Taking Australian stories and skills to the world in the age of global streaming

A Lateral Economics discussion paper commissioned by Screen Producers Australia

April 2023

LateralEconomics

CAPABLE, INNOVATIVE, RIGOROUS

Key points

Setting the scene

- Models for commissioning new screen content have changed, and buyers are seeking more extensive rights over a longer period, including worldwide distribution and other rights which previously would have remained with the production company or would have reverted to them after several years.
- The industry that commissions and buys screen content (i.e. TV networks and streaming companies) is highly concentrated, comprising a few large firms, but the screen production sector from which it buys comprises many, much smaller competitors.

Contractual terms and the micro-economics of screen production

- 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.
- In complex negotiations for deals, buyers very likely have greater bargaining power than 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 in perpetuity.
- These changes 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.

Improving contract terms

- Imbalances in market power between content buyers and production companies are seen worldwide, and other countries (e.g. the UK and France) have been ahead of Australia in trying to address them.
- The regulated UK terms of trade offer a promising model of how policymakers could

influence the terms of trade to the advantage of Australian screen producers and, in consequence, Australian economic activity. It requires that buyers and screen production companies agree on terms of trade that preserve reasonable opportunities for screen producers, with oversight provided by a government regulator—in the UK's case, Ofcom.

Crafting a policy package

- LE recommends Australia develop a UK-style terms of trade regime, to be overseen by the preeminent economic regulator, the Australian Competition and Consumer Commission (ACCC).
- To ensure that policy changes result in additional local production and are beneficial to the domestic industry, a terms-of-trade requirement should be supplemented by local content requirements for streaming companies.
- Such measures can be justified as an extension of Australia's long standing policy of promoting Australian stories in Australia and on the world stage on the basis of the profound imbalance in market power between buyers and production companies as outlined in this report, and by the desirability of retaining as much future income from successful productions in Australia as possible.
- By securing future income streams, Australian production companies will have both additional resources and additional incentives to make the investments in developing ideas for future content.

Executive summary

A time of profound structural transition sees the Australian screen production industry faced with once in a generation threats and opportunities. The challenge is to negotiate the threats in such a way that the industry does not lose sight of the extraordinary opportunities.

Successive Australian governments have evolved policies to develop Australia's screen culture and ensure it is represented at home and abroad. Australian screen production has been underpinned for many years by Australia's local content quotas, tax offsets, incentives, financing by Screen Australia and state government bodies, and ABC and SBS commissioning. The sector has gone on to generate a substantial range of original Australian stories and formats, and developed generations of talented directors, cinematographers, actors, and crew.

Over time, Australian producers have developed an extensive portfolio of ideas, stories, and formats. This portfolio of valuable intellectual property (IP) exists because of the terms negotiated between screen content producers and those buying content from them.

In turn, two key features shape Australian screen production contracts. First, screen culture entails commercial and creative risk. All movies and TV programs are costly to make, but relatively few become real hits, sparking sequels and spinoffs or showing globally. To reward creativity and manage risk, film and TV customers and producers agree on contracts that allocate between them expenses, revenue, distribution rights, risk, and intellectual property.

Second, Australian TV shows and movies are made by many smaller producers who sell to relatively few larger buyers. At times, and particularly for some genres such as light entertainment formats with international appeal, the larger content buyers can compete vigorously for quality content. When they do, the economic forces produced are likely to foster collaboration between content buyers and those they buy from. But there are also commercial incentives for large buyers to seek contractual terms that can unreasonably disadvantage producers, stifle creativity, or even lock up great ideas. If a producer has worked with a broadcaster for some time to develop a script, the broadcaster may have even stronger bargaining power: the producer may have little choice but to accept changes to terms if the broadcaster insists on them.

Despite the pressures of often unequal bargaining power, much Australian screen culture has been created on the basis that content ownership resides with the content creator. A major free-to-air (FTA) broadcaster might partially fund a production in return for licencing the rights for local display for a period. The producer would then organise other funding, perhaps from other customers, via further licencing deals. But crucially, the producer would typically retain long-lasting rights to economic exploitation in their creations, which in turn entitle them to make further licencing deals and to build new content based on their creations.

Big shifts driven by streaming

Two shifts are underway in demand for Australian-produced content: First, revenue from free-to-air is falling. To date, the loss of revenue from FTA broadcasters has largely offset the gains from the growth of streaming. While the decline of FTA has been challenging for many in the industry, there is a huge opportunity for Australian film and TV content to win a larger share of the exploding global streaming market. The streamers have deep pockets and are buying their way into dominance in the new video on demand industry. Their distribution over the internet is already giving them extraordinary reach. Australian screen content appearing on any of these platforms is now just a click away from audiences throughout the world.

Second, though the streamers' appetite for Australian-produced content has been rising, that demand has typically come with the streamers' own strong preferences to acquire comprehensive rights over the content they commission. If unchecked, streamers' strong preference for fee-for-service production, as well as full acquisition of rights, risks compromising the opportunities that Australian screen producers now have to take their characters, stories, formats, and skills to the world.

Resetting policy for the streaming era

These technology, viewership, and commercial changes are putting pressure on policy settings for the film and TV production sector. Governments are finding that sector policies for local content and industry development are no longer working as intended.

Australia faces a unique opportunity to reposition the Australian screen production industry for success in the era of global streaming. Updating quotas, tax offsets, and incentives for the streaming age can protect the flow of funds for Australian screen culture, as it becomes more

widely recognised. But more needs to be done to ensure that Australian screen culture can thrive from a base of intellectual property that is owned and controlled in Australia.

The UK experience with terms of trade policy is instructive. In just two decades, the industry was turned around from a preponderantly domestic focus to one which developed its own unique assets as a springboard for global engagement. Transforming the terms of trade on which content was commissioned was an integral part of the transformation.

Today, the UK communications regulator Ofcom has the legal standing to arbitrate on terms of trade agreed between broadcasters and the industry representative group PACT. That process has made contract setting smoother, and has resulted in the production sector developing and commercialising a broad range of innovative formats that have led to success in major export and offshore operations. As a regulator with the economic expertise and resources to monitor and assess terms of trade, the Australian Competition and Consumer Commission (ACCC) could be charged with administering a similar scheme in Australia. The Australian Communications and Media Authority (ACMA) could also be considered for this role. However, we consider the role better suited to the ACCC given the ACCC's experience in overseeing similar arrangements in other industries—from news to access to infrastructure. The terms of trade framework could also be linked to production quotas and tax offsets. For example, adhering to such terms could be made a precondition of eligibility for Australian content quotas imposed on FTA broadcasters and streaming services.

By updating our screen industry policy mix, we can ensure Australian production companies are fairly rewarded and have the resources to invest in future content development, so that even more Australian stories find their rightful place on both Australian and world screens.

Table of Contents

Key points 1

Setting the scene 2

Contractual terms and the micro-economics of screen production 2

Executive summary 4

1. Setting the scene 10

a. The Australian cultural settlement 10

b. Making and exploiting screen culture 11

c. Imbalances and the terms of trade 12

d. A changing industry 13

2. Contractual terms and the microeconomics of screen production 16

a. Contractual terms allocate costs, risks, revenue, and rights 16

i. Different kinds of contract terms 17

1. Rights governing the sharing of the burden of production. 17

2. Rights governing the sharing of the benefits from short to medium term success. 17

3. Rights to control the longer term commercial trajectory of the creation. 18

4. Long tail or residual rights. 19

5. Rights mitigating competitive threats to the funder. 19

6. (Defacto) rights to behave unreasonably. 20

b. The microeconomic dynamics of the industry 20

i. The view from economic theory 20

The determination of prices 20

The determination of distribution rights. 21

ii. Negotiating power 22

iii. Growing the pie and dividing it up 23

Box 2.1: Efficient and inefficient contracting in the automotive industry 24

iv. Opportunity and export 26

Box 2.2: UK terms of trade between public service broadcasters and independent producers 28

v. Government-funded broadcasters 28

c. Problems with contract terms 30

1. Rights governing the sharing of the burden of production. 30

2. Rights governing the sharing of the benefits from short to medium term success. 31

3. Rights to control the longer term commercial trajectory of the creation. 31

4. Long tail or residual rights. 31
5. Rights mitigating competitive threats to the funder. 32
6. (Defacto) rights to behave unreasonably. 32

3. Improving contract terms **34**
1. Public policy and private contracts 34
a. Policy & contractual terms in Australia & around the world 36
i. How Australian policies affect contractual terms today 36
ii. How policies are adapting to global streaming around the world 37
Box 3.1: Netflix in Australia 39
Box 3.2: Canadian Bill C-10 40
Box 3.3: European Union Audiovisual Media Services Directive 41

4. Crafting a policy package **43**
a. Supporting demand for Australian screen content 43
Box 4.1: Industry assistance and exports 44
b. Improving contract terms for producers of Australian screen content 45
c. Government-funded broadcasters 46
d. Unreasonable conduct 46

Bibliography **48**

Executive Summary of supplementary report **51**
About the study 51
Key findings 51
Copyright in “the tape” is important, but so is other IP 51
Supporting production company viability, employment and workforce training 51
IP retention supports the development of new IP 52
IP is important, but it can be sold if the price is right 52
Successful producers can miss out on a lot of upside due to the streamer content commissioning model 52
Examples of the importance of IP to Australian Production companies 54
Conclusions **54**

1. Introduction **55**

2. Background **56**
2.1. What is IP? 56
2.2. Framework for IP in the screen industry 56
2.2.1. Types of IP in the screen industry 56
2.2.2. Revenue related to IP in the screen industry 57
2.2.3. What happens to IP in the screen industry 59

3. Findings from consultations **61**
3.1. Types of IP that are valuable 61
3.2. Impacts on finances, workforce, and training 61
3.3. Supporting the development of new IP 63
3.4. Adequate compensation as the important issue 63
4. Financial implications of IP **65**
5. Case studies **67**
5.1. The Dressmaker 67
5.2. The Drover's Wife 68
5.3. Bondi Rescue 69
6. Conclusions **72**
Appendix A: Copyright protection **73**

1. Setting the scene

Key points of section 1

- Australia's screen production industry has been disrupted by the internet, social media, and the entrance of streaming companies.
- Models for commissioning new screen content have changed, and buyers are seeking more extensive rights over a longer period, including worldwide distribution and other rights which previously would have remained with the production company or would have reverted to them after several years.
- The industry that commissions and buys screen content (i.e. TV networks and streaming companies) is highly concentrated comprising a few large firms, but the screen production sector from which it buys comprises many, much smaller competitors.

The Australian film and TV production sector creates significant economic and cultural value. Its unique features shape how screen culture is produced and how policy supports it. Lateral Economics has been engaged by Screen Producers Australia to study the contract terms which Australian production companies supply buyers of their content, including but not limited to free-to-air broadcasters, Foxtel, and streaming companies such as Netflix, Prime Video, and Stan. These terms, often called "the terms of trade," were identified as an issue worthy of further consideration by the Australian Government Convergence Review in 2012. Since then, the transformations wrought by the growth of the streaming giants and related production work has made the issues more urgent.

a. The Australian cultural settlement

Australians don't just want a thriving TV and film industry, they want a seat at the table when global culture is created and shown on local and global screens. They want Australian stories in a globalised world. That sentiment has underpinned community support for government policies to support the creation of Australian stories in film and television.

In response, successive Australian governments have evolved policies to develop Australia's screen culture and ensure its representation at home and abroad. Australian screen production has been underpinned for many years by Australia's local content quotas, expenditure obligations, tax offsets, incentives, financing by Screen Australia and state government bodies, and ABC and SBS commissioning.The sector has gone on to generate a substantial range of original Australian stories and formats, and developed generations of talented directors, cinematographers, actors, and crew.

b. Making and exploiting screen culture

Production firms play a number of roles in the creation of film and TV culture. They both 'organise the product' and can also play a central role in creating the intellectual property. But they typically play both of these roles collaboratively, often leading to complex contractual arrangements for the sharing of costs and the resulting rights in a product.

Owing to the prevalence of contractual terms in which it was common for production firms to retain the ultimate IP in their creations, Australian producers have developed an extensive portfolio of ideas, stories, and formats. This portfolio of IP only exists thanks to the terms negotiated between producers and their counterparts.

Two key features shape Australian screen production contracts. First, screen culture entails commercial and creative risk. All movies and TV programs are costly to make but some, albeit relatively few, become highly lucrative hits—sparking sequels and spinoffs or showing globally, with potential merchandise sales. To reward creativity and manage risk, film and TV customers and producers agree to contracts that allocate between them expenses, revenue, distribution rights, risk, and intellectual property.

Like music and literature, films and TV programs, once made, can, in principle, be copied and made very widely available at low cost. That means that the rights to control and exploit a film can be divided up in different ways—for example, by geography, time period, and distribution channel (theatrical exhibition, free-to-air TV, video-on-demand, and so on). These rights are potentially very valuable. The underlying ideas embodied in a film or TV show can be even more valuable. A really good story, character, or format may be reused or extended into sequels, future series, and so on. While ownership of the various rights associated with a film

or TV program can be clearly assigned, it is not always clear who is best placed to create value from them. Indeed, the desire to retain options often results in cultural products being stranded because no deal can be done.

c. Imbalances and the terms of trade

The second feature shaping film and TV production contracts is the large disparity in firm size and industry concentration between buyers and sellers. Australian TV shows and movies are made by many smaller producers who sell to relatively few larger buyers.

