SCREEN PRODUCERS AUSTRALIA

SUBMISSION TO THE STREAMING SERVICES REPORTING AND INVESTMENT SCHEME DISCUSSION PAPER

APRIL 2022

Netflix, Apple and Stan could be required to boost Australian content

Stars lobby for Netflix to face 20 per cent local content quota

More Australians are using streaming services than watching free-to-air TV, a new survey shows, as industry groups call for a regulatory reset

Netflix to face local content quota under proposed Australian TV reforms

Movie theater owners are frustrated about streaming, but their survival depends on studios

"SVODs should pull their weight"

The Success Of Streaming Has Been Great For Some, But Is There A Better Way?

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Survey backs local quotas on Streaming platforms

How Has the Unstoppable Rise of Streaming Platforms Impacted Film? We Asked the Experts

Netflix, streaming services, destroying the film industry

TV, film producers 'missing out' in power imbalance with streamers

The Australian screen: disrupted and transformed

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Netflix and Disney+ could 'wipe out' local producers in two years

22 April 2022

Screen Producers Australia's submission to the *Streaming Services Reporting and Investment Scheme Discussion Paper*

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

As the peak industry and trade body, we consult with a membership of more than 800 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and members. Our members employ hundreds of producers, thousands of related industry practitioners and drive between $1 billion and $2 billion worth of annual production activity from the independent sector.

SPA's members are drawn from all elements of the Australian production ecosystem, including emerging and established producers, production businesses, services and facilities. Our members vary in size from large internationally owned entities, to partnerships, to sole traders and other corporate entities, and are found in every region, state and territory of Australia.

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

Screen Producers Australia welcomes the opportunity to submit to the *Streaming Services Reporting and Investment Scheme Discussion Paper* (the 'Discussion Paper').

We welcome the progression of the policy debate but wish to express a range of concerns regarding the chosen direction expressed in the Discussion Paper. The opportunity to set an entirely new regulatory framework may not occur again and it is imperative that this results in robust benefits to the Australian public and local industry.

For further information about this submission please contact SPA Policy Consultant (jane.mulligan@screenproducers.org.au).

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1 Executive Summary

- SPA reiterates its support for the swift introduction of a 20% Australian commissioned content expenditure requirement on global technology streaming businesses, with specific protections for critical genres and the implementation of terms of trade safeguards.

- Only the SPA proposal, which is strongly supported by the screen production industry, will deliver sustainable growth in the Australian screen industry and maintain Australia's long-standing public policy objective of delivering Australian stories on Australian screens.

- The Australian public want and expect meaningful levels of Australian content on streaming services and given the generous public support – both direct and indirect – that is provided to these services – we believe that this is not too much to ask.

- SPA believes that the scheme proposed in the Discussion Paper is weak, years-long and is one that creates an uncertain pathway to regulation. It features an untenable level of Ministerial discretion, and could likely result in *less* new Australian content on streaming services.

- Our view is that this is not a framework for much-needed industry growth but at best, may only serve to maintain an inadequate status quo.

- This is despite the clearly recognised need for *more* Australian content on these services, a need which is recognised by the Government itself in the Discussion Paper. There appears therefore to be a strange disconnect between the policy considerations outlined in the paper as a situation requiring regulatory action, and the proposal for weak regulatory action.

- SPA also notes that the advent of a SVOD-specific regulatory framework takes the sector further away from the objectives of "platform neutrality" that was identified in the 2019 ACCC Digital Platforms Inquiry. SPA believes that this objective should remain the ultimate goal for broadcasting policy but recognises that this requires a strong reform commitment and prioritisation from government.

- SPA also notes a further critical consequence from the rise in prominence of streamers in the screen production sector which is the changed dynamics in bargaining power between Australian content producers (most commonly SMEs) and large and powerful global streaming businesses.

- With negotiating power largely in the hands of streaming services, Australian producers and creative contributors are increasingly expected to sign away a full suite of proprietory rights over a longer – sometimes indefinite time period.

- This relationship, known as "terms of trade" and discussed in more detail below, affects the risk/reward proposition for Australian producers. SPA is disappointed that this important issue has not been addressed in the Discussion Paper and views this as a serious oversight that requires swift action from government.

- Perhaps the defining feature of the Scheme proposed is an alarming degree of Ministerial discretion, which brings with it untenable risk of inadequate and inconsistent regulatory action. Under this framework, Australian content becomes a matter for the uncertain preferences of future Ministers, who are subject to intense lobbying efforts of large commercial corporations. Our industry has seen the negative effects of this during the pandemic, without a strong regulatory framework to bind them to important public interest principles.

- In this submission, SPA is not proposing that the flaws in the overall Scheme can be redeemed through modifications to certain individual elements that we identify. However, we take this opportunity to elaborate on these concerns and address the issues raised in them.

- In addition to the above concerns, SPA notes that the policy conversation regarding these issues has been in train for a decade, and that the need for regulatory action has been clear for many years. Further delay in regulation at this late stage is disappointing to the industry, and exacerbated by the weakness of the scheme proposed.

- Turning to some of the specifics of the Scheme, SPA are concerned that the proposed 5% threshold for Tier 1 services will fall far short of what is required to ensure the regulatory scheme meets public policy objectives regarding the availability of Australian content to audiences, and the support of a vibrant and sustainable local production sector.

- We are further concerned that the rate of obligation for a Tier 2 service could in fact be set at less than 5%, and that there is no provision for public consultation when setting a Tier 2 obligation.

- In light of recently released data[1] showing that in the absence of regulatory supports, investment in the critical genres of drama and children's content falls away sharply, we are also extremely concerned that the proposed scheme does not include any specific protections for these genres – or for First Nations content.

- SPA are supportive of the proposed reporting requirements for the national broadcasters, but continue to support more formal expenditure minimum requirements that would more effectively safeguard Australian content on these vital public services.

[1] Impact of Regulatory Gap on Australian Screen Content, Screen Producers Australia, February 2022

- SPA also notes that due to the relaxation of regulation of Australian content requirements on free-to-air services that public broadcasters have been left to make up for this significant decline in children's content. SPA argues that this shortfall should be addressed with increased government funding for public broadcasters to address this shift.

- Whilst SPA sees some merit in applying the definition of Australian content from the Significant Australian Content test, on balance, we feel it is more appropriate to adopt the definition contained in the Australian content standards for commercial free-to-air television, given the regulator's experience and expertise in applying these and the precision in which that definition is applied. Note that SPA's overall preference is for a single definition across all aspects of the industry.

- SPA also opposes the proposed halving of the subscription television Australian drama obligation. The proposed cut will substantially harm subscription television audiences, who will lose access to high quality Australian narrative content. The proposal is without reasonable policy justification.

2 Introduction

The Streaming Services Reporting and Investment Scheme Discussion Paper ('the Discussion Paper') is rich with evidence that Australians want and expect access to their local stories on Subscription Video on Demand (SVOD), and that they want more than is currently available.

Yet, the Streaming Services Reporting and Investment Scheme ('the Scheme') designed to meet this need is weak and uncertain. It fails to provide a pathway to the adequate levels of Australian content that the public expects, that fosters Australian screen culture, and that industry needs to grow.

Regulation of streaming services is well overdue. After years of process, review and inaction, the present moment represents a unique opportunity to finally enact a forward-looking, effective and meaningful vision that will deliver a full range of quality and diversity of local Australian content.

As outlined in the Discussion Paper, SVODs are incredibly successful global technology businesses with rapidly increasing revenues and audiences and which are increasingly replacing more traditional platforms as the predominant place Australians seek screen entertainment.

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

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

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

SPA submit that the provision of Australian content on our screens should not be at the gift of these global businesses, but instead, must a firm, consistent and certain regulatory obligation.

While harmonisation across the entire screen industry to achieve "platform neutrality" remains the ultimate objective, the urgency of regulating SVODs means that further delay now is untenable.

To that end SPA notes that the Scheme entrenches the sector into discrete silos of regulation and moves further away from the recommendations of the 2019 ACCC Digital Platforms Inquiry Report.[2]

Australia has a strong local production sector which is geared up and ready to grow and be more consistently engaged with the streaming platforms to deliver greater levels of the content Australians love.

The depth and economic value of this industry reflects around fifty years of public support, government investment and sector development. Australia provides generous tax offsets and incentives to attract projects to our shores. To date, this has delivered a valuable and cherished cultural expression of Australian identity.

Now, after years of upheaval resulting from the global pandemic, the screen industry needs a sustainable pathway to growth to meet the challenges of changing technology use and to ensure that this sector continues to provide value to the Australian public.

For these reasons, SPA, representing the Australian production industry, is advocating for a minimum 20% investment requirement, which is based on international precedent in comparable markets and which could create an additional 300 hours of Australian content and 10,000 additional jobs.

The defining feature of the Australian content market dynamics that determine levels of local production, is that we share a common language with two of the largest content markets in the world – the UK and the US. This readily-available content substitutability is one of the main reasons that local content requirements exist and continue to be necessary.

Substitutability is a key policy rationale for Australian content obligations. These safeguards benefit both the general public and the producing industry by ensuring that commercial businesses to not simply opt for the least cost option – acquisition of overseas productions – but also take the risk of investing in local, commissioned content.

Beyond the SVOD sector, we note with alarm that there has been a marked reduction in the level of Australian content (in certain genres) on traditional free-to-air tv platforms[3], where by contrast, the Government moved quickly and decisively to deregulate.

