

29 June 2018

Screen Producers Australia's submission to the Inquiry into the Competitive Neutrality of the National Broadcasters

Screen Producers Australia was formed by the screen industry over 60 years ago to represent large and small enterprises across a diverse production slate of feature film, television and interactive content.

As the peak industry and trade body, we consult with a membership of nearly 500 independent production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and appointed Policy Working Group representatives. In 2017, the independent production sector supported nearly 20,000 jobs and drove more than \$1.2 billion worth of production activity.

On behalf of these businesses SPA is focused on delivering a healthy commercial environment through ongoing engagement with elements of the labour force, including directors, writers, actors and crew, as well as with broadcasters, distributors and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

Screen Producers Australia welcomes the opportunity to provide a submission to the Department of Communications and the Arts.

We would welcome any opportunity to again meet with the Inquiry Panel and can arrange for the Panel to meet Screen Producers Australia's members.

For further information about this submission please contact James Cheatley, Director, Government Relations and Policy (james.cheatley@screenproducers.org.au).

Executive Summary

The Australian public broadcasters have an incredibly important and valuable role to play in our community and content creation ecology. Their positive impact and importance should not be understated. As global content platforms enter the Australian market and viewership fractures, their importance is more critical than ever. To that end, it has long been Screen Producers Australia's position that both broadcasters are well supported to receive funding from Government to achieve a myriad of outcomes.

While the ABC and SBS make up a third of all broadcasters, they have a disproportionate influence on the market for television commissions. According to Deloitte Access Economics, in 2017 public broadcasters commissioned 46 per cent of all productions surveyed.¹

The public broadcasters' influence in the market is significant and they have a role in setting standards for commissioning. Unfortunately, as commercial broadcasters have come under pressure they have amplified pressure down the supply chain. The public broadcasters are doing the same. This pressure manifests in broadcasters seeking "more for less"; that is, more rights for less money (licence fee or equity). In particular, broadcasters are increasingly "warehousing" rights to prevent competitors acquiring them. These are rights that producers could otherwise exploit.

Unlike the commercial television broadcasters, the ABC and SBS are not subject to specific local content obligations with regard to drama, children's and documentary programming. As a result, expenditure on these at-risk genres is irregular, causing uncertainty in the market for investment in development and skills.

New media and streaming services like Netflix, Stan and Amazon (soon to be Disney and CBS) also do not have specific local content obligations. To provide a level playing field, these services must be brought within a regulatory environment that delivers a consistent level of Australian content for Australian audiences.

SPA makes three recommendations to the Inquiry Panel:

1. Government intervene in the television market to ensure fair contracting in the market between producers and broadcasters through legislated terms of trade
2. Government work with the ABC and SBS and independent producers to ensure certainty in expenditure by the ABC and SBS on Australian content through either a local content quota, tied funding, a Statement of Ministerial Expectations or regular market forecasting
3. Government should extend local content obligations to new media and streaming services.

¹ Deloitte Access Economics, *Screen Production in Australia*, page 23.

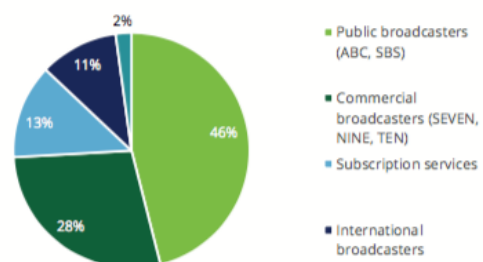
Competition issues

For producers, the market for television in Australia is failing. This failure is determined by the nature of the market itself (an oligopsony) but also that the market has come under significant pressure for advertising revenue (e.g. Google and Facebook) and audience (e.g. Netflix).

While the ABC and SBS make up a third of all broadcasters, they have a disproportionate influence on the market for television commissions. According to Deloitte Access Economics, in 2017 public broadcasters commissioned 46 per cent of all productions surveyed.²

The public broadcasters' influence in the market is significant and they have a role in setting standards for commissioning. Unfortunately, as commercial broadcasters have come under pressure they have amplified pressure down the supply chain. The public broadcasters are doing the same. This pressure manifests in broadcasters seeking "more for less"; that is, more rights for less money (licence fee or equity). In particular, broadcasters are increasingly "warehousing" rights to prevent competitors acquiring them. These are rights that producers could otherwise exploit.

Chart 3.7 Commissions by broadcaster



n= 108 productions

Source: Deloitte Access Economics survey results

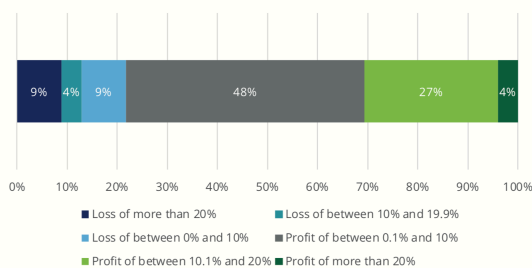
Screen Production in Australia

In June 2018, Deloitte Access Economics released *Screen Production in Australia*. Screen Producers Australia asked Deloitte to examine key trends, estimate the economic activity and provide an outlook for the independent Australian screen production industry. To do this Deloitte collected data from production businesses about their operations in the 2017 calendar year.

Deloitte found that the independent screen production industry in Australia supports substantial economic activity. By aggregating the budgets of individual productions with the revenues of businesses responding to the survey, Deloitte found that the independent screen production industry generated \$1.2 billion in production revenue in 2017. This is substantial: by way of comparison it makes the screen industry three times the size of the recorded music industry in revenue terms. Additionally, the businesses and productions responding to the survey supported almost 20,000 jobs in 2017.

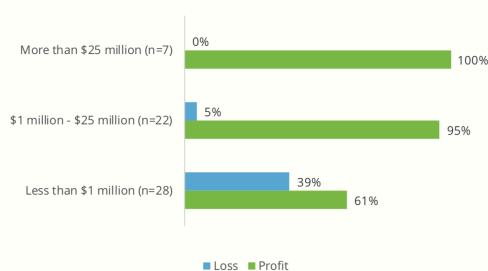
² Deloitte Access Economics, *Screen Production in Australia*, page 23.

Chart 3.1. Profit rates in the screen production industry, 2017



n=57 production businesses
Source: Deloitte Access Economics survey results

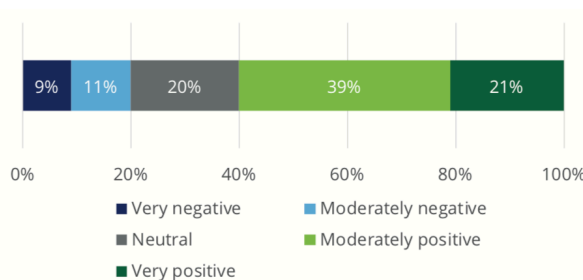
Chart 3.2 Profit rates by business size, 2017



n=57 production businesses
Source: Deloitte Access Economics survey results

Despite the independent sector's size, many production businesses are struggling. Deloitte found that two in every five (41%) production businesses with revenues less than \$1 million made a loss in 2017. Regardless of size, many production businesses do not expect to see an improvement in their financial position, with almost one in ten production businesses concerned about solvency five years from now. One in five production companies (21%) expect to reduce their operations over the next five years.

Chart 4.2 Five-year outlook for production businesses



n=70 production businesses
Source: Deloitte Access Economics survey results

Market failure for producers

At SCREEN FOREVER in 2016, in a speech titled *The Good, the Bad and the Possible*,³ Graeme Mason identified some market realities as they relate to Australian producers:

- “Television has many specific challenges, at least in scripted and documentary/factual, the areas Screen Australia is involved in. *For a start, buyers want more for less money.*”
- “But judging the deals coming to us, some producers seem to have been coerced into putting aside business realities.”
- “Some producers are also being railroaded into asking Screen Australia to sweep aside long-held terms.”
- “Many film and TV producers – experienced and not – expect and want us to police deals.”

The market for television content in Australia is an oligopsony. An oligopsony – like its inverse, an oligopoly (few sellers, many buyers) – is a form of imperfect competition. Sellers can be at a major disadvantage in an oligopsony. A large

³ <https://www.screenaustralia.gov.au/getmedia/aa9d4041-f0fd-45d2-8764-633d44d930d4/SPA-2016-speech.pdf>

number of producers⁴ compete with one another for access to spectrum, a public good, which is controlled by a small number of broadcasters.

The disadvantages of an oligopsony include:

- Buyers can set sellers off against each other, thereby lowering the purchase price paid to all sellers.
- Buyers can dictate costs of sellers through imposing exact specifications relating to quantity, quality, suppliers, wages, innovation and rights.
- Buyers are able to pass on risk inherent in the product.

The market has come under pressure to compete with Google and Facebook for advertising revenue, as set out in the consultation paper on page 17. For audience, Netflix, Stan and other new market entrants continue to grow significant subscription bases. For example, since entering the Australian market in 2015, approximately 7.6 million Australians have Netflix.⁵ These new market entrants bring with them a wealth of content to Australian audiences, the vast majority of which is foreign – Netflix has an estimated 2.5 per cent Australian content on its Australian library. There is more Australian content on the US Netflix library than there is on the Australian Netflix library.⁶

These two factors, declining advertising revenues and audience fragmentation have conspired against Australian producers, as Graeme Mason outlines above. The Australian Bureau of Statistics report *Film, Television and Digital Games, Australia, 2015-16* shows between 2011-12 and 2015-16, there has been negligible growth of five per cent in total income for production companies from \$2.2 billion to \$2.3 billion, while production income was down six per cent over the same period.