On the buyer-side, there is a small number of TV networks (e.g., Seven, ABC) and streaming services (e.g., Netflix, Stan). Historically, these networks have been the beneficiaries of the small number of commercial FTA TV licences permitted by government policy. While there is not a single monopolist (and therefore the worst type of market imbalance and exploitation is not present), the market concentration among sellers makes it likely that these firms exercise a degree of market power both vis-a-vis their suppliers and possibly with consumers of content.[1] The high degree of concentration on the buyer-side is illustrated by IBISWorld's assessment that industry concentration among FTA broadcasters in Australia is high, with the four largest players (the three commercial networks and the ABC) accounting for nearly 80% of industry revenue.[2] Among Pay Television and Internet Protocol Television Services (i.e. Foxtel and the streamers), the four largest players account for over 70% of revenue.[3]

On the seller-side, industry concentration is much lower, which suggests that the bulk of Australian production companies are at a competitive disadvantage in negotiations with TV networks and streamers. While there are some large players on the seller side, particularly those that are part of multinationals, most industry participants are SMEs, typically with no more than a handful of permanent staff. It is true that some relatively small production houses are owned by large multinationals. This may give them the capacity to bear more negotiation risk than companies without such capital resources, but it does little to protect them from the disciplines arising from their customers' ability to choose another supplier of content. The low

[1] This discussion paper is only concerned with the former relationship, however. Consumers are probably benefiting from the battle for market share in the growing SVOD and AVOD markets so there is a much lesser concern, if any, about the abuse of market power with respect to consumers.
[2] IBISWorld (2021), Free-to-Air Television Broadcasting in Australia Industry Report, p. 26.
[3] IBISWorld (2021) Pay Television and Internet Protocol Television Services in Australia Specialised Industry Report, p. 26.

degree of concentration on the seller-side is illustrated by IBISWorld's assessment that industry concentration in Motion Picture and Video Production in Australia is low. The four largest players account for less than 20% of revenue.[4]

The clear disparity in industry concentration measures between the buy-side (i.e. major players accounting for 70-80% of revenue) and the sell-side (i.e., major players accounting for less than 20%) of revenue suggests that TV networks and streamers could be considered an "oligopsony," which potentially can sway contractual terms in their favour relative to what would occur with a lower disparity in industry concentration measures. This means that production companies may be pressured by the buyers which have more market power to accept poorer contractual terms than they would in a more competitive market among buyers.

d. A changing industry

The Australian film and TV production sector is changing fast. There are huge opportunities but also huge threats. Viewers have shifted fast to online, on-demand video. Free-to-air TV viewership, advertising revenue, and production budgets for some content (particularly scripted drama) are falling. FTA networks have moved purchasing expenditure increasingly to sport and light entertainment. The whole sector is moving towards "convergence," as internet-delivered services compete with TV networks. Social media has also taken viewers away from traditional TV and deprived them of advertising revenue.

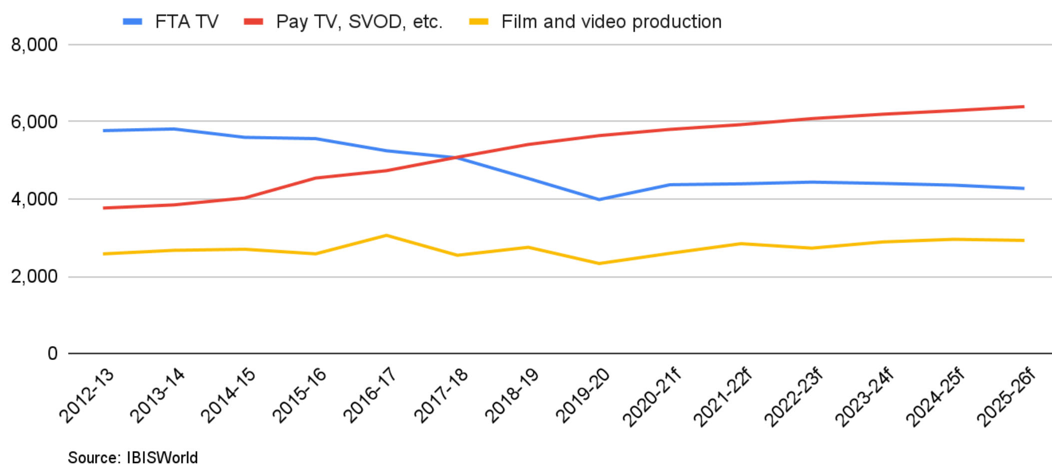
The pandemic has accelerated the shift to streaming; and the 2020 cuts to local content quota have placed further pressure on the production sector. Offsetting this, in part, is that demand from streaming services for some content has increased, creating export opportunities for Australian producers with distinctive stories and skills, high production values at competitive production costs internationally, animation, and other specific content with international appeal.

The TV and film production sector has undergone profound change in Australia over the last two decades. The internet and ubiquitous broadband have facilitated the entry of streaming services—increasing demand for content while also undermining the TV networks. IBISWorld estimates of industry revenue suggest that the rise of revenue in the Pay TV and streaming industry segment appears to have been largely offset by the decline in FTA TV revenue (see

[4] IBISWorld (2021) Motion Picture and Video Production in Australia Industry Report, p. 27.

Figure 1), meaning there has not been a large expansion of film and TV production associated with streaming.[5] Since 2018, Pay TV and Internet Protocol TV Services have had higher revenue in Australia than the TV networks.

Figure 1. Australian revenue ($m), 2012-13 to 2025-26



The major changes we have witnessed in the industry mean that production companies are now dealing with:

a) FTA TV networks which have had major revenue losses for their traditional TV broadcasting over the last decade and are seeking to cut budgets and capture more rights for themselves in deals with production companies, including rights to show programs on their own streaming services; and

b) new entrants such as Netflix and Prime Video which have no historical long-term relationships with Australian production companies and appear to prefer a cost-plus commissioning model where they take all the rights.

Streamers' appetite for acquiring historical and increasingly commissioning new Australian-produced content both for the Australian and global market has been rising, their demand typically coming with the streamers' own strong preferences to acquire comprehensive rights over content they commission. LE's consultations with industry members have suggested that some members have benefited greatly from the entrance of streaming, shifting from almost a complete reliance on revenue from FTA networks to a reliance on streaming for 90% of their

[5] It is the streaming companies which are responsible for the huge growth in the Pay TV and Internet Protocol TV Services segment, rather than Foxtel, which has been losing viewers due to streaming competitors.

revenue, which they expect to be maintained into the next decade. However, some other members are still reliant almost exclusively (nearly 100% in some cases) on deals with FTA networks. An industry-wide survey would be necessary to provide definitive data, but we expect that the trend toward greater revenue shares from streaming will continue, though it will be unequally distributed, with profound implications for the terms under which production houses are contracted.

With the rise of streaming, and with more aggressive FTA networks seeking to secure as many rights for themselves as possible, we are seeing the imposition of a cost-plus model, which is the norm in the United States and was the norm in the UK before the introduction of the terms-of-trade regime in the early 2000s which appears to have helped underpin in the UK production both onshore and investment in foreign markets. Global streaming services generally seek to acquire all rights upon completion of a product in return for a one-off payment. Further, Netflix has been reluctant to share data on viewership by program, so Australian production companies cannot know their contribution to Netflix's offering to viewers. Without such data, future revenue sharing deals become problematic, as the contribution of a given program cannot be verified.

In summary, there is a widely held view among Australian production companies that there has been an overall switch towards what are effectively "work for hire" arrangements. Further, as new buyers like Netflix become part of the landscape, the margin on costs they have offered, in place of the upside that would otherwise be shared with content producers, has tended to fall. Certainly, where production companies do not have strong backing—they are sometimes backed by international capital—or established products, the international streaming companies are showing a strong preference for work-for-hire with the offer to producers being, in effect, "take it or leave it."

2. Contractual terms and the microeconomics of screen production

Key points of section 2

- 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.
- In complex negotiations for deals, buyers very likely have greater bargaining power than production companies and this will enable 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 in perpetuity.
- These changes 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.

a. Contractual terms allocate costs, risks, revenue, and rights

Movies and small screen programs are costly to make. They are also risky. Production itself can be risky. High production values require the coordination of a high and consistent level of skill throughout critical aspects of the production. Productions are also often dependent on specific 'stars' both in front of and behind the camera who may become unavailable. Further, once production and post-production are complete, an asset is created which can be deployed at minimal marginal cost, in many different ways. It may have appeal in foreign markets and on different delivery platforms and in each case, the content will retain some potential value for as long as it retains the interest of viewers. Relatively few productions become real hits—sparking sequels, second series and spinoffs, or showing globally.

Because they are costly and risky, larger productions are often funded by numerous different entities who are each interested in having access to the content being produced for their own audiences and purposes. The contract terms negotiated between these buyers of content and their producers determine how costs and risks are borne. Given the magnitude of those costs and the uncertainty of how things will turn out in the future—sometimes in distant markets and many years into the future—it is no surprise that the terms of those contracts are fundamental to the health of individual firms and the industry.

i. Different kinds of contract terms

For reasons that will become evident when we explore the microeconomic dynamics of the industry in the next subsection, we think it is useful to group the various terms of contracts according to the categories below.

1. *Rights governing the sharing of the burden of production.*

The most fundamental terms of the contract are those that mobilise the resources necessary to ensure that the production is funded. In addition to the dollars needed, there will be numerous other terms that determine who bears what risk. For instance, those going into a production venture are likely to require the producer to have insurance for various potential liabilities. And, implicitly or explicitly, the terms will also determine who bears the burden for cost overruns, delays, and so on.

2. *Rights governing the sharing of the benefits from short to medium term success.*

Once the cost of production is borne, the parties must agree on how they share the upside. The terms determining these matters include:

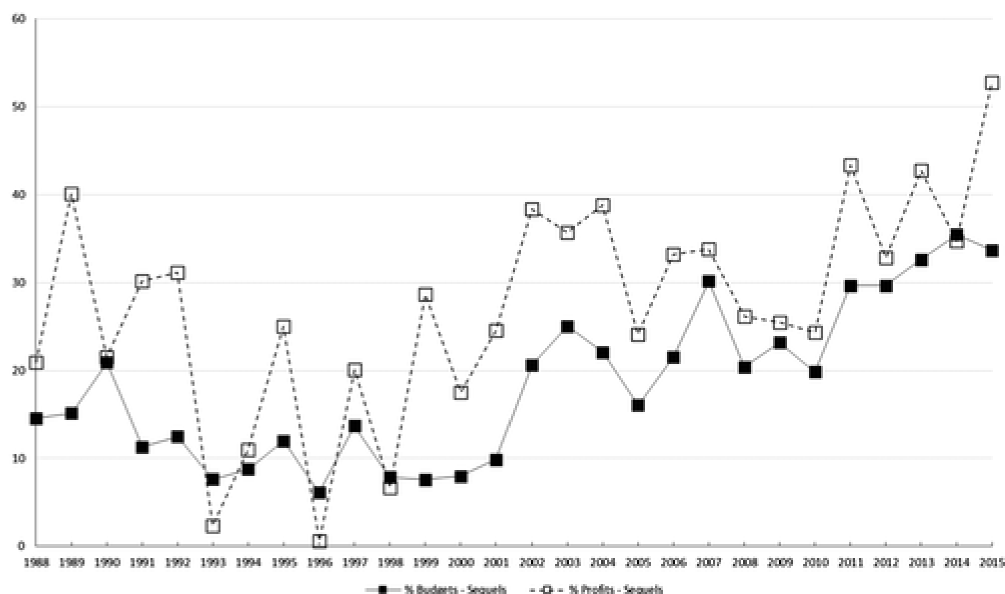
- the length of time over which the funders acquire the content over some period deemed necessary to generate a satisfactory reward for their investment in funding the production
- the terms on which they have access to that content (what royalties, fees, or other funds might be paid to producers and others involved in the production)

All the rights discussed in sub-sections 1 and 2 above may be broken down by specific identifiable markets. This might be done geographically and/or by other criteria, such as the platform over which they are delivered.

3. Rights to control the longer term commercial trajectory of the creation.

A film or TV program may build on, or give rise to, ideas that can be deployed for future screen or other products. For example, the script, characters, format, and name of a show may form the basis for additional products in the same medium (such as movie sequels or additional seasons following an initial TV series), or spinoffs in a different medium (such as a TV series based on a movie). In a minority of cases, these future products prove exceptionally valuable. The parties to an initial production agreement may agree on who has the right to initiate these future exercises, and what participation (financial or operational) other parties might have if future products are created. As one indicator of the value of such future development prospects, the budget share and profit contribution of sequels has increased for major US film studios, as shown in Figure 2.

Figure 2: Percentage of Production Budgets and Profits Accounted for by Sequels, Major US Film Studios, 1988 to 2015.



Source: Pokorny, Miskell and Sedgwick, 2018.

At each end of a spectrum, the screen producer or the funder of the content may retain all rights to create sequels and other derivative products based around an initial film or series concept. There are also intermediate arrangements. For example, upon commencing the first season of a new TV series, a producer might retain the rights to future products but may agree to offer its broadcaster partner a first option on creating a second season. Alternatively, if the broadcaster owns the rights, it might commit to a specific revenue sharing arrangement with

the producer for a prospective second season, or even include compensation that would be paid in the event that it elects to use a different producer for a subsequent season.

Rights of these kinds may languish unexploited. For example, a party that initially envisaged some use for them may shift focus and no longer work actively to free them up.

4. *Long tail or residual rights.*

Logically, this category of rights can be considered as a subset of benefit sharing rights. However, for reasons that will emerge later in this chapter, it is valuable to focus on rights to enjoy benefits that are regarded as sufficiently speculative at the time contracts must be agreed on, as to command negligible monetary consideration, if they were subject to *bona fide* negotiation between the parties. Such rights include rights to the 'long tail' of a product over time—say, rights after seven years of screening—and rights to other streams of income that, at the time of production, were extremely speculative. These might also include rights to distribute in small and unusual markets, such as particular regions or formats; or merchandising rights where, at the time of production, the funders had minimal expectation of such markets having any value.

5. *Rights mitigating competitive threats to the funder.*

Once completed, content or development work preparatory to production is an asset capable of further development. Yet, particularly given the complexity of structuring production deals and the multiplicity of perspectives and interests involved, there are numerous points at which its further exploitation can become stranded.

If existing funders do not wish to proceed, there may be other potential funders who would like to proceed. Even if the original funders do not proceed because they feel it would be uneconomic, other funders may have a different view. However, often, content or a development will become stranded simply because of some difficulty in the delicate business of coordinating the needs and efforts of a fragile coalition of funders.

In these circumstances, the best outcome, from the perspective of the Australian economy as a whole, would be to see the opportunity passed on to others in the Australian industry, should they wish to proceed. Often, contracts to fund development include clauses to ensure that the development can be passed on to another party in return for complete or partial compensation

of prior costs of the development. However, contracts also contain last matching rights[6] and other rights to delay further production—for instance, the development of a further series. Beyond a relatively short period of time to allow the original funder to consider their options, such rights exist not to share risks or burdens between contract partners but to address a funder's desire not to give an advantage to their competitors. While the holders of these rights enjoy holding them, they are generally more costly to the sector, as they impede the generation of maximum value from the assets that have been built.

6. (Defacto) rights to behave unreasonably.

We heard of several cases of funders agreeing to terms and then adding further burdens onto producers who had already invested time and resources into the project. By definition, such 'terms' may not appear in the documentation, or if they do, they appear as amendments after key agreements have been struck.

b. The microeconomic dynamics of the industry

i. The view from economic theory

The determination of prices

Considering the microeconomics of the industry, its most salient structural feature is that content producers are mostly small which means that they operate in a very competitive sector, and they sell to just a few large buyers. Economics gives us powerful analytical tools with which to understand the ways these structural features influence the economic and commercial dynamics of the sector.

