Media Reform Green Paper

Modernising television regulation in Australia

Submission by the Media Entertainment and Arts Alliance
(Equity and Entertainment, Crew and Sport Sections)

May 2021

Introduction

This submission is on behalf of MEAA's Equity and ECS (Entertainment, Crew and Sport) sections. A separate submission is being provided to government on behalf of MEAA's journalist (and allied) members with respect to the creation of a Public Interest News Gathering (PING) Trust.

MEAA represent approximately 8000 performers and crew working in the Australian screen production sector. Our members' employment is often insecure (non-permanent, short-term and contract-based). As is well-known, the screen sector was hit very hard by COVID-19. Productions were immediately shut down and affected workers largely found themselves ineligible for JobKeeper support.

Although there are high levels of screen production taking place in Australia at the moment – with a corresponding boost in employment – these levels may prove unsustainable once the global pandemic is brought under control in countries that have historically sustained significant levels of production activity.

MEAA makes this observation to caution government and its agencies against making regulatory and other changes based on the current (perhaps temporary) vitality of the film and television production sector.

Any reform must be underpinned by the reality that the Australian screen production sector, while world-class and dynamic, needs forms of market and government assistance to achieve sustainability. Central to this is the need for clear and enforceable rules governing minimum levels of Australian content programs.

Green Paper Issues

The Media Reform Green Paper (the paper), seeks industry and community feedback on several critical proposals, namely:

- Regulation of Streaming Video on Demand (SVOD) services with respect to Australian content production;
- Regulation of the ABC and SBS with respect to Australian content production and associated reporting obligations; and
- Creation of a new Create Australian Screen Trust (CAST) – should spectrum management reforms proceed and funding become available for the Trust.

The paper was released shortly after the Federal Government announced sweeping reforms to Australia's content quota system on September 30, 2020. In MEAA's submission, the shift to an overall 250 points system as opposed to discrete genre, sub-genre and format requirements will undermine the scale and value of the Australian screen production sector.

Over time, the scale of investment in and production of dramatic and documentary programs being made by commercial television broadcasters and subscription television providers will be severely reduced.

SVOD

Against this backdrop, it is critical that new requirements be established to require minimum levels of new Australian content production by the subscription video on demand (SVOD) sector.
As the paper says:

> *Despite their popularity, services operating in Australia or targeting Australian audiences are not obliged to provide Australian screen content, unlike commercial free-to-air and subscription television broadcasters. In this regard, our regulatory framework is inconsistent and unbalanced.*[1]

Accordingly, the paper states that the Government is looking to set clear expectations of SVOD … businesses about their investment in new Australian programming, consistent with the arrangements in place (or proposed) for other sectors of the Australian media industry.[2]

The key elements of the proposed 'content investment obligation' that could be imposed on SVODs would be:

- Requiring SVODs (and AVODs[3]) to invest a percentage of their Australian revenue in Australian content, in the form of commissions, co-productions and acquisitions;
- making Australian content discoverable to Australian audiences;
- requiring that SVOD and AVOD businesses report to ACMA each year about performance against those expectations; and

[1] green paper, page 30
[2] green paper, page 5
[3] AVOD is advertising-based video on demand, e.g. Youtube

- providing the Minister with the power to implement formal regulatory requirements on an SVOD or AVOD service that failed to meet expenditure expectations for two consecutive years.[4]

MEAA strongly supports these principles, but is very concerned that the paper states that a formal investment obligation 'could be imposed'.[5]

Moreover, the key elements listed above suggest that the Government may not move to immediately implement an investment requirement, but will instead set out formal 'expectations' to invest in Australian productions and make Australian content discoverable. The paper says if SVOD services subject to these expectations 'fail to meet expenditure expectations for two consecutive years', the Minister may implement 'formal regulatory requirements'.[6]

Some clarity is required about what the paper (and the Government) is proposing.

On the one hand, the green paper says that 'the Government now proposes to [designate] an Australian content investment obligation for large SVODs and AVODS', but then goes on to use the language of a 'formal expectation'.[7] The green paper then proceeds to state that 'this proposal is intended to guarantee a minimum level of investment by these services in Australian content'.[8] It is not clear to MEAA that an 'expectation' can elicit any kind of guarantee.

