# Response to ACMA Options Paper

# Supporting Australian stories on our screens.

Submitted by CJZ, one of Australia's most active, fully independent and locally owned production companies.

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Contact details:
Nick Murray
**CJZ**
16-18 Meagher St
Chippendale NSW 2008
p: 02 9217 2222
e: nick@cjz.com.au

**Background**

Thank you for the opportunity to provide input on the review of the quotas (and other support for the Australian screen industry).

CJZ is based and headquartered in Australia with operations in New Zealand and a toe-hold in the United Arab Emirates. CJZ is 100% Australian owned.

It has won an Emmy Award, multiple AACTAs and Logies. CJZ is also one of the few Australian companies to have been awarded the top TV award in the world, The Rose d'Or, and is known for its locally developed programs across all genre including *Bondi Rescue* (Factual – Ten), *Gruen, Julia Zemiro's Home Delivery* and *Mojo with Russel Howcroft* (Factual Entertainment – ABC), *The Ex-PM* with Shaun Micallef (comedy – ABC), *House of Hancock* and *House of Bond* (drama – Nine) *The Good Cop* (factual – Foxtel); *My Life is Murder* with Lucy Lawless (drama – Ten), *Go Back to Where You Came From* and *Life Drawing Live* (factual entertainment – SBS), *Highway Patrol* (factual – Seven) and *Jimmy Barnes - Working Class Boy* (feature doc – Universal). CJZ has also just completed a high rating four part documentary series about the disappearance of Peter Falconio for UK's Channel 4.

The impact of the current global COVID19 pandemic has brought the fragility of the screen sector into sharp focus. From the drop in advertising income for the commercial broadcasters, Foxtel and SBS, the complete loss of sport broadcasts on Foxtel for 3 months, the shut down of many local TV productions and the avaricious use of NBN broadband capacity by the streaming services, the pressures on the sector in 2020 is massive.

We have great sympathy for the predicament the commercial networks find themselves in as a result of COVID19. That said, it is hitting many production companies include CJZ just as hard. So it is important not to let the current problems for the networks cloud this review process. It is to be hoped the COVID19 induced slowdown will be temporary only. It is also worth remembering that the networks and streaming services are all using publicly owned assets – the broadcast spectrum and the NBN. That fact is not diminished by a health induced financial catastrophe.

This submission explores some of the options raised in the ACMA discussion paper, and we will look at the rationale for quotas and other support through a current day prism including the risks posed by the Australia-US Free Trade Agreement on quotas.

We will also stress the importance of the audience in this discussion. The "audience" is the Australian people – ie taxpayers – the ultimate owners of the spectrum and "pipes" by which all the broadcasters and streamers reach their end users. The public interest is paramount in this discussion.

**Executive Summary**

Like much of our industry, CJZ is proudly independent. Our submission proposes a number of elements we consider essential in order to preserve and foster the local industry:

**Quota System:**

- Quotas are needed to address the ability of networks to acquire internationally produced content at a fraction of production cost in a way that in any other industry, would be a breach of the Anti-Dumping provisions.
- A quota system of some sort is highly desirable. Countries such as New Zealand which have abandoned that system have severe regrets.
- If the Quotas are wound back, beware the "ratchet" system in the Australia-US Free Trade Agreement which prevents any increase in the future.
- A version of Option 3 is the most practical quota system.
- An effective licence fee based points system is needed to address the imbalance caused by the inclusion of New Zealand drama in the system at the same value as Australian drama costing networks 20 times more.
- Quotas are needed on Streaming services.
- For fairness, the commercial network quota system should apply to the ABC.
- To support locally owned companies, a proper Independent Production Quota can be implemented via minor amendments to the current definition.

**Offset System:**

- Increase the Producer Offset to 40% or equalise other Offsets.
- Balance increases in the Offset percentages by making all offset payments taxable.
- The Offset system is currently unfair - excluding some productions and giving unintended untaxed windfall profits to other productions.
- The Offset system needs to be fair and fit for purpose. For instance, broadcasters should be prohibited from hoovering up offset payments to producers.

