SCREEN PRODUCERS AUSTRALIA

PAYING PERFORMERS IN THE DIGITAL AGE

Digital technology has revolutionised the way in which audiences consume screen content. Yet what is not widely understood is that the legal mechanisms used to determine what content can be screened has not been changed for over 30 years.

The union representing screen performers (Media Entertainment and Arts Alliance or MEAA) and the association representing independent screen producers (Screen Producers Australia or SPA) are currently negotiating updates for the industry standard rights agreement known as the Actors Television Repeats and Residuals Agreement (ATRRA). Both MEAA and SPA agree that the issues are complex so to help you understand the issues SPA has prepared the following paper outlining what the ATRRA is and how it could be made better.

What is ATRRA?

- ATRRA allows Producers to buy the rights to use performance.

Performers have common law rights to authorise the usage of their performance and the ATRRA details the industry agreed terms for that usage currently for television drama and sketch comedy programs only. Producers are then able to include these rights, along with rights for script, sound and music, and contract with television broadcasters and distributors.

What does the ATRRA cover?

- Television plays & repeats

- Percentage of sales in Australia & overseas
- Allows a Performer's pay to be calculated

Television (TV) plays & repeats

ATRRA sets out the agreed industry terms under which a Producer can commercially exploit a television program. A Basic Negotiated Fee (BNF) paid to the Performer buys the right to use the Performer's performance in one (1) TV broadcast (a play) of the program.

ATRRA sets out the terms under which a television program can be exploited commercially. A Basic Negotiated Fee (BNF) paid to the actor buys the right to use the actor's performance in one (1) TV broadcast (a play) of the program. By paying percentage loadings of the BNF, a producer is able to buy additional plays (repeats) of the program. Most Producers include a payment for 70% of the BNF for 3 additional plays of an adult TV program or 5 additional plays of a children's TV program. Currently a different loading and payment structure applies to Pay TV programs. There is a restricted period of time during which these plays can be used (broadcast license period). Currently broadcast license periods are restricted to 7 years.

Percentage of sales in Australia & overseas

ATRRA also sets out the terms under which Performers are entitled to receive a share of revenue from program sales in Australia as well as from territories in the rest of the world (ROW). These entitlements are in addition to the initial payment the Performer receives at the time of engagement and known as residuals and are currently defined in the ATRRA as ancillary usage (the primary usage being TV broadcast). The current industry practice is for producers to pay an advance (up front payment) against some sales receipts when the Performer is engaged.

For example: Producers currently pay 2.5% of the BNF to performers in their fee which is a pre-buy of the Performer's entitlement to a share of up to $4,000 of revenue per episode from sales earned from exploitation of a one hour program in Australia; In addition Producers also pay 30% of the BNF to performers in their fee which is a pre-buy of the Performer's entitlement to a share of up to $20,000 of revenue per episode from sales earned from exploitation of a one hour program in overseas territories. Once revenue is greater than these thresholds Performers are entitled to additional payments based on percentages of their BNF which are listed in tables in the ATRRA agreement.

Calculation of Performer's Fee

All Performer's fees are currently calculated by including an agreed BNF and then including additional loadings. For example, a standard minimum weekly (40 hr) fee calculation for a Performer in an Australian TV program, currently looks like this:

Performer Class 2 BNF (1 TV Play) =	$1026.00
3 Additional TV Plays ($1026 X 70%) =	$ 718.20
Australian Ancillary Usage Advance ($1026 X 2.5%) =	$ 25.65
ROW Ancillary Usage Advance ($1026 X 30%) =	$ 307.80
TOTAL MINIMUM FEE =	$2077.65*

* Overtime, Annual Leave & Superannuation entitlements are paid in addition to the Total Minimum Fee

This is the minimum fee a Performer Class 2 is currently paid based on a weekly engagement and entitles the Producer to use the performance in the program for 4 TV plays as well as ancillary usage of the program in Australia

and overseas territories. Importantly the ATRRA is a minimum term agreement, which means that it sets a floor price, not a ceiling, so performers are free to negotiate with producers for a personal margin that can be in excess of the minimum BNF.

When did the ATRRA begin and has it changed much over the years?

- First negotiated in 1982.
- Amounts for TV broadcast plays and Australian and overseas residuals unchanged since 1982
- Some minor changes (Pay TV, Telemovie royalty)

First negotiated in 1982

The ATRRA was first agreed by Actors Equity (now MEAA) and SPA in 1982. It was renegotiated in 1997, 2000, and 2004.