It's abundantly clear – the time is right to move just as decisively to set up a new regulatory framework that is future-proofed and will deliver for current and future generations.

SPA is therefore greatly concerned by the Scheme put forward by Government, which sets up a heavily discretionary and uncertain pathway to a possible formal obligation at an unknown rate, at an unknown time. There is also an informal 'trigger' threshold to be set at a rate which could result in *less* new Australian content overall.

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[2] Digital Platforms Inquiry Report, ACCC, 2019

[3] Impact of Regulatory Gap in Australian Screen Content, Screen Producers Australia, February 2022.

The framework to be established under the Scheme places no obligation on future Ministers to act in any particular way, meaning regulatory outcomes are uncertain at best. The challenge in a global industry is that this proposal creates ongoing and significant uncertainty for the Australian industry which when compared to other territories falls short and will likely lead to a talent and investment drain offshore

There are also unclear and potentially very damaging impacts for child audiences, who will still have no guaranteed access to content created especially for them. A situation in which SVODs are able to rely primarily on acquired overseas content for children's viewing would not be acceptable to Australian parents.

Similarly, there is no element of the proposed regulatory framework for screen content that directly incentivises or requires the production of content from First Nations people. SPA believes that is a serious oversight.

Given the lengthy consultation and policy development process to date, and the significant level of industry feedback towards a more progressive outcome, reaching such a disappointing regulatory outcome would be more than just a missed opportunity. The result would be damaging to Australian audiences and the local production sector, in a completely avoidable way.

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

3 The proposed regulatory scheme

SPA wishes to address each component of the proposed regulatory Scheme. However, we are not proposing that the flaws in the overall Scheme could be redeemed through modifications to certain individual elements. SPA continues to support and promote the proposed regulatory solution put forward in its submission to the **Media Reform Green Paper**, which was strongly supported within the production sector as a whole, and which would deliver on the public policy objectives supported in the Discussion Paper.

3.1 Disconnect between intent and impact

The Discussion Paper sets out some clear policy parameters which, when taken cumulatively, point to significant gaps in Australian content on streaming services and a desire amongst the public for greater availability of Australian content on these services.

The Discussion Paper clearly acknowledges that:

- Australians feel that "SVOD services don't have enough Australian content."[4]

[4] Discussion Paper, p 12

- Some streaming services offer “very few” Australian titles to subscribers.[5]
- Much of the Australian content on streaming services is older.[6]
- Existing levels of Australian content invest are “not guaranteed” under the current arrangements (or lack thereof).[7]

It therefore appears incongruous that a proposal has been put forward which could result in *less* new Australian content on streaming platforms (see below). There seems to be a striking disconnect between the policy considerations outlined in the paper as requiring regulatory action, and the likely result of the regulatory action proposed.

A straightforward assessment of the likely impact of the proposal shows that it will fall short of addressing the policy parameters the Government has put forward in the Discussion Paper.

Based on PWC figures, SPA estimates the SVOD industry is deriving $2 billion per year in revenue from the local market.[8] A 5% (soft) requirement would only guarantee $100 million in investment, which is less than the $103.7 million invested in 2020-21, and $122.4 million 2019-20.[9]

This would be an extremely disappointing outcome in terms of audiences’ access to new Australian content (which the Discussion Paper has noted is lacking already) and in terms of supporting a sustainable and dynamic local production sector. There would be no regulatory incentive towards growing the overall Australian content ‘pie’, which is particularly concerning given the declines in certain kinds of Australian content on traditional media platforms in recent years.[10]

It appears that Australians and the Australian industry would be worse off overall under the Government’s proposal.

3.2 Ambiguous outcomes

Far from delivering public policy outcomes in terms of generating guaranteed, meaningful levels of Australian content, the proposal really only offers a discretionary framework for bringing unidentified platforms into a reporting framework, and nothing further as an absolute requirement (see section 3.4 below for a full consideration of discretion in the proposal). We also assume a platform could easily be removed from a Tier 1 designation, making outcomes even less uncertain.

The proposal is easily contrasted to regulatory frameworks for other media platforms in Australia, but is also able to contrasted with systems of SVOD regulation in other countries, such as France, where obligations are clear and certain.

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[5] Discussion Paper, p 13
[6] Discussion Paper, p 14
[7] Discussion Paper, p 14
[8] https://www.pwc.com.au/industry/entertainment-and-media-trends-analysis/outlook/subscription-television.html
[9] https://www.acma.gov.au/spending-subscription-video-demand-providers-2020-21
[10] https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/b122eb64-f2b0-473c-8784-335e67f26a99/Regulatory%20Gap%20Report%20(2).pdf

The proposal can further be contrasted with countries which have a more flexible system, such as Canada. Whilst there is an element of discretionary decision-making by the Canadian Radio and Telecommunications Commission (CRTC), this is in fact a structured system of decision-making which binds the CRTC to ensuring meaningful outcomes.

We reject any suggestion that the issue of SVOD regulation is a novel one, or that the policy debate is only still emerging, leading to a need for a slowed pace of intervention. As the table below clearly sets out, this issue has been dealt with multiple times through multiple reviews over the last 10 years. We are now overdue for decisive and clear minimum safeguards.

YEAR	MILESTONE
2011	Convergence Review announced
2012	May - Final Convergence Review Report released, recommends platform-neutral Aus content requirement and further consideration of terms of trade issues
2016	May – EU votes for 20% local content requirements on SVODs
2017	July – House of Reps Inquiry into the Australian film and television industry commences
	Australian and Children's Screen Content Review starts, considering how Australian content can be available regardless of platform
	December – House of Reps report released, recommends Aus content investment rules for SVODs
2018	April – EU votes for 30% local content rules for SVODs
2019	March – Senate Report on Australian content on broadcast and streaming services released, recommends SVOD Aus content requirement
2020	January – Canada releases 'Yale Report', recommends platform-neutral Canadian content rules
	July – Australian Stories on our Screens Options Paper released
	October – House of Reps Inquiry commences, considering a national cultural plan for Australia
	November – France leads implementation of EU Directive, will require SVODs to invest 20-25% into French content
	November – Canada introduces a Bill to regulate SVODs for Canadian content
	December – Senate motion, calls on Government to regulate Aus content on SVODs
2021	May – Media Reform Green Paper, considers proposals for Australian content regulation on SVODs
	June – Senate Committee report, calls for expedited SVOD Aus content rules
	August – polling shows two-thirds of Australians support a 20% requirement on SVODs
	August – voluntary SVOD investment reporting highlights need for regulation

	August – Italy implements EU decree, SVOD investment requirements of up to 25%
	October – House of Reps report on sculpting a national cultural plan recommends 20% investment requirement on SVODs in a bipartisan report
2022	Canadian Government revives Bill to regulate Canadian content on SVODs

The slow rate of progress on these issues is of particular concern when it is considered how rapidly Government intervention has progressed in other parts of the broader media sector. For example, with respect to the News Media Bargaining Code, the initial direction to the ACCC to conduct an inquiry occurred in December 2017. Just three years later, a Bill was before Parliament for a bargaining code, and the legislation was passed shortly thereafter in February 2021.

It also appears that rapid progress is being made in the consideration of advocacy from free-to-air broadcasters regarding the prominence of their apps and services on connected television interfaces. Free TV Australia included proposals in this regard in their May 2021 submission to the Media Reform Green Paper, and we understand work is well underway within Government regarding a policy response to this issue.

3.3 The rate of threshold/obligation

SPA does not support the proposed 5% trigger threshold for Tier 1 SVOD services, and does not support the discretion attached to the determination of the formal regulatory obligations under Tier 2 designations.

A 5% threshold for Tier 1 services would fall far short of what is required to ensure the regulatory scheme meets public policy objectives regarding the availability of Australian content to audiences, and the support of a vibrant and sustainable local production sector.

It simply represents a very modest return on the almost $2 billion in revenue the global streaming technology businesses enjoy from operating in Australia.[11] Businesses such as Netflix derive many benefits from their Australian operations, including generous incentives and funding support yet apparently pay low levels of corprorate tax.[12] It is also an incredibly small proportion (less than 0.3%) of the $37 billion these streaming platforms reportedly have to spend on content worldwide.[13]

A low content requirement here could see Australia further miss out in global investment strategies as platforms invest in territories with more competitive regulatory settings.

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[11] https://www.pwc.com.au/industry/entertainment-and-media-trends-analysis/outlook/subscription-television.html

[12] Netflix reveals Australian tax bill for 2020 (afr.com), Australian Financial Review, 3 May 2021,

[13] https://www.statista.com/statistics/964789/netflix-content-spend-worldwide/
https://deadline.com/2020/12/disney-will-be-spending-14-16-billion-on-all-streaming-content-by-2024-as-it-ramps-up-production-1234654652/
https://observer.com/2021/05/amazon-apple-netflix-disney-viacomcbs-nbcu-content-budgets/

To that end, SPA notes the development in Europe of the Audiovisual Media Services Directive which requires streamers to offer a 30% quota of European content to subscribers and allows EU countries to introduce nationally tailored legislation to make streamers directly reinvest a percentage of their revenues in each European country where they operate.[14]

Australia needs to address market failures by ensuring minimum investment levels are introduced across a broad range of Australian genres to ensure that our screen industry remains viable and sustainable.

SPA, along with the Australian production industry have called for a minimum 20% investment requirement, which is based on international precedent in comparable markets and which could create an additional 300 hours of Australian content and 10,000 additional jobs.