Most simply, the buyers will have a degree of market power—that is, they will be able to influence the price paid in their own favour. The logic of this is relatively simple. Consider a single buyer—known in economics as a monopsony. This monopsony buyer will pay producers only so much as is necessary for a producer to fund the production. It will pay no more

[6] **Last matching rights** enable their holder to insist that, if the party that has done the development can find another backer for further development, that the original funder of the development has a right to match the terms offered by the second potential funder. This has a profoundly chilling effect on the process by which the content provider can find another funder of further development. Getting to the stage of proceeding with the development and agreeing on terms is a costly, time-consuming process. It is unlikely to be undertaken if it can be easily trumped by a last matching offer from the original funder. And, where new funders for development are not put off by such a clause, the producer often is, as they are reluctant to expose their relationship with other funders to the potential frustrations of last matching rights being exercised.

because, if one seller will not sell them what they want at a price that covers its cost of production, one of its many other competitors will.

Nevertheless, the purchasers of screen production are not a monopsony (i.e. a single buyer, the counterpart of a monopoly, but on the buyers' side rather than on the sellers' side). They must meet the demands of regulators and their consumers to screen various kinds of content. Though their competition with each other is most vigorous and visible for some genres such as light entertainment with global appeal, their desire to maximise viewers will see them implicitly competing with one another to obtain the best value they can from local screen producers. This will swing prices back to screen producers from the monopsony price, as there will be competition between funders for the output of the best producers. Nevertheless, there are only a few of them. So, they all understand that it is not in their best interest to bid the price of content up to the point at which they would only break even. (This would be the price they would have to take if the sector buying content was competitive and was buying from a monopoly producer.)

The determination of distribution rights.

With the terms of the contract dividing and structuring the benefits of the project, economic theory tells us that the 'right' owner of any given right is the party which is capable of turning it to its most valuable use. A distributor of films in Australia might be what we call the 'highest value owner' of the rights to distribute films in Australia; while another funder from Britain might be best placed to take the rights to other English speaking markets; and a global streamer might be the most valuable owner of SVOD rights. The total value of all rights might nevertheless be enhanced if SVOD rights are subject to an additional right of the film distributors to have exclusivity for a period, while the film is in cinemas.

At least in theory, a 'perfectly' competitive market is the microeconomic structure that will arrive at the best possible division and distribution of rights. This is because, at least in principle, as the parties negotiate who has which right, the party that can put it to its most valuable use would be prepared to give up more than the other party to obtain it, and so, in a fair and rational negotiation, they will end up with it.

However, there are two major obstacles to this benign outcome. First, it will often be highly uncertain (even to the parties themselves) precisely how to divide up the rights and which of

them is the 'highest value owner' for each right. This effect will only become more pronounced the further ahead the parties are looking. Second, a large diversified firm negotiating with a smaller one is likely to have substantially more negotiating power—a subject to which we now turn.

ii. Negotiating power

In our interviews, we encountered other features of the industry that are not captured in the very simple schema above. The buyers of content are not only large but also far better placed to bear the risk that any given production will not succeed. Some of the smaller producers tend to operate one or two projects at a time, with the larger ones rarely producing more than a handful of productions at a time. Given this, the failure of a single project can have dramatic, perhaps even devastating consequences for producers. By contrast, the buyer is funding numerous projects at any one time and so faces far less dire consequences if a single project becomes unsuccessful.

It is worth considering each of the terms identified in the previous sub-section, in light of this relationship. Terms that share the burden of the production are likely to favour the (larger) buyers somewhat. But this imbalance will be kept in check by the need to cover the producer's costs. Regarding the other terms however, the larger and more diversified buyer of content will be under less pressure to negotiate the deal. This dynamic seems likely to see them allocated a range of rights on account of the advantages that their size and diversification gives them in the rights negotiation, rather than because they are necessarily the highest value owner of those rights. To distinguish this capacity to obtain better terms from *market power,* as it is normally understood in economic theory (which influences prices), we shall refer to it as the buyer's *'negotiating power'.*

Moving through the various rights identified above from 2 to 6, it seems likely to us that the stronger negotiating position of content buyers is likely to tip the scales towards the buyer obtaining too many of the rights that define a project's many upsides at too low a price. Moreover, given that the value of those rights to the purchaser is likely to decline the further down the list one goes, the confidence with which we can expect some benefits from successfully addressing the problem grows, the further down the list one goes.

iii. Growing the pie and dividing it up

There is a central dilemma in all contracting. On the one hand, the parties have an interest in maximising the total value of their production—something that will usually involve high levels of trust between them and close collaboration. On the other hand, they must agree on how that value will be shared between them. And not only can tough negotiation on its own undermine trust, but the terms that are thus negotiated can also have a direct bearing on trust.

This is most obviously the case regarding prices and the inputs to production that are most important for high quality outputs. If a buyer is excessively aggressive in capturing the benefits of a particular production, that leaves less financial room and less incentive for the producer to make choices that maximise the net value of the production at some cost to themselves. This problem is most evident by considering the contracting firms not just in one contract but through time. Industry structure can have a powerful influence on whether growing the pie or haggling over its division gets the upper hand in firms' contract negotiations. To the extent that the markets' firms reward excellence, the emphasis in contract negotiations is likely to target opportunity. Where that is not the case and the emphasis is on minimising costs for the buyer and staying alive for the seller, the emphasis is likely to be on dividing the pie.

The issues are not as well captured in economic theory as one might hope, but recent economic history illustrates their importance. As different as it is from screen production, the issues are well illustrated by the history of the international automotive industry. In that industry an oligopolistic sector (car manufacturers such as GM and Toyota) buy from a more competitive supplier sector. Yet, as we learned in the 1980s with the rise of Toyota and the Japanese automotive industry, other automotive manufacturers around the world had become trapped in a low productivity equilibrium in which large buyers focused far more on maximising their access to oligopolistic rent than they did on building value by collaborating with suppliers. Compared with its American competitors, Toyota adopted a 'patient' approach to accessing oligopolistic rent and focused much more actively on collaborating productively with its suppliers in building value they could all share. Thus, while it negotiated aggressively with its suppliers on price, it was assiduous in trying to minimise the extent to which this undermined

suppliers' trust in Toyota's continued custom providing they continued to perform, or their incentives to invest in improvements in their quality and productivity. (See Box 2.1.)

Box 2.1: Efficient and inefficient contracting in the automotive industry

From the 1950s on, the Japanese automotive industry evolved a new form of relationship between automotive manufactures and their suppliers. American car manufacturers, like GM and Ford, focused on short-term and transactional relations with both their suppliers and their employees. In this context, highly adversarial relations developed which provided little incentive for suppliers or employees to invest in their own skills.

The Japanese manufacturers—particularly Toyota—developed a highly effective partnership between the vehicle manufacturer as the financial and technical leader of their workforce, and of a whole cluster of supplier firms. In each case, they sought long-term cooperative relations with them. As Helper and Henderson confirm, this did not mean "a cozy relationship." Toyota "pushed its suppliers very hard" but it did so in a context in which it was clear that their primary goal was to, together, share the benefits of long-term cooperation and productivity growth.[7]

While both Toyota and American car manufacturers were technical leaders of the cluster of firms that supplied them, their way of sharing their knowledge was profoundly different. The American buyers of components were extractive and transactional. Toyota's approach was collaborative and focused on building progressively more productive long-term relationships. Thus, Toyota engineers were welcomed into supplier factories to provide technical advice. Having done so, the suppliers were expected to appropriate 100 percent of any cost savings Toyota's consulting services generated for one or two years, and then begin sharing it with Toyota. By contrast, American firms demanded all the resulting savings. It is not hard to see why this led to slower productivity growth.

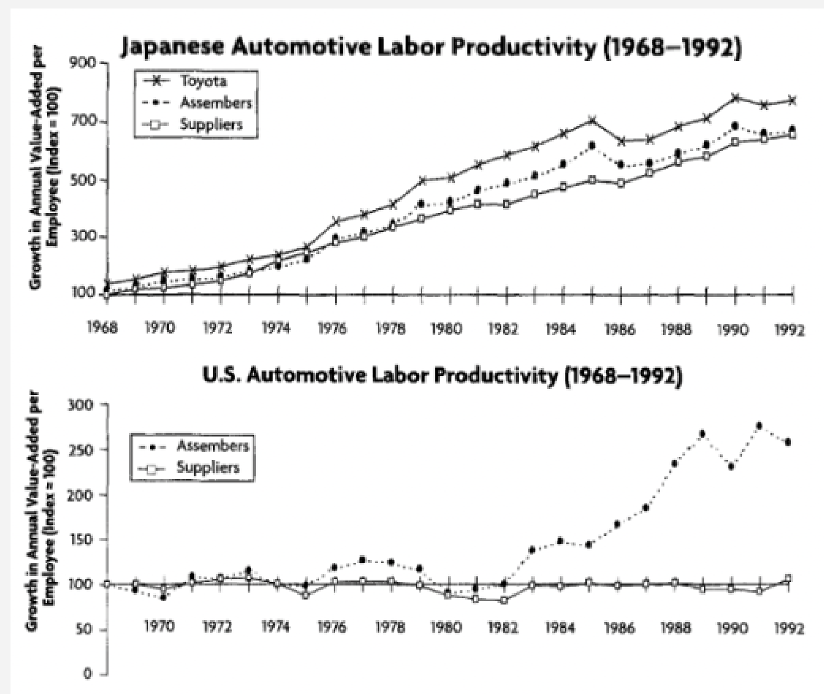
American firms' extractive and short-term focus in its relations with suppliers removed their incentive to improve. Indeed, suppliers actively resisted visits by their customers' engineers. Lieberman found that in Japan, labour productivity or value added per hour per employee increased steadily over 25 years for both vehicle manufactures and their suppliers (see Figure

[7] Toyota "pushed its suppliers very hard to reduce costs and avoid defects; it reduced the market share of suppliers who did not meet these strict goals and exited the relationship completely if improvement was not forthcoming." Helper, S. and Henderson, R. 2014. "Management Practices, Relational Contracts, and the Decline of General Motors", *Journal of Economic Perspectives*, Volume 28, Number 1, Winter 2014, pp. 49–72, AT P. 59.

below). In contrast, the labour productivity of U.S. automakers and suppliers was stagnant until the mid 1980s, whereupon U.S. automaker productivity began to rise (coincident with Japanese automakers establishing US plants). However, supplier productivity continued to stagnate.

Indeed, even when Toyota was dealing with the same suppliers as the American vehicle manufacturers, and despite Toyota's relatively relaxed attitude to sharing technology with suppliers, those suppliers' quality improvement grew at twice the rate for the parts they supplied to Toyota as they did for those supplied to the American firms.[8]

Japanese and American automotive labour productivity 1968-92



Source: Dyer, Jeffrey and Nobeoka, Kentaro, 2000. "Creating and managing a high-performance knowledge-sharing network: The Toyota case" Strategic Management Journal, 21: 345–367, p. 347.

There are clearly large differences between manufacturing vehicle components and screen production. Screen production does not require the same need for technical integration between the buyers' and sellers' systems as does automotive manufacture, while it requires far more creativity. Furthermore, screen productions typically take several months, whereas a factory will be configured to produce car models for several years. There is likely a stronger

[8] R Dyer, Jeffrey and Hatch, Nile., 2006. "Relation-specific capabilities and barriers to knowledge transfers: creating advantage through network relationships", Strategic Management Journal, 27: 701–719.

productive need for genuine, long-term collaboration between buyers and sellers in the car industry. Nevertheless, the automotive industry strikingly illustrates the way imbalances in bargaining power can generate sub-optimal performance that can be surprisingly long-lived, even after superior approaches become evident. This result has surprised economists, even if it is unlikely to surprise anyone with experience of how difficult change is in large organisations. Turning things around requires whole organisations learning numerous new ways of working that are mutually dependent on each other and which may need to be learned between firms.

Given how skill intensive the necessary change is, we should not be surprised to learn that there are no quick shortcuts to improvement. However, one area where these problems are most acute, and so offer relatively promising targets for worthwhile change, are terms of contracts which impose disproportionate costs on content producers for relatively minor benefits to their customers. This will be the case, particularly, where terms are not directed towards maximising returns to customers, but rather towards 'beggar-my-neighbour' protections against competitors. These are taken up below.

iv. Opportunity and export

Digital streaming has created a huge global market for distinctive screen products. Streaming makes it easier to distribute screen culture to the world, and it permits viewers to find and pay for high-quality TV shows and films that appeal to their particular tastes.[9] In response, producers in Australia and around the world are increasingly targeting the global streaming market. But would-be exporters of screen culture need to produce distinctive and appealing content if they are to succeed. Producers we spoke to emphasised that effective collaboration is critical to creating such content. Producers (and their creative collaborators) have the talent to create new ideas and realise them for the audience. Streaming services understand what their viewers want, or at least what has been popular with their viewers. It is in the working

[9] Crawford, G. S. (2015). It is worth noting that the price of streaming subscriptions is considerably lower than that of pay TV or what consumers would be likely to part with if they had to pay for movie tickets or rent or buy DVDs. This has implications for the revenues that can be earned by production companies, some of which have previously done very well out of revenues associated with DVD distribution rights. But with DVD demand in decline, and with content increasingly watched on streaming platforms which are demanding as many rights as they can, revenue lost from DVD sales is not being replaced. .

relationship between these parties, and through the contracts that govern them, that effective collaboration occurs.

The experience of the UK independent production sector shows that creators in relatively small markets can enjoy global export success if the industry can evolve the right contracting models and invest in emerging success. In just two decades, the industry in the UK was turned around from a predominantly domestic focus to one which developed its own unique assets as a springboard for global engagement. Transforming the terms of trade (see Box 2.2) on which content was commissioned was an integral part of the transformation.

Box 2.2: UK terms of trade between public service broadcasters and independent producers

The UK terms-of-trade requirement is established in the Communications Act 2003. Under section 285, public service broadcasters (PSBs) are each required to develop a "code of practice setting out the principles [they] will apply when agreeing terms for the commissioning of independent productions." The codes of practice must demonstrate "transparency" around the assignment of rights and that "satisfactory arrangements are made about the duration and exclusivity of those rights." They are reviewed by Ofcom.

This appears to have provided substantial benefits to independent producers. Oliver & Ohlbaum, a consulting firm, found:

Terms of Trade set out the rights available to UK broadcasters under their primary commissioning license and the revenue sharing arrangements relating to the subsequent use of their commissioned IP.

The Terms of Trade give independent producers control over the 'secondary rights' to their content, and thus the ability to monetise content they have produced in international markets.[10]

The Terms of Trade apply to PSBs and their digital channels, but not to streaming services, such as Netflix or Prime Video.

v. Government-funded broadcasters

Government-owned or government-funded broadcasters play an important role as major buyers of independently-produced TV programs and films that operate under an explicit obligation to pursue public policy goals.

