



**Queensland University of Technology**

Digital Media Research Centre

Creative Industries Precinct, Musk Avenue

Kelvin Grove Qld 4059 Australia

Phone +61 7 3138 3889 Fax +61 7 3138 3723

Email [dmrc@qut.edu.au](mailto:dmrc@qut.edu.au)

[www.qut.edu.au/research/dmrc](http://www.qut.edu.au/research/dmrc)

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Supporting Australian stories on our screens – Options paper

Department of Infrastructure, Transport, Regional Development and Communications

Via email: [contentoptionspaper@communications.gov.au](mailto:contentoptionspaper@communications.gov.au)

Dear Content Options Paper secretariat

Please find attached our submission to the Supporting Australian stories on our screens – Options paper. Our key points are on the first few pages.

Yours faithfully

Marion McCutcheon

Stuart Cunningham

Oliver Eklund

Contact name: Dr Marion McCutcheon

Organisation name: Digital Media Research Centre, Queensland University of Technology

Contact details:

Mobile: 0407 957 727

Postal address: c/- Stuart Cunningham, Digital Media Research Centre, Building Z1, Level 5, room 515, Musk Avenue, Kelvin Grove, 4059

Email: [marion.mccutcheon@qut.edu.au](mailto:marion.mccutcheon@qut.edu.au)

Our submission can be made public.

## About the Digital Media Research Centre, Queensland University of Technology

<https://research.qut.edu.au/dmrc/>

The DMRC is a global leader in digital humanities and social science research with a focus on communication, media, and the law. It is one of Australia's top organisations for media and communication research, areas in which QUT has achieved uniquely high rankings in the history of ERA, the national research quality assessment exercise. Our research programs investigate the digital transformation of media industries, the challenges of digital inclusion and governance, the growing role of AI and automation in the information environment, and the role of social media in public communication.

### About the authors:

- Dr Marion McCutcheon is Senior Research Associate, DMRC. Previously, she held policy and research positions in the Federal Department of Communications and the Australian Broadcasting Authority, and her PhD thesis, *Is Pay TV meeting its promise?*, explored the outcomes of the introduction of subscription TV services in Australia.
- Stuart Cunningham AM is Distinguished Professor of Media and Communications, DMRC. Previously policy adviser at the Communications Law Centre, board member of the Australian Film Commission, foundation chair of QPIX, Queensland's screen resource centre, and board member, Screen Queensland, he has researched and written on Australian screen culture, industry and policy for more than 30 years.
- Oliver Eklund is a DMRC PhD candidate whose research investigates inter alia the history of the new eligible drama expenditure (NEDE) instrument and its potential as a model in current regulatory debates.

## Key points

Commercial TV services continue to attract the largest number of eyeballs of any cultural or entertainment service in Australia and will continue to do so for some time. They are, simply put, too big and—despite their increasingly age-skewed demographic—too socially important to fail. That means that, over decades, governments’ successive actions to support, protect and facilitate their continued role in Australian society have been repeatedly judged politically necessary. What it also means is that the time-honoured quid pro quo—the cultural mandate that Australian content regulation carries—must be maintained, even if modification to it is necessary in the developing economic circumstances of the recent past and near future.

For this to continue to be tolerated by increasingly stressed commercial broadcasting and pay-TV services, there must be movement toward parity between the imposition on these services and on the subscription video on demand services now operating in Australia. As Minister of Canadian Heritage Steven Guilbeault said this week, in signalling the introduction of legislation modernizing Canada’s Broadcasting Act, the focus should be to even out the “inequity that’s kind of installed itself into the Canadian system” where some content providers are subject to Canadian laws around content and discoverability, while foreign-owned content providers are not.<sup>1</sup> This would be a decisive movement toward platform neutrality.

Our preferred approach in the Options Paper is Model 3A on the grounds of transparency and economic efficiency. But we believe that the current business models of commercial, subscription and SVOD services, which differ by carriage service, content focus, audience market and the territory serviced, are diverse. We agree with the Canadian approach outlined by Guilbeault: ‘of course we need to find the right tools for the right players, but what we would be asking a Netflix is probably different to what we would be asking a Disney for example, because their business model is very different, I mean obviously they produce content that we watch but beyond that there is some fundamental difference and I think our regulations need to be able to adapt to these different models. We want everybody to contribute in one way or another to the production and discoverability of Canadian content, and that’s true of music as well.’

One of the objectives of the *Broadcasting Services Act 1992* (section 3(1)(e))—‘to promote the role of broadcast services in developing and reflecting a sense of national identity, character and culture’—has been achieved through two inter-related mechanisms. The first is that commercial TV licensees must comply with minimum local content requirements set out in the *Broadcasting Services (Australian Content) Standard 2016* (Australian Content Standard) and designed to ‘develop[e] and reflect a sense of Australian identity, character and cultural diversity by supporting the community’s continued access to television programs produced under Australian creative control’. Second, subscription TV licensees must meet minimum expenditure requirements defined in the Broadcasting Services Act that were from the outset intended to contribute to the development of the Australian production industry.<sup>2</sup>

At the heart of the first mechanism is the Australian transmission quota, which defines a crucial threshold for local content for commercial TV licensees, and the sub-quotas, which ensure access to a choice of Australian drama, documentary and children’s programming, while the second mechanism, which is geared to production support, also targets drama programs. The reason why

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<sup>1</sup> ‘Gov’t to introduce web giant, CanCon, news legislation in fall: Guilbeault’, *The Wire Report*, 16 June 2020.