An expectation is weaker than an obligation. It is therefore quite unclear whether the Government proposes a 'wait-and-see', light-touch form of regulation *or* whether the starting place will be the imposition of revenue-based investment requirements.

MEAA believes it is essential that the starting place for SVOD content regulation is a mandatory investment obligation whereby SVOD providers of scale are legally bound to provide minimum levels of investment to produce Australian programs. Anything less would represent an unconscionable delay in progressing an urgent piece of public policy reform.

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[4] green paper, page 7
[5] green paper, pages 7 and 30,
[6] green paper, page 30
[7] green paper, page 30
[8] green paper, page 30

The case for regulating SVODs for the purposes of making fixed contributions to Australian content has been well-made over several years. This much was recognised by the 2017 House of Representatives Inquiry into Australia's screen production sector, which supported the principles of platform neutrality and capture of new market entrants.[9] The Inquiry recommended that:

> *" … any future reforms to Australia's content quota system ensure that commercial and subscription television companies continue to invest in and broadcast Australian programs for general audiences at current levels. In addition, the new quota system should provide that subscription video on demand services invest a percentage of the revenues they earn in Australia, for example 10 per cent, in new Australian content."*[10]

In the years since this recommendation was made, the case for subjecting SVOD providers to mandatory Australian content rules has grown.

In 2019, PwC estimated Australia's SVOD market value at $1.48 billion. PwC estimated the figure will increase to $2.68 billion in 2023, with growth calculated at about 16 per cent per annum.[11] If PwC's forecasts are correct, the SVOD sector's total value will be only $700 million less than the entire Australian commercial television sector's value of $3.8 billion in 2023.

MEAA's submission to the *Screen Options* reform process in June 2020 stated that Australian SVOD viewers then totalled 16.3 million—a 32 per cent increase from the previous year.[12] MEAA also noted that the average number of subscriptions per household is 2.4.[13]

Across the viewing/subscribing audience, MEAA stated that 12.2 million Australians ha[d] access to Netflix (6 million subscribers). Stan ha[d] 3.7 million users (1.8 million subscribers), while Amazon Prime Video ha[d] a reach of 1.5 million Australians, based on 600,000 subscribers.[14]
Disney Plus, which had only entered the Australian market in November 2019, had 1.8 million viewers, placing it in fourth in the SVOD market, while YouTube Premium has 1.48 million.[15]

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[9] The House Standing Committee on Communications and the Arts Report on the inquiry into the Australian film and television industry, tabled 7 December 2017, paragraph 3.97, page 54
[10] Ibid., recommendation 3, chapter 3
[11] Entertainment and Media Outlook, 2019, PwC, Subscription Television Chapter
[12] Telsyte, Media release: subscription home entertainment soars in Australia, 17 August 2020.
[13] Department of Infrastructure, Transport, Regional Development and Communications, 2020. Social Research Centre survey.
[14] Disney Plus attracts over 1.8 million in first 3 months, Roy Morgan, Finding No 8348, 31 March 2020
[15] ibid

The most recent data is more compelling still.

Roy Morgan data for all of 2020, albeit positively influenced by COVID-19, made three key observations:

- *17.3 million Australians (82.1%) watched a subscription TV service in an average four weeks,* ***up 2.4 million (+16.2%) from a year ago****.*
- *Netflix is by far Australia's most watched subscription television service, with 14,168,000 viewers in an average four weeks,* ***an increase of 2,265,000 viewers from a year ago*** *(+19.0%). Over two-thirds of all Australians aged 14+ (67.2%) now watch Netflix in an average four weeks.*
- *Also growing viewership strongly during 2020 have been third-placed* ***Stan which grew 1,562,000 (+46.4%) to 4,928,000 viewers, Amazon Prime which was up 2.158,000 (+190.2%) to 3,293,000*** *viewers and newcomer* ***Disney+ which now has 2,870,000 viewers***[16] *after being launched in late 2019.*[17]

When MEAA made its submission to the *Screen Options* paper process, Netflix's market capitalisation (in April 2020) was $US187.3 billion, putting it just ahead of Disney's $US186.6 billion.[18] Netflix's market cap now stands at $US218.7 billion[19] Australia's commercial television networks are simply nowhere near this scale.

