

13 March 2020

Manager, Consumer Policy Unit
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Manager,

Enhancements to Unfair Contract Term Protections

I am writing in response to the Treasury's Consultation Regulation Impact Statement on Enhancements to Unfair Contract Term Protections.

Screen Producers Australia (**SPA**) was formed by the screen industry to represent independent producers across a diverse production slate of feature film, television and interactive content. Relevantly for the purposes of this consultation, most of our members are SMEs with five or fewer ongoing employees.

Our members employ hundreds of producers, thousands of related practitioners and drive more than \$1.2 billion worth of annual production activity from the independent sector as well as nearly \$1 billion in export earnings and tourism expenditure generated by the screen industry as a whole.

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.

SPA commends the Government for taking action to address the findings of the Unfair Contracts Review. While we are supportive of strengthening the unfair contract term protections for small business in the *Competition and Consumer Act 2010*, these mechanisms are not currently being utilised by SPA's members. As we indicated in our [submission](#) to the Unfair Contract Review¹, there are structural features of the screen industry that make it difficult for independent producers to negotiate fair contract terms with commissioning parties.

A well-publicised [example](#) is SevenWest Media's recent threat to halt production of children's content.² With the use of those kind of pressure tactics, it is very difficult for independent producers to negotiate fair (or any) deals with commercial free-to-air broadcasters.

Furthermore, as set out in our submission to the Unfair Contracts Review, the standard terms of deals with global streaming platforms require a buyout of a producer's copyright. This loss

¹ <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/60a5e777-b58f-4dc7-804c-357320e4d57c/Screen%20Producers%20Australia%20-%20UCT%20Submission%20-%202021%20Dec%202018.pdf>

² 'Seven halts children's production in Australian content quota protest' *Sydney Morning Herald*, 26 February 2020 <https://www.smh.com.au/business/companies/seven-halts-children-s-production-in-australian-content-quota-protest-20200225-p5445r.html>.

of intellectual property is now having an effect on Australian export earnings. For example, according to Deloitte's second annual report on [Screen Production in Australia](#)³ while the number of producers earning export income was up from 43% in 2017 to 48% in 2018, the overall earnings declined from \$163 million in 2017 to \$160 million in 2018. This can be attributed, in part, to the fact that producers have not been able to retain the secondary rights in projects commissioned by streaming platforms.

While amending the existing unfair contract protections (for example, by clarifying what is meant by "effective opportunity to negotiate" and increasing the value threshold to \$5 million) may make the scheme more suitable for use by independent producers, this alone, is not enough. In our submission, more targeted action is required to ensure that independent producers are able to negotiate fair contract terms with commissioning parties.

The Small Business and Family Enterprises Ombudsman has raised the issue of the relationship between independent producers and commissioning parties with the Chairman of the ACCC (see **Attachment A**). SPA also [requested](#) that the ACCC expand the scope of its Digital Platforms Inquiry to consider these issues.⁴ Neither of these initiatives have resulted in any action by the Government. While the Government has accepted the ACCC's recommendation for the development of a code of conduct to mediate the relationship between digital platforms and media businesses (**Recommendation 7** of the *Digital Platforms Inquiry Final Report*) this is limited to news media businesses rather than media businesses as a whole.

In SPA's view, it is vital that action is taken to address the imbalance in bargaining power between independent producers and commissioning parties. Based on experience overseas, legislated [terms of trades](#) is the most effective mechanism for doing so.

In the United Kingdom (**UK**), the *Communications Act 2003* establishes terms of trade which govern the way public service broadcasters (the equivalent of free-to-air in Australia) commission content from independent producers. Essentially, terms of trade give independent producers control over the secondary rights to their content, and thus the ability to monetise content they have produced in international markets.

The Canadian Broadcasting and Telecommunications Legislative Review Panel has recently recommended that Canada adopt similar measures as part of its report [Canada's Communications Future: Time to Act](#).⁶ This recommendation was in part informed by Olsberg SPI's report on the [Impact of the 2003 Communications Act on UK Indie Producers](#) which demonstrated the effectiveness of the UK approach.⁷

³ Deloitte, *Screen Production in Australia: Independent screen production industry census 2019*, <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/47ffa015-6efc-4df3-a0d6-02f3d068fd68/Deloitte%20Access%20Economics%20-%20Screen%202019%20-%20FINAL.pdf>.