**Other Policy Settings:**

- The ABC, SBS and NITV need secure funding to provide certainty for the continued production of local content.
- Encourage creative development of new IP by making R&D taxation incentives available for the production industry.
- Australia needs regulated Terms of Trade with broadcasters similar to the UK system, where it is regulated by Ofcom.
- All the policy settings need to be considered in the context of a creative, export industry which thrives in an environment of bold risk taking.

**Rationale for Quotas**

CJZ is in full support of a quota system for Australian broadcasters including the ABC, Subscription Television services and Streaming services.

The reasons for this are complex.

**Anti Dumping**

If Television was any other industry, instead of quotas, the local industry would be protected via the Anti-Dumping legislation. However, copyright licencing is exempt from the operation of anti-dumping rules. If a tonne of steel costing $2 million to make, was sold here from offshore for $80,000 there would be an anti-dumping levy applied of $1,920,000 per tonne. But local broadcasters can buy an hour of drama costing more than $2 million to make, for $80,000. A similar local production might cost $1.5million to make and the networks usually need to pay $450-$750K per hour to acquire it. New Zealand programming is even cheaper and is dumped here for around $25,000 an episode or less.

So unless anti-dumping rules can be made to apply to TV programming, we need a separate quota system. QED. The above argument applies irrespective of cultural imperatives and the need for our audiences to see Australian stories on our screens.

**Submission: Either make TV program imports subject to anti-dumping regulations or maintain a proper local content quota scheme.**

**The medium used for delivery of Broadcast Television is publicly owned**

Commercial broadcasters are using a publicly owned asset – the broadcast spectrum. As such, they should remain obliged to broadcast prescribed amounts of local content with sub quotas for certain genre including scripted programs and documentary. However, we believe the children's content obligations should be refined and replaced with a quota for G rated family orientated programming.

**Submission: Commercial broadcasters should continue to be subject to an overall 55% local content quota supplemented by a refined genre based sub-quota scheme detailed below.**

**The medium used by Streaming Services is publicly owned**

Streaming Services such as Netflix, Stan, Amazon Prime, Apple + and Disney Plus should have local content requirements now they have reached a meaningful size. They are largely using a publicly owned asset - the NBN - to distribute their programming to audiences. Something like 44% of traffic on the NBN is video streaming services and video game updates - mostly streaming services. NBN Co has confirmed that streaming video is the biggest use of the NBN for which the platforms contribute nothing - zip, ziltch, zero dollars – nada!

Stan however deserves honourable mention as a good local citizen. Stan has commissioned innovative local content and as an Australian operation, is unique in having creative/editorial staff located here. However the fact they are already doing their bit for local content is no reason that they should not also be subject to quotas.

The internationally owned streamers are market leaders in avoiding paying tax in Australia and have few employee's here – they currently have no locally based creative staff – reportedly increasing to collective total of 1 later this year. Their local staff members are largely delightful, friendly government relations folk, dedicated to retaining the current system – ie avoiding both tax and local content quotas.

Those same streamers were the loudest voices in lobbying former governments for high-speed internet infrastructure, while at the time paying no tax at all to support its construction. The public paid for the NBN and are entitled to expect the streamers either pay to use it (something the streamers object to) or are subject to a meaningful local content obligation.

**Submission: Streaming services should be subject to a revenue based quota system**

## The Australia-US Free Trade Agreement

There is a lurking problem with this whole regulation review. Annex I and II of the AUSFTA cover the Australian content regulation system. It allows content to be regulated under the present system, however it also contains a ratchet scheme whereby if the content regulation system is relaxed, it can never be reinstated. This is the problem encountered by the New Zealand government and explains why they have never been able to institute a local content scheme similar to the Australian system in NZ.

No changes should be made which would invoke the ratchet system in the AUSFTA. A good reference article regarding this poison pill is available from the Evatt Foundation here: https://evatt.org.au/papers/australian-television-content.html

Given the history of Australian courts upholding provision in Free Trade Agreements (such and Australian-NZ CER) to the detriment of ACMA / ABA regulations, much care is needed to ensure that the current system is not weakened and that any modification of the content regulations does not create a long term problem for content regulation in Australia.

A miss-step now will never be able to be rectified so we must not act rashly, nor with short term goals in mind.

