



SCREEN
PRODUCERS
AUSTRALIA

SUBMISSION TO
THE SUPPORTING
AUSTRALIAN
STORIES ON
OUR SCREENS
OPTIONS PAPER

JULY 2020

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Stateless, Matchbox Pictures



2 July 2020

Screen Producers Australia's submission to the *Supporting Australian stories on our screens options 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 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 provide a submission to the *Supporting Australian stories on our screens Options paper* ('options paper'), prepared by the Australian Communications and Media Authority and Screen Australia, and released by the Minister for Communications and the Arts.

The options paper was commissioned following the findings of the Australian Competition and Consumer Commission's (ACCC) Digital Platforms Inquiry. The ACCC inquiry considered the disrupting force of unregulated digital services on regulatory frameworks that only encapsulate legacy businesses. This current review process, through the options paper and subsequent reform, must continue along this trajectory – modernising the regulatory framework and tax offsets to ensure that all related mechanisms are fit for purpose in the contemporary screen content landscape. This is a unique opportunity to address the disruption caused by newer unregulated businesses entering the market, to ensure all businesses which derive financial benefit

from the Australian content market contribute back to cultural and economic policy objectives.

For further information about this submission please contact Holly Brimble, Director of Policy (holly.brimble@screenproducers.org.au).

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1 Executive Summary

- SPA welcomes the opportunity to respond to the *Supporting Australian stories on our screens* options paper ('the options paper').
- Whilst the economic and cultural value of production and availability of Australian screen content remains widely accepted, the regulatory and other government interventions used to support those objectives are outmoded and no longer serving their intended purposes. The need for reform is well recognised across government and the screen ecosystem.
- This reform process is a unique opportunity for the Government to deliver an ambitious and forward-looking vision for screen content in Australia. The Government should adopt a firm growth target – to double the production of Australian content, to double employment in the sector and to double the Australian production industry in five years from implementation.
- Adopting an ambitious target will help focus the Government's reform agenda and will help shape regulation and incentives that secure the substantial cultural and economic benefits that Australian screen content provides.
- Achieving this target will deliver a substantial increase in the amount and quality of culturally relevant content available to Australians, and will drive significant jobs growth and economic activity.
- The SPA proposal will deliver the foundation for this growth objective.
- SPA proposes a model broadly in alignment with model 3b of the options paper – a system underpinned by a platform-agnostic expenditure requirement that is tailored to individual providers' businesses and operating models.
- This will ensure that if a content platform derives substantial economic benefit from offering content in Australia, it will in turn contribute to Australia's cultural policy objectives. It will also ensure Australians have access to Australian content on the platforms which they are now using.
- These obligations should be flexibly framed, and should be subject to legislated minimums, to reflect the diversity in distribution businesses.
- In summary, SPA's proposals are:

Regulating for audiences, industry and the economy

- A platform-agnostic expenditure requirement that is tailored to individual providers' differing business and operating models:
 - A new revenue-based expenditure obligation across all platforms (commercial FTAs, subscription TV, SVOD, AVOD/BVOD, IPTV), to commission content primarily produced by independent production companies.

- Overall framework in legislation, with key minimum requirements and protection of vulnerable genres (scripted drama, comedy, children's and documentary).
- Each provider's specific obligations to be agreed with the regulator, following industry consultation, to be reported annually and reviewed and updated periodically – no less than every three years. The regulator to have power to set obligations should agreements not be reached, as well as to monitor compliance and take enforcement action.
- Promotion and discoverability requirements.
- Transparency and reporting requirements.
- Obligations to extend to public broadcasters, with funding quarantined for vulnerable genres.

Incentives, support and business development

- A harmonisation of the Offset for significant Australian content (features, television drama and comedy, documentary, and children's) at 40% (using a qualifying points test). A 30% Producer Offset rate would be available for light entertainment.
- The Location and PDV Offsets would also be set at 30%, and would be available to scripted features, TV drama and comedy, children's content, documentary and light entertainment.
- Ensure financing support and care for vulnerable genres, including children's, documentary, scripted drama (feature films/oneoffs, television drama and comedy).
- Measures to enhance screen exports.
- Measures to enhance retention of IP.

2 Introduction

This is a crucial opportunity for Australian screen content.

Despite there being a worldwide boom in content creation, the component parts of the ecosystem that creates and delivers Australian screen content to audiences have shifted, causing the model of government intervention that underpins its success to become outmoded.

This is evident in rapid (and permanent) changes in consumer/audience behaviour and in the disrupted economics of screen content creation and delivery. The current mix of regulation and intervention measures were designed and calibrated for a consumer and business environment that no longer reflects the realities of the marketplace.

This puts at risk the underlying cultural and economic policy objectives that underpin screen content – objectives which have enjoyed bipartisan support from successive governments, both federally and at the state and territory level. Intervention is based on the widely accepted rationale that without government support, Australian content would be under-produced or non-existent in certain genres (such as scripted adult and children's content).

The threats to the ecosystem are well understood, and have been acknowledged by the options paper.

These threats and challenges have been amplified and accelerated by the impact of the coronavirus. This current review is therefore even more critical in terms of providing an opportunity to deliver certainty, sustainability and growth to the sector.

If we are to continue to have a diverse and vibrant screen culture, that delivers culturally relevant and popular content, and which stimulates widespread economic activity and employment, we must take this opportunity to create a forward looking, fit-for-purpose and resilient model of Government intervention.

In issuing the options paper and responding to the ACCC Digital Platforms Inquiry, the Government has recognised the opportunity to lead reform of outdated support and regulation measures. We urge the Government to fully acquit this opportunity and establish a forward-looking and comprehensive vision for the future of Australian screen content.

The most effective way to achieve this will be through the adoption of a measurable and ambitious growth target. A top-line target of doubling the production of Australian content, doubling employment in the sector and doubling the screen production industry in Australia in 5 years from implementation will lead to cascading benefits in terms of rapid jobs growth, increased economic output, expanded export opportunities and, most importantly, a rich return to Australians in terms of an increase in quality and quantity of culturally relevant content.

To get there, SPA supports an evolution and expansion of the current regulatory and support environment for content. It is time for a framework of incentives and regulation which allows legacy businesses to compete on a more level playing field with new market entrants by imposing obligations consistently, but with some flexibility to ensure regulations are tailored to accommodate differing business and operating models.

The incorporation of new streaming platforms into the regulatory mix is the key to unlocking the growth potential of the production industry and ensuring Australians continue to have access to cultural content on the platforms they are using. Given the global nature of most streaming businesses, this will open the door to the international market, which will deliver substantial in-flows of investment and will stimulate robust growth, all without any public expenditure.

Streaming platforms have achieved stunning success, and this represents a huge opportunity to spark growth and take more Australian stories to the world, but only if we get the regulatory and other settings right.

Government support must also recognise that the engine room of Australia's screen content ecosystem is the independent production sector, and that a competitive and sustainable independent production sector is the most effective way to ensure the future of Australian screen content.

If the Government were to pursue incremental reform (which SPA believes would be a critical lost opportunity), model 2 should be considered, but with mandatory requirements for subscription streaming services.

In this submission, SPA proposes a forward-looking vision for the screen industry that leverages regulation and incentives to deliver growth, jobs, economic activity, exports, increased industry capacity and quality/quantity of Australian content delivered to Australian audiences.

We have a unique and time-critical opportunity to repurpose our regulatory and support mechanisms to position Australia to exploit the global boom in content creation, for the benefit of employment, investment, economic activity and the delivery of culturally valuable content to Australians.

SPA looks forward to engaging further with Government and other stakeholders as the reform process progresses.

3 Background

3.1 Data

The options paper contains a useful summary of data which demonstrates to a degree the current state of play in the screen sector.

Whilst the data included contributes to an overall narrative regarding the pressure on regulatory systems from changing consumer behaviour and economics, there is a range of additional data which should be taken into account, so as to ensure all relevant information is considered.

In particular, the Government's consideration of options should be informed by a more complete set of data regarding the screen production sector. There are also new sources of data relating to cultural value, which are not reflected in the options paper.

State of the independent screen production sector

The independent screen production sector¹ is the foundation of the screen ecosystem, and missing from the options paper is consideration of the structure, performance and state of play of that sector. Understanding this is vital, to ensure that the consideration of options takes into account their impact on the continued viability and success of screen production businesses. Without a healthy and sustainable independent screen production sector, none of the economic and cultural objectives of the Government as regards screen content can be met.

To better understand the state of play for the independent screen production industry, Screen Producers Australia commissioned Deloitte Access Economics to produce an industry census in both 2018 and 2019. The census looks at the key trends, estimates the economic activity and provides an outlook for the industry.

The data contained in the Deloitte report is sourced from 2018, however, many of the economic markers in the report will have more recently been affected by the impact of the coronavirus and associated interruptions to industry activity. The report nevertheless provides a useful 'business as usual' picture of the industry.

Key data from the report is extracted at [Attachment A](#). The key findings are:

- The Australian screen industry plays an important role in the Australian economy, with revenues of \$1.2 billion and exports of \$163 million.
- The sector is also a significant employer, supporting around 30,000 people.
- Relative to other Australian businesses, screen producers are much more likely to be exporting.
- Australian ideas drives screen content in Australia, with 9 out of 10 ideas coming from within the country.

¹ The definition of 'independent producer' in the options paper Glossary is appropriate.

- Whilst the independent screen sector is a significant contributor to the economy, individual businesses are facing difficult conditions and narrowing profit margins, with small businesses in particular facing profitability challenges
- In terms of the outlook for independent production businesses, broadcaster bargaining power was the top ranked challenge, followed by high labour and capital costs, and international competition.
- Licence fees paid by broadcasters for use of the commissioned content are declining over time, and do not compare favourably with jurisdictions with regulated terms of trade.

Cultural contribution

SPA supports the discussion in the Options Paper regarding the cultural contribution of Australian screen content. In particular, we support the conclusion reached that “the cultural impact of Australian screen content is increasingly important in our on-demand, fast-evolving world.”²

Whilst the emergence of new sources of screen content have opened up new opportunities for story-telling, these new sources are predominantly comprised of international material, which has had the effect of diluting the cultural impact of Australian screen content. As discussed elsewhere in this submission, there is a need for policy settings to evolve to ensure that Australian screen content’s social and cultural importance is reflected in the available pool of content choice.

To add to the Options Paper’s discussion of cultural currency, a recent report from A New Approach, titled *A view from middle Australia: Perceptions of arts, culture and creativity*,³ provides a new insight into the cultural value of the arts and culture more generally in Australia, of which screen content is an important subset.

The key finding is that arts and culture are “*fundamental* to the Australian way of life; indeed, to being human.”⁴

The report confirms the key cultural contributions that sectors such as the screen sector make, including:

- Acting as a source of joy and inspirations⁵
- Helping us to understand each other - bringing communities together and encouraging diversity and acceptance of differences⁶
- The role arts and culture play in children’s development, including enhancing self-esteem and self-expression, and building social and intellectual skills⁷; and
- Stimulation of creativity⁸

² Options Paper, p 15

³ <https://www.humanities.org.au/new-approach/report3/>

⁴ Ibid. p 244

⁵ Ibid. p 24

⁶ Ibid. P 24

⁷ Ibid. p 7

⁸ Ibid. p 32

The research made clear that middle Australians value Australian content for its capacity to reflect their lives back to them, its capacity to help them understand their own experiences, and also for its ability to promote Australia on the world stage.⁹ Arts and culture is seen as more than just entertainment.¹⁰ Screen content is particularly effective in these areas.

A recent survey from the Australia Institute found that three in four respondents said the arts have “improved their mood and quality of life during the pandemic.”¹¹

The importance of screen culture has indeed been magnified by the pandemic and the increased time people are spending within their homes. An April 2020 study by the UK’s Policy and Evidence Centre found that eight in ten people agreed that film and TV help in dealing with challenging life circumstances such as COVID -19.¹² That study also found significant increases in TV downloading and streaming activity during the pandemic shut down period.

These sources confirm the view that screen content continues to play a vital, and valued cultural role in contemporary Australia, and that there is continued legitimacy in the cultural policy objectives that sit behind screen regulation and incentives.

⁹ Ibid. p 8

¹⁰ Ibid. p 24

¹¹ <https://www.theaustralian.com.au/arts/survey-australians-underestimate-arts-workforce-compared-with-coalmining/news-story/a0c2b094b5a3d4eb702160f68a80657d>

¹² <https://www.pec.ac.uk/assets/publications/Digital-culture-consumer-tracking-study-2020-Week-1.pdf>

4 Policy principles to guide reform

SPA notes the options paper articulates three broad policy principles, referenced in the development of the four models:¹³

- Australian screen stories are important culturally and economically
- Our stories should be available on the screens we watch
- Regulation and incentives should be fit for purpose, effective and efficient.

