

23 May 2024

Chair, Senate Environment and Communications References Committee

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

Dear Committee

CORRECTION OF INCORRECT STATEMENTS BY ANZSA

Screen Producers Australia has become aware of some additional information provided to the Committee by the Australia New Zealand Screen Association (ANZSA), received by the Committee on 26th April 2024. This information refers directly to the evidence provided by SPA CEO Mr Matthew Deaner to the Committee at its hearing on 16th April 2024.

SPA stands by the veracity of its evidence given to the Committee and refutes much of the assertions made by ANZSA and takes this opportunity to provide further details and explanation of the evidence given by SPA to the Committee.

The incorrect assertions made by ANZSA and SPA's responses are as follows:

1. **SPA claims streamers first invested heavily in Australia to stave off regulation, and are now pulling back as a result of global directives.**

SPA – like many others – has noted the rapid increase in spending in Australia by streaming services since 2020-21, when regulation was first proposed by the previous Government and does not believe this to be entirely a coincidence. Following the ACCC Digital Platforms Inquiry that ran from 2017-19, an options paper on regulation, “Supporting Australian Stories on our Screens”, was co-authored by the ACMA and Screen Australia and published in March 2020 by the Australian Government.

Other relevant factors include investment made at a time to co-ordinate with an original launch of services but with a plan to pull strongly back on these investments in the years to follow. These strategies have also been privately shared by the streamers many times with various industry participants including with various SPA members.

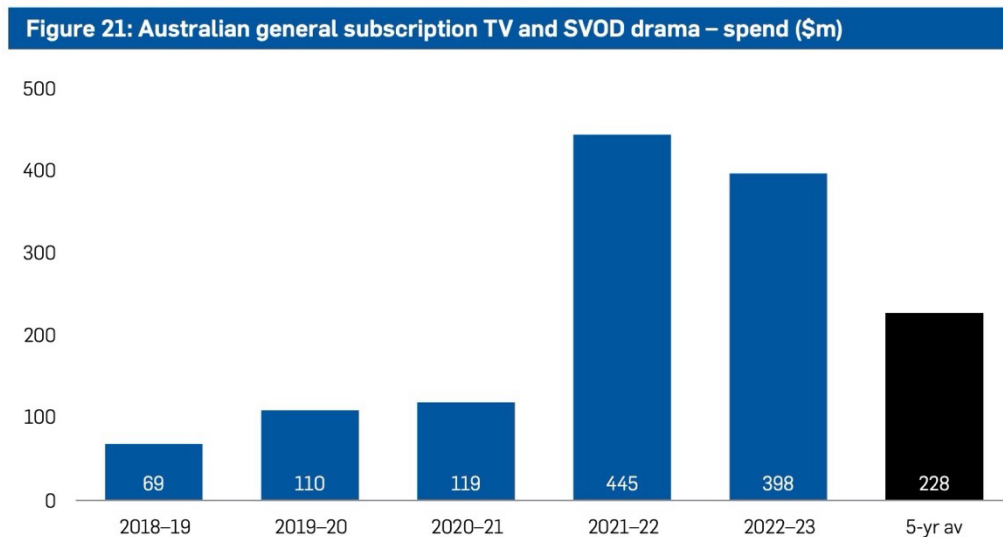
The figures provided by ANZSA also show the marked increase in SVOD spending in Australia since 2019-20, confirming SPA's observations.

It is interesting to note in the ANZSA submission, the following statement about the relevance of the AUSFTA to the SVOD investment strategy:

“Given the record levels of investment we don't believe such a finding [that Australians are being unreasonably denied access to Australian content] can be credibly made.