<sup>2</sup> Marion McCutcheon, *Is pay TV meeting its promise?*, 2006, <https://researchrepository.murdoch.edu.au/id/eprint/194/>

these genres were targeted for regulatory support was not because they were morally or artistically superior, but because they were subject to market failure—audiences might opt to watch them in large numbers but broadcaster would choose not to program them as they are less profitable. Digital disruption and increasing competition from SVOD services does not change this market failure argument—drama, documentary and children’s programming are still likely to be less profitable in a given time slot even when they attract the same or better ratings.

The audiences, however, are changing (see figures 2, 7 and 8 in the Options Paper). Fewer people are watching, particularly children who are turning instead to SVOD services and video sharing sites such as YouTube (and YouTube Kids) and to computer games as an alternative and often preferred form of screen entertainment.<sup>3</sup>

A reformed, more platform-neutral, approach will require the development of a scheme that includes both elements, ensuring access to Australian content and support for Australian producers, for all types of broadcaster—including involving public broadcasters. A hybrid scheme could be set up to anticipate an ‘end state’ of a platform neutral approach, planning for a stepped, evidence-based, movement from broadcast quotas in favour of a version of Model 3A.

**We support a variation of the Model 3A, retaining the Australian content transmission quota, with a gradual adjustment of the drama and documentary sub-quota until such time Model 3A is supportable.** Model 3A avoids the extreme level of focus on establishing, monitoring, and responding to breakdowns in a plethora of bespoke investment plans expected of the ACMA in Option 3B. Despite Option B appearing more flexible, Option A strikes a better and more transparent balance between uniformity and flexibility. Key to the success of Option A would be a full implementation of the elements described in the Options Paper, including:

- allocation of specific funding to children’s programming by national broadcasters
- a promotion and discoverability regime, together with complete implementation of the other elements of the model
- transparency in reporting requirements, and
- a single rate at the current upper level for the Producer, Location and PDV Offsets, ensuring platform neutrality

A hybrid Model 3A applicable to all service types could be defensible under the Australia-United States Free Trade Agreement. It may address all four of the caveats on local content requirements for subscription streaming services operating in Australia:<sup>4</sup> (1) measures may be applied to ‘interactive video and/or audio services’—including most forms of internet-delivered video-on-demand services and subscription streaming services; (2) measures may be applied to ensure that ‘Australian audiovisual content or genres ... is not unreasonably denied to Australian audiences’—a streamer may offer and even invest in the production of Australian content, but unless it is visible to Australian audiences, it is effectively denied to local viewers; (3) any new measures may only apply to companies carrying on a business in Australia—international streaming businesses now sell directly to consumers in Australia, including Disney, Netflix and Amazon Prime; and (4) procedural

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<sup>3</sup> ACMA, *Children’s Television Viewing and Multi-Screen Behaviour: Analysis of 2005–16 OzTAM Audience Data and 2017 Survey of Parents, Carers and Guardians*, <https://www.acma.gov.au/sites/default/files/2019-08/Childrens-television-viewing-and-multi-screen%20behaviour.pdf>, p. 20.

<sup>82</sup> For example, in January 2020, YouTube implemented

<sup>4</sup> Jock Given, ‘Not Unreasonably Denied’: Australian Content after AUSFTA’, *Media International Australia incorporating Culture and Policy* 111, (May 2004): 8-22.

preconditions must be followed if new quota-style measures are to be introduced—this review is an important part of ensuring that this requirement is satisfied.

*Consideration should be given to a model that includes the continuation of the Australian content transmission quota, with gradual adjustment of the drama and documentary sub-quotas until such time as Model 3A is fully supportable.*

Consideration should also be given to defining a new sub-category of Australian content—**Australian Indigenous content**. Our analysis of the titles reported in compliance with the NEDE requirement shows that although Indigenous titles account for 3.9 per cent of reported titles—including the feature films *Bran Nue Dae* and *The Sapphires* and NITV-commissioned children’s drama series *Grace Beside Me* (NITV’s first commissioned drama and their first co-commission with the ABC)—no Indigenous original commissions have ever been reported. Any recalibration of the mechanisms that ensure we continue to enjoy Australian stories on our screens should include more opportunities for original Indigenous content. Supporting Indigenous screen production is not a new idea: in the 1990s, the then Department of Aboriginal Affairs advocated for a two per cent sub quota for indigenous productions.