SPA supports these policy objectives as relevant and important in the consideration of policy and regulatory design. However, there are additional policy principles which should inform Government decision-making. Below are the policy principles SPA has had regard to in formulating its proposal for a reformed system of regulation and support, some of which overlap with the principles outlined in the options paper.

These principles have been formulated to inform the development of a framework of regulation and support that enhances and incentivises Australian businesses that create Australian IP, as a priority. These principles outline the critical factors for a sustainable sector that delivers to Australian audiences a diverse range of culturally relevant content through the most powerful medium of cultural exchange – the screen.

1. *Audience needs:*

- 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 free and paid platforms and services.
- c) Australian children should have access to new Australian stories told from child-centric perspectives

2. *Sustainability of businesses*

- a) 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.
- b) The Australian Government has a role to ensure competition for and address market failure in the creation and delivery of quality new Australian screen content.
- c) Independent screen businesses (SMEs) are critical to achieving cultural and economic objective. There should be a diverse range of businesses (including measures such as size, structure, geographical location etc) enabling a diverse range of voices, to contribute to and participate in the screen industry.
- d) Existing levels of production, investment, employment, commissioned content hours and exports can be optimised for growth when fit for purpose regulation and incentives are in place.
- e) 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.

¹³ Options paper, p 37

3. *Distribution of content*

- a) 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.

SPA also notes the findings of the ACCC's Digital Platforms Inquiry included several relevant policy principles/observations, including:

- Given the disruption of digital platforms, we should futureproof our enforcement, regulatory and legal frameworks.
- There is a role for Government to intervene to address imbalances in bargaining relationships between new platforms and legacy businesses.
- The regulatory imbalance that exists between legacy businesses and digital platforms should be addressed.

SPA suggests that reform of government intervention in the screen industry should be guided by these principles.

5 A new regulatory and support model for Australian screen content

With the objective of presenting a forward-looking vision for the screen industry that leverages regulation and incentives to deliver growth, jobs, economic activity, exports, increased capacity and quality/quantity of Australian content, SPA supports a regulatory model as follows:

Regulating for audiences, industry and the economy

- A platform-agnostic expenditure requirement that is tailored to individual providers' differing business and operating models:
 - A new revenue-based expenditure obligation across all platforms (commercial FTAs, subscription TV, SVOD, AVOD/BVOD, IPTV), to commission content primarily produced by independent production companies.
 - Overall framework in legislation, with key minimum requirements and protection of vulnerable genres (scripted drama, comedy, children's and documentary).
 - Each provider's specific obligations to be agreed with the regulator, following industry consultation, to be reported annually and reviewed and updated periodically – no less than every three years. The regulator to have power to set obligations should agreements not be reached, as well as to monitor compliance and take enforcement action.
 - Promotion and discoverability requirements.
 - Transparency and reporting requirements.
- Obligations to extend to public broadcasters, with funding quarantined for vulnerable genres.
- Measures to enhance retention of IP.

Incentives, support and business development

- A harmonisation of the Offset for significant Australian content (features, television drama and comedy, documentary, and children's) at 40% (using a qualifying points test). A 30% Producer Offset rate would be available for light entertainment.
- The Location and PDV Offsets would also be set at 30%, and would be available to scripted features, TV drama and comedy, children's content, documentary and light entertainment.
- Ensure financing support and care for vulnerable genres, including children's, documentary, scripted drama (feature films/oneoffs, television drama and comedy).
- Measures to enhance screen exports.

5.1 Regulating for audiences, industry and the economy

Key points

- *A revenue-based expenditure requirement that is individually tailored to providers' business and operating models, which applies to all platforms in a bespoke way*
- *Overall framework in legislation, with key minimums and protection of vulnerable genres*
- *Crucial next step is Government modelling to establish scale thresholds, expenditure requirements, overall content target for the market and required level of output in vulnerable genres.*
- *Promotion and discoverability requirements*
- *A regulatory design that enables oversight, enforcement and adaptability through regularly renegotiated licence agreements.*
- *Sufficient funding, resources and up-skilling for the chosen regulator*
- *Closing the New Zealand content 'loophole'*
- *Incorporation of the national broadcasters, with minimum obligations and protected funding for national broadcasters*
- *Transparent and comprehensive data/compliance reporting, to facilitate enforcement and effective market conditions.*

A platform-agnostic expenditure requirement

SPA supports a regulatory framework that encompasses the full diversity of professional screen content offerings for audiences, and which extracts from these offerings from all platforms through a tailored yet reasonably equitable contribution to cultural and economic policy objectives.

The ACCC identified regulatory disparity as a fundamental defect in the currently regulatory framework and SPA 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 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).

A platform-agnostic requirement would fulfil the SPA policy principles (refer to section 4) 1(a), 1(b), 2(d) and 3(a).

Scope

Similar to Model 3, SPA supports a new revenue-based expenditure obligation across platforms that deliver professionally produced content to consumers. This would cover:

- Commercial FTA television (7, 9, 10, etc)
- Subscription television (Foxtel, Fetch, Telstra TV, etc)
- Subscription video on demand (Netflix, Stan, Disney+, Binge, Amazon Prime, etc)
- Public broadcasters (ABC, SBS, NITV)
- Advertiser-supported video on demand (YouTube Premium, Facebook Watch, etc)
- Broadcast video on demand (9Now, 7Plus, 10 All Access, etc)
- IPTV

In considering the scope of the regulatory framework, and who should fall within it, SPA notes interest more broadly in securing a contribution from ISPs and digital platforms towards content (eg, Google, Facebook). Whilst not explored in this submission, SPA would be interested to discuss the issues further with Government. This submission focuses on the role of screen content distribution platforms, however we note there is merit in considering a broader catchment.

Flexibility in the scheme

Whilst consistency across platforms is the overall objective, the diversity of business and operating models, along with the variety of content offerings, strongly suggests that the level and type of obligations should be tailored to the individual business circumstances of platforms. For example, the operating model of an advertising-supported commercial FTA network, with a content offering of broad appeal across multiple genres including news and sports, is distinct from a subscription-based streaming service which focuses primarily on providing scripted features and television drama/comedy content. A locally-based streaming service which only operates in Australia has a completely different operating model than a global giant streaming service, which has an international footprint and is able to monetise content across tens of millions of subscribers.

There is also diversity and complexity amongst streaming platforms' business models, with a straight subscription play being the feature of operators such as Netflix and Stan, which is different from Amazon Prime, its purpose being as loss-leader to increase customer engagement with the Amazon online retail business (a subscription is offered 'free' to all paid Prime members).¹⁴

SPA proposes that tailored content obligation agreements be negotiated between regulated entities and the regulator on a regular basis, subject to open and transparent industry consultation. There are useful precedents in this regard in the Ofcom and CRTC models.¹⁵

An expenditure obligation could be set on a differential basis determined by the level of influence in the market. That is, services with smaller market share might attract a smaller expenditure obligation. Larger services with larger market share might attract

¹⁴ <https://www.forbes.com/sites/petercsathy/2020/01/31/amazon-prime-video-the-quiet-ominous-streaming-force/#6bb711411f1a>

¹⁵ See for example: <https://crtc.gc.ca/eng/archive/2017/2017-150.htm>

a larger expenditure obligation. This may be achieved through a percentage of contribution calculated against revenue generated in Australia.

This concept of greater regulation based on greater influence is consistent with the policy principles that inform the current media regulatory environment. Adoption of this concept could lead to a scaled basis of regulatory intervention, with a lighter touch for new paid services through to a greater touch for ubiquitous free services.

Consideration would also be given to the degree of government support a content distributor receives. The greater the level of government support (whether through direct funding, or regulatory concessions/protections, or access to spectrum for use in transmission of services), the greater the level of regulatory intervention that is warranted.

A flexible scheme will meet SPA policy principles (refer to section 4) 2(d) and 3(a).

Legislated minimums

Crucially, there should be a set of minimum requirements in new or amended legislation that each individually negotiated content agreement should conform to. This should include:

- Scale thresholds to determine which platforms would attract obligations and the relevant appropriate level of contribution.
- The baseline requirement for an expenditure requirement to be calculated as a percentage of Australian revenue.
- A requirement for that expenditure to be on new Australian content (and not, for example, expenditure on facilities or inbound international productions).
- A requirement that expenditure be on new Australian content, and not acquisition of New Zealand content (see further below).
- Protection of vulnerable genres (see further below).
- A requirement that the expenditure be used to commission new Australian content from independent production companies.
- A requirement that individual content agreements couple an expenditure requirement with a minimum floor in terms of hours or commissions.
- A requirement that individual content agreements include discoverability and promotion requirements, particularly for library-based services.
- A requirement that encourages production activity across states and regions.

A combination of an expenditure requirement and a minimum number of hours or commissions is an essential element of SPA's proposal. This is necessary to ensure sufficient economic activity in the sector to maintain and protect diversity and sustainability. Without an hours or commissions minimum, 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.

In this sense, quantity of production is a pre-requisite for quality of production. An hours or commissions minimum will ensure a quantity and volume of production out of

which careers can be built, production businesses can grow and develop, from which quality content can emerge. This has been the success of the existing hours/points based system for commercial FTA television.

As is the case in the current subscription television new eligible drama expenditure requirement, development spending should count towards the overall requirement.

Legislated minimums will be consistent with SPA policy principles (see section 4) 1(a), 1(b), 1(c), 2(b), 2(d) and 3(a).

Pre-implementation modelling

A crucial step in the implementation of this approach would be for the Government to undertake detailed modelling, prior to drafting of legislation, to establish:

- Scale thresholds for differing platforms.
- Baseline expenditure requirement for differing platforms.
- The desired level of new Australian content to be available in the market as a result of the improved/updated regulatory framework (that level should move past the status quo and allow for a sizeable amount of growth due to the incorporation of new players into the framework).
- The appropriate level of commissions and output in vulnerable genres.

This must be the next step in the reform process. Government is best placed to undertake this modelling, given its access to funding support data and ability to request commercial data from market participants on a confidential basis.

In order to assess what modelling needs to be undertaken, reference could be had to the kinds of modelling the Convergence Review undertook or recommended, given the crossover of issues canvassed.

This modelling should also include consideration of appropriate threshold levels for tax offsets (discussed in further detail below).

Promotion and discoverability

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 preferred 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)¹⁶, and also feature in the EU's Audiovisual Media Services Directive (AMSD) (article 39).¹⁷ Promotion and discoverability requirements will be consistent with SPA policy principles (see section 4) 1(a), 1(b), 2(b), and 3(a).

¹⁶ <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>

¹⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN>

Regulatory design

An option for the regulatory architecture to support this model would be to impose a licencing or registration framework on content service providers which offer their services to Australians.¹⁸ It would be a condition of licence or registration that a service provider have agreed with the regulator a negotiated content agreement, and to annually report on compliance with the agreement. Data transparency and reporting could also be made a condition of licence or registration.

Renewal of licence or registration could be required periodically, similar to the model employed in Canada, in which broadcasters undergo a licence renewal process which addresses evolving broadcasting and digital environments and proposed regulatory commitments.¹⁹ Renewals are considered and decided upon by the Canadian Radio-television and Telecommunications Commission (CRTC).²⁰

As part of the renewal process, the regulator could consider the degree to which the outgoing regulatory commitments in relation to Australian content have been met, and the degree to which they contributed adequately to the achievement of cultural and economic objectives. Reference should be had to the previously established desired level of overall production/content output.

Similar to the Canadian model, there should be opportunities for the public and industry to make submissions and attend hearings, there should be the ability to appeal the regulator's decision through administrative law, the regulator's decision-making should be guided by legislated minimums, and the Government/Minister should have reserve powers to direct the regulator to achieve public policy outcomes.

As occurs in Canada, applications for licence or registration renewal by groups of providers/platforms should be required to be made in temporal proximity, so that the regulator is able to consider the cumulative policy impact and competitive equity of separate content agreements. Content agreements which distort the competitive balance would undermine the legitimacy and hence stability of the regulatory system.

The regulator should be given flexibility in setting the length of time between licence/registration renewals. Flexibility is required to ensure that the regulatory framework can respond to large shifts in the market. However, this will need to be balanced with the need for certainty, and the need to consider the administrative/compliance impact that the renewal process will have on regulated operators.

The regulator should also have powers to monitor compliance and apply enforcement action in the period of the agreement's operation. It would not be sufficient for compliance and enforcement to only be considered at the time of renewal. This has

¹⁸ It is not proposed to replicate the extensive licensing framework that applies to broadcast services, which involves controls on market entry and a range of other regulatory obligations. Rather the intention is to provide a lever for Government to attach content obligations to, and a mechanism for their enforcement and periodic review.

