

Screen Producers Australia's submission to the Senate Standing Committees on Environment and Communications Inquiry into Australian Content on Broadcast, Radio and Streaming Services

Executive summary

Screen Producers Australia (SPA) was formed by the screen industry over 60 years ago to represent large and small enterprises across a diverse production slate of feature film, television and interactive content. Our members make Australian stories and sell them to the world. Our members employ hundreds of producers, thousands of related practitioners and drive more than \$1.7 billion worth of annual production activity from the independent sector.

On behalf of these businesses we are focused on delivering a healthy commercial environment through ongoing engagement with elements of the labour force, including directors, writers, actors and crew, as well as with broadcasters, distributors and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

Screen Producers Australia welcomes the opportunity to provide a submission to the Standing Committees on Environment and Communications Inquiry into Australian Content on Broadcast, Radio and Streaming Services.

In this submission, SPA has made a series of recommendations that would improve the quality and quantity of Australian content and ensure that Australian and international audiences have greater access to Australian content.

This submission is divided into the following sections:

- SPA's role in the Australian film and television industry
- The value of Australian content
- Recent inquiries into the Australian film and television industry
- The value and importance of local content quotas
- Competition issues
- Relevant reports from other jurisdictions

SPA brings to the committee's attention two submissions SPA prepared for the House of Representatives Standing Committee on Communications and the Arts Inquiry into Factors Contributing to the Growth and Sustainability of the Australian Film and Television Industry (Attachment A) and the Government's Australian and Children's Screen Content Review (Attachment B).

SPA has recommended:

- the producer offset be harmonised at 40 per cent, clarified to ensure independent producers are the sole beneficiaries of the offset and modernised to be platform-neutral
- local content obligations on Video on Demand services
- fully-funded local content quotas for the ABC and SBS
- any changes to the children's content quotas increase the quantity, quality and availability of Australian children's content
- the New Zealand content loophole be closed
- against any change to the drama points score that would reduce the quantity of Australian content on commercial broadcast television
- that independent producers remain the sole beneficiaries of Screen Australia funding
- against any changes that would reduce competition in the market for television production, and
- fair contracting in the market be ensured, potentially through UK-style legislated terms of trade

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SPA's role in the Australian film and television industry

SPA is an industry body that represents the interests of independent Australian film and television producers on issues affecting the business and creative aspects of screen production. SPA was formed by the screen industry 60 years ago to represent small-to-medium sized enterprises across various industries including feature films, television, games and interactive content. Independent in this context means producers independent of Australian television broadcasters.

The production sector in Australia includes a variety of producers including in-house television networks, SPA members and non-SPA members. SPA's members include around 400 production businesses, who employ hundreds of producers and thousands of other practitioners.

SPA offers the following levels of membership:

- *producer*: for established producers or production companies with at least one producer credit (credits must have received a broadcast, theatrical or online release);
- *associate*: for people who have recently embarked on a career as a producer, but have not yet earned a producer credit;
- *affiliate*: for businesses seeking to participate in the wider screen industry; and
- *service and facility business*: for businesses that provide services that directly contribute to the production of screen content (for example lawyers, accountants, insurance companies and film distributors).

The industrial landscape

Production companies may engage film and television writers, actors, directors and technical crew on an employment or contractor basis. Although it varies on a case-by-case basis, production companies generally engage writers, actors and directors as independent contractors.

The vast majority of film and television industry employers are small to medium enterprises without the resources to continually negotiate their own agreements for each production. In this context, collective participation in model term agreements is important for the sustainability of the industry. Without the capacity to contribute as a group to model term agreements, the industry would likely be dominated by a small number of large businesses, which would result in less competition and less diversity in program content. Moreover, in commercial negotiations with buyers of content, without the ability to set collective terms, smaller producers would be at a disadvantage due to a lack of resources and experience in negotiating complicated deals. To this end, the ACCC has authorised SPA to collectively bargain on behalf of its members.

Historically, there has been little publicly available information regarding what constitutes minimum standards of remuneration and working conditions for writers, actors, directors and technical crew in the industry. The model terms of engagement negotiated between SPA, the Australian Writers Guild (the AWG), and the Media Entertainment and Arts Alliance (MEAA) have therefore provided a valuable benchmark. Similarly, the model terms of engagement to be negotiated between

SPA and the Australian Directors Guild (ADG) will also provide an important benchmark. These benchmarks are important not only on an individual level to ensure that SPA, AWG, MEAA and ADG members are aware of minimum standards when they negotiate further terms of their own agreements, but on a broader industry-wide level, to ensure that minimum conditions of pay and employment are maintained.

Influence of SPA's negotiated agreements

As part of its service to members, SPA provides industrial advice, at no cost above membership fees and levies. This includes SPA negotiating model terms of engagement with AWG, MEAA and the ADG for use by SPA members. When Fair Work Australia (formerly the Industrial Relations Commission) developed the Broadcasting and Recorded Entertainment Award in 2010 covering performers and technical crew in the film and television industry the terms and conditions of the Award were substantially based on the benchmark agreements negotiated by SPA.

Producers who apply for funding from Screen Australia must comply with the Screen Australia Terms of Trade. These Terms of Trade require producers to act fairly and reasonably in relation to third parties involved in the funded projects. The Terms of Trade state that fairness and reasonableness includes paying at least the award minimum rates or any minimum rate agreed between SPA and the relevant guilds, and respecting the intellectual property rights of third parties. Third parties include writers, actors, directors and technical crew.

How SPA conducts its negotiations

When conducting negotiations, SPA forms a committee which generally includes two SPA employees and several SPA members. The process of negotiation is inclusive of all SPA members and on average each agreement takes between 9 and 12 months to negotiate. Production companies not directly involved in the committee are given opportunities, both at the start and towards the end of the process, to provide their input into the negotiations. In addition, SPA holds regular member meetings in each State at which industrial relations issues, among other things, are discussed and members can provide comments on the negotiations and model terms at these meetings.

