

22 July 2021

# **Screen Producers Australia's supplementary submission to the *Media Reform Green Paper***

Screen Producers Australia (SPA) was formed by the screen industry businesses representing large and small enterprises across a diverse production slate of feature film, television and interactive content.

As the peak industry and trade body, we consult with a membership of more than 500 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and appointed Policy Reference Group representatives. Our members employ hundreds of producers, thousands of related industry practitioners and drive more than \$1.2 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 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 has prepared the following supplementary submission to the Media Reform Green Paper. The submission responds to a selection of the key claims and contentions put forward by other submitters during the main consultation period. The supplementary submission is intended to assist in the progression of key policy discussions within Government and amongst industry stakeholders. This submission should be read in conjunction with the main SPA submission.

For further information about this submission please contact Holly Brimble, Director of Policy ([holly.brimble@screenproducers.org.au](mailto:holly.brimble@screenproducers.org.au)).

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# 1 Executive Summary

- SPA has prepared the following submission which is supplementary to its main submission to the *Media Reform Green Paper* ('the Green Paper').<sup>1</sup> The two documents should be read together.
- We are motivated in preparing this submission by a concern regarding some of the key claims made in the submissions put forward by streaming companies and the commercial free-to-air broadcasters.
- Whilst many of the claims are presented in terms of a cultural or economic policy frame, it is important to note that the underlying motivation for these submissions is an intention to avoid making mandated contributions to Australian culture and content, for streaming companies. And for commercial free-to-air broadcasters, the clear intention is to curb competition for content and audiences, as well as a possible intention to avoid regulation which might in future apply to evolved free-to-air services.
- Whereas the Screen Producers Australia policy proposal will result in a rich dividend of Australian cultural content for audiences, up to 10,000 new jobs and a sustainable content producing industry, the vision from streaming platforms and broadcasters is a regulatory vacuum, in which Australian content levels will wax and wane according to changes in business strategies and international content budgets, to the detriment of Australian audiences and industry.
- Under this vision, Australia will be left behind as content budgets are allocated to investments in overseas territories, particularly if the hard glare of regulatory scrutiny moves on from the Australian market. The impact will be particularly felt by the Australian child audience, for which there are currently no regulatory protections as regards specific content produced for that audience.
- A closer look at some of the key claims from these parties will demonstrate they present only part of a picture, and that further exploration of the issues gives rise to a different interpretation or perspective.
- For example, whilst recent increases in voluntary investments are welcome, a close examination reveals the level of investment is inconsistent across providers, is inconsistent over time, and overstates the importance of content licensing and acquisition.
- Some of the international comparisons made in other submissions attempt to draw conclusions which can be countered, and some concerns raised about impacts on costs and industry capacity are unnecessarily alarmist.
- We also consider the claims made regarding content diversity, impacts on market structure and regulatory design.
- The conclusion is that the markers for regulatory intervention in Australia remain clear, despite the claims of those opposed – the enduring importance and cultural importance of Australian stories, rapid audience take-up of streaming services, combined with inconsistent levels of voluntary investment and a clear capacity to invest.

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<sup>1</sup> <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/97f0ff71-1acb-4f43-a772-170a9fc802b1/FINAL%20GP%20Submission%20190521%20-%20Cover%20Page%20-%20v2.pdf>

## 2 Consideration of key claims made by other submissions

### 2.1 Underlying market conditions and justification for regulatory intervention

*Claim: There is no market failure in the provision of Australian content that would warrant regulatory intervention<sup>2</sup>*

One of the key themes of submissions which oppose the Government's proposal is that there is a lack of market failure in the provision of Australian content.

However, a careful consideration of the information provided demonstrates that the streaming sector's contribution to new local commissions is inconsistent across providers, and does not represent a consistent level of commitment across years in a way that might suggest regulation is unnecessary. There is also an inconsistent commitment to some genres, such as children's content and quality documentary.

For example, Appendix 5 of the Australia New Zealand Screen Association (ANZSA) submission appears to be seeking to give an overall impression of extensive investment from streaming companies in Australian works over a long period of time.

However, SPA makes the following observations regarding the list:

- In addition to listing commissions, the list casts a very wide net and captures a substantial number of acquisitions of programs developed and commissioned by broadcasters, feature films acquired after completion and broadcaster co-commissions.
  - These categories of 'investment' are not all equal when it comes to stimulating production.
  - Acquisition of a program after completion would mean the acquirer has made no contribution to getting the project off the ground, and has not contributed to the development of the project or the generation of production finance.
  - We do not agree that an acquisition makes an equal contribution to the production of Australian content as does an original commission.
- The list includes some international productions (which claim the Australian location incentive), as well as commissions coming out of foreign territories.
  - We query whether these projects should be included in a discussion of contributions to Australian cultural content.
- Whilst the list shows promising increases in commissioning in recent years, it should not be viewed as evidence of extensive engagement with the local production sector over time.
  - There is a noticeable inconsistency between the level of engagement from Netflix and Stan, for example, compared to other providers, who

