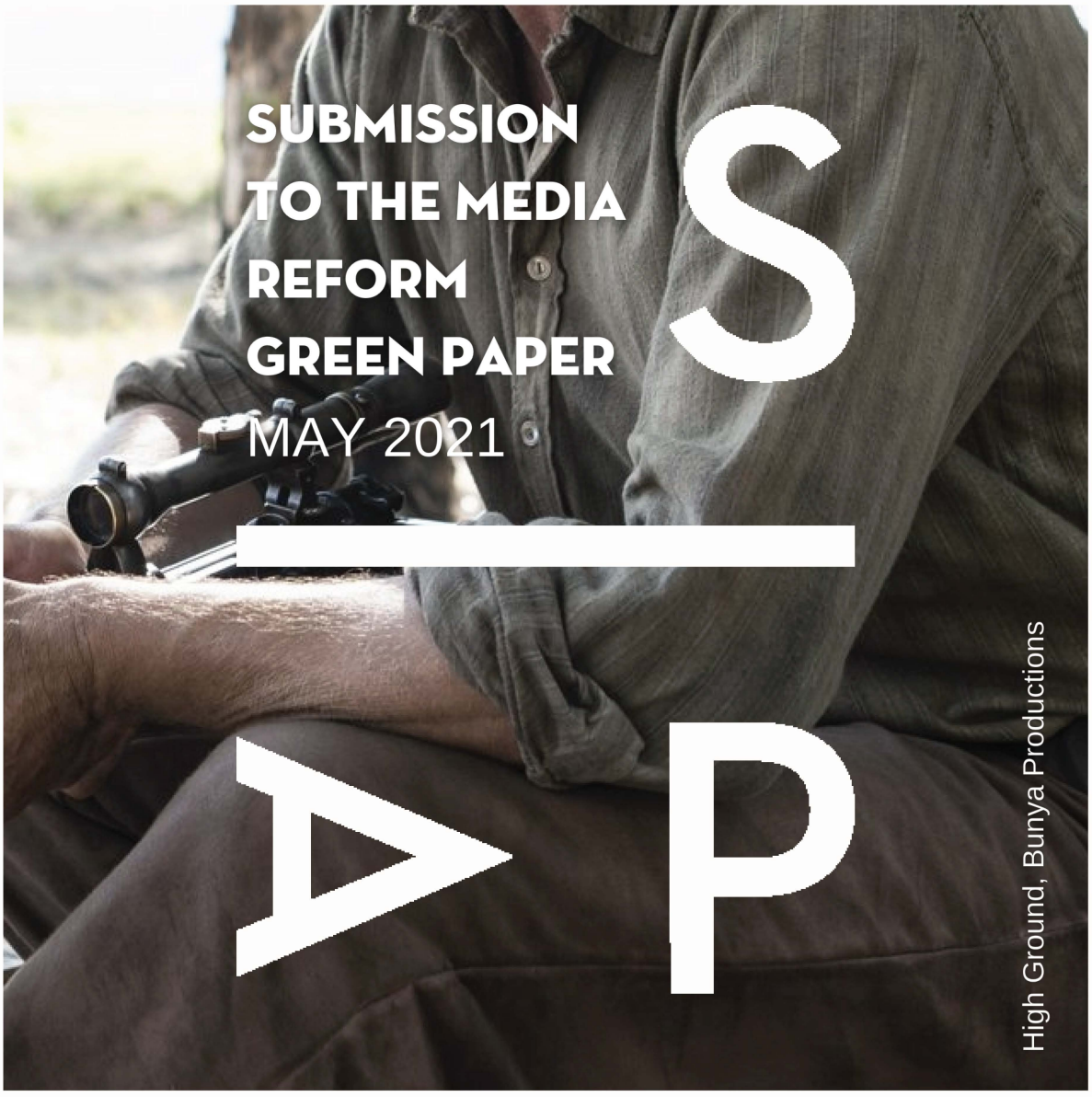
SCREEN PRODUCERS AUSTRALIA

# SUBMISSION TO THE MEDIA REFORM GREEN PAPER

MAY 2021



High Ground, Bunya Productions

**23 May 2021**

# Screen Producers Australia's submission to the *Media Reform Green Paper*

Screen Producers Australia (SPA) was formed by the screen industry businesses representing large and small enterprises across a diverse production slate of feature film, television and interactive content.

As the peak industry and trade body, we consult with a membership of more than 500 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and appointed Policy Reference Group representatives. Our members employ hundreds of producers, thousands of related industry practitioners and drive more than $1.2 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 Media Reform Green Paper. The release of the Green Paper, and its inclusion of proposals for Australian content obligations for streaming platforms was a vital next step in the reform process started by Government with the partial deregulation of linear broadcast media platforms in 2020.

This is a pivotal moment for Australian audiences and the Australian screen sector, and a critical opportunity to ensure that all businesses which derive economic benefit from operating in the Australian market are required to make a fair and proportionate contribution back to Australian public policy outcomes.

For further information about this submission please contact Holly Brimble, Director of Policy.

# The SPA proposal

## ELEMENTS

- New quota for SVODS – 20% of revenue into new Aussie content
- Protect drama, documentary and children's content
- Must be truly Australian content
- Must be new, commissioned content
- Triggered by 500k subscriptions or $50m in revenue
- Terms of trade to enable fair deals
- No exclusions for broadcaster-owned SVODs
- New rules in place by 1 January 2022

## RESULTS

**CONTENT**
300 hours of new Aussie content

**JOBS**
10,000 new Aussie jobs

**CULTURE**
Massive cultural dividend

**STABILITY**
Stable production sector

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# 1 Executive Summary

- SPA welcomes the opportunity to respond to the *Media Reform Green Paper* ('the Green Paper').
- The Green Paper accepts the threshold question of whether hugely successful and popular streaming platforms should be regulated, and places its focus on what shape that regulation should take.
- There is an urgent need for regulatory intervention, and SPA supports the immediate implementation of a requirement that streaming services which meet certain size and scale thresholds, spend 20% of locally sourced gross revenue on commissioning new Australian content.
- A requirement at this level would deliver an immediate injection of over $360 million in Australian content investment, create 10,000 jobs and over 300 hours of Australian content for audiences on these now pervasive platforms.
- The requirement must be in terms of genuinely Australian content that reflects and contributes to Australia's unique culture and society.
- To protect valuable genres at ongoing risk of market failure, there should also be sub-requirements to ensure minimum levels of commissioning of adult drama, children's content and documentary, in cases where streaming platforms are engaged with those genres.
- SPA also supports minimum obligations or incentives to drive First Nations production, and an obligation to engage with the Australian independent production sector.
- A critical part of any regulatory framework will be a pathway towards the negotiation of mutually beneficial terms of trade, to give producers the ability to retain IP assets and build sustainable businesses. Only content that is subject to agreed terms of trade should count towards the regulatory requirement.
- SPA also supports minimum regulatory obligations for the national broadcasters. This will provide critical certainty for the industry and guarantee outcomes for viewers.
- This model of regulation will ensure Australians are able to see Australian content on the services they are consuming in increasing quantities, and the pervasiveness of these platforms makes them an efficient means through which to achieve local cultural policy objectives. This model will also deliver a strong and sustainable local production sector capable of delivering this product into the market.
- 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.
- These are rapidly maturing businesses, and the concept of regulatory intervention has been live in policy discussions for many years. A regulatory 'gap' has been created by the partial deregulation of linear broadcast services and now is the time to act to secure the future of Australian content in the new media landscape.

# 2 Introduction

The consumer entertainment landscape in Australia has undergone far reaching, fundamental and permanent change over the last 5 to 10 years. Although still important, Australians are less reliant on linear broadcast media to fulfill all of their entertainment needs and this is best reflected in the rapid uptake of subscriptions to streaming service providers.

As noted in the Green Paper, this places pressure on the ability of regulatory frameworks, which apply primarily to linear broadcast media, to achieve the public policy objectives they have traditionally been asked to achieve.