The model terms of engagement are not binding under industrial law and are in principle minimum term in nature but do not preclude negotiations between the parties for variations on the model terms. The model terms do not in any way prevent non-member producers from negotiating their own agreements with the same organisations or with employees and contractors.

In SPA's 2017 Screen Industry Business Survey, approximately 70% of respondents agreed or strongly agreed that labour costs were a barrier to growth.

SCREEN FOREVER

SPA convenes an annual conference, SCREEN FOREVER.¹ At this conference, SPA connects members with potential business partners. As explained later in this submission, forging international partnerships is important in growing and sustaining successful Australian screen production businesses and the Australian film and television industry. The International Partnership Market (IPM) at SCREEN FOREVER is a key driver, with numerous productions being created and or advanced directly from meetings that take place at the IPM. At SCREEN FOREVER in 2017, participants estimated close to \$100m in deals were done.

¹ See delegates' views on SCREEN FOREVER at this link:
<https://www.youtube.com/watch?v=jC70E2LGHXg>

The value of Australian content

In 2016, Screen Australia engaged Deloitte Access Economics and Olsberg SPI to comprehensively measure the economic and cultural value of the Australian screen industry.

The *Screen Currency* report outlines that in 2014-15, the Australian screen production industry contributed over \$3 billion in value add to the economy and over 25,000 full time equivalent jobs. Specifically, the report noted that screen content under Australian creative control generated \$2.6 billion and 20,158 FTE jobs. Production, post, digital and visual effects (PDV) services provided by Australian businesses added another \$382 million and 4093 FTE jobs. Australian screen content attracts around 230,000 international tourists to Australia each year, driving an estimated \$725 million in tourism expenditure.

This report provided a snapshot of the Australian film and television at a moment in time. However, as noted in Part Three of SPA's submission to the House Inquiry,² production levels and employment in the industry have been static or in decline for the past decade.

² Attachment A.

Recent Inquiries into the Australian Film and Television Industry

The Australian film and television industry has been the subject of two significant recent inquiries. The first relevant inquiry was the House of Representatives Standing Committee on Communications and the Arts Inquiry into Factors Contributing to the Growth and Sustainability of the Australian Film and Television Industry (the House Inquiry). The second inquiry is the Australian and Children's Screen Content Review (the Content Review).

The House Inquiry

The House Inquiry was announced on 9 February 2017. SPA made a submission to that inquiry, which can be found at Attachment A.

SPA's submission to the House Inquiry noted it had been almost ten years since the last major reforms to the industry: the offsets in 2007 (producer, location, PDV) and the creation of Screen Australia in 2008. Through these reforms, the Australian Government made a significant effort to provide incentives to grow local production levels. The reforms are welcome and set the industry up for success. However, while the reforms brought about an immediate spike in production, since that time, industry employment growth hasn't outpaced jobs growth in the overall economy, production levels have remained static, new market entrants have increased the amount of foreign content on our screens, and production budgets have increased - labour costs are a significant proportion of this increase.

The static level of production and employment since the reforms demonstrate there are barriers to growth in the industry that need addressing to get proper results out of the reforms that have already been made. In short, the policy is right, but the settings need some adjustments.

These barriers include:

- cuts to funding of screen agencies and public broadcasters
- uncertainty in dealing with screen agencies and government red tape
- the "brain drain" and uncertainty in immigration processes
- variable rates of producer offsets and outdated legislation, and
- the paucity of Australia's co-production agreements.

The potential for growing the film and television industry through trade is significant, but these and other barriers need addressing.

To this end, SPA recommended the Government:

- 1) Adopt a trade-focused agenda for the industry, negotiate more co-production agreements and remove barriers in existing agreements.
- 2) Harmonise the producer offsets at 40% and modernise their administration.
- 3) Evolve and expand the regulatory environment to include new market entrants, while maintaining robust commitments to Australian and children's content to ensure the Government's cultural objectives are met in the digital era.

- 4) Provide certainty in government funding for screen agencies, public broadcasters, immigration processes and property rights.

The House Inquiry tabled its report on 7 December 2017 and made several recommendations for reform relating to:

- modernising and harmonising the producer, PDV and location offsets at 30%;
- local content obligations on SVOD services, the ABC and SBS;
- reform of the children's quotas and a contestable fund for children's content;
- a regional emphasis for Screen Australia funding;
- more and better co-production agreements with our Asian neighbours;
- introducing flexibility to the Foreign Actor Certification Scheme;
- closing the New Zealand content loophole; and
- a greater emphasis on mental health and wellbeing in the industry.

Labor members of the committee provided a dissenting report.

With regard to the substance of the House Inquiry's recommendations, SPA makes the following comments relevant to the present Committee's terms of reference.

Offset issues

The House Inquiry made several recommendations to reform the offsets.

The offsets were introduced when television broadcasting and theatrical release through cinemas were the dominant distribution channels for film and television productions. In the recent past, new market entrants have disrupted this distribution model. Streaming services have established a significant position in the market. Increasingly, these services are commissioning content.

SPA supports the recommendation by the House Inquiry to remove the 65-hour cap on television series accessing the offset.

Feature films

The House Inquiry recommended reducing the feature film offset from 40 to 30 per cent. Reducing feature films from 40 per cent to 30 per cent would increase the difficulty in financing feature films in Australia, with the result that without other interventions, fewer Australian films get made. Recent award-winning Australian feature films that simply would not have been made with an offset at 30 per cent include *Lion*, *Dance Academy*, *The Dressmaker*, *The Death and Life of Otto Bloom*, *The Sapphires*, and *Holding the Man*. If the Producer Offset were to be lowered to 30 per cent, the Government would need to increase equity funding to Screen Australia to ensure its cultural objectives are met.

The feature film offset also requires that the film be produced for exhibition to the public in cinemas (theatrical release) or by way of television broadcasting. Uncertainty surrounding the applicability of the theatrical release requirement, together with the booming streaming market, presents a continuing missed opportunity for Australian feature film producers.

