ASTRA Subscription Media Australia

Submission to the Senate Environment and Communications References Committee Inquiry into the Broadcasting Legislation Amendment (2021 Measures No.1) Bill 2021

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1. Executive Summary

- ASTRA welcomes the opportunity to provide a submission to the Senate Environment and Communications References Committee Inquiry into the Broadcasting Legislation Amendment (2021 Measures No.1) Bill 2021 (the **Bill**).

- The emergence of digital technology and increased competition from unregulated streaming services has resulted in audience viewing habits becoming increasingly fragmented. The current regulatory system does not adequately reflect this structural change in the media environment and the move to platform neutral viewing, resulting in ASTRA members not having the required flexibility to effectively compete for viewers' attention.

- Furthermore, subscription television (**STV**) broadcasting licensees and channel providers remain the most heavily regulated media businesses in Australia. The Australian content expenditure obligation and significant captioning requirements are some examples of the extensive regulation which our members must factor into their day-to-day operations.

- ASTRA strongly supports the urgent passage of the Bill on the basis that it:

    - is part of a broader package of reforms for the local production and broadcasting sector which were announced by the Government in September 2020[1] - and the changes announced in the package for other sectors including the free-to-air television (**FTA**) sector have already been implemented; and

    - assists to move media regulation towards platform neutral regulation, allowing the STV industry to compete closer to a level playing field with both local and international subscription services that are currently unregulated.

- Although the Bill reduces the expenditure required by subscription television broadcasting licensees on new eligible drama expenditure, it also includes a transitional provision that means that STV licensees are unable to carry forward our expected surplus spend of many millions of dollars from FY21 to FY22. The ability to carry forward a surplus is part of the current scheme however has been removed for FY22. In addition to other reforms available to the production sector as part of the Government's September 2020 announcement, this represents a significant benefit for the production industry

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[1] https://www.paulfletcher.com.au/sites/default/files/attachments/New%20funding%20in%20Budget%20to%20deliver%20Australian%20screen%20content.pdf; https://www.communications.gov.au/what-we-do/television/modernising-australian-screen-content-settings/qa

as STV licensees will be required to further invest in Australian drama content in view of this change.

2. ASTRA

ASTRA is the peak body representing the subscription television and radio industry in Australia. ASTRA's members include television operators, independent content companies, technology companies and the industries that support them. ASTRA manages codes of practice and represents the industry with regulators and Government.

ASTRA was formed in 1997 with the purpose of providing businesses an opportunity to come together to represent the subscription broadcasting industry. ASTRA's membership is varied, and members range from subscription-funded distribution platforms that deliver screen-based content over cable, satellite and the internet, to independent content providers, media sales agencies, technology and communications companies as well as small domestic channel groups and community-based organisations.

3. Subscription television in Australia

The subscription television industry is a significant cultural and economic contributor to the film and television production sector in Australia.

Subscription television supports Australian drama productions, including Picnic at Hanging Rock, Wentworth, The Kettering Incident, and A Place to Call Home, by providing a platform to being seen and sold to international markets, including the USA. Between 2014/2015 and 2018/2019 the subscription television sector spent $218 million on Australian drama programs to comply with its obligations under the NEDE scheme.[2]

However, the STV industry is also impacted by changing viewership patterns, ad revenue decline and competition from large internet services, including social media platforms and SVOD services.

Australian adults are watching more video content online. In 2019, 83% of adults had watched online video content in the last 6 months. As of June 2020, this percentage increased to 89%. Almost everyone aged 18 to 44-years consumes video content online, while a significant proportion of adults aged 65 and over are making the transition.[3]

Australia has seen an influx of global competitors in the current market. Large international competitors such as Amazon and Disney+ sit mainly in the SVOD space and have the backing of large global companies which leads to a greater overall market share and low business costs vis-à-vis domestic players.

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[2] https://www.acma.gov.au/spending-and-targets-0
[3] Australian Communications and Media Authority (2020)

STV has worked intensively in recent years to create a wide range of consumer options, ensuring the best mix of local and international content is available in a timely way, on a range of devices, and at attractive price points.

However, the turbulent competitive landscape is compounded by the lack of regulation of international streaming services and other new digital entrants in the broadcasting space including telco providers. With no quotas, expenditure obligations or minimum content requirements to adhere to, global operators are free to operate unencumbered by the same constraints faced by Australian subscription television licensees and channel providers.

ASTRA's members remain some of the most highly regulated in the media industry which impacts their ability to compete and to compete on a level playing field. Existing Government interventions into the production sector were predicated on certain industry conditions and viewer choice and behaviour. Given the level of disruption currently faced by the industry, it is sensible to review Government interventions to ensure they continue to meet the desired objectives.

