

21 March 2023

## Screen Producers Australia's submission to the Senate Inquiry into the National Cultural Policy

### About Screen Producers Australia

Screen Producers Australia (SPA) was formed by the screen industry businesses representing large and small enterprises across a diverse production all forms and formats of screen content.

As the peak industry and trade body, we consult with a membership of more than 600 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and members. Our members employ hundreds of producers, thousands of related industry practitioners and drive between \$1 billion and \$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 entire 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 welcomes the opportunity to make a submission to the Senate Environment and Communications References Committee on the National Cultural Policy inquiry.

For further information about this submission please contact Jane Mulligan, Director of Policy ([jane.mulligan@screenproducers.org.au](mailto:jane.mulligan@screenproducers.org.au))

## Executive Summary

- SPA welcomes the commitment by the Australian Government in the National Cultural Policy to introduce requirements for Australian screen content on streaming platforms. This long-awaited regulation of online services is of critical importance that SPA has been advocating for, for many years.
- SPA also welcomes the funding for increased investment to support digital games developers and small and medium independent games studios through Screen Australia.
- The National Cultural Policy is an important framework that signals an intention by the Australian Government to recognise and elevate the important role of culture in our lives and in the future policy decisions made by government.
- Australia's creative industries, including screen, make a valuable contribution across many portfolio areas: to the economy as a growing industry that employs thousands; as a driver of small business growth; as a beacon of cultural identity that speaks to individual wellbeing and mental health issues; as an aid to soft diplomacy efforts and Australia's global reputation; to promote Australia as a tourism destination and to share our values of liberalism, multiculturalism and democracy with the world.
- SPA believes that together with the Government's media reform agenda, that if managed well, the National Cultural Policy and its commitment to securing certain investment from streaming platforms, should serve as an impetus to renewed and sustainable growth across the Australian screen industry.
- Much will now depend on getting the detail of the streaming regulation right and satisfactorily addressing a number of critical elements to deliver on the expectations of the screen industry.
- These issues have been deeply considered and articulated by SPA in the course of developing submissions to many Parliamentary inquiries and government policy papers for many years and centre on the following key issues:
  - A 20% investment obligation for new Australian content based on streaming services' Australian revenue;
  - A recognised role for Australian small businesses – the independent screen sector;
  - A definition of and expenditure on "Australian content" that meets the aspirations of the National Cultural Policy and the challenges associated with certain genres and market failure; and
  - A mechanism to retain Australian intellectual property in Australian stories.
- To realise the full benefit from any increased investment in Australian content, government should develop a screen industry export strategy to support the export and trade opportunities that this investment will generate.

# SUBMISSION

## BACKGROUND

Who are screen producers?

Screen producers take the burden of the risks and are responsible for driving a creative project forward. They oversee the technical aspects of creating film and television content and run the process from start to finish – from identifying creative content, developing a project with writers, hiring the cast and director, financing, hiring crew, post-production and selling the final work. While the workflow is different with animation content, most of the stages can be thought of as similar in terms of the responsibility and processes.

The Australian screen industry supports a diverse range of occupations: creative, managerial and technical – all equally important as part of a creative team that bring Australian stories to our screens.

Screen producers occupy a diverse and challenging role in bringing great Australian stories to our screens. Without their business skills, creative endeavour would more often flounder for the lack of commercial and organisational acumen.

SPA is proud to represent the diverse group of screen producers that work mostly in the background yet are the engine room and facilitators of the screen industry. Screen producers are both a business, an employer and a creator.

### Past reviews

Screen Producers Australia has actively engaged with the Australian Government on regulation of digital and media platforms since the 2011 *Convergence Review*.

In the past decade, there have been a large number of inquiries and reviews to examine how regulatory settings should adapt to new digital platforms and SPA has regularly engaged in this process.

Some recent submissions on the issues covered in this submission include:

- In 2021, SPA made submissions to the Australian Government [Media Reform Green Paper](#) in 2021. In its [submission](#) and [supplementary submission](#) to the Media Reform Green Paper, SPA advocated for regulatory intervention for a requirement that streaming services which meet certain size and scale thresholds, spend 20% of locally sourced gross revenue on commissioning new Australian content.
- A [submission](#) to the 2021 House of Representatives Standing Committee on Communications and the Arts inquiry into Australia's creative and cultural industries and institutions.
- In 2022, the Australian Government proposed a new framework, the [Streaming Services Reporting and Investment Scheme](#), to which SPA made a [submission](#) on similar grounds.
- These issues were also raised by SPA in our detailed [submission](#) to the National Cultural Policy in 2022.

