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22 January 2021

Susie Black
Director | Mergers, Exemptions and Digital
Australian Competition and Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

Via email: susie.black@accc.gov.au

Dear Ms Black,

Re: Screen Producers Australia's Response to Submissions

This letter sets out Screen Producers Australia's (SPA) response to the submissions made by Nine, Stan, the Australian Directors Guild (ADG) and the Australian Writers Guild (AWG) regarding SPA's application for authorisation [AA10000535-1].

SPA represents small-to-medium businesses from the independent screen production sector across a diverse production slate of feature film, television, games and interactive content. Application has been made to the Australian Competition and Consumer Commission (ACCC) to permit SPA to collectively negotiate with industry stakeholders (MEAA, AWG and ADG) the minimum terms and conditions of engagement on independent, Australian screen productions for individual writers, directors, actors and crew.

Submissions of Nine and Stan

Nine Entertainment Co. Pty Ltd (Nine) lodges its submissions as commercial broadcaster and as a potential producer of in-house drama. Stan Entertainment Pty Ltd (Stan) is a streaming (SVOD) platform wholly owned by Nine. Both Nine and Stan *inter alia* commission and acquire screen content from SPA Producers.

It should be noted that Nine (and other free-to-air commercial broadcasters) is the beneficiary of the recent decision by the government to substantially lessen Australian content regulation on commercial television[1]. Stan as a streaming platform is not subject to any regulatory requirements to commission or acquire local content. Even in the event of the government deciding to regulate streaming platforms, the government has already announced that Stan as an SVOD owned by the holder of a broadcast licence will be exempt from regulation.[2]

Free TV (for Nine) has persistently argued for deregulation of its platform[3] and the SVODs argue against regulation of their platform[4].

Notwithstanding this, both Nine and Stan invite the ACCC to impose a number of regulatory conditions on SPA. In their submissions, Nine and Stan advise that they *do not oppose in principle* SPA's application but argue that the ACCC should as a condition of authorisation require SPA to:

- invite other interested parties to participate in meetings
- share correspondence with interested parties for their input
- take into account interested parties' views

[1] https://www.paulfletcher.com.au/print/safeguarding-australian-content-in-a-world-of-changing-viewership
[2] *Modernising Television Regulation in Australia*, Media Reform Green Paper, November 2020, p.30.
[3] https://www.communications.gov.au/sites/default/files/submissions/sass-free-tv-australia.pdf
[4] https://www.communications.gov.au/sites/default/files/submissions/sass-stan-netflix-prime-video-and-disney-plus.pdf

- demonstrate to interested parties that it has taken into account their views
- have a dispute resolution process that enables interested parties to raise concerns, and
- report annually to the ACCC that has complied with these requirements.

Further, the ACCC should restrict the term of the authorisation to no longer than 5 years.

SPA objection to submissions of Nine and Stan

SPA disagrees with the submissions made by Nine and Stan and would object to conditions being imposed.

Nine and Stan have not adequately made the case as to why SPA producers should have imposed upon them procedural conditions and a reduced time period in our attempts to negotiate collectively with our workforce. Nine argues that the proposed conduct has the *potential to lead to competitive detriments* because the cost of commissioning an Australian program is significantly higher than acquiring imported content. Stan object to provisions in ATTRA 2016 that introduced the same 3-year initial usage period for both television and SVOD. There is no evidence advanced that imposing restrictions on SPA's operational capacity will enhance the competitiveness of the independent screen production sector. Indeed, the opposite is the case.

In our submission, the restrictions proposed are unwarranted, overly burdensome and would exacerbate the imbalance in bargaining power between commissioners of content and independent producers.

Conditions not warranted, SPA does consult

SPA operates as a small not-for-profit organisation that already consults with industry participants and listens to views expressed in this process. For example, the most recent negotiation resulting in wholesale changes to usage rights was ATRRA 2016. SPA relies on the same submissions made as part of the 2015 authorisation regarding the industry consultation that occurred prior to settling those terms. Beginning on 22 October 2014, there was one formal meeting and several informal updates via telephone and in person with each free-to-air broadcaster. More recently, on at least 7 February 2018, 18 December 2018 and 18 February 2020, SPA meet with other broadcasters to *inter alia* review the impact of the ATRRA 2016 changes. SPA is not at all resistant to conducting discussions with Stan and Nine. We recognise that consultation is desirable.