We argue that it is only through holistic and platform neutral regulatory reform that broadcasters can achieve competitive parity, which will have flow on economic and cultural benefits for the Australian content industry and audiences. We recognise that our members bear the responsibility to innovate and respond to market conditions. We suggest that the Government, too, plays a critical role to ensure that healthy, fair competition is preserved, and regulatory conditions remain fit for purpose. We argue that removal of redundant and anachronistic regulation is the most effective method for achieving constructive regulatory reform.

This submission outlines how the provisions in the Bill which relate to subscription television go some way towards remedying these deficiencies in media regulation and why they should be passed.

4. NEDE Scheme Amendments

This section outlines the proposed amendments to the new eligible drama expenditure (**NEDE**) scheme and why ASTRA supports their immediate implementation.

<u>NEDE spend obligation</u>

The subscription media industry is committed to producing and providing high quality and diverse Australian content, producing thousands of hours of Australian content each year across all program genres.

The NEDE scheme currently mandates that investment in new Australian drama must represent at least 10% of program expenditure for STV drama channels. It is one of the most restrictive pieces of regulation for Australian subscription television broadcasting licensees and channel providers and ASTRA supports the reduction of the scheme's total spend obligation.

The NEDE spend obligation currently applies to nearly 30 individual channels offered on the Foxtel platform. Between 2014/2015 and 2018/2019 the subscription television sector spent $218 million on Australian drama programs to comply with its obligations under the NEDE scheme.[4]

In addition to requiring a specific figure is spent on content, it also specifies a narrow genre of content on which it is required to be spent as well as containing extremely strict eligibility conditions as to what qualifies as an Australian drama program.

The Bill proposes to reduce the NEDE spend obligation from 10% to 5%.

<u>Part of broader package of reforms</u>

Our view is that the amendments in the Bill which relate to the reduction in NEDE spend are part of a broader reform package announced by the Government in September 2020[5] to assist the local film and television sector, following the Government's public *Supporting Australian Stories on our Screens* options paper and consultation process. It would therefore be highly inequitable if the NEDE reforms contained in the Bill are not legislated.

It was anticipated that these amendments would be effective from 1 July 2021 to ensure continuity of the reduction that was first implemented by the Government as part of the COVID relief package announced in April 2020.

As part of this package the FTA sector has already been granted substantial relief and are no longer be bound by the requirement to air at least 260 hours of children's programs and 130 hours of pre-school programs annually. Instead, via the *Broadcasting Services (Australian Content and Children's Television) Standards 2020* the FTA sector has been granted more flexibility to choose the relevant mix of Australian drama, children's and documentary content to meet their quotas.

The package also granted considerable support to the local production sector including additional funding of:

- $30 million to Screen Australia over two years from 2021–22 for funding for Australian drama, documentary and children's screen content across film and television;
- $3 million to Screen Australia over three years from 2020-21 to support a Screen Writing and Script Development Fund; and
- $20 million over two years from 2021-22 to the ACTF to invest in the development, production and distribution of Australian children's content.

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[4] https://www.acma.gov.au/spending-and-targets-0
[5] https://minister.infrastructure.gov.au/fletcher/media-release/new-funding-budget-deliver-australian-screen-content-0

Further, the Government's announcement also included amendments to the Australian Screen Production Incentive. The proposed legislation to implement this package was released for consultation on 21 May 2021 and ensures that the production sector is supported via budgetary reforms including increasing the Producer Offset rate for non-feature film productions from 20 per cent to 30 per cent and removing the 65 commercial hour episode cap for drama series.

The residual of the Government's announcement is the commitment to a legislated reduction in the Australian content spend obligation on selected subscription television channels from ten per cent to five per cent. One of the purposes of this Bill is to ensure that this portion of the Government's broader relief package is implemented, so that all participants in the Australian film and television production sector are granted support.

We therefore argue that the NEDE scheme amendments should not be viewed in isolation but as one part of a broader reform package underway for the entire local film and television sector.

Competitive neutrality and greater flexibility

The NEDE scheme amendments proposed by the Bill are significant to the STV sector and in addition to assisting our members respond flexibility to changing market conditions, will also ensure regulatory parity between commercial and subscription broadcasters with respect to local content investment requirements.

This is supported by the following statement from the Government's Supporting Australian Stories discussion paper:

As the ACCC's DPI report indicated, continuing to heavily regulate a sector under pressure while allowing a booming sector to remain unregulated does not represent a level-playing field. Urgent consideration should therefore be given to updating government support measures and regulatory interventions to appropriately reflect the contemporary context.[6]

ASTRA argues that passage of the Bill will ensure that the STV industry also receives their portion of comparative relief. The reduction in the STV NEDE spend obligation allows for flexibility of investment on Australian content across a variety of genres. The reduction of the NEDE scheme spend to 5% is an effective mechanism to improve STV's ability to compete.

We also argue that if the FTA sector were to transition to the new licence model proposed by the Media Reform Green Paper, and they no longer have content quotas on their multi-channels, then this would press the case for passage of the Bill even further.