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<sup>2</sup> Netflix submission, Green Paper submission, p 1; Australia New Zealand Screen Association (ANZSA), Green Paper submission, p 24; ViacomCBS Green Paper submission, p 6; Amazon Prime Video, Green Paper submission, p 3; Nine Entertainment Co, Media Reform Green Paper submission p 3

- have either only recently announced investments (Amazon), or who have only made isolated investment (Apple TV+).
- A report from Oliver and Ohlbaum noted that the current share of Australian content on streaming services is 4%, which does not suggest a mature Australian content market on streaming services.<sup>3</sup>
- Even in the case of Netflix, we note that 86% of the Australian content in Netflix Australia's catalogue in 2020 was acquired.<sup>4</sup>
- This suggests the market alone is not working to guarantee consistent levels of contribution across the sector, and that a regulatory safeguard is needed.

We are also concerned that the current levels of investment are tied to the regulatory spotlight that the Government's process has cast onto the sector. Whilst a level of investment may be maintained in the absence of regulation, some may not. If we had seen multiple years of reasonable levels of investment without the prospect of regulation at play, it might be possible to make the claim that the market would provide without regulation. However, we have not seen this, and hence we lack confidence that an unregulated market will deliver on cultural policy objectives.

We would also make the point that if streamers are, as they state they are, committed long term to current levels of investment, then a regulatory requirement that safeguards those levels should not be a concern.

In terms of underlying market failure, we see clear evidence of this occurring in relation to the deal structures being negotiated between independent producers and streaming platforms, and the need for terms of trade. For further explanation of this evident market failure, please refer to section 4.11 of the main SPA Green Paper submission.

*Claim: Streaming platforms have an ongoing commitment and intent to commit to and invest in Australian content<sup>5</sup>*

We note that some streaming companies have outlined an ongoing commitment and intent to commit to and invest in Australian content. This commitment is welcome, however mandated minimums are a reasonable way to ensure this commitment survives changing market conditions and investment strategies. Indeed, if there is a genuine commitment to increasing investment, a regulatory obligation should not be a concern.

We also note that this commitment is not shared across all providers, further highlighting the need for regulatory intervention to ensure comparable access to Australian content for audiences of all streaming services (of size and scale).

We note suggestions by some providers that policy decisions should be delayed until the voluntary ACMA reporting is available,<sup>6</sup> until the impact of the increased Producer Offset and COVID 19 is known, and until we have the results of the next Screen Australia Drama Report.<sup>7</sup>

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<sup>3</sup> Oliver & Ohlbaum Associates, *Supporting Local Content Investment: International Policy Approaches to VOD Services*, May 2021, p 7

<sup>4</sup> Oliver & Ohlbaum, p 54

<sup>5</sup> Netflix p 2, 20, ANSZA p 3, 4

<sup>6</sup> Stan Entertainment Pty Ltd, Media Reform Green Paper submission, p 5

<sup>7</sup> Netflix p 3

SPA does not agree with this positioning as the case for regulatory intervention is already clear and a timely Government response is crucial. We already know that consumers have and are migrating to new streaming platforms, and we already know that the public policy objective of ensuring those audiences have access to Australian stories is of enduring importance. We already know that the underlying market failure that attaches to Australian content production continues to exist, and we already know that voluntary contributions are inconsistent across providers and are vulnerable to fluctuations in the perceived risk of regulatory intervention.

We also know that the Government has already acted to deregulate the commercial free-to-air television platform, creating the risk of a dangerous contraction in the local production sector (particularly in children's content) and a decrease in the amount of Australian scripted content that is available to audiences.

We have also seen moves in other territories to regulate streaming platforms, which creates an incentive for streaming platforms to commit their global investment budgets to those territories, to the detriment of unregulated markets, such as Australia.

We also note that the voluntary reporting to the ACMA will not capture detail regarding the fairness of deal structures in the market.

The Government should be wary of attempts to delay a much needed regulatory response.

*Claim: Licensing of second run content provides additional access to audiences, boosts the production sector and should be included in a consideration of local content investment<sup>8</sup>*

As outlined in our main submission, SPA's regulatory proposal would require the minimum investment to be made through original commissions.

We note that the streaming platforms have argued that a broader range of spending be considered when weighing up streamer contributions, including acquisition and licensing.<sup>9</sup> Netflix have suggested that licensing second run content provides new access to the content here and overseas, as well as financially supporting the production sector. This latter point is perhaps more complex than is presented. The degree of benefit to the production sector depends on who has been holding the rights. If the rights are held by a distributor or broadcaster, no benefit may ever go back to the production sector, or if it does, it can be quite insignificant (the Australian system, with no mandated terms of trade, doesn't ensure retention of rights by producers).

