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# Screen Producers Australia's submission to the IP Australia Interim Report on scoping study for stand-alone legislation to protect and commercialise Indigenous knowledge

## 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 840 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 IP Australia Interim Report on scoping study for stand-alone legislation to protect and commercialise Indigenous knowledge.

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 supports measures to protect the ownership of recordings and digitised records of Indigenous Knowledge (“IK”) and the commercial exploitation of IK without benefits flowing to Indigenous communities.
- In the context of the Australian screen industry, SPA has been advocating for a “terms of trade” framework to ensure that screen stories of cultural significance, including those containing IK, are retained within Australian creative control and ownership and do not have IP or other rights assigned to global streaming businesses in perpetuity.
- This issue addresses the Consultation Question about what other issues affect the capacity of Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK.
- At present, there are few “terms of trade” protections for Australian screen rights and SPA members are experiencing difficult commercial conditions in commercial contract negotiations with global streaming businesses which are resulting in the loss of IP and other rights.
- SPA has seen a strong growth in Aboriginal and Torres Strait Islander majority-owned screen production businesses amongst its membership, now numbering 18 companies signalling the capacity that has been building in the sector.
- SPA is committed to ensuring that this Aboriginal and Torres Strait Islander screen capacity continues to grow in future years in order to foster a dynamic and robust screen industry, able to share Australian stories of unique cultural value to audiences at home and to global audiences.

## Recommendation

- SPA supports the work of IP Australia in seeking to address the issues that affect the capacity of Aboriginal and Torres Strait Islander peoples to protect and benefit from their IK.
- SPA recommends that IP Australia consider the impact of the lack of a “terms of trade” framework for the Australian screen industry on the capacity of Aboriginal and Torres Strait Islander screen businesses to retain creative control and ownership of screen stories containing IK.
- SPA supports the creation of a new form of IP right recognising collective or communal rights in TK owned by the communities, language groups or peoples who are the Traditional Owners of that TK.
- SPA also supports the creation of a supporting structure of a legislative body which would work in partnership with Aboriginal and Torres Strait Islander peoples to assert, protect and enforce their IK rights

## Introduction

SPA has seen a strong growth in Aboriginal and Torres Strait Islander majority-owned screen production businesses amongst its membership, now numbering 18 companies signalling the capacity is building in the Australian screen sector.

In addition, SPA has other screen producer-members with significant Aboriginal and Torres Strait Islander leadership and contribution that do not have the >50% majority ownership cited above. All of these businesses are making an important contribution to telling unique Australian stories and our shared national culture is enriched by this storytelling.

The growth in Aboriginal and Torres Strait Islander businesses and storytelling has not happened without the support of government and its agencies. SPA acknowledges the critical and successful work that Screen Australia has done over more than 25 years through its Indigenous Department that has supported Aboriginal and Torres Strait Islander productions and training opportunities.

In addition, all state and territory screen agencies play valuable roles in building and supporting Aboriginal and Torres Strait Islander productions and the capacity of the sector as well as institutions such as the Australian Film and Television School (AFTRS) and the National Institute of Dramatic Art (NIDA).

SPA endorses the application of Indigenous Cultural and Intellectual Property (ICIP) protocols that refer to all the rights that Indigenous people have, and want to have, to protect their traditional arts and culture.

SPA is committed to supporting and advocating for measures and funding ensure continued growth in this important cultural sector of the screen industry.

## SPA Submission

### Terms of trade framework needed for Aboriginal and Torres Strait Islander stories

Australia's national culture is enhanced by the success of this generation of Aboriginal and Torres Strait Islander screen storytellers. These stories are unique and have a significant cultural and financial export value to the screen industry.

Along with much needed growth funding, it is also of critical importance that we ensure that proprietary ownership in the creation of our Aboriginal and Torres Strait Islander stories (together with all our stories) is able to be retained by our story creators and producers and that the rights are retained within the creative control of creators, and not lost offshore to global content businesses.

The lack of "terms of trade" protections across the Australian screen industry is of great concern to SPA and is particularly relevant to a consideration of Aboriginal and Torres Strait Islander cultural heritage and the need to retain control and ownership of this in a globalised industry.