Conditions are overly burdensome

However, imposing additional, onerous and legally binding conditions on our existing consultation processes would have a number of negative consequences. The conditions proposed would significantly increase operating costs, create multiple impracticalities (including for example, that SPA would be required to become *de facto* the regular convenor of an all-of-industry industrial relations forum) and potentially exposes SPA's producer members to a legal risk of non-compliance with conditions that are highly subjective and lacking in certainty.

The rationale for the authorisation is to enable SPA producers to negotiate collectively with MEAA, ADG and AWG for fair, reasonable and agreed minimum terms and conditions of engagement. Such collective negotiations are entirely lawful as they relate to those writers, directors, actors and crew who are engaged within an *employment* relationship – that is, the overwhelming majority of engagements in the independent screen production sector. The effect of the authorisation sought is to extend protection to the collective negotiations as they relate to those writers, directors, actors and crew who are not engaged within an employment relationship.

If conditions were applied, they could only apply to the negotiations that relate to contractors rather than employees. The practical effect of this is that SPA would need to conduct two parallel but discrete sets of negotiations, both negotiations relating to the same jobs (writer, director, actor, crew) and subject matter (minimum terms of engagement) but held separately (by type of engagement) with one set of negotiations subject to different procedural conditions. In our submission, this would be highly inefficient and overly onerous.

Imbalance in market strength

In addition to these significant operational inefficiencies, SPA is concerned that by imposing conditions on producers' ability to negotiate minimum terms of engagement, broadcasters and other acquirers of content would be unduly using third party industrial relations to advance their own commercial interests. Nine is quite frank in its position that the 'meaningful consultation' it seeks is for the purpose of achieving outcomes more favourable to broadcasters and other acquirers of content.

Nine, Stan and other broadcasters and commissioners of content have significant power as acquirers of content and are in a strong bargaining position compared to the producers that SPA represents. To highlight the imbalance of negotiating power between free-to-air commercial broadcasters and the independent production sector, we ask the ACCC to consider the following:

- Nine reported Revenue of $2.2 billion for FY20 for the 12 months to June 2020.[5]
- Stan had a 'landmark' year FY20, with the combination of accelerated subscriber growth and a price rise underpinning a 54% increase in Stan's revenue across the year.[6] (It is also noted that over the year, Stan sourced more than 60 first-run exclusives from 17 different distributors[7], the majority of whom are not SPA members. Stan is under no obligation to source content from local screen production businesses.)
- There are 100 to 150 Australian businesses competing to produce screen content for the commercial, public free-to-air and subscription television broadcasters and streaming services.
- According to the 2019 Deloitte industry census[8], about 44% of these businesses reported annual revenue of less than $1 million. Another 42% reported revenue between $1 and $10 million, while 7% had an annual turnover of between $10 and $25 million. Only 7% of Australian screen businesses reported an annual turnover more than $25 million.
- Further, screen production businesses are facing difficult conditions and narrowing profit margins, with the smaller businesses in particular facing profitability challenges. One in five businesses made a loss, and another half (40%) only made a slight profit. While this represented a marginal improvement on the preceding year (where 22% of businesses made a loss), profitability remains an on-going issue for the industry.[9]
- The Deloitte study also tested the outlook of Australia's independent production sector, taking into account the top challenges faced by screen producers. Broadcaster bargaining power was the top ranked challenge, followed by high labour and capital costs, and international competition.[10]

Further disruption ahead

In September 2020, the Government announced a substantial lessening of commercial free-to-air television quotas with no immediate corresponding transition to imposing regulatory quotas on streaming platforms.

In place of the longstanding regulatory requirement to acquit points in selected genres (drama, documentary, children's), is a significantly reduced single points target (based on budget size rather than actual financial contribution), with no genre minimums.

Under this new flexible model the amount of drama, children's and documentary commissioning will reduce substantially in the coming years. In terms of drama production alone, SPA estimates the impact of this deregulation will be some $100 million less investment in production and a loss of 2,800 jobs[11].

The independent screen production sector has a longstanding concern regarding broadcasters' disproportionate bargaining power. The lessening of content regulation on commercial broadcasters and no content regulation on streaming platforms will further exacerbate this inequality. In this context particularly, broadcasters should not be able to impose conditions on SPA producers that effectively enable those broadcasters to dictate and/or erode the minimum terms of engagement.

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[5] https://www.nineforbrands.com.au/wp-content/uploads/2020/08/FINAL-ASX-release-FY20-results.pdf; https://www.adnews.com.au/news/analysis-nine-entertainment-s-financial-strength-stands-out-in-the-media-landscape

[6] https://www.nineforbrands.com.au/wp-content/uploads/2020/08/FINAL-ASX-release-FY20-results.pdf; https://www.adnews.com.au/news/analysis-nine-entertainment-s-financial-strength-stands-out-in-the-media-landscape

[7] Ibid.