However, the public policy objective of ensuring Australians have access to Australian stories, endures, and hence we must ensure that our regulatory frameworks are equipped to meet these objectives in the new entertainment landscape. Regulatory intervention remains necessary given underlying market failures and an uneven contribution from different platforms. We must ensure the transition in the market is matched with a transition in regulatory frameworks. Given the pace of change, urgent action is therefore required to ensure that Australian audiences are not left worse off in terms of cultural policy objectives, just because they have embraced compelling new consumer products.

Given the inconsistent levels of Australian content on streaming platforms, it is evident that there continues to be a strong need for regulatory intervention to ensure the achievement of policy objectives relating to Australian screen content within this new entertainment landscape. 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 submits there is an urgent need for regulatory action, particularly given the collapse in commissioning in certain genres (such as drama and children's content) impacted by the partial deregulation of linear broadcast media, such as children's and drama content. Whilst some production activity continues, this can partly be attributed to continuing projects initiated under the previous regulation, and partly due to the incentive towards commissioning created by the promised review of the revised commercial free-to-air regulatory framework (scheduled for 2022). Neither of these factors can be relied on in the long-term to stimulate meaningful levels of commissioning.

The primary piece of legislation governing the achievement of public policy objectives through screen content is the *Broadcasting Services Act 1992* (BSA). Whilst the BSA has undergone a constant cycle of review and reform during its lifetime, the regulatory policy in section 4 has remained consistent. Subsection 4(1) outlines the principle that different levels of regulatory control be applied across broadcasting, internet and online services according to the degree of influence that they exert in Australia.

The BSA is now arguably inconsistent with this regulatory policy in that the level of regulation applying to some of the most influential and popular services (streaming platforms) is vastly out of step with their level of influence on the community.

The practical result of this is that enduring policy objectives relating to access to Australian content for Australian audiences are not being effectively met by the current regulation, and intervention is required to redress this imbalance. The pervasiveness of streaming platforms means they are ideally placed to assist in the delivery of public policy objectives.

Also adding to the pressure for change, previous Government reviews have identified the regulatory disparity between legacy and new platforms as a fundamental defect in the currently regulatory framework. SPA firmly supports reforms to address this issue. In particular, an extension of the regulatory framework to incorporate platforms which are currently out of scope will ensure a more fit for purpose and sustainable regulatory framework, which minimises competitive disadvantage and reflects the reach, influence and popularity of the new streaming services (and the commercial benefit they derive from operating in Australia).

It is important that platforms make comparable contributions, not just in a cultural sense, but also in a structural sense, to ensure there are multiple commissioning opportunities and a robust marketplace.

We believe it is now beyond contention that streaming services, which derive such substantial benefits from operating in Australia, should make an appropriate contribution to the achievement of public policy outcomes. PwC estimates these services are deriving $2 billion per year in revenue from the Australian market, and this is tipped to grow markedly in the coming years.[1] We also note that some of these companies pay minimal Australian taxes[2] and rely on the publicly funded National Broadband Network for distribution. These services are fast becoming the preferred destination for Australians to access content. With such volume of content on these platforms, it is crucial that there is also the ability for audiences to see and hear their own stories and culture.

The strong public policy arguments which favour the creation of an obligation to contribute back to Australian society and culture are on a continuum of policy thinking that stretches back to the first introduction of Australian content requirements on commercial free-to-air television, who, on the basis of their then pervasive success, were asked to contribute back to the Australian public.

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.

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

[2] https://www.afr.com/companies/media-and-marketing/netflix-reveals-australian-tax-bill-for-2020-20210502-p57o5v

Certainty is also critical for the production industry, in terms of investment, job opportunity and career pathways.

It is also important that we recognise the need for policy in this area to support a sustainable and efficient Australian independent production sector, given its role in ensuring the supply of cultural content (as well as jobs and economic output). With a substantial amount of investment taken out of the market through deregulation of commercial free-to-air television, there is a need to ensure this investment support is found through other means to avoid a serious contraction in the country's ability to produce quality and quantity of local cultural product.

The screen sector is a key part of Australia's economy, being a subset of the arts and entertainment sector which employs many more people per million dollars of turnover than industries like building construction, coal mining and gas extraction. Relative to turnover, arts and entertainment employs nine times as many people as coal mining does.[3]

Getting the settings right will lead to cascading benefits in terms of jobs, economic output, export opportunities and, most importantly, a rich return to Australians in terms of the quality and quantity of culturally relevant content.

# 3 Overview of SPA's regulatory proposal

In this submission, SPA proposes a progressive and forward-looking regulatory proposal that will generate a wealth of Australian content for audiences, sustain a vibrant production sector and address key inequities in the current regulatory landscape.

The proposal is centred around a requirement that eligible streaming platforms invest 20% of locally sourced revenue on commissioning new Australian content, with minimum requirements to commission into sub-genres (drama, documentary and children's content) and with the independent production sector, and with a framework that enables retention of IP by producers.

SPA estimates this requirement would deliver over $360 million of local investment, over 300 hours of content and 10,000 additional jobs, creating a rich dividend to Australians out of the significant benefit that streaming operators derive from participation in the Australian market.

A summary of the model is set out in the table below. The model is explored in further detail in section 4 of this submission.

[3] https://australiainstitute.org.au/post/new-analysis-arts-entertainment-funding-creates-10x-more-jobs-for-women-than-homebuilder/

**SUMMARY OF REGULATORY PROPOSAL FOR STREAMING SERVICES**

| Issue | Proposal |
|---|---|
| The regulatory obligation | • Eligible SVOD and AVOD services to invest 20% of their Australian-sourced revenue into commissioning new Australian content |
| Who it applies to | • Content services whose primary purpose is to provide professionally produced content delivered over the internet to Australians<br>• At least 500k subscribers or registered users<br>• At least $50m pa in Australian revenue<br>• No exemption for services owned by a corporate structure that also owns a broadcasting licence |
| What is required | • Investment into commissioning new Australian content, not acquisition |
| Sub quota | • Obligation to commission into genres (drama, documentary, children's) triggered by a platform's engagement with non-Australian content in that genre<br>• Obligation or incentive to engage with Indigenous production |
| Other sub-requirements | • Minimum requirements to engage with independent sector (80%) |
| Terms of trade | • A pathway to negotiated terms of trade, with the backstop of possible Government intervention |
| Promotion and discoverability | • Obligations to make Australian content discoverable to Australian audiences |
| Reporting | • Reporting to the ACMA |
| Timing | • Commencement on 1 January 2022 |
| ABC/SBS proposal | • Minimum regulatory obligations for ABC and SBS, combined with increased reporting transparency and adequate funding support |

*Policy principals informing the proposal*

SPA's regulatory proposal for the future of Australian content in a transformed media market is based on the following policy considerations:

a) Australian content has both significant cultural (and economic) importance.
b) Australian audiences should have access to a broad range of new Australian stories across all the platforms they are using.
c) All platforms that derive financial benefit from the Australian consumer market should financially contribute to the creation of new Australian content for the benefit of their consumers.
d) Even application of rules across market participants to build a vibrant and diverse commissioning marketplace.
e) In order to meet audience expectations, there is a need to ensure we maintain and support a healthy screen sector (development, production (including post-production), distribution), that delivers employment, economic activity, industry upskilling, exports and growth opportunities.
f) The Australian Government has a role to address market failure in the creation and delivery of quality new Australian screen content.
g) Independent screen businesses (SMEs) are critical to achieving cultural and economic objective.
h) There is significant scope for growth in existing levels of production, investment, employment, commissioned content hours and exports provided fit for purpose regulation is in place.
i) Independent screen businesses should be permitted to own or retain a significant amount of as much intellectual property (IP) and rights in their work as possible to best reward risk and contribution. This principle will assist businesses to remain viable and enhance their capacity to invest in the development and production of new IP.

# 4 The regulatory proposal in detail

## 4.1 Why is a percentage of revenue requirement the right model for streaming platforms?

There are several options for designing regulatory obligations for streaming platforms.