## Getting it right – regulation of online streaming platforms

Given the long wait for regulation of streaming services in Australia, it is critical that the Australian Government gets the detail of the regulatory model right and that any model adopted meets the expectations of the National Cultural Policy and the Australian public.

Streaming services are incredibly successful global technology businesses with rapidly increasing revenues and audiences and which are increasingly replacing more traditional platforms as the predominant place Australians seek screen entertainment.

The history of public policy intervention in media is based on the principle that broadcasting platforms utilising public assets and infrastructure and with a significant cultural role in Australian society should bear corresponding public interest obligations.

Streaming services rely on the publicly-owned National Broadband Network infrastructure to deliver their services. The reciprocal public interest obligation entailed by the use of a publicly owned asset (the NBN) to deliver commercial services is not yet reflected in the regulatory framework for Australian content provision on these highly profitable streaming services.

Whilst some streaming providers have pursued engagement with local audiences through Australian content without regulatory imperative, this not true of all providers, and the extent of voluntary engagement is vulnerable to changes in management and content strategy (and indeed fluctuations in the perceived risk of regulatory intervention).

SPA notes 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.

SPA argues that the provision of Australian content on our screens should not be at the gift of these global businesses, but instead, must a genuine, reliable and credible regulatory obligation.

Government regulation of streaming platforms should be guided by the following principles:

- a) Australian content has both significant cultural (and economic) importance.
- b) Australian audiences should have access to a broad range of new Australian stories across all the platforms they are using.
- c) All platforms that derive financial benefit from the Australian consumer market should financially contribute to the creation of new Australian content for the benefit of their consumers.
- d) Even application of rules across market participants will build a vibrant and diverse commissioning marketplace.
- e) In order to meet audience expectations, there is a need to ensure we maintain and support a healthy screen sector (development, production (including post-production), distribution), that delivers employment, economic activity, industry upskilling, exports and growth opportunities.
- f) The Australian Government has a role to address market failure in the creation and delivery of quality new Australian screen content.
- g) Independent screen businesses (SMEs) are critical to achieving our cultural and economic objective.

- h) There is significant scope for growth in existing levels of production, investment, employment, commissioned content hours and exports provided fit for purpose regulation is in place.
- i) Independent screen businesses should be permitted to own or retain a significant amount of as much intellectual property (IP) and rights in their work as possible to best reward risk and contribution. This principle will assist businesses to remain viable and enhance their capacity to invest in the development and production of new IP.

#### 1. *A 20% investment obligation based on streaming services Australian revenue*

The primary rationale for an investment obligation in Australia is largely due to the factor of “substitutability” – that is the fact we share a language with two of the largest content markets in the world – the UK and the US.

This means there is a large body of content in our language which is available for purchase at rates well below the cost of producing local content. Content substitutability is well recognised and has been acknowledged over time as one of the main reasons that local content requirements in Australia are necessary.

SPA has long called for a minimum 20% investment requirement, which is based on international precedent in comparable markets and which could create an additional hours of Australian content.

The basis and rationale for the proposed 20% rate of obligation has been determined with reference to the following policy considerations:

- Access for Australians to a sizeable and diverse range of quality Australian content on the services they are using.
- Ensuring a growing and sustainable independent production sector capable of delivering quality content to audiences.
- Trends in international regulatory approaches.

This issue was examined by the House of Representatives Communications and The Arts Committee in 2021 and the report made the following recommendation:

*The Committee recommends that the Commonwealth Government introduce legislation that requires over-the-top (OTT) media services (streaming and video/subscription video on demand services) to allocate at least 20 per cent of their local revenue on new Australian drama, documentary, children’s content, commissions, co-productions or acquisitions of content.<sup>1</sup>*

SPA has also considered whether a 20% obligation is a reasonable expectation of industry in terms of capacity and current local market engagement. While streaming revenue figures are not publicly available, from publicly available data SPA estimates the SVOD industry is deriving over \$3 billion per year in revenue from the local market.

The ACMA publishes a report on spending by SVOD services each year which for 2021-22 reported that spending by the five major SVOD services in Australia on “Australian” and

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<sup>1</sup> House of Representatives, Standing Committee on Communications and the Arts, *Sculpting a National Cultural Plan: Igniting a post-COVID economy for the arts: Inquiry into Australia’s creative and cultural industries and institutions*, October 2021.

“Australian-related” content amounted to \$668.5 million.<sup>2</sup> From these figures it can be ascertained that streaming services are likely already investing in Australian content in the vicinity of a 20% obligation without causing any undue harm to their business conditions and that the Australian screen industry has the capacity to operate at this level of investment. Indeed, given the relative cost base and earnings in this market, it is more than apparent that streaming businesses could comfortably invest significantly more than that which is occurring currently.