We note that due to reductions in regulation and investment/output on commercial free-to-air platforms, SPA's proposal for 20% is not all upside given this deficit that has been created by Government deregulatory action.[15] This applies similarly to the impact of the proposed 5% threshold/trigger, which may not even offset the amount of investment lost from deregulation of traditional platforms.

We refer to section 4.2 of our submission to the Media Reform Green Paper, which sets out the basis and rationale for the proposed 20% rate of obligation. SPA argued that the rate of obligation should be determined with reference to the following policy considerations:

- Access for Australians to a sizeable and diverse range of quality Australian content on the services they are using.
- Addressing the regulatory gap created by deregulation of commercial free-to-air television.
- Ensuring a growing and sustainable independent production sector capable of delivering quality content to audiences.
- Trends in international regulatory approaches.

We do not believe that the proposed 5% trigger threshold is consistent with any of these policy considerations and refer to our Green Paper submission for an explanation of the rationale for a 20% requirement.

Shortcomings in international comparisons

In the explanation in the Discussion Paper regarding the 5% threshold, we are concerned that inappropriate comparisons have been made to jurisdictions which do not share the same market and industry conditions as exist in Australia.

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[14] Audiovisual Media Services Directive Audiovisual and Media Services | Shaping Europe's digital future (europa.eu)

[15] Modelling undertaken by SPA suggests the deregulation of commercial free-to-air television could amount to a loss of $97 million a year in investment.

For example, the paper references the Czech Republic, Slovenia, Denmark, Belgium, Croatia and Germany as benchmarks where a 5% investment obligation (or levy) has been imposed.[16]

The defining feature of the Australian content market, when it comes to considering market dynamics that determine levels of local production, is the fact we share a language with two of the largest content markets in the world – the UK and the US.

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

This factor does not feature in any of the comparator jurisdictions cited by the Discussion Paper as having minimal rates of obligation.

We would welcome further information as to whether the Government has investigated the size and health of the local production sectors in those jurisdictions. One decision-making factor which may be influential in setting low rates of obligation in those countries may be the small size of the local production sector, which may not yet support a higher rate of obligation.

This is not a factor in the Australian setting, where many years of policy settings have supported the development of a production sector with significant capacity and IP generation, able to support a higher rate of obligation. We believe these conditions can also be seen in the main comparator countries SPA references – France and Canada.

It would also be worthwhile considering whether these jurisdictions have the same history of bipartisan support for regulatory safeguards ensuring minimum levels of local content on traditional media sources. This is a feature of the Australian setting, and can also be seen in France and Canada.

Flexibility in the rate of formal obligation

We note the Discussion Paper emphasises the importance of flexibility in terms of the amount of obligation to be applied to Tier 2 SVOD services. Whilst we agree there should be periodic review of regulatory settings to ensure they are appropriate to market conditions, we believe the amount of flexibility proposed would create uncertainty for industry and audiences. This is less than ideal in an industry sector that already assumes a high level of risk in investment decisions.

A clear and definitive statement regarding the required rate of investment obligation would have benefits for SVODs, the production sector and audiences, who would all then know what to expect from the regulatory settings. For businesses, this permits forward planning and is a crucial element in business confidence. We feel that in the proposals, the balance has been weighted far too far in favour of ‘flexibility’.

[16] Discussion Paper, p 24

This is at least the case in relation to the rate of obligation under a Tier 2 designation. Whilst we are not in favour of the degree of ‘flexibility’ in the scheme, we note that there is an inconsistency in this regard in the design of the scheme. Whilst there is discretion regarding the level of obligation under a Tier 2 designation, there is zero flexibility proposed regarding the threshold trigger for Tier 1 SVODs. We query this inconsistency but note our preference is in fact for immediate commencement of a 20% formal regulatory obligation.

We also note that regulatory settings in overseas jurisdictions are signalled to evolve (including in the ones cited by the Discussion Paper) and that under the proposals, the only way to respond (in relation to the Tier 1 trigger/threshold) would be via primary legislation, which suggests an uneven application of the intended ‘flexibility’.

To be clear, SPA’s position is in support of the immediate introduction of a formal regulatory obligation set at 20% of local revenue for all streaming services which meet size and scale thresholds. However, as a comment on the proposals put forward by Government, the inconsistent application of flexibility is notable.

3.4 Discretion and uncertainty

The amount of Ministerial discretion in the proposed scheme is cause for concern.

Discretion appears to be a feature in almost every significant element of the scheme, meaning there is no certainty of regulatory outcomes for audiences, streaming companies or the local production sector. This lack of clear outcomes is in contrast to the clear public policy deficits in Australian content on streaming services identified by the Discussion Paper itself (refer to section 3.2 above).

For example, it is at the Minister’s discretion as to whether to designate SVODs under the reporting/monitoring Tier 1 category. It also appears that the criteria on which this decision will be made will be at the Minister’s discretion, with the Discussion Paper stating that “the Minister would determine the eligibility criteria for what constitutes a large service.”[17] So even at the outset of the scheme, it is not possible to map which services may be included.

The degree to which non-compliance with the conditions of Tier 1 designation will result in a regulatory obligation to invest in Australian content also appears to be entirely at the discretion of the Minister, with a further discretionary power to set the terms of that regulatory obligation.

As phrased in the Discussion Paper, the failure to report or invest at least 5% of revenues in Australian content would not automatically trigger a hard regulatory obligation. The Discussion Paper stated the Minister would be enabled to “*consider* designating the service under Tier 2 of the scheme.”[18] It appears to be open to the Minister to take no further action in response to such a scenario.

[17] Discussion Paper, p 20
[18] Discussion Paper, p 17

In the event the Minister does elect to designate a service under Tier 2, the amount of formal investment obligation would be "determined in the designation instrument".[19] There is no mention of any binding considerations that the Minister must comply with which would guarantee that even a 5% level of investment would be applied. Ie, it appears to be open to the Minister to impose a level less than the proposed 5% trigger for Tier 2 designation.

Indeed, we are concerned regarding the proposal that the Minister be enabled to consider "The contribution of the Tier 1 service to the production and availability of Australian content for Australian audiences, considering as a whole the contribution of the service together with any related bodies corporate."[20] This appears to open up the scope of the regulatory scheme beyond measuring direct investment in new commissions which meet the definition of Australian content.

This element of the scheme appears to reflect proposals from some streaming companies that their investment into production facilities, or their investment in acquired content, should be counted when considering an Australian content obligation. It may also create the opportunity for the Australian content spend of a related corporate entity to be considered (specifically, a co-owned but separately regulated media entity).

Presumably, this proposed consideration could result in a lesser percentage investment obligation based on non-content or non-commissioning contributions. This would significantly dilute the public policy benefits of the proposed scheme, leading to less new Australian content for audiences, and less investment into the local production sector.

As stated previously by SPA, new Australian commissions are where the public policy upside is in terms of audiences and the local industry. The ability of the Minister to take non-content or non-commissioning investments into account when determining a Tier 2 designation detracts from the otherwise sound proposal in the Discussion Paper which would see only new Australian commissions count towards the 5% trigger calculation.

When combined with the extended timeframes over which the designation and regulation processes are slated to play out, this drawn out and heavily discretionary process falls well short of providing the Australian people with guaranteed access to Australian content, and delivers damaging uncertainty to the local production sector.

3.5 Timeframes and delay

The proposed timeframes set out in the Discussion Paper would mean that formal regulatory obligations may not come into effect until as late as mid-2026. This is of critical concern, given that the policy considerations justifying regulatory intervention are apparent now (as recognised by the Discussion Paper – see section 3.4 above of this submission).

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[19] Discussion Paper, p 17

[20] Discussion Paper, p 20

The Government has already started a transition of regulatory emphasis away from linear broadcast services and it is vital that it acts urgently to finish this task by implementing forward-looking and progressive requirements for the now dominant streaming platforms. The proposal appears to fall far short of achieving this.

Based on the information in the Discussion Paper,[21] SPA has mapped the following timeframes (erring towards optimistic interpretations where firm timings are not known).

STEP	DESCRIPTION	TIMEFRAME
Legislation	Legislation to enact the scheme passes Parliament	Optimistically – end 2022
Tier 1 designation	Minister designates SVODs into Tier 1	1Q2023
ACMA develops reporting framework	ACMA works develops reporting framework	2Q2023
1st reporting cycle	1st reporting cycle commences (12 months)	3Q2023
End of 1st reporting cycle	First 12 month reporting cycle for Tier 1 completed	3Q2024
ACMA processes and publishes data	ACMA typically requires some time to process and publish data	3Q2024
Minister considers Tier 2 designation	This is the earliest point at which Minister considers whether a Tier 2 designation should be made, and at what level.	4Q2024
Tier 2 designation commences (early estimate)	Designation would commence from 1 July of the financial year following the making of a Tier 2 designation instrument, provided there was at least 6 months between the making of the instrument and commencement date.	1 July 2025
Tier 2 designation commences (late estimate)	See above – if Minister makes a Tier 2 designation less than 6 months out from 1 July, the Tier 2 designation would not start until 1 July in the following financial year.	1 July 2026

The delay and uncertainty in the timing of regulatory obligations is concerning. The Government acted with speed and certainty to repeal existing Australian content obligations on commercial free-to-air television, an act which gave urgency to the task of reforming regulation to protect audiences' access to Australian content on new platforms and providing investment and certainty to the local production sector.