*Establish an Indigenous Australian content category to encourage investment in and availability of content produced under the creative control of Australia’s First Nations peoples, and as a sub-component of the Australian Production Fund.*

## Responses to review questions

### MODEL 1: STATUS QUO

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

Undoubtedly the continuation of the current support system while commercial TV and subscription audiences are fragmenting and their business models are deteriorating will result in fewer opportunities and smaller budgets for Australian producers.

The changing market is also creating opportunities for regulated businesses to change the way they operate and avoid compliance with their Australian content obligations. For example, subscription TV channel providers can shift from packaging content for broadcast on subscription TV to marketing their own streamed services online, thereby avoiding their NEDE obligations, reducing funds available for Australian drama production and potentially limit viewing choices for Australian television audiences.

This is already occurring. In February 2020, following the launch of its Disney+ streaming service, Disney Australia announced that it was leaving Foxtel.<sup>5</sup> No longer a subscription TV channel, Disney Australia now has no obligation to comply with the NEDE, potentially a significant loss to the Australian children’s drama production sector, especially given its substantial contribution to Australian children’s television. Over the 20 years of its investments under NEDE, Disney Australia contributed to approximately 20 per cent of the Australian children’s drama programming listed in

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<sup>5</sup> Max Mason, ‘Disney to leave Foxtel as streaming wars heat up,’ *Australian Financial Review*, 5 February 2020, <https://www.afr.com/companies/media-and-marketing/disney-to-leave-foxtel-as-streaming-wars-heat-up-20200205-p53xy2>.

compliance with the NEDE. It was an affiliated channel entity on 3.4 per cent of NEDE titles and was the sole investor in four titles, *As the Bell Rings*, *Mind Over Maddie*, *Book of Once Upon a Time*, and *Balloon Barnyard*, and joint investor with the Nine Network on *Space Chickens in Space*.

Other subscription TV channels are also vulnerable; replicated by first-party streaming platforms or exclusive license agreements. For example, Nickelodeon and Cartoon Network content appear to be at risk of leaving the subscription TV environment following Nickelodeon's exclusive deal with Netflix, and Cartoon Network's parent company Warner Media launch of first-party streaming service HBO Max may limit availability of popular HBO content to Foxtel after its current deals expire.

## MODEL 2: MINIMAL

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

The 55 per cent minimum Australian content transmission requirement provides a crucial threshold for local content for commercial TV licensees. It effectively sets the expectations of Australian audiences as to what Australian television should look like, and ensures all Australian television broadcasters deliver services tailored to Australian audiences. Since the 1950s, research has shown that 'competitive broadcasters are likely to supply similar programs in a situation where audience preferences are highly skewed,' extending Hotelling's principle that competitive firms have a tendency to market products of 'excessive sameness'.<sup>6</sup> If we lower or abolish the 55 per cent threshold, the direct effect will be a drastic reduction in all kinds of local content on all types of Australian screens—and ultimately international screens as well.

How it is possible that we can predict this? We can witness it occurring in New Zealand, where its deregulated television market is delivering less and less local content to New Zealand audiences. Between 2006 and 2016, for example, the proportion of local content on prime-time television fell from 43 to 31 per cent.<sup>7</sup> And The Options Paper itself quotes PWC research for a previous review that removed the quotas would result in a significant decrease in expenditure on overall Australian content.<sup>8</sup>

There is an enormous incentive for commercial TV licensees to reduce the 55 per cent threshold—Australian content is not cheap, with commercial TV licensees directing 85 per cent of their total program expenditures towards local content over the last two years (Table 1).

*The threshold should not be lowered as it is crucial for maintaining the availability of local content across commercial TV schedules. Rather, it could be rebalanced across commercial TV channels, with a new focus on prime time and the visibility of local content on BVOD services.*

<sup>6</sup> Bureau of Transport and Communications Economics, *Elements of Broadcasting Economics*, Report 83, (AGPS, 1993) p. 46.

<sup>7</sup> Ministry of Social Development, The Social Report 2016, <http://socialreport.msd.govt.nz/cultural-identity/local-content-programming-on-new-zealand-television.html>; NZ On Air, Local TV content steady 2017