The economic might of these companies is being channeled into productions. Netflix committed to spending $US15 billion on content throughout the world in 2019,[20] while Amazon disclosed that it was on track to spend $US7 billion for the year.[21] The most recent figures reveal that in a period heavily impacted by COVID-19 (i.e. reduced production), Netflix still spent $US11.8 billion and Amazon Prime provided $US11 billion in funding across its streaming, film and music services.[22]

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[16] **bolded** emphasis added. Source: Subscription TV viewers soared to 17.3 million Australians during 2020: Netflix, Foxtel, Stan, Disney+ & Amazon Prime all increased viewership by at least 1.5 million, Roy Morgan, Finding No. 8606, 12 January 2021

[17] Subscriber numbers are approx: (Netflix 6.1 million / Stan 2.3 million / Disney-Plus 1.8 million / Prime 1.8 million

[18] Netflix Worth More Than Disney After Streamer's Stock Hits All-Time High, Todd Spangler**,** *Variety*, 15 April 2020

[19] As at 15 May 2021.

[20] Netflix Raising $US2 billion in Debt Amid Original Content Push', Georg Szaili, *Hollywood Reporter*, 21 October 2019

[21] Amazon on pace to spend $7 billion on video and music content this year, according to new disclosure, Eugene Kim, *CNBC*, 26 April 2019.

[22] Amazon Spent $11 Billion on Prime Video and Music Content in 2020, up 41% From Year Prior, Todd Spangler, *Variety*, 15 April 2021

To give an example of streaming production expenditure outside of the USA, in 2019 Netflix revealed its plans to spend $US500 million making more than 50 TV shows and films in the UK over 2019-20.[23]

In November 2020, *Variety* magazine reported that Netflix has doubled its UK production budget to $US1 billion, following the global success of shows including *The Crown* and *Sex Education*. *Variety* said:

> *Netflix is spending this budget on producing more than 50 shows in the UK, despite a fraught year that has seen production on* The Witcher *shut down twice due to the coronavirus pandemic.*

The *Variety* article also noted that:

> *The streamer is investing heavily in studio space to house its productions. Last year, Netflix set up a huge production hub at Shepperton Studios outside London.*[24]

In spite of this growth and major investments being made in production outside the United States, the paper notes that SVOD services provide relatively modest levels of Australian content as a proportion of their overall catalogues.[25] It is also the case that a 'large proportion of the Australian screen content that is available on SVODs tends to be older content, and the commissioning of new Australian content by SVODs is low by international standards'[26].

MEAA further notes that, although Australia is in the top 10 Netflix markets globally (in terms of overall subscriber numbers), the number of current and upcoming original local productions is much lower when compared to the other countries in this group.[27]

Mandating Australian content requirements, whether via investment or genre quotas and sub-quotas, should not be viewed as a cost or penalty by SVOD providers. Australian content is appealing and enjoys high levels of consumption. As the Deloitte survey canvassed in the paper shows, 34 per cent of respondents considered it 'very important' to be able to access Australian [content] on SVOD services.[28]

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[23] Netflix to spend $500m on British-made TV shows and films, Mark Sweney and Tara Conlan, *Guardian*, 20 September 2019.
[24] Netflix Doubles U.K. Production Budget to $1 Billion, After *The Crown*, *Sex Education* Global Success, Naman Ramachandran, Variety, 25 November 2020
[25] Page 32, green paper
[26] page 34, green paper
[27] green paper, p.p. 33-34
[28] green paper, page 34

In the absence of regulated minimum production investment requirements, the major streaming companies can simply forum shop countries in which they undertake productions. This results in highly variable commitments in a jurisdiction year on year. This, in turn makes the screen production ecosystem unstable. This instability means that workforce planning and the ability of performers and crew to attain work is unpredictable and continuously compromised.