In order to capture revenue generated from BVOD services as well as SVOD, SPA believes that the percentage should apply to all gross revenue generated in Australia by relevant online services. A revenue-based obligation is flexible and allows for the fluctuations in subscriber numbers or advertising revenue from year to year.

#### *Addressing capacity issues*

SPA is aware that many stakeholders have raised the issue of capacity issues in the screen sector being a constraint on the capacity of the Australian screen industry to produce local content. SPA rejects this argument as being based on incorrect assumptions and one which ignores the temporary capacity constraints in the industry.

Furthermore, capacity issues often cited are being experienced across many industry sectors and around the world. The situation is far from unique to Australia. SPA believe that to ensure sustainable growth in the screen industry that Australia should support a suite of workforce improvement, training and skill-development programs with key roles for both government and industry.

Competition for studio space and experienced crew in Australia is fierce, although there are different impacts across different parts of the sector. SPA believes that capacity issues are a largely temporary situation that will stabilise over time and should not be the basis for any permanent policy development.

It is also relevant to note that the majority of Australian stories are in fact filmed on location, so the issue of studio access while important, is not as critical for them as it is for international productions. Furthermore, supporting a stable and sustainable Australian screen industry will provide a strong pipeline of work, bring more skilled Australian crew and actors’ home.

The Australian screen industry is experienced in managing peaks and troughs in industry cycles and in scaling up and down to meet these cycles. The near doubling of funding for the *Location Incentive* in 2021, with an additional \$400m injected (a large part of which was front-loaded into the industry in a short timeframe) led to a jump in international productions coming to Australia, taking up studio space and crew.

This Covid-related strategy lacked proper planning to manage the inevitable capacity pressures that occurred and has exacerbated existing screen capacity issues.

Ironically, many of those now citing capacity constraints as being a problem for the sector are also calling for additional funding to be applied to the *Location Incentive* so that the current boom in international productions filming in Australia can continue.

SPA is identifying a number of measures to improve screen industry workplaces and address crew retention, such as the package *Respectful Workplaces* that SPA recently launched concerning bullying and harassment; OHS training; and mid-career managerial

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<sup>2</sup> ACMA, [Spending by subscription video on demand providers: 2021–22 financial year](#).

skills to ensure our industry is seen as more attractive as a long-term career and addresses employment pressures.

In addition, Australia is well placed to grow our capacity to meet the needs of a growing industry sector. Further investment in Australian skills and training needs is actively being addressed through the creation of Jobs and Skills Australia and the establishment of 10 new Jobs and Skills Councils. These new measures – to coordinate between state and territory governments, employers, unions, universities and the VET sector – will help Australia tackle skills and workforce needs that are being experienced across all industries.

New investment in Australian screen stories should be seen as an opportunity to grow and strengthen this important sector of our economy and build on the strong successes of the past to ensure a growing industry of the future.

#### *International trends*

When benchmarking a proposed Australian investment obligation against those which apply in other nations, it is important to reference jurisdictions which share similar market and industry conditions as exist in Australia.

It is true 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.

Over time, it will become evident that the creation of strong policy interventions in some markets (such as France, Italy and Canada) will mean that digital platforms will prioritise their investment budgets in those markets. This can be expected to increasingly drive other governments to consider how regulatory interventions in their markets are positioning their territories for a 'piece of the pie'.

Factors to be considered in making any comparison include the size and health of the local production sectors in those jurisdictions, as well as language considerations. Countries that do not share language with other (large) nations do not face the same challenges as Australia in seeking to balance local with international content because national language content will always dominate.

In this context, it is disingenuous to seek to benchmark Australia against any country which does not have a tradition of strong government support for a strong domestic screen industry such as that that exists in Australia. For this reason, comparison with countries such as, for example, the Czech Republic, Slovenia, Denmark, Belgium, Croatia and Germany where relatively small investment obligations (or levies) has been imposed are deliberately misleading.

Another distinct feature of the Australian screen sector is the history of bipartisan support for regulatory safeguards over the past 50 years, ensuring minimum levels of local content on traditional media sources. This tradition has built a strong local industry, a strong sense of cultural identify and national pride. The advent of streaming platforms should offer the opportunity to grow this tradition, not to sacrifice it to global corporate interests.

Many years of policy, incentives and regulation of in Australia has supported the development of a production sector with significant capacity and IP generation, able to support a higher rate of obligation. (This capacity is well demonstrated by the recent rapid industry expansion to absorb increased international productions driven by a large boost in the *Location Incentive*.)