In 2017, KEO Films, a UK-owned but locally-run production company, with commissions from SBS (*River Cottage Australia* and *Struggle Street*) and the ABC (*War on Waste*), closed its Australian operations, citing difficult market conditions in Australia.⁷ At the time, company spokesperson said the decision to close the Australian arm of the business was:

“symptomatic of the challenges facing independent production companies that do not have the scale that comes from having long-running series”.⁸

Without government intervention, the market structure and current market conditions will continue to disadvantage Australian producers to the benefit of either international competitors who operate in more favourable market conditions or broadcasters who commission content from producers. This will in turn, disadvantage Australian audiences through a lack of diversity in quality Australian programming. A cohort of strong Australian producers in the market is key to a

⁴ 2819 film and production businesses in 2015-16, see Australian Bureau of Statistics, 8679.0 - Film, Television and Digital Games, Australia, 2015-16.

⁵ <http://www.roymorgan.com/findings/7343-netflix-subscriptions-june-2017-201709270713>

⁶ Dr Ramon Lobato and Alexa Scarlata, *Australian Content on SVOD Catalogs: availability and discoverability*

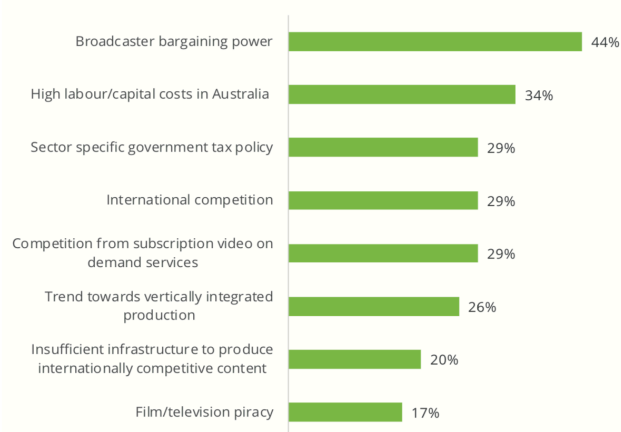
⁷ <http://www.screenhub.com.au/news-article/news/television/david-tiley/keo-kod-as-war-on-waste-company-goes-into-the-bin-253947>

⁸ <https://mumbrella.com.au/production-company-behind-struggle-street-war-waste-keo-films-close-australian-operation-453844>

diversity of quality Australian programming. The key to a strong Australian production sector that supplies the market is producers' capacity to retain the intellectual property in their productions and leverage this through international trade.

In Deloitte's Screen Production in Australia report, broadcaster bargaining power was the number one ranked challenge, selected by 44 per cent of businesses. As noted above, the market for television programs in Australia is an oligopsony, a form of imperfect competition which hands buyers great control over the market. The broadcasters can use this market power to play producers off against one another to demand more, for less, while bringing more production in-house. Another concerning trend emerging in the market is increasing vertically-integrated broadcasters that produce more content in-house. The worst-case long-term scenario if this trend continues is a handful of vertically-integrated broadcasters, all that have their headquarters within a handful of kilometres from the Sydney CBD, controlling the development, generation and output of Australian programming for Australian audiences.

Chart 4.1 Top challenges faced by screen producers



n=71 production businesses

Source: Deloitte Access Economics survey results

Note: Other lower ranked challenges not shown on the chart include the exchange rate, a lack of support for actors, community expectations and workplace issues such as discrimination and sexual harassment.

How does the Government regulate the market power of the broadcasters?

Outside general competition law, there exists two *de facto* arrangements to address the market power of broadcasters: a minimum licence fee in the Australian Content Standard and Screen Australia's terms of trade.

Australian content standard

Section 11 of the Australian Content Standard sets out a formula for calculating the drama score for an Australian drama program: 'drama score = format factor x duration (in hours)'. Drama series and serials acquired by broadcasters from independent producers for certain a determined minimum licence fee receive a higher format factor than other series and serials. There is also a tiered treatment of feature films in recognition of the disparity in licence fees paid by licensees. This minimum licence fee increases annually.

This market intervention is a tacit admission of market failure and provides an incentive to a broadcaster to contract with an independent producer at a price determined by the government. However, this content standard applies only to the commercial broadcasters, not the public broadcasters.

Screen Australia's terms of trade

Screen Australia's terms of trade broadly outline the core terms on which it transacts its business. Including Screen Australia investment in a production is an incentive for both the producer and broadcaster: producers can obtain the benefit of having Screen Australia at the table with its terms of trade, broadcasters have the benefit of a reduction in the overall cost of content.

Among other things, Screen Australia's terms of trade:

- denies broadcasters access to Screen Australia funding
- guarantees at least award (or above award if agreed) rates for employees, and
- seeks to ensure the producer retains some margin on the offset (10 per cent for feature films and television, 15 per cent for documentaries).

As outlined by Graeme Mason at SCREEN FOREVER, these terms of trade seek to ensure producers may contract on a long-term sustainable basis by retaining a margin on their productions. The margin is there to be drawn upon if production costs balloon, but also to ensure production businesses can retain some equity in productions. Critically, they also exclude broadcasters from program funding, which assists independent producers to build sustainable businesses and contribute to a diverse slate of programming.⁹ These terms of trade only apply where Screen Australia is involved in some way. However, Screen Australia is not involved in most contracts in the market. For example, Screen Australia does not invest in light entertainment or reality television. Moreover, licence fees paid by commercial broadcasters have significantly dropped to the point where some producers have felt they had to work outside of Screen Australia minimums in order to get a project produced.

International experience - the BBC

The BBC Charter and Agreement requires Ofcom to consider the impact of the BBC's activities on fair and effective competition.

The Ofcom has noted:

As a large publicly-funded organisation, the BBC inevitably has an impact on competition in the wider media market. It may have a positive effect by stimulating demand or encouraging sector wide innovation, for example. But in fulfilling its objectives, the BBC may also harm the ability of others to compete effectively.¹⁰

Ofcom has a responsibility to set out requirements on the BBC to ensure that the relationship between the BBC's commercial activities and the BBC Public Service does not distort the market or create an unfair competitive advantage. In July 2017,

⁹ SPA is concerned by reports that broadcasters are seeking to access Screen Australia program funding.

¹⁰ https://www.ofcom.org.uk/__data/assets/pdf_file/0026/99503/BBC-competition-framework.pdf

Ofcom published *The BBC's commercial and trading activities: Requirements and guidance*.¹¹

The solution to market failure

There is one solution to address market failure created by the oligopsonic market structure where a minimum level of production is determined by quotas: legislated terms of trade that sets standards for contracting between big and small business.

David Fernández-Quejada has written on the nature of quota obligations and their effect on the market:

“The simple implementation of quota policies leads to a scenario of low-cost entry and plentiful suppliers; in other words, an oligopsonic market in which broadcasters control the bottleneck of access to the television spectrum. In this context, producers have no chance to build assets, meaning that growth can only occur at the expense of other competitors or from a quota increase. However, this hypothetical increase cannot be a long-term solution because the tendency is to reproduce the same scenario. *The only solution is the one that the UK implemented in 2003: a regulatory intervention on the terms of trade governing agreements between broadcasters and producers that allows producers to retain control over rights and to build their own portfolio of products that can be marketed elsewhere.*”¹²

This simple intervention has created in the United Kingdom, arguably, the most successful independent production industry in the world. As Chalaby writes, with this intervention, “the British government operated a strategic shift in favour of content producers and created a new intellectual property regime. This regime has enabled producers to keep hold of their rights and become asset-owning businesses, eventually giving rise to a new breed of production companies: the super-indies [which] have acquired the scale to compete in an international TV market and drive ... British TV exports.”¹³

Other Australian markets have similar interventions. Relationships between buyers and suppliers in the food and grocery market, dominated by just two buyers – Coles and Woolworths – is mediated by The Food and Grocery Code of Conduct, a voluntary code prescribed under the Competition and Consumer Act 2010 and administered by the Australian Competition and Consumer Commission. The horticulture market has a mandatory code of conduct that sets contractual conditions in relationships between growers and buyers.¹⁴

¹¹ https://www.ofcom.org.uk/__data/assets/pdf_file/0025/99412/bbc-commercial.pdf

¹² David Fernández-Quejada (2012) Quoting television: a cross-national analysis of regulatory intervention in the independent television production industry in the UK and Spain, *International Journal of Cultural Policy*, 18:4, 378-397 – emphasis added.

¹³ Chalaby, J. (2010). The rise of Britain's super-indies: Policy-making in the age of the global media market. *International Communication Gazette*, 72(8), pp. 675-693.

¹⁴ <https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct>

SPA and the ABC negotiated terms of trade that was in effect from July 2013 to July 2015. These terms of trade provided greater certainty for ABC contracting. SPA has been in discussions with the ABC over a new terms of trade since they expired.

In the past few months, SPA has been made aware of several deals from the ABC and SBS that are inconsistent with industry-standards and industrial agreements relating to rights afforded and fees paid to actors and writers. These deals involve the ABC and SBS requiring broader rights packages without paying additional compensation for new rights. This has significantly impacted on producers' ability to monetise and exploit certain rights in the domestic and international market and as a result, some producers have paid actors and writers out of their own fee, rather than out of the production budget.

In other cases, SPA has been made aware of deals whereby producers are required to agree to appoint the ABC's distribution business (i.e. ABC Commercial) as the distributor of the program in consideration for commissioning a program. In such circumstances, producers are prohibited from entering into distribution arrangements with third parties which may be more commercial advantageous to the producer (e.g. the producer may be able to negotiate lower commissions and expenses with a third party distributor and a third party distributor may have a better distribution track record in the international marketplace).

SPA is prepared to discuss these deal terms confidentially with the Panel.

Recommendation 1: Government intervene in the television market to ensure fair contracting in the market between producers and broadcasters through legislated terms of trade

Broadcasting in Australia and levels of Australian content

In the Australian market, there exist three categories of broadcaster:

- public (ABC and SBS)
- commercial (Channel 7, Channel 9 and Network 10), and
- subscription (Foxtel).