⁴ SPA submission to Digital Platform Inquiry, April 2018 <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/47ffa015-6efc-4df3-a0d6-02f3d068fd68/Deloitte%20Access%20Economics%20-%20Screen%202019%20-%20FINAL.pdf>.

⁵ <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/6b2e47fd-4578-4304-b5a1-00ab388e4c20/20200218%20-%20One%20Pager%20-%20Terms%20of%20Trade%20v%203.pdf>


⁶ <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>

⁷ <https://www.o-spi.co.uk/wp-content/uploads/2016/02/CMPA-Terms-of-Trade-Report-by-Olsberg-SPI-04-06-2015.pdf>.

In SPA's view, there is a pressing need for regulatory oversight of the relationship between independent producers and commissioning parties in Australia. It is unclear whether this issue will be canvassed as part of the Options Paper currently being drafted by the ACMA and Screen Australia as part of the Government's response to **Recommendation 6** of the *Digital Platforms Inquiry Final Report*. We therefore raise this issue for your attention.

SPA looks forward to continuing to engage as this package of reforms develops. If you have any queries, please do not hesitate to contact either myself, or our policy consultant, Fiona Phillips fiona.phillips@screenproducers.org.au.

Yours sincerely



Matthew Deaner

CEO

Screen Producers Australia



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

16 July 2018

Mr Rod Sims
Chair
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Rod
Dear Mr Sims

MEDIA INDUSTRY - PRODUCERS AND BROADCASTERS RELATIONSHIP

We would like to discuss the change in the relationship between Australian broadcasters and independent producers of Australian content. There appears to be an abuse of power by Australian broadcasters which is undermining the intent of the Producers Offset to 'enhance the ongoing capacity of the Australian production sector in bringing Australian stories to our screens.'¹

We would ask that you commence an investigation to determine if the contracts offered by Australian broadcasters to independent Australian producers create a significant imbalance in the parties' rights.

There is a small group of broadcasters in Australia, two public and three commercial. As a result, independent producers have no power in negotiations as there is limited competition for productions. We note that this may change as productions can be commissioned by the new formats such as Netflix. This is yet to have much effect on the market.

To support producers the government introduced the Producer Offset (PO). The PO is a critical component of the structure to fund a production. Funding will combine marketplace finance, loans, the PO, producers' capital and equity investments. A 'crucial advantage of the Producer Offset (PO) is that the producer keeps the equity its contribution represents'²

To access the PO a program, in particular a series or serial form drama, must be able to be seen by Australian audiences. This ties independent producers to Australian broadcasters. The lack of competition has led to Australian broadcasters decreasing their equity contribution by the value of the Producers Offset. At the same time, they have increased their demands for rights over post production distribution. The power held by broadcasters remains the primary concern of the industry.³

These demands are established in the unfair contracts offered to independent producers. For example, the broadcasters first right of refusal. If the concept of a show is developed for Seven West Media but they decide not to progress, the producer may approach Ten Network Holdings. If Ten Network Holdings is interested, the producer must advise Seven West Media of the offer. Seven West Media may then undertake production on the same terms or refuse to release the concept.

¹ Screen Australia, *Producer offset at-a-glance*, 2018

² *ibid*

³ Deloitte Access Economics, *Screen production in Australia*, 2018

Contracts also seek to warehouse all channels of distribution post production. For example, shows produced for commercial broadcasters could be reproduced for subscription video on demand (SVOD) – the format required to sell to Netflix. Even though our Australian broadcasters do not utilise SVOD, terms of the contract mean they own the rights and prevent the producer selling to Netflix. Yet most screen producers rely on post production distribution for revenue.⁴

Broader industry issues have also been identified by the Australian Bureau of Statistics industry update⁵. Since 2011-12, commercial television broadcasters have cut their commitment to Australian drama and documentaries by 20 per cent and increased the substitution of Australian content for New Zealand content. Broadcasters are moving more production in-house, from 44 per cent of production in 2011-12 to 55 per cent in 2015-16. This prevents an even playing field for Australian independent producers.

Thank you for your consideration of these issues. If you would like to discuss this matter further please contact either myself or Ms Jill Lawrence, on 02 6263 1558 or at jill.lawrence@asbfeo.gov.au,

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Kate Carnell'.

Kate Carnell AO
Australian Small Business and Family Enterprise Ombudsman

⁴ Deloitte Access Economics, *Screen production in Australia*, 2018

⁵ [Australian Bureau of Statistics – 8679.0 Film, Television and Digital Games](#), Australia 2015-16