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**FOXTEL RESPONSE TO THE AUSTRALIAN AND CHILDREN'S SCREEN CONTENT  
REVIEW**

**OCTOBER 2017**

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## **INTRODUCTION**

Foxtel welcomes the opportunity to contribute to the Australian and Children's Screen Content Review.

Our submission is structured as follows:

1. Executive Summary
2. Background
3. Foxtel's commitment to Australian production
4. Existing incentive arrangements
5. Direct funding
6. Legislated minimums
7. Possible new quotas
8. Conclusion

## **EXECUTIVE SUMMARY**

- Foxtel welcomes the opportunity to contribute to the Government's review of Australian and Children's Screen Content.
- Foxtel has a long-standing and proven commitment to producing and broadcasting a rich variety of high quality Australian content which resonates with our audience, contributes strongly to cultural objectives and stimulates economic activity.
- The Review's consultation paper assumes the ongoing importance of Australian screen content as a cultural good and economic driver.
- Foxtel shares this view, and therefore sees the review as an opportunity, not to question the public policy objectives relating to Australian content, but rather to assess the ongoing efficiency and efficacy of Government intervention in the local production sector.
- Foxtel proposes a set of reforms which would not radically alter Government intervention or market dynamics.
- Instead, we set out a range of targeted improvements to existing mechanisms which, in our view, continue to deliver important public policy outcomes and drive a dynamic production sector.
- Of primary importance is the equalisation of the Producer Offset for television productions. This simple, inexpensive reform could deliver significant beneficial impacts for Australian jobs and the economy.
- A range of other improvements to existing tax offsets can be made which would remove barriers to investment, innovation and job creation, including liberalising eligibility, removing artificially high minimum spend requirements and increasing the rate of the Location Offset.
- To support these enhancements, we propose that Screen Australia's existing documentary and drama funds be redirected to contribute to the cost of increasing existing offsets. Alternatively, there are a range of improvements which can be made to the way these funds are allocated.
- Despite substantial market disruption and changing viewer behaviour, it would be premature to roll back existing legislated quotas for broadcast television; however, we believe they should be monitored and reconsidered as the market evolves further.



- However, there is merit in reconsidering legislated minimums for children's television content.
- Lastly, we do not consider that a robust quota model can be derived for video on demand providers and instead propose that these new providers have equitable access to the enhanced tax incentives proposed in this submission.

## **2. BACKGROUND**

### **About Foxtel**

Foxtel is one of Australia's most innovative and dynamic media companies and home to award winning local drama plus the widest choice in live sport, hit international TV and movies and a host of complete TV seasons. Foxtel believes in the importance of telling Australian stories, and its ongoing commitment to creating the best in Australian programming has garnered numerous industry awards for its Foxtel Original productions.

Foxtel has helped put Australian talent on the world stage with highly acclaimed international exports and it proudly invests in the people who help tell those stories by employing thousands of Australians directly and indirectly across Australia's creative industry.

It has also pioneered advancements in entertainment technology with the iQ3 set top box; the Foxtel app for mobile devices; streaming service, Foxtel Now and Foxtel broadband, home phone and entertainment bundles.

The wider subscription television industry is a key part of the film and television production sector in Australia. In addition to its cultural contributions, the subscription television industry makes substantial economic contributions.

In 2016–17 the subscription television industry invested a record \$918 million in Australian screen content (including drama and other genres). Over \$6 billion has been invested over 10 years. Local broadcasters are the key underwriters of the Australian production industry, and in 2016 provided over half of the total finance for the Australian TV drama slate. Our industry stands ready to invest even more and a key part of that will be ensuring that the regulatory environment and funding support rules encourage investment, creative risk-taking and innovation.

Continuous local television production also helps maintain a 'critical mass' of industry knowledge, production facilities and specialist expertise, which feeds back into higher production values, innovative approaches to production and creative risk taking.

### **Industry conditions**

Existing government interventions into the production sector were predicated on particular industry conditions and viewer choice and behaviour. Given the level of disruption currently in the industry, in relation to market dynamics and consumer behaviour, it is sensible to review Government interventions to ensure they continue to meet the desired objectives.

The industry's future ability to continue its investment is being tested by the influx of new entrants into the Australian market and rapidly changing consumer behaviour. Increasing unregulated competition is driving up programming costs, particularly for key differentiating content such as sport and premium drama, making scale more important than ever.

Yet it is extremely challenging for local broadcasters to match the ability of the unregulated new entrants to invest in original and existing content.

This confluence of factors requires local broadcasters to adapt, invest and innovate and Foxtel is well down this path. Subscription TV 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, review of production support measures is also vital so as to ensure the industry can continue to deliver highly valued services, invest in local productions and employ thousands of Australians.

### **Timeliness of review**

The economics of content creation and aggregation in Australia which have previously warranted Government intervention, have persisted, despite extensive change in the industry.

Similarly, Australians' desire to see local productions on screen has not abated, despite the massive expansion in content choice available to the modern viewer.