[21] Discussion Paper, p 17, p 19

However, when faced with the task of transitioning the regulatory framework to new streaming services, the Government has put forward a highly contingent and drawn out framework that culminates in an uncertain and likely inadequate level of safeguard up to 4 years from now.

The case has been made for immediate introduction of concrete and meaningful Australian content safeguards. The proposals in the Discussion Paper clearly miss the mark in this regard.

3.6 Transparency in reporting

It is not clear, but it appears from the Discussion Paper that the reporting proposed for Tier 1 services is not guaranteed to be made public. References in the Discussion Paper are to SVOD platforms reporting to the ACMA, and there is no specific mention of whether the reporting will be published.

It is imperative that the data collected under any reporting scheme is made as transparent and public as possible. At present, the data collected on a voluntary basis is only partially published and this hinders accountability and restricts the ability of stakeholders to assess key trends in investment and market participation. For example, under the voluntary data, only an aggregated figure across all platforms is reported, and there is no way to discern the varying contributions each platform makes. We are also unable to see the breakdown of spend across genres, making it difficult to assess how investment is tracking in at-risk genres such as drama and children's content.

SPA submits that any reporting scheme should collect and make public the following information at a minimum:

- Spend on new Australian content commissioned by the platforms
- Spend on acquired Australian content
- Spend on new Australian children's content
- Spend on content from First Nations people
- Spend on new Australian drama
- Spend on new Australian documentary
- Spend on new Australian feature film
- Cost per hour of commissions
- Total budgets per program
- Program duration
- Production companies engaged, including company location
- Production location
- Revenue per platform

There is a need for transparency in any proposed scheme to permit ongoing assessment of its efficacy and efficiency.

3.7 Opportunities for consultation

We note the indication from Government that Ministerial designations under the scheme would be legislative instruments, and therefore subject to Parliamentary disallowance provisions.[22]

It would be preferable if there were requirements for public consultation in relation to proposed designations under either tier of the proposed scheme. Parliamentary scrutiny is a valuable and important element, however given the impact on the public and industry, a short period of public consultation would improve the transparency and accountability of these critical decisions. For example, industry may have valuable information regarding a streaming platforms engagement in the local market that would be relevant to designation decisions. This could reflect the processes in Canada, where public consultation is a feature of the process of determining Canadian content obligations.

3.8 Definition of Australian content

As first noted in SPA's submission to the Media Reform Green Paper, we are supportive of as much consistency as possible between existing Australian content tests, and the measures to be adopted under the new regulatory scheme.

As regards the two key tests currently in use (that in the Broadcasting Services (Australian Content and Children's Television) Standards 2020, and the Significant Australian Content Test), we can see merit in both definitions and both offer familiarity and consistency for industry if chosen.

On balance however, if the ACMA is to be the chosen regulator for this scheme, it is preferable to adopt the definition in the Australian and Children's Television standard, given the ACMA has experience and expertise in applying this definition. Conversely, the ACMA does not have experience or expertise in applying the Significant Australian Content test, and indeed may apply it differently to Screen Australia, creating uncertainty and confusion for industry participants.

4 Critical issues have not been addressed

4.1 At-risk genres

SPA holds particular concerns regarding the decision not to include sub-requirements for children's, drama and documentary as part of the proposals. The opportunity to create a regulatory requirement for content from First Nations people has also been ignored.

There have been no transparent data releases which demonstrate adequate voluntary investment in these genres from the streaming platforms. Data on genre-based spend is not released as part of the ACMA publication of voluntary reporting.

[22] Reference evidence from Mr James Penprase during Senate Environment and Communications Estimates 15 February 2022.

The data we do have pertains to commercial free-to-air television and this data plainly demonstrates the vulnerability of these genres, drama and children's content in particular, to an absence of regulatory supports.

The recently released data shows sharp declines in Australian drama and children's content (in terms of expenditure, hours and titles) following the relaxation of commercial television new Australian content obligations (and in particular, the removal of Australian children's content requirements). This deregulation started to take effect from 1 January 2020, following a decision from Government to suspend regulatory safeguards for that year due to COVID-19 interruptions, with permanent reductions to the regulation implemented from 1 January 2021.

Data published in the 2021 Screen Australia Drama Report shows that investment by commercial free-to-air television in Australian drama was half the amount in the last full year of the outgoing regulatory framework ($107m in 2018/19, down to $54 million in 2020/21).[23]

The amount of Australian drama made for commercial free-to-air television also sharply declined as a result of deregulation, down from 434 hours in the last full year of the previous regulatory framework, to 282 hours in 2020/21. The number of programs was down also from 25 in 2018/19 to 11 in 2020/21.[24]

The impact on children's content is particularly stark. Under the new regulatory framework for commercial free-to-air television, there are no minimum requirements for children's content. Screen Australia's data shows that whilst spend was steady on last year ($48m compared to $51m), the number of titles halved (7 down from 14) and the number of hours more than halved 39 down from 87). Animated titles, typically commissioned by commercial free-to-air broadcasters, were down 75%, hours by 77%, budgets by 66% and spend by 52%.[25]

The data makes plain how vulnerable Australian children's content is in the absence of regulatory supports. This is backed up by the recent release of data relating to Australian content spend by streaming platforms, which reported declines in Australian children's drama and non-drama, compared to the previous year (without specifying figures).[26]

It is now abundantly clear that Australian children's content needs regulatory supports, without which, Australian children will miss out on access to content that is specifically designed to meet their developmental, educational and cultural needs. The availability of this content creates a safe space for children within a crowded and uncertain entertainment landscape.

SPA has also identified the need for any new regulatory framework for screen content to directly incentivise or require the production of content from First Nations people.

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[23] Screen Australia Drama Report 2021, p 28
[24] Screen Australia Drama Report 2021, p 28
[25] Screen Australia Drama Report 2021, p 20
[26] https://www.acma.gov.au/spending-subscription-video-demand-providers-2020-21

This form of content faces particular financing and marketplace challenges yet has a resonating cultural importance. In our view, it is a missed opportunity to overlook supports for this genre through a requirement or incentive for streaming platforms to work with Indigenous-led businesses on projects with a genuine Indigenous voice.

The absence of these genre safeguards in the proposals is an area of concern that urgently requires rectification.

4.2 Terms of Trade

SPA is concerned that the proposals released do not include any measures which address the significant concerns raised by industry regarding negotiating conditions between producers and platforms.

In its submission to the Media Reform Green Paper, SPA detailed how one of the foundations to the sustainability of independent screen businesses is their ability to secure fair and equitable terms during deal-making with commissioning platforms. The submission explained that at present, there is a failure of the market to provide fair and equitable terms in deal making, due to the oligopsonic market structure, in which power resides with the small number of buyers in the market (commissioning platforms), to the detriment of the large number of sellers (independent producers).

Given the importance of this issue to the economic sustainability and vitality of the independent production sector, and the role that sustainability plays in underpinning the creation of high quality, diverse, relevant, and compelling Australian content, the absence of any consideration of this issue is of substantial concern. A weak Australian content regulatory framework will entrench this imbalance.

Recent developments

Since its Media Reform Green Paper submission, SPA has publicly released further evidence and explanation of the criticality of this issue.

In December 2021, SPA released the results of a research survey which shows Australia's independent screen producers are facing a range of complex bargaining challenges in doing business with commissioning platforms.[27]

The survey asked producers who have recently had a commission with the ABC, SBS, commercial free-to-air television broadcasters, subscription television broadcasters and their providers, or streaming platforms, a range of questions relating to the terms on which they have done business over the last three years.

The responses provide an insight into the ways in which producers, particularly small to medium enterprises, can feel compelled to compromise on key aspects of production deals in order to get a commission over the line or maintain a working relationship with commissioning platforms.

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[27] https://www.screenproducers.org.au/news/spa-survey-reveals-industry-conditions-unfavourable-to-smes

The data reveals:

- In **41% of reported commissions**, producers experienced challenges in ensuring the appropriate budget was offered to meet the quality and volume expectations of commissioner. This has knock on effects for risks to safety and ongoing working relationships and is likely to be a reflection of funding challenges within the sector.
- In **26% of reported commissions**, producers reported being pressured or encouraged to start production without an official greenlight, a situation which creates undue risk for a production and impacts smaller businesses in particular.
- In **22% of reported commissions**, producers are facing difficulties with the way drawdowns and cashflows are structured, which can create serious difficulties with liquidity, particularly for smaller producers who may not have the resources to absorb cashflow delays/shortfalls in the middle of a production.
- **30% of respondents** reported feeling pressured to agree to non-beneficial contract variations following the commencement of a production. This experience was recognised as occurring with half of all the platforms include in the survey. This is highly suggestive of an unequal bargaining relationship and unfairly leaves producers worse off.

A copy of the full results of the survey are supplied by way of a confidential attachment to this submission.

Whilst these results suggest producers often feel pressured to accept unfavourable terms, further results suggest a lack of confidence that good work or good will from producers will in fact lead to future opportunities with the commissioning platform. Reported by almost half of the respondents, this lack of confidence in future opportunity is sub optimal for small business operators and stifles the kind of entrepreneurial behaviour that is a pre-requisite for small business growth.

Also in December, SPA released a report commissioned from Lateral Economics containing discussion, analysis and recommendations relating to the 'terms of trade' for bargaining between producers and commissioners.[28] The focus of the report is on the relationships between local SME businesses, who employ and invest locally, and global digital giants, who are increasingly taking economic value off shore.