¹⁹ Broadcasting Act 1991, section 9. <https://laws-lois.justice.gc.ca/eng/acts/B-9.01/FullText.html>

²⁰ For an example of a broadcast licence renewal, see <https://crtc.gc.ca/eng/archive/2017/2017-150.htm>

been identified as a shortcoming of the Canadian framework, under which non-compliance can only be addressed at the time of licence renewal.²¹

The regulator

Given its role as the agency of enforcement for broadcasting content regulation, it may be appropriate for the above outlined regulator functions to be assigned to the Australian Communications and Media Authority (ACMA). However, many of the functions described above would represent new challenges for the ACMA, and industry will need to have confidence that the ACMA is appropriately resourced and skilled to fulfil those functions.

It may be appropriate to require a particular skill set or sector-specific experience in Authority members. It would also be appropriate to update the ACMA's enabling legislation to include the new regulatory functions. Specific funding to support the additional functions should also be assured.

Protection of vulnerable genres

As noted in the Options Paper, features, scripted adult drama, comedy, children's content and documentary remain vulnerable genres at risk of market failure without regulatory support. To ensure Australians continue to have access to these important categories of programming, it is crucial that the new regulatory framework include minimum safeguards across platforms.

This can be achieved in slightly different ways for different platforms, within the negotiated content agreements. For example, for streaming video services, it is proposed to match a platform's delivery of international content in a certain genre with an obligation to commission new Australian content in that genre. That is, if a platform features in its offering an amount of international adult drama, the negotiated content agreement must include an obligation to commission and show new Australian adult drama. Similarly, if a platform features international children's programming, it should have an obligation to commission and show new Australian children's programming.

The regulator should be guided by legislative safeguards which determine the ideal 'end state' for levels of production and transmission across the genres.

A different approach is proposed for commercial FTA television, which should continue to have obligations to show minimum levels of new Australian drama, comedy, documentary and children's content (with the children's category to be redefined as programming suitable for an audience 0-16 years). Those levels should be broadly commensurate with existing levels (for drama and documentary), and could be instituted through a points system.

Commercial FTA television continues to be the primary viewing destination for Australians, and is universally available in Australian homes. Over 13 million Australians watch commercial FTA television every day, and the platform reaches

²¹ See for example, recommendations 75 and 77, <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html#Toc26977873>

92% of the population every month.²² Broadcast TV watched on in-home TV sets still accounts for most video viewing.²³

The broadcasters also continue to benefit from significant regulatory concessions, in the form of cheap (temporarily free²⁴) access to prime public spectrum, legislated protection from competition and privileged access to premium sports rights.

These factors have to date formed the policy justification for a heavier regulatory treatment of commercial FTA broadcasters, and this logic continues to be relevant in the current market environment. Whilst commercial FTA viewing is in decline, it is still currently the dominant platform and therefore maintaining protection of vulnerable genres on this type of platform ensures a wide audience for the content, which can also access it free of charge.

Across all platforms, consideration should be given to a system which incentivises investment in features. That is, an overarching expenditure obligation would apply, and sitting under that would be a points system for ensuring minimum protections for vulnerable genres.

A system similar to the points leveraging in the current Australian Content Standard for commercial FTA television could be considered, with expenditure of features counting for additional value against the expenditure requirement.

This approach will be consistent with SPA policy principles (see section 4) 1(a), 1(b), 1(c), 1(b) and 3(a).

New Zealand content

Due to there being no “cultural exception” in the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement, for the purposes of the Australian Content Standard, New Zealand programs qualify as Australian for the purposes of the quotas.

This means that instead of commissioning new Australian-produced content, commercial television broadcasters can buy second-run, cheap New Zealand programs and have them qualify as Australian programs to acquit their obligations under the Australian Content Standard. In 2019, the Nine Network averaged 51.4% New Zealand content in acquitting their drama obligations.²⁵ This proposition is increasingly attractive to commercial broadcasters due to audience fragmentation, new entrants into the market and declining advertising revenue.

The availability of cheap second-run NZ content to acquit first-run Australian content obligations means Australian producers are competing with NZ producers at a price point that is uncompetitive. This is on the basis that the content is either purchased in

²² <https://www.freetv.com.au/what-we-do/power-of-tv-advertising/>

²³ <https://www.nielsen.com/au/en/insights/report/2018/screen-time-still-an-australian-pastime/>

²⁴ <https://www.paulfletcher.com.au/media-releases/media-relase-immediate-covid-19-relief-for-australian-media-as-harmonisation-reform>

²⁵ <https://www.acma.gov.au/sites/default/files/2020-06/2019-Compliance-with-Australian-Content-Standard-and-Childrens-Television-Standards.pdf>

its second window after airing in New Zealand or because the cost of production in New Zealand is often cheaper (labour costs are lower) or more heavily subsidised (some New Zealand television content attracts a 40 per cent tax offset. New Zealand productions also do not have to pay 'fringes' (compulsory union obligations or personal benefits such as holiday pay and health, government levies or union dues). This can save up to 25% of personnel costs and is used as a marketing tool by New Zealand in promoting itself as a film-making destination.²⁶

This, together with oligopsonic market conditions, means Australian producers are hamstrung from competing on a level playing field, with deleterious effects over the long term for sustainability of the independent production sector.

This situation critically undermines the efficacy and integrity of the existing regulatory framework. The new regulatory framework for Australian content must ensure that only truly Australian content qualifies for the purposes of expenditure obligations.

There are three options that SPA has identified to fix the problem.

A first option to reduce the influx of New Zealand programs meeting the requirements of quotas in Australia is to redefine the term "first release", as it appears in the *Broadcasting Services Act 1992* and the Australian Content Standard. By broadening the definition of first release to reflect the concept of a worldwide premiere, and not just a program's initial screening in the licence area, the ACMA may be able to restrict the practice of Australian broadcasters purchasing discounted New Zealand content to satisfy their obligations under the Standard.

A second option is to define that an "Australian program" is to be determined based on its content, rather than its provenance. If this is done, much (if not all) of the cheap New Zealand content that had been qualifying will no longer be suitable. However, there is also the risk that a lot of content of Australian provenance might also not satisfy the new standard.

A third option is to renegotiate the Protocol to provide a cultural exception. Clearly this option will achieve the required outcome, but the diplomacy and politics required to reopen negotiations would most likely be too much of an obstacle.

Closing the loophole will be consistent with SPA policy principles (see section 4) 1(a), 1(b), 1(c) and 2(a).

Incorporation of public broadcasters

SPA proposes the partial inclusion of the public broadcasters into the proposed new regulatory framework, specifically a requirement that they negotiate content commitments with the regulator on a regular basis. This should result in specific obligations to deliver Australian content across genres, including scripted drama and comedy, documentary and children's content (specifically, C and P content).

²⁶ <https://www.aucklandnz.com/film/why-auckland/fringes-and-incentives>

The public broadcasters to date have not had specific requirements to produce and show Australian content. This, combined with expanding their service delivery activities and managing reductions in operating budgets, has resulted in a long term decline in expenditure and the number of hours commissioned on new Australian content.²⁷

Crucial to the success of SPA's proposal would be an arrangement under which funding is protected within the ABC and SBS budgets for drama and comedy, documentary, light entertainment and children's programming.

The level of hours required and the funding to be specifically allocated for these genres would form the basis of the negotiated agreement with the regulator.

We note previous submissions/views from the national broadcasters that minimum requirements or tied funding may impinge on their independence. We note for comparison that a layer of regulatory oversight and minimum obligation has been applied to the BBC in the United Kingdom,²⁸ and to the CBC in Canada²⁹ and submit that a similar model could successfully be deployed in Australia.

Indeed, it can be argued that the broad understanding of the ABC's independence should be through the prism of news and current affairs and editorial independence (an absence of government interference in news and current affairs), which SPA continues to support.

Tied funding is also not an unprecedented concept for the public broadcasters. There are numerous examples where triennial funding agreements have included funding tied to specific programs or outcomes. For example, the Enhanced Newsgathering Program, introduced in 2013 and continued in the 2016-19 triennium.³⁰

The foremost example is the additional funding provided to the ABC from 2009 for drama and the establishment of a dedicated children's channel with a commitment to deliver 50% Australian programs.³¹

Incorporation of the public broadcasters in this way would be consistent with SPA policy principles (see section 4) 1(a), 1(b), 1(c), 2(b), 2(d) and 3(a).

Reporting

To ensure the regulator can monitor the effectiveness of individual content agreements (and the scheme as a whole), and to ensure it can fulfil an enforcement role, a robust system of reporting will be a fundamental part of the new regulatory framework. The need for transparent and open reporting in regulated markets was supported by the ACCC as part of the Digital Platforms Inquiry.

²⁷ <https://theconversation.com/missing-in-action-the-abc-and-australias-screen-culture-76797>

²⁸ <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/bbc-operating-framework>

²⁹ <https://crtc.gc.ca/eng/television/cbc-src-consultation.htm>

³⁰ <http://about.abc.net.au/press-releases/abc-2016-2019-funding/>

³¹ Kim Dalton, *Missing in Action: The ABC and Australia's screen culture*, 2017. P 5

All content delivery platforms, including the public broadcasters, would be required to report annually on a range of key indicators. This is to enable the regulator to assess compliance with minimum requirements and to assess the overall health of the regulatory system.

The reporting requirements should take in revenue by source (less relevant to national broadcasters), profitability, program expenditure across genres, content output across genres, performance against agreed 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 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 can not assess the true value of their product to streaming platforms, which hamstrings their ability to negotiate commercial 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 reporting of the kind proposed by SPA has precedent in the Broadcasting Financial Results, which were collected and published under the former scheme for broadcast licence fees.

A robust reporting framework will be consistent with SPA policy principles (see section 4) 2(a), 2(b), and 2(c).

Regulation of economic relationships – retention of IP

Key points

- *Fair and equitable terms in deal-making with commissioning platforms underpins the sustainability of independent screen businesses, and in turn, the creation of Australian content.*
- *There is a market failure in this regard, due to the small number of buyers (broadcasters) and the large number of sellers (production businesses).*
- *There is a role for Government to intervene and require equitable terms.*

As has been stated elsewhere in this submission, 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.

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 market place and have driven British TV exports.^{32 33}

The ongoing 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 to be determined by the ACCC.³⁴ 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.³⁵

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.³⁶ 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 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.

³² 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.

³³ 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>

³⁴ <https://www.accc.gov.au/media-release/views-sought-on-issues-for-draft-news-media-and-digital-platforms-bargaining-code>

³⁵ ACCC Digital Platforms Inquiry Final Report, p 8

³⁶ Ibid. p 16

SPA is proposing this could be effected through two ways. Either by making eligibility for Offset funding conditional on agreement to terms of trade that protect the retention of IP, or by making it a condition of licence or registration of a content distribution platform that terms of trade are agreed with the independent production sector.

SPA has been advocating for regulated terms of trade for many years, with a focus on the imbalance in deal-making between independent production businesses and commercial FTA broadcasters. However, the arrival of streaming services has exacerbated the issue, and underlines the need for intervention in this area. Most streaming services offer deals predicated on the purchase of all rights in all territories, for all time. 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.

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.

Regulation of economic relationships would be consistent with SPA policy principles (see section 4) 2(a), 2(b), 2(c) and 2(e).

Regulation and Australian screen exports

Co-production treaties are a form of regulation which allow Australian producers to partner with producers from treaty countries to access the benefits of each country's regulatory and taxation environments and can be an effective conduit for increasing export opportunities.

Australia currently has 12 co-production treaties and MOUs with other nations. In total, there have been 188 official co-production titles made with total budgets of \$1.9 billion exported to over 250 territories (as at May 2019). Australia produced less than 8 official co-productions per year on average over the last 10 year period.³⁷

This is small in comparison with other countries. For example, China (16 treaties), France (over 30 treaties) and Canada (over 60 treaties) each produce approximately 60 co-productions per year. This is a clear regulatory impediment on Australian screen businesses being able to realise their ambitions.

Many of the co-production treaties Australian has in place were concluded before the internet, the rise of Asia as an economic power, and the emergence of Google, Facebook, Netflix and Amazon. As such, there are many anachronisms within the treaty texts that require updating to make them fit for purpose.

There is a pressing need for improvements to existing treaties so that businesses can use them more efficiently and effectively to grow the pool of available revenue. At

³⁷ Data is drawn from the Screen Australia website: <https://www.screenaustralia.gov.au/funding-and-support/co-production-program>

present, many of the treaties are difficult to utilise to their full potential and are not fit for purpose.

These issues are explored in more detail in the submission of the Screen Export Council (SEC), which SPA endorses.