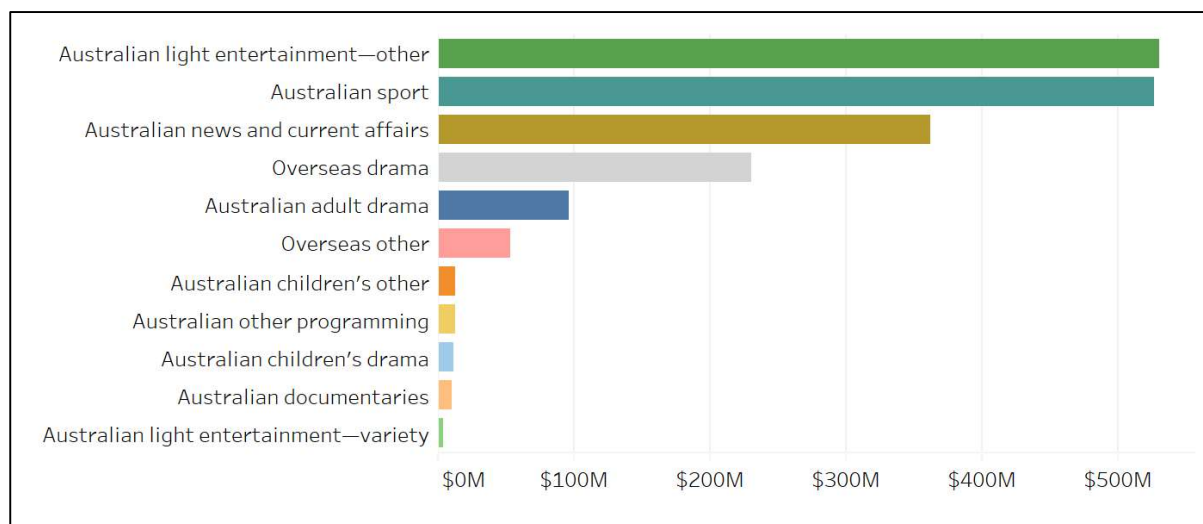
<sup>8</sup> PwC, *How Do Local Content Requirements Impact Australian Productions? Review and Analysis of Broadcast Sector Minimum Content Requirements*, report prepared for the Department of Broadband, Communications and the Digital Economy, 2011, p. 49.

**Table 1 Total expenditure on Australian and overseas programming by commercial TV licensees**

	Total expenditure (\$ million)			Proportion of total program expenditure (%)		
	2016-17	2017-18	2018-19	2016-17	2017-18	2018-19
Australian programs	1,608.8	1626.0	1566.5	81.4	84.5	84.7
Overseas programs	367.4	299.1	283.4	18.6	15.5	15.3

Source: ACMA, Program expenditure information, Aggregated data for commercial television, May 2020, [https://www.acma.gov.au/sites/default/files/2020-06/Program-expenditure-information-2018-19\\_0.docx](https://www.acma.gov.au/sites/default/files/2020-06/Program-expenditure-information-2018-19_0.docx)

**Figure 1 Commercial TV licensee program expenditure, 2018-19**



Source: ACMA, Program expenditure information, Aggregated data for commercial television, May 2020, [https://www.acma.gov.au/sites/default/files/2020-06/Program-expenditure-information-2018-19\\_0.docx](https://www.acma.gov.au/sites/default/files/2020-06/Program-expenditure-information-2018-19_0.docx)

**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?**

**Australian drama.** Drama programming—both Australian and from overseas—is a significant part of the commercial TV offer to audiences, and an important part of broadcasters' budgets. Commercial TV licensees broadcast more hours of first-release drama programs each year than any other type of service in Australia, nearly 70 per cent of all first-release drama in 2018-19, and consistently proportionally more per licensee than the ABC (Figure 2). Australian drama is the fifth-largest programming category for commercial TV licensees, after Australian light entertainment, Australian sport, Australian news and current affairs and overseas drama, and represents, on average, five per cent of their programming expenses (Figure 1, Table 2).

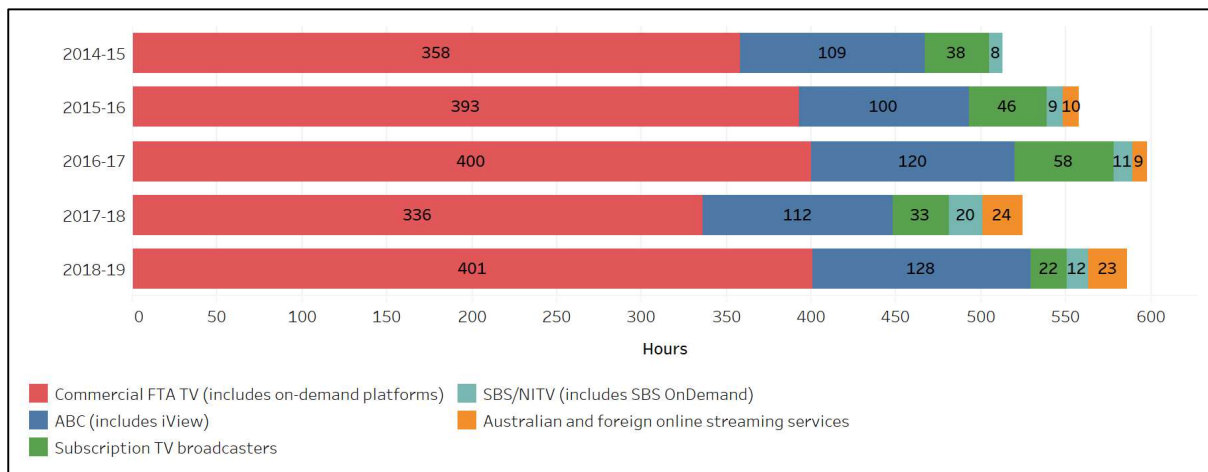
It is worth noting that the commercial TV licensees spend more than twice as much on overseas drama programming than on Australian drama (Table 2). This is by choice, not by regulatory mandate, suggesting that they believe their audiences have a taste for drama content and that it is profitable to supply them with it and highlighting the vulnerability of costlier Australian drama. It is also worth remembering that a key objective of the sub-quotas is to ensure that Australians have access to a range of local programming.