Television

Lifting the television offset from 20 to 30 per cent would not necessarily bring about a commensurate increase in production activity for Australian television drama, documentaries and children's content for commercial broadcasters, as the volume of output for those genres is determined by broadcasters by quotas. However, for public and subscription broadcasters, Australian production levels are likely to rise. However, without any conditions placed on broadcasters accessing the producer offset, a lift from 20 to 30 per cent will increase the incentive for in-house production. Without any other intervention to ensure a diversity of supply (e.g. an independent production quota as in the UK), further vertical integration and consolidation of the industry to a few key broadcasting businesses is to the detriment of the independent production sector, diversity of programming, creativity and innovation and ultimately, Australian audiences.

SPA has recommended previously that the producer offsets should be harmonised at 40 per cent and clarified to ensure that producers remain the beneficiaries of the offset.

When the producer offset was introduced, the then Minister for the Arts, the Hon Senator Brandis QC made it clear that the benefits of the Government's new policy were to accrue to the independent production sector, not broadcasters.

In his Second Reading Speech introducing the producer offset legislation, Senator Brandis said:

"I take this opportunity to affirm on the part of the government its intention that the independent sector should be beneficiaries of the producer rebate ... Were it to be the case that in the early months of the operation of the scheme independent producers were missing out, it would be the intention of the government to re-look at the matter. In that regard, might I adopt the language of paragraph 11.47 of the report of the Senate Standing Committee on Economics, which says:

It would be the committee's expectation that were the availability of the scheme for in-house production to have a detrimental effect on the independent sector then the Government on the basis of that evidence should legislate to restrict the producer offset scheme to independent producers."

Unfortunately, broadcasters have access to the offset for in-house productions. SPA has also seen contracts where broadcasters have used their market power to demand the producer pay the producer offset to the broadcaster, including the producer "margin" – the margin that is usually reserved for producers to cover overages. This takes away a producer's opportunity to build equity in their productions and businesses. Competition issues in the market are further discussed below.

Recommendation 1

SPA recommends the producer offset be harmonised at 40 per cent, clarified to ensure independent producers are the sole beneficiaries of the producer offset and modernised to be platform-neutral

Foreign productions

Lifting the location offset from 16.5 per cent to 30 would provide certainty for international productions and the local services industry in attracting footloose productions to Australia. Certainty is preferable to the *ad hoc* and opaque process for top ups that currently exists.

However, in light of this, the Government must maintain, and indeed enhance, the critical ballast provided by Australian productions in developing Australia's narratives, which are generated by local businesses. To weight Australia's industry too heavily towards an offshore fee-for-service sector, driven in significant parts by currency rates and changeable comparable international incentives, would be an incredibly risky strategy, destabilising and ultimately damaging to the entire industry.

Australian businesses that produce Australian content make up the vast majority of production activity in Australia. The primary investment from Government should always be made available for Australian productions and the relative balance of investment between local and foreign production must remain focused on local industry and bear in mind the benefits provided by international productions clearly focused on building local capacity and global brand appeal for local productions.

Enhanced support for Australian productions through policy measures such as the producer offset is an important signal of the value they provide to Australian stories, Australian audiences and local Australian businesses.

Local content obligations on VOD services

SPA maintains a longstanding policy position that new market entrants should have similar obligations to Australian audiences and industry as legacy businesses. Netflix has a multi-billion war chest for content acquisitions and commissions and has a significant market share in Australia. Netflix announced its first Australian original commission – *Tidelands* – in May 2017, though at the time of writing *Tidelands* has not gone into production.³ The majority of Australian content in the Australian Netflix library is made up of licensed content (over two-thirds licensed from the ABC).⁴ Amazon is establishing a presence in Australia with a large acquisitions and commissioning budget. Disney, CBS and Telstra TV have entered or are entering the market.

SPA welcomed the House Inquiry's recommendation relating to SVOD services. The House Inquiry recommended that a percentage of revenue earned in Australia by SVODs should be spent on Australian productions. The House Inquiry recommended a local content expenditure level of up to 10 per cent. SPA supports

³ <https://media.netflix.com/en/press-releases/netflix-announces-tidelands>

⁴ Dr Ramon Lobato and Alexa Scarlata, *Australian Content on SVOD Catalogs: availability and discoverability*

an expenditure obligation on local production for SVOD, as well as other VOD services (BVOD, AVOD, TVOD etc.).

The benefits of an expenditure model (as opposed to a volumetric quota level) is that it provides flexibility for the VOD provider to invest in quality, rather than quantity, of production. Furthermore, the nature of VOD services is different to linear broadcast, where quotas are a more appropriate and proven policy measure in ensuring Australian audiences are delivered Australian content. That said, to ensure that Australian audiences have access to Australian content on VOD services, a quota, together with a display and promotion obligation must come with an expenditure obligation.

The level of Australian content on Australian SVOD services is in a dire state. A quantitative analysis of the Australian Netflix library by Dr Ramon Lobato and Alexa Scarlata from RMIT found:

- the Australian Netflix catalogue presently features around 2.0-2.5 per cent Australian content.
- The level of Australian content on Stan is higher (9.5 per cent), though its catalogue is smaller.
- There is more Australian content in the United States Netflix catalogue than there is in the Australian Netflix catalogue.
- In the absence of regulation, the SVOD market is unlikely to generate significant investment in new Australian content, though it adds some value to existing content rights.⁵

The European Union model

By way of comparison, Netflix has close to two million subscribers in France⁶ and the EU is bringing SVOD services into its regulatory environment. The proposed revision to the EU Audiovisual Media Services Directive⁷ will include modifications to the existing Directive with aim of enhancing the promotion of European film and television content by:

- allowing media services to impose financial contributions to providers of on-demand services established in other media services (but only on the turnover generated in the imposing country – France has a 26% expenditure obligation)
- putting on-demand players under the obligation to promote European content to a limited level by imposing minimum quota obligations (30% share of the audiovisual offer of their catalogues⁸) and an obligation to give prominence to European works in their catalogues, and
- low turnover companies, thematic services and small and micro enterprises are exempted from these requirements.

