Australian content review

Submission – The establishment of an Australian Screen Content Fund – a phased incentive based model to achieve the policy objectives of the review

Stuart Cunningham [1] and Ian McGill[2]

Please contact the authors at s.cunningham@qut.edu.au and [redacted] (Cunningham) and Ian.McGill@allens.com.au and 02 9230 4893 (McGill).

Introduction

The Australian content review was announced by Minister Fifield in mid-May. It is designed to review the complex web of support measures in place for producing and delivering Australian and children's screen content, to determine if these remain fit for purpose in the new, multi-platform environment that has emerged since these measures were established.

Speaking at the commencement of the review in a speech to the Australian Content Conversation, Minister Fifield struck some strong notes: there are 'gaping holes' in Australian policy, there is a significant turning away from linear viewing, there needs to be a walled garden for kids, there is a steady decline in advertising revenue for FTA broadcasters, a precipitous decline in advertising revenue for newspapers, and a spectacular growth in advertising share for online. There needs to be significant investment in new business models. The question of 'high-quality' Australian content is significant, because quality including, we think, innovative and experimental content is the best way of achieving the cultural outcomes that we should be seeking from a significant and sustainable increase in investment in Australian content.

In this submission, when we refer to Australian content, we mean the commonly accepted categories of feature film, scripted drama and comedy, documentary, and children's and pre-school programming, but we also include innovative and original new scripted content, including small screen content and what the review refers to as 'user generated content', but which we call 'social media entertainment'. This is content uploaded to the main digital platforms (YouTube, Facebook, Instagram, Snapchat, Twitter) for which creators receive remuneration through programmatic advertising, branded content, influencer marketing, merchandising, licensing deals, and live appearances and, through the exploitation of these revenue sources, are building new business models for the production of Australian content.

We understand that there are three core policy objectives to guide the review:

- securing quality content to promote Australian identity and culture
- securing quality Australian content for children
- driving more sustainable Australian content industries.

---

[1] Distinguished Professor, Media and Communications, Queensland University of Technology. The views expressed in this submission are personal.

[2] Partner, Allens and non-executive director, Documentary Australia Foundation Pty Limited as trustee for the Documentary Australia Foundation Trust (**DAF**), which administers the public fund known as the Documentary Australia Foundation Donations Fund. The views expressed in this submission are personal and do not represent the views of any client of Allens or of DAF.

We further understand that if government intervention is warranted, it should follow these policy principles:

- service clearly identified public policy goals
- be clear, simple and transparent
- be platform agnostic
- produce benefits that outweigh the costs
- be flexible enough to cope with changing environments.

Background

The long history of Australian content regulation has had the characteristics of a 'regulatory settlement' through which cultural (Australian voices in the most important forms of popular culture reaching the largest proportions of the population) and industry (the capacity of Australian producers to meet the demand for such voices) objectives have been met in part through broadcasting content regulation of commercial television and radio. Additionally, substantial direct funding to public broadcasters, tax offsets, and screen cultural agency funding are core components of the current ecology. This approach has seen commercial broadcasting system having to consent to being regulated to deliver a cultural dividend in return for a quasi-protected oligopoly of long standing. This model of regulation has been characterised by political scientist Hugh Emy[3] as 'protection all around', or the *quid pro quo* approach.

This 'regulatory settlement', which has developed over many decades since the 1960s, has been eroded by demographic, cultural and technological change. The first point of erosion is the multiservice, multiplatform, multichannel options now available, thus undermining the technological ground of spectrum scarcity that raised not only regulatory but technical barriers to entry into broadcasting.

Demographic and cultural change includes a generation or more that might be considered a lost audience for broadcasting, that is now firmly not oriented to linear broadcasting and may well be lost forever. This rate of erosion is increasing and may be reaching a tipping point in terms, particularly, of the loss of broadcasting and other established media advertising revenue that is being captured by Google and Facebook.

Overwhelmingly, however, technological change is rendering technology-specific regulation (as well as subsidy tied to specific distribution technologies such as broadcasting) less relevant, both practically and in principle.

Our proposal in the context of the review's policy objectives

Our preference is to adopt, in a carefully transitioned way, an incentives-based model for the production of Australian content which depends on a public-private funds development partnership, under the umbrella of a new converged Australian Screen Content Fund. We seek to develop both sustainable funding, and sustainable funding models, from government, the corporate sector, from philanthropists and from ordinary Australians, who, for example, may wish to crowd fund an innovative new project in Australian content. The key new elements in this proposal are to attract

[3] Hugh Emy, Remaking Australia: The State, the Market and Australia's Future, Allen & Unwin, Sydney, 1993, p. 60

into the screen content space a new level of involvement of funds management expertise designed to grow the pie, while also making the pie increasingly contestable, driving future-oriented, innovative content strategies.