SPA believes that IP Australia should consider the impact of the lack of a "terms of trade" framework for the Australian screen industry on the capacity of Aboriginal and Torres Strait Islander screen businesses to retain creative control and ownership of screen stories containing IK.

The Australian screen industry exists within a commercial business framework and as global streaming services increase their presence and influence; the Australian screen sector is increasingly subject to global business drivers.

SPA believes it is therefore important to ensure that screen industry practitioners, including Aboriginal and Torres Strait Islander content creators operate within an economic framework that enables them to create, participate and prosper within this important cultural sector and at the same time, have the framework in place to support their ability to retain ownership and creative control over stories containing IK.

Without the retention of important rights in these stories containing IK, Aboriginal and Torres Strait Islander screen producers risk a loss of control over who uses IK and how it is used. In addition, the commercial exploitation of IK could only be to the commercial benefit of global streaming businesses and not Indigenous communities.

SPA is committed to ensuring that Aboriginal and Torres Strait Islander screen businesses are successful to ensure the Australian screen industry rewards successes and that our screen culture retains its cultural characteristics of diversity and dynamism.

For these reasons, SPA believes that screen production deals and in particular, Aboriginal and Torres Strait Islander screen deals should be underpinned by fair negotiation of commercial contracts to ensure these screen businesses and that those they employ are all able to operate sustainably and that Indigenous communities are not disadvantaged by the business practices of global corporate interests.

This principle is particularly applicable to Australian screen stories of high cultural worth, including those created by Aboriginal and Torres Strait Islander businesses and stories containing Indigenous Knowledge (IK), Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE).

### Importance of a Terms of trade framework to the Australian screen industry

In a 2021 report commissioned by SPA from Lateral Economics<sup>1</sup>, it was identified that financing deals for screen productions are complex, involving negotiations over a wide range of terms covering responsibilities, bearing of risks, the allocation of IP rights, and licencing arrangements.

The report found that:

In complex negotiations for deals, buyers [streaming platforms] very likely have greater bargaining power than [Australian] production companies and this enables them to secure more rights than they otherwise would be able to. For instance, TV networks are requiring AVOD or SVOD rights as a matter of course and streaming companies seek worldwide screening rights in perpetuity.

These changes are denying Australian production companies potentially large streams of future earnings from successful programs. To the extent that the rights holders are now overseas-owned international streaming companies, these earnings are lost to the Australian economy.

For independent screen producers in particular, the income generated by these rights and royalties can help sustain a small business between productions. The ownership of intellectual property and

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<sup>1</sup> SPA has attached a copy of this 2021 Lateral Economics report to this submission.

the ability to monetise rights within the production also incentivises entrepreneurship and provides a return on investment in ideas and creativity.

The retention of high levels of intellectual property is a feature of countries that rank well for innovation. The cultural and creative industries are also proven drivers of innovation. Unfortunately, data suggests this is an area where Australia is falling behind. The 2021 Global Innovation Index ranks Australia 25th in the world, down from 14th in 2014 below a comparable country such as Canada (at 16).

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.

According to a 2020 UK submission: Public service broadcasting, streaming services and the future for "terms of trade" by the UK Copyright and Creative Economy Centre (CREATe):

"There is a considerable weight of empirical evidence that limiting the assignable dimensions of copyright, or implementing reversion rights can have positive effects in balancing the interests of creators, investors and consumers of cultural works.

The rise in prominence of SVODs has led to many other countries, including France, Italy and Canada considering how to apply a 'terms of trade' framework to this new industry environment that is being driven by powerful global digital corporations.

For example, a number of territories now impose limited timeframes over the use of work by the commissioning platform with rights reverting back to the producer company. In the case of France, these rights revert back to the producer after 3 years. This is a relatively simple and clear regulatory framework that would quickly achieve a better outcome for Australian screen producers and in particular, Aboriginal and Torres Strait Islander screen producers if adopted here.

SPA believes that in conjunction with any regulation for additional investment by streaming platforms or others, that Australia must urgently implement a "terms of trade" framework to screen stories of cultural significance in order to maintain the sustainability and viability of our screen industry and ensure that valuable IP is retained within the creative control and ownership of creators.