These could include:

- A requirement to invest a proportion of revenue into new Australian content
- A requirement to ensure a proportion of library is Australian content
- A requirement to commission a minimum number of hours of Australian content

The Government's Green Paper preferences a revenue requirement for streaming platforms and SPA supports this model. It offers a simplicity in regulatory design and implementation that will benefit not only law-makers, but also regulated entities and those considering entering the Australian market.

In our submission to the *Supporting Australian Stories on Our Screens* Options Paper, SPA put forward a revenue-based requirement across all media platforms which would empower a regulator to set the specific terms of each provider's obligation.[4] We understand the Government is not minded to pursue this model, and hence SPA has adapted its position towards a more straightforward flat rate of requirement for streaming platforms (which meet size and scale thresholds). This will enable a consistent contribution across all businesses, with flexibilities built in to reflect the genre strategies of the various platforms.

A revenue requirement also links the level of regulatory obligation to business performance and will adjust over time as business performance changes. This is an element which has been missing from, for example, the regulation that applies to commercial free-to-air television, which has led to that regulatory framework coming under pressure for change from those broadcasters for some time. A regulatory framework that has a built-in ability to flex with changing market conditions could go some way to avoiding this kind of outcome.

This approach would also follow international precedent, with France and Germany[5] having implemented requirements based on revenue and Canada's Parliament considering legislation on this basis also. Existing Canadian content regulation for broadcasting providers in Canada is also based on a revenue measure, and this has proved to be a stable and successful model in that market.

## 4.2 Determining the appropriate rate of requirement

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.

In the first instance, SPA would like to address the proposed rate as set out in the Green paper.

*Green Paper proposal*

SPA does not support a proposal that the rate of streaming obligation should be matched to the rate of obligation that is proposed to apply to subscription television (5%).

[4] 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

[5] https://www.hollywoodreporter.com/news/netflix-criticizes-european-content-quota-1152970#:~:text=German%20law%20requires%20streaming%20companies,third%2Dquarter%20results%20late%20Tuesday.

Whilst SPA's Options Paper submission did support harmony across all platforms, the Green Paper's proposal would link only two platforms in the overall screen ecosystem.

There are several very important distinctions to be made between the subscription television and streaming services platforms which mean that matching the rate is inappropriate.

Firstly, it should be noted that the two measures are in fact quite distinct. The subscription television New Eligible Drama Expenditure (NEDE) Scheme imposes an obligation to spend a proportion (currently 10%, however legislation has been introduced which would cut the rate to 5%)[6] of the program budgets of drama channels on Australian drama.

This is quite distinct from the model being proposed for streaming services, which is a measurement of locally sourced revenue across the entire business to be spent on a broader range of Australian content.

We note the Minister has used the language of 'harmonisation' in relation regulation applying to subscription television and streaming platforms.[7] Whilst we recognise the Government has indicated its ongoing commitment towards addressing regulatory imbalances across media platforms, we do not agree that this should result in the matching of the rate of obligation across subscription television and streaming platforms (notwithstanding the above points regarding the mismatch in format of the regulatory obligations).

Subscription television and streaming platforms are very different businesses in very different stages of their life cycle. There are around 16 million streaming services subscriptions in Australia,[8] whereas traditional subscription television is servicing around 2 million subscribers.[9] In fact there is an inverse link between the fortunes of subscription television and streaming platforms, with the former suffering sharp subscriber and revenue declines following the introduction of streaming platforms which offer a competing product at a significantly cheaper price.

Given the sharply different market positions and outlooks between the two platforms, it is more logical to impose regulatory obligations which are tailored to the differing characteristics of these platforms.

In any event, SPA does not support the proposed cut to the rate of subscription television's drama requirement, which at 10% is relatively modest and ensures subscription television customers are able to access a range of quality Australian drama.

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[6] Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021

[7] https://www.theguardian.com/media/2021/apr/01/foxtel-can-halve-australian-drama-production-under-new-broadcasting-bill

[8] https://www.telsyte.com.au/announcements/2020/08/17/subscription-home-entertainment-soars-in-australia

[9] https://www.smh.com.au/business/companies/foxtel-subscribers-back-as-sport-kicks-off-20200922-p55y4j.html

*Addressing the regulatory gap*

An important consideration in determining the rate of obligation should be to address the regulatory 'gap' created by the rapid deregulation of commercial free-to-air television. Whilst for audiences this is measured in terms of reduced access to Australian programs, it is useful to consider the gap in terms of lost investment into the content market, as this allows a calculation in dollar terms, which can then be directly correlated to an appropriate rate of revenue obligation.

SPA modelling suggests a decrease in commercial free-to-air television spending on adult drama, children's content and documentary of approximately $100 million per year following the deregulation which commenced on 1 January 2021. This is based on an analysis of the revised points scheme, including the removal of any minimum requirements for children's television content.

Our assessment of an appropriate rate of obligation for streaming platforms is built around the transitioning of this lost level of investment. We note there is some level of production activity in the commercial free-to-air sector continuing, however many projects have collapsed, and those are on foot are continuations of activity stimulated under the outgoing regulatory scheme. We also suggest that the regulatory pressure imposed by the scheduled review of the new commercial free-to-air scheme mid next year is creating activity that may not persist beyond the point of review.

However, this is only part of the picture, and any future regulatory obligation should also ensure that as a minimum, existing SVOD Australian content expenditure should be continued. The average annual contribution from SVODs to Australian drama over the last three years was $62.3 million.[10] Whilst there has been a recent uptick in production, it is likely this is at least partly attributable to the regulatory pressure that the current Green Paper process is applying, and we lack confidence that this will be a consistent level of output in the absence of regulatory pressure.

Hence, a rate of revenue obligation that delivered $160 million of SVOD content investment would secure an outcome that roughly maintains the size of the content market that existed prior to deregulation of commercial free-to-television, and hence delivers a comparable amount of Australian content to audiences.

However, SPA does not support a rate of obligation that merely secures a status quo result. We have an opportunity to set an optimistic, progressive and enterprising regulatory framework that capitalises on the stunning success of streaming platforms to deliver a strong rate of growth, both in terms of content for audiences and the capacity and sustainability of the local production sector.

SVOD revenues are forecast to reach $1.8 billion in 2021,[11] and hence a rate of obligation set at 20% would deliver approximately $366 million in Australian content investment – a result that would lead to a sustained increase in Australian content

[10] https://www.screenaustralia.gov.au/fact-finders/production-trends/online-drama

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

investment from the status quo outlined above, with a resulting economic dividend of 10,000 jobs[12] and a sustainable future for the Australian independent production sector. Our modelling suggests this rate would deliver over 300 hours of Australian content to streaming audiences each year.

This outcome would secure a prosperous and sustainable future for Australian content production without any additional draw on public funding.

*Industry capacity*

We note the influx of international productions and that some have cited this as a reason not to impose growth-based regulatory requirements on streaming platforms due to concerns about industry capacity. However, SPA notes that levels of international production are at abnormal highs, given the coronavirus pandemic. Changes in risk levels, international incentive settings in other territories and currency exchange rates can induce reductions in international production levels at any time, at which point, a large amount of skilled labour will be available. We also note that it is not unusual for our sector to contract and expand over time. Long-term policy settings for streaming platforms should not be dictated by the current, temporary, uptick in international production activity.

It is also important to note the contractionary impact of changes to commercial free-to-air television quotas, which will help offset increases in demand for skilled labour.

The production industry is capable of building capacity, and the best conditions to do this in are conditions of certainty of demand, which is what a legislated quota on streaming platforms will provide.

*International trends in regulation*

An Australian obligation set at 20% would also follow the strong precedent set in Europe by the French Government, which has legislated a total obligation for streaming platforms at 25.5-30.5% of locally sourced revenues. The obligation is constituted as follows:

- An overall obligation set at 20-25% of the net income generated in France the year before.
- 4% to be contributed towards cinematic works and 16% for ‘audio visual’ (or small screen) works.
- A sub requirement to commission French speaking works (85% of the overall requirement).
- A sub requirement to commission new works (50% of the cinema requirement and 75% of the audio-visual requirement).
- Further sub requirements for engagement with the independent production sector.
- Separate 5.5% requirement to contribute to the CNC (equivalent of Screen Australia).