Public policy makers assume that market players will, and should be expected to, act broadly in their own self-interest. In this context, regulation seeks to influence the incentives they face to promote some policy objective—such as a clean environment. Requiring FTA networks to show a minimum of Australian content can be seen in this context. However, for nearly a century,

[10] Oliver & Ohlbaum (2018) *The impact of Terms of Trade on the UK's television content production sector*, report prepared for the Canadian Media Producers Association (CMPA), p. 2.

Australian governments have directly funded broadcasting through bodies such as the ABC and more recently SBS.

While it is healthy for those institutions to promote their own growth and interests, this should only be to the extent that their own growth and interests promote the purposes for which they are funded. In that regard, we heard evidence from some content providers that the ABC could be relatively aggressive in the extent of terms they sought to negotiate with local content providers. The ABC should seek those terms necessary to deliver the maximum value to Australian taxpayers for the government funding it receives.

Pursuant to that objective, it must deliver the best quality programming it can at the lowest possible cost, consistent with fair dealing with content providers. However, it should interpret this objective broadly for two reasons.

First, even where firms seek only their own interest and even where they are powerful in the market, as Toyota's experience makes clear, there is often a pronounced difference between contracting for one's short-term, self-interest and one's longer-term interest, as part of a wider industry ecology. In the period when it was demonstrating the superiority of its production model, Toyota negotiated hard with its suppliers, but, at the same time, understood the value of seeing their role as leading a partnership, and ensuring their suppliers retained sufficient incentive for them to continue developing their capabilities.

Second, where a private broadcaster's ultimate goal in negotiating terms with a content provider can be understood to be seeking to maximise the long-term interests of its shareholders, the ABC's ultimate goal is to optimise its own mission. That mission places the contract terms in a different light. Thus, while the price the ABC pays and the quality of the product are both clearly critical to optimising its mission, a range of terms that purchasers seek from content providers relate far more to advantaging themselves over competition rather than to optimising its mission. In this context, government broadcasters should exercise the various rights to defend their competitive position with restraint. Thus, for instance, there is a case for it to have contractual rights to continue developing some content for some period of time that enables it to consider its options. But beyond the period in which it could reasonably have exercised that right, its existence only hampers the asset finding its most valued owner and contributes nothing to the ABC's mission.

c. Problems with contract terms

This section considers the potential economic inefficiencies arising from buyers' superior market and negotiating power under the classification given above in section a.

1. Rights governing the sharing of the burden of production.

Prices may be too low: In light of the above analysis, it would be surprising if the buyers of content do not enjoy prices somewhat lower than the level that would be regarded as ideal, in economic theory. Nevertheless, two arms of policy mitigate what problems there may be. First, local content requirements that have applied for many decades (though they have recently been relaxed) place a burden on the FTA networks and subscription TV providers, such as Foxtel, to screen Australian-produced content. Second, screen tax offset provisions subsidise production from tax revenue foregone. These measures have clearly been important underpinnings for Australian content production. The first of these policies underpins demand for Australian content consistent with the nation's cultural policy and the second lowers the private cost of meeting that demand.

However, it is worth setting out their different economic effects as they should influence policymakers' choices in navigating the profound structural changes already transforming the industry. Both Australian content requirements imposed on FTA networks and subscription TV (e.g. Foxtel) and tax subsidies raise demand for Australian production.[11] The content requirements provide a safety net, and are likely to have a greater impact on demand, while the subsidies reduce production costs and can stimulate some additional demand. To that extent they increase effective revenue to Australian producers and, to attract sufficient resources to the industry to increase its output, they raise the effective prices (i.e. their earnings from productions) Australian producers can command in the market.[12]

However, the way those increases in revenue and prices are funded are very different.[13] In the case of content requirements, the increased revenue to Australian producers is funded from

[11] Regarding subscription TV, there is a requirement that 10% of spending on drama channels must be on new local dramas (https://www.acma.gov.au/spending-subscription-tv-drama).

[12] Here the "effective price" refers to the net price received by production companies, after taking into account the effect of subsidies.

[13] In microeconomics, the content requirements could be viewed as shifting out the demand curve, while tax offsets, as subsidies, result in shifting production along the demand curve, by effectively shifting down the supply curve for production companies' output.

content *purchasers,* who will aim to recover these costs from advertising or, increasingly, via sales internationally, the latter being revenue which traditionally would have gone to production companies. In the case of tax subsidies, not only is it the *taxpayer* who pays for the increase in revenue and prices for producers, but, depending on negotiations between the buyer and the seller of the content, the subsidy subsidises both of them with lower effective prices for the buyer and higher effective prices for the seller.[14]

2. *Rights governing the sharing of the benefits from short to medium term success.*

Licensing periods may be too long. Before the structural transformations brought on by streamers, FTA buyers of content tended to seek licences of around three years, with IP rights retained by the producers who can sell licenses (for the program or the format) into other other markets or develop other IP rights (e.g. historically video and DVD distribution and occasionally merchandise). Today, where they do not seek rights in perpetuity, streamers seek at least seven years and typically 10 to 15 years of exclusive SVOD rights, though we also heard of a few shorter licence periods.

3. *Rights to control the longer term commercial trajectory of the creation.*

Too many rights may be in funders' hands: Particularly in a small market such as Australia, global streamers may not be best placed to develop particular series and franchises into ones with long lives. Yet their negotiating power may well mean that they retain the important rights controlling such matters. With the global streamer not having the skills or the management bandwidth to nurture the value of Australian content into a long life, and its producers not having the rights to benefit from any such development, there may be more stranded IP than would occur if producers retained these rights.

4. *Long tail or residual rights.*

Too many rights may be in funders' hands: Similar considerations apply as in the previous case.

[14] That is, both buyers (e.g. TV networks or streaming companies) and sellers (i.e. production companies) split the benefit of subsidies such as tax offsets between them. To produce a certain amount of content, buyers can spend less and production companies will ultimately earn more than in the absence of the tax offset or subsidy.

5. *Rights mitigating competitive threats to the funder.*

Placing excessive weight on their competitive position, funders' rights strand content: It is easy to see why firms funding development and content require producers to give them rights, such as last matching rights, to protect their position against competitors. But, as outlined above, beyond some reasonable period to enable the original funder to decide if they wish to further develop the asset, such clauses have a 'beggar-my-neighbour' quality to them. Indeed, if the original funder does not wish to proceed, they can generally expect a financial benefit from a competitor developing the asset, as this will typically come with some recompense to them for use of the asset.

While the prevalence of such practices speaks to their own perceptions of their commercial interests, their fondness for such clauses is likely to reflect a collective action problem. This is analogous to 'non-compete' clauses which give firms rights over employees leaving their employ for competitors. While one can see why firms might seek such rights, a good argument can be made that all firms would be better off if none had the ability to impose such clauses. This is because it leaves the skills of employees freer to circulate within the industry to find their highest value uses.

Thus, a number of scholars have argued that one reason for the rise of Silicon Valley relative to 'Route 128" in Massachusetts in IT is that, although Massachusetts began with a strong lead in industry development, the inability to enforce such clauses under California law meant that skills and ideas circulated far more freely in Silicon Valley.[15] This contrasts with the region around Massachusetts where such clauses were enforceable. An analogous argument applies to the industry's (and the economy's) interest in ensuring that content and development find their highest value owner, whenever they might otherwise become stranded.

6. *(Defacto) rights to behave unreasonably.*

Behaving unreasonably, larger firms degrade trust and industry productivity: It is clearly unfair for large buyers to act unreasonably towards smaller firms from whom they are buying by

[15] See for instance Ronald J. Gilson, 1999. "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete", 74 *N.Y.U. L. REV*. 575, 586-89 and Booth, R.A., 2006. "Give me equity or give me death-the role of competition and compensation in Silicon Valley", *Entrepreneurial Bus. LJ*, 1, p.265.

making demands that they cannot afford not to meet. Examples of unreasonable behaviour can relate to onerous payment schedules for financing, production companies fully or largely bearing the risks for events outside of their control, and productions effectively being forced to start before contracting is completed to meet deadlines.

Unreasonable behaviour may also be unconscionable conduct at law. But legal remedies are extremely expensive to access and, in any event, come with long delays between initiation and resolution. For a firm in the kind of circumstances where such conduct occurs, it is unlikely to be a wise choice. From the perspective of economic efficiency, such conduct is also highly damaging. Not only does it undermine trust between partners who should be collaborating closely, it undermines business certainty which is likely to have wide-ranging if often subtle effects on a business's capacity to plan, raise finance, invest, and to be a dependable partner for other businesses.

3. Improving contract terms

Key points of section 3

- Policy can address market power imbalances and improve contract terms for Australian production companies.
- Imbalances in market power between content buyers and production companies are seen worldwide, and other countries (e.g. the UK and France) have been ahead of Australia in trying to address them.
- The regulated UK terms of trade offer a promising model of how policymakers could influence the terms of trade to the advantage of Australian screen producers and, in consequence, Australian economic activity. It requires that buyers and screen production companies agree on terms of trade that preserve reasonable opportunities for screen producers, with oversight provided by a government regulator—in the UK's case, Ofcom.

1. Public policy and private contracts

It is clear from our discussion above that the imbalance between buyers and sellers in screen production leads to a range of problems. On the other hand, whatever its benefits, policy intervention usually involves costs. In trying to identify an appropriate policy agenda, we have sought to craft policy options which minimise potential downsides while maximising the upside. In this regard, as one moves down the six categories of rights identified in earlier sections, the top two or three are fundamental to the economics of projects, whilst the bottom three are much more marginal to the attractiveness of projects.[16] This suggests two things.

First, in seeking the redress of imbalances in market power regarding the most fundamental economic rights (the first two or three headings above—those rights that determine the price paid for content, the short to medium and possibly, longer term upside), governments need to

[16] This is not necessarily literally true of the last category of rights—those which can be opportunistically seized by the stronger party on unreasonable grounds. But however much such rights might advantage those exercising them in the short term, they are likely to do more harm than good, all things considered. Accordingly, we do not accord them value.

be careful in regulating behaviour. While regulating to address imbalances of market power may be desirable, regulations should seek to minimise potential unintended consequences. In particular, they should allow sufficient flexibility to encourage firms to negotiate their own arrangements in their own best interests. And they should not adversely affect the demand for Australian-produced content. Thus, for instance, in the absence of a regulated safety net for engagement in the market, if one simply regulated to prevent a buyer of Australian screen production from obtaining rights beyond a short period of time, this could affect firms' appetites for commissioning content in Australia—resulting in lower prices being offered and/or projects not going ahead.

Ultimately, policy for improving outcomes for Australian screen producers in these areas cannot do so without directly increasing the demand for Australian screen production. This is a central rationale for content requirements or regulated minimums and government subsidies, such as tax offsets and government equity partnership via Commonwealth and State Government bodies, e.g. Screen Australia. Further, though it is not explicitly identified as a principal objective of ABC and SBS funding, this also has the effect of supporting the Australian industry.

Second, and by the same token, one can be more optimistic about influencing the terms of trade for rights that do not have a high commercial value at the time contracts are negotiated. This is the case for the rights in categories 4 to 5 identified in the previous section—what we have called long tail, residual rights and rights mitigating competitive threats to the funder. This then raises the question of how best to encourage a healthier distribution of rights. Here we have the advantage of international experience. As will be made clear, we were impressed with the impact of British policy for improving the terms of trade between funders and screen producers. It appears to have effected the kind of transition we think desirable for Australia at the same time as leaving significant room for commercial negotiation to address local circumstances.

Furthermore, given the way in which quotas have been relaxed (and have been losing their efficacy over time as the FTA sector has been losing market share) drawing streamers into the the quota system would provide some demand support which might give policymakers confidence that they could seek to gain some leverage to wrest better terms of trade for Australian screen producers in category 3—the right to control the trajectory of their creations.

a. Policy & contractual terms in Australia & around the world

In Australia, as elsewhere, the structural changes in the industry, as documented above, are prompting important policy changes.

i. How Australian policies affect contractual terms today

Australia already has a range of policies that affect the film & TV industry, but not all of these, and indeed only a limited number, affect the terms of trade (Table 3.1). Policy settings affecting the screen production industry include the local content requirements for Australian FTA networks and subscription TV providers (e.g. Foxtel) and the tax offsets for local film production and post-production. In some cases, equity finance from Screen Australia helps to shape what films are produced and how rights are controlled. Commercial activities of the government-owned broadcasters, the ABC and SBS, also have an influence on the broader production industry.

Table 3.1: Key Australian film and TV policies

Policy		Impact on contract terms
Local content requirements	ACMA imposes Australian local content requirements on FTA networks, although these were relaxed in 2020.	No direct impact but, prior to recent changes, local content requirements influenced licence fees in contracts by specifying higher points for drama productions with licence fees exceeding a threshold
Offsets (producer, location, post/digi/vis)	Various tax incentives are provided by the Australian Government to encourage film and TV production in Australia.	No direct impact, but potentially offset eligibility could be linked to contract terms; could be conditioned
Incentives (location, state gov't)	State governments offer a range of "top up" incentives such as payroll tax waivers or direct subsidies to attract international co-productions to their states.	No direct impact, but potentially incentives could be linked to contract terms; could be conditioned
Screen Aust equity investment	In addition to administering the Producer Offset, Screen Australia has some funds and discretion to	If Screen Australia is part of a SPV to produce a show/film, it requires long tail rights

	participate as an equity partner in co-productions.	retention by the Australian production company.
Public broadcaster procurement (ABC, SBS)	ABC and SBS are major buyers of content from Australian production companies.	Public broadcasters could act as model negotiators and provide an example of appropriate and fair terms of trade. In the past, SPA had agreed to terms of trade with the ABC, but currently no agreement exists.

ii. How policies are adapting to global streaming around the world

In several jurisdictions worldwide, policymakers want to:

- promote their national cultures;
- support their domestic film and TV production industry; and
- prevent smaller production companies from being exploited by larger buyers.

The UK experience with policy action to strengthen the terms of trade in favour of independent producers is instructive (Box 2.2). This change was integral in transforming the structure of the industry from a preponderantly domestic focus to one which developed its own unique assets as a springboard for global engagement. Policy action was taken in the early 2000s in response to industry concerns that the viability of production companies was threatened by aggressive cost controllers at public service broadcasters (The BBC and other public FTA broadcasters). In the UK, production companies were typically engaged using a cost-plus model, and, over the years, cost controllers were limiting the costs which could be included and reducing the “plus” in cost-plus. The broadcasters were often also acquiring export rights and selling British-produced content in offshore markets.