TV plays and Australian and overseas residuals unchanged since 1982

Percentage loadings for additional plays beyond the first TV broadcast have not been changed. The thresholds that trigger Performers' entitlement to residuals payments have also never been changed. Performers' fees have increased every year along with increases to the BNF. These minimum BNF fees are negotiated in a separate agreement between the MEAA and SPA called the Actors Television Programs Agreement (ATPA).

Some minor changes (Pay TV, Telemovie royalty)

There have been some minor changes since 1982, the most significant of which was the introduction of rights loadings for Pay Television (Pay TV) plays (Exhibition Days) in 1997. The other change is that in 2004 the threshold table setting out Performers' entitlement to residuals for

Australian ancillary usage of telemovies was replaced by a fixed royalty system of 16.67% less commissions and costs capped at 35%.

What's wrong with ATRRA?

- Designed for limited channel environment.
- Does not cover programs made for transmission on the internet only
- Has not kept pace with changes in technology and audience behaviour.
- Hinders flexibility and innovation.
- Prevents the re-licensing of Australian programs

<u>ATRRA was designed for limited channel environment</u>

In 1982 there were four national TV channels with SBS still not accessible throughout Australia. There was no 24-hour broadcasting, TV simply went to sleep at night. There was no significant competition from other forms of technology including Pay TV and home entertainment recording and replay technology was in its infancy. There was no internet as we now know it. By today's standards there wasn't very much to watch. It was in this environment that one (1) TV Play was seen as great value to TV broadcasters and advertisers.

Today in late 2015 we have at least 25 digital free-to-air TV broadcast channels and a Pay TV (Foxtel) service. Additionally there are an extraordinary number of services screening programs in Australian and in all overseas territories via the internet on transactional video on demand (TVOD) platforms like iTunes and Amazon, subscription video on demand (SVOD) platforms like Stan and Netflix and almost limitless entertainment available on the world wide web (YouTube). In this crowded environment

one (1) TV Play simply does not have the same value to broadcasters and advertisers that it did over thirty-three years ago.

ATRRA does not cover programs made for transmission on the internet only.

As the ATRRA has not been changed to reflect demand platforms like SVOD and TVOD, Producers making programs made for the internet have had to negotiate with MEAA on a case by case basis. As the number of these programs increases this is becoming time consuming and impedes production. Producers and Performers will benefit from a negotiated industry standard for this new platform.

ATRRA does include provision for programs made for TV that are later shown on platforms on the internet. Revenue from sales of a program to providers that have a platform on the internet are covered by ancillary usage . Performers are entitled to a share once revenue reaches the thresholds in the ATRRA tables.

However the ATRRA does prevent any transmission of the program before it has screened on free to air or Pay TV. MEAA and SPA initially agreed to this measure to prevent a home video rental release before a program was screened on TV. This was seen as maximising the value of the TV screening. Today broadcasters see this as a limitation that prevents them from utilising the internet to publicise programs and reach audience in a crowded market. More on this below.

ATRRA has not kept pace with changes in technology and audience behaviour

Whilst the invention of home recording systems has allowed audiences to record a program and watch it later (time shifting), it wasn't until after the internet became widely accessible that the ability to store digital files of a program resulted in audiences time shifting their viewing habits in ways never previously seen. Today whole sections of the 'audience' simply never watch free to air television.

TV broadcasters have responded to audience demand by making programs available to stream via their websites, after the program has gone to air. This practice is known as 'catch up'. Further, some TV networks sometimes make the program available on one of their multi-channels (eg ABC2, 7Mate, Gem, Go! etc).

The audience ratings of some TV programs are now falling when measured solely by their free to air TV first Play. However a similar number of audience might still be watching the program but the audience is now spread across different platforms and at different times – on catch up, multi channel repeats, and the initial TV Play.

TV broadcasters are now telling producers that the value of the TV Play is much less than it used to be. While TV broadcasters do not want to see Producers pay Performers any less they are asking for more flexibility in the use of each play of a program.

ATRRA hinders flexibility and innovation.

The introduction of providers using broadcast platforms on the internet has significantly increased competition for audiences and TV broadcasters are now arguing that they need flexibility to compete.