The recent picture of SVODs making Australian programs is revealing. Screen Australia's 2019-20 Drama Report noted that over the last three years Australian and foreign online streaming services invested:

2017-18: $30 million for 6 dramatic titles and 24 hours of programs
2018-19: $19 million for 8 dramatic titles and 23 hours of programs
2019-20: $46 million for 6 dramatic titles and 24 hours of programs[29]

The five-year investment average for streaming services was $21 million. Of the six dramas made in 2019-20, three were produced by Stan, and one each by Amazon Prime, Netflix and Adult Swim.[30]

By way of comparison, commercial television invested $114 million for 23 programs for a total of 401 hours in 2019-20, while public broadcasters contributed $58 million in 32 titles for a total of 140 hours in the same year.[31] Put another way, Australia's television broadcasters contributed almost four-times as much towards the production of drama than foreign and Australian streaming services.

The inequality of investment and commitment towards Australian productions between the viewing platforms is telling and reinforces the point that without firm regulation, SVOD companies will make highly variable contributions to the Australian drama slate.

A regular production investment stream would better enable screen production companies, performers and crew to make reasonable estimations about how much work they might secure over a given period. This will aid capacity building in the sector to improve and enable screen professionals to draw more income from their chosen field of work.

[29] Screen Australia Drama Report (Drama Report) 2019-20
[30] Drama Report, page 22
[31] Drama Report, page 22

MEAA's position is clear: companies that derive significant benefits from Australian consumers and which have access to government screen rebates should be subject to Australian content requirements.

It is well past time that our content rules were modernised to reflect contemporary viewing habits and consumption and to capture a portion of the budgets overseas entities like Netflix and Amazon expend on programs each year.

It would be unconscionable that entertainment market players such as Netflix, Amazon and Disney+ should be regulation-free while accumulating massive subscriber bases and associated revenue streams, especially in an environment where traditional screen providers (e.g. linear television broadcasters) face ongoing financial challenges and market disruption.

Australia would not be alone in moving to regulate streaming services. In 2018, the European Parliament voted in favour of a new quota for content on streaming services, requiring each company to have, from September 2020, at least 30 percent of their catalogs in Europe devoted to European works.[32]

As the paper observed, France and Germany have mandated investment levels in either creating local content or funding film institutions, while Canada is well on its way to requiring minimum funding levels for its screen production sector.[33]

These new obligations, the paper states, have not caused the affected providers to withdraw from the market, or to otherwise reduce their service offerings.[34]

Eligibility Tests

The paper canvasses a range of eligibility and content criteria that would apply to SVOD providers.

On the critical questions of subscriber and revenue thresholds, the paper proposes criteria of one million subscribers and $100 million per annum in Australian revenue.

[32] The EU's audiovisual media services directive states that member states "shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30 per cent share of European works in their catalogues and ensure prominence of those works." See page 35 of green paper

[33] green paper, page 35

[34] green paper, page 35

MEAA believes these thresholds are too high.

MEAA supports regulatory capture where an SVOD service has 500,000 subscribers. The revenue test should also be half the amount contemplated in the green paper – i.e. content rules should apply where a service has $50 million (or more) in Australian revenues in a given year.

As to the type of content (or genre) required of SVOD providers, the paper says:

> *The obligation would require investment in new Australian content, but would not set any requirements for the genre of content. Service providers would have discretion to determine the genres of Australian programming that they acquired, commissioned or licensed.*[35]

It is MEAA's strong preference that SVOD providers captured under revised Australian content rules be subjected to specific genre requirements. Without such requirements, the production of important content areas will not be pursued.

MEAA is however not opposed to a scheme whereby investment obligations are offset (or weighted) by the production of content considered vulnerable, such as children's programs.

The paper also considers what type of overarching criteria will apply to any new investment obligation. It states that:

> *To the extent possible, the new investment obligation could incorporate established and understood definitions in the BSA and the Broadcasting Services (Australian Content) Standard 2016 (ACS).*

MEAA strongly supports the concept of investment being tied to Australian programs, but notes that Australian programs include content made in New Zealand. MEAA does not support an investment obligation that can be materially watered down by enabling productions in other jurisdictions to be counted towards an SVOD service's contribution to the Australian marketplace.

As to the question of how much of annual Australian revenues must be devoted to Australian productions, MEAA rejects the notion that SVOD providers be required to only contribute five per cent of their annual subscription revenues into Australian content productions.