The focus of the report is on these relationships, the serious implications of the unequal bargaining dynamic for the economics and sustainability of the Australian production sector, and the compelling need for Government intervention to correct damaging imbalances.

Key findings of the report include:

- There is a high degree of concentration amongst commissioning entities.
- Buyers have greater bargaining power than production companies.
- Buyers are hence able to secure rights which would have previously remained with, or reverted to, producers.
- These changes are denying Australian production companies streams of future earnings and are sending earnings overseas.

[28] https://www.screenproducers.org.au/news/landmark-report-released

- Australia is lagging behind other countries (eg, UK, France) in addressing these imbalances.
- The regulated UK terms of trade offer a promising policy model for Australia, and could be administered here by the ACCC.
- Regulated terms of trade should be accompanied by local content requirements for streaming companies.

The report is based on extensive interviews and field work, with Lateral Economics engaging broadly across the sector and internationally to inquire into and measure the real world bargaining conditions and impacts on local businesses.

The recommendations follow on from the precedent set by the Government in establishing the News Media Bargaining Code, which was essentially an intervention into unequal bargaining relationships between local content creators and global platforms.

A copy of the report is attached to this submission.

SPA submits there is now sufficient evidence before the Government to justify a policy intervention which addresses the underlying issues outlined above and which are critical to Australia's continuing ability to create high quality, diverse, relevant, and compelling Australian content.

4.3 Other outstanding matters

We would like to note a number of other key issues which were raised during the Green Paper consultation but not formally responded to in the Discussion Paper.

Firstly, we assume the proposed Create Australian Screen Trust will not proceed as proposed in the Green Paper. Whilst not specifically addressed in the Discussion Paper or the associated Media Policy Statement, we assume that, given the Trust was linked to spectrum auction processes/timeframes which are no longer proposed, the Trust will not be pursued. SPA would like to reiterate its support for the Trust, and submits that Government consider whether it could exist in a modified form.

SPA's submission to the Media Reform Green Paper also raised the issue of minimum safeguards to incentivise indigenous participation and content creation, and minimum requirements for streaming services to work with the independent sector. These are important issues, however they have not been addressed in the Discussion Paper. We would welcome further engagement from the Government on these central issues.

We also note ongoing references in policy debates to ensuring a level regulatory playing field and note that the issue of broadcaster video on demand (BVOD) services has not been addressed in the Discussion Paper. Indeed, if this scheme is implemented, there will still be separate and distinct regulatory systems for commercial free-to-air television, public broadcasters, subscription television, SVOD services (and potentially distinct categories of regulation for different SVOD companies within the proposed scheme) and BVOD services (no regulation). This inconsistency has long been noted as a public policy problem and the industry has in the past advocated for a technology-neutral approach to regulation.[29]

5 Welcome developments

There are several components of the proposals which are welcome progressions from the policy thinking first outlined in the Media Reform Green Paper.

In particular, SPA notes the proposal that only new Australian commissions are to be included when assessing whether Tier 1 SVODs are investing in Australian content. This is a progression from earlier proposals which would have captured acquisitions and re-licensing. New Australian content is where the public policy upside is for both audiences and industry and this is a welcome development.

Whilst not specifically mentioned in the Discussion Paper, there appears to have been a change in thinking regarding earlier proposals to exclude from the regulatory scheme any streaming platforms which had ownership links with licensed broadcasters. We strongly support all streaming services (that meet size and scale thresholds), regardless of ownership structure, being required to contribute to Australian content.

As noted in SPA's submission to the Media Reform Green Paper, Australians deserve to see their stories on the screens they are using, regardless of the corporate structures of the services they subscribe to. However, any upside here would be negated should the Minister exercise his ample discretion and exclude broadcaster-linked businesses from the scheme.[30]

We are also encouraged that there is an element of the scheme that recognises that discoverability of Australian content is an important part of maximising the public policy benefit of investment. We note that Tier 1 services will be required to report on the extent to which they are making Australian content promoted to Australian audiences. Whilst this will provide useful information, to be clear, SPA's preference remains that there be (as part of formal expenditure requirements for all SVODs), clear and enforceable transmission and promotion obligations.

We note promotion of local content is a feature in overseas jurisdictions, including in the EU, where under the Audio-Visual Media Services Direction (AVMSD), VOD providers are required to ensure prominence of European works included in their catalogue.[31] This may include a dedicated section on the homepage, the ability to conduct a specific search, promoting a certain amount of European works within the catalogue (using banners or similar tools) and the use of local content in marketing activities.

[29] https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/e1a32a48-4342-4b0d-aacc-e356ed16b9e1/20200702%20-%20SPA%20Options%20Paper%20submission%20-%20v%206.pdf
[30] We note the Minister's comments in this article, whereby broadcaster-linked businesses were not mentioned when discussing candidate businesses for Tier 1 - https://www.mediaweek.com.au/morning-report-archive/mediaweek-morning-report-february-14-2022
[31] See Article 13

We note free-to-air broadcasters are advocating for regulatory intervention to ensure prominence of their BVOD app on smart TV interfaces. It would be appropriate that any regulatory response to this issue should extend promotion and discoverability requirements for Australian content to broadcasters' on-demand apps.

If free-to-air broadcasters are provided with regulatory protection of their services, it is appropriate that there be corresponding obligations in relation to the public service content on those services. This would also be a step towards improving regulatory parity across BVOD and SVOD services.

6 Subscription TV proposal

SPA also wishes to address an element of the Government's Media Policy Statement, released at the same time as the Discussion Paper.

In the Statement, the Government reiterates its intention to halve the rate of drama expenditure required of subscription television broadcasters from 10% of program expenditure, down to 5%. This is justified on the basis of putting "the subscription broadcasting sector on a more equal footing with their competitors in the online streaming sector."[32]

SPA rejects this rationale, primarily on the basis that we do not agree that 5% is an appropriate rate of obligation for streaming services, and therefore should not be used as a benchmark for regulating an entirely separate platform.

We also reiterate concerns we have expressed elsewhere that comparisons between expenditure requirements which have different bases are misleading and invalid. The subscription television expenditure requirement is set as a percentage of program expenditure. The conversation regarding streaming platforms is centred around expenditure requirements as a percentage of revenue.

For example, total spending on new Australian drama by subscription television ranges from between $51.95 million in 2016-17 to $8.75 million in 2020-21.[33] Foxtel revenues in 2021 were $2 billion.[34] If a true harmonisation between subscription television and the proposed SVOD threshold/trigger were undertaken, and Foxtel was required to spend 5% of revenue on new Australian drama, the expected output would be $100 million per year.

The rationale put forward in support of the proposed cut are not appropriate justifications for removing vital regulatory supports for an at-risk genre. The change will have a contractionary impact on drama production, investment and employment. Any assurances from subscription broadcasters which purport to claim that deregulation will not lead to a reduction in investment should be viewed with cynicism, given the results of recent reporting from Screen Australia. That reporting shows that

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[32] Media Policy Statement, p 26

[33] https://www.acma.gov.au/spending-and-targets-2

[34] https://www.afr.com/companies/media-and-marketing/foxtel-s-kayo-and-binge-drive-growth-as-news-corp-posts-profit-20210806-p58gcz

in 2020-21, when the drama expenditure obligation was suspended by the ACMA, there was no investment of any kind in drama by subscription television.[35]

We also note that the New Eligible Drama Expenditure (NEDE) scheme as it currently stands has an inbuilt flexibility and ability to adapt to changing market conditions. There is an ability under the scheme to flexibly run shortfalls or bring excess expenditure forward from previous years. Further, being a percentage requirement, the obligation naturally scales up and down with changing business conditions.

The scheme has generated such notable and award-winning titles as *Top of the Lake*, *Hacksaw Ridge*, *Lion, Love My Way, Wentworth, Devil's Playground, Deadline Gallipoli, Fight Season, Mr Inbetween, Picnic at Hanging Rock, Secret City* and *Tangle*. Each year, the obligation results in approximately $25-30 million in investment in Australian drama across Foxtel owned and operated channels (eg, Binge, Box Sets, Fox 8, Fox Classics, Foxtel Movies, Showcase), to independent channels (eg, BBC First, Boomerang, CBeebies, Disney Channel, Disney Junior, Disney XD, FX, Nickelodeon, Nick Jr, Turner Classic Movies, UKTV and Universal). This range of channel involvement results in a diversity of commissioning.

SPA is concerned that the proposed cut to the NEDE rate of obligation will substantially harm subscription television audiences, who will lose access to high quality Australian narrative content.

The ongoing appropriateness of the subscription television NEDE scheme was also not given detailed consideration as part of the Green Paper process and we submit that a dedicated, thorough review should be undertaken. This review should consider whether the scheme should also extend into other genres, such as children's content or documentary. The NEDE scheme has always been a relatively light touch regulation with 10% being a comparatively modest rate of obligation.

7 National broadcasters

SPA welcomes the proposals in the Discussion Paper to formalise more rigourous reporting and accountability measures regarding the investment by national broadcasters in local Australian content. SPA would appreciate and expect to be involved in the process of advancing these proposals and identifying the type of reporting that is being sought from the National Broadcasters.

There is, however, scope to consider further measures which would more directly support investment in the local independent production sector. In our submission to the Media Reform Green Paper, we signalled our support for minimum requirements for the national broadcasters. One possible model could be to require the national broadcasters to spend an agreed percentage of their government-sourced revenue into commissioning Australian content from the independent production sector.

