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Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Secretary

Broadcasting Legislation Amendment (2021 Measures) Bill No.1 2021

We refer to the legislation above and welcome the opportunity to make a submission to the Committee's inquiry into the Bill. Our comments are restricted to Schedule 1 of the Bill, relating to the New Eligible Drama Expenditure (NEDE) Scheme for subscription television.

Screen Producers Australia (SPA) was formed by the screen industry to represent independent producers across a diverse production slate of feature film, television and interactive content. Relevantly for the purposes of this inquiry, our members have engaged extensively with subscription television on significant drama projects over the years.

The independent production sector enjoys a close and productive relationship with the subscription television industry, both individual channel providers and platforms, this having developed over the last two decades in part through the development of the NEDE Scheme. We recognise that these partnerships have created many high quality screen productions for the benefit of the industry as a whole as well as for Australian and global audiences.

SPA does not support Schedule 1 of the Bill. The Bill will halve Foxtel's current Australian content obligations. The downgrading of what was already a modest obligation to spend 10% of drama channels' program budgets on Australian drama will damage the local independent production sector and will harm Foxtel customers' access to Australian voices and stories in an area of narrative content that requires ongoing regulatory interventions (drama). We also note that the obligation has to date been acquitted across adult and children's content and that the proposed reduction will therefore impact on the critically vulnerable genre of children's content which has recently been substantially deregulated.

The Bill will also forgive any historical underspends accrued to 1 July 2021, which we do not support.

If the NEDE scheme is to be revised, SPA submits that this should occur following the determination of the regulatory scheme for competing streaming services and should only occur after a thorough review that considers possible extension of the NEDE scheme.

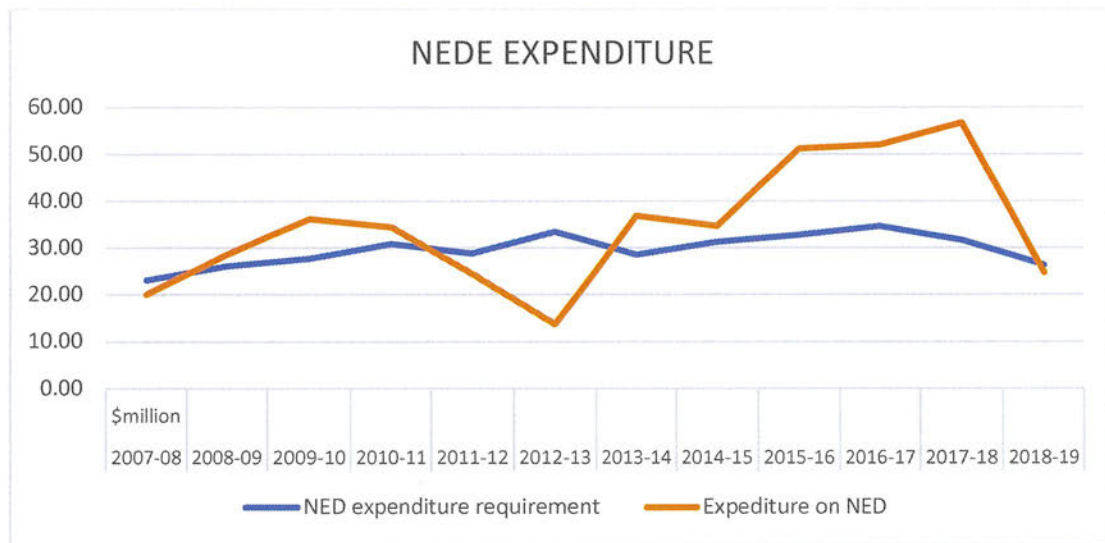
Background

Under the NEDE scheme, subscription broadcasting licensees (primarily Foxtel) are required to spend at least 10% of total program expenditure for each drama channel on new Australian drama programs.

There is an ability under the scheme to flexibly run shortfalls or bring excess expenditure forward from previous years.

Each year, the obligation results in approximately \$25-30 million in investment in Australian drama across Foxtel owned and operated channels (eg, Binge, Box Sets, Fox 8, Fox Classics, Foxtel Movies, Showcase), to independent channels (eg, BBC First, Boomerang, CBeebies, Disney Channel, Disney Junior, Disney XD, FX, Nickelodeon, Nick Jr, Turner Classic Movies, UKTV and Universal). This range of channel involvement results in a diversity of commissioning.

Being a percentage requirement, the obligation naturally scales up and down with changing business conditions, as is demonstrated in the graph below.



Source: ACMA Annual Reports and compliance results

The scheme has generated such notable and award-winning titles as *Top of the Lake*, *Hacksaw Ridge*, *Lion*, *Love My Way*, *Wentworth*, *Devil's Playground*, *Deadline Gallipoli*, *Fight Season*, *Mr Inbetween*, *Picnic at Hanging Rock*, *Secret City* and *Tangle*.

Likely impact of proposed reduction in obligation

Australian drama remains a critical genre from a cultural perspective and continues to resonate with audiences. SPA is concerned that the proposed cut to the NEDE rate of obligation will substantially harm subscription television audiences, who will lose access to high quality Australian narrative content.