[35] green paper, page 32

In MEAA's view, five per cent has no policy validity beyond being in alignment with the new (unexplained and unwarranted) Australian content expenditure requirements that will apply to subscription television providers through the New Eligible Drama Expenditure rules from 1 July 2021.

A five per cent rate would be the lowest common denominator outcome; it may represent a reduction in current levels of Australian production expenditure by SVOD providers and is well under the rate secured in Europe and elsewhere.

ABC and SBS

The green paper states that:

- The *Government proposes* to amend legislation to establish a clear and explicit requirement for the ABC and SBS to provide new Australian programming, in line with the obligations imposed (or proposed) for other sectors of the Australian media industry.
- The *Government also proposes* to require the ABC and SBS to provide information about their investment in, and provision of, new Australian programming to ACMA annually, again, in line with other media organisations.[36]

The paper acknowledges that the ABC and SBS are significant commissioners of Australian content and are also important providers of this content to audiences across the country.[37] It points to the ABC's submission to the Screen Options Paper in 2020, which stated that:

> *the ABC had invested over $200 million in Australian drama, comedy and Indigenous content, producing more than 70 hours of content per annum, and nearly $90 million on children's content, producing an average of 310 hours of content per annum.*[38]

Similarly, the paper acknowledged SBS's track record in providing local programs. It states that in 2019-20:

> *SBS reported that it broadcast 171 hours of locally commissioned programs which were first run on SBS and SBS VICELAND, and 59 hours of locally commissioned programs which were first run on NITV.*[39] *In that year, the amount of first run and repeat Australian content on SBS*

[36] green paper, page 37
[37] green paper, page 37
[38] green paper, page 37
[39] Portfolio Budget Statement, 2020, 1.1, pg. 500.

was 2434 hours, or around 27 per cent of all content.[40] *On NITV, the proportion was higher, with around 68 per cent of all programming being Australian.*[41] [42]

The inference to be drawn from these observations is that both public broadcasters would not have their operations or independence hindered by being subjected to formal (i.e. general) Australian content requirements.

The main question posed by the paper is, *if* the principle that Australian content quotas should apply to the ABC and SBS is conceded, how should an obligation to produce new Australian programming be expressed? Should the obligation focus on *levels of investment* in Australian programming **or** require the provision of a *minimum number of hours* of Australian programming? In addition, the paper asks, should the obligation focus on Australian programming broadly **or** should it specify genre and sub-genre program requirements?

It is not clear whether the paper, by stating that the government is to establish 'a clear and explicit requirement for the ABC and SBS to provide new Australian programming', is foreshadowing mandating public broadcasters to achieve the 250 points genre point system (at Schedule 1 of the Broadcast Service Standard) or whether specific genre requirements may be imposed.

Although requiring public broadcasters to achieve the 250 points in the flexible manner now permitted of commercial broadcasters is less objectionable to a more prescriptive system, such a reform should not proceed in an environment where there is substantial discord between the government and the ABC (and to a lesser extent, SBS/NITV).

MEAA is concerned that imposing content requirements on public broadcasters at a time of budget restraint (if not cuts) and where the government happily foments attacks on the integrity and overall operations of the ABC in particular, would be underpinned by the objective of reining in these organisations' independence.

It follows that MEAA would be more concerned still by any move to mandate genre and sub-genre production requirements (e.g. *x* hours of children's television and *y* hours of adult drama each year) on the public broadcasters. This would be wholly inconsistent with the (flexible) 250 points system

[40] SBS Annual Report 2018–19, pg. 134, at page 37, green paper
[41] SBS Annual Report 2018–19, pg. 136, at page 36, green paper
[42] green paper, page 36

which came into force on 1 January 2021. The new system, of course, replaced quite prescriptive genre, sub-genre and format points system.

It would be passing strange for the government to apply a system it had just dispensed with on (public) broadcasters that have never been covered by formal Australian content rules. MEAA sees no justification for such a stance.

Compelling the ABC (and SBS) to deliver programming against discrete genre or sub-genre targets also plays into the regressive view that public broadcasters should be responsible for generating content that commercial entities do not consider commercially viable. This kind of thinking does a disservice to both our public broadcasters. They are quality broadcasters in their own right and should not be unreasonably constrained as to the type of content they deliver.