[8] *Screen Production in Australia: Independent screen production industry census*, Deloitte Access Economics (2019)

[9] Ibid. p 19

[10] Forty-nine percent said that broadcast bargaining power was the top ranked challenge, up from 44% in 2017, ibid. p 26

[11] https://www.aph.gov.au/Parliamentary_Business/Committees/House/Communications/Arts/Submissions

Nothing prevents negotiating of own terms

Nine points out that it is affected not only as an acquirer of content but also as a potential producer of in-house drama. In their submission, if Nine were to produce Australian drama in-house in the future *the SPA's model terms of engagement would also be the framework upon which Nine engages actors, writers and directors for its in-house drama productions.*

With respect, SPA disagrees with this view. We note that Seven is both a network and a producer of in-house drama. Seven has negotiated at least three comprehensive agreements with MEAA to cover their in-house productions, including the *Seven Network (Operations) Limited Actors Agreement*, the *Actors Seven Television Repeats and Residuals Agreement* (ASTRRA) and the *Seven Network (Operations) Limited Productions Enterprise Agreement 2019* (19 July 2019 AG2019/2176). The ABC has also negotiated with MEAA the *ABC Actors Agreement* to cover in-house productions and SPA understands that the ABC negotiates with MEAA and CPSU over the minimum terms and conditions of engagement for crew on their in-house productions.

In our submission, there is nothing to prevent Nine from entering into negotiations with writers, directors, actors and crew directly and/or with their representatives for fair, reasonable, agreed minimum terms on productions where Nine directly engage the services of these people.

Need ability to continue collective negotiations precisely because of rapid change

Nine and Stan point to technological, structural and impending regulatory changes and argue that the term of an authorisation should be limited to 5 years. In fact, it is precisely because of rapid and constant industry change that a longer period is sought.

As Nine acknowledges, the agreements in question are generally complex and take a long time to negotiate. As outlined in the SPA submissions, the ATRRA 2016 took in excess of 5 years to conclude. Negotiations for the TV Animation Voiceover Agreement occurred over more than 3 years. These time periods do not factor in the agreement to stagger the adoption (or 'grandfathering') of new terms nor any period for review. These negotiations were lengthy and complex precisely because the agreements required wholesale change to become fit for purpose in times of technological and structural disruption.

Stan points out that over the last 5 years there have been significant changes in the SVOD market, suggesting that certain provisions in ATRRA 2016 (notably, the length of the licence period) should be updated. This is an argument to grant a longer period to enable ongoing negotiations for continuous improvement. In the context of constant change, small business independent producers need the ability to negotiate with their workforce without the regulatory burden of making application to extend authorisation midway through industry transition.

We also note that the digital disruption to which Nine and Stan refer commenced more than a decade ago. Traditional practices for producing, distributing, exhibiting and consuming screen content have been in a state of challenge and change for many years. The mere fact of constant change is not a sufficient argument to restrict the proposed conduct to a shorter term. The question that Nine and Stan fail to address is what relevant factors of this technological, structural and regulatory change are likely to make SPA's proposed conduct suddenly no longer a net public benefit.

If Nine and Stan are genuinely concerned that circumstances will change materially during the authorisation period such that SPA's proposed conduct is no longer a net benefit, other avenues (such as conducting a review) remain available. In our submission, if the ACCC is satisfied as to the application, the term of authorisation should be for a meaningful and reasonable period. The onus should then be on Nine and Stan to demonstrate that the *material circumstances* have changed not just that the industry is itself changing.

ADG Submission

The ADG seeks to make it clear that the scope of the *terms of engagement should also extend to copyright and moral rights*. SPA does not dispute this. At paragraph 2(c) of the SPA application, we set out that the '*model terms of engagement negotiated between SPA and AWG, MEAA and ADG include*… [inter alia] *minimum contractual arrangements dealing with copyright, moral rights and credit*…'

In our submission, no amendment is required. SPA accepts that the proposed conduct extends to copyright and moral rights and will comply with the law with respect to any negotiated agreement with the ADG that covers these matters.

For the reasons outlined in this letter, SPA objects to the submissions made by Stan and Nine in relation to conditions and term but does not object to the submissions of the ADG and AWG.

Please do not hesitate to contact us if you require any further information.

Yours sincerely,

Zoe Angus
Director, Industry and Commercial