[12] SPA modelling

SPA notes that the level of regulatory obligation can increase up to a total of 25% depending on release windows, with more favourable rights available to the streaming platforms in exchange for greater levels of investment.[13]

The implementation of this framework demonstrates what can be achieved for local audiences when a strong cultural imperative drives policy-making and sets a frame of reference of what's possible that Australia should have regard to.

Also of interest is the introduction into the Canadian Parliament of Bill C-10,[14] which proposes amendments which would empower the regulator, the Canadian Radio-television and Telecommunications Commission (the CRTC), to make Canadian content obligations for 'online undertakings' (streaming services). The intention is to ensure streaming platforms are subject to the same kinds of Canadian content obligations as traditional broadcasting platforms, which are currently subject to a requirement to invest 30% of local revenues into Canadian content broadly. Whilst the rate of obligation for streaming platforms will be determined in the future by the CRTC, the existing rate of obligation for broadcasters is expected to be instructive.

Regard to international precedent is important for a number of reasons, partly due to illustration of what level of regulatory intervention is possible with sufficient will and planning, but also because there is a risk to Australia from a failure to align with overseas examples.

The investment budgets of streaming platforms will necessarily be directed to jurisdictions in which there are mandated minimum investment levels, and without an internationally competitive rate of obligation, investment will be directed away from Australia and towards those markets where regulation is in place. It is imperative that Australia is not exposed to this threat and a timely introduction of a meaningful rate of obligation is the best means of avoiding this outcome.

Australia is a unique position in that it is able to follow the leading territory (France) and set a highly effective rate of obligation, rather than settle for the least ambitious and least effective examples in other territories. We should be ambitious in our cultural objectives and the opportunities that presents. We are aware some parties are depicting France as an outlier; however, SPA regards it as a market leader that sets the bar for what is possible in terms of ensuring a dividend for consumers from the stunning success of streaming platforms.

## 4.3 Thresholds

SPA notes the Green Paper proposed eligibility thresholds to determine when a streaming services provider would become subject to Australian content requirements.

[13] https://variety.com/2020/film/global/eu-directive-streamers-local-content-netflix-amazon-france-1234839918/

[14] https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c10.html

SPA supports the need for eligibility thresholds, to ensure that smaller and emerging streaming providers are not faced with regulatory obligations that may inhibit or deter market entry or business maturity.

SPA also supports these thresholds being tied to a provider's Australian sourced revenue and Australian subscriber numbers. However, we do hold concerns that the levels proposed in the Green Paper are too high and would act to exclude relatively mature and stable businesses with significant reach and who are deriving substantial benefit from operating in Australia.

SPA proposes a revenue threshold of $50 million per year and a subscriber threshold of 500,000 as appropriate levels at which the regulatory obligation would be triggered. Based on analysis of publicly available information, this would ensure the regulatory scheme incorporated Netflix, Stan, Amazon Prime and Disney+. Hayu would potentially be caught in coming years:

| **Platform** | **Subscribers** |
|---|---|
| Netflix | 5,300,000[15] |
| Stan | 2,200,000[16] |
| Disney+ | 1,100,000[17] |
| Kayo | 851,000[18] |
| Amazon | 600,000[19] |
| Binge | 516,000[20] |
| Hayu | 300,000[21] |
| Apple | Not available |
| Acorn TV | Not available |
| Femflix | Not available |
| Britbox | Not available |
| Paramount+ | To launch in August 2021 |

None of the businesses captured by these proposed thresholds could reasonably be argued as being small or challenged start-ups for whom regulatory obligations should be waived. Indeed, most are part of global conglomerate ownership structures.

It would be appropriate for the eligibility thresholds to be subject to regular, periodic reviews (for example, every two years), to ensure they continue to reflect the market structure of the streaming sector.

[15] As at April 2019 https://www.media-partners-asia.com/files/mpa/262/AustraliaSVODStudy.pdf
[16] FY19 https://www.pwc.com.au/industry/entertainment-and-media-trends-analysis/outlook/subscription-television.html
[17] https://www.smh.com.au/business/companies/disney-rakes-in-600m-in-australian-revenue-20210127-p56xao.html
[18] https://www.adnews.com.au/news/foxtel-s-pandemic-resurgence-pushes-subscribers-to-record-3-5-million
[19] As at April 2019 https://www.media-partners-asia.com/files/mpa/262/AustraliaSVODStudy.pdf
[20] As at May 2020 https://www.smh.com.au/business/companies/news-corp-revenue-jumps-foxtel-strategic-pivot-provides-flexibility-and-optionality-20210507-p57pp6.html
[21] As at April 2019 https://www.media-partners-asia.com/files/mpa/262/AustraliaSVODStudy.pdf

## 4.4 Proposed exemption for broadcaster-owned businesses

The Green Paper proposes that streaming services which are part of a corporate ownership structure that also includes licensed broadcasting services would be exempt from the new Australian content requirements. It is not clear on what basis this is proposed.

SPA strongly opposes the proposed exemption, which in the current market would exempt Stan (one of the largest and most popular streamers, and a distinct content and consumer proposition compared to the television services) and also, following its launch, Paramount+ (part of a global media conglomerate).

The exemption would detract from the overall guiding policy principles informing the Government's proposed regulatory intervention and would result in harm to Australian audiences. A viewer of a streaming service could miss out on access to Australian content simply because a related corporate entity faces regulation on a distinct and separate service. This is despite the fact that that viewer may not even access the related service.

The proposal to exempt on the basis of corporate structure appears to be without precedent in Australian media law.

The Australian media landscape features many content services which are commonly owned, but which are not exempted from their various regulatory frameworks simply by virtue of common ownership. For example, Southern Cross Austereo owns various commercial television licences, as well as a broad range of commercial radio licences. This fact of common ownership has not justified the exemption of any of these businesses from the various regulatory frameworks which apply relating to Australian content, local news and information or content standards. This is logical given that the potential harms or goods impact viewers and listeners according to the service they are watching or listening to, and not according to the ownership structure of those services.

There is also common ownership of television and newspaper interests through Seven West Media and Nine Entertainment Co, however there are no exemptions that arise in relation to the Commercial Television Code of Practice, defamation law, advertising restrictions, classification, national security laws, etc, even where those services share content across their platforms (news content, for example). This reflects the fact that these protections are needed for each individual content service or product that a consumer interacts with. It is the point of interaction between consumer and service/product which determines whether a potential harm or public good requires regulation.

SPA also notes the possibility of unintended consequences or potential avenues for content businesses to find means of exploiting this proposed exemption in ways not yet considered. For example, there is also the possibility in future that any migration of broadcast services to a pure online play would see the online service exempt from any regulation, if the company operating the business retained ownership of the

broadcast licences it originally held (for example, if Foxtel migrated its primary service to online distribution but retained ownership of the broadcast licences it had previously used to distribute its content).

It is also worth noting that the BVOD/AVOD services currently deployed by commercial free-to-air television licensees primarily as free catch-up services could evolve and change very quickly, altering the extent to which they 'double up' on content that is on the primary broadcast service. SPA's members have reported some BVOD/AVOD services acquiring shows just for the BVOD/AVOD platform, with no broadcast distribution.

SPA speculates that in proposing this exemption, the Government may have concerns regarding the application of regulation twice to the same content. If this is the case, then a proposal should be developed that has regard to the existence of the same content on commonly owned services. That is, a proposal should be developed for consultation in which regulation could be exempted for services which feature almost all of the same content. This would ensure consumers are not missing out in terms of the benefits of public good regulation as it applies to the creation of Australian content.

Inherent in this proposal though is a need for adequate regulation to remain in place for the original/licenced platform. SPA is concerned that recently announced reforms to commercial free-to-air television and subscription television may mean the applicable regulatory frameworks are inadequate.