On the basis of these two drivers (Government intervention and audience demand), Australia has built up a world-class production sector and a critical mass of skilled professionals. This has gifted us with an ability to deliver world-class productions, substantial economic benefit and ongoing employment and training for thousands of Australians.

The cost to Government of its intervention in the market for content creation is far outweighed by the economic, social and innovation dividend our local screen industry delivers.

For these reasons, this submission sets out proposals which would not radically alter Government intervention or market dynamics, instead setting out a range of targeted improvements to existing mechanisms which, in our view, continue to deliver important public policy outcomes and drive a dynamic production sector.

### **3. FOXTEL'S COMMITMENT TO AUSTRALIAN PRODUCTION**

The depth and diversity of Foxtel's programming remains the primary attraction for its viewers and a crucial part of this offering is distinctive, original and high quality Australian content.

Foxtel commissions a slate of Australian dramas to premiere on Australian screens such as *Wentworth*, *A Place to Call Home*, *The Kettering Incident*, *Secret City* and in 2018 *Picnic at Hanging Rock* and *The Fighting Season*. In the factual realm Foxtel has created programs such as *The Archibald*, *Court Justice*, *Sydney and Lawless*, *The Real Bushrangers*. Popular Australian programs in the lifestyle and reality genres include *Selling Houses Australia* and *Gogglebox*, *River Cottage Australia* and *Australia's Next Top Model*.

Foxtel works with a wide range of independent production companies to produce its Australian content, and in so doing supports creative experts who also work across the Australian free-to-air (FTA) television and film sectors.

In a rapidly changing media environment, Foxtel is committed to continuing to produce great Australian content. Our audiences love it and it fulfils an important public policy objective. It also drives significant economic benefits through the activity and employment it generates.



#### **4. EXISTING INCENTIVE ARRANGEMENTS**

This part of the submission examines the existing range of incentive arrangements put in place by successive Governments in pursuit of cultural policy objectives, and outlines a number of ways in which their effectiveness and efficiency can be easily improved in the modern media environment.

##### **Rate of Producer Offset**

The Producer Offset, administered by Screen Australia and paid through the Australian company tax system has proven to be an effective and efficient incentive to television production. The Offset has had great success encouraging projects of greater scale and ambition, increasing financing certainty and providing relief from the challenges of raising production budgets which has enabled greater confidence in and employment of the thousands of producers, actors, writers, directors and crew in the sector. In combination, this has worked to help retain Australia's creative talents from leaving for other competitive centres of production most notably Los Angeles or London.

The beauty of the Offset is that it directs funding to projects for which broadcasters and producers are confident there is an audience. In the case of STV that doesn't always mean a mass audience, it could be niche and specialised.

This beneficial impact could be amplified through one simple and inexpensive reform – equalising the rate of the incentive for television productions with film productions.

Economic analysis from PwC demonstrates significant beneficial impacts for Australian jobs and the economy from an increase in the Producer Offset tax incentive for television productions.

The analysis, found that 360 new television jobs and \$103.9 million in economic activity would be created if the tax offset available to qualifying television productions was doubled from 20% to 40%, the same value currently enjoyed by film.

The report shows that a doubling of the tax offset from 20% to 40% would cost the Commonwealth \$15.5 million, yet would generate an additional \$119.4 million in economic activity, making the overall economy better off by more than \$100 million.

The Offset recognises the importance to Australian cultural policy objectives of a healthy and viable production sector. It was introduced to support the Australian screen media industry at a time when it is striving to meet the challenges of a changing global environment.

The tax offset model of support encourages greater private sector investment in the industry and has greatly improved the market responsiveness of the industry since its introduction in 2007. Tax-based incentives have also been successful in overseas jurisdictions. In the US state of Georgia, the introduction of production industry tax credit has seen annual production spending increase 400%, as well as the creation of large amounts of broader economic benefits including increased numbers of local suppliers, substantial infrastructure development and training opportunities.

However, the funding disparity in favour of film over television under the Australian Producer Offset scheme is becoming ever more difficult to justify given the increasing prominence of television (and other platforms) as vehicles for distribution of quality audio-visual content. Increasing the offset rate to 40%, to align with film, would encourage greater investment and production on the platforms where content is more likely to be seen by Australian audiences.

A guiding principle should be that of a consistent offset for Australian content regardless of the format or distribution mechanism. The cultural objectives of having Australian stories produced and viewed are equally realised via television as they are through feature film. In addition, the local television production industry is at least as valuable a creator of jobs and expertise as the local film production sector and is as deserving of stimulus.



Television programs are also seen by a far larger audience than many local films, and therefore the benefit from Government assistance is arguably greater for television productions.

### **Other aspects of the Producer Offset**

In addition to the industry's request for an increase in the rate of Producer Offset for television productions, there are a number of improvements to the Offset eligibility rules which would greatly improve the operation of the scheme. There are some aspects of eligibility which act as barriers to investment, innovation and job creation and should be removed.

