issue is of substantial concern.

### The Screen Producer's Problem

The economic sustainability and vitality of the independent production sector is a crucial underpinning of the creation of high quality, diverse, relevant, and compelling Australian

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<sup>1</sup> ACMA, [Communications and media in Australia: Trends and developments in viewing and listening 2020–21](#), p 6.

<sup>2</sup> PWC, [The Australian Entertainment and Media Outlook 2021-25](#), p 63

content. One of the foundations to the sustainability of independent screen businesses is their ability to secure fair and equitable terms during deal-making with commissioning platforms.

At present, there is a failure of the market to provide fair and equitable terms in deal-making, due to the oligopsonic market structure, in which power resides with the small number of buyers in the market (commissioning platforms), to the detriment of the large number of sellers (independent producers).

This market failure is evident in buyers seeking “more for less” from producers, in particular in relation to the level of licence fees paid for content and the ability of producers to retain IP.

Retention of IP is vital for the predominantly SME producer community, as it provides an asset they can leverage into other revenue streams (in particular, exports) and helps to build an economic base that provides stability and opportunity for their business.

SPA has been on the record in support of regulated terms of trade for many years, highlighting the relative market power of the small number of television platform buyers, compared to the large number SME producers competing for commissions.

However, this imbalance in market power is dramatically more pronounced and damaging as regards streaming platforms. This is in part due to their size and scale (the market mostly features global streaming giants who have incredibly large corporate structures), but also due to the fact that with deregulation of linear broadcast media, streaming platforms are increasingly the means through which production businesses can seek commissions.

The overwhelming trend in the market is for streaming platforms to use this imbalance in bargaining power to take all international and ancillary rights in a project for an extended licence term (sometimes for all time). Where a producer may previously have retained ancillary rights or rights to exploit outside of Australia, and in so doing generate a revenue stream that supported a sustainable production business as an ongoing concern, this option is now no longer available.

Due to the oligopsonic market conditions, producers are not in a favourable position in which to negotiate for the retention of any IP, which severely harms their ability to build sustainable businesses based on strong IP assets.

The fees going back to producers in these deals are not necessarily increasing despite the increased value of the deal to commissioning platforms. In this way, a commissioning dollar from a linear broadcast media business is not necessarily comparable to a commissioning dollar from a streaming platform.

#### [Previous protections](#)

There were previously some minimum incentives/protections in the regulatory framework for Australian content on commercial free-to-air television (Australian Content Standards (ACS)), through the minimum licence fee protection and the incentive to work with the independent production sector.

Whilst these were removed in the regulatory changes that took effect on 1 January 2021, they were a recognition of the need for some protections against oligopsonic market dynamics.

A similar recognition exists through Screen Australia's Terms of Trade, applicable to projects that receive direct funding through that agency. There may, however, be a gradual drift away from direct funding for television projects towards the increased Producer Offset, which may further dilute the effectiveness of the Terms of Trade in the sector as a whole.

The diminution of the previous protections offered through the previous ACS and Screen Australia Terms of Trade and the rise in dominance of digital screening platforms further supports the need for enhanced contracting protections

### Similarities with News Media Bargaining Code

SPA has considered the development of the News Media Bargaining Code that was introduced in February 2021, and believes the circumstances that led to it are near-identical to the bargaining imbalances for Australian screen producers.

Through a reference by the Australian Government to the ACCC which resulted in the *Digital Platforms Inquiry and Report*, it was ascertained that the major digital platforms are unavoidable trading partners for Australian news businesses, and therefore possess substantial bargaining power over these businesses

SPA believes that there are compelling reasons for a similar examination of the consequences of the bargaining power between global streaming platforms and Australian screen producers.

SPA believes that if a similar inquiry was held that looked into the commercial contract negotiations between Australian screen producers and major streaming platforms such as Netflix, Amazon and Disney+, that a near-identical bargaining power imbalance would be evident.

SPA argues that if a remedy can be developed for one Australian industry sector facing such a bargaining imbalance, that there can be no reason why a similar bargaining code be developed for the Australian screen industry.

### Similarities with Prominence Framework

SPA notes that through the current consideration of a new [Prominence framework](#) for the Australian media sector, the willingness of the Australian Government to intervene in a marketplace to address an outcome that has arisen due to a market dynamic that is unfavourable to free-to-air broadcasting businesses.

SPA is seeking that the same willingness to regulate could be applied to poor outcomes faced by Australian producers in their commercial negotiations with powerful digital platforms..

### The evidence

#### Lateral Economics Report

Since its Media Reform Green Paper submission, SPA has publicly released further evidence and explanation of the critical nature of this issue.