SPA believes that this ANZSA statement conveys their strategy against regulation and the reasons behind the increased investment to head off Australian Government regulation by recourse to the AUSFTA provisions. (explained further below)

The figures for drama from the 2022-23 Screen Australia [Drama Report](#) tell the same story of a dramatic rise in the same recent timeframe:



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The global directive within some streaming businesses – not all – to pull back on international investments including Australia is well known, has been communicated to many of SPA’s member’s directly by the streamers, and more broadly has been reported widely in trade press, for example, “*Paramount to pull back on international output, refocus on ‘Hollywood hits’*” and in these sorts of articles:

- <https://www.c21media.net/news/paramount-to-pull-back-on-international-output-refocus-on-hollywood-hits/>
- <https://statics.teams.cdn.office.net/evergreen-assets/safelinks/1/atp-safelinks.html>
- <https://www.broadbandtvnews.com/2024/01/26/paramount-pulls-back-from-international-content/>
- <https://www.michaelgeist.ca/2023/06/the-bill-c-11-fallout-continues-disney-pauses-original-commissions-in-canada/>

It should also be noted that SPA, like Netflix and Prime Video, believe that regulation should also be fair, flexible and sustainable, in the following terms:

- We believe it is fair that major streaming platforms should be required to reinvest a percentage of their Australian revenue into newly commissioned Australian stories. This is what already happens in like-nations with strong domestic film industries where cultural heritage is a valued industry.
- We absolutely need to construct this flexibly, with an investment obligation on Australian-generated revenue that rises and falls in line with subscriber and advertising numbers.
- To be truly independent and to safeguard our cultural sovereignty, Australian producers must be able to retain more of their Australian intellectual property. Only

then is our Australian screen industry sustainable in the face of increasingly dominant global streaming platforms.

2. **SPA claims streamers are campaigning for a loose definition of what is Australian content so they can use international projects to satisfy an Australian investment obligation.**

As evidence of this, SPA referred to and tabled a document from ANZSA (“Proposed local content rules harm Australian content creators and consumers”) that SPA believed, made some incorrect claims about what would and would not qualify under the models proposed by the Australian Government.

The Additional Document from ANZSA confirms their opposition to the application of the *Broadcasting Services (Australian Content and Children’s Television) Standards 2020* (ACCTS) to any streaming investment obligation, claiming it is no longer fit for purpose.

SPA believes it is important that any definition of Australian content applied to investment obligations from streaming platforms ensures that Australian audiences are guaranteed to see stories from Australians, created by Australians and reflecting Australian culture.

Australian audiences enjoy screen stories from a range of international cultures but to deliver on the National Cultural Policy, there needs to be a place for storytelling that is under Australian “creative control” as is specified in the ACCTS definition.

ANZSA refers to wanting to change this definition to prevent a situation where: “*Australians may miss out on the benefit of working with and learning from a highly skilled international director or writer*”.

We note (as they also do in footnotes) that the existing rules enable the ACCTS to be met by working with either a non-Australian director or non-Australian writer so it is hard to understand what further flexibility is being sought here unless it is to have projects count as Australian that do not have Australian producers or are not under the creative control of Australians. SPA does not agree with such a situation.

Under the definitions applied by the [ACMA](#), for the purposes of their annual report on SVOD investment in Australia, streamer content is divided into two broad categories:

“**Australian**” programs are those that meet minimum requirements for key creative roles, including producers, directors, writers and cast.

- “**Boy Swallows Universe**” is a show that could be considered “Australian”. In January, it was **the fifth most-watch program on Netflix in the world**.
- Spending in this category by the five major streaming platforms dropped in 2022-23 to **\$324.1m** from **\$335.1m** the previous year.
- The spend on “Australian” programs in 2022-23 represented 40% of the SVOD spend in Australia.

“**Australian-related**” programs are essentially **International productions** filming on location in Australia using some Australian cast and crew. They meet some – but not all – of the criteria for an Australian program.

- **Nine Perfect Strangers** is an example of an Australian-related program. Filming on location near Byron Bay generated important local economic activity, but minimum Australian cultural benefit.
- Spending in this category by the five major streaming platforms increased in 2022-23 to **\$452.9m** from **\$333.4m** the previous year.