## 4.5 What expenditure counts towards the requirement?

Determining what kind of expenditure will acquit the regulatory obligation is key, as this will in turn determine the economic benefits that will flow from the obligation, particularly in terms of the maintenance of a sustainable independent production sector.

*Expenditure on newly commissioned projects*

SPA submits that the requirement should only be able to be acquitted through newly commissioned programs, and that expenditure on licensing and acquisitions should not be eligible for meeting the regulatory obligation.

This will ensure that regulated entities are required to engage directly with the independent production sector at the most critical part of a project's lifecycle in both creative and financial terms. Whilst income from acquisitions and licensing is beneficial, financial engagement and commitment at the beginning of a project is critical in the independent production ecosystem and is the key to financing for many production businesses.

A commissioning platform's early participation in the creative process is also hugely beneficial for the quality and success of the final product. This allows for the commissioning platform to bring into the decision-making their knowledge and expertise in terms of which content is likely to appeal to audiences and find success in the market. This also allows the platforms to work directly with content producers to

shape the content to their needs, while building creative relationships that encourage future opportunities.

A commissioning platform's green light also helps secure other key aspects of a project, including government support measures and other investing partners. The fact of a commissioner taking the risk on a project is a critical signal.

SPA has also observed that when a platform commissions, rather than acquires a piece of content, greater investment is made in promotion and marketing, which enhances the chances of that content becoming successful.

In addition, SPA does not support a regulated entity having the ability to acquit its regulatory obligation through contribution to a content fund. SPA is concerned that a content fund inserts a layer of discretionary decision-making (in the form of the body that determines the allocation of the fund) into the commissioning process which would add unnecessary uncertainty.

Further this model prevents content businesses from building direct and meaningful relationships with the commissioning platforms. These relationships are crucial as they typically lead to future business opportunities between the two parties, which may otherwise not occur.

Furthermore, competitive tension in the sector is vital. The more platforms that are commissioning, the greater the competitive tension, which delivers better results in terms of content and in terms of the commissioning deals which finance that content.

*Definition of 'Australian'*

There are two key existing definitions of 'Australian' content in regulatory instruments – firstly, in the Australian and Children's Content Standard 2020 and secondly, in the Producer Offset legislation through the Significant Australian Content test.

In the interests of certainty and predictability, SPA supports the adoption of one of these existing definitions. The creation of another, separate definition would add complexity and uncertainty and is not desirable.

Alternatively, SPA would support the creation of a single definition of Australian content to apply in all regulatory and funding circumstances. As outlined in our Options Paper submission, we proposed a model similar to the points-based test used by the British Film Institute[22], which provides a level of certainty, objectivity and transparency, which will be extremely valuable to production businesses in forward business planning, particularly in regard to the types of content they choose to develop.

Any definition of Australian content should explicitly exclude New Zealand content.

[22] https://www.bfi.org.uk/film-industry/british-certification-tax-relief/cultural-test-video-games/summary-points-cultural-test-film

## 4.6 Support for vulnerable genres

A critical part of the new regulatory framework will be the incorporation of well-designed protections for the at-risk genres of scripted adult drama, comedy, children's content and documentary. These remain vulnerable genres and are at risk of market failure without regulatory support.

This ongoing vulnerability was acknowledged in the Government's Supporting Australian Stories on Our Screens Options Paper[23], and is also evident in the behaviour of linear broadcast media in relation to their changing regulatory obligations. For instance, SPA members have reported that following the deregulation of commercial free-to-air television quotas on 1 January 2021, broadcasters cancelled well-developed drama projects on the basis that they were no longer required by regulation. A similar drop off in commissioning of children's content has also been experienced following the removal of minimum requirements.

We also note Foxtel's submission to the Options Paper, which argued for deregulation to "allow for flexibility of investment on Australian content across a variety of genres,"[24] which suggests that in the absence of regulation, Australian drama would not be commissioned on that platform at existing levels.

We also note that in the Screen Content Reforms Regulation Impact Statement,[25] the Government identified first release Australian drama, first release Australian C drama, and first release Australian C programs as genres where "regulation is a determining factor in providing the content."[26]

Notwithstanding this, the Government has moved, and is moving further to reduce the regulatory protections for these vulnerable genres, making it more imperative that appropriate minimums are applied into the new regulatory framework for streaming services. This will ensure Australians continue to have access to these important categories of programming.

*Children's content production in Australia*

SPA notes the submission made by Australian Children's Producers (ACP) and supports the explanation of the ongoing criticality of the availability of Australian content for child audiences. SPA also supports the demonstration of the underlying market failure and in turn supports the need for direct regulatory protection for this genre.

We note the Government has acknowledged the public policy benefits of Australian children's content, and the need for Government support through the provision of additional funding to the Australian Children's Television Foundation (ACTF) (this was announced following the removal of minimum children's content obligations on

[23] Supporting Australian Stories on Our Screens Options Paper, p 7
[24] Foxtel submission, p 8
[25] https://ris.pmc.gov.au/2020/10/06/australian-screen-content-reforms
[26] Screen Content Reforms Regulation Impact Statement, p 6

commercial free-to-air television).[27] However, we share the concern from ACP that this additional funding does not solve the central need for a platform commission in order to trigger funding support from private and public sources of finance. We also note the ACP submission that reliance on a single commissioning platform (the ABC) will not support a viable and sustainable children's production sector or result in a diverse range of Australian children's content.

We note that in the past, minimum regulatory obligations on commercial free-to-air television were the primary means through which public policy objectives regarding children's television content were achieved. The transition of audiences away from this platform was one of the key justifications cited for deregulation. It is critical to note that this justification (of changing audience habits), is in itself a justification for regulatory intervention on the platforms to which these audiences have transitioned. We note that child and family viewing are key drivers of SVOD take-up and use.[28]

We have seen a demonstration of the underlying market failure in this segment in the sharp drop off in children's content on commercial free-to-air television following the ACMA's decision in April 2020 to suspend Australian and children's television content. Compliance results for 2020 show that the Seven Network did not comply with the minimums relating to first release children's drama (4 out of 25 required hours), all children's programs (87 out of 260 required hours) or Australian preschool programs (41.5 out a required 130 hours).[29] This shortfall is not indicative of supply problems, as the more thorough compliance of other networks demonstrates (who were able to rely on content already commissioned or supplied). It is, however, a reflection of the Seven Network's well publicised opposition to the children's content quotas[30] and is a clear demonstration of what is a likely outcome if regulation is not in place.

The consequence of a failure to secure a future for Australian children's content on streaming platforms will be an abrupt loss of connection for child audiences with Australian culture, values and stories. A failure to act promptly will lead to an abrupt loss of capacity in the children's production sector, jeopardising our nation's ability to produce cultural content that is vital for child audience development.

*What would genre protections look like?*

SPA acknowledges that streaming platforms tend towards specialised curation of certain genres to a greater degree than generalist platforms such as commercial free-to-air television and subscription television. We recognise that it would be inappropriate to require a streaming platform to engage and invest into a genre that does not otherwise feature on that platform.

However, where a platform does invest in and distribute international adult drama, children's content or documentary content, this should trigger an obligation to acquit a

[27] See for example, Screen Content Reforms Regulation Impact statement (September 2020)

[28] https://www.ampereanalysis.com/insight/more-content-families-with-the-family-content-on-disney-life

[29] https://www.acma.gov.au/publications/2021-05/report/2020-compliance-australian-and-childrens-content-compliance-tv-content-standards

[30] https://www.smh.com.au/business/companies/seven-halts-children-s-production-in-australian-content-quota-protest-20200225-p5445r.html

proportion of the platform's overall regulatory obligation into new Australian content in that genre.

For instance, Disney+ has an incredibly strong engagement with Australian child audiences, yet those audiences are currently only exposed to international content on that service, with no Australian children's content available on the platform. Introducing a requirement for that platform to acquit a proportion of its overall obligation towards Australian children's content would therefore not be inconsistent with its chosen audience strategy.