New market entrants (Stan, Netflix, Telstra TV etc.) but these services are not creatures of regulation, indeed barely regulated at all. Their effects on the market are discussed below.

These broadcasters exist because of government intervention: the ABC and SBS by virtue of their enabling legislation; the commercials and Foxtel owe their existence to licences afforded under the *Broadcasting Services Act 1992*. The commercial broadcasters are supported by Government through restricting the number of commercial broadcast licences to three,¹⁵ affording them privileged access to live sporting events through the anti-siphoning list and most recently, abolishing their

¹⁵ Section 37A, *Broadcasting Services Act 1992*.

licence fees and introducing a spectrum charge, saving those broadcasters hundreds of millions of dollars.

With regard to levels of Australian programming, the government has a different approach to regulation depending on the nature of the broadcaster. These regulations are demand-side interventions in the market and have been demonstrated to be largely successful, yet not without problems, in achieving public policy objectives.

The Public Broadcasters

Just as the market requires strong and successful commercial broadcasters, the market requires strong and successful public broadcasters. Amid a series of budget cuts, the public broadcasters continue to provide valuable public service. The ABC has renewed its commitment to Australian audiences through its *Investing in Audiences* strategy. SBS is commissioning award-winning independent drama.

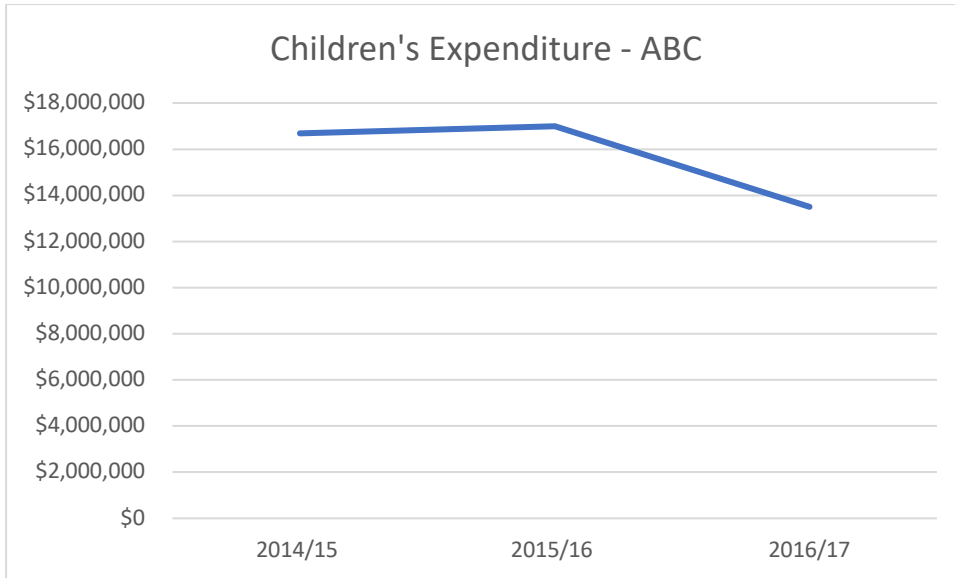
With regard to levels of Australian content, the ABC and SBS are independent of government and the levels of Australian programming is informed by their interpretations of their interdependent charters. Absent any specific obligations to deliver Australian content, the public broadcasters can align their commissions and acquisitions to other priorities.

ABC Hours, Expenditure and External Commissions

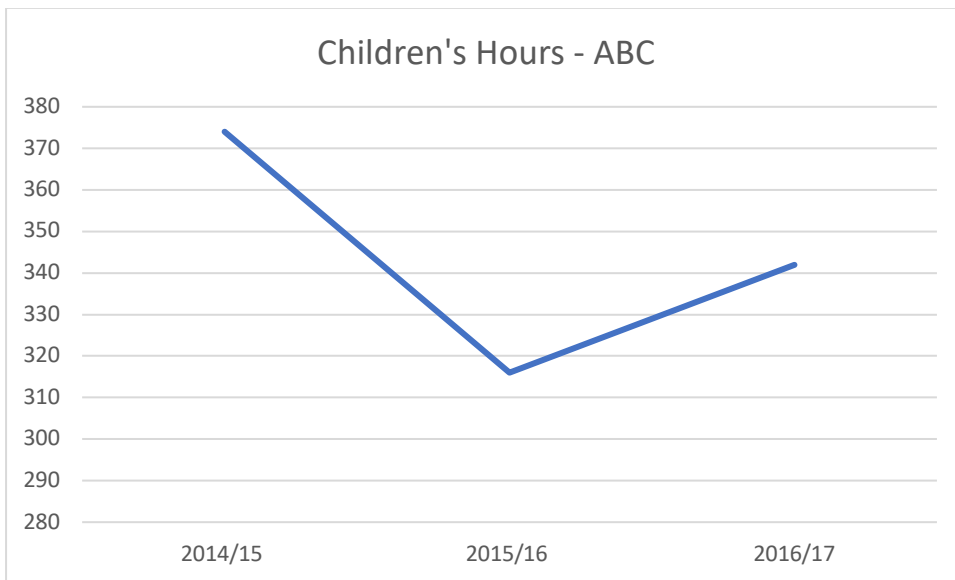
The following tables are reproduced from answers provided to questions on notice from Senator Hanson-Young at the May 2018 Budget Estimates of the Senate Standing Committee on Environment and Communications. Each question referred to budgets for each of the financial years 2014/16 through to 2016/17. These questions and their answers are at **Attachment A**.

Children's

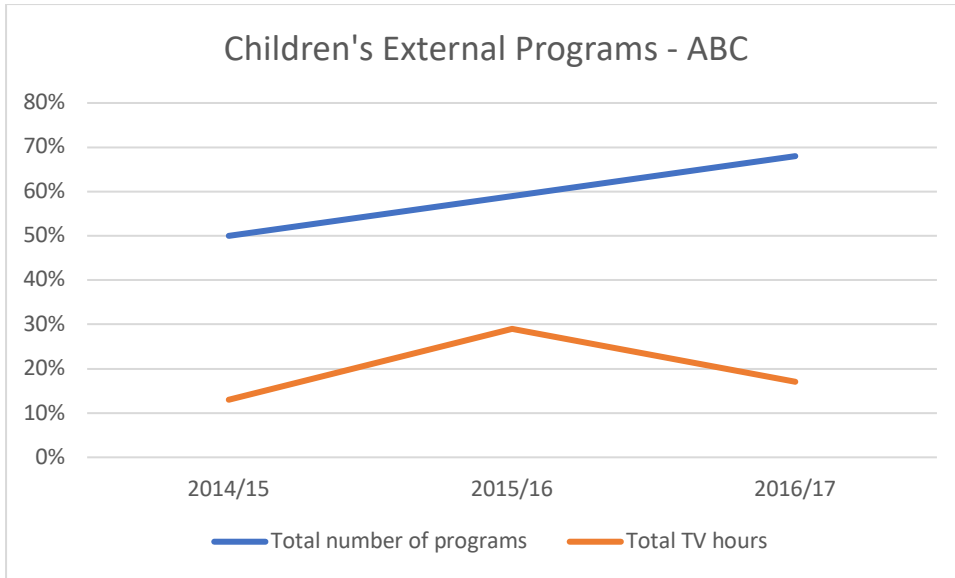
Over the period 2014/15 to 2016/17, expenditure on children's fell, as did hours. The percentage of the total number of externally-commissioned children's program rose significantly, while the percentage of total TV hours externally-commissioned rose slightly. This indicates that the ABC is commissioning more from the independent sector, though total expenditure on children's is falling.



Source: Senate Standing Committee on Environment and Communications



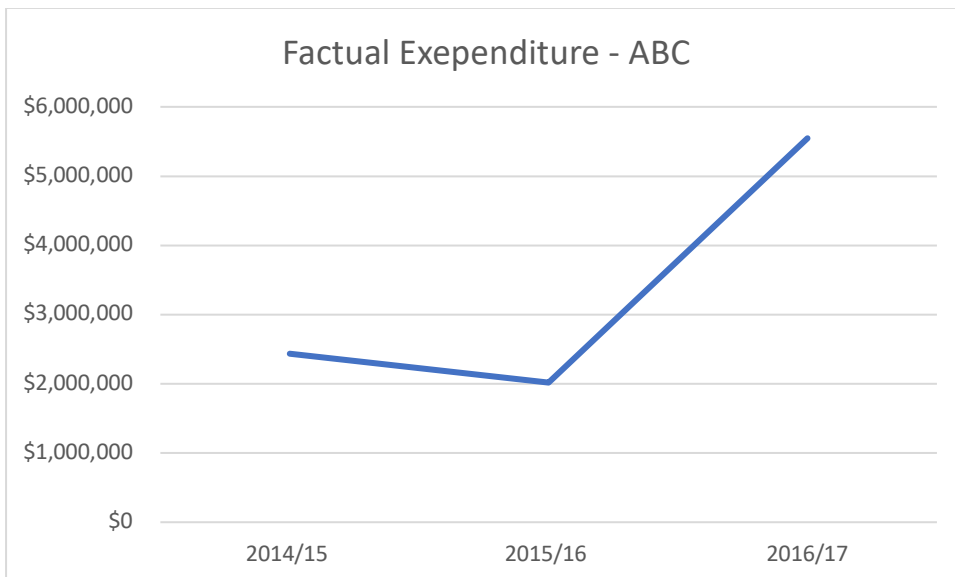
Source: Senate Standing Committee on Environment and Communications