Whilst licensing of content does provide access to Australian content for audiences of streaming services, our view is that the focus of any regulatory obligation should be on the creation of new content, and on ensuring streamers are active participants in the commissioning of that content. This is explored further in section 4.5 of our main submission, and in short, ensures that regulated entities are required to engage directly with the independent production sector at the most critical part of a project's creative and financial life cycle.

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<sup>8</sup> Netflix, p 2

<sup>9</sup> Amazon Prime Video, p 4

It also ensures Australian streaming audiences get the benefit of new Australian content, as well as access to pre-existing library content.

For these reasons, we suggest that any assessment of streamers' contribution to the Australian production sector should give only marginal weighting to rates of Australian content acquisition.

*Claim: Australia has a low rate of 'natural interest' in Australian content.<sup>10</sup>*

We note that several submissions have made reference to a level of 'natural interest' in Australian content which is based on analysis of Australian film box office success. Given the current debate centres around the small screen, we think a better comparison is with what Australians like to watch on the small screen. To this end, we note that all of the Top 50 programs in 2019 on commercial free-to-air television were Australian,<sup>11</sup> which suggests a very high level of natural interest in Australian content. Whilst this list features more sport and unscripted content than appears on streaming services, it nevertheless demonstrates a natural affinity amongst audiences for local issues, local voices, local accents and local stories.

We also note that when surveyed, Australians express strong support for the importance of Australian content, and indeed, Government support for Australian content. As noted in the Options Paper:

“According to the research project Screen Currency, Australians believe that Australian screen content is recognisably different, important to support and valued for its diversity. It is similarly preferred by both low and heavy viewers of online content. This research also showed that 76 per cent of surveyed Australians are in favour of government providing support to the sector.”

We also note the streamers' consistent messaging that they have made and will continue to make voluntary investments in Australian content. This seems at odds with the suggestion there is a low level of natural interest.

There is also a comparison to the level of 'natural interest' in French cinema content. It is important to note that French cinema content is extremely well supported through regulation and investment, and SPA would welcome a discussion about similar levels of support for Australian cinema.

*Claim: The Australian production sector is doing well, has been assisted through the pandemic and is poised for great growth.<sup>12</sup>*

We note reference is made to the production sector performing well based on assistance through the pandemic and a strong rebound. Our assessment is that the industry is well paced to deliver Australian content for Australian audiences if the key factor of commissioning demand is present. Our assessment is that regulatory intervention will be required to guarantee that commissioning demand, because as we have seen, demand from commercial free-to-air television will reduce following

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<sup>10</sup> Netflix, p 51; ANZSA, p 39

<sup>11</sup> <https://www.screenaustralia.gov.au/fact-finders/television/industry-trends/top-programs>

<sup>12</sup> ANZSA, pp 2-3; ViacomCBS, p 6

deregulation, and voluntary investment from streaming platforms is inconsistent across providers.

*Claim: The Australian screen production sector has weathered the initial phase of digital disruption better than any other sub-sector in the Australian Screen Industry, and now, with a globally competitive incentive framework following the increase of the Producer Offset TV to 30% and the increased Location Incentive allocation, opportunity abounds to produce Australian stories.*<sup>13</sup>

Whilst we agree that the increase in the Producer Offset will be warmly welcomed, SPA queries reference here to the Location Incentive, which doesn't incentivise the creation of Australian stories or cultural content. The depiction here is of a local sector that is benefiting from international production, and that we assume the implication is that no additional regulatory intervention is required to assure the sustainability and health of the sector.

It is important to distinguish between the parts of the industry benefiting from international production, and those parts of the sector which rely on local commissions and the creation of local stories. For the majority of the local independent production sector, inbound productions do not bring significant opportunity.

The key to sustainability of the Australian local independent sector (which is the engine room of the creation of Australian cultural content) are regulatory settings which engage all distribution platforms into the creation of local stories at a meaningful level and on an ongoing basis.

The ANZSA analysis also fails to note the contractionary impact expected to be felt as a result of the partial deregulation of the commercial free-to-air television platform.

*Claim: Producers derive significant benefits from the entry of VOD services into the market.*<sup>14</sup>

The ANZSA submission correctly notes that producers derive benefit from the entry of SVOD services into the market. We agree that increasing the number of participants and investment levels in the market is beneficial. This is why we support safeguards to ensure that increased participation is sustained with certainty over time and at meaningful levels.

However it should be noted that for producers, it is not all upside. The deal terms being imposed by streaming platforms are more rigid, and less beneficial in the long term for producers, leaving independent producers under more strain financially.

*Claim: An investment requirement would fail to value the investments that platforms have made in things like studios and facilities, production companies and dubbing.*<sup>15</sup>

We note that these facilities and investments are set up as profit making exercises in their own rights, often with government support to establish them. This partly assists the business to reduce its costs in creating international product using resources in

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<sup>13</sup> ANZSA, p 16

<sup>14</sup> ANZSA, p 13

<sup>15</sup> ANZSA, p 31

other territories. Whilst there are benefits to the Australian economy and workforce, in their own right these investments don't deliver a substantive contribution to Australian content.