For example, the restriction on internet usage prior to TV broadcast prevents TV broadcasters from making limited streams of the program available before the TV broadcast to publicise the program, create word of mouth, and drive up the audience for Australian programs.

TV broadcasters would like more flexibility around the launch of a program to increase their audiences awareness of Australian programs and to build larger audiences. TV broadcasters would like the flexibility to repeat the premiere program on the primary or secondary channels in the first week with the aim of having a larger audience for the Australian program in the second and subsequent weeks.

TV broadcasters would also like to have the flexibility to restart a TV series if the initial launch time slot failed to reach the target audience. This often happens in Australia with overseas series as the TV broadcaster has unlimited play rights for programs it purchases from overseas territories.

Public TV broadcasters have shown a clear need to compete with platform on the internet and subscription services by having certain targeted programs available to binge watch on their own internet platforms. Binge watching is when the entire series is available simultaneously on an internet platform.

Commercial TV broadcasters have expressed concern that their internet competitors like Netflix who do not have any statutory Australian content obligations and have only commissioned limited original Australian programming. The TV broadcasters have expressed a clear need for the maximum flexibility over the promotion and usage of Australian programs to enable them to compete with unregulated internet providers.

ATRRA prevents the re-licensing of Australian programs

No commercial broadcaster has re-licensed an Australian adult drama TV series for more than a decade because after the TV broadcaster has used all the contracted TV Plays during the license period, they must purchase any repeat Plays by paying the performers a percentage of their BNF. However the amount payable using this method exceeds the amount the market is prepared to pay for the re-license of the program, The result is that TV broadcasters simply buy foreign programs to fill up their schedules instead.

It has been long known that the cost of re-licensing Australian TV programs is prohibitive under the ATRRA system. Producers have suggested to MEAA that a change to the existing royalties based method that would entitle Performers access to a percentage of sales revenue.

It is true that some Children's TV series were re-licensed by ABCTV after the introduction of its dedicated Children's channel ABC3. This enabled ABCTV to quickly build a catalogue of programs for TV broadcast. Following recent and past Government budget cuts to ABC Funding ABCTV have informed Producers that they are no longer in a position to re-license Australian Children's TV series.

With the exception of some Performers in the Children's TV series that were re-licensed by the ABCTV Performers are not receiving any additional payments for repeat fees after the initial TV broadcasting license period because there is simply no program re-licensing.

As the current ATRRA does not reflect current industry practices, the ATRRA restrictions end up benefiting the producers and distributors of programs imported from overseas territories into the Australian television market, all to the detriment of the makers and contributors of Australian programs.

Why should ATRRA be changed?

- To maximise popularity of Australian programs

Maximise popularity of Australian programs

Australian Producers want to make Australian programs and want those programs seen by a wide audience. The ATRRA needs to be changed for benefit of the entire Australian screen content industry, to maximise the popularity of Australian programs, ensure the highest possible levels of production and employment and to ensure that the Australian industry has a competitive future. Audience popularity is the key to TV networks commissioning subsequent series in what is now a crowded and globally competitive market.

How can ATRRA be changed?

- There has to be something in it for everybody

There has to be something in it for everybody

MEAA and SPA know that agreements by their very nature require compromise and agreement, a bit of give and take. Producers understand there has to be something in it for everybody. Producers are hearing it loud and clear that TV broadcasters want more flexibility on Plays and internet platforms to be competitive. Producers want programs to maintain their value and be popular with audiences so that there will be more Australian programs commissioned. Producers also understand Performers want a fair fee for the use of their performance and repeat and regular engagements.

The current license period in the ATRRA is too long for programs to maintain

their value. After 7 years, the program's value is significantly diminished and is little or no value to the market.

Producers believe a number of things need to happen. Performers can agree to changes to the current repeat fee structure for broadcast re-licenses and accept a royalty of sale. This will immediately reduce the cost of a broadcast re-license and Australian programs will be competitive with foreign content. At the same time, TV broadcasters can accept a reduced license period for the program as this will result in Australian programs retaining market value. In return for changing the license period, the TV broadcaster will receive more Plays and this will allow them be more flexible, more innovative and ultimately more competitive.

Producers believe that changes to the ATRRA can increase the competitiveness of Australian TV broadcasters whilst maintaining Performers entitlement to revenue share. Producers want Australian programs to have increased audience popularity. Producers want more Australian programs and more work for Australian Performers.