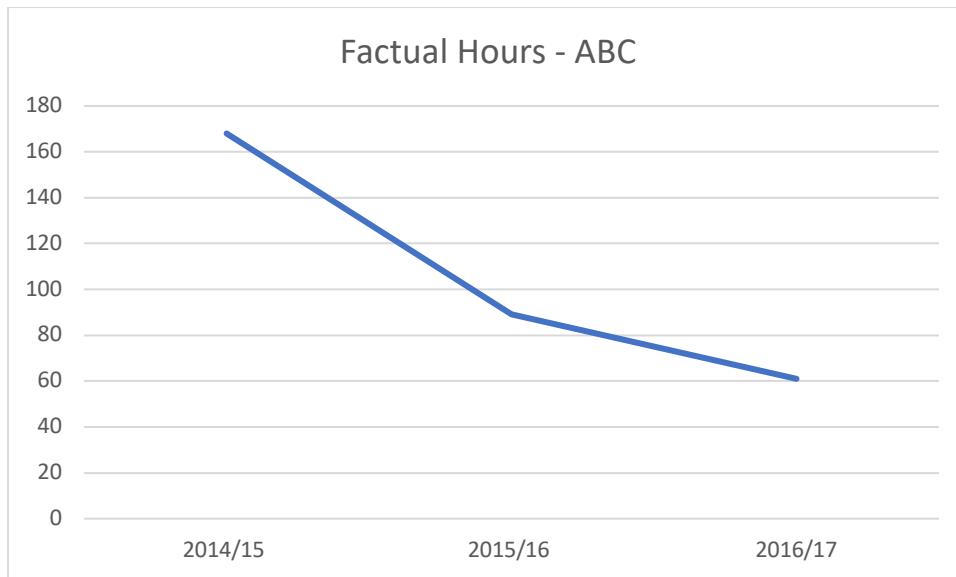
Source: Senate Standing Committee on Environment and Communications

Factual

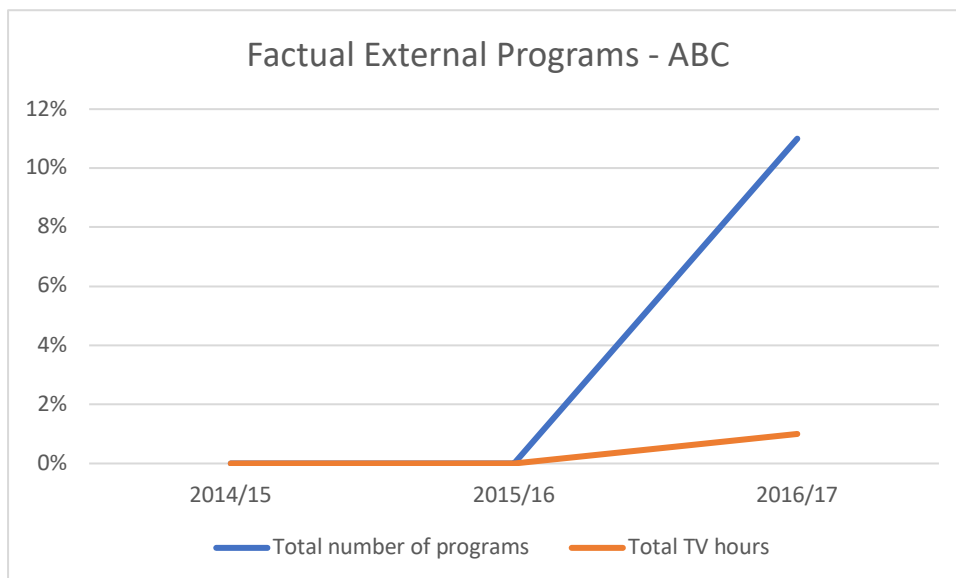
Over the period 2014/15 to 2016/17, expenditure on factual rose, while hours fell. The percentage of the total number of externally-commissioned factual programs rose in 2016/17 to 11 per cent of the total number of programs and 1 per cent of total hours. This is off the back of no externally-commissioned factual programs in 2014/15 and 2015/16.



Source: Senate Standing Committee on Environment and Communications



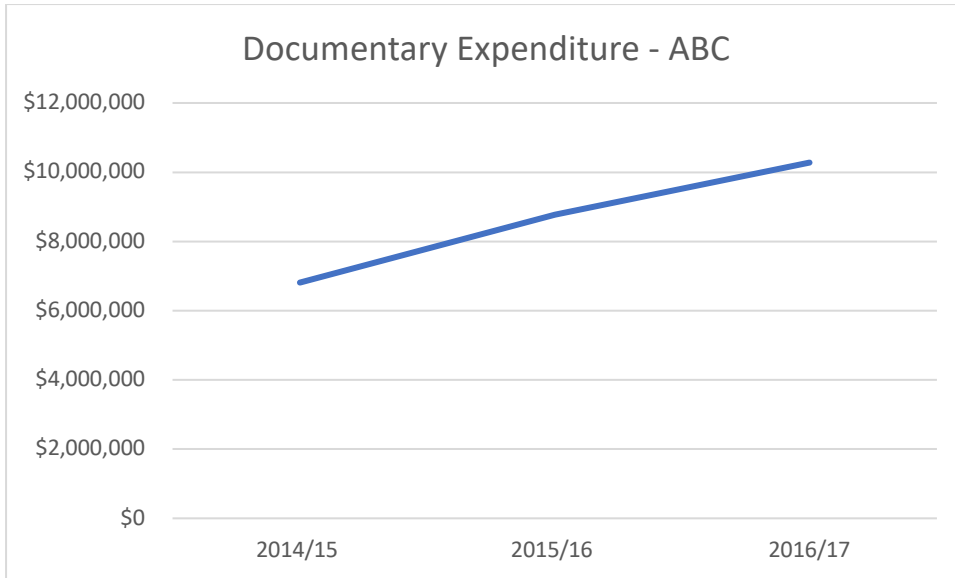
Source: Senate Standing Committee on Environment and Communications



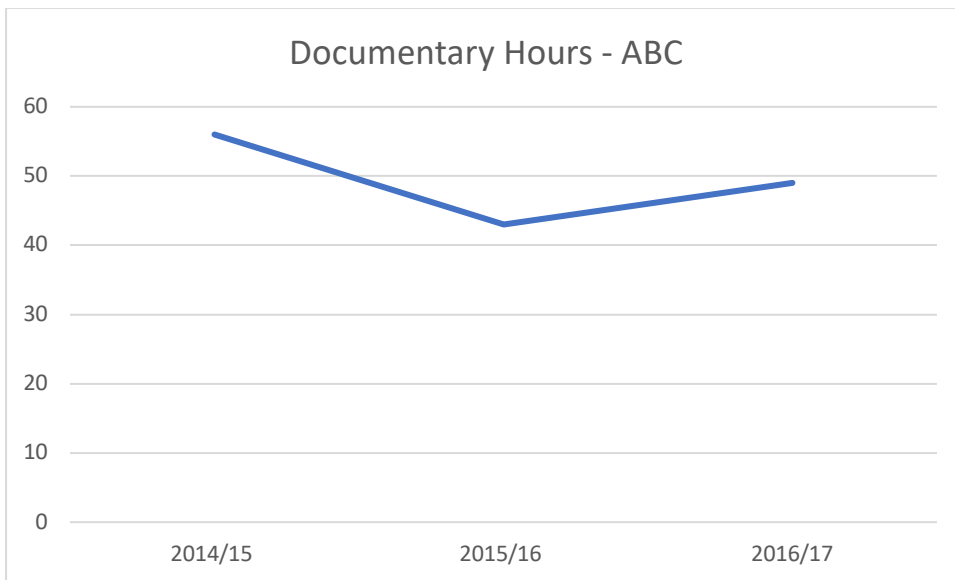
Source: Senate Standing Committee on Environment and Communications

Documentaries

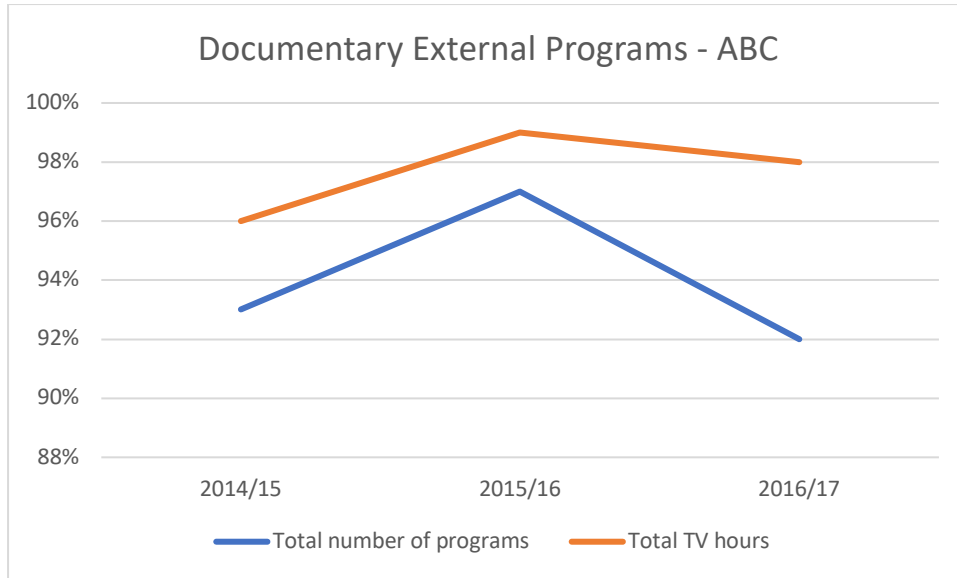
Over the period 2014/15 to 2016/17, expenditure on documentaries rose from \$6.8m in 2014/15 to \$10.2m in 2016/17, while hours fell slightly over the same period. The percentage of the total number of externally-commissioned documentary programs remained strong, averaging 94 per cent and the total number of externally-commissioned documentary programs averaged 98 per cent.