## 2.2 Production industry capacity and impact on content costs

*Claim: There are capacity challenges in the productions sector and regulatory minimums would exacerbate these.*<sup>16</sup>

We note an emphasis in some submissions on the impact that increased demand would have on capacity within the Australian production sector. We urge the Government to respond to this with caution, and submit that long-term policy decisions should not be made on the basis of any short-term capacity issues.

We note that, at the time of writing, the industry is experiencing, to different degrees, some capacity issues. However, these are expected to be short-lived. For example, the level of inbound production that Australia has experienced in the last 6-12 months is not expected to persist, with international queries already dropping off and production in overseas territories starting to rebound.<sup>17</sup> Our understanding is that the full effect of international rebound will be evident by mid-2022.

Indeed, Australia's level of attractiveness as an international location for shooting is subject to a range of variables which can change at any time. This includes the risk profile of shooting in Australian versus other territories as regards COVID. This risk profile is changing all the time as rates of vaccination in other territories outpaces Australia's, and Australia continues to experience lockdowns and outbreaks.

Changes in international tax and funding incentives will also impact on location decisions and there is no guarantee Australia will continue to be considered a leader in this space as other territories introduce new or improved measures.

These factors combined could see an exodus of international production, thereby creating an immediate boost to industry capacity.

There is therefore a need to consider future employment certainty for the workforce being trained into the industry. An ability for this workforce to pivot into local productions will deliver more long-term certainty than is available through international work. A robust set of measures to regulate streaming services will provide this certainty.

The Oliver & Ohlbaum report states that "foreign investment may not provide long-term, stable investment in local content as international producers can move about according to global competition in tax breaks. It also does not provide the same access to IP to allow growth in the local industry. Service provision needs to be a balanced, additional layer over solid local investment."<sup>18</sup>

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<sup>16</sup> Netflix, ANZSA, Oliver & Ohlbaum, ViacomCBS, Nine Entertainment Co, Stan Entertainment Pty Ltd

<sup>17</sup> <https://www.nydailynews.com/new-york/ny-film-industry-pandemic-rebound-20210704-x5gibuoy5ffvjrrpwwithg6m-story.html>

<sup>18</sup> Oliver & Ohlbaum, p 42

However, we also note that the production industry has, over time, consistently seen a cycle of expansion and contraction, and that capacity typically adjusts. The best conditions in which the sector can grow sustainably are conditions of demand certainty, which is what a regulated quota on streaming platforms will provide.

It is also our view that the response to capacity constraints should be well-informed industry policy that facilitates growth in trained and skilled personnel, rather than to short change Australian viewers by dismissing the issues as ‘too hard’.

*Claim: Regulatory intervention could drive up prices.<sup>19</sup>*

We note the claims from streaming platforms and others that a minimum regulatory quota would lead to an increase in the cost of content. This needs to be considered in light of the concurrent claim that SVODs are investing in the market without regulation and will continue to do so (“investment in Australian content is already significant and growing”<sup>20</sup>). Any fluctuations in market pricing for content is therefore also likely to occur from increasing levels of voluntary investment and should therefore not be considered as a factor against minimum regulatory safeguards.

We also note that over time, the lower rates of remuneration in Australian production has led to many highly talented and qualified practitioners leaving to work in overseas markets, typically the US. If, however, an increased rate of participation in commissioning from streaming platforms resulted in payment at global rates, Australia may be able to attract back Australians currently pursuing their career overseas. That is to say, an increase in costs will deliver a dividend in the form of greater quality and retention of the talent base. We note that an increase in the quality of screen content has been a consistent objective of the current Government.

## **2.3 The international context**

*Claim: International examples can be contextualised, most countries have no VOD requirements, those that have do so at levels below ‘natural interest’ in local content.<sup>21</sup>*

We note the ANZSA submission suggests that “most countries have not required VOD services to invest in local content”.<sup>22</sup> We agree that internationally, we are at the beginning of the story of local content regulation on streaming platforms. This is a natural consequence of the fact that these platforms have only recently risen to their dominant positions in the media and entertainment landscape. There is significant ground still to be covered and it is possible that initial regulatory interventions may be reviewed in the near future as we see the roll out of market-leading interventions in France and Canada. It will become evident that the creation of strong policy interventions in some markets means that platforms will prioritise their investment budgets in those markets. This can be expected to drive Governments to consider how regulatory interventions in their markets are positioning their territories for a ‘piece of the pie’.