- The spend on “Australian-related” programs in 2022-23 represented nearly 60% of the SVOD spend in Australia.

Streaming services commonly conflate figures for spending on “Australian” and “Australian-related” titles as if they are the same thing. They are not.

SPA encourages international collaboration and notes that there are many schemes to enable that collaboration to occur with validity and fairness including Australia’s co-production program which creates flexibilities around the formal requirements of the ACCTS (and the Screen Australia “[Significant Australian Content](#)” test applied for the purposes of the Producer Offset).

3. SPA claims streamers have circulated misleading information to Parliamentarians claiming that Australian documentaries such as *The Test*, *The Story of the Wiggles* and others would not be counted as Australian content.

In a [recent document](#) circulated by streaming platforms and referred to by SPA in recent evidence (“Proposed local content rules harm Australian content creators and consumers”), a number of programs were listed that were claimed as not qualifying under the Government’s proposals. The document stated: “There are a range of programs we make that would not qualify under the proposals”.

Given that there is no decision from Government at this stage to exclude documentaries, that claim was highly misleading. In addition, some of the titles listed in this document including *The Test* and *the Story of the Wiggles* (and referred to by SPA in evidence to the Committee), had already met the ACCTS definition of Australian content and are listed in the ACMA report as being “Australian”. That is why SPA characterised the document as misleading.

4. SPA claims streamers are investing in ‘filler content’, that is licensing of content from broadcasters, as opposed to commissioning new Australian content.

SPA based this observation on the [ACMA report on SVOD spending](#) showed that in 2022-23 spending on acquisitions had increased by \$23.6 million to \$105 million out of a spending total of \$324.1 million, or just above 30% of that spend.

SPA has long argued that any investment obligation on streaming services should focus primarily on [commissioning new content](#), as that is where the real value is for audiences and industry, through the creation of new content and not the re-licensing or re-selling of existing content.

Streamers commonly refer to all spending, whether commissions, co-commissions or acquisitions as if they all have the same value to the screen industry and audiences. They do not.

It should be noted that the benefit of re-licensing or re-selling existing content often does not flow to the creators of the original work but instead to the commissioning platforms, often due to weak interventions around protection of intellectual property that have been allowed to develop in the Australian industry.

Furthermore, when SPA analysed a claim by Netflix that it had invested \$1 billion in 80 new films and shows, we found that 22 of those were acquisitions (mostly from the ABC) and 9 were international projects (“Australian-related”) and that was the finding that was referenced by Mr Deaner in the Senate hearing.

5. **SPA referenced that in May 2023, the Office of the Arts estimated that a 20% spending obligation would equal around \$341.5m of investment in Australian content, which would require streamers to spend an additional \$17.4m each year on Australian content.**

SPA notes that the streamers have the capacity to provide public information about what different levels of obligation would result in in terms of regulated investment. However they treat this information as commercial-in-confidence and as a closely guarded secret. The resulting limitation is that the Australian screen industry and stakeholders are unable to have a transparent discussion about the effect of any proposed regulatory models.

In 2023, to enable screen industry stakeholders to assess various regulatory models proposed by the Australian Government, a figure of \$341.5 million was nominated as being what a 20% revenue obligation entailed. SPA compared this figure to the \$324.1 million SVOD spending figure on Australian content (out of a total spend of \$777.1 million) published by the ACMA and came up with a difference of \$17.4 million.

This continues to remain the only published information to date that industry can use to model outcomes and understand the impact on investment in the Australian industry by SVODs. SPA would welcome the streamers publishing detailed information that is able to be verified to enable the currently discussion to be held more transparently.

SPA notes that ANZSA in its examples of comparing streaming contributions with free-to-air television contributions or subscription television contributions is equivalent to comparing apples with oranges. That is because SVOD services have a very different business model to free-to-air television broadcasters and cannot really be directly equated.