A new paradigm for children's content - summary of children's content measures

Key points

- *There is an enduring need for children to have access to content especially designed for them, and which helps them understand their world through an Australian lens.*
- *Children's programming is the most vulnerable genre, and faces market failure without regulatory and incentives support.*
- *SPA proposes a suite of measures to evolve the outdated regulatory framework to provide long term regulatory stability and move the debate forward.*
- *This includes evolving the commercial FTA obligation, a new home for C and P on the national broadcasters, new requirements for streaming platforms and a specific children's content fund.*

In 2019, children aged 0-16 years constituted 21% of the Australian population.³⁸ A regulatory framework for content must address the specific needs of this substantial part of Australia's population.

Children's consumption habits may be evolving, however the need for content that helps them understand the world around them and Australian values and culture, endures. As demonstrated in the options paper, children are consuming a diet almost exclusively of on-demand content. If the aim is to supply them with the content they need developmentally and culturally, the regulatory framework for children's content has to reflect this new mode of consumption. All Australian children should have the opportunity to access content especially created for them, told from an Australian perspective and which reflects their lives and experiences, on the platforms they are using to access content.

Children's programming is the most vulnerable genre of production made for the most impressionable audience members. A reason the Government originally introduced a requirement to produce and broadcast Australian children's television programs was to ensure there would be programs which capture, portray, and reflect Australian culture, stories and people to Australian children and more specifically to offset the enormous amount of imported US and UK content which filled broadcaster program schedules.

³⁸ Australian Bureau of Statistics, 3101.0 - Australian Demographic Statistics, Sep 2019, table 59

Whilst these policy objectives remain relevant today, the regulatory environment is out of date and needs to be evolved to better fit the current content landscape. Obligations on commercial FTA television should continue, albeit in a modified form coupled with some additional relief provided through an easing of advertising restrictions. Equally regulations should be extended to new market entrants which will keep the playing field level. This will ensure our children have access to a diversity of new Australian-made children's content on all platforms, whilst providing a boost to the local production industry.

It is time for a new paradigm of and for children's content, which better services this audience and moves the debate past a focus on the commercial impact of this genre on FTA television. This can be achieved through a combination of the following measures:

- Remove C and P requirements on commercial FTA television.
- Minimum requirements on commercial FTA television broadcasters for a reframed Australian youth content (0-16 years), including a sub-requirement for new scripted Australian youth content.
- Pre-classification of content by the ACMA would no longer be required.
- Restrictive commercial FTA advertising rules to be liberalised, to assist in ensuring the commerciality of the new youth content requirement.
- Introduce children's content requirements on new streaming platforms – if a platform screens international children's content, there would be a requirement to screen first run Australian children's content as part of each platform's agreed framework with the regulator (requirement should reflect a range of sub genres, including live action, animation, factual magazine consistent with the international content they screen). Consideration may need to be given to platforms which only acquire, rather than commission original children's content.
- A proportion of the ABC's triennial funding must be tied to children's content, and the ABC should be required to deliver minimum levels of C and P content through an agreed framework with the regulator.
- Additional funding for SBS/NITV to create indigenous and multicultural children's content (including P, C and youth), the output of which is agreed with the regulator
- A specific children's content fund.

A critical part of this proposal is the migration of C and P content to the public broadcasters. The relaxation of these requirements on commercial FTA television cannot be uncoupled from the introduction of equivalent requirements (with funding addressed) placed onto the public broadcasters. Evolution of the children's content regulatory framework would fail if C and P content is lost entirely from Australian screens and which importantly are available free to children and families.

This combination of measures will address the marketplace failure which has seen a decline in the production of new Australian children's content over the past ten years and which has disadvantaged this particular audience. By better meeting children's needs the underlying sustainability of the children's production sector will be improved and hence its capacity to deliver culturally relevant content designed specifically for Australian children. It should be noted that Australian originated live action children's

content has consistently been exported with huge success. Most recently ‘Bluey’ the Australian animated children’s series has led the export charts.

‘Bluey’ also continues to be extremely successful in Australia, with series 2 already amassing a total of 43 million program plays on iview/ABC Kids app since its launch on 17 March 2020. Since its launch in 2018, series 1 has had a total of 261 million program plays.³⁹ This reinforces the continued interest in and potential for success of Australian children’s programs.

A revitalised and well supported children’s sector will deliver significant cultural and economic benefits for all Australians.

The new paradigm for children’s content would be consistent with SPA policy principles (see section 4) 1(a), 1(b), 1(c), and 3(a).

Regulatory model in summary

A summary of the proposed regulatory model for content distribution platforms is set out in the table below.

³⁹ <https://tvtonight.com.au/2020/05/bluey-at-43-million-plays.html>

Table: Regulatory model for content distribution platforms

Government support	Very High (Spectrum, funding, NBN)	High (spectrum, funding, NBN)	Medium/high (spectrum, sports rights, competition, NBN)	Low (NBN)	Low (NBN)
Entity type	National Broadcasters		Commercial free-to-air television	Subscription television	SVOD, BVOD
Entity		 	   + regional affiliates	  	      
Influence	Very high	High	High	Medium	Medium to high (depending on reach)
Contribution to protection of vulnerable genres	High level of regulatory control: <ul style="list-style-type: none"> Requirements across all genres – drama, documentary, children’s (P and C) Requirements in hours/points and expenditure 		Medium-high level of regulatory control: <ul style="list-style-type: none"> Requirements across drama, documentary, youth Requirements in hours/points and expenditure 	Medium-low level of regulatory control: <ul style="list-style-type: none"> Requirements for genres provided by service Requirements in hours/points and expenditure 	Medium-low level of regulatory control (varying with level of influence): <ul style="list-style-type: none"> Requirements for genres provided by service Requirements in hours/points and expenditure

5.2 Incentives, support and business development

The Federal Government has at its disposal two main tools for supporting local and international screen production. Firstly, the Producer, Location & PDV offset schemes operated through tax regulation which are variously available to local or international production entities to the specifics of a production. Secondly, grants or equity investments provided via funding from Screen Australia and only available to local productions.

Whilst the tax offsets provide equitable access through an established decision-making framework, the system of direct government support through Screen Australia investment allows the Government to be very specific in choosing which projects to support.

Regardless, both these support mechanisms can only be fully optimised for success when implemented in concert with demand-side regulation (quotas/obligations on distribution platforms). The two interventions go hand in hand, and can not be viewed in isolation. A holistic approach to regulation and support must be adopted, ensuring these mechanisms are updated and made fit for purpose, otherwise imbalance and inefficiency (of government intervention) will result.

Modernising the tax offsets

Key points

- There is an opportunity to refresh and modernise the existing offsets scheme to further stimulate the creation of compelling Australian content.
- A harmonisation of the Offset for significant Australian content (features, television drama and comedy, documentary, and children's) at 40% (using a qualifying points test). A 30% Producer Offset rate would be available for light entertainment.
- The Location and PDV Offsets would also be set at 30%, and would be available to scripted features, TV drama and comedy, children's content, documentary and light entertainment.

The offsets have provided a welcome stimulation to the film and television's industry levels of productivity. However, since their introduction in 2007 there have been substantial commercial and cultural changes across the global content marketplace which means these mechanisms are no longer as effective as they have the potential to be.

There are two main areas where the offsets can be realigned to further stimulate production - harmonisation and modernisation.

SPA proposes a harmonisation of the Producer Offset for significant scripted Australian content (features/one-offs, television drama and comedy, documentary, and children's) at 40% (using a revised qualifying points test).

Harmonisation of the Producer Offset at 40% across these genres will position Australian content and Australian owned IP to be more commercially competitive in the international marketplace, particularly the English language market. Whilst the high calibre of Australian produced content is well recognised internationally, the small size of our domestic marketplace coupled with the unique attributes of Australia's social and industrial policies do have an impact on the ability of Australian productions to be cost competitive when placed side by side with international alternatives, most specifically the US and UK.

In addition, harmonisation at 40% would address an inadvertent anomaly which currently sees many offshore productions accessing higher level of support at 30%, through a combination of the location offset (16.5%) and location incentive (13.5%), than what many Australian producers can access for similar content (being the 20% currently available to television productions). It also removes the outdated anomaly of feature films requiring a bricks and mortar release.

We note that Australian-based producers remain committed to creating Australian content and owning their IP and the production dollars they spend remain almost entirely in Australia. Whereas offshore productions typically pitch territory against territory to gain the best incentive available and any incentive gained eventually benefits companies residing offshore, with limited long-term benefit or commitment to grow the screen industry in the winning territory.

It is therefore reasonable to question why Australian producers are required to jump through more eligibility hoops, to access support at a lower rate of offset. This review provides an opportunity to reprioritise government intervention to favour the growth of Australian businesses, Australian owned IP and its export potential, whilst recognising that incentivising a reasonable proportion of offshore production still delivers a value to the Australian screen industry and the economy more broadly.

SPA also proposes a flat 30% offset would be available for Australian created light entertainment content. This support recognises that the small size of Australian marketplace along with changing consumer behaviour and the fragmentating market for commercial advertising dollars also pose market failure challenges for producers of these types of content, although not to the same extent as those experienced for scripted content.

The Location and PDV Offsets should also be harmonised at 30% in order for these incentives, aimed at attracting offshore productions to Australia, remain competitive. This recognises that the PDV offset is currently working successfully at 30%, whilst the Location Offset at 16.5% has been only been successful when topped up to a level of 30% - which has been provided through various additional government funds being made available over the last 5 – 7 years, the most recent being the \$140 million Location Incentive which is understood to be almost fully utilised. Note that the federal Government should take into account the state and territory-based incentives which top up the federal incentives and which are usually around 10% of budget.

SPA also supports a reconsideration of the thresholds for the offsets. This should be undertaken in consultation with industry and on the basis of Government modelling that takes into account how the thresholds are operating in the marketplace.

Delivering a 40% top rate for eligible Australian film and television projects will stimulate greater levels of production in the most culturally valuable yet commercially vulnerable projects.

The Producer Offset assists in achieving quality through higher budgets, which help secure name case and other production components, than would otherwise be attainable. This then enhances the export potential of content, as it is more likely to meet international market and audiences' expectations of quality. This in turn stimulates the entry of international investment into the domestic market, with the overall effect is to stimulate greater levels of employment and drive additional business opportunities.

Should delivering on all these proposed offset changes present un-navigable budget forecast calculations, priority should be directed to increasing offsets which traditionally supported scripted content in vulnerable genres, and content that generates local business growth, IP ownership and export potential.

There may also be merit in considering a structure whereby a higher rate of offset (for example, 40%) is available for QAPE up to, for example, \$30 million in value. A reduced rate of offset, (for example 30%) would then be available for QAPE above \$30 million. This could help cap the overall impact of the offsets to the federal budget.

Modernising the offsets would involve removing outdated, technologically specific and other barriers from the legislation (eg, theatrical release requirements) making the offsets more effective and fit for purpose in the current and future content market. This would provide greater investor confidence, by reducing the uncertainty tied to outmoded eligibility criteria.

As noted elsewhere in this submission, SPA supports a revised single test to determine whether content is eligible to be regarded as significant Australian content, across all regulatory and support measures.

We propose a model similar to the points-based test used by the British Film Institute⁴⁰, 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.

There are also improvements which could be made to the administration of the offsets. A more rapid decision-making process, and a flexible periodic payment system for Australian businesses accessing the Producer Offset (as opposed to the current single payment at the end of the process) would provide valuable cashflow support to

⁴⁰ <https://www.bfi.org.uk/film-industry/british-certification-tax-relief/cultural-test-video-games/summary-points-cultural-test-film>

production businesses, reducing interest costs and red tape, while stimulating economic activity.

Consideration should also be given to where and how Screen Australia can modernise its practices, thereby ensuring it continues to provide effective and efficient delivery of its services while responding to marketplace needs.

The 65-episode cap should also be lifted, to stimulate increased investment into production with long-running series potential, which provide significant benefits to the industry through long-term employment and skill development and training. However, this should not be at the expense of the above outlined increases to existing rates of offset.

Harmonisation and modernisation of the offsets would be consistent with SPA policy principles (see section 4) 1(a), 1(b), 1(c), 2(a), 2(b) and 2(d).