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<sup>19</sup> Netflix, p 4; ANZSA, p 3; O&O, p 7; ViacomCBS, p 6; Nine Entertainment Co, p 3, Stan Entertainment, p 2

<sup>20</sup> ANZSA, p 27

<sup>21</sup> ANZSA, p 9

<sup>22</sup> ANZSA, p 9

It is also important to carefully select appropriate international comparisons. Whilst it is true that most countries have not yet regulated streaming services, it makes more sense to compare Australia to other sophisticated economies where there are obvious challenges and clear signals about market failures. A lot of markets don't have public broadcasting, or film tax offsets, or content regulation at all, so it doesn't make sense to compare Australia to those markets. For these reasons, France and Canada make very appropriate comparators for the Australian policy discussion.

In any event, it is evident that there are clear markers for regulatory intervention in the Australian market (service uptake, regulatory inconsistencies, consumer benefit, consumer demand, revenue performance), which mandate Government action, regardless of what has occurred in other markets overseas. We can see these recognised in the Government's Green Paper.

*Claim: Regulation in Canada has not yet been implemented.*<sup>23</sup>

We are concerned by any attempt to suggest that Canada's regulatory intervention is unlikely to occur. We note that the Canadian Government's intentions in this area have been clear for some years, going back to Prime Minister Trudeau's published mandate letter in 2019.<sup>24</sup> Whilst there has been some controversy regarding the implementing legislation (Bill C-10), the concerns relate to completely separate measures relating to online speech. There is also cross-party support for regulatory intervention on the streamers, so depicting this aspect as contentious or conditional is not accurate.

*Claim: The French regulatory model will be unusual internationally.*<sup>25</sup>

We also note suggestions that the French regulatory intervention will be unusual internationally, and should therefore not be a useful reference for the Australian debate. An alternative interpretation is that France is a market-leader, an example of what is possible with political will and an ambition to protect localism. Our sources also indicate that other EU territories will see the success of the French approach and revisit the level of regulatory intervention in those territories shortly.<sup>26</sup>

*Claim: Countries such as the United Kingdom and Germany have the highest levels of investment, yet have lower levels of policy restrictiveness.*

We note that the Netflix submission draws a link between the level of 'policy restrictiveness' and levels of investment, saying "countries such as the United Kingdom and Germany have the highest levels of investment, yet have lower levels policy restrictiveness."<sup>27</sup> We would urge caution before drawing a bold line between levels of SVOD regulation in these countries and the level of investment. There may be some correlation, but this is distinct from causation.

These are very different markets to Australia, and the strength of the independent production sectors are based on a variety of economic and policy settings that may not feature in Australia. For example, the UK has had very strong terms of trade

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<sup>23</sup> Netflix, p 51

<sup>24</sup> <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-canadian-heritage-mandate-letter>

<sup>25</sup> Netflix, p 51

<sup>26</sup> <https://www.youtube.com/watch?v=J6As-BVZ2Xo>

<sup>27</sup> Netflix, p 4

protections for the independent sector for many years, which have supported its growth and vibrancy.

There are also regional programming and production obligations and a significant intervention in the market through funding for the BBC and the establishment of Channel 4. This intervention is highly significant when compared to Australia - the ABC receives one eighth the funding of the BBC, to serve one third the population.<sup>28</sup>

Also, the BBC has regulatory oversight from Ofcom and has transparent payment quantum for productions and clearly articulated content frameworks.

We also note there is regulatory intervention in the UK through the implementation of the minimum library requirements of the EU's Audiovisual Services Media Directive. The BBC has also called for streamers to be regulated with quotas similar to those applicable to broadcasters.<sup>29</sup>

Germany and the UK are also much larger markets than Australia, altering the likelihood of an underlying market failure in local content. Both territories are dominant cultural powers and lead in the generation of two key languages (English and German).

A number of these factors were recognised in the Oliver & Ohlbaum report commissioned by Free TV Australia and the ABC. The report notes there have been:

“a series of judicious policy and regulatory interventions to support UK content investment and the wider audiovisual sector, over decades. These work alongside and enable industry ambition and are necessary to compensate for the relatively small size of the UK's home market. Supported by this framework, the public service broadcaster, commercial FTA broadcasters and a dynamic independent production sector with access to IP, are the cornerstone of investment in high-quality local content for UK audiences.”<sup>30</sup>

*Claim: South Korea is an example of a light touch regulatory environment which has strong levels of local production.*<sup>31</sup>

We think caution should be applied before considering the Korean market as a suitable model for Australian policy-making. Korean content is not easily substitutable for English language content, which is the underlying cause of market failure in Australia.