For example, where free-to-air relies on and therefore invests heavily on Australian content to the form of live sport, light entertainment and news and current affairs, streamers primarily program drama and factual / documentary programs (and in some cases sport).

ACMA figures published this week showed that commercial broadcasters spent \$1.6 billion on Australian programs in 2022-23. Free TV Australia has separately published reports outlining the economic contribution of their services:

<https://www.freetv.com.au/wp-content/uploads/2022/09/Everybody-gets-it-2022.pdf>

In addition, ASTRA – representing subscription television – has previously published information about program investment (as well as overall economic contribution) which is much more significant than SVOD's contribution:

- <https://mumbrella.com.au/astra-claim-tv-918-million-invested-local-tv-sector-471004>
- https://astra.org.au/pdf/news/DAE_economic_contribution_ASTRA_NOV_2023_FINAL.pdf

In both cases Australian commercial broadcasters and subscription television platforms contribute a very significant amount of their earnings to new content for their audiences. Internationally based SVOD providers do not invest anywhere near this same level of their earnings on Australian content hence the need for regulation of these businesses.

6. **SPA claims an expenditure model would be ineffective as no regulator will be able to validate the data provided by streamers about their investment. Mr Deaner stated Canada has explicitly said it will not pursue an expenditure model for this reason.**

The [ACMA report](#) on spending by the five major SVOD services in Australia is a voluntary reporting framework to the ACMA and is not independently verified nor is there any current audit capacity or authority from the regulator. However, this type of reporting – particularly concerning new Australian drama, documentary and children’s commissions – is more likely to be verifiable by Government by comparing information held and reported by Screen Australia than any other regulatory approach.

However, none of this information captures the overall expenditure that each streamer is making in the global market on the non-Australian content supplied to the Australian market – which incidentally how an ‘expenditure model’ would be calculated. Again, in its response document ANZSA is not tackling the core issue that was being raised and is again seeking to compare apples with oranges.

Regarding the Canada’s position, the Canadian CRTC made the following observation in their examination of submissions on this issue of revenue vs expenditure:

52. The Commission considers that a revenue-based threshold is a relatively simple and objective criterion that can be applied by all online undertakings, regardless of their business models. Bundled services such as Amazon Prime have methods of allocating revenues for their subscription-based broadcasting undertakings.

...

54. In regard to using multiple criteria, the Commission notes that there is generally a strong relationship between the number of subscribers and the level of revenues of an undertaking. Adding a subscriber threshold would therefore be largely redundant and burdensome. Further, using numerous indicators would make registration much more complex, thereby making it more difficult for the Commission to track information and communicate the requirements for registration. Finally, none of the interveners provided compelling evidence that using other indicators would be a significant improvement to the proposed approach based on an annual revenue threshold.

55. In light of the above, the Commission finds that a monetary threshold based on annual Canadian gross revenues would be the clearest and most comprehensive way to determine which online undertakings are to be exempted from the requirement to register with the Commission.¹

7. SPA claims there is an abuse of market power by ‘powerful digital streaming services’ who are intimidating creatives into surrendering their rights, and that screen producers are increasingly unable to do business deals on fair terms with ‘powerful’ digital service providers.

Commercial contracting arrangements between the few SVOD services and the many screen producers is not a level playing field and there are no “terms of trade” applied to this contracting as is the case in some other international jurisdictions and some other domestic industries with the same market imbalance.

These commissioning contracts are commercial-in-confidence and Australian screen producers are reluctant as well as often contractually unable to speak publicly about the tough contracting conditions they face as this is very risky for their ongoing business relationships.

¹ Canadian Radio-television and Telecommunications Commission, Broadcasting Regulatory Policy CRTC 2023-329 and Broadcasting Order CRTC 2023-330, 29 September 2023, p 11.

Nevertheless, SPA is satisfied that sufficient information exists to support the claim of unfair contracting practices that have arisen due to the small number of buyers and a large number of sellers and the changed business conditions driven by powerful online streaming platforms. SPA also commissioned a report on this issue from [Lateral Economics](#) in 2021, updated in 2023 that outlines this issue in more detail.