**Submission: Much care needs to be exercised to ensure any change in the quota system does not trigger protections in the AUSFTA which would permanently weaken the ability of AMCA or Government to regulate Australian content on our screens.**

## Children's Programming

We do not support the continuation of specific children's and preschool quotas. Those quotas should be replaced with family friendly prime time shoulder requirements.

We believe it is unreasonable to expect a commercial broadcaster to telecast programming subject to advertising restrictions such as those mandated by the current P and C classification regulations. In that regard we support the Seven Network in its proposal for a relaxation of children's content quotas. The difference in our position is that we firmly believe that the audience can be best served by replacing the C drama quota with a similar amount of "G" classification scripted family friendly content (which can be comedy or drama) for broadcast in the early evening. There should be no advertising restrictions placed on this quota obligation.

**Submission:**
**• Replace "C" quota with a requirement to broadcast "G" classified programs**
**• Remove all advertising restriction on Children's programming.**

## Which quota model is best?

CJZ supports Option 3 in the discussion paper.

For the reason outlined elsewhere there is a need and good reason to extend quotas to streaming services.

The quota could also be tweaked to provide incentives for the networks to take more risks in commissioning scripted content.

For instance, comedy is difficult and relatively expensive to make because there is little offshore market for it, meaning the budget is generally 100% locally sourced, increasing $$ cost for the networks despite the actual production costs being lower than drama per hour. Scripted comedy should receive a risk factor in the quota system. Indeed the scripts for comedy programs already have such a risk factor applied on payments to the writers where an uplift "comedy loading" is applied to increase writers fees by 15%.

There is also justification for modifying the current rules to make them more modern and to recognise the problems with the current system.

Fail number 1: For instance, because of the definition of mini-series (having to be made up of episodes with durations of one hour or more) drama currently gets a format factor of 4 while scripted comedy with half hour durations only scores 3. There is no logical justification for this difference since the same crews make scripted comedy using the same production methodology and similar shooting schedules. Drama and Comedy should receive the same format factor.

Fail number 2: In the case of New Zealand drama, it can be acquired for as little as $10,000 an hour (usually around $25,000) and still gain the same content quota points as an actual Australian show via a format factor of 4.

Fail number 3: Finally through an oversight in the drafting of the current standards, what the industry thought was a licence fee protection via mandated minimum and indexed licence fees, it turns out that the licence fee is not taken into account for "mini-series". Amazingly, it seems that pretty well every drama is a "mini-series" now and gets the maximum format factor of 4. This includes New Zealand drama which is acquired for virtually nothing (or more specifically at about 5% of the cost of acquiring an Australian drama). This element of the quota system is patently not working as intended. Let's call it an "epic fail".

These three examples show that there are a number of inherently unfair outcomes in the present system, which must be addressed now.

CJZ also submits that the system should be changed to make the points system be based on the licence fee paid using the current indexed licence fee (currently approx $460K per hour) to get the maximum points. A purely expenditure based model has worked extremely well for subscription television services for nearly 25 years and has resulted in Foxtel commissioning and broadcasting some truly outstanding local drama.

That model can be used as the basis for streaming quotas but using the revenue taken from subscription payments in the Australian market as the source of the calculation (rather than how much is paid for the Australian rights which is difficult to calculate in global rights deals.)

So a format factor system with a sliding scale might look like this:

| Licence fee per hour | Fee based Format Factor |
|---|---|
| Under $10,000 | .25 |
| $10,001 to $50,000 | 0.5 |
| $50,000-$100,000 | 1 |
| $100,001-$150,000 | 1.25 |
| $150,001-$200,000 ` | 1.5 |
| $200,001-$250,000 | 2 |
| $250,001-$350,000 | 2.5 |
| $300,001-$350,000 | 3 |
| $350,001-$450,000 | 3.5 |
| Over $450,000 | 4 |
| Over $550,000 | 5 |
| Over $650,000 | 6 |

*Note the incremental scale is important to actually drive the price paid instead of networks using the minimum in each band.
**The bands need to be indexed to allow for inflation as per the present system.

The above scale, is designed to reward higher licence fees, and operate in association with the current overall points targets.

Under no circumstances should the actual budget be used as the basis for calculating the format factor because of the examples of cheap NZ programming or networks paying very low licence fees on expensive productions.

