

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.

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-%2021%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>.

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 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](#)⁵ 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

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%20203.pdf>

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

SPI's report on the [Impact of the 2003 Communications Act on UK Indie Producers](#) which demonstrated the effectiveness of the UK approach.⁷

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

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