Depending on the amount of initial Commonwealth grant to the Australian Content Fund, and the amount of corporate funding it is able to attract, the Fund is designed to be substantially self-perpetuating through expert investment strategies and thus, over time, to produce benefits that outweigh the cost of its administration.

Our approach is to assume, that if the honey pot of funding for Australian content is sufficiently large with fair and transparent access rules and commercially reasonable terms of trade, that all existing and future screen platforms, and the Australian content production sector, would be interested in developing, producing, broadcasting or streaming Australian content, where that content has been effectively partially subsidised by the Australian Screen Content Fund. We prefer carrots, rather than sticks.

We understand that a key objective of this review will be to identify *sustainable* policies that support the ongoing availability of Australian and children's content to domestic and international audiences *irrespective of the platform*.

In a globally connected, on-demand world we agree that it remains vital that Australian stories are told by and are heard by Australians, in particular our children, and across the world. Some of the current production and distribution incentives were developed nearly a decade ago and *do not fully reflect changing consumption patterns, methods of delivery or business models*.

By aligning production incentives with audience demand we can assist local content production and distribution industries' sustainability whilst contributing both to our cultural identity and, as a necessary by product, economic outcomes including the digital jobs of the future. With the transition arrangements we propose, the Review can give due recognition to the complex economic ecosystem that has developed over many years in the Australian broadcasting and content production sector. A new approach should not throw out any babies with the bathwater.

Ascertaining whether the three objectives are being met would be addressed through traditional measures of hours of programming made, audience ratings and critical acclaim, economic contribution measures, employment trends in the Australian content production industry, but would also include critical engagement measures such as reaching audiences lost to broadcasting, quality as well as scale of reach. The Bureau of Communications and Arts Research could be tasked with monitoring the operations of the Australian Screen Content Fund and report in detail on its impact in achieving the three policy objectives of the review.

Our proposal

- Maintain current Australian content regulation and production measures during a reasonable transition period, to measure whether the proposed incentive approach through the operation of the Australian Screen Content Fund is shown to have a beneficial impact on the financing and production of new Australian content.
- A transition regime will also enable the potential impact of our proposal under the Australia-United States of America Free Trade Agreement (AUSFTA) to be determined. For example, we are conscious of the stated ratchet effect, under Annex I of the AUSFTA, that if an

existing law or policy is made less regulatory, it must remain at the lower level and cannot be changed back by a future Government.[4]

- In terms of production incentives, there seems no reason not to immediately harmonise the producer offsets at 40% of qualifying Australian production expenditure and to move to immediately modernise the offsets as recently recommended by the Screen Producer's Association.[5]
- During the transition period:
  - establish the funding and governance model for a new Australian screen content fund (**Australian Screen Content Fund**), to be administered by a new board of trustees or by Screen Australia, but reconstituted as a board of trustees;
  - the Australian Content Fund trustees would recruit high quality fund management expertise to connect with the screen production sector;
  - establish the Australian Content Fund access rules, including terms of trade for investment by the Australian Content Fund in new Australian content – we see no reason in principle why the broadcasters are not entitled to access the fund, should they wish to commission, in house or through co-productions with independent producers, Australian content;
  - harmonise the existing quota and expenditure requirements, to ensure that access to the Australian Content Fund during the transition period is "credited" to the existing distribution measure quotas and expenditure requirements.
- At the end of the transition period, if satisfactory benchmarks (to be determined) of production and reception of quality and innovative Australian content are achieved, move to review existing Australian content quotas for free to air television and investment requirements for subscription television. It may be possible, for example, at the end of the transition period, on an objective evidence basis, to move entirely from quotas to a uniform investment requirement for all broadcasters, or, more controversially repeal the quotas and the investment requirements. We see no reason why that can could not be kicked down the road, for the present.
- The Australian Screen Content Fund to be established as a public private partnership, under the sponsorship of the Commonwealth, with funding as follows:
  - an initial Commonwealth grant to establish the Australian Screen Content Fund to be invested and administered by the trustees of the Australian Screen Content Fund, along similar lines to the Future Fund funds;
  - during, or by the end of the transition period, by:
    - diversion of existing annual Commonwealth funding for screen production of Screen Australia to the Australian Screen Content Fund;
    - diversion of existing quadrennial Commonwealth funding for the national broadcasters attributable to Australian content production to the Australian Screen Content Fund (where the national broadcasters have a right to access the Australian Screen Content Fund for program subsidy on a level playing field with other calls on the fund); and

[4] See submission to the Senate Select Committee on the Australia – United States of America Free Trade Agreement in relation to the Audiovisual Sector by Michael Frankel & Co Solicitors, per Greg Duffy.
[5] See Screen Producers Australia's 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.