We note the subscription television NEDE scheme, which offers an example of how Australian content obligations can successfully be applied to platforms/channels with an international focus. For example, the NEDE scheme applies to BBC (and historically, UKTV), which has a focus on British content. The NEDE scheme has generated content with a successful combination of British and Australian narratives which nevertheless still links to the genre focus of the channel. In this way, the scheme has ensured the delivery of Australian cultural product, but with flexibility through co-productions that has enabled the content to be integrated into the overall brand objectives of the channels.

SPA is open to further discussion regarding how the level of sub-requirement would be determined, with options including a flat rate minimum (eg, 20% of the overall 20% requirement should be children's content), a rate proportionate to the amount of sub-genre international content on the platform, or a rate proportionate to the spend on sub-genre international content on the platforms.

It may be appropriate for a regulator to have a role in determining the rate of sub-genre requirement as a proportion of the overall regulatory obligation.

*A minimum requirement for First Nations content*

There is currently no element of Australia's regulatory framework for screen content that directly incentivises or requires the production of content from First Nations people. Whilst specific funding is made available to NITV and through Screen Australia's Indigenous unit, Australia lacks any form of requirement for the private sector to engage in this important genre of Australian content.

This form of content faces particular financing and marketplace challenges, yet has a resonating cultural importance and the formulation of a new regulatory framework for streaming platforms offers an opportunity to build supports for the genre which are not reliant on Government funding models.

SPA submits that the regulatory framework for streaming platforms include a requirement or incentive for streaming platforms to work with Indigenous-led businesses on projects with a genuine Indigenous voice. Important issues surrounding the shape and level of the regulation or incentive should be determined in consultation with Indigenous producers and Indigenous production businesses.

We note that Canada has in place a system for incentivising large broadcasters to produce and show Canadian programming produced by Indigenous producers. This

was imposed on the large English and French language broadcasting groups by the regulator, the CRTC, in 2017 and sees broadcasters receive extra credit towards their Canadian content expenditure requirements for programming produced by Indigenous producers.[31]

## 4.7 Minimum requirement to work with independent sector

SPA supports minimum requirements for streaming platforms to acquit a majority of the regulatory obligation through projects commissioned with the independent production sector. SPA submits that 80% of the overall 20% expenditure requirement should be required to be acquitted through working with the independent sector.

Without such a requirement, there is the potential for streaming services to establish in-house production facilities and acquit the expenditure obligation primarily through in-house production. This would lead to a substantial reduction in commissioning opportunities, which are a necessary part of sustaining a diverse range of independent production businesses. A significant loss of capacity could occur within the sector, with drastic impacts for many SME production businesses.

A trend towards in-house production would have a damaging impact on market structure overall. The presence of multiple participants in the industry establishes a diversity of pathways for creative professionals, which is the means by which a diversity of ideas is delivered into the content ecosystem.

A diversity of participants also ensures the economic benefits of the sector are distributed across geographic regions, as in-house production facilities tend to consolidate in major capital cities. An industry that is spread geographically is a more effective and nimble way of accessing the creative resources (people) which are located throughout Australia, and in turn creates jobs and economic stimulus in a range of locations.

The independent production sector is also comprised of a significant number of smaller businesses which, due to their size, are incentivised towards greater efficiency and a tendency to extract maximum value from IP assets. In this sense, smaller businesses (and hence the independent production sector), are a more efficient channel through which to achieve cultural policy objectives.

## 4.8 Monitoring of quantum of production

There is a risk that a platform may choose to acquit all, or the majority of its expenditure requirement on a single project. If this trend were to establish, there would be a reduction in commissioning opportunities which are needed to sustain a diverse range of independent production businesses, and a significant loss of capacity would occur, whilst the lost opportunity for industry growth would be enormous.

[31] https://crtc.gc.ca/eng/archive/2017/2017-148.htm

In this sense, quantity of production is a pre-requisite for quality of production.

SPA submits that careful monitoring will be required following the implementation of a regulatory obligation to assess whether this trend establishes. If it does, it may be appropriate to consider minimum requirements, or possibly a points system that incentivises quantity and volume of production.

## 4.9 Delivery to audiences

An expenditure model must also come with a transmission and promotion obligation. In the absence of a transmission obligation to deliver and promote the content to Australian audiences, a service could potentially invest in Australian productions that intentionally or inadvertently might not be seen by Australians. This is particularly so for algorithmic services that offer content based on past individual viewing habits or preferenced to a platform's own content over others'.

Promotion and discoverability were part of the recommendations of the Broadcasting and Telecommunications Legislative Review in Canada (recommendation 63)[32], and also feature in the EU's Audiovisual Media Services Directive (AMSD) (article 39).[33]

## 4.10 Transparency and reporting

To ensure the effectiveness of the new regulatory framework can be monitored, and to enable effective enforcement by the regulator, a robust and transparent system of reporting will be a fundamental part of the new framework. The need for transparent and open reporting in regulated markets was supported by the ACCC as part of the Digital Platforms Inquiry.

All streaming platforms should be required to publicly report annually on a range of key indicators. This is to enable the regulator to assess compliance with minimum requirements, to assess the overall health of the regulatory system and to enable tracking of the size and scale of platforms that have not yet met eligibility thresholds for inclusion in the scheme.

The reporting requirements should take in revenue by source, profitability, program expenditure across genres, content output across genres, performance against content obligations, and performance against other regulatory measures (such as promotion, discoverability). Consumption information should also be provided where this is not available through open means (eg, OzTAM, RegTAM and Nielsen data is available for television broadcasters, however no consumption data is released by video on demand platforms).

Data will not only be crucial to the regulator. The availability of market data is vital to ensuring fair participation in the market by all participants. For example, at present, a

[32] https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html
[33] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN

producer has no visibility regarding the viewing data of content on streaming platforms. Unlike television, which through OzTAM, RegTAM and Nielsen has reliable and widely available viewing data, streaming platforms have chosen not to publicise viewing information. Without this information, producers cannot assess the true value of their product to streaming platforms, which hamstrings their ability to negotiate commercially fair deal terms and impacts their long-term viability. This is an imbalance in negotiating power, of the kind identified by the ACCC throughout its Digital Platforms Inquiry.

Detailed public reporting of the kind proposed by SPA has precedent in the Broadcasting Financial Results, which were collected and published under the former scheme for commercial free-to-air television licence fees.

## 4.11 Support fair deals in the market

The economic sustainability and vitality of the independent production sector is a crucial underpinning of the creation of high quality, diverse, relevant, and compelling Australian content.

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.

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).

This market failure is evident in buyers seeking “more for less” from producers, in particular in relation to the level of licence fees paid for content and the ability of producers to retain IP.

Retention of IP is vital for the predominantly SME producer community, as it provides an asset they can leverage into other revenue streams (in particular, exports) and helps to build an economic base that provides stability and opportunity for their business.

SPA has been on the record in support of regulated terms of trade for many years, highlighting the relative market power of the small number of television platform buyers, compared to the large number SME producers competing for commissions.

However, this imbalance in market power is dramatically more pronounced and damaging as regards streaming platforms. This is in part due to their size and scale (the market mostly features global streaming giants, with only one local provider, who is nevertheless part of a large corporate structure), but also due to the fact that with deregulation of linear broadcast media, streaming platforms are increasingly the means through which production businesses can seek commissions.

The overwhelming trend in the market is for streaming platforms to use this imbalance in bargaining power to take all international and ancillary rights in a project for an extended licence term (sometimes for all time). Where a producer may previously have retained ancillary rights or rights to exploit outside of Australia, and in so doing generate a revenue stream that supported a sustainable production business as an ongoing concern, this option is now no longer available. Due to the oligopsonic market conditions, producers are not in a favourable position in which to negotiate for the retention of any IP, which severely harms their ability to build sustainable businesses based on strong IP assets.

The fees going back to producers in these deals are not necessarily increasing despite the increased value of the deal to commissioning platforms. In this way, a commissioning dollar from a linear broadcast media business is not necessarily comparable to a commissioning dollar from a streaming platform.