Source: Senate Standing Committee on Environment and Communications



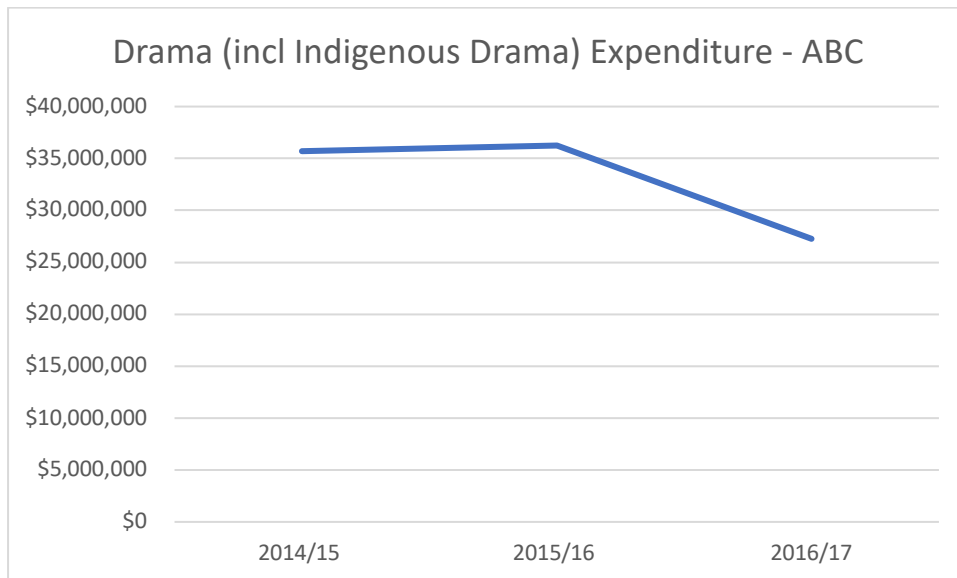
Source: Senate Standing Committee on Environment and Communications



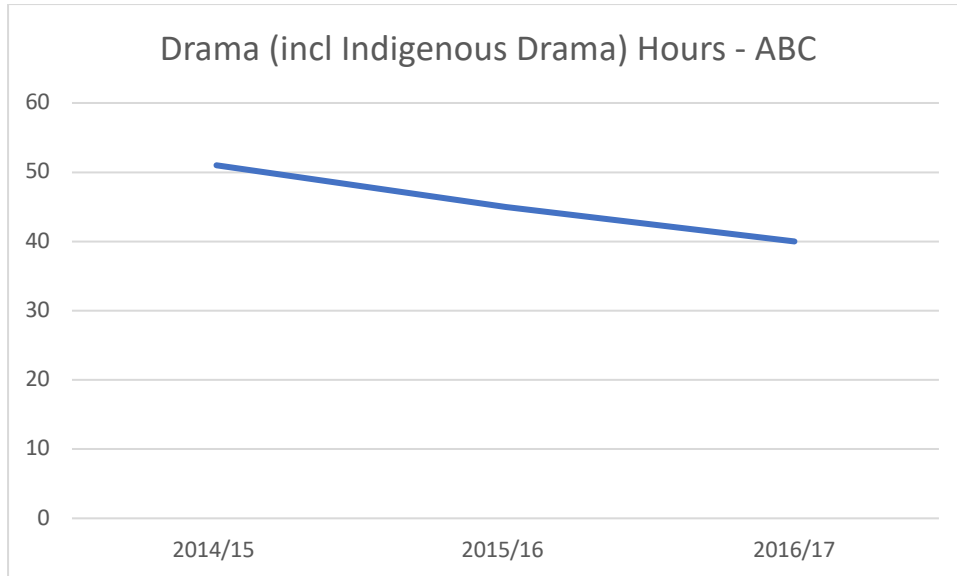
Source: Senate Standing Committee on Environment and Communications

Drama

Over the period 2014/15 to 2016/17, expenditure on drama fell 24 per cent from \$35.7m in 2014/15 to \$27.2m in 2016/17, while hours fell 22 per cent over the same period. The ABC commissions all its drama production from the independent sector.



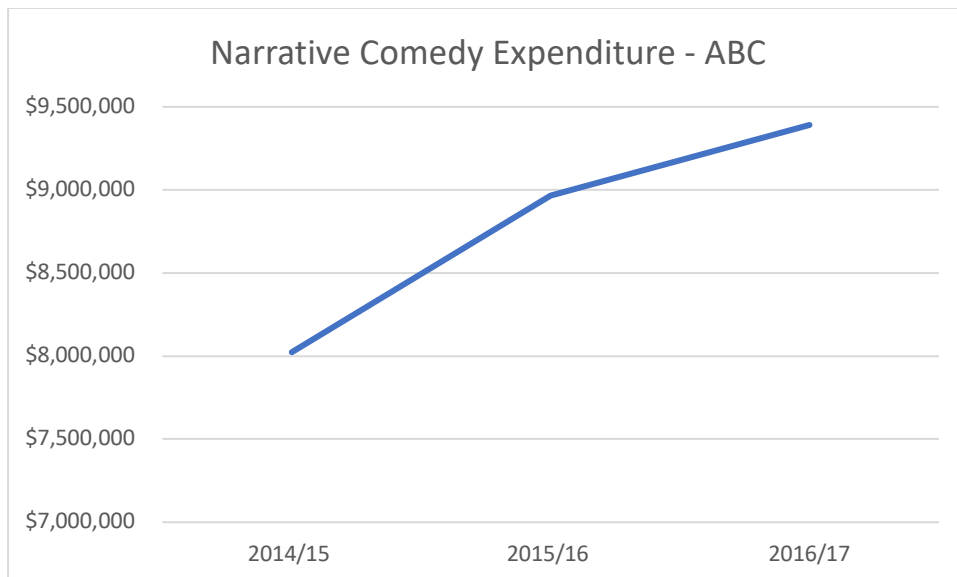
Source: Senate Standing Committee on Environment and Communications



Source: Senate Standing Committee on Environment and Communications

Narrative Comedy

Over the period 2014/15 to 2016/17, expenditure on narrative comedy rose from \$8m in 2014/15 to \$9.3m in 2016/17, while hours fell from 24 in 2014/15 to 20 in 2016/17. The ABC commissions all its narrative comedy production from the independent sector. The data suggests the ABC is paying more per hour for narrative comedy.



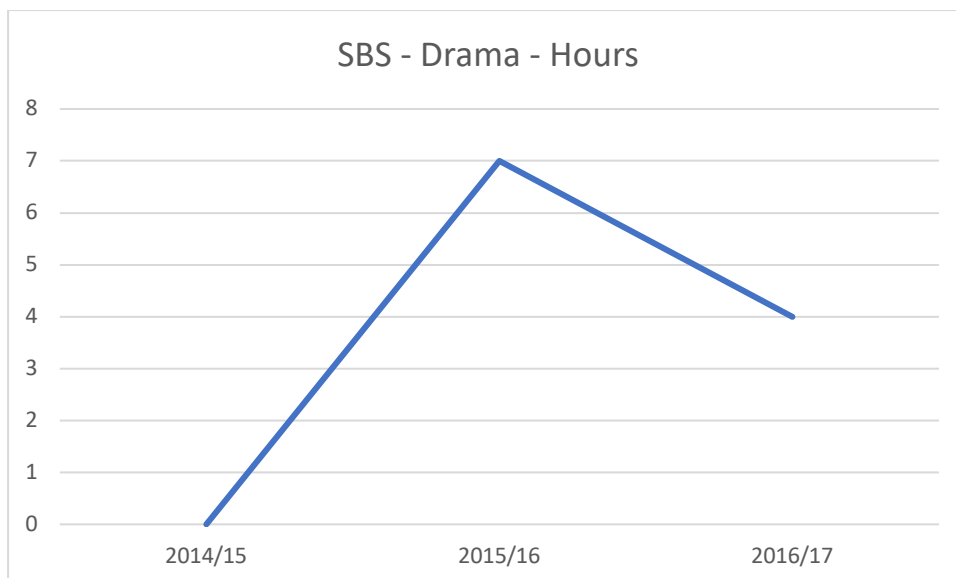
Source: Senate Standing Committee on Environment and Communications



Source: Senate Standing Committee on Environment and Communications

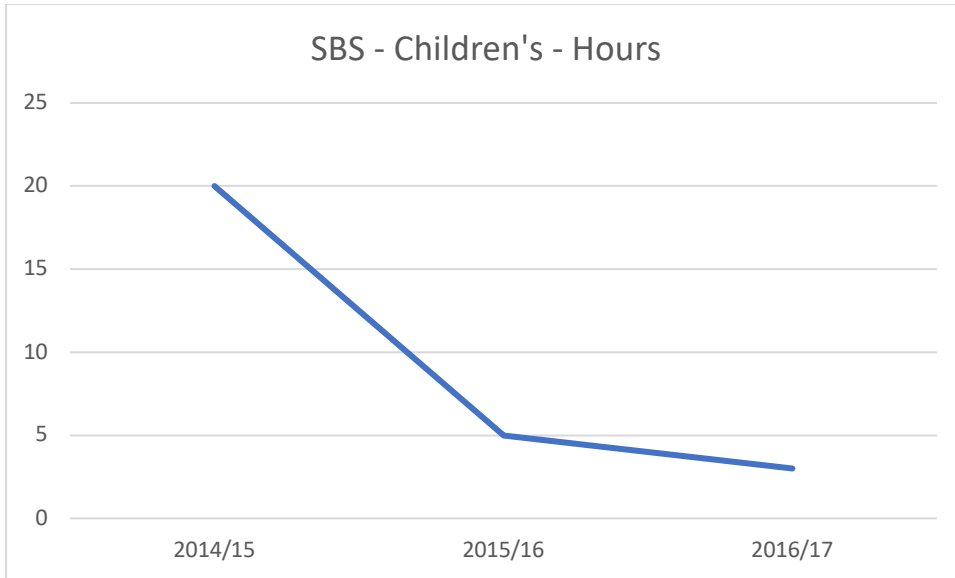
SBS Hours and External Commissions

Senator Hanson-Young asked SBS the same questions as the ABC. SBS only answered questions on hours and external commissions and claimed answers to questions around expenditure were commercial-in-confidence. Questions and answers to SBS are at **Attachment B**.