In December 2021, SPA released a report commissioned from Lateral Economics containing discussion, analysis and recommendations relating to the 'terms of trade' for bargaining

between producers and commissioners.<sup>3</sup> The focus of the report is on the relationships between local SME businesses, who employ and invest locally, and global digital giants, who are increasingly taking economic value offshore.

The focus of the report is on these relationships, the serious implications of the unequal bargaining dynamic for the economics and sustainability of the Australian production sector, and the compelling need for Government intervention to correct damaging imbalances.

Key findings of the report include:

- There is a high degree of concentration amongst commissioning entities.
- Buyers have greater bargaining power than production companies.
- Buyers are hence able to secure rights which would have previously remained with, or reverted to, producers.
- These changes are denying Australian production companies streams of future earnings and are sending earnings overseas.
- Australia is lagging behind other countries (eg, UK, France) in addressing these imbalances.
- The regulated UK terms of trade offer a promising policy model for Australia, and could be administered here by the ACCC.
- Regulated terms of trade should be accompanied by local content requirements for streaming companies.

The report is based on extensive interviews and field work, with Lateral Economics engaging broadly across the sector and internationally to inquire into and measure the real world bargaining conditions and impacts on local businesses.

The recommendations follow on from the precedent set by the Government in establishing the News Media Bargaining Code, which was essentially an intervention into unequal bargaining relationships between local content creators and global platforms.

A copy of the Lateral Economics report is attached to this submission.

### SPA Survey

In December 2021, SPA released the results of a research survey which shows Australia's independent screen producers are facing a range of complex bargaining challenges in doing business with commissioning platforms.<sup>4</sup>

The survey asked producers who have recently had a commission with the ABC, SBS, commercial free-to-air television broadcasters, subscription television broadcasters and their providers, or streaming platforms, a range of questions relating to the terms on which they have done business over the last three years.

The responses provide an insight into the ways in which producers, particularly small to medium enterprises, can feel compelled to compromise on key aspects of production deals in order to get a commission over the line or maintain a working relationship with commissioning platforms.

The data reveals:

- **30% of respondents** reported feeling pressured to agree to non-beneficial contract variations following the commencement of a production. This experience was

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<sup>3</sup> <https://www.screenproducers.org.au/news/landmark-report-released>

<sup>4</sup> <https://www.screenproducers.org.au/news/spa-survey-reveals-industry-conditions-unfavourable-to-smes>

recognised as occurring with half of all the platforms included in the survey. This is highly suggestive of an unequal bargaining relationship and unfairly leaves producers worse off.

- In **41% of reported commissions**, producers experienced challenges in ensuring the appropriate budget was offered to meet the quality and volume expectations of commissioner. This has knock on effects for risks to safety and ongoing working relationships and is likely to be a reflection of funding challenges within the sector.
- In **26% of reported commissions**, producers reported being pressured or encouraged to start production without an official greenlight, a situation which creates undue risk for a production and impacts smaller businesses in particular.
- In **22% of reported commissions**, producers are facing difficulties with the way drawdowns and cashflows are structured, which can create serious difficulties with liquidity, particularly for smaller producers who may not have the resources to absorb cashflow delays/shortfalls in the middle of a production.

Whilst these results suggest producers often feel pressured to accept unfavourable terms, further results suggest a lack of confidence that good work or good will from producers will in fact lead to future opportunities with the commissioning platform. Reported by almost half of the respondents, this lack of confidence in future opportunity is sub optimal for small business operators and stifles the kind of entrepreneurial behaviour that is a pre-requisite for small business growth.

SPA submits there is now sufficient evidence before the Government to justify a policy intervention which addresses the underlying issues outlined above and which are critical to Australia's continuing ability to create high quality, diverse, relevant, and compelling Australian content.

### International Action

Australia is far from alone in seeking to come to terms with the market imbalance between SVODs and independent producers. The range of regulatory actions implemented and proposed varies, although the underlying rationale is identical to the circumstances being experienced in Australia. The following are the key international examples of regulatory action.

#### United Kingdom – “terms of trade”

In the UK, ‘terms of trade’ is a code of practice established in the *Communications Act 2003* that ensures independent television producers retain an interest in intellectual property in works commissioned by public service broadcasters.

This regulatory intervention had a critical impact on the dynamics of the UK production sector by ensuring that producers of programming, as opposed to the historically powerful broadcasters, known as public service broadcasters (PSBs) that commission the content, retain control of secondary IP rights that subsist within productions. The motive for the ‘terms of trade’ framework was to foster a competitive and diverse independent production sector by limiting the buyer power of PSBs.