Also, we do not agree regulation in that market is 'light touch'. Whilst there may not be regulatory requirements on streaming services yet, the Korean market features strong protections in the cinema space, which incentivises investment across the board. For example, there is a screen quota that requires movie theatres to show domestic films for at least 146 days per year.<sup>32</sup>

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<sup>28</sup> <https://www.abc.net.au/cm/lb/9944818/data/the-cost-of-being-the-abc-data.pdf>

<sup>29</sup> <https://www.theguardian.com/media/2018/sep/16/tony-hall-regulate-video-streaming-services-or-risk-killing-off-uk-content>

<sup>30</sup> Oliver & Ohlbaum, p 33

<sup>31</sup> Netflix, p 51; ANZSA, p 28

<sup>32</sup> [https://en.wikipedia.org/wiki/Cinema\\_of\\_South\\_Korea](https://en.wikipedia.org/wiki/Cinema_of_South_Korea)

We also note some commentary suggesting that recent declines in South Korean Netflix subscriptions may be in part due to a lack of local content.<sup>33</sup>

We are also concerned by the implication that a lack of regulation incentivises natural levels of investment, noting that in Australia, an absence of regulation has only incentivised minimal investment from key players Disney+ and Apple TV+.

## **2.4 Impact of a regulatory requirement on the content offering in the market**

*Claim: a regulatory requirement could lessen the diversity and range of content offerings available to consumers and negatively impact broadcasters who differentiate themselves in the market based on their local content offerings<sup>34</sup>*

We note the argument that requiring streaming companies to invest in Australian content will lead to investments in ‘the same forms of content’, and that this could lessen the diversity of content available to consumers. It is also suggested this would have negative impacts on free-to-air broadcasters, who differentiate themselves based on their local offerings.<sup>35</sup>

In response to this, SPA notes that a minimum investment obligation wouldn’t necessarily drive similar commissioning decisions across platforms, and there is no part of the SPA proposal that would dictate this. We have seen voluntary investments result in a diversity of content that reflects individual platforms’ strategies and goals, and this should be able to continue with regulatory minimums in place. There is also an inherent potential diversity in screen content (including across elements such as length, tone, target audience, casting, scripting, etc). It should also be noted that an increase in Australian content will increase the diversity of platforms that would otherwise be dominated by overseas content.

In relation to broadcasters, we note they are on record as saying they do not want to be forced to do as much of the kind of scripted/narrative content that streamers prefer.<sup>36</sup> So an increase in streamer activity in these categories should not impact on broadcasters in the way suggested.

*Claim: Regulatory minimums would lead to less diversity of content overall<sup>37</sup>*

We query the claim from ANZSA and Free TV that regulation will lead to reduced diversity of content. It seems more logical that an increased volume of Australian production will necessarily result in a greater diversity of creative ideas and executions. A requirement to engage with the local independent sector will also generate diversity of creative executions.

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<sup>33</sup> <https://www.allkpop.com/article/2021/07/netflix-lost-1-million-subscribers-in-korea-during-the-first-half-of-2021>

<sup>34</sup> ANZSA, p 25; Nine Entertainment Co, p 3

<sup>35</sup> Netflix, p 46; ANZSA, p 45

<sup>36</sup> Refer to Free TV Australia submission to the Supporting Australian Stories on our Screens Options Paper (2020).

<sup>37</sup> ANZSA, p 31; Free TV submission to the Green Paper, p 74

Under a well-designed regulatory system, we note that platforms will be free to continue to pursue their own content strategies in fulfillment of quota obligations. In any event, we note there is already a degree of cross-over in international content across the different providers (premium narrative drama, feature films, international children's content, etc), which suggests a similar amount of cross-over in Australian content should not be problematic.

We also note that commercial free-to-air television broadcasters have recently been granted a level of deregulation intended to enable them to pursue their own investment strategies in content creation, which should mitigate against any homogeneity with other platforms. We also note that streaming platforms to date have tended towards narrative drama and documentary and that these are the two genres of Australian content (along with children's content), that the commercial free-to-air broadcasters have recently argued should not be required on their platform at previous levels.

*Claim: Local broadcasters and media companies are best placed to deliver truly local content, given the pressure on globals to make their content globally appealing.<sup>38</sup>*

We agree that there is an incentive for streaming platforms to make globally appealing content which can be monetised across the global business. This is in fact one of the reasons why regulatory intervention is needed to ensure meaningful investment in Australian cultural content. With the right definition of 'Australian content', a regulatory system can guide investment into programs which are "truly local" and which serve Australian audiences as their primary objective. Commercial free-to-air television is not unique in its ability to commission local stories from local producers.

There is no reason why Australian stories cannot be delivered by more than one platform.

*Claim: Global SVOD productions are unlikely to reflect Australian cultural diversity in the way that national and commercial free-to-air broadcasters do. There is also unlikely to be comparable depth and breadth of genres or significant volumes of spend.<sup>39</sup>*

The Oliver & Ohlbaum report argues that global SVOD productions and commissions are unlikely to reflect Australian cultural diversity in the way that content from the national and commercial FTA broadcasters does. It is also claimed that SVOD content is unlikely to cover a comparable depth and breadth of genres or significant volumes or spend.

Under a regulatory scheme for SVODs, the content required to be produced will reflect the chosen definition of Australian content. Under the SPA proposal, there would be a consistent definition across platforms and in this way, the potential for a piece of content to fulfil cultural policy will be largely the same across platforms.