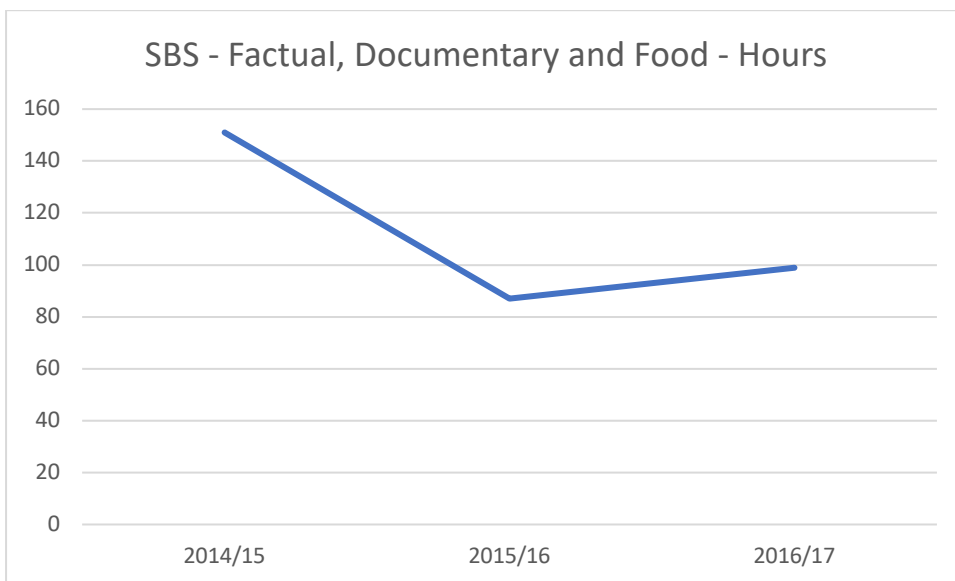
Source: Senate Standing Committee on Environment and Communications

SBS is an acquisitions-focussed broadcaster, hence the handful of commissioned dramas produced each year, and all were commissioned from the independent sector.

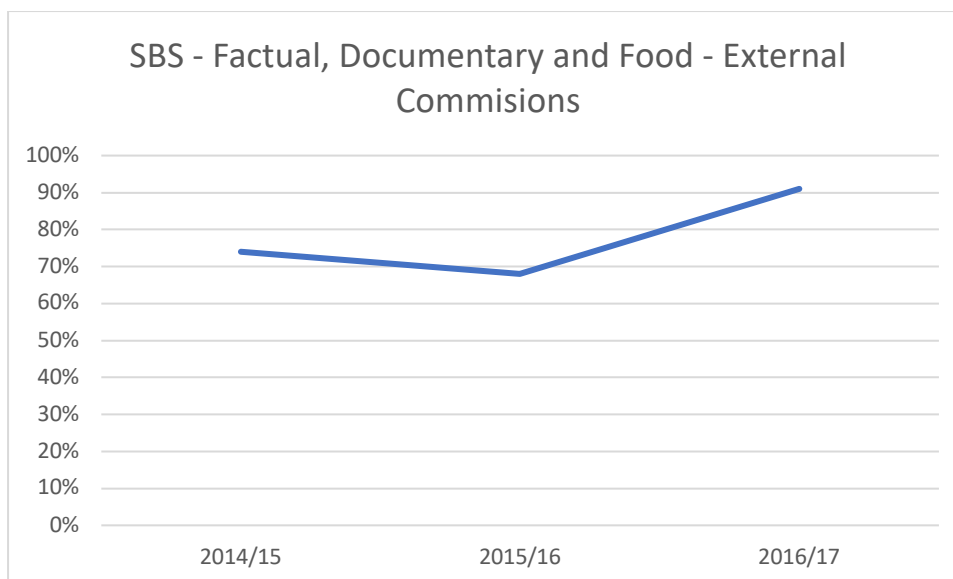


Source: Senate Standing Committee on Environment and Communications

SBS’s children’s programming dropped 85 per cent from 2014/15 to 2016/17 and all were commissioned from the independent sector.



Source: Senate Standing Committee on Environment and Communications



Source: Senate Standing Committee on Environment and Communications

SBS's first run factual, documentary and food hours has dropped 35 per cent from 2014/15 to 2016/17. Over this period external commission have risen from 74 per cent of total hours factual, documentary and food to 91 per cent.

Providing certainty for the independent sector

To ensure a vibrant, diverse independent sector that provides healthy competition and investment certainty, the public broadcasters have a significant role to play. It is clear that absent any specific obligations to Australian content, the ABC's output is on a downward trend for drama and children's commissions, while it invests more in other, less-expensive genres. The SBS is investing more in Australian drama, albeit off a low base. Children's programming is also falling at SBS.

There are several measures the Government may adopt to address certainty in investment in Australian content from the ABC.

1) Quotas, a points system or expenditure requirements

Quotas, points systems and expenditure requirements are proven ways to ensure consistency in output.

The Government may choose to introduce quotas on the public broadcasters. This is the case in other jurisdictions. Last year the United Kingdom government, through its regulator (Ofcom) imposed a minimum children's content quota on the BBC. From 3 April 2017, CBBC has been required to show at least 400 hours – and CBeebies at least 100 hours – of new UK commissioned programming each year.¹⁶ SBS has proposed that it be subject to a fully-funded 30 per cent Australian content quota. Screen Producers Australia commends SBS on this proposal.

¹⁶ "Ofcom outlines plans for regulating the BBC's performance", 29 March 2017.

Alternatively, a points system can provide incentives for commissioning different types of content or from different sources. The Australian Content Standard contains a points system for adult drama that provides incentives for independent commissioning.

An expenditure requirement ensures a level of expenditure while providing flexibility on the commissioned content. Drama channels on subscription broadcasters are subject to an expenditure obligation.

2) Tied funding

The Government may choose to provide tied funding to the ABC to deliver certain genres of content. For example, in the 2009/10 budget, the ABC was provided \$136.4 million in new funding over the next three years to develop an advertising-free digital children's channel and increase output of Australian content. That funding was expected to help the ABC produce up to 90 hours of local drama programs a year.¹⁷

3) Ministerial Statement of Expectations

The Minister for Communications and the Arts may make a Ministerial Statement of Expectations that addresses:

- the volume of Australian content that the ABC delivers each year
- the ABC's relationship with the independent sector and the terms on which it commissions content.

4) Market Forecasting

To enable the independent sector to invest in development of ideas and skills, the ABC may choose to provide market forecasts of its content budgets for drama and narrative comedy, children's and factual and documentary.

Recommendation 2: Government work with the ABC and SBS and independent producers to ensure certainty in expenditure by the ABC and SBS on Australian content through either a local content quota, tied funding, a Statement of Ministerial Expectations or regular market forecasting

Commercial broadcasters

The commercial broadcasters have local content obligations in the form of quotas (transmission, sub-genre). These quotas exist for a variety of strong public policy reasons: the importance of Australian stories, narrative and expressions on Australian screens, a quid pro quo for privileged access to a public asset, the

¹⁷ <http://www.abc.net.au/news/2009-05-12/abc-gets-record-funding-boost/1680934>

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

Prima facie, it may seem that the commercial broadcasters are disadvantaged against the public broadcasters and SVOD platforms because they are regulated to deliver a certain amount of Australian content (drama, documentary and children's in particular). However, the regulatory environment for commercial broadcasters contains a significant loophole that allows the commercial broadcasters to acquit their first run Australian content obligations with second run New Zealand content that can be bought for 10 per cent of the purchase price of Australian content. The New Zealand content loophole is discussed further below. Moreover, there appears no real appetite for enforcement by the regulator. In 2017, a dozen regional broadcasters breached their licence conditions and the ACMA took no enforcement action.

The Government has made a series of decisions to make commercial broadcasters more competitive in the face of the threat of Google and Facebook. These decisions include abolishing broadcast licence fees, saving the commercial broadcasters hundreds of millions of dollars collectively. These decisions also include no action on the New Zealand content loophole (a House of Representatives committee recommended a solution to the New Zealand content loophole late last year¹⁸). An unintended consequence of these decisions is that in making the commercial broadcasters more competitive, it has made the value proposition for in-house production and sports rights more appealing, to the detriment of the independent sector. In-house production has increased from 44 per cent of all production costs in 2011/12 to 55 per cent in 2015/16.¹⁹

The Nine Network recently concluded a five-year deal for the Australian Open worth \$300m. The Seven Network and Foxtel recently concluded a six-season deal for cricket rights

Program expenditure	2015-16 \$ million	% of total spending
Australian sport	497.9	26.0%
Australian news and current affairs	384.2	20.0%
Overseas drama	300.5	15.7%
Australian light entertainment - other	243.5	12.7%
Australian light entertainment - variety	220.0	11.5%
Overseas - other	113.4	5.9%
Australian adult drama	95.2	5.0%
Australian other programming	30.2	1.6%
Australian children's - other	13.1	0.7%
Australian children's drama	10.4	0.5%
Australian documentaries	8.7	0.5%

Source: ACMA

worth \$1.2 billion. In comparison, in 2015/16 the three commercial broadcasters spent just \$95.2m on adult drama and \$10.4m on children's drama (of which they have submitted to the Government that they want to be relieved of their obligations).