It is reasonably certain that a reduction in the regulated rate of obligation will lead to a reduction in the amount of new Australian drama available to subscription television audiences.

In its submission to the *Supporting Australian Stories on Our Screens* Options Paper, Foxtel emphasizes that deregulation will “allow for flexibility of investment”, which can only be understood as signalling a desire to move investment away from Australian drama and in to other areas of the business.

We also note that in the most recently published compliance results, the subscription television industry's spend on new eligible drama was at or about the level of the obligation, which strongly suggests the obligation is the determining factor in providing the content.¹

We also note the likely impact on investment and employment in the independent production sector arising from any reduction in subscription television drama obligations. The sector is also facing uncertainty and damage from the decision to significantly reduce Australian content quotas on commercial free-to-air television.

Broader reform landscape

We note that the NEDE reforms in this Bill sit in a context of ongoing review and reform of Australian content support measures:

- In April 2020, Minister Fletcher released the *Supporting Australian Stories on Our Screens* Options Paper, which invited submissions on the appropriate settings for Australian content regulation and funding support.²
- In September 2020, Minister Fletcher announced the Government's response to that consultation, which included changes to direct funding and tax support measures, as well as deregulation of commercial free-to-air television and subscription television Australian content obligations.³
- In November 2020, Minister Fletcher released the *Media Reform Green Paper*, which included proposals to introduce Australian content regulations on unregulated streaming platforms.⁴
- On 1 January 2021, the new regulatory framework for Australian content on commercial free-to-air television commenced operation.⁵
- In May 2021, submissions to the *Media Reform Green Paper* closed.

A key theme over the last 12 months of review and reform has been the regulatory imbalance that exists between traditional modes of content distribution (broadcast television) and new streaming services (eg, Netflix, Disney+, Stan), who face no Australian content regulation. Indeed, Foxtel has drawn attention to the imbalance in regulation between its platform (subject to the NEDE scheme) and the absence of regulation on streaming services.

SPA acknowledges this regulatory imbalance and agrees it needs to be addressed. However, we do not agree that the appropriate response is to substantially reduce regulation on traditional platforms, but rather to impose sensible and proportionate obligations on new, unregulated platforms.

This was the basis of SPA's submissions to both the *Supporting Australian Stories on Our Screens* Options Paper⁶ and the *Media Reform Green Paper*,⁷ which argued for a new regulatory framework to ensure streaming platforms make a proportionate contribution to the availability of Australian content on their services.

¹ Refer to Screen Content Reforms Regulation Impact Statement, p 6

² <https://www.paulfletcher.com.au/media-releases/media-release-immediate-covid-19-relief-for-australian-media-as-harmonisation-reform>

³ <https://www.paulfletcher.com.au/media-releases/media-release-new-funding-in-budget-to-deliver-australian-screen-content>

⁴ <https://minister.infrastructure.gov.au/fletcher/media-release/media-reform-green-paper>

⁵ <https://www.acma.gov.au/australian-content-commercial-tv>

⁶ <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/4b21db55-e426-406f-b0f8-42ed9a33d12d/FINAL%20response%20to%20submissions%20100820.pdf>

⁷ <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/f1e6be2e-be97-4029-96c6-af4f235f3292/20210524%20-%20Media%20Release%20-%20Green%20Paper%20Submission.pdf>

SPA's preferred position was for policy decisions regarding regulatory frameworks for Australian content across platforms to be made as a coordinated whole, with reference to the consolidated impact on audiences and industry.

However, the Government has elected to move to deregulate traditional platforms before a decision on regulation for new platforms has been made. We have ongoing concerns regarding the extent to which this approach limits the ability to make holistic decisions that appropriately take into account the impacts across the sector as a whole.

We therefore submit that it is not appropriate to pursue deregulation of subscription television before a policy decision on the regulatory framework for competing content streaming platforms has been taken.

The ongoing appropriateness of the subscription television NEDE scheme was also not given detailed consideration as part of the Options Paper process and we submit that a dedicated, thorough review should be undertaken. This review should consider whether the scheme should also extend into other genres, such as children's content or documentary. The NEDE scheme has always been a relatively light touch regulation with 10% being a comparatively modest rate of obligation.

Other matters

SPA notes clause 33 of the Bill would result in any shortfall amount that arose before 1 July 2021 being disregarded. This would ensure the deregulatory effect of the Bill would reach back into the 2020-21 financial year and feels excessive given the future requirement is proposed to be halved. We also note that in April 2020, the Australian Communications and Media Authority (ACMA) announced it would apply regulatory forbearance for any non-compliance with subscription television NEDE requirements for 2020,⁸ and it is unclear the relationship between that announcement and clause 33.

Thank you again for the opportunity to provide a submission to the Inquiry.

Yours ~~sincerely~~

Matthew Deaner

CEO

Screen Producers Australia

⁸ <https://www.acma.gov.au/articles/2020-03/covid-19-important-information-industry#april15>