Looking at international examples of regulation, Canada is in the process of finalising legislation for a bill (“C-11 – the Online Streaming Bill”) that will empower their regulator to regulate streaming platforms to deliver more Canadian content. The Canadian Government approach was outlined in a speech by the Minister of Canadian Heritage, Hon Pablo Rodriguez introducing the C-11 Bill in February 2022:

*It starts with this bill, the online streaming act. It starts with making sure that online streamers contribute to the strength and vitality of Canada's cultural sector. Let us remember Canada's strong culture is no accident. We made that decision. We decided and we chose to be different. We chose to be different from our neighbours to the south. We chose cultural sovereignty.*

*For more than 50 years, the Broadcasting Act has helped us share our stories. That is how we built a strong Canadian culture. That is how we forged our Canadian identity, and that is how we brought Canadian voices to the world. We want to build on this for the future. We must recognize that times have changed.*

*Canadian broadcasters have been investing in the system for decades to create the content we love, so it is only fair that online broadcasters be asked to contribute. We are only asking them to do their part, nothing more, which is fair.*

*Companies like Netflix, Amazon and Disney, to name a few, are already investing in the Canadian economy, which is great. We all benefit from that. Some of their content is really entertaining. This means money for and significant investments in our country. We are very pleased that they continue to invest here and pursue their projects in Canada.*

*Let us be honest, though. There is another reason why they are investing in Canada. It is because we have incredible talent here, including directors, actors and technicians. We have amazing talent, by any measure, so it makes good business sense to come and invest in Canada.*

*Basically, what Bill C-11 does is it updates the rules so that all broadcasting platforms contribute to our culture. That is all. That is what the bill is all about.<sup>3</sup>*

An Australian obligation set at 20% would also follow the strong precedent set in Europe by the French Government which is constituted as follows:

- An overall obligation set at 20-25% of the net income generated in France the year before.
- 4% to be contributed towards cinematic works and 16% for ‘audio visual’ (or small screen) works.
- A sub requirement to commission French speaking works (85% of the overall requirement).
- A sub requirement to commission new works (50% of the cinema requirement and 75% of the audio-visual requirement).
- Further sub requirements for engagement with the independent production sector.
- Separate 5.5% requirement to contribute to the CNC (equivalent of Screen Australia).

There is no question that when it comes to regulation, that France is a market-leader and an example of what is possible with political will and an ambition to protect localism. It is highly likely that over time, other EU territories will see the success of the French approach and revisit the level of regulatory intervention in those territories.

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<sup>3</sup> [Canadian House of Commons Debates](#), 16 February 2022

The other strong example of streaming regulation is Italy. The Italian Government has introduced a graduated investment obligation currently set at 18% (and rising to 20% from 2024) of revenues to be re-invested into a combination of European and Italian language works and to be commissioned with independent producers. Independent producers are defined as those that are not controlled or connected to an audio-visual media service provider (ie, SVOD) and which have a reversion of primary rights back to the production company after 3 years and retention of all secondary rights.

### *Subscription vs streaming regulation*

SPA agrees that the “holy grail” of content regulation should be “platform neutrality” as proposed in the 2011 *Convergence Review*. However, reaching that long term objective requires a re-write of the *Broadcasting Services Act 1992* and should not be used as a device to lower expectations for the regulation of streaming services. For that reason, SPA rejects any argument that seeks to match to the rate of obligation for SVODs to the ‘number’ (10%) which currently applies to subscription services.

It is relevant to note section 4 of the BSA which says:

- (1) The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and internet services according to the degree of influence that different types of broadcasting services, datacasting services and internet services are able to exert in shaping community views in Australia. [*emphasis added*]

Subsection 4(1) outlines the principle that different levels of regulatory control are to be applied across broadcasting, internet and online services according to the degree of influence that they exert in Australia. It would be inconsistent with the regulatory policy objective of the BSA set out in this subsection to seek to apply a perfectly consistent regulatory obligation on streaming and subscription content services.

As regards any arguments to benchmark streaming regulation with that of subscription (pay tv) services, there are several very important distinctions to be made between the subscription television and streaming services platforms which mean that matching the rate is inappropriate.

Firstly, it should be noted that the two measures are in fact quite distinct. The subscription television New Eligible Drama Expenditure (NEDE) Scheme imposes an obligation to spend a proportion (10%) of the program budgets of linear broadcast drama channels on new Australian drama.

The NEDE scheme is therefore a genre-for-genre scheme based on linear programming models. Streaming services are largely a library service. The regulation of streaming services is therefore more fitting to apply as a measurement of a percentage investment calculation against locally sourced revenue to the service which in turn is to be spent on new Australian content.