Table – Proposed model for the Producer, Location and PDV Offsets

	Location Offset	PDV Offset	Producer Offset	
	<i>Made in Australia</i>		<i>Australian Stories Made in Australia</i>	
Incentive Level	30%		30%	40% (up to \$30m)
Eligible Formats	<ul style="list-style-type: none"> • Feature Films • TV Series (Drama, Comedy & Reality) • Documentaries • Children’s Programs • Short form programs • Light Entertainment 		<ul style="list-style-type: none"> • Light Entertainment 	<ul style="list-style-type: none"> • Feature Films • Children’s Drama • TV Series (Drama & Comedy) • Documentaries • Short form programs
Monetary QAPE Thresholds	Remain at a minimum of \$15 million	Remain at a minimum of \$500,000	Retain current minimum expenditure thresholds but simplify as follows: \$250,000 for Documentary and Short Form programs \$500,000 for Feature Films and single episode TV programs \$1 million for a season of a TV series	
Duration QAPE Thresholds	Retain current minimum duration thresholds except in relation to ‘Short Form’ where the duration minimum removed (but continues to be tied to a minimum spend threshold).			
Distribution Requirements	Eligible distribution formats are those that result in public distribution including cinemas, direct-to-video, direct-to-DVD, television broadcast, subscription television, SVOD, AVOD, BVOD, IPTV and online distribution		Eligible distribution formats are those that result in public distribution to Australian audiences, include cinemas, direct-to-video, direct-to-DVD, television broadcast, subscription television, SVOD, AVOD, BVOD, IPTV and online distribution	
Establishing Eligibility	Existing eligibility criteria should remain.		The modified Producer Offset should incorporate a new qualifying points test to ensure transparency and certainty.	
Equity	N/A		Terms of trade enacted to ensure that as between broadcasters and producers, producers retain equity attributed to Producer Offset, PDV or location offset.	

Continuity to the current system of direct investment and other mechanisms

Given the well understood potential for market failure in certain genres, direct investment support is critical to the continuation of those genres. These include documentary, children's content and scripted feature films/one-offs, drama and comedy.

It is critical that existing levels of direct funding support continue and that, as part of its response to this review, the Government commits to a long-term future for investment and grants. SPA is open to discussions on how best this support should be administered.

Of paramount importance, given the relaxation of C and P requirements on commercial FTA broadcasters proposed under SPA's model, is the need to ensure renewed funding support for C and P programming.

SPA supports a specific Australian children's content fund, to ensure a stable base underpins the continued provision of new content created specifically for children. The fund should only be able to be accessed by independent production companies and producers. This will support new IP, fostering growth, sustained production opportunities and export potential for these businesses. The fund would be a top-up fund over and above the minimum licence fee commitments and should only be accessed if a program has secured a minimum licence fee and attachment to a content distribution platform.

Continued funding and support would be consistent with SPA policy principles (see section 4) 1(a), 1(c) 2(b) and 2(d).

Investment support to transform and sustain business

There is an ongoing role for a part of Government support to be directed to building capacity, diversity, innovation and sustainability in the screen production industry, at a business level. This support for individual businesses benefits the screen industry more broadly, and in turn the entire screen content ecosystem.

This would be consistent with SPA policy principles (see section 4) 2(a), 2(b) and 2(c).

A program of development for businesses to realise their export potential

In a competitive global environment where relationships and market knowledge is paramount there are extreme challenges for businesses based in Australia who need to have a global footprint and deep market understanding in a complex ever changing landscape. There is a need to support SME's by assisting them with international market knowledge and navigation and access as well as providing individual relationship development opportunities.

This should be done through specific training and skill development, market delegation co-ordination for outbound efforts as well as inbound support for those international businesses that commission content from Australian businesses.

Screen Forever is Australia's primary locally based content market and should be supported in its development as a content market for global business and specifically the local Asia Pacific region.

These issues are explored further in the SEC submission, which SPA endorses.

State and territory funding and support

SPA notes that the options paper does not consider or explore the extensive support network provided through state and territory funding and incentives.

State and territory funding bodies are critical participants and their role in the broader screen content ecosystem needs to be carefully considered as part of a holistic calibration of federal government intervention and support.

Ideally, and where possible, state, territory and federal funding and support systems should interface and coordinate, to align funding rounds, reach consistent terms of trade and not require duplication of red tape across different territories.

5.3 Support for feature film

Feature film was not considered in detail in the options paper. To help support the continued creation of one-off features, SPA proposes three key measures as part of its proposed framework for regulation and incentives.

Firstly, continuation of the current rate of Producer Offset of 40% for one-off features is vital for the ongoing creation of Australian films, which continue to face significant financing challenges.

Secondly, the removal of the requirement for 'bricks and mortar' theatrical release in accessing the Producer Offset and Screen Australia funding support. This is explored in more detail in the answer to consultation question 10 below. The current requirement puts film-makers at a substantial disadvantage with distributors who exploit the requirement for a presale as a pre-requisite for Government financing support to leverage unfavourable deals. This means producers are unable to effectively monetise their IP.

Thirdly, consideration should be given to structuring the proposed new expenditure requirement so that expenditure on features is leveraged, providing an incentive for platforms to invest in this genre. This would be similar to the points leveraging currently permitted for features in the Australian Content Standard for commercial FTA television.

5.4 Screen export – meeting the potential

SPA provides secretariat support for the Screen Export Council (SEC), which was formed in April 2019 to help advance the export potential of Australia’s local screen industry in taking Australian stories to the world. The SEC’s role is to advance the export potential of the screen industry as a key part of Australia’s creative industries.

The SEC provides strategic oversight and focus on building export skills and capabilities of Australian screen businesses as well as boosting screen trade and co-productions in underserved Asian and European markets.

As well as delivering a diverse range of high-quality and highly valued cultural content to Australians, the Australian production industry also takes our stories to the world and has a rich export potential. Screen exports play a vital role in Australia’s ‘soft diplomacy’ efforts internationally.

This potential is currently under-utilised and export revenue has flatlined. We see this as due to a lack of strategic leadership and co-ordination, a stagnation of co-production treaties, limited opportunities for SMEs to create exportable content, and limitations in the regulatory and competitive financing environment for Australian content and formats. These factors have limited opportunities for SMEs to create exportable content.

SPA wishes to endorse the separate submission of the SEC, which considers the current reform opportunity through the lens of Australia’s screen export capacity and focuses on measures which will unlock that potential, including:

- A co-ordinated approach to screen exports from Government
- Competitive tax offsets
- Growth in the number of official co-production treaties, with a particular focus on Asia and Europe
- Modernisation and harmonisation of existing co-production treaties
- Streamlining of visa processes for key elements of production
- Removal of the regulatory loophole that allows New Zealand content to count as Australian
- A single umbrella branding and strategy for the sector internationally
- Make permanent the temporary increases announced in April 2020 to the Export Market Development Grant.⁴¹

5.5 Transition to the new framework

Careful planning will be needed to the transition arrangements for the proposed new regulatory framework. Regulated entities will need a period in which to adjust to and plan for the new obligations. However, implementation should not be unduly delayed as uncertainty and disruption will ultimately harm all sector participants and consumers.

⁴¹ <https://www.trademinister.gov.au/minister/simon-birmingham/media-release/funding-boost-support-australian-exporters-and-tourism-businesses>

It may be appropriate for commercial FTA broadcasters to complete the current cycle of triennially measured Australian content requirements, with transition to the new system to occur at its completion. We understand the broadcasters are in year 1 of the drama and documentary cycle, and year 3 of the children's cycle. Regardless, existing regulatory frameworks must apply throughout the implementation period.

Obligations for new video on demand platforms could be developed on a faster track, given those platforms will not be required to transition out of legacy regulatory arrangements.

Given the need for pre-implementation modelling and consultation, the need for an upskilling and resourcing of the regulator, and the need for negotiated content agreements to be developed, the following timeline may be appropriate:

- July 2020 – ACMA announces 2021 sub-quotas will apply in full.
- July – September 2020 – Government considers first-round submissions.
- September – October 2020 – Government consults on detailed regulatory proposal and undertakes detailed modelling work.
- October – December 2020 – internal Government work (policy approvals, legislative drafting).
- January 2021 – temporary suspension of commercial FTA quotas ends
- January 2021 through to final implementation of new model – existing obligations apply.
- January – February 2021 – consultation on legislation.
- March 2021 – legislation in Parliament, Committee process likely.
- May 2021 – Budget (should include all funding support and tax offset measures).
- July 2021 – new legislation takes effect, regulator commences content agreement process with streaming services, subscription television and national broadcasters, new Offset scheme commences.
- June - December 2021 – new content agreements with streaming services, national broadcasters and subscription television are completed.
- January 2022 – new content agreements with streaming services, national broadcasters and subscription television commence.
- January 2022 – June 2022 – regulator commences content agreement process with commercial FTA broadcasters.
- December 2022 – end of existing commercial FTA content regulation.
- January 2023 – new content agreements with commercial FTA television commence.

6 Regulatory models in the options paper

In this part of the submission, SPA responds to the options for change outlined in the options paper, and addresses the consultation questions linked to each option.

6.1 Model 1

Model 1 would retain existing regulations and incentives with no change, and is not supported by SPA. Model 1 would fail to achieve most of the policy objectives articulated by SPA in section 4 of this submission and would furthermore fail against the kinds of high-level cultural and economic objectives which underpin the options paper. Indeed, the options paper notes that “to sustain the economic and cultural benefits delivered by our screen sector, adjustments are necessary.”⁴²

Under this scenario, none of the pressures on the existing regulatory framework (as identified in the options paper) will be addressed:

- Australians will continue to migrate their consumption of content to unregulated platforms, and therefore see their cultural intake diluted.
- Unregulated platforms will continue to extract revenue from Australia without making a contribution to cultural and economic policy objectives.
- The policy framework will continue to place undue emphasis in the achievement of economic and cultural policy objectives on legacy platforms.
- Legacy platforms’ capacity to be the primary vehicle for cultural and economic policy objectives will continue to come under pressure, as economic conditions and structural challenges accelerate.
- Legacy platforms will continue to pressure Government to address the regulatory disparity with newer platforms, placing the regulatory system under further strain and robbing the broader sector of stability.
- A substantial opportunity for growth in Australian content production and consumption will be missed if new platforms are not required to make a contribution. This will be a missed opportunity to secure employment, growth and sustainability in the overall screen production sector.
- A substantial opportunity to innovate regulation across all areas will be missed.
- Australia will fall behind international trends towards regulation of streaming platforms.

Consultation question

1. What outcomes for audiences and industry will the current system support, and for how long?

Under Model 1, audiences will continue to benefit from minimum levels of Australian content on commercial FTA television and subscription television. However, as identified in the options paper, the ever increasing volume of

⁴² Options Paper, p 3

screen content available to Australians will see the cultural impact of regulated content diminish.

The trend identified in the options paper of fragmenting audiences and declines in terrestrial broadcast viewing will continue, leading to a further reduction in the effectiveness of sub quotas.⁴³

The economic pressure on legacy platforms will continue, and this can be expected to drive further advocacy for an easing of regulatory obligations, calling into question how long Australians would continue to derive the current level of cultural benefit under this approach. Over the last decade, commercial FTA broadcasters have been successful in obtaining a series of substantial regulatory concessions, including additional flexibility in meeting content obligations. This suggests that current regulations would come under significant pressure within a few years.

The continued economic pressure on legacy platforms will also continue to influence their commissioning behaviour and will continue to negatively impact on the terms of deals with independent production businesses.

The options paper also noted that although budgets for Australian dramas are increasing, total annual spend on Australian drama by commercial FTA broadcasters has decreased since 2010-11. This trend could be expected to continue.

Australians will continue to miss out on the volume and diversity of Australian screen content which could be offered if new platforms were incorporated into the regulatory scheme. The Australian economy, in terms of economic activity, jobs and export opportunities, will continue to miss out on a rich source of growth (arising from no new platform regulation).

6.2 Model 2

Model 2 offers an incremental reform of existing measures, and a voluntary scheme for contribution from subscription streaming platforms. If the Government were not minded to pursue far reaching reform, as proposed by SPA in this submission, model 2 may be a starting point for incremental reform. However, SPA considers this option would constitute a missed opportunity to establish a forward-looking and sustainable regulatory model with longevity and ongoing industry support.

There may be some merit in the proposals in Model 2 which would add flexibility into the regulatory framework for commercial FTA television and subscription television. Retaining the existing underlying framework for these platforms could also ensure an ongoing baseline of Australian screen content, and would continue a well understood and functioning framework.

⁴³ Options Paper, p 30

However, our primary concern is the proposal for a system of voluntary undertakings for new subscription services.

A voluntary scheme for streaming services fails to address the fundamental consideration of regulatory disparity, which was highlighted in the final report of the ACCC's Digital Platforms Inquiry. Indeed, the current reform and consultation process has been framed by Government in terms of the ACCC's findings, with the Government response committing the Government to "a staged process to reform media regulation towards an end state of a *platform-neutral regulatory framework* covering both online and offline delivery of media content."⁴⁴ (Emphasis added).

In its Final Report, the ACCC made the following finding:

"Media regulatory disparity can distort competition by providing digital platforms with a competitive advantage because they operate under fewer regulatory restraints and have lower regulatory compliance costs than other media businesses when performing comparable functions."