Even if Australian content on streaming services does not cover the same genres and meet the same volume as broadcasters, this is not an argument against them contributing in a way that fits their different business model. Our suggestion is not that SVOD Australian content should supplant broadcast Australian content. We are

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<sup>38</sup> Free TV, pp 74-75; Stan Entertainment Pty Ltd, p 2

<sup>39</sup> Oliver & Ohlbaum, p 6

suggesting it should be additive. Hence, the fact that SVOD Australian content does not match the depth and diversity of free content is not a reason not to require a contribution from streaming platforms.

We also note suggestions that SVODs do not provide the same depth and breadth of Australian content as the ABC and commercial free-to-air television. We agree this is the case but do not agree that this is a reason not to regulate streaming platforms. The current situation has arisen from a lack of regulation. Failing to regulate would only perpetuate this problem.

*Claim: Under a direct investment requirement, the content would be on services that are not free to access and do not have universal reach, in contrast to the national and commercial FTA broadcasters.*<sup>40</sup>

The Oliver & Ohlbaum report implies that a drawback of a direct investment requirement is that the content would be on services that are not free to access and do not have universal reach, in contrast to the national and commercial free-to-air broadcasters. This is an unusual perspective, given that there is no proposal currently under discussion under which the amount of free and universally available Australian content is diminished as a result of the imposition of requirements on SVODs (indeed it is the commercial free-to-air broadcasters who have been arguing to reduce their own requirements).

What is under consideration is access to Australian content for those subscribers who choose to pay for services through a subscription to an SVOD provider. There should be no negative impact on the amount of freely available Australian content.

## **2.5 Impact of regulatory intervention on market structure**

*Claim: Regulatory intervention could result in fewer streaming providers and deter market entry.*<sup>41</sup>

We would urge caution when assessing alarmist views that regulatory intervention could mean a reduced number of streaming platforms in the market, including through reduced market entry. Streaming platforms who submitted to the review have all indicated a positive outlook on voluntary investment, so we question the extent to which minimum regulatory safeguards would induce market exit. In terms of market entry, we do think it is appropriate that smaller providers be provided with some accommodation, and have therefore supported size and scale thresholds as applying in the new regulatory framework. This kind of regulatory certainty will in fact be beneficial for those planning market entry.

We also note that following the imposition of world-leading regulatory obligations in France, there have been no indications of providers looking to exit the market.

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<sup>40</sup> Oliver & Ohlbaum, p 7

<sup>41</sup> ANZSA, p 3

## 2.6 Questions of regulatory design

*Claim: Regulatory interventions based on revenue thresholds will be difficult due to Amazon example and lack of available data due to commercial confidentiality requirements.*<sup>42</sup>

The ANZSA submission argues against a revenue-based regulatory intervention given the difficulties associated with bundled services (Amazon Prime) and the lack of available data due to commercial confidentiality requirements.

Whilst we note the difficulties associated with the Amazon example, this is not an industry-wide problem and should not hold up policy progress for the whole industry. It certainly requires further work, but should not be put in the 'too hard basket'. Inquiries should be made as to how the French Government has addressed this problem as part of the implementation of its revenue-based quota.

As regards the lack of available data, SPA agrees this is a problem, but proposes that the regulatory framework would require a reporting component, in the same way the previous commercial free-to-air television licence fee system required financial reporting from those networks.

*Claim: The current low levels of Australian content on SVOD services implies a low quota would be appropriate.*<sup>43</sup>

The Oliver & Ohlbaum report suggests that a quota should be set at about the same level as the current Australian average Australian content share on SVOD (4%). This is a curious conclusion, with an alternative perspective being that the low level of Australian content on streaming services is evidence that regulatory intervention is required to induce an increase to meaningful levels. Our view is that the current level of Australian content on SVODs is insufficient to meet consumer demand and public policy objectives. A quota on commissioning is the most effective way to remedy this under-performance.

*Claim: Unless there were sub-requirements or incentives on global SVOD/AVOD providers to co-produce with the national and commercial FTA broadcasters (given their specialism in culturally relevant content) and to commission from Australian producers, a direct investment requirement would also fail to increase access to IP in Australia.*<sup>44</sup>

The Oliver & Ohlbaum report correctly concludes that increased investment from SVODs may not of itself result in additional access to IP in Australia. This echoes concerns raised by SPA in its submission in relation to the need for regulatory protection of the negotiating position of producers in deal-making with SVODs, to protect their ability to retain IP. Whilst the Oliver & Ohlbaum report suggests the remedy may be a requirement to co-produce with broadcasters, the more effective intervention would be through negotiated terms of trade which enhance the bargaining position of independent producers. Refer to section 4.11 of the SPA main submission for further discussion of this crucial issue.