This strategy has been hugely successful in retaining IP and growing the independent screen sector. A report on the impact of Terms of Trade on the UK's television content production sector for the Canadian Media Producers Association (CMPA) by Oliver & Ohlbaum in December 2018 showed that since the introduction of a ‘terms of trade’ framework in 2004, the UK independent production sector has grown to become a global

leader in TV production, in particular:

- TV related revenues have increased from around £1.5 billion in 2004 to more than £2.6 billion in 2017
- International UK TV rights income grew at an average annual rate of 22 per cent between 2004 and 2008 and continues to grow at approximately 7 per cent.<sup>5</sup>

Unlike Australia, the UK has recognised the importance of intellectual property as key to the continued growth and success of their “creative industries” which featured as one of the four key sectors to drive the country’s growth after the pandemic in the economy-wide *Build Back Better* strategy.<sup>6</sup>

France – “rights reversion”

In Europe, a regulatory system has been introduced under the auspices of the European *Audiovisual Media Services Directive* (AVMSD) which is aimed at facilitating regulation of streaming platforms at the individual nation level.

In France, the regulation of content from SVODs (under which the government will force streamers to invest up to 25% of their local revenues in French-language content) is linked to the reversion of intellectual property rights to independent producers.

Of the regulated SVOD platforms, 66% of the investment in French TV series will have to be done through independent producers to whom rights will revert within 36 months. For cinema releases, SVODs must channel 75% of their investments through indie producers who will get their rights back after 18 months.

Canada – “collective bargaining”

Canada is currently in the process of legislating a new law to empower their media regulator, Canadian Radio-television and Telecommunications Commission (CRTC) to regulate online streaming through the [C-11 bill](#), currently before the Canadian Senate.

While the exact regulatory framework is still to be put into place by the CRTC, the Minister of Canadian Heritage, Hon Pablo Rodriguez introducing the C-11 Bill in February 2022 said this:

*It starts with this bill, the online streaming act. It starts with making sure that online streamers contribute to the strength and vitality of Canada's cultural sector. Let us remember Canada's strong culture is no accident. We made that decision. We decided and we chose to be different. We chose to be different from our neighbours to the south. We chose cultural sovereignty.*

*For more than 50 years, the Broadcasting Act has helped us share our stories. That is how we built a strong Canadian culture. That is how we forged our Canadian identity, and that is how we brought Canadian voices to the world. We want to build on this for the future. We must recognize that times have changed.*

*Canadian broadcasters have been investing in the system for decades to create the content we love, so it is only fair that online broadcasters be asked to contribute. We are only asking them to do their part, nothing more, which is fair.*

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<sup>5</sup> [Oliver & Ohlbaum - The impact of the UK terms of trade \(cmpa.ca\)](#)

<sup>6</sup> [Build Back Better: our plan for growth - GOV.UK \(www.gov.uk\)](#)

*Companies like Netflix, Amazon and Disney, to name a few, are already investing in the Canadian economy, which is great. We all benefit from that. Some of their content is really entertaining. This means money for and significant investments in our country. We are very pleased that they continue to invest here and pursue their projects in Canada.*

*Let us be honest, though. There is another reason why they are investing in Canada. It is because we have incredible talent here, including directors, actors and technicians. We have amazing talent, by any measure, so it makes good business sense to come and invest in Canada.*

*Basically, what Bill C-11 does is it updates the rules so that all broadcasting platforms contribute to our culture. That is all. That is what the bill is all about.<sup>7</sup>*

As part of their advocacy for Bill C-11, the Canadian Media Producers Association (CMPA) has been calling for the CRTC to be empowered to implement and enforce collective terms of trade, to provide for a greater balance in bargaining power between programming services and independent Canadian producers.

The rationale for collective bargaining rights for independent producers and SVODs is set out in the CMPA submission on the C-11 bill and includes the following rationale:

Collective terms of trade would provide a code of baseline conditions that would then be used in good faith negotiations between the parties when licensing a program. It would help support key cultural and economic objectives:

- rectifying market imbalances in negotiating power by providing all
- stakeholders with an equitable share in the risks and rewards of a production;
- providing safeguards for Canadian ownership and control of the content
- created and produced by Canadians; and
- supporting a virtuous cycle of investment and reinvestment in Canadian
- companies and Canadian content.<sup>8</sup>

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<sup>7</sup> [Debates \(Hansard\) No. 32 - February 16, 2022 \(44-1\) - House of Commons of Canada \(ourcommons.ca\)](#)

<sup>8</sup> CMPA Study on the Subject Matter of Bill C-11, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts [2022-11-09 TRCM Brief C-11 CMPA e.pdf \(sencanada.ca\)](#), November 2022.