Prescribing levels of investment in Australian content/programs would be a genuine incursion on the broadcasters' independence and curb their ability to manage the ongoing issues and exigencies that are present in almost all business environments.

Moreover, the current state of public broadcaster funding does not suggest that the ABC or SBS can simply hive off a section of their budgets and devote it towards achieving new content requirements. The funding trend for both the ABC and SBS as released in the 2021-22 Budget papers suggests ongoing funding cuts in real terms (or at best, flatlining government contributions) to both organisations for the foreseeable future.

If content rules are to apply to public broadcasters, MEAA maintains its position that public broadcasters should be subject to the *Broadcasting Services Act 1992* requirement to annually broadcast a minimum of 55 per cent Australian programming / content between 6am and midnight on their primary channels and 1460 hours of Australian content on non-primary channels.

Create Australian Screen Trust (CAST)

The paper contemplates the creation of new trust to fund and invest in Australian screen productions. It is a speculative but welcome proposal.

The paper says CAST would:

- *fund the creation and distribution of Australian content, giving additional support to the production sector; and*

- *be administered by Screen Australia, with recommendations for allocation of funding made to the Board of Screen Australia by the trustees of CAST, which would include people with experience across finance, business, distribution, content development, sales and acquisition sectors.*[43]

With up to 10 per cent of the allocated capital available to be drawn down in any given year to support the production and distribution of documentary, drama and children's screen content, the trustees would be responsible for identifying projects to receive funding. The Government envisages that CAST would have two funding pools:

- *one pool to support projects of cultural significance (that is, broadly the same criteria as are presently used by Screen Australia in determining whether to fund productions); and*
- *one pool to focus on making commercial investments (that is, investments where there is a prospect of commercial return).*[44]

MEAA notes and welcomes the objective of CAST is to provide 'additional support to the production sector'.[45]

MEAA note however that funding for CAST would be drawn from 'a portion' of the proceeds of an auction of radiofrequency spectrum, which the government considers 'a multibillion-dollar public resource.'[46] Such an auction will only occur if at least two existing commercial television broadcasters move to a new licence and operating system that requires less radiofrequency spectrum.

The paper goes on to acknowledge that if 'at least two commercial free-to-air television broadcasters in each market' do not sign up to the new model, there would be insufficient spectrum available to realise a digital dividend, and to allocate that spectrum via auction for other uses'.

In this context, it is perhaps understandable that the paper does not provide information about the scale of funding that may be available to the trust and that its nominal start date is 2025.

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[43] Page 27, green paper
[44] Page 28, green paper
[45] Page 27, green paper
[46] The green paper states that advances in television compression technology mean that different transmission arrangements which use less (radiofrequency) spectrum can be used by broadcasters at close to current levels, with a minimal impact on viewers.

It is nonetheless obviously difficult to provide comment on a concept, the existence of which is contingent on range of variables, some of which are understood to be technically and operationally contentious.

This said, MEAA offers its in principle support for the creation of CAST, subject to the following:

- what is the potential scope of a one-off injection of funds into CAST if spectrum management reforms are achieved?
- CAST funding should be used to bolster current screen assistance (offsets and incentives) and investment measures as are presently available.
- Clarity is needed on how, if at all, the funding administered by CAST would intersect or interact with existing funding screen funding support mechanisms and agencies. Would current forms of assistance and programs be subsumed into CAST?
- How and by whom would trustees be selected and what would their terms of office be?
- How would the phrase ‘projects of cultural significance’ be interpreted?
- Which criteria would guide CAST deliberations on production investments? Where would the proceeds of successful investments be directed?

Although the CAST concept raises numerous questions, MEAA welcomes that measures aimed at benefitting the Australian screen sector have figured in deliberations about where income generated by spectrum licensing reforms may be directed to.

Finally, a further spectrum-related proposal in the paper is that broadcasters that move to use less spectrum will thereafter have no obligation to meet an Australian content requirement on their multi-channels.[47]

MEAA neither understands nor supports the basis upon which a television broadcaster would be relieved of their responsibilities to air Australian (and New Zealand) content on their multi-channels if they move to the new spectrum licensing regime. On its face, this proposal does not withstand any reasonable scrutiny.

[47] Page 18, green paper