8. SPA claims that streamers are ‘weaponising’ the US Australia Free Trade Agreement (AUSFTA) and say they have obtained legal advice that confirms that the language of Annex 2 in AUSFTA does not restrict the Australian Government from imposing a minimum 20% of revenue obligation.

SPA was alarmed to read misleading claims about the effect of the AUSFTA on the Australian Government’s ability to regulate streaming platforms in an article in *The Australian* newspaper on 6 February 2024 (“Australian streaming quotas could violate US free trade agreement, tech giants warn”) and which are repeated by ANZSA.

There are, based on current legal advice received by SPA, minor qualifications around Australia’s ability to regulate audio-visual services but SPA believes these are straightforward and can be easily satisfied by the Australian Government and therefore do not represent any significant obstacle. SPA believes that Annex II of the AUSFTA provides a clear pathway for the Australian Government to proceed with regulation of these services.

We note that ANZSA has located a 20-year-old joint submission made by the Australian Writer’s Guild, Australian Screen Director’s Association and the Screen Producers Association of Australia provided to a Senate Select Committee on the Australia United States Free Trade Agreement in 2004. In that submission, critical questions were raised around how the AUSFTA might impact on future Government regulation which are highly relevant to current regulatory considerations by the Australian Government. Screen Producers Australia’s views are as expressed today and based on current legal advice.

SPA notes that as a result of the AUSFTA provisions, the US Government, on behalf of American streaming businesses, is considered to be an affected party and is participating in the development of regulation for Australian audiences and our local industry by the Australian Government and that streaming regulation is regrettably perceived as a threat to the profitability and autonomy of these American businesses.

SPA is particularly alarmed by the incorrect assertion from ANZSA that the US Government has a veto power over any Australian Government regulatory proposals. The task for the Australian Government in this regard is to implement the language of the AUFTA through a straightforward interpretation of the language of the agreement.

I trust this information is of assistance to the Committee.

Matthew Deaner
CEO
Screen Producers Australia

APPENDIX – ACCTS DEFINITION OF AUSTRALIAN CONTENT

An Australian program under the [Broadcasting Services \(Australian Content and Children's Television\) Standards 2020](#) (ACCTS) is:

10 Australian program - definition

- (1) Subject to subsections (3) and (4), a program is an Australian program if it is produced under the creative control of Australians. [Emphasis added]
- (2) For subsection (1), a program is produced under the creative control of Australians if:
- (a) the producer of the program is, or the producers of the program are, Australian (whether or not the program is produced in conjunction with a co-producer, or an executive producer, who is not an Australian); and
 - (b) either:
 - (i) the director of the program is, or the directors of the program are, Australian; or
 - (ii) the writer of the program is, or the writers of the program are, Australian; and
 - (c) at least 50% of the leading actors, including voice actors, or on-screen presenters appearing in the program are Australians; and
 - (d) in the case of a drama program — at least 75% of the major supporting cast appearing in the program are Australians; and
 - (e) the program is produced and post-produced in Australia (whether or not it is filmed in Australia);
 - (f) in the case of an animated program — the program satisfies at least 3 of the following requirements:
 - (i) the production designer is Australian;
 - (ii) the character designer is Australian;
 - (iii) the supervising layout artist is Australian;
 - (iv) the supervising storyboard artist is Australian;
 - (v) the key background artist is Australian.
- (3) If a program includes segments that, if they were individual programs, would not comply with subsection (2), only a segment that, if it were an individual program, would comply with subsection (2) is taken to be an Australian program.

Examples:

A sketch comedy program including Australian skits or a documentary including Australian segments.

- (4) A documentary that complies with subsection (2) is not an Australian program if it is a reversioning of one or more existing documentaries that are not Australian programs, Australian official co-productions, New Zealand programs or Australian/New Zealand programs.