

26 August 2020

[bargainingcode@accc.gov.au](mailto:bargainingcode@accc.gov.au)

Dear Sir/Madam

### **News media bargaining code**

Screen Producers Australia (SPA) appreciates the opportunity to comment on the exposure draft bill for a news media bargaining code ('the code').

SPA has actively participated in the various consultation processes conducted in relation to the ACCC's Digital Platforms Inquiry and wishes to make further comments in relation to the policy principles underlying the code and their wider applicability in the screen sector.

As noted in SPA's previous submissions to the ACCC, Government intervention into dealmaking between news media businesses and the digital platforms is recognition of the harm that an imbalance of power in bargaining can have on content-creation businesses.

The fact that news media and digital platforms were unable to agree a code on a voluntary basis, and that Government action to mandate a code has been deemed necessary, is reflective of the underlying imbalance and the need for government intervention in such market conditions to ensure fair bargaining conditions.

SPA remains consistently of the view that similar market conditions exist as between independent screen production businesses and 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 small-to-medium enterprise 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.

We have also seen the policy intent of Government support measures subverted by the power imbalance between screen production businesses and distribution platforms. Specifically, the Producer Offset, which was introduced to support producers by enabling producers to keep the equity it represents. The lack of competition has seen broadcasters decreasing their equity contribution by the value of the Producer Offset whilst at the same time increasing their demands for rights over post production distribution (for example, warehousing streaming rights). Broadcasters have also moved to acquire 100% of the equity in a project, despite the intention of the Offset to be to ensure producers retain some equity. Contracts with unfair terms are also becoming more prevalent, including clauses giving broadcasters first right of refusal over a project. This is creating substantial difficulties, particularly for smaller screen production businesses.

This scenario is comparable to the market conditions which have given rise to the draft news bargaining code. We note the code arose from the ACCC finding that news media businesses have been unable to individually negotiate equitable terms over the use of their content by digital platforms, and that this is indicative of the imbalance in bargaining power. This has directly impacted on the ability of IP creators (the news media businesses) to monetise their IP and maintain sustainable businesses. The Government in this instance has recognised the cultural and societal benefits of sustainable news businesses and intervened to ensure their ongoing stability.

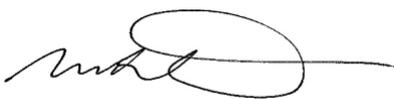
Similar thinking should guide the Government towards intervention in the market for screen content and the introduction of measures which will assist production businesses to reach fair terms and retain IP wherever possible. Australian screen content's cultural contribution is comparable to the societal contribution of news media businesses, and there is therefore a comparable case for Government intervention to secure the sustainability of the screen businesses which underpin that cultural contribution.

SPA refers to its submission to the Supporting Australian Stories on our Screens Options Paper, which further explores the role that mandated terms of trade should have in a renewed environment of support and regulation.<sup>1</sup>

We note that commissioning platforms (in this case, commercial free-to-air broadcasters) have, in the context of the digital platforms, publicly acknowledged the harm that an uneven playing field can have on content creators. For example, Free TV Australia has noted the importance of platforms "paying a fair price" for the "content that creates value for the platforms."<sup>2</sup> Similarly, Free TV also acknowledge the need for regulators to "even up the playing field" between small and large businesses. Both of these statements match with the underlying policy principles behind SPA's calls for mandated terms of trade.

Thank you again for the opportunity to comment on the draft code. Should you have any queries or require further information, please contact Holly Brimble, Director of Policy ([holly.brimble@screenproducers.org.au](mailto:holly.brimble@screenproducers.org.au)).

Yours sincerely



Matthew Deaner

CEO

Screen Producers Australia

---

<sup>1</sup> <https://www.screenproducers.org.au/advocacy/submission>

<sup>2</sup> <https://www.freetv.com.au/googles-cynical-ploy-to-mislead-and-frighten-australians-shows-why-the-code-is-necessary/>