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<sup>42</sup> ANZSA, p 29

<sup>43</sup> Oliver and Ohlbaum, p7

<sup>44</sup> Oliver & Ohlbaum, p 7

We also note that without terms of trade for broadcast deals, co-productions with broadcasters would not necessarily result in increased IP retention for producers.

*Claim: The Green Paper's proposals would worsen inconsistency and distortion in the regulatory landscape.*

There is an argument from Netflix that the Green Paper's proposals would introduce additional categories of regulation, and would therefore worsen inconsistency and distortion to the media landscape.<sup>45</sup>

SPA has previously advocated for a technology-neutral regulatory model,<sup>46</sup> and agrees that consistency is worthwhile goal. However, the Government has elected to maintain different regulatory systems for different platforms, and this is the environment in which regulation of streaming services must now be considered. In this environment, the best way to minimise regulatory distortion is to ensure obligations apply across different sectors of the industry, and to ensure whole sectors aren't left unregulated. Leaving one whole sector unregulated would be a far greater distortion than any variation in the manner of regulation that applies across sectors.

*Claim: The Green Paper should have considered deregulation as a means to harmonise regulatory settings.*<sup>47</sup>

We note there is a suggestion that regulatory harmonisation could be achieved through deregulation. However, we note that deregulation was considered by the Government through the *Supporting Australian Stories on Our Screens Options Paper*, and through its September 2020 response, was clearly rejected as a viable option.

Given the widespread support (in the community and from successive Australian Governments and state/territory Governments) for the cultural and economic value of Australian screen content, deregulation should continue to be dismissed out of hand.

We know from overseas examples that deregulation of vulnerable genres leads to massive declines in investment. This has been the experience in the UK, where the removal of children's content regulation led to a direct and dramatic drop in the making of that content (expenditure fell 93 per cent after quotas were removed)<sup>48</sup>.

For further exploration of the likely effects of deregulation on audiences and industry, please refer to section 6.4 of SPA's submission to the Options Paper.<sup>49</sup>

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<sup>45</sup> Netflix, p 45

<sup>46</sup> <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/e1a32a48-4342-4b0d-aacc-e356ed16b9e1/20200702%20-%20SPA%20Options%20Paper%20submission%20-%20v%206.pdf>

<sup>47</sup> Netflix, p 45

<sup>48</sup> <https://www.telegraph.co.uk/news/2017/04/17/broadcasters-forced-invest-british-made-childrens-tv-programmes/>

<sup>49</sup> <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/e1a32a48-4342-4b0d-aacc-e356ed16b9e1/20200702%20-%20SPA%20Options%20Paper%20submission%20-%20v%206.pdf>

*Claim: The existing definition of Australian content in the ACMA standards should not be adopted, as it is too restrictive for services wanting to reach global audiences with Australian stories.*<sup>50</sup>

It is vital that regulatory quotas for streaming services result in the creation of truly Australian content that fulfils cultural policy objectives. Anything less would fail to deliver on the underlying policy objectives of ensuring Australian voices and stories are available to Australian audiences on the platforms they are now using. We would be extremely concerned if the intention here is to homogenise local product so that it had the look and feel of global content.

### **3 Other comments**

We note the position in the submissions from commercial free-to-air broadcasters which opposes regulatory minimums for Australian content on streaming services. We note that the position of broadcasters has changed over time, with some having previously supported applying local content rules to SVOD platforms.<sup>51</sup> The broadcasters have also in the past chosen not to take a position on the issue.<sup>52</sup> It would appear that the position on regulation for streaming platforms is changeable, and may evolve again in the future.

We also note that regulation is opposed in relation to some issues (for example, Australian content quotas, spectrum taxes) but favoured in relation to others (anti-siphoning, 'prominence' on connected TVs).

### **4 Conclusion**

We present this analysis in an attempt to give the public policy discussion regarding Australian content on streaming services a well-rounded and comprehensive perspective.

We find that the overall policy discussion will benefit from closer scrutiny of many of the supporting claims from streaming companies and commercial free-to-air broadcasters, and that further exploration of the issues gives rise to a different interpretation or perspective than that originally presented.

The conclusion we draw from the above is that there is a clear delineation between the vision presented by the screen production industry, and that presented by streaming platforms and commercial free-to-air broadcasters. On the one hand, is a framework which ensures the fulfillment of enduring cultural policy objectives and the needs of audiences. On the other, a regulatory vacuum in which audiences have inconsistent and unreliable access to the content which tells their stories in their voice.

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<sup>50</sup> ANZSA, p 28

<sup>51</sup> <https://thewest.com.au/business/media/seven-west-media-chairman-kerry-stokes-pitch-for-level-local-content-playing-field-with-foreign-streaming-services-ng-b881381427z>

<sup>52</sup> <https://www.freetv.com.au/wp-content/uploads/2020/07/Free-TV-Submission-to-Australian-Content-Options-Paper-6-July-2020.pdf>