*What needs to be done*

The UK experience shows that mandated terms of trade enable producers to retain rights and become asset-owning businesses. This has given rise to the 'super indies', who have gained extensive success in the international marketplace and have driven British TV exports.[34] [35]

We have also seen the problem recognised and addressed in the regulatory scheme imposed by the French Government, which mandates that rights revert to the producer after 36 months, with no capacity for the streamer to take distribution rights.

The recent policy and regulatory discussion regarding the lack of equitable deal-making between Australia's news media businesses and the large digital platforms is also instructive.

These developments stem from the findings of the ACCC's Digital Platforms Inquiry, which has led to direct Government intervention in the form of a new bargaining code.[36] The need for the code arose from the imbalance in bargaining position between news media and digital platforms, the latter of which have used their ubiquity to become unavoidable business partners for many Australian news media businesses and who have amassed substantial market power.[37]

The ACCC found that news media businesses have been unable to individually negotiate equitable terms over the use of their content by digital platforms, and that this is indicative of the imbalance in bargaining power.[38] This has directly impacted on the ability of IP creators (the news media businesses) to monetise their IP and maintain sustainable businesses. The Government in this instance has recognised the

[34] Chalaby, J. (2010). The rise of Britain's super-indies: Policy-making in the age of the global media market. International Communication Gazette, 72(8), pp. 675-693.
[35] Examples of terms of trade can be found at: https://www.itv.com/commissioning/articles/terms-of-trade And: https://www.bbc.co.uk/commissioning/tv/articles/how-we-do-business
[36] https://www.accc.gov.au/media-release/views-sought-on-issues-for-draft-news-media-and-digital-platforms-bargaining-code
[37] ACCC Digital Platforms Inquiry Final Report, p 8
[38] Ibid. p 16

cultural and societal benefits of sustainable news businesses and intervened to ensure their ongoing stability.

This scenario is comparable to the market failures in deal-making which exist in the market for screen content. Similar thinking should guide the Government towards intervention and the introduction of measures which will assist SME production businesses to reach fair terms and retain IP wherever possible.

There were previously some minimum incentives/protections in the regulatory framework for Australian content on commercial free-to-air television (Australian Content Standards (ACS)), through the minimum licence fee protection and the incentive to work with the independent production sector. Whilst these were removed in the reforms that took effect on 1 January 2021, they were a recognition of the need for some protections against oligopsonic market dynamics.

A similar recognition exists through Screen Australia's Terms of Trade, applicable to projects that receive direct funding through the agency. There may, however, be a gradual drift away from direct funding for television projects towards the increased Producer Offset, which may dilute the effectiveness of the Terms of Trade in the sector as a whole.

The diminution of the protection offered through the previous ACS and Screen Australia Terms of Trade further supports the need for enhanced contracting protections.

SPA is proposing this could be effected through the new regulatory framework by stipulating that expenditure is only eligible to acquit a streaming platform's regulatory obligation if it expenditure on a project governed by terms of trade.

Similar to the news media bargaining code, the production sector and streaming platforms should be given the opportunity to negotiate those terms of trade directly, but with the back stop of Government intervention should negotiation not progress in a timely fashion and in good faith between the parties.

It may also be appropriate for the Government to set some guidance or parameters as to the minimum requirements that the negotiated terms of trade should include.

In order to ensure independent screen businesses are able to hold a reasonable amount of IP in their work, and to assist them to remain as stable and sustainable as possible, improved terms of trade are vital.

## 4.12 Proposed two-step regulatory implementation

The Green Paper proposes a two-step process of regulatory implementation under which a formal expectation would be set by the Government as to the percentage of Australian revenue streamers would be required to invest in Australian content. If this expectation were not met for two consecutive years, the Minister would have the power to implement formal regulatory requirements.

SPA does not support this two-stage approach and instead favours an immediate implementation of clear and enforceable regulatory obligations. The Government's proposed approach could conceivably result in some large streaming services effectively delaying their contribution to Australian content for at least 2 years. Given the gap in investment created by the rapid deregulation of commercial free-to-air television (implemented on 1 January 2021), the market needs immediate certainty regarding SVOD investment and without a timely transition of commissioning demand to streaming platforms, there is a risk of serious damage to the independent production sector. Australian viewers should also not be forced to wait a potential further two years for access to Australian content on some of the streaming platforms.

SPA also notes it has observed almost a complete decline in commissioning of children's content, which makes regulatory interventions to support this genre an immediate problem.

SPA submits that if the Government has accepted the need for regulatory intervention (as is evident in the Green Paper's proposals), then the case for immediate regulation of these services has essentially already been made.

## 4.13 Timetable for implementation

The Green Paper includes a proposed timetable for introduction of the new regulatory arrangements that would seem them commence 1 July 2022. SPA is concerned that this constitutes an undue delay for the commencement of SVOD regulation.

SPA proposes that the new obligations should commence 1 January 2022, given the Government has already moved with much haste to deregulate subscription television and commercial free-to-air television.

The question of Australian content obligations for streaming services has been part of the public policy discourse for many years now, and the prospect of regulation should not be an unexpected one for streaming services already in market.

There is an urgent need for regulatory implementation, particularly in areas where, as a result of deregulatory reform, there has been a collapse in commissioning. This is particularly the case for children's content, following the removal of minimum obligations on commercial free-to-air television.

## 4.14 Review of implementation

Any implementation roadmap should include a requirement for a Government review of the scheme after around 2 years post-implementation. This would serve to allow an assessment of the effectiveness of the scheme and any unintended consequences. The review should be required to consult publicly and publish its findings.

# 5 CAST Fund

SPA welcomes the Government's proposal for the establishment of the Create Australian Screen Trust (CAST) in that it recognises that an important part of the screen content ecosystem is ongoing direct funding support for vulnerable forms of content.

However, in terms of both the immediate and longer-term benefits for the industry and viewers, SPA believes the timely implementation of a well-designed Australian content obligation for streaming services is most important.

This is due in large part to the pathway mapped in the Green Paper for the implementation and funding of CAST, which is dependent on the restack and sale of spectrum currently used by commercial free-to-air television. This is proposed in the Green Paper as a kind of voluntary or opt-in process, which would not proceed unless a certain number of broadcasters signed up for the proposed new class of broadcasting licence.

Whilst broadcasters' submissions were not available at the time of writing, SPA is generally aware of concerns that the proposed new class of licence, and accompanying spectrum arrangements may not be sufficient to incentivise broadcasters to sign up to the proposed scheme.

For example, it is unclear whether broadcasters agree with the Government's analysis that they will be able to replicate their current service numbers and quality under the revised spectrum arrangements. It is also unclear as to whether the revised spectrum arrangements would preclude any further growth or adaptation in broadcasters' services. SPA also notes that the process of restacking spectrum is labour-intensive and not without risks for broadcasters.

Hence it would seem that there are many contingencies, complications, and controversial decisions to be addressed, and many years to pass, before the Government would be in a position to contribute the proceeds of a spectrum sale to the proposed CAST fund.

Whilst SPA supports the fund in-principle, we are cautious towards the likelihood of its eventual implementation in the form proposed by the Green Paper.

An alternative approach to capitalising CAST would be for the Government to fully fund CAST immediately, and then recoup the initial capitalisation once the spectrum auction has been complete. This would enable the benefits of the model to be delivered without delay.

As a general note, if an additional fund were created it should be additive to the overall funding picture. SPA would not support a reduction in direct support through screen agencies being a consequence of an additional screen content fund.

# Attachment A - Consultation questions

*3.1 Is the deregulatory benefit on offer sufficient to encourage commercial television broadcasters to take up this offer?*

SPA does not support complete deregulation of Australian content obligations on commercial free-to-air television multichannels being offered as an incentive for broadcasters to take up the new class of television licence.

Broadcasters have recently benefited from substantial deregulation of Australian content obligations and no policy rationale for further deregulation of what are relatively modest obligations is advanced in the Green Paper.

The most recent Australian content compliance demonstrate that broadcasters are comfortably exceeding their minimum requirement to broadcast 1460 hours of Australian content on non-primary channels[39] and we therefore query whether the obligations are causing significant hardship.