Subscription television and streaming platforms are very different businesses in very different stages of their life cycle. Just 21% of Australians indicate they use Pay TV for viewing but in contrast, the prevalence of streaming services is growing, with nearly 70% of Australians reporting they use an online subscription service to watch television content.

There is an inverse link between the fortunes of subscription television and streaming platforms, with the former suffering sharp subscriber and revenue declines following the

introduction of streaming platforms which offer a competing product at an often-lower entry price.

As stated, SPA recognises the long-term goal of addressing regulatory imbalances across media platforms, however, we do not agree that this should result in the matching of the rate of obligation across subscription television and streaming platforms (notwithstanding the above points regarding the mismatch in format of the regulatory obligations).

## *2. A recognised role for Australian small businesses – the independent screen sector*

The ecosystem of Australian screen production is characterised by a large number of small, independent producers. SPA itself has almost 700 members, spread across the nation, all of which are defined as SMEs, with most being micro-businesses. These independent producers are the strength of the Australian screen industry, bringing new ideas, creativity and diversity of storytelling to our screens.

An important consideration that should be applied to any regulation of streaming platforms is that investment in Australian stories should for the most part be directed towards Australia's independent producers.

The concept of "independent" referred to by SPA in this context specifically refers to genuine arms-length transactions between contracting parties that are not controlled or connected to a streaming platform so as to ensure competition and diversity and cultural contributions across the production industry.

SPA argues that as an integrity measure, investment by streaming platforms under the proposed regulation should include a cap of 20% on how much of the regulated investment obligation can be allocated within vertically integrated businesses, with the remaining 80% to be directed to genuinely arms-length commissions.

To avoid the likelihood of global corporate ownership of Australian cultural intellectual property, SPA believes that the concept of "independent" producer should be linked with IP ownership. That is, a producer should be considered independent if they retain some creative rights or control over the IP they create. Again, this is an issue that has been adopted in France and Italy and under active consideration in Canada as they similarly grapple with the issues associated with online streaming regulation.

## *3. A definition of "Australian content" that meets the expectations of the National Cultural Policy;*

It is vitally important that any investment obligation on streaming platform adopts an authentic definition of "Australian" content that meets the ambitions and expectations of the National Cultural Policy.

In addition, the type of content that is the focus of the expenditure should be on newly commissioned works as opposed to re-licencing of existing works. In addition, SPA would welcome a focus on supporting the content that has consistently been challenging to generate at scale without government interventions such as adult drama (scripted), children's content and documentary.

SPA believes that specific requirements for Australian content types could as far as would be relevant, match the programming make up of a streaming service. For example, if a platform does not include drama, it should not be required to invest in Australian drama, and

visa-versa. But if it does supply children's content, then it should be required to invest in this type of work.

#### *What are the facts about current streaming spending in Australia?*

The streaming services rely heavily on the ACMA Report "[Spending by subscription video on demand services, 2021-22](#)" to demonstrate their spending on Australian content. This data is voluntarily provided by five major streamers (Amazon Prime Video, Disney, Netflix, Paramount+ and Stan). The way in which the data is currently presented by the ACMA creates challenges in being able to make clear policy decisions or arguments.

By presenting a loose definition of spending on Australian content that includes co-commissions, acquired titles and 'Australian related' expenditure, this report currently facilitates a misleading picture of streamer contribution to what should be the focus of regulation and which is of cultural worth – that of newly commissioned 'Australian content'.

The current ACMA data captures but does not always cleanly separate out:

- "acquired" programs (that is, re-runs) as Australian content. These provide very low cultural value for the Australian public and very little for the screen industry.
- "co-commissions" in this calculation as it undermines the intention of any investment obligation by diluting the total spend amount flowing to industry and obscures the source of spending which may be counted twice for similar purposes.
- "Australian-related" expenditure which does not meet a definition of "Australian".
- Sport titles which are highly commercial and not requiring cultural policy support.

#### *The problem with including "acquisitions" and licensed titles*

SPA does not agree with arguments from streaming platforms that a broader range of spending be considered when weighing up streamer contributions, including acquisition and licensing. Acquisition of a program after completion means 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.

SPA do not agree that an acquisition makes an equal contribution to the production of Australian content as does an original commission. (In Italy, works counted for the purposes of their investment obligation cannot be more than 5 years old – avoiding the inclusion of the acquisition of older works in the relevant obligation calculation.)

SPA is aware of arguments 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 will ensure 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. [*This is explored further in section 4 below.*]

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.

SPA is aware of the following misleading claims by streaming services about their level of spending in Australia:

**Claim 1: "A record investment of \$668 m in Australian content and Australian programming"**

ACMA figures show that the five major streaming platforms spent \$253.7 million on commissioned "Australian" content, \$81.4 million on acquiring Australian programs and \$333.4 million on acquiring, producing or investing in "Australian-related" programs in 2021-22. Added together, these figures paint a positive but misleading impression of spending by streaming services.