Today, the UK communications regulator Ofcom has the legal standing to arbitrate on terms of trade agreed between each broadcaster and the industry representative group PACT. That process has resulted in a set of standard minimum contract terms applicable to production for each broadcaster and known as the ‘terms of trade.’ This process has made contract setting smoother, and has resulted in the production sector developing and commercialising a broad range of innovative formats in a major export and offshore operations success. The arrival of global digital streaming giants in Australia poses challenges to and opportunities for the

domestic production industry and to the policies which have supported it in recent decades. The Australian Government appears poised to apply local content requirements on SVOD services such as Netflix.

If a 20% (of locally-sourced revenue) quota is introduced, it would result in an increase in local screen production. Total revenue for SVOD providers in Australia is in the order of $2 billion based on IBISWorld estimates, so a 20% quota requirement may require $400 million of local content spending per annum.[17] Now, according to ACMA, SVOD providers in 2019-20 spent $153 million on commissioning new (over 80%) or purchasing old Australian content (i.e. less than 20% of the amount). So, a quota requirement for SVODs could boost spending on Australian content by $250 million per annum, meaning it could expand the existing $2½ billion industry by around 10% per annum.

There is a legitimate public policy rationale for such a policy, given:

- it would support the development of Australian culture which can be viewed, broadly speaking, as a public good; and
- it would ensure more of the benefit from streaming companies entering the Australian market is retained in Australia, noting that concerns have been expressed regarding how Netflix appears to be paying relatively little tax, approximately $550,000 in 2020 compared with a total revenue of over $1 billion (see Box 3.1).[18]

[17] IBISWorld (2021) Pay Television and Internet Protocol Television Services in Australia Specialised Industry Report, p. 34-37. This is an indicative estimate based on IBISWorld's estimated revenue for Netflix in Australia of $1.14 billion in calendar year 2021, Stan's estimated revenue of $390 million in 2020-21 and a reported market share for Disney of 3.0% versus Netflix's 19.6%. IBISWorld was unable to estimate Prime Video's revenue in Australia because it is rolled up into the Amazon Prime service, but it is assumed it amounts to at least $300 million, pushing our ballpark estimate for Australian SVOD revenue to $2 billion.
[18] Ward, M. (2021) "Netflix reveals Australian tax bill for 2020", *Australian Financial Review*, 3 May 2021.

Box 3.1: Netflix in Australia

Netflix has a small Australian office in Sydney. When it was established in 2019, it was expected to grow to ten employees.[19] Although Netflix's revenues from Australian consumers are estimated to be in the order of $1.1 billion, only a small fraction of these revenues are booked to the Australian office. The local office only earned revenue of $20.5 million in calendar year 2020.[20] Local subscriber revenue (i.e. the $1.1 billion) is collected by Netflix Australia's parent company located in the Netherlands. Netflix Australia's revenue comprises fees from its parent company for payment processing and other support services.[21] It appears that Netflix plans to invest in more Australian content. In mid-2020, Netflix Australia hired Que Minh Luu, as director of local originals for Australia. Luu was formerly an ABC executive producer with experience in prominent shows such as "Harrow.".[22]

Additionally, Australia could learn from approaches in the UK and EU, particularly in France, which are directed at improving the terms of trade for local production companies.

For example, France has imposed a local production quota on global streaming services. Streamers will need to spend 20-25% of their French revenues on French content.[23] The new French decree, issued in June 2021, also regulates the terms of trade by specifying maximum licence periods. Streamers' exclusive rights will be limited to 36 months. As a *Variety* contributor noted, "The French decree is a stepping stone in the implementation of the Audiovisual Media Services Directive (AVMS), legislation promulgated by the European Commission to place streaming giants on an even playing field with existing players across

[19] Lobato, R. and Cunningham, S. (2019) "Netflix is opening its first Australian HQ. What does this mean for the local screen industry?", *The Conversation*, https://theconversation.com/netflix-is-opening-its-first-australian-hq-what-does-this-mean-for-the-local-screen-industry-118903

[20] Saimos, Z., (2021) "Netflix Australia revenue grows off major COVID-19 streaming boom", Nine-Fairfax papers, 2 May 2021, https://www.brisbanetimes.com.au/business/companies/netflix-australia-revenue-grows-off-major-covid-19-streaming-boom-20210502-p57o47.html

[21] Ibid.

[22] Layton, M. (2020) "Netflix hires ABC exec Luu to oversee Oz originals", *Television Business International*, https://tbivision.com/2020/06/19/netflix-hires-abc-luu-to-oversee-oz-originals/

[23] Keslassy, E. (2021) "Netflix, Amazon Must Invest 20-25% of French Revenues in Local Content, France Government Decrees", *Variety*, 30 June 2021.

Europe."[24] On the AVMS and proposed regulation affecting the streamers in Canada, see Box 3.2 and Box 3.3.

The UK experience of direct regulation of the terms of trade between producers and commissioners is particularly instructive for Australia. As noted above, in the UK, the communications regulator Ofcom seeks to influence the terms by requiring that public service broadcasters, which include both the BBC and commercial channels, negotiate standard terms of trade with the industry, as represented by the industry peak body PACT. Ofcom has regulatory oversight, and according to PACT this has enabled production companies to get fair deals with networks, while, at the same time, leaving firms with the freedom to negotiate specific arrangements that suit their circumstances.

In the UK, the negotiated terms of trade have limited licence periods: e.g. five years for the BBC and ITV and three years for Channel Five. Terms of trade also set out minimum terms for, among other things, rights to extend the licence period, SVOD/AVOD/TVOD rights, distribution rights, format rights, and hold back rights (e.g. 12-18 months until it can be shown on SVOD).[25]

The ACCC or ACMA could be charged with administering a similar scheme in Australia, although the ACCC would arguably be a better choice owing to its economic expertise in analysing market power imbalances. The terms of trade framework could also be linked to production quotas and tax offsets. For example, adhering to such terms could be made a precondition of eligibility for Australian content quotas imposed on FTA broadcasters and streaming services.

Box 3.2: Canadian Bill C-10

The Trudeau government in Canada is seeking to pass a bill, held up in the Canadian Senate as of mid-July 2021, which imposes new regulations on streaming and social media companies. According to the Globe and Mail, Bill C-10 to amend Canadian broadcasting legislation would:

[24] Ibid.
[25] This information was provided by SPA.

..subject web giants broadcasting in Canada to the same regulations as traditional broadcasters, which would mean they would have to offer certain amounts of Canadian content on their sites, and contribute financially to the production of Canadian cultural industries.[26]

We note that the policy report which has instigated these regulatory reforms made recommendations around terms of trade. However, we are yet to see how this may be introduced into the Canadian system.[27]

Box 3.3: European Union Audiovisual Media Services Directive

The Audiovisual Media Services Directive (AVMSD) is a new law which created an EU-wide legal framework to coordinate national legislation on all audiovisual media. Within the EU, all audiovisual media services are broadly regulated under Directive 2010/13/EU (AVMS Directive).

The Directive was adopted to codify and harmonise the existing legislation concerning audiovisual media services.

In 2018, the EU Commission adopted a further revised version of the AVMS Directive 2018/1808 (AVMS Directive 2.0).[28] EU member states had to transpose the new rules into their national legislation by September 2020.

The AVMSD, which was recently revised again, aims to level the regulatory playing field for broadcasters and video platforms, including streaming services such as Netflix and Amazon Prime.

One of the AVMSD's main aims is the extension of an existing production quota to all subscription video on demand platforms. It would require streamers to ensure at least 30% of their content is European, which traditional broadcasters must already do. EU countries are also introducing tailored legislation to make streamers directly re-invest a percentage of their revenues in each European country where they operate.

[26] Raman-Wilms, M. and Curry, B. (2021) "What is Bill C-10 and why are the Liberals planning to regulate the internet?", *The Globe and Mail*, 4 June 2021.
[27] https://www.ic.gc.ca/eic/site/110.nsf/eng/home
[28] In brief: media law and regulation in European Union

Similar AVMS-related directives involving small investment quotas in local language content of under 6% are being drafted in other European territories such as the Netherlands, Denmark, Croatia, and Poland.

4. Crafting a policy package

Key points of section 4

- LE recommends Australia develop a UK-style terms of trade regime, to be overseen by the preeminent economic regulator, the Australian Competition and Consumer Commission (ACCC).
- To ensure that policy changes result in additional local production and are beneficial to the domestic industry, a terms-of-trade requirement should be supplemented by local content requirements for streaming companies.
- Such measures can be justified as an extension of Australia's long standing policy of promoting Australian stories in Australia and on the world stage on the basis of the profound imbalance in market power between buyers and production companies as outlined in this report, and by the desirability of retaining as much future income from successful productions in Australia as possible.
- By securing future income streams, Australian production companies will have both additional resources and additional incentives to make the investments in developing ideas for future content.

We have suggested the principles according to which a policy package should be designed. This section sketches out such a package but it should be understood as indicative. Finding the most promising path will need further careful investigation of options, which are presented here at a high level.

a. Supporting demand for Australian screen content

First, if there were good reasons for imposing minimum Australian content obligations on domestic FTA networks, there is a good case for imposing them on streamers with substantial activity in the Australian market, which have been taking market share from the FTA networks. This should be viewed as the seizing of an opportunity. For the first time in human history, streamers provide a means of reaching the vast majority of wealthy country markets with minimal additional marketing. Moreover, while it may be appropriate to impose obligations designed to ensure that a class of the content bought by streamers is Australian in character,

any content regulation should be as encouraging to facilitating exports to offshore markets. Though this may happen as a matter of course, it is nevertheless worth highlighting because industry support has so often focused on the domestic market with inadequate consideration of international opportunities (See Box 4.1).

Box 4.1: Industry assistance and exports

In the 1960s, Australia and Canada had similar automotive manufacturing industries. But Canada's policy makers understood that it was foolish to focus on supplying the domestic market only. Canadian policymakers allowed exports to the US to satisfy their manufacturers' local content requirements under their local content plan. This meant that Canadian manufacturers received the benefits of protection whether they sold domestically or by exporting to the US.

This spared the Canadian industry the crippling burden that the Australian manufacturers had producing a panoply of components and vehicles for the small domestic market. By contrast, the Canadians could specialise in whatever product lines they could sell most profitably throughout North America.

This small stroke of the pen transformed Canadian protectionism, redirecting policy support and industry energy towards specialisation and export. It also undermined uncompetitive Canadian production (because Canadian exports to the US earned rights to duty-free component imports from the US). In the upshot, the Canadian automotive manufacturing industry grew to become over four times the size of Australia's, where manufacturers only received assistance for those vehicles they sold domestically. Today, all the major vehicle manufacturers have exited vehicle assembly in Australia.

Today, platforms massively reduce the cost of supplying far flung markets and, in so doing, create much greater prospects for Australian content to find possibly surprising markets serendipitously. Because the global streamers would have an incentive to show any programs they commissioned anywhere they appealed in their global network, quotas for streamers would operate in the same way that assistance for Canadian vehicle production worked—to provide as much assistance to export as for supplying domestic consumers.

Source: N Gruen, Choosing your Parents, Australian Financial Review, February 23, 2009

b. Improving contract terms for producers of Australian screen content

The policies outlined in the previous subsection would promote demand for Australian content. But as we have argued, there is a good case for considering action to improve the contract terms that Australian screen producers are increasingly being forced to accept as structural change intensifies in the sector. Here there are, broadly speaking, two options.

The first is to mandate certain terms. Terms deemed to be strongly associated with inefficiencies or inequities could be prohibited. For example, regulators could impose 'use it or lose it' obligations on some types of rights where they had remained unexercised after some period deemed reasonable. This could apply to various kinds of options and to rights such as last matching rights. Ultimately, however, it seems likely that direct regulation of contractual terms could prove ineffective or counterproductive, on account of its inflexibility. Regulators simply have inadequate information to allow appropriate exceptions to rules that might be justified in general, but not in specific instances.

A second model is to mandate collective bargaining to develop a set of contract terms that would apply to one or more classes of film and TV production in Australia, perhaps along the lines of the UK system set out above, or drawing on the bargaining code developed for social media companies and Australian media companies by the ACCC. ACMA is also a potential regulator, however Lateral Economics considers that the ACCC has the experience to provide the required oversight..

The model used in the UK provides that standard minimum terms be developed by broadcasters with an industry representative body. What seems promising about this model is that it builds in scope for standard terms to be commercially negotiated by each broadcaster, subject to arbitration in the event that an agreement cannot be reached. (Australia has similar arrangements for providing access to national infrastructure under the National Competition Policy and the News Media and Digital Platforms Mandatory Bargaining Code introduced in 2021 is another relevant example). Though the UK arrangements apply only to the major FTA broadcasters, there is no reason why a similar approach could not be adapted to the market for streaming content.

As discussed in section 3.1, the 'terms of trade regime' we have sketched above would ideally be accompanied by some scheme underpinning demand—which would include local content requirements and tax offsets for local production.

c. Government-funded broadcasters

The report has previously advanced the case for a degree of forbearance from government-funded broadcasters in the contract terms they seek from Australian screen content providers. To reiterate, this should not be interpreted as suggesting that government-funded broadcasters should be a 'soft touch' for the industry, or that they be given any specific additional charter obligation to provide assistance to the screen production industry, other than its own custom as a capacious buyer of Australian production.

The appropriate concept can be articulated by analogy with the Productivity Commission's case for requiring government agencies to act as model litigants. As the Commission puts it, "the proper role of government is to act in the public interest (as it has no legitimate private interest)".[29] It also points out that, given their size, government agencies "can be important role models in setting benchmarks for behaviour and conduct across the system".

We think that the ABC and SBS should be expected to be 'model commissioners' of content and to eschew aggressive practices or practices which tend to raise the chances of developments and content becoming 'stranded' without any commensurate benefit in serving their missions.

d. Unreasonable conduct

Gaining direct policy purchase on the problem of opportunistic breach of basic contractual norms is problematic. At least from what we heard, we expect that some of these practices would not stand up in court. But, given the dramatic inefficiencies of our legal system, legal

[29] Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra, pp. 430-431. In this context, note the statement in the ABC's Five Year plan 2020-25, that its "sole purpose is to serve the common good, without any commercial obligation or agenda." Further "The ABC is also a powerful generative force: an incubator of Australian talent; a catalyst for creative and artistic achievement; a proving ground for exciting new content. As a major customer of the creative sector of the Australian economy, the ABC helps to sustain jobs and activity across the broader media and production ecosystem around the country." (p. 4). Note further that two of the six goals of the ABC's corporate plan in the current 5 year period are to:
• Prioritise quality over quantity and;
• Invest in the workforce of the future. (p. 7).

proceedings are only likely to further disadvantage small parties against large ones. And even if they did not, the very circumstances in which such practices occur are those in which the smaller firm is heavily dependent on the project going ahead for its own financial security. We did hear of a firm that kept a 'league ladder' of the purchasers who were best and worst to deal with. We were surprised that the ABC was at the bottom of the list, though it was outside the scope of our study to determine whether this was consistent with others' experiences.