As PwC modelling suggested in 2011,²⁰ if the quotas were removed the level of programming would fall significantly. PwC used three hypothetical scenario that

¹⁸ The House Standing Committee on Communications and the Arts, *Report on the inquiry into the Australian film and television industry*, Tabled 7 December 2017.

¹⁹ Australian Bureau of Statistics, 8679.0 - *Film, Television and Digital Games, Australia, 2015-16*.

²⁰ PwC, *Minimum content requirements research report*, 2011

modelled the likely effect of changes to the Australian minimum content requirements.

With regard to the first hypothetical scenario “The minimum content requirements are removed and all other levels of government support remain the same”, PwC’s modelling provides a cautionary tale. Where Australian content requirements are removed, PwC estimated the volume of Australian content broadcast would fall to approximately 43 per cent. The level of investment in Australian television content would fall approximately 28 per cent and in the short run employment in the television production and broadcasting sector would fall by approximately 2,000 full time equivalent jobs. Documentary production was expected to halve. Subscription broadcast spend on Australian drama was expected to fall to 6 per cent. No children’s content was expected to be produced. This is consistent with the effect of removing children’s quotas in the UK, where expenditure fell 93 per cent after quotas were removed.²¹

As SPA noted in its submission to the Standing Committee on Communications and the Arts Inquiry into Factors Contributing to the Growth and Sustainability of the Australian Film and Television Industry, production levels have been static or declining for many genres over the past 10 years.²² It is not a coincidence that of all the genres, commercial broadcasters’ expenditure is falling only in those genres that are the subject of quotas. It is indicative of the approach adopted to these “at risk” genres by commercial broadcasters. Should the quotas be removed, an unregulated market will not deliver anywhere near the same level of drama, documentary and children’s program that is currently produced.

How can quotas be met while expenditure falls?

There are three main reasons why quota obligations can be met while expenditure can remain “stagnant or decrease” for drama, documentaries and children’s programs:

- the increasing use of New Zealand content to acquit Australian content obligations
- competition issues determined by the structure of the market as outlined above, and
- increasing engagement by producers in global markets to finance productions (14 per cent of total production revenue in 2017²³).

New Zealand content loophole

This loophole means that instead of commissioning new Australian-produced content, commercial television broadcasters can buy second-run, cheap New

²¹ <http://www.telegraph.co.uk/news/2017/04/17/broadcasters-forced-invest-british-made-childrens-tv-programmes/>

²² Submission 86, pp 18-22.

²³ Deloitte Access Economics, *Screen Production in Australia*, 2017

Zealand programs and have them qualify as Australian programs to acquit their obligations under the Australian Content Standard.

The availability of cheap second-run NZ content to acquit first-run Australian content obligations means Australian producers are competing with NZ producers at a price point that is uncompetitive. This is on the basis that the content is either purchased in its second window after airing in New Zealand or because the cost of production in New Zealand is often cheaper (labour costs are lower) or more heavily subsidised (some New Zealand television content attracts a 40 per cent tax offset). This, together with oligopsonic market conditions, means Australian producers are hamstrung from competing at a level playing field, with deleterious effects over the long term for sustainability of the independent production sector.

In 2014, the commercial television broadcasters averaged 180 hours of New Zealand content that qualified as Australian. In 2015, the commercial television broadcasters averaged 135 hours. In 2016, the average was 110 hours. According to ACMA's 2017 compliance report,²⁴ 25 per cent of first release drama on the Nine Network was from New Zealand, though Seven and Ten did not count any New Zealand content towards this requirement. For documentaries, 17 per cent of Seven's and 27 per cent of Ten's documentary quota came from New Zealand. Nine did not count any Kiwi docos towards its first release doco requirement. With regards to their total local programming, Seven averaged 290 hours of New Zealand content in 2017, Nine 83 hours and Ten 62 hours.

In late 2017, the House Standing Committee on Communications and the Arts Inquiry into factors contributing to the growth and sustainability of the Australian film and television industry recommended the Government close the New Zealand content loophole by redefining the concept of "first release":

"The committee recommends that first-release be redefined to mean first broadcast anywhere in the world."

Unregulated buyers

Subscription video on demand services deliver television programs and films over the internet, rather than through traditional broadcasting means. As such, they are not regulated like broadcasting organisations and operate in a regulatory "grey area".

In September 2000, the then Minister for Communications, Information, Technology and the Arts, Senator the Hon Richard Alston, made a ministerial declaration specifying that the following class of service does not fall within the definition of "broadcasting service":

...a service that makes available television programs or radio programs using the internet, other than a service that delivers television programs or radio programs using the broadcasting services bands.

²⁴ <https://www.acma.gov.au/-/media/Community-Broadcasting-and-Safeguards/Information/pdf/Compliance-with-Australian-Content-Standard-and-Childrens-Television-Standards--2017-pdf.pdf?la=en>

The minister explained that the purpose of the definition is to ensure that a service that “provides television or radio programs through the internet—other than a service that delivers television programs and radio programs using the broadcasting services bands—does not fall within the definition of a broadcasting service”. What was perhaps a minor regulatory intervention to address a lower order issue in 2000, has had a host of unintended consequences that persist decades later.

Because SVOD services make television programs and films available through the internet and not the spectrum, these services are not regulated like television broadcasters. These unregulated do not have requirements to show Australian, regional and children’s content, restrictions on advertising and classification requirements, or minimum expenditure on Australian drama.

The media landscape has changed dramatically since Senator Alston made his declaration in 2000, with new market entrants taking a greater audience share. At December 2017, Foxtel had more than 2.8 million subscribers and obligations to Australian content.²⁵ Stan has close to a million Australian subscribers.²⁶ Roy Morgan estimates 7,558,000 Australians aged 14+ (37.7 per cent) had Netflix in the three months to June 2017, up from 4,453,000 (22.6 per cent) in the March quarter 2016.²⁷ Amazon Prime has entered the market, Facebook is commissioning long-form content and plans to spend up to \$1 billion on original commissions in 2018.²⁸ YouTube Red is commissioning,²⁹ and niche streaming services continue to emerge. Disney has announced it will launch a streaming platform in 2019. CBS, the owner of the Ten Network, is expected to launch its streaming service in Australia soon. While these services bring added competition to legacy businesses, they also do not compete on a level playing field - none of these services have obligations to Australian content.

The European Union model

The EU is bringing SVOD services into its regulatory environment. The revision to the EU Audiovisual Media Services Directive³⁰ includes modifications to the existing Directive with aim of enhancing the promotion of European film and television content by:

- allowing media services to impose financial contributions to providers of on-demand services established in other media services (but only on the turnover generated in the imposing country),
- putting on-demand players under the obligation to promote European content to a limited level by imposing minimum quota obligations (30% share of the audiovisual offer of their catalogues) and an obligation to give prominence to European works in their catalogues,

²⁵ https://newscorpcom.files.wordpress.com/2018/02/q2-2018-press-release_final_02-08-2018-1230pm.pdf

²⁶ <https://www.if.com.au/stan-sees-growth-spurt-subscribers/>

²⁷ <http://www.roymorgan.com/findings/7343-netflix-subscriptions-june-2017-201709270713>

²⁸ <https://techcrunch.com/2017/09/08/facebook-plans-to-spend-up-to-1b-on-original-shows-in-2018/>

²⁹ <http://variety.com/2018/digital/news/youtube-the-super-slow-show-robert-kyncl-1202675301/>

³⁰ <https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd>

- low turnover companies, thematic services and small and micro enterprises are exempted from these requirements.

Standing Committee on Communications and the Arts recommendation

In late 2017, the Standing Committee on Communications and the Arts Inquiry into factors contributing to the growth and sustainability of the Australian film and television industry recommended:

“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.”

The ABC’s position on SVOD regulation

In answer to a question on the ABC position on the desirability of local content obligations on SVOD services asked by Senator Hanson-Young in May 2017, the ABC responded:

“The application of quotas to SVOD entities is a policy matter for government. However, given the popularity of local content with Australian audiences, the ABC considers that the local broadcasters are in a unique position to develop and produce Australian content and this local market advantage should be encouraged rather than unduly encouraging additional competition in the production of local content.”

In November 2017, Justin Milne, the Chairman of the ABC, noted in his Hector Crawford Oration at SCREEN FOREVER:

“But as the policy makers search for the right framework it’s important to remember the last 50 years have shown us all that a combination of regulation and targeted assistance is vital to building a local industry, which in turn nourishes our nation. Now we are entering a new phase with the arrival of Netflix, Amazon et al it is important that they too are required to make a strong contribution to the local industry, as indeed Europe and Canada are requiring them to do.”

The industry is united behind the Make it Australian campaign that seeks local content obligations on new media and streaming services. The ABC’s position on this important issue should be made clear and align with industry for the future health of independent sector.

Recommendation 3: The Government should extend local content obligations to new media and streaming services.

Question on notice no. 187

Portfolio question number: 187

2017-18 Additional estimates

Environment and Communications Committee, Communications and the Arts Portfolio

Senator Sarah Hanson-Young: asked the Australian Broadcasting Corporation on 27 February 2018—

What has been the expenditure on first-run Australian drama programs for each of the past three years? Please provide financial and calendar years?

What has been the expenditure on first-run Australian children's programming for each of the past three years? Please provide financial and calendar years?

What has been the expenditure on first-run Australian comedy programming for each of the past three years? Please provide financial and calendar years?

What has been the expenditure on first-run Australian factual programming for each of the past three years? Please provide financial and calendar years?

How many hours of first-run Australian drama were broadcast for each for the past three years? Please provide financial and calendar years?

How many hours of first-run Australian children's programming were broadcast for each of the past three years? Please provide financial and calendar years?