[35] 2021 Screen Australia Drama Report, p 28

This is an effective means of safeguarding levels of Australian content on the national broadcasters, whilst still being flexible and responsive to changing budgetary considerations. Of course, any such requirement must be accompanied by sufficient and sustainable levels of national broadcaster funding.

8. Appendices

Appendix A: Taking Australian stories and skills to the world in the age of global streaming - A Lateral Economics discussion paper commissioned by Screen Producers Australia, 7 October 2021

Appendix B: Impact of Regulatory Gap on Australian Screen Content, Screen Producers Australia, February 2022

Appendix A

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

A Lateral Economics discussion paper commissioned by Screen Producers Australia

7 October 2021

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

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

[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.

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 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.

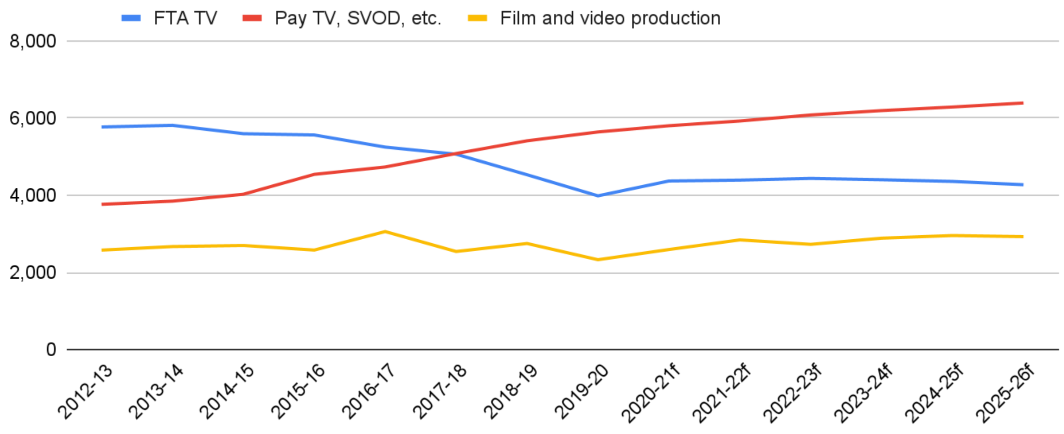
The pandemic has accelerated the shift to streaming; and the 2020 cuts to local content quota have placed further pressure on the production sector. Offsetting this, in part, is that demand from streaming services for some content has increased, creating export opportunities for Australian producers 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 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

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

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



Source: IBISWorld

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 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:

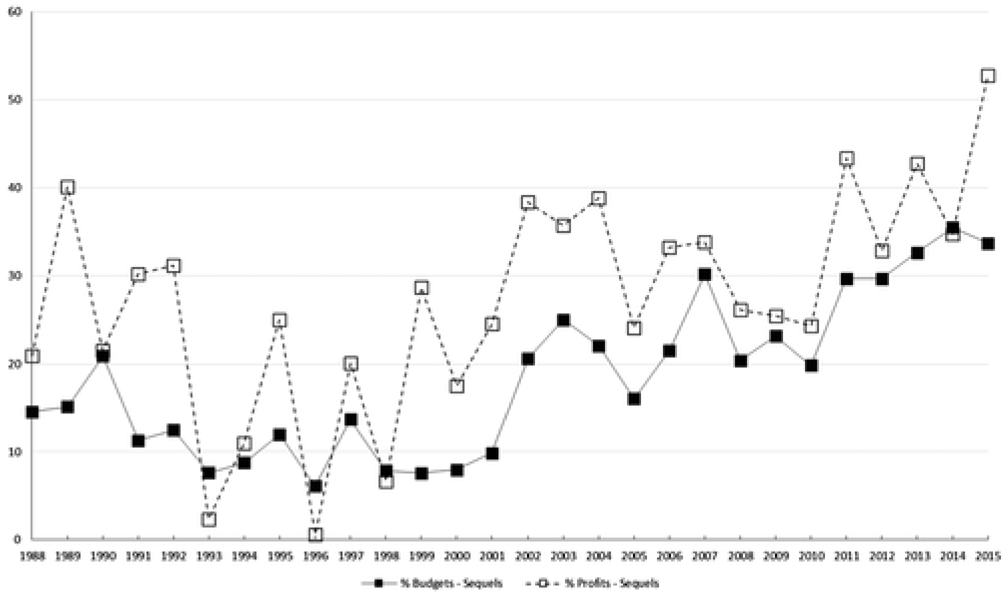
- the length of time over which the funders acquire the content over some period deemed necessary to generate a satisfactory reward for their investment in funding the production
- the terms on which they have access to that content (what royalties, fees, or other funds might be paid to producers and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

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[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.

only so much as is necessary for a producer to fund the production. It will pay no more 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 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]

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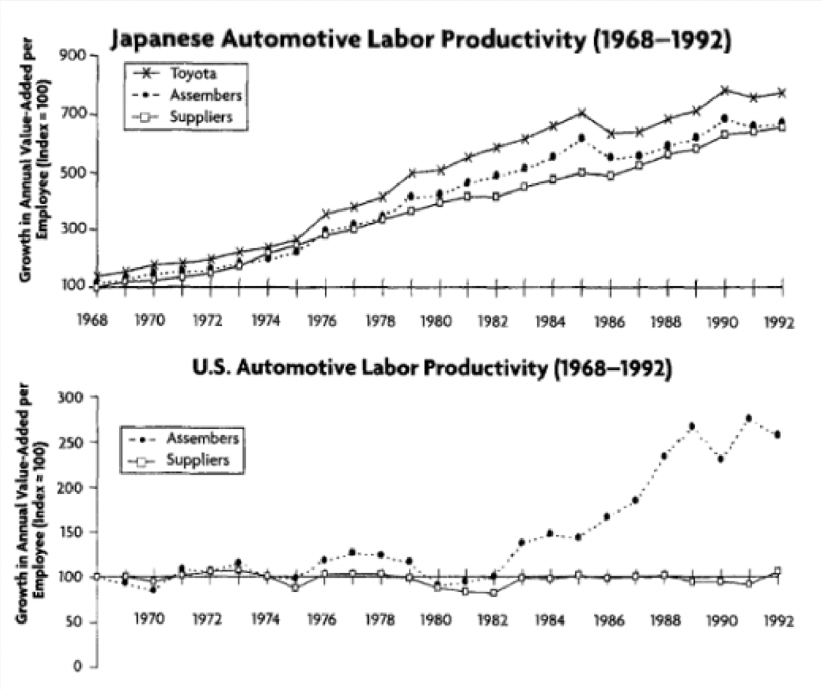
[7] Toyota "pushed its suppliers very hard to reduce costs and avoid defects; it reduced the market share of suppliers who did not meet these strict goals and exited the relationship completely if improvement was not forthcoming." Helper, S. and Henderson, R. 2014. "Management Practices, Relational Contracts,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

[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.

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 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 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 (see Section 3a).

[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. .

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, 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.

[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.

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

[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).

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 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.

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

[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.

[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.

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 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.

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[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.

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 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.

[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.

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 participate as an equity partner in co-productions.	If Screen Australia is part of a SPV to produce a show/film, it requires long tail rights 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 below).[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 Europe."[24] On the AVMS and proposed regulation affecting the streamers in Canada, see the boxes below.

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.

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[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.

[24] Ibid.

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 4.2: 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:

..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 4.3: 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.

[25] This information was provided by SPA.
[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

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.

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 4.4).

Box 4.4: 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 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

[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).

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.

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Appendix B

IMPACT OF REGULATORY GAP ON AUSTRALIAN SCREEN CONTENT

v1

FEBRUARY 2022

SCREEN PRODUCERS AUSTRALIA

SUMMARY

- Recent Government decisions (taking effect from 2021) have created a regulatory 'gap' as regards Australian screen content.
- Safeguards on traditional media platforms (commercial free-to-air television) have been wound back, leading a reduction in the amount of Australian drama, documentary and children's content required.
- Implementation of Australian content safeguards for hugely popular streaming platforms still some time away
- New data shows the damaging impact of the regulatory 'gap', as content production declines on traditional platforms and fails to meet expectations on new platforms.
- This includes:
  - declining Australian content on traditional platforms following deregulation;
  - a particularly devastating impact on Australian children's content production; and
  - voluntary investments from streaming platforms falling well short of potential.
- SPA strongly supports regulatory minimums for streaming platforms, including:
  - a requirement they invest 20% of local revenues back into Australian content;
  - safeguards to ensure the production and supply of children's content;
  - safeguards to ensure the content can be easily found; and
  - measures to ensure fair dealings between streaming platforms and producing businesses.

THE IMPACT OF THIS REGULATORY GAP? GREAT AUSSIE STORIES, LIKE THOSE ON THE COVER, WILL STOP BEING MADE FOR COMMERCIAL FREE-TO-AIR NETWORKS.

KEY FINDINGS: DRAMA CONTENT

HOURS DROPPED 35% FROM 434 TO 282

PROGRAMS DROPPED 56% FROM 25 TO 11

DECLINING AUSTRALIAN CONTENT ON TRADITIONAL PLATFORMS FOLLOWING DEREGULATION

The recently released data shows sharp declines in Australian drama and children's content (in terms of expenditure, hours and titles) following the relaxation of commercial television quotas (and in particular, the removal of Australian children's content requirements). This deregulation started to take effect from 1 January 2020, following a decision from Government to suspend regulatory quotas for that year due to COVID-19 interruptions, with permanent reductions to quotas implemented from 1 January 2021.