**Claim 2: "equating to more than \$1.5 billion in Australian content investment since FY19/20"**

According to ACMA figures, investment in "Australian" titles since FY19/20 is \$568.6 million. Investment in "Australian-related" titles since is \$898.4 million. Again, the streamers have added these two categories together to create a more favourable claim.

**Claim 3: "the reported annual investment by streamers has more than doubled since FY19/20" – again, only if "Australian" and "Australian-related" titles are counted together.**

**Claim 4: "As at 30 June 2022, there were 2,345 Australian program titles, equating to 7,714 hours available across these five services"**

SPA analysis of the ACMA data shows that 66% of these titles and 46% of these hours referred to are sport titles. Sport titles are highly commercial and face less investment challenges than other genres of drama, children's drama, documentary and children's non-drama programs.

**Claim 5: "Screen Australia's 32<sup>nd</sup> Drama Report revealed a total of \$655 million was spent on 62 general television and video-on-demand projects in 2021-22 financial year"**

Again, streamers have added together spending by free-to-air, subscription, streaming and AVOD services to exaggerate their claimed spending. The Screen Australia *Drama Report* (page 22) shows that subscription tv and streaming spent \$445 million on 29 titles in 2021-22.

*4. A mechanism to retain Australian intellectual property in Australian stories.*

For the screen industry, a National Cultural Policy exists within a commercial business framework and as global streaming services increase their presence and influence, the Australian screen sector is increasingly subject to global business drivers.

It is therefore important for a National Cultural Policy to ensure that our screen industry practitioners operate within an economic framework that enables them to create, participate and prosper within this important cultural sector. Without profitable screen businesses that rewards successes, screen culture would lose its characteristics of diversity and dynamism.

That is why SPA believes that, in conjunction with an investment obligation, that screen production deals should be underpinned by fair negotiation of commercial contracts through a mechanism to support fair bargaining practices, to ensure our screen businesses and that those they employ are all able to operate sustainably and are not disadvantaged by the business practices of global corporate interests.

The Australian Government has long recognised the need for intervention into markets to address bargaining power imbalances across industries as broad and varied as dairy, electricity, grocery, and news.

Historically in the Australian screen industry there has been interventions through Screen Australia's investment requirements as well as the Australian Content Standard and its application to commercial television broadcasters up until 2021. Many international screen territories intervene in their contracting arrangements to ensure fair practices in what are otherwise very imbalanced market conditions. Both points are touched on below.

In 2021, SPA commissioned a report by *Lateral Economics* to investigate the nature of the commercial contracting between streaming platforms and Australian producers. That report identified that financing deals for screen productions are complex, involving negotiations over a wide range of terms covering responsibilities, bearing of risks, the allocation of IP rights, and licencing arrangements.

The report found that:

In complex negotiations for deals, buyers [streaming platforms] very likely have greater bargaining power than [Australian] production companies and this enables them to secure more rights than they otherwise would be able to. For instance, TV networks are requiring AVOD or SVOD rights as a matter of course and streaming companies seek worldwide screening rights often in perpetuity.

These bargaining practices are denying Australian production companies potentially large streams of future earnings from successful programs. To the extent that the rights holders are now overseas-owned international streaming companies, these earnings are lost to the Australian economy.

For independent screen producers in particular, the income generated by these rights and royalties can help sustain a small business between productions and build unique and independent content development. The ownership of intellectual property and the ability to monetise rights within the production also incentivises entrepreneurship and provides a return on investment in ideas and creativity.

*What is the situation for Australian producers?*

Due to its highly commercially sensitive nature, this information will be provided to the Committee on a confidential basis and treated as "in-camera" evidence.

In summation, steaming platforms are persistently seeking contractual terms that take extensive rights to Australian-created intellectual property and for very large periods of time

if not in perpetuity, leaving Australian producers with few, if any, rights to further develop the IP in their creative work or to retain any potential for earnings from their works.

Because of the unequal bargaining power between commissioning platforms generally but streamers specifically and producers, there is little if any capacity for producers to address this without Government intervention.

Evidence also demonstrates that Australian producers are not being compensated for these aggressive rights deals and that the loss of rights in their intellectual property has serious long-term implications for the structure of the Australian screen industry and the ability of the industry to generate its own content.