In any event, we think that SPA or the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) should put some modest funding towards keeping a register of the experiences of production companies. It would be necessary to ensure companies' confidentiality to get them to share their experiences—at least with the worst offenders. But, if it can be done economically and practicably, knowledge of which firms are best and worst to deal with is an industry-specific public good of substantial value, particularly where some firms are behaving unreasonably. It would not only enable production firms to be forewarned and, thus, forearmed. It is also likely to generate preferences for screen producers to deal with some purchasers in preference to others. This would generate salutary incentives towards higher trust contracting practices and against lower trust practices.

Bibliography

Australian Communications and Media Authority (August 2021) *Spending by subscription video on demand providers 2019–20*.

ABC (2020) Five Year Plan 2020-2025.

Booth, R.A. (2006) "Give me equity or give me death-the role of competition and compensation in Silicon Valley", *Entrepreneurial Bus. L.J.*, 1, p.265.

Crawford, G. S. (2015) 'Chapter 7 - The Economics of Television and Online Video Markets', in Anderson, S. P., Waldfogel, J., and Strömberg, D. (eds) *Handbook of Media Economics*. North-Holland, pp. 267–339.

Dyer, J.H. and Hatch, N.W. (2006) "Relation-specific capabilities and barriers to knowledge transfers: creating advantage through network relationships". *Strategic Management Journal*, 27(8), pp.701-719.

Gilson, R.J. (1999) "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete", 74 *N.Y.U. L. REV*. 575, 586-89.

Gruen, N. (1997) "Competitive Neutrality and Access to Government Business Enterprises: Can one have too much of a Good Thing?", A paper delivered at the 26th Annual Conference of Economists '97, 'Policy Challenges of the New Century'.

Gruen, N. (2009) Choosing your Parents, *Australian Financial Review*, 23 February 2009.

Helper, S. and Henderson, R. (2014) "Management Practices, Relational Contracts, and the Decline of General Motors", *Journal of Economic Perspectives*, Volume 28, Number 1, Winter 2014, pp. 49–72, AT P. 59.

IBISWorld (2021) *Free-to-Air Television Broadcasting in Australia Industry Report*.

IBISWorld (2021) *Pay Television and Internet Protocol Television Services in Australia Specialised Industry Report*.

IBISWorld (2021) *Motion Picture and Video Production in Australia Industry Report*.

Keslassy, E. (2021) “Netflix, Amazon Must Invest 20-25% of French Revenues in Local Content, France Government Decrees”, *Variety*, 30 June 2021.

Layton, M. (2020) “Netflix hires ABC exec Luu to oversee Oz originals”, *Television Business International*, https://tbivision.com/2020/06/19/netflix-hires-abc-luu-to-oversee-oz-originals/

Lobato, R. and Cunningham, S. (2019) “Netflix is opening its first Australian HQ. What does this mean for the local screen industry?”, *The Conversation*.

Oliver & Ohlbaum (2018) *The impact of Terms of Trade on the UK’s television content production sector*, report prepared for the Canadian Media Producers Association (CMPA).

Kanter, J. (2021) “UK’s Wildly Popular TV Tax Breaks Could Be Expanded To Encourage Streamers To Invest In Public Service Content”, *Deadline*.

Pokorny, M., Miskell, P. and Sedgwick, J. (2019) ‘Managing uncertainty in creative industries: Film sequels and Hollywood’s profitability, 1988–2015’, *Competition & Change*, 23(1), pp. 23–46.

Productivity Commission (2014) *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra.

Raman-Wilms, M. and Curry, B. (2021) “What is Bill C-10 and why are the Liberals planning to regulate the internet?”, *The Globe and Mail*, 4 June 2021.

Saimos, Z., (2021) “Netflix Australia revenue grows off major COVID-19 streaming boom”, *Brisbane Times/Sydney Morning Herald*, 2 May 2021, https://www.brisbanetimes.com.au/business/companies/netflix-australia-revenue-grows-off-major-covid-19-streaming-boom-20210502-p57o47.html

UK Government (2021) *The future of public service broadcasting: Government Response to Committee’s Sixth Report of Session 2019–21*.

Ward, M. (2021) “Netflix reveals Australian tax bill for 2020”, *Australian Financial Review*, 3 May 2021.

The Value of Intellectual Property to film production companies

A Lateral Economics supplementary report prepared for Screen Producers Australia

December 2022

LateralEconomics

CAPABLE, INNOVATIVE, RIGOROUS

Executive Summary of supplementary report

About the study

Screen Producers Australia (SPA) has commissioned Lateral Economics (LE) to study and report on the value of intellectual property (IP) for Australian film production companies. The study involved desktop research and consultations with a broad cross-section of Australian screen production companies.

Key findings

Copyright in "the tape" is important, but so is other IP

Copyright can exist in multiple different aspects of a film or TV show. Traditionally, it is the copyright in "the tape", that is the film or TV show itself, that is important, as it allows the company to earn revenues from broadcasting or distribution deals, for the original screening and re-runs. But a wide range of other pieces of IP protected by copyright can be lucrative for different companies either on their own or bundled with other IP, and/or products and services. It depends on the type of content they produce, whether it is scripted, unscripted (e.g. reality TV or interview shows) or documentary style. This could include revenues from YouTube or licensing deals for show "formats" around the world. This can apply not only to unscripted reality style programs such as MasterChef, but to scripted shows, too. For example, *Secrets and Lies* was an Australian production from Hoodlum Entertainment which was later adapted for the US market, airing on US ABC for two seasons in 2015-16.

Supporting production company viability, employment and workforce training

LE has found IP assets are very important for many Australian production companies. They provide a steady source of additional revenue which can help maintain the financial viability of companies. As one production company managing director said, "If you don't have IP, you don't have a business."

By supporting the viability of production companies, IP in turn supports employment and workforce training, given production companies are critical to screen industry on-the-job

training and skills development. Hence the retention of IP is likely to be important to the development of Australia's creative economy, as it appears to have been for the UK independent screen industry.

Some Australian IP has had extraordinary longevity. Consider for example the Blinky Bill animated character developed by Yoram Gross based on the Dorothy Wall stories from the 1930s. This is IP which has generated multiple TV series and films since the 1992 film *Blinky Bill: The Mischievous Koala* was written, directed, and produced by Yoram Gross.

IP retention supports the development of new IP

Rather than IP being locked up by a streaming company, it can be beneficial for a production company to retain IP because it can then use it in new projects. Either it can reuse footage or use the characters and stories to create spin-offs or license the format for use in other markets. Industry players concurred that IP helps support future projects, including co-productions between different production companies. As a senior employee of one production company told LE, "The revenue from IP gives us freedom to pursue some projects we otherwise wouldn't." That is, it takes the pressure off and allows time to be devoted to creating new IP.

IP is important, but it can be sold if the price is right

In some circumstances, IP can be sold or licensed to another party for a long period, if there is adequate compensation and fair terms. A savvy production company with a good negotiating position may be able to retain some level of creative control even if they trade away global rights. For example, Brisbane's Ludo Studio has licensed global distribution rights to Bluey to BBC Studios, but it has retained rights including all future production rights, ensuring that they and the creator are included in all future development of Bluey. Some Australian production companies indicated that it can make sense to trade away IP in negotiations, depending on the deal.

Successful producers can miss out on a lot of upside due to the streamer content commissioning model

Streaming companies have a strong preference to take 100% of the IP in a production in return for covering 100% of the production costs, and paying a production company fee, which may

only amount to 10% of the initial series budget, net of some negotiated exclusions. Commission agreements of this type are attractive to streaming companies for several reasons. They can brand content as their own original content (e.g. "Netflix Original") which they can use globally, and they can assemble a large and ever growing exclusive catalogue of material which improves their appeal to consumers. They also are saved from the administrative hassle and costs of having to track IP rights over time.

Because of the terms of the commission agreement, Australian production companies can miss out on substantial revenues if a show is successful and subsequent seasons of the show are commissioned.

Agreements between streamers and production companies typically include an option for the streamer to commission the production company to make unlimited subsequent seasons for a per episode fee at the same fee as the first season with, in some cases, a season-on-season percentage increase (e.g. 5%). However, this provides very little upside for production companies which have been instrumental in the creation of a successful series.

Production companies have limited leverage to negotiate better terms with streamers for subsequent seasons. This is because streaming companies own the IP and can instead commission other production companies to produce subsequent seasons. The imbalance of bargaining power between streamers and Australian production companies suggests some policy measures to improve the terms of trade would be worth considering, as Lateral Economics discussed in its 2021 report for SPA.[30]

One policy measure worth exploring is the 2021 French directive that streaming companies can only have exclusive rights on the content of independent producers for three years.[31] There would need to be industry consultation to ensure the design of any new regulation delivers net benefits to the local screen industry and broader community. It would be worthwhile monitoring the French experience to learn whether the measure has been beneficial and if any improvements would be desirable.

[30] Lateral Economics (2021) Taking Australian stories and skills to the world in the age of global streaming A Lateral Economics discussion paper commissioned by Screen Producers Australia.
[31] Keslassy, E. (2021) "Netflix, Amazon Must Invest 20-25% of French Revenues in Local Content, France Government Decrees", Variety, https://variety.com/2021/streaming/global/avms-france-netflix-new-rules-streamers-1235008364/

Examples of the importance of IP to Australian Production companies

LE's consultations with production companies revealed numerous examples of the value of IP. Several examples have been developed into case studies in this report. These include:

- *The Dressmaker*, which generated revenues from multiple sources, including traditional cinema distribution, DVD sales, and a costume exhibition;
- *The Drover's Wife*, which started as a stage play and has been turned into a successful novel and feature film; and
- *Bondi Rescue*, which is popular in re-runs and is high-performing on YouTube.

Conclusions

Given the value of IP to production companies, the trend for content buyers such as streaming companies to acquire all the IP rights is concerning. This is particularly the case where it appears that streamers adopt maximalist rights strategies not in order to maximise the exploitation of IP via IP extensions of the kind original producers often pursue but to maximise procedural uniformity and administrative convenience in large global companies. Australian taxpayers invest millions of dollars each year in the local screen industry via various tax offsets and grants. If IP is acquired at less than a reasonable price, the return on public investment in the sector is reduced substantially.

1. Introduction

Screen Producers Australia (SPA) has engaged Lateral Economics (LE) to study the value of intellectual property (IP) for Australian film production companies. This is a supplementary report to our first report for SPA on the terms of trade facing Australian production companies.

It is informed by desktop research and consultations with over a dozen production companies. By production companies, we mean the businesses which produce the films and TV shows we watch. That is, they lead the development and filming of content. Production companies range from small family-owned operations to larger companies with dozens or over 100 employees.

The questions we were engaged to answer included:

1. What are the different types of IP your production company owns?
2. What does the company do specifically with the IP? Is it a source of passive income or do you seek to build upon the IP to generate additional revenue?
3. Is there a connection between having IP and having resources to train new people, building a new generation of talent for the sector? To what extent do revenues from IP finance reinvestment in the company?
4. Also, how does the creation of IP allow for the development or acquisition of the next piece of IP, and so on? Is there a virtuous circle of opportunity? If so, please let us learn something about what it is, what's necessary to get it going and what can obstruct it.
5. To what extent does IP allow the business to build relationships with the broader film and TV industry, in turn facilitating the growth of the whole industry? Does owning IP give you more (and/or more secure) opportunities to collaborate with other companies?

2. Background

2.1. What is IP?

According to IP Australia:

> "Intellectual property (IP) is the property of your mind or proprietary knowledge. Basically, the productive new ideas you create. It can be an invention, trade mark, design, brand, or the application of your idea."

There are four broad types of IP recognised in law:

1. Patents;
2. Trademarks;
3. Copyright; and
4. Trade secrets.[32]

For the screen industry, copyright is the most relevant IP. Only in the rarest of circumstances–e.g. Disney's Mickey Mouse–does IP owned by a production company also include a trademark. A summary of the rules regarding copyright protection is provided in Appendix A.

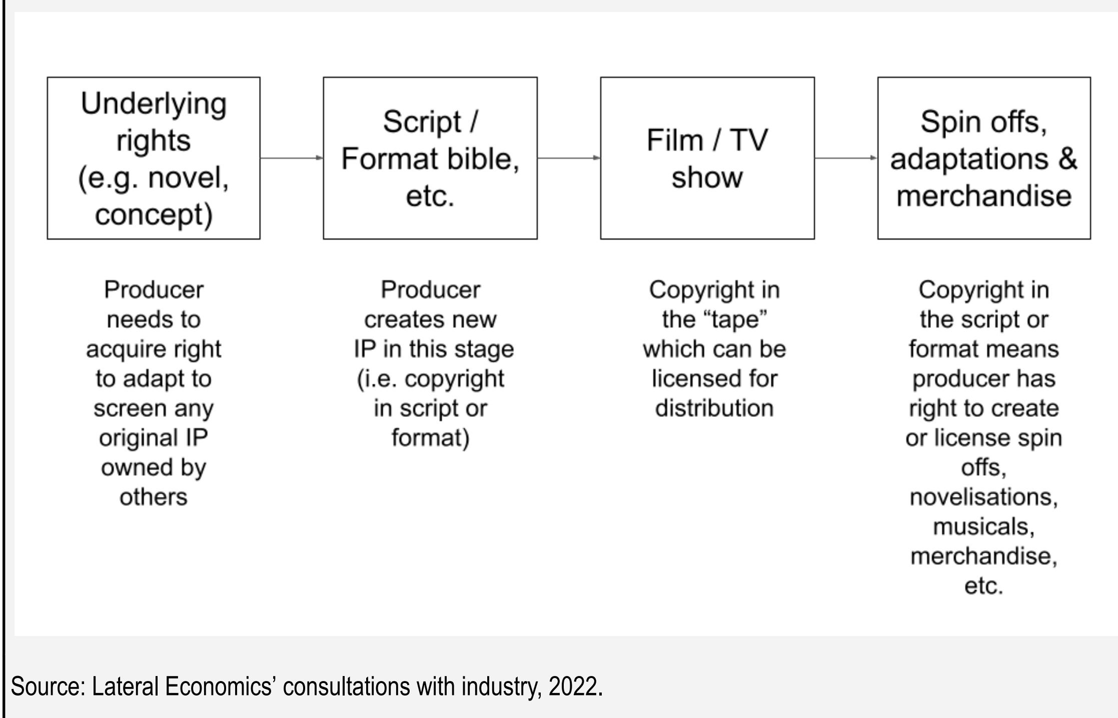
2.2. Framework for IP in the screen industry

2.2.1. Types of IP in the screen industry

A wide variety of IP rights are relevant to screen producers. Consider the three major categories of creations for which copyright will exist, and for which IP rights can be assigned (Figure 1). Copyright exists for the film or TV show separate from the script or format bible on which it relies, and separate from the underlying rights in the novel or concept that has been developed by a production company. All of these rights can be owned or licensed for use by the same party or different parties.