Data published in the 2021 Screen Australia Drama Report shows that investment by commercial free-to-air television in Australian drama was half the amount in the last full year of the outgoing regulatory framework ($107m in 2018/19, down to $54 million in 2020/21) as shown in Figure 1.

The new obligations permit businesses such as networks 7, 9 and 10 to acquit their obligations through the creation and delivery of a single soap opera production such as *Home and Away* or *Neighbours*.

Figure 1: Commercial free-to-air television investment in drama[1]

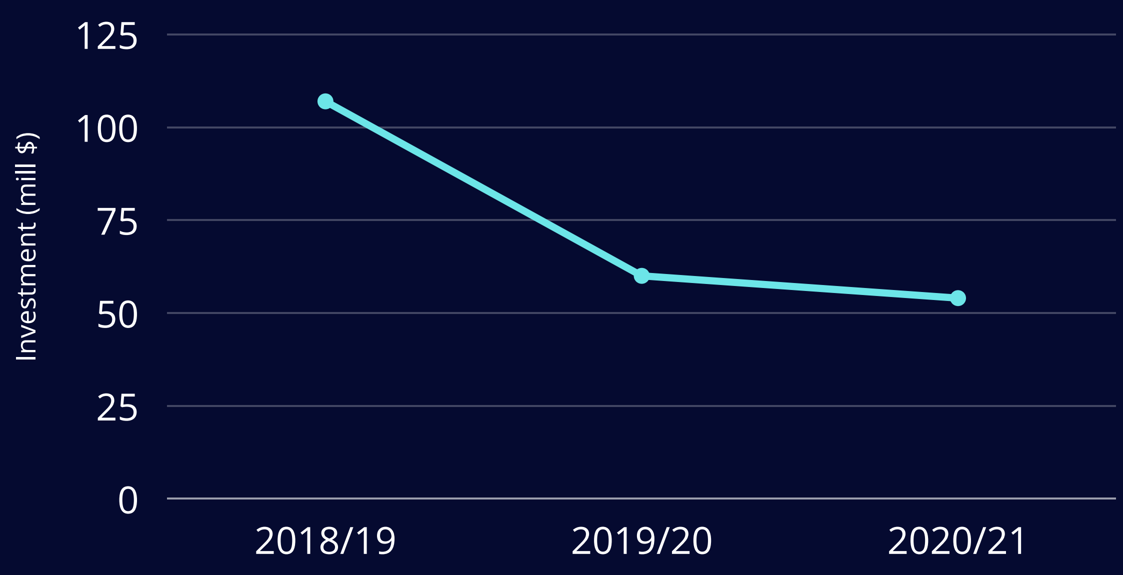
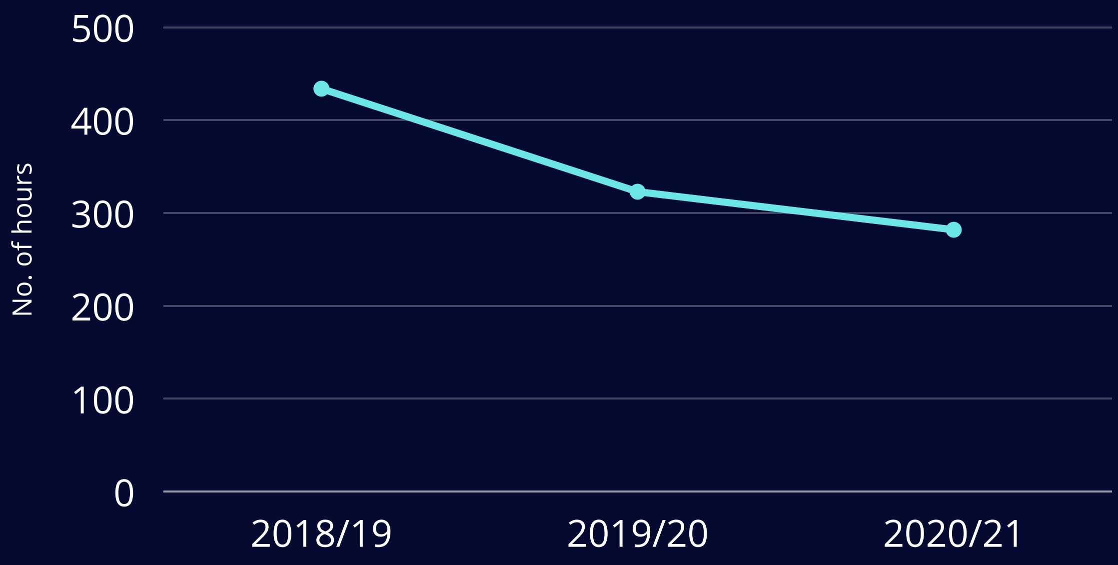
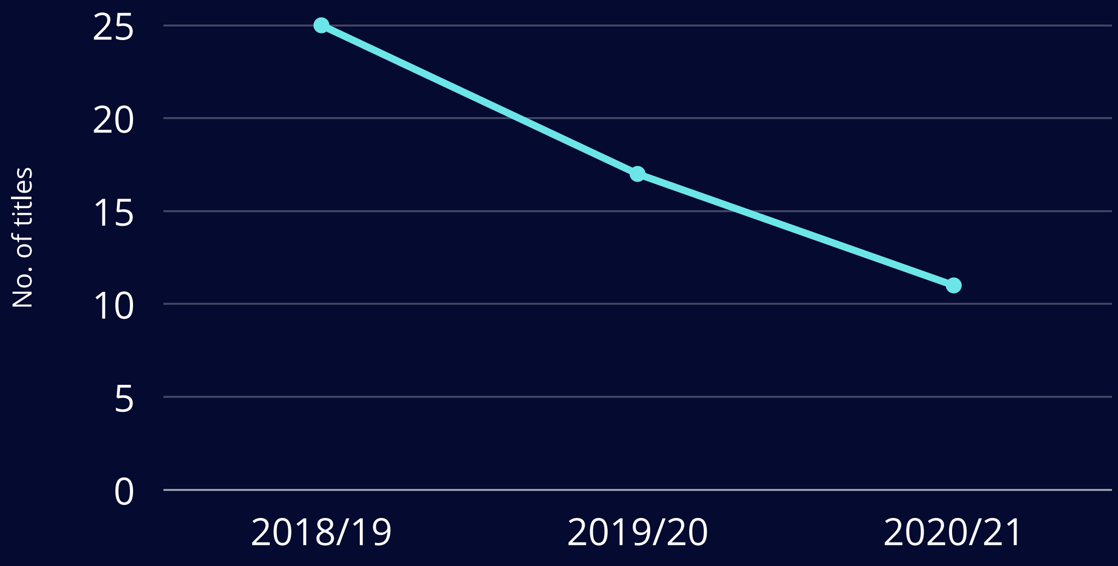


Figure 2: Commercial free-to-air television drama hours



The amount of Australian drama made for commercial free-to-air television also sharply declined as a result of deregulation, down from 434 hours in the last full year of the previous regulatory framework, to 282 hours in 2020/21, as shown in Figure 2. The number of programs was down also from 25 in 2018/19 to 11 in 2020/21, as shown in Figure 3.