**Submissions:**
**• Establish a risk factor bonus for risky genre like scripted comedy.**
**• Equalise the points format points system so comedy and mini series are equal,**
**• All drama should be scored on the licence fee paid, not the "format factor".**
**• We recommend a sliding scale of points based on licence fees (set out above).**

## An Independent Production Quota?

There should also be a significant benefit for networks in commissioning productions from independent production companies. Care must be taken in redrafting this clause. In the UK, if a production company is a subsidiary of company that controls a broadcast network in Europe or the UK, it cannot be classified as "independent" for the purposes of the independent production quota (broadly set at 25% of commissions).

In Australia, because of the quirks of the structure of the pay TV industry, the actual licences for all pay TV channels are generally held by the platform (ie Foxtel, Optus, Fetch), rather than by the channel itself. So any reference to broadcast licence should also catch channel operators. If this is not done, subsidiaries of companies such as Fox, Disney and BBC Studios (each of whom have operated multiple pay TV channels in Australia) will be classified as "independent producers" despite clearly not being so. These are large multinational broadcaster/distributors and should not be considered on the same level as locally owned pure production entities.

This can be achieved via the addition of "channel providers" in both parts (a) and (b) of Section 6A of the Australian Content Standards (definition of independent producer). We are happy to provide more input as to how an independent production quota or bonus could operate so as to achieve the desired policy outcomes.

**Submission: Create an enhanced Independent production quota either as a percentage of all production or as bonus points as per the current system.**

## Support via the Offset system

There are various proposals floating around for increased support for production through the Producer Offset and PDV Offset schemes. Care needs to be taken when considering any of these schemes.

## Producer Offset and PDV

For a start, the Producer Offset scheme was intended to be solely for the benefit of Production Companies. The Explanatory memorandum accompanying the enabling legislation was clear that it was intended to allow producers to retain more of the IP and back-end value in productions and to bolster the balance sheets of the relevant production company. Over the years various bodies have sought covertly and overtly to garner control of the benefit from the Offset schemes. From Screen Australia, to US studios and the commercial broadcasters - everyone wants a piece of the pie now (or in some cases the whole pie).

Some commissioning agreements from networks now demand that some, or all, of the Offset flows to the network on receipt, instead of to the producer. Subscription television operators including the studio owned channels, have for years, claimed as part of expenditure requirements, refunds they know they are going to get in the future from the producer of Offset rebates. This has artificially inflated their drama expenditure. ACMA itself has steadfastly refused to act on this despite it clearly not being within the intention of the quota scheme or the Offset scheme.

We are now seeing the PDV scheme being misused at significant cost to the taxpayer. The ACMA discussion paper at page 11 states the policy objective of the PDV as being *"To attract post-production, digital and visual effects production to Australia, regardless of where the film is shot."* Where in this objective does it say that local remakes of international shiny floor entertainment formats should also get the PDV incentive? But that's what's happening.

The unfairness of the current scheme is that just because light entertainment/variety competitions and certain shows that should be considered "reality" are of such high budget, they get either the Producer Offset or the PDV. Foreign formats such as The Voice, Got Talent and MasterChef are getting large untaxed PDV payments, while smaller budget or shorter run local shows in the same genre don't. Further, the producers of those shows are then able to remit the proceeds to their international shareholders **tax-free** because the PDV and Producer Offsets are not considered taxable by the ATO.

This should be addressed by changing the status of any offset receipts to taxable. This will not disadvantage those producers using the offset income to invest in, or cash-flow the production in question. But it will force internationally owned companies to pay tax on any windfall gains such as those flowing to big budget entertainment show producers such as the producers of Lego Masters. If the money isn't being spent on production, it should be taxable.

The misuse of these schemes needs to be addressed before changes are made to the schemes which would further advantage foreign companies to the disadvantage of the Australian taxpayer.

**Submission: All Offset payments should be assessed as taxable in the hands of the production entity receiving them.**

## Increase the Offset?

We are provisionally in favour of increasing in the producer offset to 40%. However, without some protections for producers, an increase will lead to an erosion of the trading terms with commercial networks in particular. Without formal terms of trade such as those which exist in the UK through Ofcom, the negotiating power imbalance between producers and networks will be further tipped in favour of the networks due to the removal of Screen Australia from the process.