Commercial TV is clearly a significant driver of Australian drama production, which means that a key challenge for this review is improving the efficiency of Australian drama sub-quota while ensuring that this core support is not lost. Options for achieving this include:

- Minor changes to the points system defined in the Australian Content Standard in recognition of changes in the costs and risks associated with Australian drama programming. This would ensure that commercial TV licensees continue to make Australian drama content available to Australian audiences on a free-to-air basis, in compliance with section 3(1)(e) of the *Broadcasting Services Act*, and minimise any biases in investment across different content types.
- Reducing the overall points required to be met, in recognition of the increasing cost of quality drama programming and competition for popular content, and potentially further reductions over time. This would recognise the increasing financial precariousness of commercial TV broadcasters as their audiences continue to fragment as they shift viewing preferences to other platforms.
- A minimum expenditure requirement, similar to the NEDE rule for subscription TV. Although this would ensure a set proportion of commercial TV broadcaster budgets is directed at local drama, it could potentially expose Australian producers to additional market volatility, and potentially lower and lower budgets if the commercial TV business model becomes even more precarious.
- A hybrid model, that trades off broadcast hours of first-run local drama against contributions to an Australian Production Fund. The just-so solution, this would allow broadcasters to choose whether they want to pursue an Australian drama strategy, or to invest in the Australian Production Fund and contribute to the development of content across platforms independent of its programming choices.

*An Australian first-run adult drama sub-quota should be retained, with a rebalanced points system, a lowered points threshold and an option for trading off drama content against transfers to an Australian Production Fund.*

**Figure 2 Drama hours by first release platform**



Source: Screen Australia, *2018-19 Drama Report*, 2019, <https://www.screenaustralia.gov.au/getmedia/08d8518b-867b-4f61-8c2e-ebd10f0dc3a4/Drama-Report-2018-2019.pdf>



**Table 2 Total expenditure on Australian and overseas adult drama programming by commercial TV licensees**

	Total expenditure			Proportion of total program expenditure (%)		
	2016-17	2017-18	2018-19	2016-17	2017-18	2018-19
Australian drama	\$126.3m	\$92.4m	\$95.7m	6.4	4.8	5.2
Overseas drama	\$277.1m	\$242.9m	\$230.8m	14.0	12.6	12.5

Source: ACMA, Program expenditure information, Aggregated data for commercial television, May 2020, [https://www.acma.gov.au/sites/default/files/2020-06/Program-expenditure-information-2018-19\\_0.docx](https://www.acma.gov.au/sites/default/files/2020-06/Program-expenditure-information-2018-19_0.docx)

**Australian documentaries.** Commercial TV licensees spend 0.5 per cent of total program expenditure on Australian documentaries. The aggregated commercial TV expenditure time series shown in the Options Paper (Figure 12) illustrates that total expenditure on Australian documentary has not changed significantly since 2010-11, with the report stating that ‘The ACMA’s compliance results show that broadcasters are comfortably exceeding the first-release documentary sub-quota each year’ and observing a shift towards series production (p. 32). This suggests that documentary has a comfortable place on commercial TV, however, the Options Paper also quotes the PWC report commissioned for the 2011 Australian content review, which found that removing the documentary quota would result in a decrease in expenditure on documentary programming.

Australian documentary continues to be potentially vulnerable to substitution on commercial TV services, from both Australian sport and light entertainment programming and from overseas content. Options for ensuring access to local first-run documentary content on Australian screens could include:

- Maintaining the sub-quota of 20 hours—this would sustain the status quo, with commercial TV licensees increasingly investing in longer-form documentary series.
- A hybrid model allowing commercial TV licensees to trade off their first-run documentary obligation against contributions to an Australian Production Fund

*An Australian first-run documentary sub-quota should be retained, with an option for trading off documentary obligations against transfers to an Australian Production Fund.*

**Table 3 Total expenditure on Australian documentary programming by commercial TV licensees**

	Total expenditure (\$ million)			Proportion of total program expenditure (%)		
	2016-17	2017-18	2018-19	2016-17	2017-18	2018-19
Australian programs	14.1	10.4	9.6	0.7	0.5	0.5

Source: ACMA, Program expenditure information, Aggregated data for commercial television, May 2020, [https://www.acma.gov.au/sites/default/files/2020-06/Program-expenditure-information-2018-19\\_0.docx](https://www.acma.gov.au/sites/default/files/2020-06/Program-expenditure-information-2018-19_0.docx)

#### **Australian children’s content—and**

#### **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?**

Commercial TV licensees have long argued that the Australian children’s content sub-quota is problematic: advertising during children’s programming is highly restricted, so the time slots are not

as profitable as they might otherwise be, and family audiences are leaving commercial TV services in favour of the public broadcasters, subscription TV services and SVOD services with less advertising, as well as YouTube Kids and alternative sources of screen entertainment including games. It continues though to be hugely important for children to have access to age-appropriate entertainment and educational content that reflects the society in which they live.