Figure 3: Commercial free-to-air television drama titles



KEY FINDINGS: CHILDREN'S CONTENT

HOURS DROPPED 55% FROM 87 TO 39

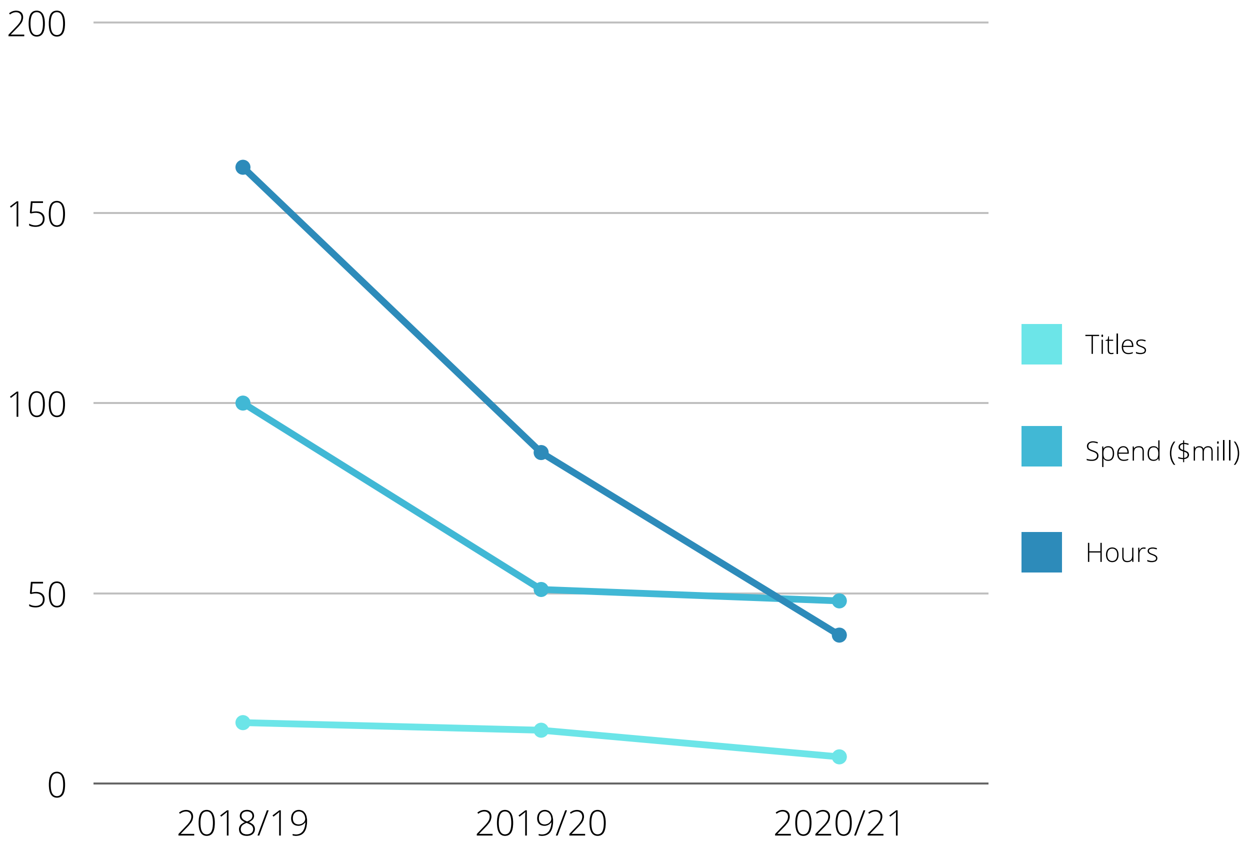
PROGRAMS DROPPED 50% FROM 14 TO 7

The impact on children's content is particularly stark. Under the new regulatory framework for commercial free-to-air television, there are no minimum requirements for children's content. Screen Australia's data shows that whilst spend was steady on last year ($48m compared to $51m), the number of titles halved (7 down from 14) and the number of hours more than halved 39 down from 87), as shown in Figure 4. Animated titles, typically commissioned by commercial free-to-air broadcasters, were down 75%, hours by 77%, budgets by 66% and spend by 52%.

The data makes plain how vulnerable Australian children's content is in the absence of regulatory supports. This is backed up by the recent release of data relating to Australian content spend by streaming platforms, which reported declines in Australian children's drama and non-drama, compared to the previous year.

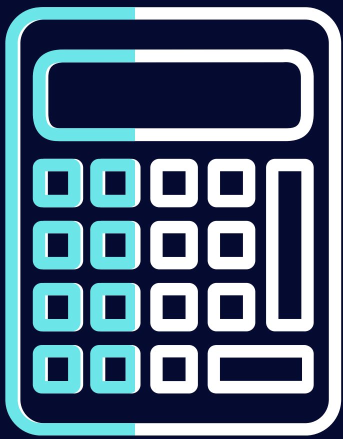
It is now abundantly clear that Australian children's content needs regulatory supports, without which, Australian children will miss out on access to content that is specifically designed to meet their developmental, educational and cultural needs. The availability of this content creates a safe space for children within a crowded and uncertain entertainment landscape.

Figure 4: Australian children's content



KEY FINDINGS: ANIMATED CONTENT

HOURS DROPPED 77%



BUDGETS DROPPED BY 66%

PROGRAMS DROPPED 75%

SPEND DROPPED BY 52%

VOLUNTARY SPENDING FROM STREAMING PLATFORMS NOT REACHING FULL POTENTIAL

Data gathered by the Australian Communications and Media Authority (ACMA) shows that in the absence of regulation, streaming platforms will not voluntarily make a meaningful contribution to Australian culture through Australian screen content.

That data reveals that spending on new Australian commissions by Netflix, Stan, Amazon Prime Video and Disney+ in 2020-21 was $103.7 million, slightly down on last year's figure of $122.4 million. The total spend on commissioned and acquired programs that meet the definition of 'Australian content' was $178.9 million. Of that, 58% ($103.7 million), was spent on commissioning new titles.

This means that the remaining 42% ($75.2 million) has been spent on re-licencing existing works which does not create jobs or new production activity for the industry but instead provides money for the most part to broadcasters who currently hold the rights in much of the work the production industry creates given the absence of fair 'terms of trade' in many historical industry deals.

The result of $103.7 million in new Australian commissions is tracking at roughly a third of the output which would be guaranteed by the regulatory model proposed by SPA, and endorsed by the House of Representatives Standing Committee on Communications and the Arts, which would require streaming companies to spend 20% of locally earned revenues back into new Australian commissions.

It is important to note that what we are seeing in terms of investment levels is undoubtedly driven in part by the fact that Australian content regulation is currently under consideration. If the opportunity to put regulatory safeguards in place is missed, and the policy spotlight moves on from this industry, we would be very concerned that voluntary investment levels would start to taper off.

Well-designed regulatory safeguards will help to ensure that investment in new, genuinely Australian content is protected from fluctuations in these businesses global budget allocations (increasingly to already regulated markets) and at times impulsive investment strategies which in turn provides assurances to our SME businesses, local employment and audiences alike.

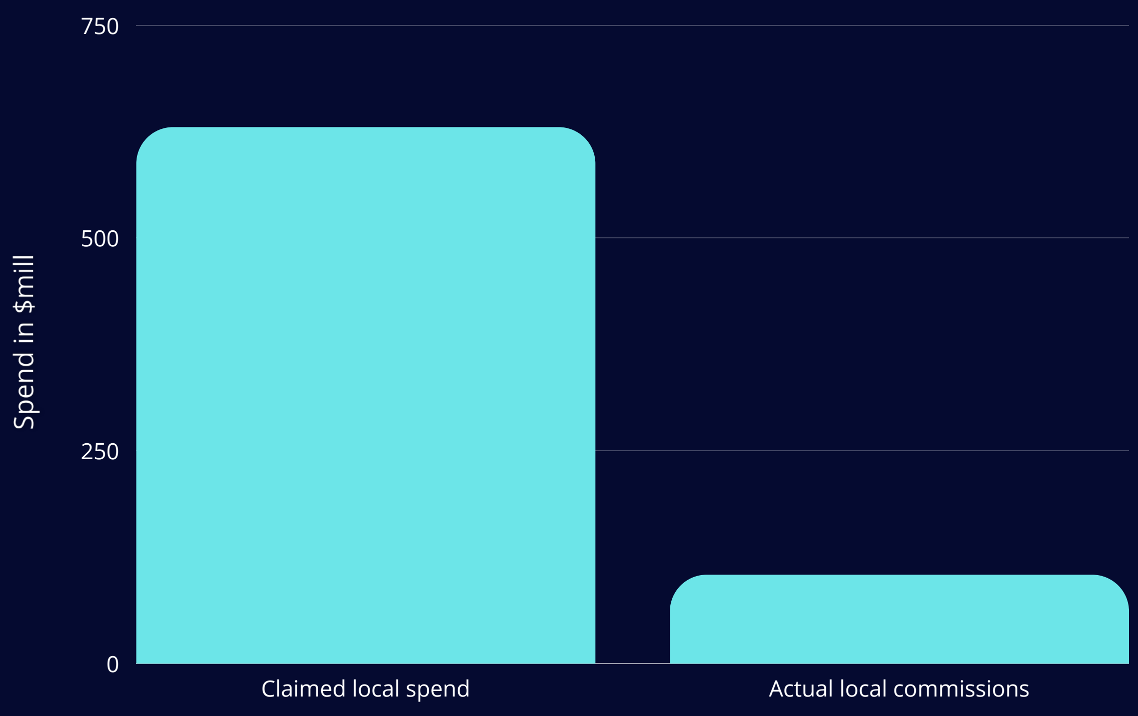
Australians' access to Australian content on streaming platforms relies on this content being prominent and easy to find on user interfaces. However, this content can be hard to find amongst the multitude of other choices on these services. Provision is needed in the new regulatory framework for streaming services to ensure Australian content is prominent and easy to find. This is a safeguard for local audiences that exists in an increasing number of other territories.

The Government is currently considering a proposal from free-to-air television broadcasters that would see TV manufacturers required to ensure that apps from local broadcasters are prominent on user interfaces. A requirement that Australian content be easily surfaced on streaming platforms should be part of this wider conversation.

We note that in some contexts, much higher levels of 'Australian' investment are being reported and promoted. We urge caution when encountering much higher figures than those reported by the ACMA, as they often take in money spent on a number of big-budget imported productions that don't meet the definition of being genuinely 'Australian'. Some reports also include amounts invested into training and facilities.

The most relevant figure remains as the investment in new, truly Australian content ($103.7 million), as this is where the public policy upside is in terms of both audiences, and the local production sector. With streaming platforms estimated to be accruing revenues of about $2 billion a year (and increasing), there is clear potential for a much more meaningful contribution to be required.

Figure 5: Claimed vs Actual spend



THE IMPERATIVE TIMING

This data clearly demonstrates the harmful impact on Australian content production when regulatory frameworks are weakened or absent, underlining the ongoing criticality of regulatory supports for Australian screen culture.

With deregulation of traditional media having an immediate and damaging impact on screen production, the finalisation of meaningful regulatory safeguards for new streaming platforms has become an urgent issue, for Australian culture, audiences and production businesses.

FOOTNOTES

[1] Screen Australia Drama Report 2021, p 28
[2] Screen Australia Drama Report 2021, p 28
[3] Screen Australia Drama Report 2021, p 28
[4] Screen Australia Drama Report 2021, p 20
[5] Screen Australia Drama Report 2021, p 20
[6] https://www.acma.gov.au/spending-subscription-video-demand-providers-2020-21

IMAGE CREDITS

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