SPA's ongoing and oft cited concern is that these practices are resulting in an accelerating loss of ownership and control of intellectual property in Australian-created screen titles. Contracting arrangements such as these are a marked departure for contracting in our industry and streamers are importing a negative and highly aggressive commercial practice that the industry is unable to withstand unilaterally due to the unequal bargaining power in our oligopsony market.

This has combined with a recent loss of what were in effect contracting protections through the removal in 2021 of the previous points model regulating Commercial Television investments (which incentives fairer deals) as well as the increasing bypassing of Screen Australia's equity investment protections (the agency's 'terms of trade') for producers in favour of grants or offset only financing structures.

SPA notes that "Revive", the National Cultural Policy, outlines a commitment by the Government to an intellectual property framework that includes "the regulation of broadcasting and content industries, and celebration and protection of First Nations arts and culture – to support the success and vibrancy of Australia's cultural and creative sector".

For SPA, evidence that Australia's current intellectual property framework is not meeting this commitment for Australian screen stories is beyond doubt. The loss of intellectual property rights in First Nations screen content would be particularly egregious and highly contrary to the positive intent of "Revive".

#### *International approaches to intellectual property retention*

The retention of high levels of intellectual property is a feature of countries that rank well for innovation. The cultural and creative industries are also proven drivers of innovation. Unfortunately, data suggests this is an area where Australia is falling behind. The 2021 *Global Innovation Index* ranks Australia 25th in the world, down from 14th in 2014 below a comparable country such as Canada (at 16).

A report on [\*The impact of Terms of Trade on the UK's television content production sector\*](#) for the Canadian Media Producers Association (CMPA) by Oliver & Ohlbaum in December 2018 showed that since the introduction of a 'terms of trade' framework in 2004, the UK independent production sector has grown to become a global leader in TV production, in particular:

- TV related revenues have increased from around £1.5 billion in 2004 to more than £2.6 billion in 2017
- International UK TV rights income grew at an average annual rate of 22 per cent between 2004 and 2008 and continues to grow at approximately 7 per cent.

According to a 2020 UK submission: [Public service broadcasting, streaming services and the future for “terms of trade”](#) by the UK Copyright and Creative Economy Centre (CREATE):

“There is a considerable weight of empirical evidence that limiting the assignable dimensions of copyright, or implementing reversion rights can have positive effects in balancing the interests of creators, investors and consumers of cultural works.

The rise in prominence of SVODs has led to many other countries, including France, Italy and Canada considering how to apply a ‘terms of trade’ framework to this new industry environment that is being driven by powerful global digital corporations.

In Europe, a regulatory system has been introduced under the auspices of the European *Audiovisual Media Services Directive* (AVMSD) which is aimed at facilitating regulation of streaming platforms at the individual nation level.

In France, the regulation of content from SVODs (under which the government will require streamers to invest up to 25% of their local revenues in French-language content) is linked to the reversion of intellectual property rights to independent producers.

Of the regulated SVOD platforms, 66% of the investment in French TV series will have to be done through independent producers to whom rights will revert within 36 months. For cinema releases, SVODs must channel 75% of their investments through independent producers who will get their rights back after 18 months.

SPA believes that in conjunction with any regulation for additional investment by streaming platforms or others, that Australia must urgently implement a “terms of trade” framework in order to maintain the sustainability and viability of our screen industry.

This must start with the inclusion of a reversion of rights to the producer after a window of initial use by the commissioning business and ensure the ability for the producer to retain all rights other than the streaming release – collectively known as derivative rights.

## Growing Screen Exports?

### *Need for a Screen Export Strategy*

SPA notes that as an action item, the National Cultural Policy identified the following:

*Take forward the Government’s trade diversification agenda to strengthen and expand trade networks, including growing markets for cultural and creative export.*<sup>4</sup>

SPA endorses the need for this approach in the Australian screen industry and believes that it is important for this area to receive further attention from government.

To realise the full benefit from any increased investment in Australian content, government should develop a strategy to support the export and trade opportunities that this investment will generate.

SPA is aware of strong examples in international jurisdictions of better co-ordinated and more uniformly branded screen industries from different countries that are appearing and engaging in global markets in more effective ways than Australia is currently doing.

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<sup>4</sup> Australian Government, “Revive” , National Cultural Policy, 2023, p 105.

There are also many examples of programs including funding and relationship development that exist in other territories that better target the growth of screen exports. Our screen industry agencies would do well by better targeting the outbound opportunities for our industry as Sounds Australia has done for our music industry.

A lot of energy has been spent focusing on the, at times, limited benefits for parts of our industry from inbound productions, or in creating pathways and funding for some of our workforce to support and work for overseas screen industries, rather than our own.

By contrast, very little energy has been spent ensuring that Australian-made works employing all aspects of our screen industry and with all the benefit of export dollars and soft diplomacy that they bring, have well-supported pathways to global audiences.