In order to ensure Australian children have access to age-appropriate content on the Australian screens that they are most likely to use, we are proposing that the Australian children’s content sub-quota for commercial TV licensees be abolished, and be replaced by a requirement to transfer an amount similar to what they had been spending on children’s content to an Australian Children’s Content Fund, which could be run as a sub-program of the Australian Production Fund.

There are categories of young people who have not been well served by the Australian children’s content sub-quotas. These include older children and Indigenous children. The role of an Australian Children’s Content Fund could be extended beyond funding the C and P programming defined in the Australian Content Standard to include family programming and content developed for young Indigenous viewers.

*The Australian children’s sub-quota should be replaced with an expenditure rule, requiring commercial TV licensees to transfer 1.0 per cent of total program expenditures to the Australian Children’s Content Fund.*

*The Australian Production Fund should include a Children’s Content Fund, which would only invest in content that meets the standards of the current Australian Children’s Content Standard, with additional provisions for content suitable for older children and for Indigenous content. The Fund would facilitate exhibition by tying production investment decisions to licensee / outlet deals as is standard now with funding agencies.*

**Table 4 Total expenditure on Australian children’s programming by commercial TV licensees**

	Total expenditure (\$ million)			Proportion of total program expenditure (%)		
	2016-17	2017-18	2018-19	2016-17	2017-18	2018-19
Australian children’s drama	5.7	10.6	11.7	0.3	0.6	0.6
Australian children’s other	12.1	15.0	13.2	0.6	0.8	0.7
Total Australian children’s content	17.9	25.6	24.9	0.9	1.3	1.3

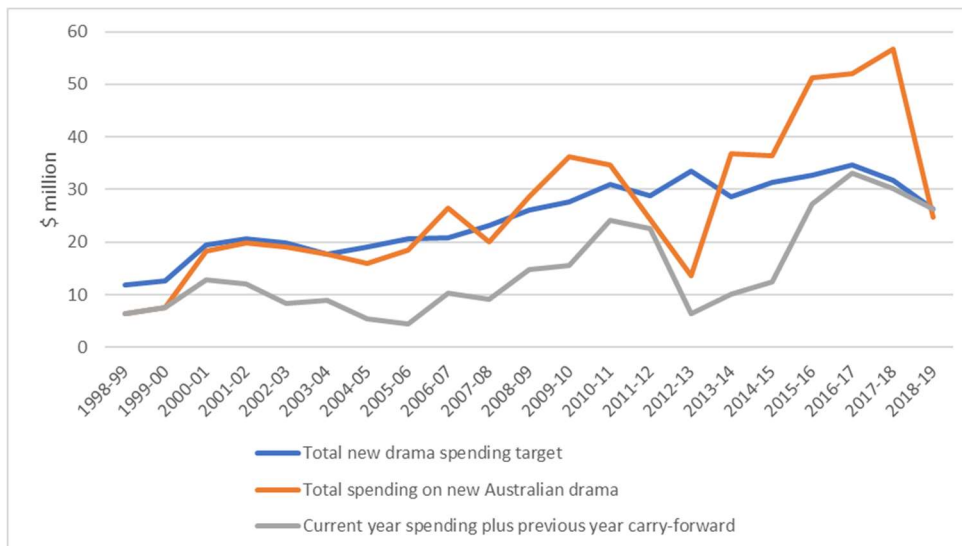
Source: ACMA, Program expenditure information, Aggregated data for commercial television, May 2020, [https://www.acma.gov.au/sites/default/files/2020-06/Program-expenditure-information-2018-19\\_0.docx](https://www.acma.gov.au/sites/default/files/2020-06/Program-expenditure-information-2018-19_0.docx)

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

The NEDE has proven to be a significant source of funding for Australian drama production. Between 1999-2000 and 2017-18, 230 investments and acquisitions have been listed in NEDE compliance reports, representing a total of 155 unique drama series, telemovies and feature films that aired on both subscription and free-to-air services. It has also provided a growing pool of funds to Australian producers, growing at an annual average of 6.3 per cent since the scheme became compulsory as

increasing competition from local broadcasters and streaming networks pushed up the cost of licence fees for popular drama programming. However, although they are significant, the amounts actually expended under the scheme each year are highly variable (Figure 1). The reasons for this are various. The value of the 10 per cent requirement varies as the cost of total acquisitions varies, and is vulnerable as networks negotiate for the rights to high-profile content (eg. HBO dramas), or shifts programming investment strategy, (eg. Foxtel’s five-year plan to produce its own drama series).