These modest requirements should be retained to ensure no future degradation of audiences' access to Australian content across the commercial free-to-air product offering.

*3.3 What elements of the existing regulatory framework should continue to apply?*

All remaining Australian content obligations applying to commercial free-to-air television broadcasters should continue to apply. As noted above, broadcasters have benefited very recently from significant deregulation of Australian content requirements and no further deregulation is warranted at this time.

*5.1 Do you consider that revenue from the sale of spectrum could be used to support public policy initiatives?*

SPA supports in-principle the use of proceeds from the sale of publicly owned spectrum for the achievement of public policy initiatives, and in particular, public policy initiatives related to Australian screen content.

However, as noted in section 5 of this submission, SPA is concerned by the many complicated contingencies involved in the process for restack and spectrum auction, and hence is concerned that the spectrum sale may be delayed or not eventuate. For these reasons, our immediate focus is on the public policy and economic benefits that a well-designed and promptly implemented regulatory obligation for streaming platforms offers.

[39] https://www.acma.gov.au/publications/2021-05/report/2020-compliance-australian-and-childrens-content-compliance-tv-content-standards

*5.2 Are there examples of best practice in providing sustainable and targeted support in other jurisdictions?*

As a general principle, SPA does not support investment in cultural outcomes being tied to secondary determinants. We support funding for cultural outcomes being a standalone factor in budgetary settings.

*6.1 Should the investment obligation apply to all types of SVODs, BVODs and AVODs including those that specialise in content such as sport?*

SPA supports a broad-reaching obligation that applies to all SVODs, BVODs and AVODs offering professionally produced content that meet specified size and scale thresholds (see section 4.3 of this submission), and subject to the proposed consideration outlined in 4.4 of this submission relating to whether the service is comprised of substantially the same content as a related, regulated service.

SPA notes the example of a streaming service that offers large amounts of live and on-demand sports coverage. Whilst this may seem to suggest that content obligations would be inappropriate, we note that the major sports streaming company operating in Australia, Kayo sports, currently offers a range of Australian and international documentary sports coverage.[40]

It would be appropriate for some form of regulatory obligation to apply to a service that in addition to live sports also offers documentary content. A modified obligation may need to be developed for this class of service given the impracticalities of determining revenue attributable to particular types of content on a service. It may be more appropriate for these kinds of services to be subject to a requirement that a minimum proportion of the documentary library be new Australian documentaries.

*6.2 Would a rate of investment of five per cent of Australian revenue be reasonable? Is there an alternative rate that is more appropriate?*

As discussed in section 4.2 of this submission, the rationale put forward to support a rate of five per cent is misguided and inappropriate.

As explained in section 4.2, SPA supports a rate of 20% as an internationally competitive rate which will deliver a rich dividend of Australian content for audiences and ensure a sustainable and vibrant independent production sector.

*6.3 Should alternative models, such as a percentage of overall programming expenditure, be considered?*

As outlined in section 4.1 of this submission, SPA prefers a revenue-based requirement, as this follows international precedent, and matches the level of regulatory obligation to business success in the Australian market. We are unsure as to whether programming expenditure for the Australian market could be accurately derived, given the global nature of the majority of streaming services operating in this market.

[40] https://help.kayosports.com.au/s/article/What-documentaries-do-kayo-have-available

*6.4 Is the proposed revenue threshold of $100 million reasonable?*

As outlined in section 4.3 of this submission, SPA acknowledges the need for eligibility thresholds, to ensure that undue burden is not placed on immature streaming businesses and to ensure that regulation does not deter market entry.

However, SPA believes that a revenue threshold of $50 million is more appropriate and signals a level of business size at which it is reasonable to expect a business will have the capacity to engage in the commissioning process in a sustainable way.

*6.5 Should the investment obligation be able to be fulfilled with any genre of Australian content, or genres such as drama, children's programming or documentaries?*

The regulatory requirement for streaming platforms should not be limited to scripted content. SPA believes a more broad-ranging approach should be adopted, subject to the proposed measures to protect vulnerable genres as a subset of the overall requirements (and excluding sport). A broad-ranging approach will help stimulate increased production activity, while increasing employment and export opportunities.

A content distribution platform should be able to acquit its investment requirement against the full range of Australian content, provided sub-requirements relating to vulnerable genres are set and met.

As noted in section 4.6 of this submission, a requirement to commission into drama, documentary or children's content would be triggered by a platform's engagement with international content in those genres.

SPA is open to further discussion as to how the levels of sub-requirement could be determined, and notes there may be a role for the regulator in determining the appropriate level of requirement for each platform provider.

*6.6 Should the investment obligation be geared to commissioned content, or broadened to permit the acquisition of Australian content that would satisfy the first release requirement?*

As noted in section 4.5 of this submission, SPA supports a requirement for the obligation to be acquitted through new commissions, to the exclusion of licensing and acquisitions. This is necessary to encourage the participation of the platforms in financing and creative decisions at the outset of projects, which is fundamental to their success.

*6.7 Should the investment obligation capture broader categories of content investment, such as pre- and post-production?*

SPA supports a broad capture of expenditure into the obligation, covering pre- and post-production.

*7.1 Is the current amount of Australian content produced and commissioned by the ABC and SBS appropriate?*

In order to form a view on this question, SPA would require to see the data produced out of the proposed enhanced reporting regime for the national broadcasters. However, it is highly likely that there should be an increase in budget allocations to secure stability and growth.

*7.2 How should a statutory obligation for the ABC and SBS to provide Australian content be constructed?*

*7.2.1 Should this focus on the investment in Australian programming, or require the provision of certain levels of Australian programming?*

*7.2.2 Should the obligation focus on Australian programming broadly, or target particular genres such as drama and children's programming?*

*7.2.3 To what extent should the obligation differ for the ABC and SBS to accommodate their differing roles and remit?*

SPA supports minimum regulatory obligations for the ABC and SBS to commission new Australian content into children's, drama and documentary genres.

We are open-minded regarding the nature in which the obligations should be structured, noting the ultimate objective should be to ensure funding directed towards Australian content is not redirected into other parts of the funding structure.

We acknowledge the national broadcasters' preference against regulation and note support from some for tied funding as a means of protecting funding levels. Whilst we appreciate that this is intended to protect operational independence, SPA would retain concerns that tied funding is still vulnerable to reallocation into base funding. Strategic commitments to content investment also fluctuate with shifts in management and Board outlook.

For these reasons, SPA believes minimum regulatory obligations are the most effective and stable way of ensuring stability in investment levels.

Any regulatory minimums must be accompanied by adequate and stable budget funding for the national broadcasters.

*7.3 What impact would the imposition of a clear Australian content obligation for the ABC and SBS have on the Australian screen production industry and the provision of Australian content more broadly?*

Enhanced certainty regarding investment targets and priorities is of assistance for small businesses in particular in terms of business planning. Small businesses in particular are impacted by unclear and changeable business conditions.

*8.1 Is the timeframe proposed in this chapter realistic?*

As outlined in section 4.13 of this submission, SPA supports an accelerated roll out of the proposed new regulatory obligation for streaming platforms. This is necessary in order to minimise the damage to sector created by the fact that linear broadcast platforms have already been deregulated, in advance of the transition of regulation to new platforms.

SPA supports an effective date of commencement of 1 January 2022, which we note will nevertheless mean the regulatory gap between linear broadcast platform deregulation and streaming regulation will be a year.[41]

*8.2 Are there any particular stages that would require a greater or lesser period of time?*

Refer to the answer to question 8.1 above.

*8.3 Are there particular risks and factors that need to be taken into account in terms of the timing for the transition to the new licensing and regulatory model?*

We note that the timetable for reform set out in the Green Paper was drafted in the context of the original date for submissions (being March 2021). Ideally the extra time afforded for submissions should not lead to any delay in the timetable for decision-making and implementation, noting SPA's position in support of a 1 January 2022 commencement date.

[41] In practical terms, the gap was created in April 2020 when the suspension of quotas on commercial free-to-air television and subscription television was announced, which resulted in a freeze in commissioning activity.