How many hours of first-run Australian factual programming were broadcast for each of the past three years? Please provide financial and calendar years?

How many hours of first-run Australian comedy programming were broadcast for each of the past three years? Please provide financial and calendar years?

For each of the past three years, what percentage of first-run comedy programming was commissioned from the independent sector? Please provide financial and calendar years?

For each of the past three years, what percentage of first-run drama programming was commissioned from the independent sector? Please provide financial and calendar years?

For each of the past three years, what proportion of first-run factual programming was commissioned from the independent sector? Please provide financial and calendar years?

For each of the past three years, what percentage of first-run children's programming was commissioned from the independent sector? Please provide financial and calendar years?

Answer —

Please see attached.

Senate Standing Committee on Environment and Communications

Answers to Senate Estimates Questions on Notice

Additional Estimates February 2018

Communications Portfolio

Australian Broadcasting Corporation

Question No: 187

Australian Broadcasting Corporation

Hansard Ref: Written, 13/03/2018

Topic: Australian Television Content

Senator Sarah Hanson-Young asked:

- 1) What has been the expenditure on first-run Australian drama programs for each of the past three years?
 - a. Please provide financial and calendar years
- 2) What has been the expenditure on first-run Australian children's programming for each of the past three years?
 - a. Please provide financial and calendar years
- 3) What has been the expenditure on first-run Australian comedy programming for each of the past three years?
 - a. Please provide financial and calendar years
- 4) What has been the expenditure on first-run Australian factual programming for each of the past three years?
 - a. Please provide financial and calendar years
- 5) How many hours of first-run Australian drama were broadcast for each for the past three years?
 - a. Please provide financial and calendar years
- 6) How many hours of first-run Australian children's programming were broadcast for each of the past three years?
 - a. Please provide financial and calendar years
- 7) How many hours of first-run Australian factual programming were broadcast for each of the past three years?
 - a. Please provide financial and calendar years
- 8) How many hours of first-run Australian comedy programming were broadcast for each of the past three years?
 - a. Please provide financial and calendar years
- 9) For each of the past three years, what percentage of first-run comedy programming was commissioned from the independent sector?
 - a. Please provide financial and calendar years
- 10) For each of the past three years, what percentage of first-run drama programming was commissioned from the independent sector?
 - a. Please provide financial and calendar years

Senate Standing Committee on Environment and Communications

Answers to Senate Estimates Questions on Notice

Additional Estimates February 2018

Communications Portfolio

Australian Broadcasting Corporation

- 11) For each of the past three years, what proportion of first-run factual programming was commissioned from the independent sector?
- a. Please provide financial and calendar years
- 12) For each of the past three years, what percentage of first-run children's programming was commissioned from the independent sector?
- a. Please provide financial and calendar years?

Answer:

Please note that the answers to questions 1 to 12 exclude news and current affairs programs, hours and expenditure. Also note that the ABC records and provides this information by financial year only. It would require additional time and resources to provide this information on a calendar year basis.

1)

Drama Total (ACMA Definition*) expenditure (excluding labour)			
Content Unit	2014/15	2015/16	2016/17
Drama (incl Indigenous Drama)	\$35,732,704	\$36,247,667	\$27,263,228
Narrative Comedy	\$8,023,257	\$8,965,436	\$9,390,957
Drama Total	\$43,755,961	\$45,213,102	\$36,654,185

2)

Children's expenditure (excluding labour)			
Content Unit	2014/15	2015/16	2016/17
Childrens	\$16,672,739	\$16,991,480	\$13,499,940
Grand Total	\$16,672,739	\$16,991,480	\$13,499,940

- 3) The expenditure for the first-run Australian comedy programming has been outlined in the answer to question 1.

4)

Factual and Documentaries expenditure (excluding labour)			
Content Unit	2014/15	2015/16	2016/17
Documentaries	\$6,811,584	\$8,766,546	\$10,278,150
Factual	\$2,516,237	\$2,838,850	\$5,546,235
Grand Total	\$9,327,822	\$11,605,396	\$15,824,384

5)

Drama Total (ACMA Definition*) First Run Australian Hours Broadcast			
Content Unit	2014/15**	2015/16	2016/17
Drama (incl Indigenous Drama)	51	45	40
Narrative Comedy	24	22	20
Drama Total	75	67	60

**Please note that 2014/15 does not include iview programming.

Senate Standing Committee on Environment and Communications

Answers to Senate Estimates Questions on Notice

Additional Estimates February 2018

Communications Portfolio

Australian Broadcasting Corporation

6)

Childrens First Run Australian Linear Hours Broadcast			
Content Unit	2014/15	2015/16	2016/17
Childrens	374	316	342
Grand Total	374	316	342

**Australian Premiere hours on ABC3 may include content produced by News*

7)

Factual First Run Australian Linear Hours Broadcast			
Content Unit	2014/15	2015/16	2016/17
Documentary	56	43	49
Factual	168	89	61
Grand Total	224	132	110

8) The total hours of first-run Australian comedy programming has been outlined in the answer to question 5.

9) The percentage of first-run comedy programming commissioned with the independent sector has been outlined in the answer to question 10.

10)

Drama Total (ACMA Definition*) Commissioned Linear - External Programs (Incl Indigenous Drama & Narrative Comedy)		
Fin. Yr Comm'd	Total No. of Programs	Total TV Hours
2016/17	100%	100%
2015/16	100%	100%
2014/15	100%	100%

Factual Commissioned Linear - External Programs		
Fin. Yr Comm'd	Total No. of Programs	Total TV Hours
2016/17	11%	1%
2015/16	0%	0%
2014/15	0%	0%

11)

Documentary Commissioned Linear - External Programs		
Fin. Yr Comm'd	Total No. of Programs	Total TV Hours
2016/17	92%	98%
2015/16	97%	99%
2014/15	93%	96%

Senate Standing Committee on Environment and Communications

Answers to Senate Estimates Questions on Notice

Additional Estimates February 2018

Communications Portfolio

Australian Broadcasting Corporation

12).

Children's Commissioned Linear - External Programs		
Fin. Yr Comm'd	Total No. of Programs	Total TV Hours
2016/17	68%	17%
2015/16	59%	29%
2014/15	50%	13%

Footnote

*The ACMA definition of an Australian drama program from page 5, Part 2, Section 6 from the Broadcasting Services (Australian Content) Standard 2016 states an *Australian drama program*:

(a) means an Australian program that:

(i) has a fully scripted screenplay in which the dramatic elements of character, theme and plot are introduced and developed to form a narrative structure; or

(ii) has a partially scripted screenplay in which the dramatic elements of character, theme and plot are introduced and developed to form a narrative structure and has actors delivering improvised dialogue that is based on a script outline or outlines developed by a writer or writers; or

(iii) has actors delivering improvised dialogue that is based on a script outline or outlines, developed by a writer or writers, in which the dramatic elements of character, theme and plot are introduced and developed to form a narrative structure; and

(b) includes a fully scripted sketch comedy program, animated drama or dramatised documentary;

(c) does not include:

(i) a program, or a segment of a program, that involves the incidental use of actors; or

(ii) an Australian children's drama.

Question on notice no. 82

Portfolio question number: 82

2017-18 Additional estimates

Environment and Communications Committee, Communications and the Arts Portfolio

Senator Sarah Hanson-Young: asked the Special Broadcasting Service Corporation on 27 February 2018—

What has been the expenditure on first-run Australian drama programs for each of the past three years? Please provide financial and calendar years

What has been the expenditure on first-run Australian childrens programming for each of the past three years? Please provide financial and calendar years

What has been the expenditure on first-run Australian comedy programming for each of the past three years? Please provide financial and calendar years

What has been the expenditure on first-run Australian factual programming for each of the past three years? Please provide financial and calendar years

How many hours of first-run Australian drama were broadcast for each for the past three years? Please provide financial and calendar years

How many hours of first-run Australian childrens programming were broadcast for each of the past three years? Please provide financial and calendar years

How many hours of first-run Australian factual programming were broadcast for each of the past three years? Please provide financial and calendar years

How many hours of first-run Australian comedy programming were broadcast for each of the past three years? Please provide financial and calendar years

For each of the past three years, what percentage of first-run comedy programming was commissioned from the independent sector? Please provide financial and calendar years

For each of the past three years, what percentage of first-run drama programming was commissioned from the independent sector? Please provide financial and calendar years

For each of the past three years, what proportion of first-run factual programming was commissioned from the independent sector? Please provide financial and calendar years

For each of the past three years, what percentage of first-run childrens programming was commissioned from the independent sector? Please provide financial and calendar years

Answer —

1. This information is commercial-in-confidence.
2. This information is commercial-in-confidence.
3. This information is commercial-in-confidence.
4. This information is commercial-in-confidence.
5. This information is only available for financial years.
 - o 2016-17: 4 hours
 - o 2015-16: 7 hours
 - o 2014-15: 0 hours
6. This information is only available for financial years.
 - o 2016-17: 3 hours
 - o 2015-16: 5 hours
 - o 2014-15: 20 hours
7. This information is only available for financial years. It includes documentary and food, and excludes news and current affairs.
 - o 2016-17: 99 hours
 - o 2015-16: 87 hours
 - o 2014-15: 151 hours 8.

This information includes comedy and entertainment hours.

- o 2016-17: 118 hours
 - o 2015-16: 217 hours
 - o 2014-15: 93 hours
- 9.

- o 2016-17: 91%

- o 2015-16: 95%

- o 2014-15: 80%

10.

- o 2016-17: 100%

- o 2015-16: 100%

- o 2014-15: N/A

11.

- o 2016-17: 91%

- o 2015-16: 68%

- o 2014-15: 74%

12.

- o 2016-17: 100%

- o 2015-16: 100%

- o 2014-15: 100%