Screen Australia has been very useful in helping producers retain some of their rights through its involvement in the contracting process with networks.

There is merit in considering a move to equality between the various offsets. But this must be accompanied by implementing the protections regarding making the offsets taxable detailed above, together with firm rules on networks strong-arming producers into handing over the offset as part of the licence deal. The Federal Office of the Small Business Ombudsman has details of specific examples of this behaviour. This is a misuse of market power and needs to be curtailed before any changes are made to the offset system.

**Submission:**
- **We support an increase of the Producer Offset system to 40% provided at the same time, all Offsets should become taxable rather than retain the current tax exempt status, and**
- **Protections be introduced to address the imbalance of negotiating power between commissioners and producers.**

## Should the Offset be extended to Entertainment programs?

There is a suggestion floating around that the Offset be extended to Entertainment programs. Entertainment as with Comedy as discussed elsewhere is responsible for significant employment and has uncovered a vast array of talent over the year.

We do query whether the large multi night entertainment formats require this form of assistance. It is clear however that lower budget local shows do require some assistance.

**Submission: We support extending the Offset to Entertainment Programs subject to the reduction in threshold below and the proviso that the Offset become taxable and be limited to locally developed concepts.**

**Reduce the Offset thresholds?**

Yes.

Government and the industry need to be looking at more efficient ways to make programming post COVID and the thresholds are a disincentive to make programs cheaper.

Despite what is happening in practice, the best use of the policy settings such as the Producer Offset is to make it available to lower budget shows. There are some examples of low budget scripted shows – comedy in particular – which fall below the offset threshold of $500K per hour (about $418K a commercial hour). Lower budget productions should be encouraged but are often hard to finance, yet the operation of the Offset is slanted in favour of higher budget shows. There are many long lasting benefits from low budget programs including talent development.

Shows at the cheaper end of the production spectrum from decades ago such as comedies The D Generation/The Late Show, Comedy Company, Fast Forward and Full Frontal still deliver to the industry from their introduction of cast like Magda Szubanski, Jane Turner and Gina Reilly, Rob Sitch, Jane Kennedy, Tony Martin, Glenn Robbins, Kitty Flannagan, Julia Morris, Eric Bana and Shaun Micallef and creative talent like Andrew Knight, Daina Reid, Santo Cilauro, Tom Gleisner – all of whom in turn, are helping foster new talent and contributing to or running production companies and new programs across the world and across genre. This group of talent are all just from 4 programs in the late 80s/early 90s and have generally had a bigger impact locally than alumni from pure scripted drama.

The benefits are obvious and measureable but sadly those types of risks and productions are unlikely in today's risk-averse climate. So the challenge is how to introduce a policy where the objective is to encourage risk taking in creative decision-making?

Perhaps there is a quota format factor bonus for new concepts. Or an additional offset kicker for new shows to help the development of new ideas.

**Submission:**

- **Provided the Offset is made taxable, consideration should be given to reducing the threshold for the Producer Offset – both Documentary and Non Documentary.**
- **Introduce an extra level of Offset for new original Australian concepts.**

## Other Policy Settings:

### R&D Tax Incentives

The Screen Production industry is one based on creative thinking and the creation of new intellectual property. That has driven the industry here and elsewhere in the world to be exporters of content.

For the same reason as R&D in technology or drug research is encouraged by the existence of R&D tax incentives, the Screen Production industry should have similar tax incentives available for genuine new development.

**Submission: We propose the broadening of R&D tax incentives to encompass the Screen Production sector for the development of new local IP.**

### Funding of the ABC, SBS and NITV

As the industry becomes more fractured for players in the sector and more confusing for the audience, the funding of the public broadcasters is more important than ever.

They need monger term funding agreement which take them outside the political cycle and give secure funding that allows for longer term planning for their suppliers – ie producers.

Many programs take years to develop and write before they enter production – for dramas, this process can take 5 – 7 years to develop, pitch, write and finance. This obviously can therefore span two or three triennial funding cycles and increases the risk that funding may not be available at the end of the process to actually make the show.