SPA believes that this is an important aspect of the screen industry that under the auspices of the National Cultural Policy, could be strengthened. This is reflected in feedback to SPA from members indicates that the screen sector would benefit from more focus on and investment in development and marketing of screen stories by agencies – particularly film – to help Australian stories succeed and reach audiences.

#### *Increased effort towards co-productions*

Co-productions – both official and non-official – are important pathways to markets and international audiences and are of great value to independent productions. With the exception of the recent Australia-India co-production agreement, SPA is disappointed that the work associated with the development of new co-production agreements sought by the sector and the revision of existing ones has been stagnating for years.

The recent signing of the Australia India Coproduction Agreement, if managed well, should be good news for both the Australian and Indian screen industries. A co-production agreement is not a “set and forget” undertaking. The success of this agreement will require effort towards the identification and connection between the SME sectors of each country and government oversight and management to ensure a balanced exchange of screen activity.

It should be noted that Australia has an attractive range of tax incentives and grants, at both a federal and State level, to attract international productions to film in Australia. If these are not matched by India for the benefit of Australian-based titles, then there is a risk of one-way traffic with an unmatched step-up of Bollywood titles filming in Australia. It will therefore be important to ensure that there is a balanced exchange of screen activity as a result of this new agreement.

Unfortunately, there are many more examples where these arrangements have languished for years. For example, the Danish-Australian co-production agreement’s text was settled and ratified by the Danish Parliament in 2012. More than ten years on and Australia has still to uphold its end of the bargain and ratify this agreement.

In terms of relative activity from our partner (and often competitor) countries, Canada has 56 co-production agreements. The UK and France both have over 50. Australia has 13. A focus on co-production reform and expansion is necessary and urgent if our industry is to be able to maximise global opportunities as well as be competitive in its partnering with other nations.

SPA believes that the European Free Trade Agreement currently being negotiated is an important opportunity to expand Australia’s co-production arrangements with new

partnerships as well as update existing bilateral arrangements with many European member states.

SPA believes that there is a strong interest in reviving Australia's cooperation and engagement on this matter. There are 23 EU countries that currently don't have co-production arrangements with Australia.

#### *A strategic framework for screen exports?*

In conjunction with the [Screen Export Council](#), SPA has considered the steps required to develop a strategic framework for increasing screen exports. This includes:

- A co-ordinated approach to screen exports from Government;
- Creating and funding a screen-specific export program and strategy.
- Growth in the number of official co-production treaties, with a particular focus on Asia and Europe;
- Modernisation and harmonisation of existing co-production treaties;
- A single umbrella branding and strategy for the sector internationally, including expanding marketing and relationship maturing opportunities; and

The strategy could have as key targets the following measures:

- Double export revenue for the screen sector in five years.
- Expansion of number of markets providing export revenue.
- Improved and increased facilitation of market access across sector both in outbound and inbound programs.
- Development of skills and knowledge within the sector about trade and export opportunities.
- Improved retention of IP by Australian producers.

#### Conclusion

The strong public policy arguments which favour the creation of an obligation to contribute back to Australian society and culture are on a continuum of policy thinking that stretches back to the first introduction of Australian content requirements on commercial free-to-air television, who, on the basis of their then pervasive success, were asked to contribute back to the Australian public.

Whilst the streaming market is still growing, the businesses operating in this market are well advanced and have a strong revenue base. Now is an appropriate time to set clear and well understood regulatory obligations, for the good of the Australian public, and in terms of providing certainty to existing and potential new market participants. Certainty is also critical for the production industry, in terms of investment, job opportunity and career pathways.

It is also important that we recognise the need for policy in this area to support a sustainable and efficient Australian independent production sector, given its role in ensuring the supply of cultural content (as well as jobs and economic output). With a substantial amount of investment taken out of the market through deregulation of commercial free-to-air television, there is a need to ensure this investment support is found through other means to avoid a serious contraction in the country's ability to produce quality and quantity of local cultural product.

The screen sector is a key part of Australia's economy, being a subset of the arts and entertainment sector, which employs many more people per million dollars of turnover than industries like building construction, coal mining and gas extraction. Relative to turnover, arts and entertainment employs nine times as many people as coal mining does.<sup>5</sup>

Getting the settings right will lead to cascading benefits in terms of jobs, economic output, export opportunities and, most importantly, a rich return to Australians in terms of the quality and quantity of culturally relevant content.

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<sup>5</sup> <https://australiainstitute.org.au/post/new-analysis-arts-entertainment-funding-creates-10x-more-jobs-for-women-than-homebuilder/>