⁵ Dr Ramon Lobato and Alexa Scarlata, *Australian Content on SVOD Catalogs: availability and discoverability*

⁶ <https://www.broadbandtvnews.com/2017/01/09/france-televisions-top-launch-netflix-rival-producers/>

⁷ <https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd>

⁸ https://www.theregister.co.uk/2017/05/25/eu_pegs_homegrown_netflix_quota_at_30pc/

Recommendation 2

SPA recommends a local content quota, expenditure obligation as well as a display and promotion obligation on video on demand services.

The ABC and SBS

The ABC and SBS are independent of government and the levels of Australian programming is informed by their interpretations of their interdependent charters. Absent any specific obligations to Australian content, the public broadcasters can align their commissions and acquisitions to other priorities. As outlined in SPA's submission to the House Inquiry and the Content Review, the ABC's expenditure on Australian drama and children's content is inconsistent. However, SPA notes that the ABC has been working over the past 12-18 months to stabilise investment in Australian content and SPA welcomes the ABC's recently affirmed plans to increase its commitment to local content.⁹ SBS has called for a fully-funded local content quota of 30 per cent.¹⁰

The national broadcasters should have specific obligations to deliver Australian content and transparency requirements. The BBC has specific local content quotas and is overseen by a regulator, so should the ABC and SBS.

Recommendation 3

SPA recommends fully-funded local content quotas for the ABC and SBS.

Children's television

Commercial broadcasters (7,9 and 10) have led an aggressive campaign to abolish their obligations to Australian children. In its submission to the Content Review, Free TV argued that children aren't watching children's television and instead, watching reality and family television. Reality television is not subject to the same classification process as children's content and as such, the age-appropriateness of some reality content for children is questionable.¹¹

From the broadcasters' perspective, the nub of the problem is opportunity cost. The children's programming obligations come with sensible content and advertising restrictions aimed at protecting Australian children from potentially harmful content. These restrictions prevent the broadcasters from maximising advertising revenue in the same manner as they do from programs such as *Sunrise* and the *Today Show*.

In 2012, the commercial broadcasters succeeded in being provided flexibility to acquit their Australian and children's content obligations on their secondary channels. The commercial broadcasters argued this flexibility would allow them to create "destination" viewing for children and greater compete with the ABC, which had a dedicated children's channel. Having succeed in being provided flexibility, the commercial broadcasters shifted their children's programming to the secondary

⁹ <https://www.screenproducers.org.au/news/statement-on-abc-investing-in-audiences/>

¹⁰ <https://tvtonight.com.au/2018/02/sbs-pushes-for-local-quota-second-window-for-subscription-drama.html>

¹¹ <https://www.theage.com.au/entertainment/tv-and-radio/why-i-cant-bear-to-watch-the-most-popular-show-in-australia-with-my-daughters-20180221-h0wfn8.html>

channels, all the while knowing that audience numbers on the secondary channels are considerably lower than the primary channel. For example, one producer's high-profile, award-winning children's program was shifted to the secondary channel, the audience fell to a tenth of the primary channel's audience. Now, the commercial broadcasters are using low audience numbers as a justification for abolishing the children's content obligations. In seeking reward for failure, commercial broadcasters blame the quotas, while accepting no responsibility. Moreover, the basis on which the viewer statistics are presented by Free TV are selective and do not necessarily take into the entire viewership, catch up figures and regional audiences.

The House Inquiry made several recommendations to reforming both the demand and supply-side issues relating to Australian children's content.

SPA notes:

- Australian children require quality and dedicated Australian children's content to assist their development, learning and understanding. Children's live action and animation both have a role to play in achieving this objective.
- Children's production is necessarily different from other genre production (e.g. adult drama, factual) and industry capability must be maintained to ensure quality content continues to be produced.
- Competition among buyers and broadcasters is key to ensuring quality Australian children's content; a diversity of opportunity leads to a diversity of supply and a diversity of content.
- When the UK Government removed children's content obligations from its commercial broadcasters, it led to a 93 per cent decline in expenditure. The UK Government is now planning to quickly return children's content obligations on the commercial broadcasters.
- As children increasingly view content online, there is scope for modernising the children's content standard to encompass online viewing without lessening the quantity and quality of Australian children's content.
- There is an option available to the Government to impose a 10 per cent children's expenditure obligation on subscription television.

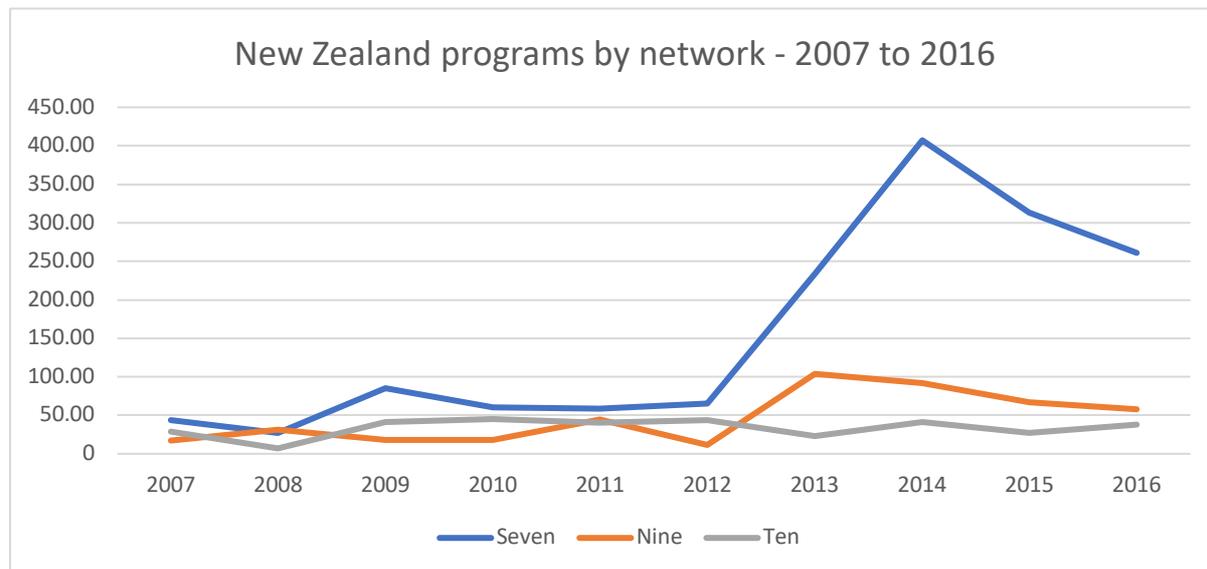
Recommendation 4

SPA recommends any changes to the children's content quotas increase the quantity, quality and availability of Australian children's content.

