

21 May 2021

Pauline Sullivan
First Assistant Secretary
Content Division
Department of Infrastructure, Transport, Regional Development and
Communications
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Dear Ms Sullivan and Broadcasters and Content Reform Taskforce,

Media Reform Green Paper: modernising television regulation in Australia

Independent Cinemas Australia (**ICA**) thanks the Taskforce for the opportunity to make this brief submission on behalf of its members.

About ICA

ICA represents independent cinema exhibitors and has members in every State and Territory in Australia including large and small businesses such as Palace, Grand, Wallis, Dendy and iconic cinema sites such as the Hayden Orpheum, Randwick Ritz and Cinema Nova. ICA represents around 80% of regional cinemas – mostly small family businesses.

Independent cinemas comprise 26% of the 2,210 cinema screens in Australia and 29% of cinema sites – with ICA representing the owners and operators of 659 cinema screens across around 176 cinema locations ranging from rural areas through to metropolitan multiplex circuits.

Significantly, ICA members play a crucial role in bringing Australian and diverse stories to the big screen. For example, in 2019 independent cinemas generated over 90% of the box office for 22 individual Australian titles including four films in the Top 20 Australian Films.¹

ICA's Position on the Green Paper

ICA appreciates that the focus of the Green Paper is television. It also appreciates that, unlike the exhibition sector which relies on private cinema infrastructure, the television sector relies on publicly owned spectrum and is therefore subject to regulation. ICA further notes that streaming platforms also rely on publicly owned telecommunications infrastructure.

¹ Based on 2019 Box Office figures collated by Numero.

ICA broadly supports the proposal put forward in the Green Paper to regulate streaming services, however, we have no set position on the mechanism of the regulation. This is subject to one caveat: it is our strong view that implementation of the regulation should not impact the negotiation of exclusive theatrical windows which are important to ensure broad public access to cinema exhibition of feature films in Australia.

To the extent that the policy objective of the proposed reform is to promote the production of Australian screen content and its availability to Australian audiences, in ICA's view it is artificial to look at television and streaming platforms in isolation from the overall Australian screen content industry.

While streaming has certainly disrupted the screen sector, exhibition remains an important part of the overall screen ecosystem providing access to screen culture for all Australians. This is clearly demonstrated by the recent box office success of Australian films such as *The Dry* and *Penguin Bloom*. This much was recognised in the Minister's press release on 11 April in which he stated:

Australian feature films play an important role in our cultural identity and resonate strongly with audiences at home and abroad. After consulting with Australian feature film producers and considering the feature film environment abroad, we have determined that retaining the offset at 40 per cent is appropriate to ensure the ongoing vitality of the sector.²

The importance of the independent exhibition sector has also been recognised by the Government's establishment of the SCREEN Fund on 26 March.

ICA welcomes this recent support for Australian feature film and exhibition by the Government. In our submission, an appreciation of the broader screen ecosystem and the wider impact of proposed changes also needs to be factored into any regulatory regime for streaming platforms. This is necessary to ensure there are no unintended negative consequences on the vulnerable feature film and local independent exhibition sector as a result of the manner in which local content obligations are introduced to streaming platforms.

The business models of streaming platforms differ. For example, while Netflix's business model is based on commissioning/buying exclusive content for its platform, other platforms function as an arm of a broader screen business. For example, Disney + is the streaming platform of the Walt Disney Corporation. Hence films such as *Raya and the Last Dragon* and *Cruella* are currently or about to screen at cinemas in Australia and via Disney + Premier Access (**PVOD**) and it is understood that a number of future Disney releases will occur simultaneously in cinemas and via PVOD in Australia.

This marks a difference in how the distribution of screen content has traditionally been approached. Distribution of feature films has historically been on the basis of an exclusive period for theatrical release, after which time the content is made available for home entertainment, at first via limited channels such as pay per view and then more

² The Hon. Paul Fletcher MP, *Supporting Australia's screen production* Media release, 11 April 2021, <https://minister.infrastructure.gov.au/fletcher/media-release/supporting-australian-screen-production>.

generally, such as via streaming, subscription television or free-to-air television. This system is known as “windowing”. It is designed to maximise returns for film makers and investors by making acquisition of the content as attractive and financially viable as possible for those in the various distribution channels, such as exhibitors, that relay the content to the public through their platforms.

The exclusive theatrical window in Australia for which exhibitors pay distributors a premium, has been generally stable between 90 -120 days for most theatrical release feature films for the last 5 years until the COVID-19 pandemic. COVID-19 has caused many distributors to delay the theatrical release of films due to cinema closures and constrained capacity overseas. For cinemas open for business in Australia, this has caused a shortage of theatrical release screen content, especially (but not solely) high profile overseas studio content normally expected to attract high patronage and box office receipts. This in turn has created a significant imbalance in the market whereby Australian independent exhibitors, desperate for content, have had little choice but to accept shorter or no windows for films, often without any commensurate discount in fee.

ICA has already raised its concerns with the Government about market power imbalances, and the potential damaging impact to the more economically vulnerable independent cinema sector in Australia, especially regional cinemas.

It would be a matter of concern to ICA if the effect of requiring streaming platforms to show Australian content was to provide further pressure for the contraction of theatrical windows. ICA submits that it should be explicit that any local content requirement imposed on streaming platforms shall not be a factor in Australian industry negotiations regarding theatrical release windows. In our submission, this approach is supported by the European Union (EU), where the same piece of legislation, the *Audiovisual Media Services Directive (AVMSD)*³ covers both local content requirements on television broadcasters and streaming platforms and a general obligation in relation to theatrical windows.

Article 8 of the AVMSD provides:

Member States shall ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rightsholders.

While some EU Member States (such as France and Bulgaria) regulate theatrical windows, others leave it up to industry agreements. This is bolstered by funding requirements in some EU Member States which link eligibility to theatrical release (as is the case in Australia via the feature film producers offset).

³ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities
PE/33/2018/REV/1.

ICA does not at this time support a legislated model for theatrical windows provided commercial negotiations achieve timely, fair and balanced outcomes between distributors and the independent cinema sector. However, for industry agreements to operate efficiently, we do not believe that they should be inadvertently impacted by external factors, such as local content quotas on streaming platforms. That is why we favour this being made explicit as part of the implementation of such quotas.

We do not have a fixed view on how this would be best achieved in the context of Australia's regulatory regime and would welcome the opportunity to discuss this issue with the Taskforce. However, we strongly submit that a threshold position needs to be adopted by the Government as follows:

To achieve a 40% offset a production must be genuinely intended as a feature film or feature documentary for theatrical release with an exclusive commercial theatrical window to be negotiated between the distributor and the exhibitor on a fair and equitable basis.

The requirement to comply with Australian content obligations will not be permitted to be used by an entity as leverage to reduce theatrical windows.

Our concern is that streaming platforms, broadcasters, or other entities will otherwise achieve a 40% offset for feature length content primarily intended for streaming or other platforms and not genuinely intended for commercial theatrical release.

I look forward to providing further information to assist the work of the Taskforce.

Adrianne Pecotic
CEO
Independent Cinema Australia