**Figure 3 New Eligible Drama Expenditure Requirement and Actual Expenditure, 1998-2018**



Sources: ABA and ACMA NEDE compliance reports

Amendments to consider:

**SVODs and the NEDE.** SVODs already license and commission local content: in 2019 1.7 per cent of Netflix’s library and nine per cent of Stan’s was Australian—including 69 and 140 feature and TV drama titles respectively,<sup>9</sup> in Stan’s case comparable to the total number of titles ever listed under the NEDE. As streaming services increasingly attract audiences for drama and documentary programming from FTA broadcasters and subscription TV, breaking the quid pro quo assumptions that have underpinned local content regulations and forcing commercial broadcaster to adjust their business models and shift their programming focus to genres that are under less competitive pressure, it is crucial that supports are also adjusted to ensure that creators of drama and documentary content can continue to produce Australian stories

Current Australian content expenditure by SVODs is not insignificant. The Screen Australia Drama Report shows that in 2017-18 and 2018-19, investment in drama programs first released on SVOD services equalled or surpassed those on subscription TV.<sup>10</sup> Identifying the exact expenditure incurred or revenue earned by SVOD services is an important step in planning new regulation, and ensuring that newly imposed regulation does not incentivise a *decrease* in local content expenditure.

<sup>9</sup> Ramon Lobato and Alex Scarlata, *Australian Content in SVOD Catalogs: Availability and Discoverability*, 2019 edition, <https://apo.org.au/sites/default/files/resource-files/2019-10/apo-nid264821.pdf>, 8 and 10.

<sup>10</sup> Screen Australia, *2018-19 Drama Report*, 2019, <https://www.screenaustralia.gov.au/getmedia/08d8518b-867b-4f61-8c2e-ebd10f0dc3a4/Drama-report-2018-2019.pdf>, p. 22.

*An amended NEDE scheme could be applied, in fulfilment of Model 3A, to SVOD services.*

**Volatility.** Figure 3 shows that expenditure on local drama content under the NEDE requirement is highly volatile. This is a direct consequence of relying on historical expenditures on drama content to calculate the required contribution. Expenditure on drama content fluctuates with the market and strategic decisions to investment in highly popular, high cost programming. Linking the amount of funding available for content investment to expenditure levels makes the whole production value chain vulnerable to market volatility. Although this does perpetuate a positive investment feedback loop when demand is increasing, when it is not it has the potential to reinforce the depressive effects of a recession. Further complicating the application of an expenditure measure is that the territories defined in geographical licensing agreements are less and less likely to neatly define Australia as a market as international subscription streaming services become increasingly ubiquitous.

One approach to reducing volatility under these circumstances would be to shift the calculation of the NEDE requirement to a proportion of revenue, rather than a proportion of expenditure—or a combination of both. A revenue measure would be much more straightforward to apply where revenues are earned in Australian territories but expenditures are incurred across a larger region by a drama-focussed business such as an SVOD service, while a measure based on expenditure on drama content could continue to be appropriate for a geographically-defined multi-genre subscription TV service—and would make the NEDE requirement easier to apply to overseas streaming services in the future should the need arise.

*Amend the NEDE scheme to minimise volatility: calculate the NEDE requirement on the basis of revenue, rather than a proportion of expenditure—or a combination of both.*

**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?**

There is no pressing need to exclude New Zealand content from the definition of what is Australian. New Zealand content has not drowned out Australian programming under either the commercial TV content standard or the NEDE scheme. In relation to the NEDE requirement, the 1983 Australian and New Zealand Closer Economic Relations Free Trade Agreement (CER) requires that Australian and New Zealand content be treated equally in cultural policy regulation, upheld by the High Court in relation to the NEDE in 1999. CER’s inclusion of New Zealand content has not led to problems for Australian local content within the 10% requirement: between 1999-2000 and 2017-18, New Zealand programs accounted for only 1.9 per cent of all 155 titles reported under the NEDE.

While the Options Paper appears to have excluded what the Canadian legislative reform review called ‘sharing services’ from its purview, there is an SVOD service (YouTube Premium) which should be considered as one of the range of currently unregulated SVOD services operating in Australia.

**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?**

In order to determine the effectiveness of local content support policies, there is a real need for better and more uniform data that describes what content broadcasters are investing in, when and where it is available to audiences and the audiences it attracts. In particular, the summaries

published by the ABC and SBS in their annual reports are not sufficient to understand their contributions to Australian content production.

Additional data should be provided that can be compared with commercial TV licensees' compliance returns. Also of value would be reporting on how programming investments deliver on social outcomes such as Reconciliation Action Plans.

### **MODEL 3: SIGNIFICANT**

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

The revenue and investment percentage calculations should be performed in a transparent and simple manner so that they can be understood by all stakeholders—and so that their effectiveness can be tracked over time.