This is a crucial consideration in the context of framing a regulatory system for screen content. If the regulatory responsibility for screen content distribution/commissioning falls too onerously onto one or two sectors of the broader industry, that puts them at a significant competitive disadvantage as compared to unregulated businesses. This is not a sustainable approach to regulation, as it could easily lead to a situation where regulated businesses are at such a disadvantage as to threaten their viability and hence their ability to fulfil their role under the regulatory framework, thereby threatening the efficacy of the regulatory framework.

The achievement of cultural and economic policy objectives through regulatory intervention relies on the continued existence of healthy and competitive commissioning/distribution platforms. A continued and pronounced regulatory disparity puts that at risk.

Given the economic pressures facing regulated platforms (as identified in the options paper, and exacerbated by the COVID-19 pandemic), it would also be reasonable to expect those platforms, on the basis of regulatory disparity, to continue to lobby for the relaxation of regulatory obligations. That is to say, a failure to address regulatory disparity could see the regulatory model come under considerable pressure for further reform in the near term, robbing the broader screen content industry of certainty and longevity. This would be a significant loss, given the disruption already caused by years of uncertainty regarding the future of regulation in this area.

The international trend is towards mandatory regulation of streaming services. For example, the Canadian *Broadcasting and Telecommunications Legislative Review Expert Panel Report* found that "there is an urgent need to proceed quickly to address the inequities in the audiovisual sector caused by the rise of unregulated programming services delivered over the Internet with no Canadian content obligations."⁴⁵

⁴⁴ Australian Government, *Regulating in the digital age, Government Response and Implementation Roadmap for the Digital Platforms Inquiry*, p 12

⁴⁵ <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html#Toc26977873>

We have also seen extensive regulatory activity in Europe, under the AVMSD, which as noted in the options paper, empowers member states to require streaming services to contribute to European content. Several member states have already moved to require streaming services to contribute via a percentage of their revenue.

SPA is not convinced that a voluntary model will deliver a substantial amount of commissioning activity and Australian content output from streaming services. The experience overseas has been that voluntary systems do not result in positive outcomes – for example, in the UK when children’s content obligations were removed the amount of children’s content available to UK audiences plummeted.⁴⁶ It was only through the threat of re-regulation from Ofcom that broadcasters have made commitments to reinstate children’s programming.

Moreover, self-regulatory systems are appropriate generally where factors indicate that industry has the incentive and ability to work to effectively address the underlying issue.⁴⁷ Given the levels of Australian content on streaming services is generally low, this can not be said to be the case. Australian titles made up 1.7% of Netflix’s Australian catalogue in 2019.⁴⁸

SPA is also concerned that Model 2 proposes only an additional reporting obligation for the national broadcasters. As outlined in section 5.1 of this submission, there is a need to ensure the national broadcasters are accountable to minimum obligations for commissioning and broadcasting Australian content in vulnerable genres. To support such obligations, it is also necessary to ensure designation of funding within the national broadcasters’ budgets.

SPA also does not support Model 2’s proposals as regards the rate of the Producer Offset. Whilst it would be beneficial to children’s content, which would have access to an increased rate of Offset, remaining eligible television production would continue to be at a significant disadvantage, only able to access a 20% rate of Offset.

Consultation questions:

2. In the context of an Australian content transmission requirement for commercial FTA broadcasters what percentage requirement across channels should apply?

The current rate of 55% on a broadcaster’s primary channel remains an appropriate level. Indeed, broadcasters consistently exceed this requirement (in 2018 the three metropolitan broadcasters averaged 73.2%⁴⁹), which suggests that it is not overly burdensome at this time.

There are a range of strong public policy reasons for this quota to remain, including: the importance of Australian stories, narrative and expressions on Australian screens, a quid pro quo for regulatory gifts, the importance of a local

⁴⁶ Emma Dawson, *Stories to Tell – Protecting Australian Children’s Screen Content*, 2017, p 16

⁴⁷ ACMA, *Optimal conditions for effective self- and co-regulatory arrangements*, June 2010. P 10

⁴⁸ Options paper, p 20.

⁴⁹ <https://www.acma.gov.au/publications/2019-09/publication/2018-compliance-results-metropolitan-networks>

independent production industry of sufficient size and scope that has capability and capacity to supply the quotas.

There is value in considering a transmission quota across all services provided by FTA broadcasters, given their continued community impact and the benefits of seeing Australian content across the entire schedule.

3. How should requirements to support Australian drama, documentary and children's programming be prioritised? For example, should sub-quota arrangements (or elements) of these be retained, or should a proportion of the overall transmission requirement be dedicated to these formats?

Sub-quota requirements for at-risk genres form a fundamental part of any regulatory model for Australian screen content. Scripted drama and comedy, documentary and children's content are at risk of market failure in the absence of regulatory intervention, yet retain very high levels of cultural value.

As outlined in the options paper, broadcasters tend to meet "or only marginally exceed" sub-quotas for Australian drama, children's and preschool programs.⁵⁰ Should the quotas be removed, an unregulated market will not deliver anywhere near the same level of drama, documentary and children's programs that are currently provided. This is recognised in the options paper, which notes previous research that found there would be a significant decrease in overall Australian content expenditure if obligations were removed, with decreases most extreme for drama and children's programming, and documentary.⁵¹

As noted in the options paper, these genres retain significant cultural value and can drive significant revenue, economic activity and employment.

Protection of these genres is a feature of SPA's preferred model, as outlined in section 5 of this submission.

4. Would contribution to an Australian Children's Content Fund by commercial FTA broadcasters, in lieu of broadcasting children's content, be feasible, and if so, at what level?

Whilst content fund models have merit and have been successfully deployed in other markets, and whilst a content fund would be superior to a complete eradication of quota, SPA's preferred model is for an evolution of the current commercial FTA children's obligations and expansion of protections onto other platforms.

As outlined in section 5 of this submission, it is proposed that commercial FTA broadcasters be released from C and P obligations, and instead have a minimum requirement for content aimed at a broader youth audience (0-16 years), with restrictive advertising rules also repealed. This is intended to ensure Australian youth continue to see programming that is designed

⁵⁰ Options Paper, p 32

⁵¹ Options Paper, p 30

especially for them, but balanced with the need for commercial FTA broadcasters to be able to monetise and see a return on that content.

Under SPA's proposal, C and P content would be delivered by the national broadcasters through agreements with the regulator, and funding would be set aside for this programming.

Children's content would also find a home on new streaming platforms, with a requirement for those platforms that carry international children's content, to show an agreed level of Australian children's content.

5. What, if any, amendments could be made to the NEDE scheme to improve outcome for the sector?

As outlined in section 5 of this submission, SPA's preferred model is for subscription television broadcasters to be brought into a unified scheme for content regulation. This would see the end of the subscription television NEDE scheme.

If the Government were not minded to pursue model 3, SPA would support the continuation of the NEDE scheme but with an expanded range of genres (children's, documentary).

6. How should Australian content be defined in the minimal and significant models? Is there a need to revise key definitions, including first-release, documentary and children's programs?

SPA proposes a single Australian content definition apply across the regulatory framework and in relation to tax incentives and direct funding. To increase certainty and enhance forward planning, SPA proposes a points-based test, similar to the test administered by the British Film Institute.⁵²

Specific definitions for first-release, documentary, drama, comedy and children's content would continue to be required under SPA's proposal, and should be formulated in consultation with industry. It may be preferable for these definitions to be contained in regulation, rather than legislation, to ensure they can be adjusted as the market and audiences evolve.

7. To ensure a better understanding of the levels of Australian content broadcast on FTA television what additional data should be provided by the public broadcasters?

Under SPA's proposed regulatory framework (see section 5), all content distribution platforms, including the national broadcasters, would be required to report annually on a range of key indicators. This is to enable the regulator to assess compliance with minimum requirements and to assess the overall health of the regulatory system.

⁵² <https://www.bfi.org.uk/film-industry/british-certification-tax-relief/cultural-test-video-games/summary-points-cultural-test-film>

The reporting requirements should take in revenue by source (less relevant to national broadcasters), profitability, program expenditure across genres, content output across genres, performance against agreed content obligations, and performance against other regulatory measures (such as promotion, discoverability). We note this was also recommended in the *Canadian Broadcasting and Telecommunications Legislative Review Expert Panel Report* (recommendation 76).⁵³

We note the extensive reporting and accountability frameworks in place between the BBC and Ofcom in the UK, and the CBC and CRTC in Canada.

8. In the context of the model considerations listed on page 40, what revenue and subscriber thresholds would be appropriate for the minimal and significant models?

SPA submits that modelling is required to be undertaken by Government before specific thresholds can be determined. Similar modelling was undertaken as part of the Convergence Review and should be refreshed to take into account contemporary business offerings along with the diversity of business models across services.

For example, the scale threshold should not unduly exclude very niche services, compared to services which carry content of broad appeal. The content marketplace looks very different to that which existed when the Convergence Review was undertaken, and there is a need to ensure that regulatory scale thresholds reflect the diversity in the market.

9. What investment levels and library catalogue requirements might be considered appropriate voluntary undertakings

SPA does not support voluntary undertakings.

As noted in section 5 of this submission, SPA submits that Government will need to undertake extensive modelling of several preferred regulatory models to determine investment requirements that meet the key policy objectives that underpin regulatory intervention.

10. At what level should the Producer Offset be set for children's programs and one-off feature length programs, and what other settings around minimum spend, qualifying spend and pathway to audience, would appropriately target support?

As outlined in section 5 of this submission, SPA supports a consistent Producer Offset at 40% for significantly Australian content in scripted drama and comedy, documentary, features/oneoffs and children's content, along with a revised points test. A 30% Producer Offset should be available to light entertainment and the Location and PDV Offsets should be set at 30%.

⁵³ <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html#Toc26977873>

The current requirement for theatrical release for features should be removed. This requirement was relevant when theatrical release for features through cinemas was the dominant and primary distribution channel for this product, before finding its way to secondary market windows of home entertainment (DVDs) then television broadcast and onto other ancillary markets. However, new market entrants have significantly disrupted this distribution model, with streaming services having established a significant position in the market. Additionally, other global marketplace changes have also negatively impacted the financial viability of this outdated release strategy.

Features are being commissioned directly by streaming platforms. For example, Netflix commissioned *The Irishman*, *Marriage Story* and *The Two Popes* but bypassed widespread theatrical release and traditional windowing. This trend has been exacerbated by worldwide shut down of cinemas as a result of the coronavirus pandemic and the long-term implications are not yet known.

Additionally, streaming services have become dominant acquisitions purchasers for completed feature projects at festivals and markets, outbidding traditional sales agents as buyers and distributors. Further, the current requirement for Australian feature film producers to have a theatrical distribution agreement in place in order to include the Producer Offset in their finance plan, which then triggers other finance along with borrowed cashflow against the offset, is now placing them at a significant financial disadvantage within the domestic and global marketplace. This becomes extremely counterproductive to the export value of their product.

There is therefore a need for improved flexibility in the Offset to ensure that is fit for purpose in the current and future content landscape, particularly to ensure that features/one-offs that do not conform to outmoded distribution pathways are not unnecessarily excluded from valuable support.

6.3 Model 3

SPA supports the policy objective stated in the Options Paper in relation to Model 3 – the establishment of a platform-neutral, future facing set of obligations and incentives that take into account differing individual platform offerings and better service Australian audiences.

SPA's preferred regulatory model is broadly in accordance with Model 3 option B, with some divergence on matters of detail and is outlined in detail in section 5 of this submission. For this reason, we do not provide extensive separate comment on Model 3 in this section of the submission.

However, SPA wishes to note it does not support a content fund model (part 2 of Option A in Model 3). 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.

It is far more efficient for regulated entities to be required to make the commissioning decisions in relation to their regulated investment requirements. 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.

Consultation questions:

11. Should scripted Australian content be limited to Australian drama, documentary and children's content, and are revisions to those terms necessary? Should it be limited to 'new' content, however defined?

SPA does not agree that the regulatory requirement for content distribution platforms be limited to scripted content, and believes that a more broad-ranging approach should be adopted, subject to the proposed measures to protect vulnerable genres (which primarily relates to scripted content) as a subset of the overall requirements. 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.

The requirement should only be able to be acquitted through newly commissioned programs.

12. How should revenue be calculated and what would be an appropriate investment percentage rate? Should that percentage rate be consistent across service providers or varied according to business models?

As outlined in section 5 of this submission, SPA supports a regulatory scheme in which investment obligations can be tailored to the specifics of a content delivery platform's business and operating model.

We support a legislated minimum, to be determined through a subsequent stage of Government consultation and modelling, and also legislated guidance for the regulator to direct its decision-making.