Reduction of the NEDE spend obligation will simply allow subscription

[6] Supporting Australian Stories on our Screens options paper, March 2020, p 9.

television broadcasters and channel providers the opportunity to adapt and base funding and investment efforts on existing environmental factors, which will also benefit local producers.

Reduction of the NEDE spend obligation will also allow for flexibility of investment on Australian content across a variety of genres. As highlighted above, subscription television has proven success with Australian drama and the removal of the NEDE scheme does not mean that audiences will no longer see themselves represented on our screens, it simply provides STV with more freedom to compete in the way and manner we see fit and in accordance with audience demand.

This freedom will have flow-on benefits for the local production sector as we will be able to respond more flexibly to audience tastes by developing local content with local production houses. STV works with a wide range of external independent production companies to produce its local content, and in doing so supports creative experts who also work across the Australian film and television industry. Reducing restrictive regulation such as the NEDE scheme will ensure that this collaboration continues.

We also note that the Bill includes a transitional provision that means that STV licensees are unable to carry forward our expected surplus spend of many millions of dollars from FY21 to FY22. The ability to carry forward a surplus is part of the current scheme however has been removed for FY22. This represents a significant benefit for the production industry as licensees will be required to further invest in Australian drama content in view of this change.

5. Captioning Amendments

This section outlines the proposed amendments to STV captioning requirements in the BSA and the reasons ASTRA supports their immediate implementation.

<u>STV captioning rules</u>

The Bill does not amend STV captioning obligations; the Bill introduces provisions to move the subscription television captioning rules from the BSA into a disallowable Ministerial instrument.

For reference purposes, captioning rules for subscription television are onerous, complex and out of date, and place a disproportionate burden on subscription television compared to the requirements faced by the free-to-air channels.

Key elements of these rules are listed below:

- STV captioning obligations increase each financial year, both in terms of the number of channels required to caption and level at which those channels must caption.

- Captioning targets are particularly stringent and increase at a uniform rate of 5% per annum across each channel until they reach 100%.
- By 2022, all channels will be required to caption, subject to any individual exemptions (in FY20 more than 90 channels on the Foxtel platform were required to caption).
- By comparison, the FTAs will only have to caption 75% of their main channel (100% of 6am to midnight) with no meaningful obligation on their multi-channels (other than a requirement to caption repeats of previously captioned programs).

The captioning rules introduced in 2012 were reflective of industry conditions at the time, before the impact of increased competition from international streaming giants and the major digital platforms was felt.

<u>Disparity in captioning regulation</u>

We argue that moving the subscription television captioning rules from the BSA into a disallowable Ministerial instrument is the first step towards providing some regulatory relief to STV licensees, without diminishing their commitment to captioning. ASTRA's view is that the amendment will ultimately allow for some small adjustments to the current rules and assist in supporting the move to a more sustainable operating model for the subscription television broadcasting industry.

The current captioning rules for subscription television place a disproportionate regulatory and technical burden on the subscription television industry. The current scope of STV captioning regulation also has an impact on the viability of small and niche STV channels which have more limited resources than their FTA multi-channel counterparts.

The STV industry is committed to supporting hearing impaired customers, however the ongoing increasing captioning obligation is inconsistent with requirements imposed on other television industry players. These obligations are particularly onerous on small niche channel providers with very low audience share.

If passed, the Bill will allow the Government more flexibility in making captioning rules for subscription television and potentially alleviate their regulatory burden on subscription broadcasters, without impacting the current level of captioning provided on subscription television. For reference, in FY20 close to 550,000 hours across close to 100 channels were captioned on the Foxtel platform.

The STV captioning obligations of the STV industry are significant compared to the obligations held by the FTA channels and streaming services. Whilst STV licensee are required to eventually caption 100% of its content across 100% of their channels:

- FTA networks are only obliged to caption their main channel for 18 hours a day and News and Current Affairs programmes that may appear on their multi-channels and repeats where the original programming had captions; and

- Streaming services are not subject to captioning regulations at all.

FTA multi-channels escape substantive captioning obligations while STV channels are regulated for the same genres and, per the below example, in many cases with much lower audience shares. In FY 2019, STV channels such as Premiere Movies was required to caption 95% of its content, despite having an audience approximately one third the size of comparable channel 7Flix which was (other than repeats) ostensibly exempt from captioning.

Captioning is also a subscription television licence condition under the BSA, meaning that if a licensee does not meet its captioning requirements for any given year, it is in breach of one of its licence conditions. This is in direct contrast to platforms such as Netflix which while providing some captioning, faces no regulatory consequences for any lapses or errors.

This Bill is therefore a very important step in ensuring some regulatory relief is provided to STV participants, without impacting their commitment to captioning. As mentioned above, we understand that the form of the updated captioning rules will be subject to extensive public consultation before they are finalised. However, the urgency of captioning reform is now reaching a critical level particularly as in FY23 all channels will need to caption irrespective of audience size and technical difficulties associated with this.