New Zealand content

The House Inquiry recommended the New Zealand content loophole be closed. The New Zealand content issue is an unintended consequence of a trade deal done in the 1980s. As a result of a protocol to Australia's Closer Economic Relations agreement with New Zealand and a High Court decision (*Project Blue Sky*), New Zealand content is treated as Australian content. The increasing use of New Zealand content is a significant impediment to local production industry growth and undermines the effectiveness of Australia's local content regime.

As the decline in audiences for children’s content correlated with the 2013 decision to allow commercial broadcasters to acquit their obligations online, conversely commercial broadcasters increased their use of New Zealand content.



The availability of cheap second-run NZ content to acquit first-run Australian content obligations means Australian producers are competing with NZ producers at a price point that is uncompetitive. This is on the basis that the content is either purchased in its second window after airing in New Zealand or because the cost of production in New Zealand is often cheaper (labour costs are lower) or more heavily subsidised (some New Zealand television content attracts a 40 per cent tax offset. This, together with oligopsonic market conditions, means Australian producers are hamstrung from competing at a level playing field, with deleterious effects over the long term for sustainability of the independent production sector. Indeed, the Seven Network produced *800 Words* in New Zealand, where the tax rebate for production is 40 per cent for television and acquits it as Australian drama.

In 2014, the commercial television broadcasters averaged 180 hours of New Zealand content that qualified as Australian. In 2015, the commercial television broadcasters averaged 135 hours of New Zealand content. In 2016, the commercial broadcasters averaged 164 hours of New Zealand content. Hypothetically, assuming the entirety of the 135 hours was substituted for first run miniseries drama and the cost of first-run Australian drama miniseries averages nearly \$1.368 an hour,¹² the loss to the Australian production industry is estimated to be \$184.68m in 2015.¹³

The House Inquiry recommended the Government close the New Zealand content loophole by redefining the concept of “first release”:

“The committee recommends that first-release be redefined to mean first broadcast anywhere in the world.”¹⁴

¹² Screen Australia, *Drama Report 2015-2016*.

¹³ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8679.0>

¹⁴ Recommendation 6.

Recommendation 5

SPA recommends the New Zealand content loophole be closed.

The Content Review

The Content Review was announced on 6 May 2017. SPA made a submission to the Content Review (Attachment B). With regard to the process of the Content Review, SPA remains concerned, given the stated timeframe for a decision on any new policy framework, that industry will not be afforded an opportunity to comment formally on any new policy framework. SPA maintains that the timeframe for decision making include an adequate consultation period with those affected by any proposed new policy framework.

In its submission to the Content Review, SPA identified market failure for Australian producers of film and television content. In the market for television content, this market failure is an inherent feature of the market, which is set up by government itself through legislation. This market failure expresses itself through buyers seeking “more for less” from producers. It is incumbent, therefore, on government to address this market failure by ensuring fair contracting in the market. Without government action to address market failure, there will be an accelerating decline in the number of sustainable production businesses, which in turn will have an impact on jobs, skills development, the diversity of Australian content and hasten the brain drain to larger markets.

SPA made 12 recommendations that will ensure the viability, sustainability and strength of the independent production sector. These recommendations relate to both demand and supply side issues. Demand-side interventions in the market and have been demonstrated to be successful in achieving their public policy objectives of ensuring Australian audiences have access to quality Australian content. With regard to supply-side issues, the producer offset has been a hugely successful source of secure funding for Australian productions. However, offset legislation has not been significantly updated since it was introduced and some modernisation is required to make its scope platform-agnostic. SPA recommends harmonising the producer offset at 40 per cent and returning the producer offset to its original policy intention – that it is for producers, not broadcasters.

SPA also made recommendations relating to increased trade through more and better co-production arrangements, greater coordination of trade strategy between state, territory and federal governments potentially through the Cultural Ministers’ Council, and reforms to the Foreign Actor Certification Scheme.

Free TV’s submission to the Content Review

Free TV represents the commercial broadcasters. In its submission to the Content Review, Free TV made a series of recommendations that, if implemented, would have the effect of:

- entrenching the commercial broadcasters privileged competitive position
- weakening competition from the independent sector and public broadcasters

- reducing the quantity and quality of Australian drama on commercial television, and
- reducing significantly the quantity and quality of Australian children's content on commercial television.

Commercial broadcasters will do less Australian content

Free TV has recommended reform of the Australian Content Standard drama points scheme and the abolishment the Australian Children's Standard (Recommendation 1).

If the Free TV drama points scheme was active in 2016, SPA estimates a reduction in drama hours of 40 per cent, a reduction in budgets of \$125 million and a loss of close to 3500 jobs. This is in addition to the significant decline in production activity if the Children's Standard were to be abolished, as recommended by Free TV.

Recommendation 6

SPA recommends against any change to the drama points score that would reduce the quantity of Australian content on commercial broadcast television

Commercial broadcasters will have less incentive to commission independently

Free TV and Foxtel have recommended an increase in the producer offset from 20 per cent to 40 per cent (Recommendation 2.1.1) and access to Screen Australia funding (Recommendation 2.1.4).

If adopted, without controls, these two recommendations will hasten the trend to vertically-integrated commercial broadcasters that produce, broadcast and distribute their own content. While SPA supports harmonising and modernising the producer offset, it must be returned to the original beneficiary of the scheme – the producer. With regard to Screen Australia funding, where a commercial broadcaster enters an in-house production into a Screen Australia funding round, it would have little incentive to commission any competing independent production that has also entered that round.