It is not possible therefore for SPA to indicate a preferred rate of contribution in this submission, as the financial and consumer data necessary to undertake the modelling required is not publicly available. We are recommending this be determined through an open process of consultation and the overall objective should be to determine rates which deliver substantial growth in the production and supply of Australian content.

13. In relation to option B for commercial content service providers, how often should these investment plans be negotiated?

As noted in section 5 of this submission, there is a balance to be struck across three considerations on this question:

- The need for agreements to be in place for a sufficiently long time to provide certainty to all market participants
- The need for there to be sufficient flexibility that permits agreements to reflect changes in the marketplace and consumer behaviour
- The need to ensure sufficient length in the agreements to offset the administrative and compliance burdens that the renewal process will impose on all interested parties.

The Canadian model may be instructive, as it provides flexibility for the CRTC to determine the length of the agreement, with maximum terms set by legislation.⁵⁴ In general terms, licences in Canada are typically issued with a 3 year term.

14. In relation to option B for commercial content service providers, what authority should the ACMA have to negotiate investment plans and impose minimum requirements?

Please refer to section 5 of this submission, in which SPA outlines the preferred model for the regulator's role and powers.

15. What promotion and discoverability requirements would be effective in the minimal and significant model?

Requirements could be tailored to the operating model of the content platform. The requirements would clearly need to distinguish between broadcast and on-demand modes of operating, and further differentiation may be required within those categories of service. The adequacy of promotion and discoverability measures should be a consideration of the regulator in approving or renewing a negotiated content agreement.

In Canada, the Broadcasting and Telecommunications Legislative Review included a recommendation that new requirements on internet delivered content services include a discoverability requirement (recommendation 61).⁵⁵

⁵⁴ <https://laws-lois.justice.gc.ca/eng/acts/b-9.01/page-2.html#h-34268> – see section 9(1)(b) of the Broadcasting Act (SC 1991 c. 11)

⁵⁵ <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html>

In the EU, the AVMSD empowers member states to impose prominence requirements for European works in their domestic regulatory frameworks (see para 35).⁵⁶

16. What would be an appropriate level of funding for national broadcasters to allocate to children's content?

SPA supports the reinstatement of children's funding levels as per the 2009 Government funding grant for the establishment of a dedicated children's channel (\$27m per year).⁵⁷ This funding should be quarantined within the ABC budget (it should not be permitted to be rolled into base funding and reallocated elsewhere).

A similar amount should be considered for SBS and NITV.

17. What level of Offset rebate should be provided across all platforms? Why would some Australian content require additional support, and should this be provided via direct or indirect funding? What other settings around minimum spend, qualifying spend and pathway to audience would appropriately target support?

Please refer to section 5 of this submission, in which SPA outlines its proposals for reform of the Offsets.

6.4 Model 4

Given the widespread support (in the community and from successive Australian Governments and state/territory Governments) for the cultural and economic value of Australian screen content, Model 4 should be disregarded as a feasible policy choice.

Removing all obligations would lead to unacceptable harm to Australian audiences businesses, employees and to the economy. It would rapidly result in large scale job losses and irreparable damage to Australia's capacity to produce screen content.

As pointed out on page 32 of the options paper, the commercial broadcasters have mostly met their obligations or only marginally exceeded them. The quotas are minimum requirements. The commercial broadcasters comfortably met their overall transmission quotas, but the results for sub-genre quotas for first run drama, documentary and children's programming are less comfortable reading.

That the commercial broadcasters' results either barely met the minimum requirements or fell below the minimum requirements indicates their level of commitment to those genres is dictated by those obligations.

Studies undertaken in conjunction with previous Government reviews have shown that the withdrawal of regulatory intervention will result in dramatic reductions in Australian

⁵⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN>

⁵⁷ Dawson, 2017, p 12

screen content. This has also been the experience in the UK, where the removal of children's content regulation led to a direct and dramatic drop in the making of that content (expenditure fell 93 per cent after quotas were removed)⁵⁸.

Public service broadcasters (PSBs) in the UK have made commitments to reinvigorate children's content, however this is only because Ofcom has the power to re-regulate. As noted below, because of the ratchet provisions of the Australia – United States Free Trade Agreement (AUSFTA), Australia will not have this option, and hence all leverage will be lost.

As part of the Convergence Review, the Government commissioned PwC to consider the impact on output if regulations were withdrawn. PwC estimated if the quotas were removed, but current supply-side interventions remained, the volume of Australian content broadcast would fall to approximately 43 per cent. The level of investment in Australian television content would fall approximately 28 per cent and in the short run employment in the television production and broadcasting sector would fall by approximately 2,000 full time equivalent jobs. Documentary production was expected to halve. Subscription broadcast spend on Australian drama was expected to fall to 6 per cent. No children's content was expected to be produced.⁵⁹

In the absence of any Government support, the market might produce a handful of big-budget television dramas, a handful of feature films, no children's content, less than half the current level of documentary production would be produced. Low budget, short form and amateur content would continue to be produced. The production industry would be devastated, putting at risk 17,000 jobs, sustainable production businesses, career opportunities and skill training. This then would accelerate the brain drain of skilled workers to bigger English-speaking markets.

The capacity of the industry to produce high-quality feature films and television content would be severely constrained as a sustainable high-skilled workforce is needed, which would then need to be sourced from other jurisdictions. It has been demonstrated that the market cannot be left alone to supply Australian audiences with a diversity of quality Australian content.

Furthermore, as an English-speaking market, without government intervention, Australia will become more of a dumping ground for content from other, bigger, English-speaking markets. Moreover, as film and television products are classed as services, rather than goods, there are no anti-dumping remedies available under international trade law. Antidumping remedies are available where an exporter sells goods into Australia a price significantly below the "normal value" of the goods. The normal value of the goods is usually determined by the domestic price of the goods in the country of export. The margin of dumping is the amount by which that normal value exceeds the export price of the goods. While dumping itself is not prohibited, where the goods have been subsidised in some way by the exporter's government and the dumping causes material injury to domestic industry, remedies are available. Many jurisdictions, like Australia, support their local film and television industries, but to greater extents – for example while Australia provides a 20 per cent tax offset for

⁵⁸ <https://www.telegraph.co.uk/news/2017/04/17/broadcasters-forced-invest-british-made-childrens-tv-programmes/>

⁵⁹ PwC, Minimum content requirements research report, 2011

television productions, New Zealand provides 40 per cent tax offset and New Zealand productions are Australian for the purposes of Australian content obligations.

We must also consider the impact of the AUSFTA, which means that if Australia removed all obligation, it could be prevented from re-introducing it. It is likely that if regulation were removed, and the availability of Australian content rapidly declined, there would be public support for regulation to be reimposed. This might not be possible and our capacity to apply the required regulatory interventions to ensure supply of culturally relevant content could be lost permanently.

7 Other matters

7.1 Impact of coronavirus

Like much of the economy, the screen ecosystem has been seriously disrupted by the coronavirus pandemic.

In order to comply with official health advice and social distancing requirements, much of Australian production activity in scripted drama content has shut down. The number of affected productions has reached 119, including some of Australia's most beloved stories and formats. The reported budgetary figure on the line has now risen to almost half a billion dollars (comprised of \$232 million in actuals and \$239 million in estimates). This has left thousands of hard-working creative Australians out of work. We note the landmark JobKeeper and expanded JobSeeker payments, which are taking effect across our members.

Whilst the impact on drama productions has been extensive, there are some parts of our industry and types of production which, given the right conditions, can be productive now or in the near future. Animation and some factual work (with significantly increased cost and risk) in particular, has been able to continue, and with the right assistance, even more productions could be active.

The industry is shovel ready and working hard to innovate and find options to return to work, to save as many businesses, jobs and creative IP as possible, and to start the slow process of recovery. For example, the industry has recently released COVID-Safe Guidelines, which provide support and assistance to producers to eliminate and minimise the risks associated with exposure of personnel to COVID-19 while returning to work on production. A number of productions have announced their plans to return in the coming weeks and months.

However, recovery will simply not be possible without the right regulatory settings.

The devastating impact of the pandemic on production underscores the need for a reform process that delivers on the key objectives of certainty, sustainability and growth, in a timely and considered fashion.

7.2 Suspension of Australian content quotas

SPA remains deeply concerned by the decision to extend regulatory forbearance to commercial FTA broadcasters as regards their Australian content sub quotas, and subscription television as regards their drama obligations, for 2020.

We understand the decision was made in response to concerns that insufficient supply of sub quota content would occur as a result of interruptions to productions due to coronavirus.

Whilst it is true that productions have been impacted by shut downs, the impact is not the same across all kinds of productions, and indeed there have been some kinds of production (animation, documentary, some drama) that have been able to proceed. We also note broadcasters can acquit their obligations across a three year period.

A complete suspension of quotas fails to reflect this and instead acts to disincentivise new commissions, which might otherwise have been made. The effect has been a complete slow down of the development and commissioning process.

We also note that many productions are now resuming. With the announcement of the Government's Temporary Interruption Fund and the release of COVID-Safe guidelines for the safe resumption of production, the industry is ready and able to resume/commence production of quota content.

Ironically, forbearance likely to lead to its own supply problems, due to the broadcasters' behaviour rather than any actual disruption to production activity. The lack of regulatory certainty is acting as a brake on commissioning activity.

A more appropriate response would have been forbearance only for contracted programs which can demonstrate delayed delivery due to COVID-related measures. This would ensure demand returns to the system at sufficient levels to stimulate production and economic activity and to create and sustain employment.

It is vital that regulatory forbearance is not extended into 2021. It is also vital that an announcement that 2021 quotas will apply is made as a matter of urgency, so that demand can return to the market in time for commissioned programs to be completed for the 2021 year.

Attachment A

State of play for the independent screen production sector – key data from *Screen Production in Australia: Independent screen production industry census*

Revenue, exports and employment

The Deloitte study found that the Australian screen industry plays an important role in the Australian economy, with revenues of \$1.2 billion and exports of \$163 million. This is three times to the size of the music industry in revenue terms.⁶⁰

The sector is also a significant employer, supporting around 30,000 people.⁶¹ This is made up of over 1300 people employed on an ongoing basis in a production business' corporate headquarters, and over 18000 roles linked to specific productions.⁶² As production staff are hired for a particular production, rather than on a permanent basis, some personnel work on more than one production in a given year. As such, these figures do not denote FTE numbers or individuals employed.

In total, more roles were supported by scripted productions (7,871) than unscripted productions (3,974). An average scripted production supported 119 roles, however some of the larger ones supported upwards of 1,300 roles. For unscripted productions, the average was 52, with some supporting more than 800.⁶³

Relative to other Australian businesses, screen producers are much more likely to be exporting. Forty-seven per cent of production businesses received at least some revenue from overseas. This compares to only 7.6% of Australian business more broadly. Australian productions are seen in at least 225 territories.

The lion's share of exports were to other English speaking territories, with a third coming from the UK (38%), and another 21% coming from the United States.⁶⁴

The industry has a clear potential to expand its trade output, which is currently under-utilised. As noted elsewhere in this submission, SPA supports calls for modernisation and expansion of co-production arrangements, and strategic leadership and direction from Government to expand screen export capabilities.