[32] https://legal.thomsonreuters.com/en/insights/articles/four-types-of-intellectual-property

Figure 1. Categories of creative works for which copyright can exist in the screen industry



Source: Lateral Economics' consultations with industry, 2022.

Producers will want to secure exclusive use of underlying rights for their film or TV projects. Typically, they start off securing options to purchase underlying rights for a relatively small amount and then proceed to purchase the rights, paying a much larger amount, if they can secure finance for the screen production which relies on those rights. Regarding the script or format bible, they will either develop that "in house" or pay a freelancer and secure the copyright from the freelancer.

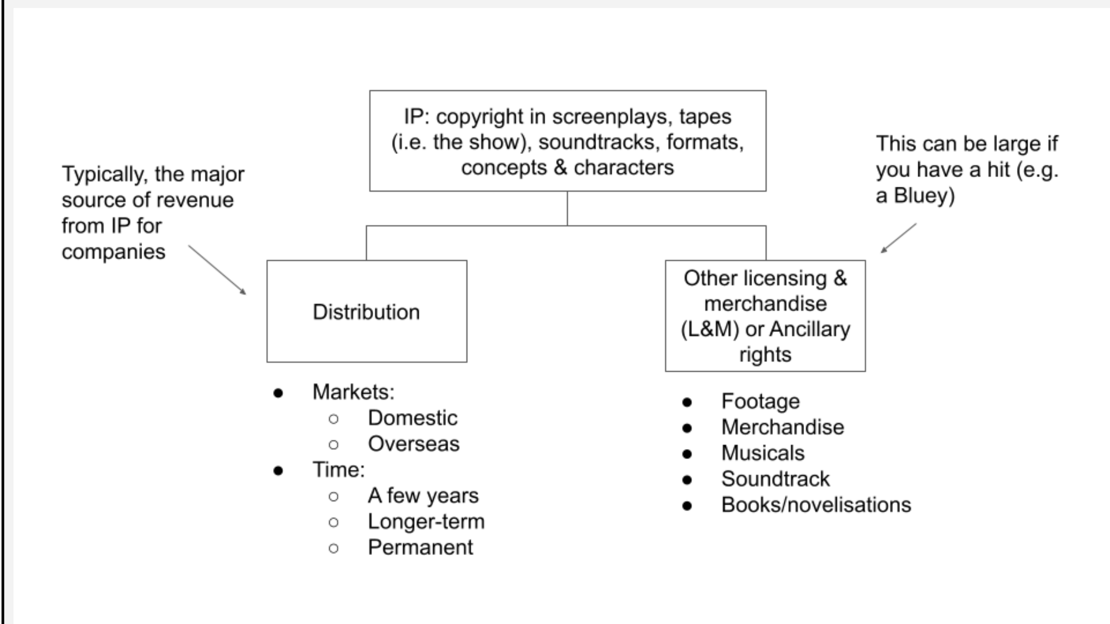
In addition to these rights which it is necessary to secure prior to production, production companies may also secure so-called "life rights", meaning the company can make use of parts of a person's life in their productions without a risk of being sued for defamation. While securing life rights is a common strategy, legally it is not a type of IP.

2.2.2. Revenue related to IP in the screen industry

Broadly speaking, the two major revenue streams stemming from film and TV IP are distribution royalties and other licensing and merchandising (L&M) royalties coming from the

assignment of so-called ancillary rights (Figure 2). These revenues come not only from the screen production itself, but from related IP. For instance, they could come from merchandise or from exhibitions of the costumes from the production (see *The Dressmaker* case study in section 5).

Figure 2. Revenue streams coming from screen industry IP



Source: Lateral Economics' consultations with industry, 2022.

In addition to revenue coming from various distribution and licensing agreements, Australian producers may also receive revenue from Screenrights, a not-for-profit, which collects secondary royalties related to the retransmission of content, such as for educational or government use or on subscription television (i.e. Foxtel which retransmits free-to-air channels).

Note that a fraction of some of the revenues flowing from screen industry IP need to be paid by producers to performers as residuals, under an agreement negotiated between SPA and the Media Entertainment and Arts Alliance (MEAA) (see Box 1). Screenrights provides a Residuals Service to assist producers in calculating the residuals payments they need to make.

Box 1. Performers' residuals

"Residuals are a form of royalty payment for performers. Residuals mean performers benefit financially in a show's success when it sells well. Payments are calculated on the basis of sales performance domestically and globally using rules that are set out in industry negotiated agreements.

We refer to these payments as 'Residuals' for simplicity. It's easier this way!

Residuals – as a generic term – covers Repeat Fees, Ancillary Usage Fees and Residuals fees for TV and online, and Australian Free Television Residual Fees, Making-Of Residual Fees, North American Residual Fees, Performer Net Profit Entitlements and US Network Residual Fees for feature films."

Source: https://www.screenrights.org/screen-industry/residuals/

2.2.3. What happens to IP in the screen industry

Recall that there is a presumption that the creator of the IP will own the copyright, but copyright can be assigned to others. In practice, the type of financing deal for the production will allocate the rights, and everything is subject to negotiation. It depends on the deal.

First consider the different types of deals which can be entered into by production companies and investors in a film project, which could include other production companies, major studios, and TV or streaming companies.

Typically, a special purpose vehicle (SPV) will be set up to produce the film or TV show. The production company will be a party to this SPV and will contribute its IP to it. After the production is completed the SPV will be wound up and the various pieces of IP will be assigned as agreed in the contract at the outset. Various outcomes are possible depending on the deal.

Typically, the production company would retain the IP, at least in the period since the Producer Offset was introduced in 2007, giving producers a recognised equity stake according to some industry participants LE has consulted. However, recently, and associated particularly with the streaming or Video on Demand (VOD) companies such as Netflix, Amazon Prime, Disney, and Stan, a different type of outcome has increased in prevalence. Under

Production-Finance-Distribution (PFD) agreements, production companies do not retain IP. US media lawyer Schuyler Moore wrote about these agreements in Forbes in 2019:

> "...a distribution company (e.g., a studio or VOD company) hires a production company to produce a film, and the distribution company agrees to directly finance production of, and to distribute, the film. Under these agreements, the production company is little more than a dependent agent of the distribution company and is subject to the complete control of the distribution company on all aspects of production. The grant of distribution rights to the distribution company is always of all rights in perpetuity throughout the world, making the distribution company the complete and absolute owner of the film."[33]

These agreements are attractive to streaming companies for several reasons. They can brand content as their own original content (e.g. "Netflix Original") which they can use globally, and they can assemble a large and ever growing exclusive catalogue of material which improves their appeal to consumers. They also are saved from the administrative hassle and costs of having to track IP rights over time.

Productions made under PFD agreements are not the only productions to be labelled "originals" by the VOD companies. There is an established practice of productions, commissioned and licensed by VOD companies where the producer retains IP, but the productions are nevertheless labelled "Original" productions. In each instance the VOD company is the sole or majority financier of production and/or development.

Despite the producer retaining rights, these productions are often licensed for an extended term (beyond 15 years) and are subject to strict holdbacks (i.e. restraints on the exercise of rights), preventing the producer from exploiting the IP in other territories or formats. In some cases, such holdbacks could prevent a producer from developing and producing a subsequent season or sequel because the VOD company has elected not to continue with a subsequent commission. In essence, the value of any IP retained by the producer is negligible.

[33] Moore, S. (2019) "The 9 Types Of Film Distribution Agreements", Forbes, https://www.forbes.com/sites/schuylermoore/2019/07/19/types-of-film-distribution-agreements/?sh=282781cc6253

3. Findings from consultations

3.1. Types of IP that are valuable

Copyright can exist in multiple different aspects of a film or TV show. Traditionally, it is the copyright in "the tape", that is the film or TV show itself, that is important, as it allows the company to earn revenues from broadcasting or distribution deals, for the original screening and re-runs. But a wide range of other pieces of IP protected by copyright can be lucrative for different companies. It depends on the type of content they produce, whether it is scripted, unscripted (e.g. reality TV or interview shows) or documentary style. This could include revenues from YouTube or licensing deals for show "formats" around the world. This can apply not only to unscripted reality style programs such as MasterChef, but to scripted shows, too. For example, *Secrets and Lies* was an Australian production from Hoodlum Entertainment which was later adapted for the US market, airing on US ABC for two seasons in 2015-16.

3.2. Impacts on finances, workforce, and training

LE has found IP assets are very important for many Australian production companies. They provide a steady source of additional revenue which can help maintain the financial viability of companies. As one production company managing director said, "If you don't have IP, you don't have a business." If IP is lost, say in a deal with a streaming company, Australian production companies can lose out on the substantial upside if a series is successful. How this occurs is illustrated in Box 2.

Box 2. Streamer content commissioning model: The downsides of success

If a producer pitches a new show to a streamer which then elects to commission the show, the streamer will take 100% of the IP in the concept and program in return for funding 100% of the cost of making the program. Say the program is a series. The return to the producer under this model is a production company fee (i.e. for the production services involved in making the series) equal to, say, 10% of the initial series budget minus some negotiated exclusions.

In the commission agreement, the streamer also takes an option to commission the producer to make unlimited subsequent seasons of the series for a per episode production company fee. This fee for subsequent seasons is the same as the fee for the initial series plus, in some cases, a season-on-season percentage increase (say, 5%). If the program does well, it is likely the streamer will exercise its option to commission a subsequent season. The number of episodes for the subsequent season and the series budget will be determined by the streamer. The more successful the initial series is, the more inclined the streamer might be to increase its budget in future seasons (to maximise the appeal of the subsequent season to the first season's audience)

The producer will doubtless want to continue to be associated with the successful series it has created. However, the return to the producer no longer tracks the series budget. Rather, the producer's fee for subsequent seasons of its now successful show is tied to a relatively small increase over the per episode fee it received for the first season before it was successful. In real terms, this means that the per episode fee paid to the producer loses ground against the production values of the show and its value to the streamer, notwithstanding:

- the success of the series created and produced by the producer;
- the reduced risk to the streamer of commissioning a subsequent season, because it now knows the producer's program has an audience on the streamer's platform; and
- the real likelihood of the subsequent season's budget being bigger and therefore requiring more work from the producer.

The producer has limited leverage to negotiate a production company fee that is more commensurate with the budget for subsequent seasons and the success of its program. Leverage is limited because, by owning all the IP in the program, the streamer has the ability to take subsequent seasons to another producer which will charge less for their services. Then the link between the producer and its successful program would be severed forever.

By supporting the viability of production companies, IP in turn supports employment and workforce training, given production companies are critical to screen industry on-the-job

training and skills development. Hence the retention of IP can be seen as important to the development of Australia's creative economy. LE's 2021 report for SPA highlighted the positive impact that the UK terms of trade had on the sector. The UK introduced a presumption in favour of independent producers retaining rights. In a 2018 report prepared for the Canadian Media Producers Association, the consultancy Oliver & Ohlbaum found export earnings of UK independent production companies accelerated substantially since the introduction of terms of trade in 2003, with a compound annual average growth rate of 22.2% from 2004 to 2008, compared with 12.6% over 1998 to 2003.[34] Between 2004 and 2017 UK independent producer sector TV-related revenue increased from around £1.5 billion to £2.6 billion.[35]

3.3. Supporting the development of new IP

Rather than IP being locked up by a streaming company, it can be beneficial for a production company to retain IP because it can then use it in new projects. Either it can reuse footage or use the characters and stories to create spin-offs or license the format for use in other markets. Industry players concurred that IP helps support future projects, including co-productions between different production companies. As a senior employee of one production company told LE, "The revenue from IP gives us freedom to pursue some projects we otherwise wouldn't." That is, it takes the pressure off and allows time to be devoted to creating new IP.

3.4. Adequate compensation as the important issue

In some circumstances, IP can be sold or licensed to another party for a long period, if there is adequate compensation and fair terms. A savvy production company with a good negotiating position may be able to retain some level of creative control even if they trade away global rights. For example, Brisbane's Ludo Studio has licensed global distribution rights to Bluey to BBC Studios, but it has retained rights including all future production rights, ensuring that they and the creator are included in all future development of Bluey. Some Australian production companies indicated that it can make sense to trade away IP in negotiations, depending on the deal.

[34] Oliver & Ohlbaum (2018) *The impact of Terms of Trade on the UK's television content production sector*, report for the Canadian Media Producers Association (CMPA), p. 10.
[35] Ibid., p. 9.

The imbalance of bargaining power between streamers and Australian production companies suggests some policy measures to improve the terms of trade would be worth considering, as Lateral Economics discussed in its 2021 report for SPA.[36]

One policy measure worth exploring is the 2021 French directive that streaming companies can only have exclusive rights on the content of independent producers for three years.[37] There would need to be industry consultation to ensure the design of any new regulation delivers net benefits to the local screen industry and broader community. It would be worthwhile monitoring the French experience to learn whether the measure has been beneficial and if any improvements would be desirable.

[36] Lateral Economics (2021) Taking Australian stories and skills to the world in the age of global streaming A Lateral Economics discussion paper commissioned by Screen Producers Australia.
[37] Keslassy, E. (2021) "Netflix, Amazon Must Invest 20-25% of French Revenues in Local Content, France Government Decrees", Variety, https://variety.com/2021/streaming/global/avms-france-netflix-new-rules-streamers-1235008364/

4. Financial implications of IP

The clear message from LE's consultations with screen producers is that retaining IP contributes greatly to having profitable and financially viable businesses. The revenues related to IP help companies deal with highly variable cash flows which can be a feature of the business, particularly if firms have to rely solely on production fees with a 10-20% profit margin. While the profit margin on individual projects may seem reasonable, the problem comes from additional overhead costs for the business which companies cannot roll into production costs for projects. That profit margin needs to cover other costs other than the production costs.