At this point SPA stresses the importance of independent production. Ofcom has summarised the reasons for independent production quotas in the UK as a mix of cultural and economic rationales, including:

- Promoting innovation, creativity and risk taking.
- Increasing competition, raising quality and reducing costs.
- Increasing range and diversity, in terms of programme genres and geography.
- Providing an alternative source of new on- and off-screen talent as well as helping to develop a skilled workforce.
- Making it easier for new channels to enter the market, thereby contributing to viewer choice.

- Increasing employment in different parts of the UK, and in places which lack a major in-house production presence, thereby contributing to dispersal of production around the UK.
- Creating a base for international success.

These reasons are equally important in the Australian context.

Recommendation 7

SPA recommends that independent producers remain the sole beneficiaries of Screen Australia funding

Commercial broadcasters effectively are asking for an anti-siphoning list for Australian content

Free TV and Foxtel supported a competitive neutrality review into the public broadcasters. While the terms of reference are yet to be settled, in its submission Free TV asked for a review of the ABC and SBS charters (Recommendation 3.2). SPA is concerned that an outcome of these reviews what will be a *de facto* anti-siphoning list for Australian content, where commercial broadcasters have “first rights” on Australian content. This would have a significant negative impact on the capacity for production companies to increase value in their productions through a competitive sales process, as well as the public broadcasters.

Recommendation 8

SPA recommends against any changes that would reduce competition in the market for television productions

The value and importance of local content quotas

Local content quotas have been of demonstrable value and importance in ensuring Australian audiences are provided with quality Australian content and an industry capable of producing such content. Without local content quotas, the economics of Australian content simply cannot compete. A broadcaster can import cheap second-run content from larger markets (such as the United States) for which the initial and more valuable first run has been paid. An unregulated, free market led to a situation in 1961 where just one per cent of all drama on Australian television was Australian produced. The other 99 per cent was imported.¹⁵

With regard to Australian content quotas, some clear propositions may be offered:

- There is strong audience demand for quality Australian content.
- Industry capability is a key consideration to meeting the demand for Australian content.
- Industry capability is informed by demand side interventions.
- Quantity of production will provide the circumstances for quality production.
- In the absence of demand side interventions, the market will not deliver local content of a cultural nature adequate to satisfy audience demand.
- Those who are regulated will seek deregulation, those who are not regulated will actively resist regulation.

Regulated buyers

In the Australian market, there exist three categories of regulated buyer:

- public (ABC and SBS)
- commercial (Channel 7, Channel 9 and Network 10), and
- subscription (Foxtel).

The new market entrants (Stan, Netflix, Telstra TV etc.) are not creatures of regulation, indeed barely regulated at all.

The regulated buyers in the market exist because of government intervention: the ABC and SBS by virtue of their enabling legislation; the commercials and Foxtel owe their existence to licences afforded under the *Broadcasting Services Act 1992* with government thus far supporting commercial broadcasters by restricting the number of commercial broadcast licences to three.¹⁶ With regard to levels of Australian programming, the government has a different approach to regulation depending on the nature of the broadcaster. These regulations are demand-side interventions in the market and have been demonstrated to be largely successful, yet not without problems, in achieving their public policy objectives.

¹⁵ *Report from the Senate Select Committee on the Encouragement of Australian Productions for Television*, 1963.

¹⁶ Section 37A, *Broadcasting Services Act 1992*.

Subscription television broadcasters

Subscription television broadcasting services are currently required to spend 10 per cent of the program budgets of drama and general entertainment channels on new Australian drama. Under the United States Free Trade Agreement, the Government may allow this requirement to be increased to 20 per cent, and introduce a 10 per cent requirement on some new channel genres such as arts, children's, documentary, educational.

Commercial broadcasters

The commercial broadcasters have local content obligations in the form of quotas (transmission, sub-genre). These quotas exist for a variety of strong public policy reasons: the importance of Australian stories, narrative and expressions on Australian screens, a quid pro quo for privileged access to a public asset, the importance of a local independent production industry of sufficient size and scope that has capability and capacity to supply the quotas.

The Government has made a series of recent decisions to make commercial broadcasters more competitive. These decisions, which are outlined in the *Screen Production Industry Policy Ledger* at Attachment C, include abolishing broadcast licence fees and no action on New Zealand content. These decisions are demonstrably effective in strengthening the commercial broadcasters. Network Ten has been bought by CBS. In the week the Nine Network announced its interim results, its shares were up 27.8 per cent.¹⁷ In the same week the Seven Network was up 30.6 per cent. An unintended consequence of these decisions is that in making the commercial broadcasters more competitive, it has made the value proposition for in-house production more appealing, to the detriment of the independent sector. In-house production has increased from 44 per cent of all production costs in 2011/12 to 55 per cent in 2015/16.¹⁸

The commercial broadcasters have mostly met their transmission and genre-specific obligations. The quotas are minimum requirements. The commercial broadcasters comfortably met their overall transmission quotas, but the results for sub-genre quotas for first run drama, documentary and children's programming are less comfortable reading. That the commercial broadcasters' results either barely met the minimum requirements, or fell slightly below the minimum requirements,¹⁹ indicates their level of commitment to those genres is dictated by those obligations.

As PwC modelling suggested in 2011 as part of the Convergence Review,²⁰ if the quotas were removed the level of programming would fall significantly. PwC used three hypothetical scenario that modelled the likely effect of changes to the Australian minimum content requirements.

With regard to the PwC's first hypothetical scenario "The minimum content requirements are removed and all other levels of government support remain the same", PwC's modelling provides a cautionary tale. Where Australian content

¹⁷ <https://www.smh.com.au/business/companies/nine-chief-hugh-marks-says-social-is-out-of-favour-with-advertisers-20180222-p4z179.html>

¹⁸ Australian Bureau of Statistics, 8679.0 - *Film, Television and Digital Games, Australia, 2015-16*.

¹⁹ Australian and Children's Screen Content Review, Consultation Paper, August 2017.