Australian content

Australian ideas drives screen content in Australia, with 9 out of 10 produced ideas coming from within the country. This trend is also reflected along the value chain, with 72% of filming and 87% of post-production work completed in Australia. Filming takes

⁶⁰ *Screen Production in Australia: Independent screen production industry census*, Deloitte Access Economics (2019), p 2

⁶¹ Australian Bureau of Statistics, *8679.0 – Film, Television and Digital Games, Australia, 2015-16, 2017*

⁶² *Screen Production in Australia: Independent screen production industry census*, Deloitte Access Economics (2018), p 14

⁶³ *Ibid.* p 14

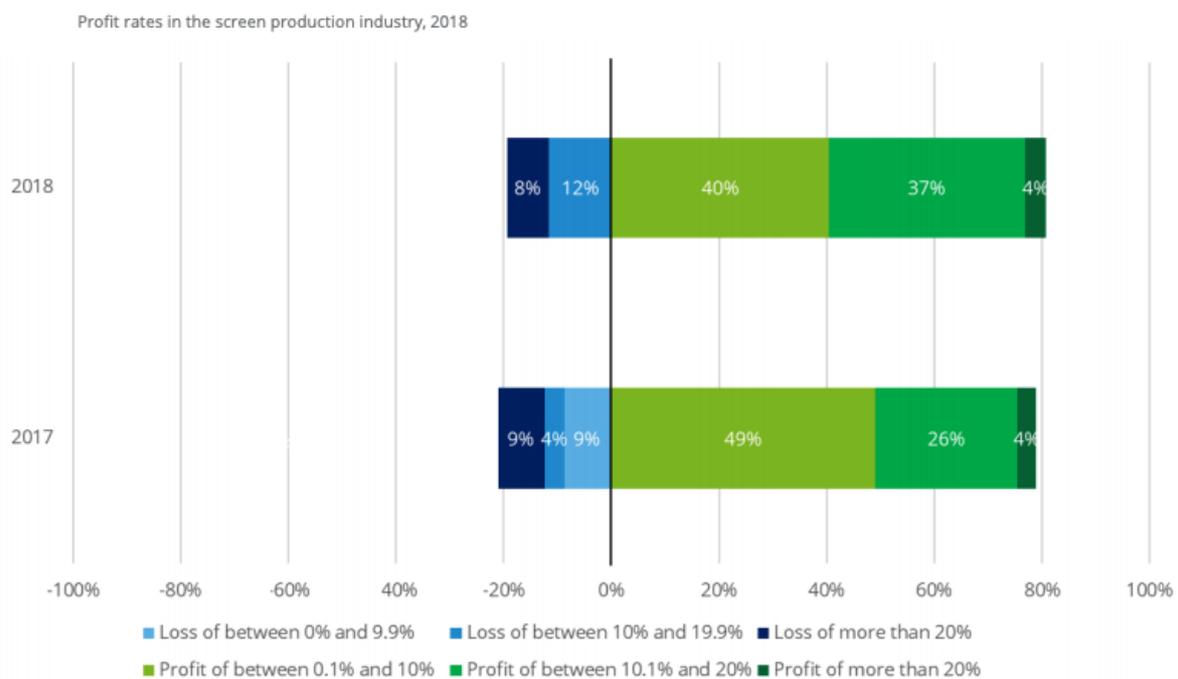
⁶⁴ *Ibid.* p 12

place across the country, including across all states and territories and across a mix of regional and metropolitan locations.⁶⁵

Financial performance

Whilst the independent screen sector is a significant contributor to the economy, individual businesses are facing difficult conditions and narrowing profit margins, with small businesses in particular facing profitability challenges.

In 2018, one in five businesses made a loss, and another half (40%) only made a slight profit. While this represented some improvement on profit rates in 2017 – where 22% of businesses had made a loss and about 49% had made slight profit, it is clear that profitability remains an on-going issue for the industry.⁶⁶



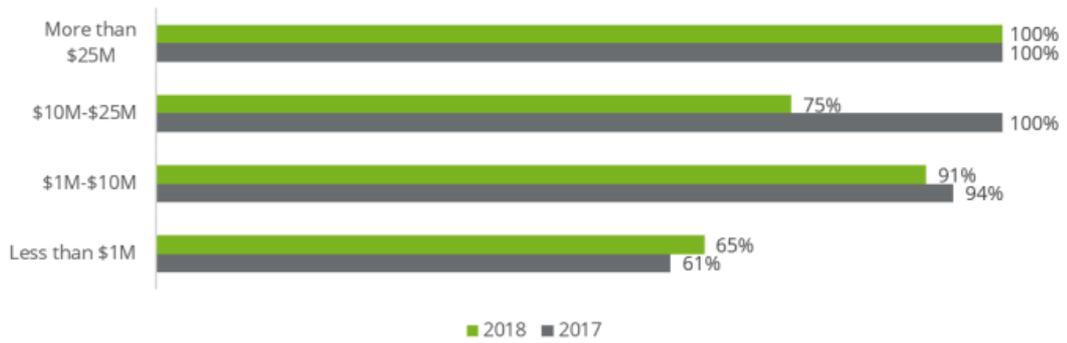
Source: Deloitte Access Economics and Qualtrics, *Screen Production in Australia Industry survey* (2019).
n = 52 production businesses

As is seen across the economy, larger production businesses were performing better than smaller businesses. All of those screen production businesses with revenue over \$25 million said they were making a profit, compared to 65% of businesses with less than \$1 million in revenue.

⁶⁵ Ibid. p 17

⁶⁶ Ibid. p 19

Figure 1.1.1 % of production businesses which are profitable, by business size, 2018



Source: Deloitte Access Economics and Qualtrics, *Screen Production in Australia Industry survey* (2019).
 n = 52 production businesses

Larger businesses are more often located in Sydney, and sometimes Melbourne. They tend to perform better in negotiations and have funding and IP support through their international ownership structures. By comparison, smaller businesses face challenges in the marketplace in terms of retaining IP and negotiating advantageous economic deals.

Funding sources

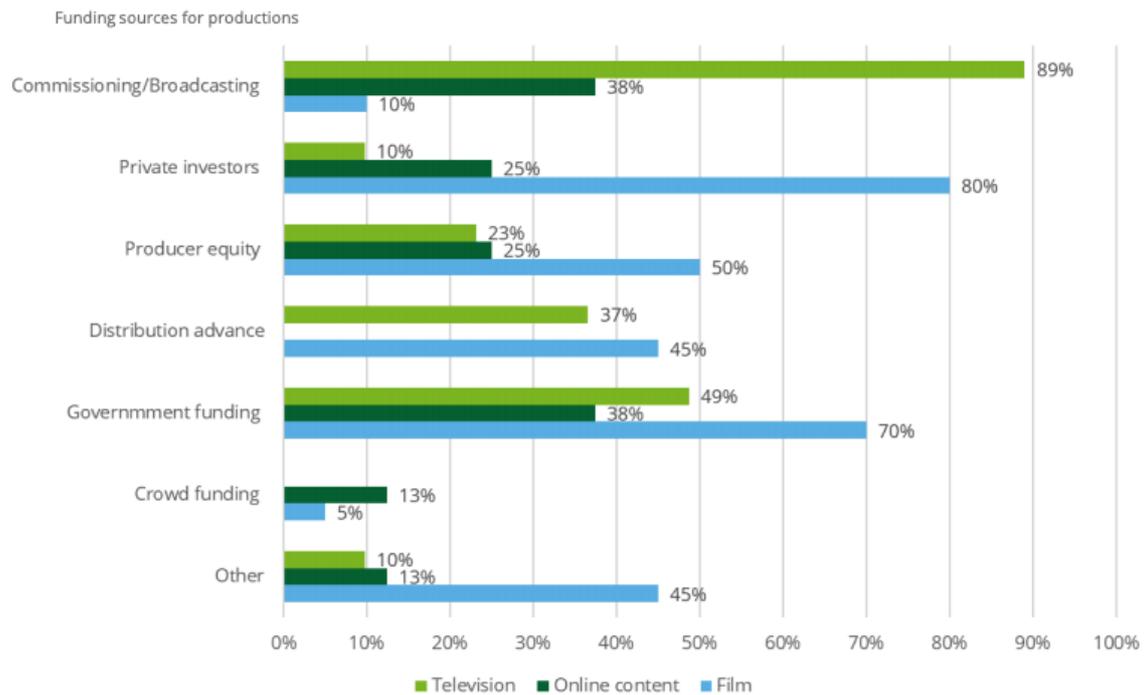
The Deloitte survey demonstrated the variety of funding sources production businesses receive funding through. Two in three productions reported receiving some part of their revenue through commissioning or from a broadcasting network.⁶⁷

This was followed by government funding (50%), and distribution advances (34%).⁶⁸

While the major source of demand for Australian-made television lies in commissioning, major films are more likely to receive funding from private investors.

⁶⁷ Ibid. p 21

⁶⁸ Ibid. p 21



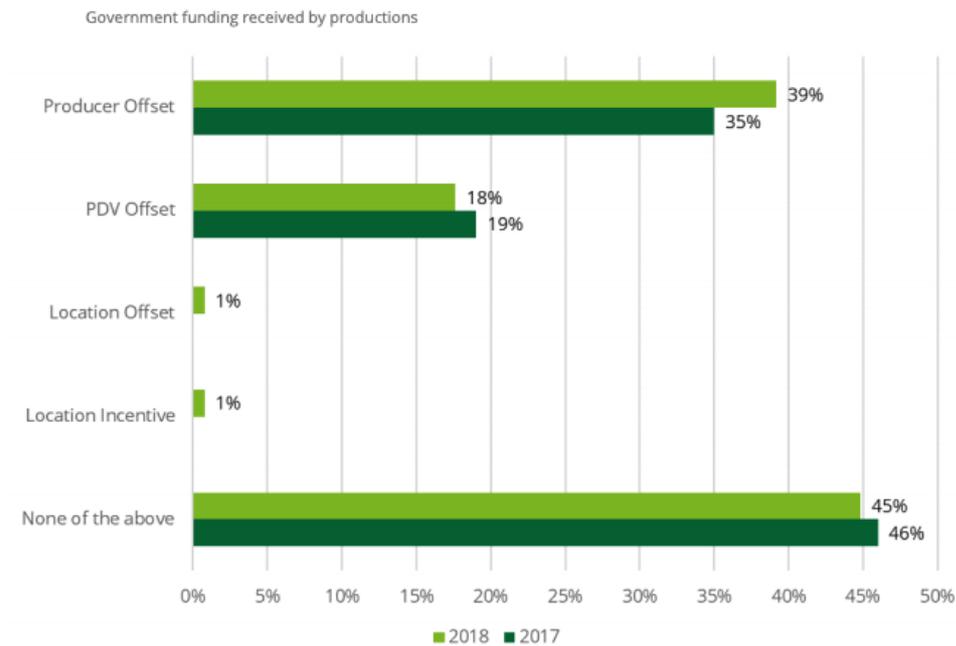
Source: Deloitte Access Economics and Qualtrics, *Screen Production in Australia Industry survey* (2019).
n = 125 productions

In terms of the source of commissions, almost half were from public broadcasters, and 28% were from the major commercial broadcasters.⁶⁹

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

⁶⁹ Ibid. p 25

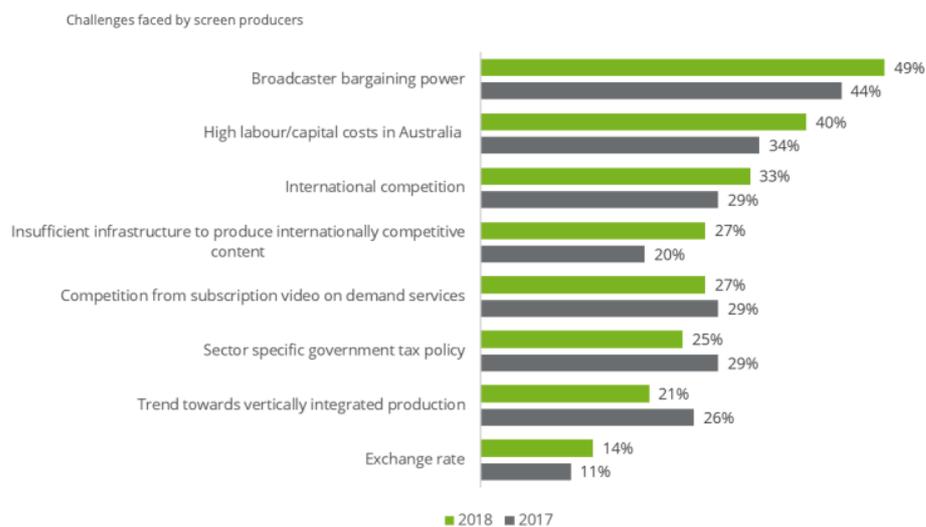
The main forms of government funding received by productions is summarised in the following table:



Source: Deloitte Access Economics and Qualtrics, *Screen Production in Australia Industry survey (2019)*.
n = 125 productions

Sector outlook

The Deloitte study also tested the outlook of Australia’s independent production sector, taking into account the top challenges faced by screen producers. Broadcaster bargaining power was the top ranked challenge, followed by high labour and capital costs, and international competition.⁷⁰



Source: Deloitte Access Economics and Qualtrics, *Screen Production in Australia Industry survey (2019)*.
n = 73 production businesses

⁷⁰ Ibid. p 26

The top line concern was broadcaster bargaining power at 49%, and this is informed by trends in financing, driven by changing viewership habits and global competition.

For television, licence fees are decreasing over time. According to Screen Australia, total broadcaster and distributor funding for TV drama formats has decreased by more than \$25 million, between 2012-13 and 2016-17. In 2008, commercial broadcasters were paying between \$75,000 and \$95,000 per episode for animated children's drama. In 2017, licence fees were only \$45,000.⁷¹ In 2018 onwards, licence fees have dipped to all time lows of \$30,000.

By comparison, the BBC pays between 150,000 pounds and 300,000 pounds per hour for children's animation.⁷²

These figures underline SPA's calls for mandated terms of trade, explored further in section 5 of this submission.

⁷¹ *Screen Production in Australia: Independent screen production industry census*, Deloitte Access Economics (2018), p 28

⁷² http://downloads.bbc.co.uk/commissioning/site/tariff_prices_for_independents.pdf