*Revenue should be calculated in the simplest-possible manner than minimises any chance of accounting distortion.*

*The investment percentage rate should be calculated to ensure a smooth transition from the current support system to a new regime—first by determining the amount that needs to be raised each year and second by calculating this investment goal as a percentage of total service provider revenue.*

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

#### **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?**

Past experience of NEDE compliance is evidence of the likelihood of intended outcomes being eroded under a negotiated or voluntary investment plan. During its period of voluntary participation, subscription TV routinely failed to meet the 10 per cent requirement with the ABA reporting seven per cent compliance in 1995-96, and that in 1998-99 the overall sector fell short.<sup>11</sup>

A negotiated investment plan is also unlikely to be a stable source of investment funding for local content over time. For example, the year 2019 may mark a high for investment in local TV drama and features by subscription streaming services in Australia. As competition for audiences ramped up in the streaming market, in the year to August 2019, Netflix added three original Australian TV series (*Tidelands*, *Lunatics* and *Extreme Engagement*), and Stan added a *No Activity* Christmas special and a six part drama series (*Bloom*) to their existing Australian catalogues.<sup>12</sup> With the global economy weakening in 2020, it is highly probable that this level of investment in Australian drama content will not be maintained and may not be regained for some time.

<sup>11</sup> Australian Broadcasting Authority, *ABA Update*. August 2000, 15-16.

<sup>12</sup> Lobato and Scarlata, *Australian Content in SVOD Catalogs*, 10.

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

Australian content needs to be visible. Its availability during prime time for free-to-air broadcasters and easily searchable menu listings for SVOD services are both important pathways for ensuring local content is visible and findable.

The Australian Production Fund should facilitate exhibition by tying production investment decisions to licensee/outlet deals, as is standard now with funding agencies.

Another way of improving the discoverability of Australian content—and a potential tool for promoting it—would be to require service providers to report to Screen Australia their catalogue listings, so that Screen Australia can include where content can be viewed in its online Screen Guide.

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

National broadcasters need to be funded so that they can maintain—or increase—their spending on children’s content. If the children’s content obligations for commercial TV licensees are to be lifted, consideration needs to be given to increasing ABC/SBS/NITV funding—or to give them discounted access to programs produced through the Australian Children’s Program Fund.

**MODEL 4: DEREGULATION**

**18. What Australian content would be provided in the absence of content regulations or incentives?**

Commercial TV services continue to attract the largest number of eyeballs of any cultural or entertainment service in Australia and will continue to do so for some time. They are, simply put, too big and—despite their increasingly age-skewed demographic—too socially important to fail. That means that, over decades, governments’ successive actions to support, protect and facilitate their continued role in Australian society have been repeatedly judged politically necessary. What it also means is that the time-honoured quid pro quo—the cultural mandate that Australian content regulation carries—must be maintained, even if modification to it is necessary in the developing economic circumstances of the recent past and near future.

Removal of all regulation would not result in the ‘level playing field’ described under the ‘Deregulation’ model in the Options Paper. The need to support the production of Australian screen content and to regulate Australian content on television has been recognised since the early 1960s.<sup>13</sup> Although the technological constraints that limited the bandwidth available for transmission of broadcasting services to the broadcasting services bands and subscription TV cable and satellite—and therefore provided broadcasters with privileged access to Australian loungerooms—have dissolved thanks to digital disruption, Australian screen content is still vulnerable to substitution by content from other, larger countries and cultures.

In the absence of content regulations and incentives, less Australian content will go into production, and more of it will disappear behind paywalls. As described in our response to Question X, there is

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<sup>13</sup> See, for example, Australian Broadcasting Tribunal, *Oz Content: An inquiry into Australian content on commercial television*, Volume 1 (Australian Government 1991), 28.

clear evidence that in the absence of content regulation, investment in Australian drama programming by subscription TV broadcasters would fall. The pressure placed on the ACMA and the Federal Government by commercial broadcasters to reduce or eliminate their Australian content obligation at each review of the Australian Content Standard and the Children's Standard is additional evidence that they underpin the production and availability of content that would otherwise not be available to Australian audiences. A third piece of evidence is the 87 years of Australian cinema that is sitting behind a paywall on Amazon Prime.<sup>14</sup>

Furthermore, any deregulation of local broadcasting services with predominant interests in entertainment will need to sit alongside the demands of local media with predominant interests in news and information (and there are crossovers between the two) who want heavy, experimental, first-in-the-world regulation of Google and Facebook.<sup>15</sup> Government has already instructed the ACCC to develop a mandatory code requiring these two platforms to share advertising revenues with news media companies for content they created which the platforms are distributing. A media policy environment that regulates to underpin the viability of news content while leaving vulnerable TV drama series and features to market forces would truly be turning media regulation on its head.

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<sup>14</sup> Lobato and Scarlata, *Australian Content in SVOD Catalogs*, 7.

<sup>15</sup> Stuart Cunningham and Alex Scarlata, 'New forms of internationalisation? The impact of Netflix in Australia', *Media International Australia* (forthcoming).