Overall, industry profitability is not exceptional, with a 4.2% profit margin for the Motion Picture and Video Production industry, according to IBISWorld.[38] While this profit margin is not far from the profit margin of 5.4% for the broader Information Media and Telecommunications sector, it is lower than many other industries. For instance, the profit margin for the manufacturing sector is nearly 7%. Deloitte Access Economics in 2018 reported that, in the five years up to 2017, 30% of businesses reported their profit margins had narrowed. In 2017, 22% of surveyed businesses made a loss.[39] Data such as these reinforce the need for Australian production companies to get the best possible deals, so their viability is not at risk due to slim profit margins which provide minimal buffers for cost overruns, called "overages" in the industry jargon.

Depending on the size of the company, revenues associated with retained IP can amount to tens of thousands or hundreds of thousands of dollars in any year. One production company told us that in one financial year its IP-related revenue from past projects was roughly the same as its gross profit and in another year it was half that.

LE has created a stylised example to illustrate the tradeoff involved with letting go of IP. We compare two firms, otherwise equivalent, but one firm retains IP and hence earns ongoing licensing revenues and the other is more-or-less a work-for-hire production company. The stylised example corresponds to a medium-sized production company, noting Deloitte Access

[38] Jeswanth, D.K. (2022) INDUSTRY REPORT J5511 Motion Picture and Video Production in Australia.

[39] Deloitte Access Economics (2018) *Screen production in Australia: Independent screen production industry census*, report prepared for Screen Producers Australia.

Economics classifies medium-sized companies as those with between $1 million to $10 million revenue. The numerical figures presented are based on consultations with industry and reflect what a medium-sized company could earn in revenue from its IP. The value of IP in providing a buffer or margin of safety for production companies is apparent. IP can transform marginally profitable production companies into companies with healthier profit margins, making them more financially viable over the long-term. In the stylised example, the profit margin almost doubles from 5% to nearly 10%.

Table 1. Stylised example of value of IP

Revenue	With IP	Without IP
Revenue		
Production fees	$10,000,000	$10,000,000
Licensing fees & royalties	$500,000	
	$10,500,000	$10,000,000
Expenses		
Production costs	$8,000,000	$8,000,000
Overheads	$1,500,000	$1,500,000
	$9,500,000	$9,500,000
Profit (before tax)	*$1,000,000*	*$500,000*
Profit margin (% of revenue)	9.5%	5.0%

Source: Lateral Economics, 2002, based on consultations with SPA members.

In our stylised example in Table 1, one firm enters a deal to relinquish its IP as a part of a Production-Finance-Distribution deal with a streamer, while the other firm does not. To an extent, production companies may be compensated for any IP they bring to or create in the process of producing content for the streamer. The stylised example helps illustrate the tradeoff involved. The lump sum payment needs to be sufficient to justify sacrificing future revenues, and it may need to be in the order of 5% of the production budget, if not more. It is very difficult to assess what fair compensation would be, and we are unable to determine to what extent companies are currently being compensated for the IP they create in deals with streamers. Ultimately, the emerging status quo with streamers could mean Australian production companies miss out on large upside revenues associated with hits.

5. Case studies

The following case studies illustrate the value of retaining rights for Australian-generated screen content and how the retention of those rights has benefited producers. Unfortunately, because of trends in screen rights negotiations, (See Box 2 above), similar cases may be less frequent in the future.

5.1. The Dressmaker

The Dressmaker is a 2015 Australian comedy drama starring Kate Winslet and Judy Davis. The film is set in the Australian outback. It was filmed in Victoria at various locations including Melbourne, Horsham and Mount Rothwell. *The Dressmaker* was an Australian production developed by Film Art Media, and financed with the assistance of Screen Australia, Film Victoria, White Hot Productions, Soundfirm and UK-based Ingenious Films.

The film is a good example of how underlying IP can be obtained and adapted by a production company to create valuable new pieces of IP. The underlying IP was a 2000 novel of the same name by Rosalie Ham. It was adapted for the screen by writer/director Jocelyn Moorhouse and P.J. Hogan, who assisted with the screenplay.

The film was distributed in Australia by Universal Pictures International which sought to obtain all the IP in the film for the territory. Film Art Media, however, was able to secure rights which were of negligible value to Universal, particularly the rights to educational use, 'making-of' documentary and to exhibit costumes from the production.

The educational IP rights have proven very important to Film Art Media, bringing in tens of thousands of dollars each year since the book was added to the educational curriculum after the film was released. When schools teach the book, teachers will often show the film to students, and this results in royalties for Film Art Media via Screenrights, which licenses content to educational institutions.

Another set of IP rights retained by Film Art Media were the IP in the costumes and the right to exhibit them. After *The Dressmaker* was released, the costumes were exhibited across

Australia in partnership with the National Trust. This exhibition brought in tens of thousands of dollars of licensing revenue.

Finally, Film Art Media secured the right to produce the making-of documentary for the film. It was able to negotiate a zero license fee for all the footage and clips from the movie in return for licensing the documentary at zero cost back to Universal. This allowed Film Art Media to produce the documentary *The Dressmaker: Behind The Seams*, which Universal then packaged with the film in a reissued Special Edition DVD. This was a win-win because Universal was able to now market a new-and-improved DVD as a Christmas release and Film Art Media resulting in additional DVD revenue. Film Art Media also obtains some revenue from sales and rentals of the documentary video via Vimeo, a video-on-demand (VOD) platform.

5.2. The Drover's Wife

The Drover's Wife: The Legend of Molly Johnson is a 2021 Australian drama starring Leah Purcell, who also wrote the screenplay and directed the film. It was co-produced by Oombarra Productions, the production company Purcell owns with her partner Bain Stewart. Bunya Productions, another Australian production company, was the other co-producer.

The Drover's Wife started off as a play written by Purcell and first performed at Belvoir St Theatre, Sydney in 2016. The play was acclaimed by critics and audiences, and it received various awards, including the Nick Enright Prize for Playwriting, the Victorian Premier's Award for Drama, the Victorian Prize for Literature, and the Golden AWGIE at the Australian Writers' Guild Awards.

Purcell and Stewart were confident from the outset the play could be adapted to film and started early in this endeavour. Caris Bizzaca of Screen Australia tells the story:

> "To wind down from performing each night to sold-out audiences, Purcell would come home and work on the screenplay. It got development funding from Screen Australia and Create NSW and the journey progressed from there: the film, which also received Screen Australia production funding, started principal photography in late 2019 and premiered at SXSW Film Festival in early 2021."[40]

[40] Bizzaca, C. (2022) *Podcast - Writer/Director Leah Purcell on her feature film debut,* https://www.screenaustralia.gov.au/sa/screen-news/2022/04-21-podcast-leah-purcell

Oombarra has successfully retained valuable IP in *The Drover's Wife*. It has signed all-media distribution deals with various distributors internationally (e.g. Roadshow in Australia, Cinemien in European markets, Modern Films in the UK and Ireland, and Samuel Goldwyn Films in the US), but these rights should eventually revert to Oombarra Productions after an agreed period. Furthermore, it has retained the valuable rights to produce further IP based on the film, including fiction and non-fiction books, a musical or opera, and TV shows. Indeed, Purcell had her novelisation of *The Drover's Wife* published by Penguin in 2019. As Bain Stewart told us, "If you have a good story, you can do anything." *The Drover's Wife* is an excellent example of the importance and value of IP to Australian production companies.

The Drover's Wife screening at the Classic Cinemas, Elsternwick, Victoria.

5.3. Bondi Rescue

Bondi Rescue is a popular unscripted reality TV show following the experiences of live guards patrolling Sydney's Bondi Beach. The show has so far run over sixteen seasons starting in 2006. It has won five Logie awards for Most Popular Factual Program.

Bondi Rescue is produced by major Australian production company CJZ, formerly Cordell Jigsaw Productions. The show was produced for Network 10, which secured broadcasting

rights for the show in Australia. CJZ was able to retain a substantial proportion of the rights in international licensing of the show, which has done well in overseas markets.

Lifeguard tower at Bondi Beach.

Bondi Rescue is a good example of how IP can be repurposed and generate new revenue for production companies. The success of clips of the show on YouTube and Facebook is a good example of this.

The *Bondi Rescue* YouTube channel has 2.16 million subscribers. Its most popular videos have tens of millions of views–e.g. “Lost Children at Bondi Beach” with 34 million views, “Pervert Gets Arrested! Lifeguards Go Undercover” with 22 million, and “Bondi Lifeguards Resuscitate Korean Tourist Ryan Kim (Dead for 5 minutes!)” with 20 million. This is bringing in significant revenue to CJZ from its share of the associated advertising revenue earned by YouTube. Reportedly, YouTube pays in the order of US$2,000 to 3,000 for every one million views of a video. Also, episodes from seasons 10 to 14 of *Bondi Rescue* can be purchased via YouTube, providing another revenue stream.

Facebook provides another avenue of monetisation and Bondi Rescue appears to be doing well there, too. One video posted in March 2022, “Body Found Off Bondi's Treacherous Rocks”,

has accrued 6 million views so far. It is unknown how much revenue could be generated via Facebook for Bondi Rescue.

Bondi Rescue demonstrates another way IP can be valuable for companies, through spin-offs or reuse of the format, either by the production company itself or by companies overseas which license the format. CJZ produced an eight episode spinoff of the show, *Bondi Rescue Bali* in 2008.

Overall, *Bondi Rescue* is a great example of uniquely Australian IP and the value of retaining it to production companies. CJZ is using the new income from digital sources (e.g. YouTube, Facebook) to replace falling international broadcast licencing income. The digital income streams are increasingly important in filling deficits in production budgets and has allowed the *Bondi Rescue* series to continue production.

6. Conclusions

The key findings include:

- Different types of IP are valuable to different production companies. It depends on the content they produce.
  - For some, it's the right to have some share of future distribution revenues that is important, for others it's rights to produce a musical based on the content or soundtrack recording rights (e.g. for The Sapphires).
  - For documentary makers, it can be the internal reuse of footage in future projects that is important.
  - For animators or producers of childrens' content, it could be the right to license merchandise which can be lucrative.
- A large share of revenues doesn't typically come from rights to non-current projects, but they can keep production companies profitable and financially viable. Examples were given of how royalties can be a large share of operating profit, and can amount to several $100k per year.
- Production companies will trade away IP for a good deal. This can involve either sufficient compensation and/or some retention of creative control (e.g. BBC Studios long-term deal with Ludo for Bluey rights).
- For production companies, the big problem with the streamers' approach to deals and rights acquisition is that the deals undercompensate companies for IP developed in house.
- Even if a production company didn't come up with the original idea, there is still a large amount of creative work in developing the idea for screen.

Appendix A: Copyright protection

Copyright is protected in Australia by the federal Copyright Act 1968. As noted by the Australian Copyright Council:

> "Copyright does **not** protect ideas. It protects the way those ideas are expressed."[41]

Copyright gives its owner several exclusive rights over their creations (Table 2). Anyone else who wishes to use the copyrighted material in ways covered by those exclusive rights generally needs permission to do so. This can be granted by a license to use the material, often for monetary compensation. There is a limited exception to the need to obtain permission to use copyrighted material in the case of fair dealing, to allow people to quote short excerpts from books, for example, for purposes of research or criticism. In addition to research and criticism, the fair dealing exception could also cover the limited use of another's IP for purposes of satire, news reporting, professional advice, and making works accessible for people with disabilities.[42]

Table 2. Exclusive rights granted by copyright

Films, sound recordings & broadcasts	Literary, dramatic, artistic & musical works
Copy the material	Reproduce the work (e.g. photocopying, filming, recording & scanning)
Show films and play recordings in public	Make the work public for the first time
Transmit films and sound recordings to the public using any form of technology	Communicate the work to the public
Rebroadcasting TV & sound broadcasts	Perform the work in public (NA to artistic works)
	Make an adaptation (NA to artistic works)

Source: Australian Copyright Council (2019) An Introduction to Copyright in Australia, INFORMATION SHEET G010v20, p. 5.

[41] Australian Copyright Council (2021) Film & Copyright, FACT SHEET G069v07, p. 7.
[42] Australian Copyright Council (2020) Fair Dealing: What Can I Use Without Permission?, INFORMATION SHEET G079v09, pp. 1-2. The Australian Copyright Council notes: "Fairness is to be judged objectively in relation to the relevant purpose. Factors that may be taken into account to determine whether a use is fair include whether the person using the material is doing so for commercial purposes and whether the copyright owner is out of pocket from the use (e.g. where a person copies the whole of a work that is available for sale). The mere fact that the person using the material is not making a profit does not make it fair."

Copyright protection is free and does not need to be applied for. Since the enactment of the Free Trade Agreement with the United States on 1 January 2005, copyright now lasts for the life of the creator plus 70 years.[43]

Copyright protects a broad range of expressions of ideas, including:

- textual materials–e.g. books, articles, screenplays, song lyrics, reports, etc.;
- computer programs;
- compilations (e.g. anthologies);
- artistic works–e.g. paintings, drawings, cartoons, architectural drawings, etc.
- dramatic works–e.g. dramatic plays and screenplays, choreography, etc.
- cinematographic films–the visual and related sounds themselves, as distinct from the screenplay or music, etc;
- sound recordings–the recording of a work as distinct from any related scripts, musical compositions or lyrics;
- broadcasts–the copyright in the broadcasts themselves by TV and radio broadcasters, which is distinct from copyright that exists for the material they broadcast; and
- published editions–i.e. the typographical arrangements of books or other printed material.[44]

The Copyright Council of Australia notes:

> "The general rule under the Copyright Act is that the first owner of copyright is the creator of the work, or the person responsible for making the sound recording, film, broadcast or published edition."[45]

More explicitly for the screen industry, the Copyright Council of Australia, "The first owner of copyright in a film is usually the producer or the person who paid for it to be made."[46]

Copyright in work done by employees is usually owned by the employer.

Copyright is transferable, and it can be either:

---

[43] Australian Copyright Council (2019) An Introduction to Copyright in Australia, INFORMATION SHEET G010v20, p. 6.
[44] Ibid, p. 2.
[45] Ibid., p. 3.
[46] Copyright Council of Australia (2019), An Introduction to Copyright in Australia, INFORMATION SHEET G010v20, p. 4.

- assigned–i.e. sold; or
- licensed–i.e. someone else can use the copyrighted material. [47]

Hence, it is not necessarily the case that the person who created the work owns the copyright. Copyright could even be held by a corporate entity with shareholders. To illustrate, consider the 2020 report that singer-songwriter Stevie Nicks sold 80% of the rights to her music catalogue for US$ 100 million.[48]

[47] Ibid., p. 5.

[48] Meisenzahl, M. (2020) "Stevie Nicks sold the copyrights to some of her most popular songs in a deal reportedly valued at $100 million", Business Insider, https://www.businessinsider.com/stevie-nicks-sold-catalog-majority-stake-copyrights-2020-12