    - by the payment by the Commonwealth to the Australian Screen Content Fund of an amount representing the annual radiocommunications licence fees paid by the commercial television licences;
    - the issuance of units or, potentially, social benefit bonds[6], to sophisticated investors to fund particular sub-funds of the Australian Screen Content Fund focussed on a particular Australian content genre seen to be of significant Australian cultural benefit;
  - contribution by public and private corporations, philanthropists, public ancillary funds and individuals by way of donation to a series of tax deductible charitable funds focussed on the particular Australian content genres as represented in the divisions of the Fund.
- In terms of structure, we suggest that the Australian Screen Content Fund be administered by a board of trustees, and that the fund be an umbrella fund, with the Australian Screen Content Fund to have a number of divisions, to enable transparent funding and fundraising for each genre of Australian content.
- The sub-funds or divisions of the Australian Screen Content Fund may have distinct and fit-for-purpose access rules and terms of trade, as befits the genre of the content and the market and distribution channels the content seeks to serve.
- The Fund's divisions could include:
  - an independent journalism division (folding in elements of the $60m fund for small journalism businesses that was part of the package to pass the media reform bill in the Senate)
  - an grassroots innovation division (connecting to the dynamic online content creation small business sector facilitated by Google/YouTube and other major digital platforms which we have included in our definition of Australian content),
  - an Indigenous content division,
  - divisions supporting the 'market failure' genre currently the focus of both subsidy and the points system component of the Australian content regulations) which include social documentary, feature film, television series and serials, and children's content.
- The current indirect subsidies for Australian content through the taxation incentives known as the Australian Screen Production Incentive (including the three offsets, the producer offset, the location offset and the post, digital and visual offset) could be examined, and if not fit for purpose, repealed at the end of the transition period, with the notional amount of Commonwealth contribution by way of tax incentives to be replaced by annual direct subsidy, and direct Commonwealth contribution to the Australian Screen Content Fund.
- Access to the fund, and the terms of the funding for Australian content, will be developed during the transition period, but we should be clear that access to the Australian content fund could be open to all who wish to invest in, and distribute, Australian content. There would be no reason why an OTT provider such as Netflix would be precluded from pitching

---

[6] A relatively new phenomenon to emerge in debt capital markets, social benefit bonds are an innovative funding mechanism to privately fund programs and initiatives aimed at improving social outcomes, usually for disadvantaged groups in society, through the reduced future cost of the poor social outcomes they replace. It would be unique to propose such bonds in this context: however the bonds are intended to encourage innovation through the sharing of risks associated with developing new approaches to the delivery of government services, and provide a mechanism to maximise the social and economic benefit of philanthropic investment. We see no reason why creative and original thinking could be applied here to encourage private investment in an area of predominantly Commonwealth subisidy.

an Australian content production to the fund, just as any Australian broadcaster, the national broadcasters or any independent producer could do so. The Australian Screen Content Fund will establish funding rules, including what proportion of a budget the fund will contribute to and on what terms. These could include an expectation of reciprocity on the part of larger stakeholders: investment in the Fund gives rights of access to the Fund.

If the Fund was seen to be working well, attracting new sources of funding for Australian content, and engaging new viewerships and helping to support innovative new voices and new business models, it would be expected that platforms and streaming services would also invest.

Conclusion

In making this recommendation, we hope to secure some common ground for major reform. Investment models are something that most stakeholders can agree in principle on, while more or less regulation is something very few can agree on. We look to grow the pie, to stimulate the screen production sector through access to high-quality funds management expertise, and to draw expert funds managers and creative funding methodologies into supporting the sector. The proposal is fully technology neutral, and stimulates contestability and innovation. We see the synergies that could be established across the divisions as highly innovative. In essence, culture is too important to be left only to cultural experts. This is an opportunity for business expertise to structurally contribute to the sustainability of cultural production, rather than it be a relationship mediated mostly through philanthropy.