²⁰ PwC, *Minimum content requirements research report*, 2011

requirements are removed, PwC estimated the volume of Australian content broadcast would fall to approximately 43 per cent. The level of investment in Australian television content would fall approximately 28 per cent and in the short run employment in the television production and broadcasting sector would fall by approximately 2,000 full time equivalent jobs. Documentary production was expected to halve. Subscription broadcast spend on Australian drama was expected to fall to 6 per cent. No children's content was expected to be produced. This is consistent with the effect of removing children's quotas in the UK, where expenditure fell 93 per cent after quotas were removed.²¹

It is an open question whether if the current obligations are removed or reduced they are able to be re-introduced or restated because of the ratchet mechanism in Australia's free trade agreement with the United States. Moreover, the Legislation (Exemptions and Other Matters) Regulation 2015, which was introduced without industry consultation,²² removes parliamentary oversight of any executive decision to remove or reduce the quotas. This change makes any decision to revoke or vary a content standard non-disallowable by the Senate.

It is not a coincidence that of all genres, commercial broadcasters' expenditure fell only in those genres that are the subject of quotas. It is indicative of the approach adopted to these "at risk" genres by commercial broadcasters. Should the quotas be removed, an unregulated market will not deliver anywhere near the same level of drama, documentary and children's program that is currently provided.

How can quotas be met while expenditure falls?

There are two main reasons why quota obligations can be met while expenditure can remain stagnant or decrease for drama, documentaries and children's programs: the increasing use of New Zealand content to acquit Australian content obligations and competition issues determined by the structure of the market.

As noted below, the market for television programs in Australia is an oligopsony, a form of imperfect competition which hands buyers great control over the market. The broadcasters can use this market power to play producers off against one another to demand more, for less, all the while bringing more production in-house. Another concerning trend emerging in the market is increasing vertically-integrated broadcasters that produce more content in-house. According to ABS data, this trend is increasing. The worst-case long-term scenario if this trend continues is a handful of vertically-integrated broadcasters, all that have their headquarters within a couple of kilometres from the Sydney CBD, controlling the vast majority of output of Australian programming for Australian audiences.

²¹ <http://www.telegraph.co.uk/news/2017/04/17/broadcasters-forced-invest-british-made-childrens-tv-programmes/>

²² Question 169 asked by Senator Hanson-Young of the Australian Communications and Media Authority, Questions on Notice, Budget Estimates May 2017.

Competition issues

In its submission to the Content Review, SPA outlined the state of the market and the competition issues that arise from the unique nature of the market.

At SCREEN FOREVER in 2016, in a speech titled *The Good, the Bad and the Possible*,²³ Graeme Mason identified some market realities as they relate to Australian producers:

- “Television has many specific challenges, at least in scripted and documentary/factual, the areas Screen Australia is involved in. *For a start, buyers want more for less money.*”
- “But judging the deals coming to us, some producers seem to have been coerced into putting aside business realities.”
- “Some producers are also being railroaded into asking Screen Australia to sweep aside long-held terms.”
- “Many film and TV producers – experienced and not – expect and want us to police deals.”

The market for television content in Australia is an oligopsony. An oligopsony – like its inverse, an oligopoly (few sellers, many buyers) – is a form of imperfect competition. Sellers can be at a major disadvantage in an oligopsony. A large number of producers²⁴ compete with one another for access to spectrum, a public good, which is controlled by a small number of broadcasters.

The disadvantages of an oligopsony include:

- Buyers can set sellers off against each other, thereby lowering the purchase price paid to all sellers.
- Buyers can dictate costs of sellers through imposing exact specifications relating to quantity, quality, suppliers, wages, innovation and rights.
- Buyers are able to pass on risk inherent in the product.

The market has come under significant pressure to compete with Google and Facebook for advertising revenue.²⁵ The Government is aware of the competition issues in the market and recently announced an ACCC inquiry into the dominance of Google and Facebook in the advertising market.

For audience, Netflix, Stan and other new market entrants continue to grow significant subscription bases. For example, since entering the market in 2015, Netflix has amassed a significant market share. Roy Morgan estimates 7,558,000 Australians aged 14+ (37.7%) had Netflix in the three months to June 2017 – up from 4,453,000 (22.6%) in the March quarter 2016.²⁶ In Nine’s FY18 interim results statement, it noted Stan recorded a seasonally strong period for sign-ups, with active

²³ <https://www.screenaustralia.gov.au/getmedia/aa9d4041-f0fd-45d2-8764-633d44d930d4/SPA-2016-speech.pdf>

²⁴ 2819 film and production businesses in 2015-16, see Australian Bureau of Statistics, 8679.0 - Film, Television and Digital Games, Australia, 2015-16.

²⁵ Google and Facebook account for 85 per cent of new online advertising spend and 2017 is the year that globally, online advertising spend has overtaken television advertising spend: [Kleiner Perkins Internet Trends 2017](#).

²⁶ <http://www.roymorgan.com/findings/7343-netflix-subscriptions-june-2017-201709270713>

subscribers now around 930,000, together with revenue growth of 83 per cent, and a cost increase of 29 per cent. These new market entrants bring with them a wealth of content to Australian audiences, the vast majority of which is foreign – the Australian Netflix library contains between 2 to 2.5 per cent Australian content and Stan has 9.5 per cent Australian content. These services are not subject to local content obligations.

These two factors, declining advertising revenues and audience fragmentation have conspired against Australian producers, as Graeme Mason outlines above. The Australian Bureau of Statistics report *Film, Television and Digital Games, Australia, 2015-16* shows between 2011-12 and 2015-16, there has been negligible growth of five per cent in total income for production businesses from \$2.2 billion to \$2.3 billion, while production income is down six per cent over the same period to \$1.6 billion. Last year, KEO Films, a UK owned but locally run production company, close its Australian operations, citing difficult market conditions in Australia.²⁷

Without government intervention, the market structure and current market conditions will continue to disadvantage Australian producers to the benefit of either international competitors who operate in more favourable market conditions or broadcasters who commission content from producers. This will in turn, disadvantage Australian audiences through a lack of diversity in quality Australian programming. A cohort of strong Australian producers in the market is key to a diversity of quality Australian programming. The key to a strong Australian production sector that supplies the market is producers' capacity to retain the intellectual property in their productions and leverage this through international trade.