Further, it is becoming apparent that the commercial broadcasters are increasingly reluctant to take risks on Australian ideas, whereas the public broadcasters have had great success with locally developed programs. Our own shows Gruen (ABC) and Go Back to Where You Came From (SBS) have been the most watched series on their host broadcasters in certain years, proving that the audience will watch well made, locally developed and produced programs.

**Submission: Provide public broadcasters certainty of funding and sufficient levels of funding to allow them to continue the job. This is an efficient use of taxpayer dollars.**

### ABC Kids

At the same time, the audience as a whole should have some mandated source for safe programming directed at children. We propose that the ABC have a protected and mandated requirement to continue and increase its commitment to programming aimed at children.

The ABC has been extremely successful in attracting and retaining audiences for its children's programs on both broadcast mediums and online. A formal quota should be introduced to ensure the maintenance of Free To Air broadcasting of this programming.

The COVID19 pandemic has revealed the extent to which there is a "digital divide" in Australia where many households in lower socio economic areas have little or no access to online services. Those households were demonstrated to have been disadvantaged in their lack of access to online teaching resources during the COVID19 pandemic.

It follows that a meaningful proportion of the population will be excluded from accessing online programming and any argument that certain styles of programming should be relegated to online only should be ignored as exclusionary. The most disadvantaged elements of society would be denied access to this programming if it was partitioned online only.

**Submission: Ensure that the ABC is funded sufficiently to commission children's programs and is made subject to an associated content quota to ensure its continued broadcast on Free To Air television.**

## Importance of Indigenous Stories and multicultural content.

The recent suite of programming on the ABC and SBS highlighting both indigenous teams and stories shows that there is a mainstream audience for such programming. It is also important to note that as a multicultural country, there are other stories that are important to be told here. SBS's mandate is to reflect the makeup of current multicultural society. Its continued and healthy funding, is important in this discussion.

The commercial broadcasters have also commissioned programming which has highlighted our cultural diversity. Reality and entertainment programming on commercial networks have often been the most diverse programming on television. Shows such as Masterchef, Australian Idol, The Voice, Australia's Got Talent and MKR have for many years showcased a broad spectrum of our population.

But it is through the telling of stories which include our first people's stories and importantly depict indigenous characters in mainstream programs which will continue to have critical importance to furthering the wider audience's understanding of this section of our population. Accordingly funding must continue to be available to specifically commission programming for SBS, NITV and the ABC in this category. Screen Australian is probably the best vector for this important initiative.

## Terms of Trade

As discussed elsewhere in this submission, there are many reasons to implement a Terms of Trade system overseen by ACMA in the same way as that system exists in the UK regulated by Ofcom.

The UK Terms of Trade have underpinned the development of the UK production sector and its expansion into other markets such as the US. This was achieved through recognising the imbalance that previously existed between broadcasters and producers when negotiating rights deals. The UK system ensures that the producers of content had margins available to remain sustainable, had the power to retain international control over their concepts and earn export income from them.

Such a system allows producers to leverage that greater ownership of their own IP into an export market and use the greater revenues for developing even more new ideas.

Terms of Trade need to be established and regulated by ACMA. International experience has shown the value of it to the industry and the audience.

**Submission: Establish a regulated Terms of Trade system similar to the UK model.**

**Conclusion**.

One thing is for certain, without lateral thinking on how to help the industry create new local ideas, Australia will become an outpost of foreign companies simply remaking ideas that have already been made somewhere else. This is not helpful for exports and does not foster creative thinking.

The screen production sector is one industry where machines cannot take over from actual people doing jobs. The creative industry needs to keep working on new ideas – developing local content from the germ of an idea. That's what successful industries the world-over are doing. This will not be achieved without policy intervention to help shape thinking at networks and with R&D tax incentives to encourage new development.

We can help everyone make brave decisions. The ultimate beneficiary will be the audience – the taxpayer. That's who we are here to serve.

**Nick Murray**
Managing Director
CJZ

CJZ is one of the most active locally owned independent production companies.

Nick is a past president of SPA and prior to working in production, was founding CEO of Foxtel's the Comedy Channel. He has also run legal and business affairs at Network Ten.