How does the Government regulate the market power of the broadcasters?

Outside general competition law, there exists two *de facto* arrangements to address the market power of broadcasters: a minimum licence fee in the Australian Content Standard and Screen Australia's terms of trade.

Australian content standard

Section 11 of the ACS sets out a formula for calculating the drama score for an Australian drama program: 'drama score = format factor x duration (in hours)'. Drama series and serials acquired by broadcasters from independent producers for certain a determined minimum licence fee receive a higher format factor than other series and serials. There is also a tiered treatment of feature films in recognition of the disparity in licence fees paid by licensees. This minimum licence fee increases annually.

This market intervention is a tacit admission of market failure and provides an incentive to a broadcaster to contract with an independent producer at a price determined by the government.

²⁷ <http://www.screenhub.com.au/news-article/news/television/david-tiley/keo-kod-as-war-on-waste-company-goes-into-the-bin-253947>

Screen Australia's terms of trade

Screen Australia's terms of trade broadly outline the core terms on which it transacts its business. Including Screen Australia investment in a production is an incentive for both the producer and broadcaster: producers can obtain the benefit of having Screen Australia at the table with its terms of trade, broadcasters have the benefit of a reduction in the overall cost of content.

Among other things, Screen Australia's terms of trade:

- denies broadcasters access to Screen Australia funding
- guarantees at least award (or above award if agreed) rates for employees, and
- seeks to ensure the producer retains some margin on the offset (10 per cent for feature films and television, 15 per cent for documentaries).

As outlined by Graeme Mason at SCREEN FOREVER, these terms of trade seek to ensure producers may contract on a long-term sustainable basis by retaining a margin on their productions. The margin is there to be drawn upon if production costs balloon, but also to ensure production businesses can retain some equity in productions. Critically, they also exclude broadcasters from program funding, which assists independent producers to build sustainable businesses and contribute to a diverse slate of programming.²⁸ These terms of trade only apply where Screen Australia is involved in some way. However, Screen Australia is not involved in most contracts in the market. For example, Screen Australia does not invest in light entertainment or reality television. Moreover, licence fees paid by commercial broadcasters have significantly dropped to the point where some producers have felt they had to work outside of Screen Australia minima in order to get a project commissioned.

The solution to market failure

There is one solution to address market failure created by the oligopsonic market structure: legislated terms of trade that sets a standard for contracting between big and small business.

David Fernández-Quejada has written on the nature of quota obligations and their effect on the market:

“The simple implementation of quota policies leads to a scenario of low-cost entry and plentiful suppliers; in other words, an oligopsonic market in which broadcasters control the bottleneck of access to the television spectrum. In this context, producers have no chance to build assets, meaning that growth can only occur at the expense of other competitors or from a quota increase. However, this hypothetical increase cannot be a long-term solution because the tendency is to reproduce the same scenario. *The only solution is the one that the UK implemented in 2003: a regulatory intervention on the terms of trade governing agreements between broadcasters and producers that allows*

²⁸ SPA is concerned by reports that broadcasters are seeking to access Screen Australia program funding.

producers to retain control over rights and to build their own portfolio of products that can be marketed elsewhere.”²⁹

This simple intervention has created in the United Kingdom, arguably, the most successful independent production industry in the world. As Chalaby writes, with this intervention, “the British government operated a strategic shift in favour of content producers and created a new intellectual property regime. This regime has enabled producers to keep hold of their rights and become asset-owning businesses, eventually giving rise to a new breed of production companies: the super-indies [which] have acquired the scale to compete in an international TV market and drive ... British TV exports.”³⁰ The next sections lists a number of reports that outline the nature of the UK market and the benefits of terms of trade for the independent sector, broadcasters and UK audiences.

SPA notes that in 2016 the UK Government, through its regulator Ofcom, recently reviewed and renewed terms of trade in that jurisdiction.

Culture Secretary John Whittingdale said:

“I have considered carefully Ofcom’s report on the television production sector and decided that the regulations continue to be effective and play a key role in supporting a diverse and vibrant production sector. We have therefore decided to make no change.”³¹

Other Australian markets have similar interventions. Relationships between buyers and suppliers in the food and grocery market, dominated by just two buyers – Coles and Woolworths – is mediated by The Food and Grocery Code of Conduct, a voluntary code prescribed under the Competition and Consumer Act 2010 and administered by the Australian Competition and Consumer Commission. The horticulture market has a mandatory code of conduct that sets contractual conditions in relationships between growers and buyers.³²

Recommendation 9

SPA recommends fair contracting in the market be ensured, potentially through UK-style legislated terms of trade

²⁹ David Fernández-Quijada (2012) Quoting television: a cross-national analysis of regulatory intervention in the independent television production industry in the UK and Spain, *International Journal of Cultural Policy*, 18:4, 378-397 – emphasis added.

³⁰ Chalaby, J. (2010). The rise of Britain's super-indies: Policy-making in the age of the global media market. *International Communication Gazette*, 72(8), pp. 675-693.

³¹ <http://www.c21media.net/uk-terms-of-trade-remain-unchanged/>

³² <https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct>

Relevant reports from other jurisdictions

SPA brings to the Committee's attention several relevant reports from other jurisdictions.

United Kingdom

- [Impact of the 2003 Communications Act on UK Indie Producers](#)
- [Scotland's Screen Sectors – Economic Baseline](#)
- [From the Cottage to the City: the Evolution of the UK Independent Production Sector](#)
- [TV production sector evolution and impact on PSBs](#)
- [Review of the operation of the television production sector](#)
- [More UK Programs on the BBC](#)
- [The Evolution of the UK TV content production sector](#)
- [PACT - UK Television Production Survey 2017](#)

European Union

- [The Audiovisual Media Services Directive](#)

Canada

- [Economic Report on the Screen-Based Media Production Industry in Canada](#)
- [Canadian Content in a Digital World](#)
- [Exporting Canadian Television Globally: Trends, Opportunities and Future Directions](#)