#### Definition of 'Documentary'

In 2013, the Parliament passed amendments to the rules establishing eligibility for the Offset for documentary programs. The amendments specifically exclude from the definition of 'documentary' (for the purposes of eligibility for the Offset) infotainment, lifestyle and magazine programs based on a broad definition of such programs which penalises them because of their "entertainment value".

In our view, these were retrograde changes which artificially box in creativity and innovation in the documentary production sector. In an environment in which increased global competition is already placing significant pressure on the viability of documentary production, a decision to restrict government support so narrowly risks being extremely counter-productive.

In submissions on the amendments, ASTRA noted that the amended definition was drawn from an outdated regulatory instrument written in the 1990s for the FTA platform. Despite this, the definition has been applied to production on all television platforms, notwithstanding the very different business models and audience expectations on the various platforms.

As ASTRA submitted at the time of the amendments, subscription television's multi-channel environment and the targeted nature of subscription TV programming should have been taken into account in formulating any definition of 'documentary' that is applied to subscription TV programming. Yet the development of the definition did not take into account issues relating to the production of factual programming for platforms other than commercial television, such as subscription TV.

The styles and formats of factual programming have evolved significantly since the 1990s. At the same time, audience expectations regarding the form, style and substance of factual programming are also evolving, meaning producers and broadcasters are constantly exploring new and innovative ways of delivering factual programming for viewers that are engaging and entertaining, and in formats and styles that are relevant and accessible to changing audience demands. Therefore, it seemed incongruous to impose a 14 year old definition without any regard to contemporary and evolving notions of documentaries.

The definition does not reflect the current nature of documentary production and the types of factual programming that are of value to viewers. This is an area where Government review and reform is warranted.

Such a review should investigate contemporary understandings of what constitutes a 'documentary' as opposed to other forms of factual programming. It should also critically evaluate which types of documentary and related/peripheral programs should be eligible for the Producer Offset in making a documentary. Such an evaluation should be based on the requirements and needs of the production industry, so to ensure ongoing production of all these types of programs, as well as the proper allocation of public capital.

Issues relating to the production of factual programming for platforms other than commercial television, such as subscription television, should be considered. Subscription TV's multi-channel environment and the niche nature of subscription TV



programming should be taken into account in formulating any definition of 'documentary' that is applied to subscription TV programming.

Styles and formats of factual programming have evolved significantly since the current definition of 'documentary' was devised. At the same time, audience expectations regarding the form, style and substance of factual programming have evolved, meaning producers and broadcasters are constantly exploring new and innovative ways of delivering factual programming for viewers that are engaging and entertaining, and in formats and styles that are relevant and accessible to changing audience demands.

Factual programming should not be excluded simply for also being entertaining.

#### Minimum spend requirements

In order to obtain the benefit of the Producer Offset, a production must include a minimum level of 'Qualifying Australian Production Expenditure' (QAPE). For example, a drama must reach a minimum QAPE of \$500,000 per hour (and a total of at least \$1 million) in order to be eligible.

These levels apply on a 'one size fits-all' basis and do not account for the differences in the types of platform (including FTA, subscription TV, SVOD). It is unclear why such levels are necessary and they clearly hinder the ability for content makers to innovate and create programming on lower cost bases.

It is also increasingly the case that broadcasters are looking for young creative teams (who may have started in the digital space) but cannot take the risk of a big budget production on untested talent. Therefore, minimum spend requirements limit the potential to develop new talent.

#### Scope of the offset

The subscription television industry invests significantly in genres other than those eligible for the Producer Offset (for example, reality television). Hence, consideration could be given to expanding the range of eligible formats so as to foster increased diversity and innovation, particularly in terms of driving the development and financing of popular local Australian productions.

#### 65 episode ceiling

Screen Australia's Producer Offset eligibility guidelines stipulate that once a series (as made up by all of its seasons) totals 65 commercial hours, the series ceases to be eligible for the Offset.

This is an arbitrary cap and appears to derive from an assumption that in the FTA world a show that makes to 65 episodes must be rating well and bringing in sufficient advertising revenue to sustain itself. In the subscription TV world (and this applies to the ABC as well) the economics do not change materially for a show that runs for one series or for many. Popularity may help ensure a program's continued production, however, it does not significantly change the revenue it generates.

Perversely, on subscription television, popular shows, such as *Wentworth* and *A Place to Call Home* may be at risk of discontinuation once the 65 episode threshold is reached because the economics of making them is drastically altered.

#### **Location Offset**

Large international television productions enable skills development and retention within the local industry, and also bring new investment in innovation, technology and equipment. International production has played a crucial role in the development and enhancement of skills and infrastructure of the local television industry.

There are characteristics of the Australian production industry which make it an attractive option for international production, including the presence of skilled labour and high quality production infrastructure.



However, these are also present in other markets which are distinguished from Australia by the availability of more attractive tax offsets for large scale television productions.

For these reasons, ASTRA supports the production industry's proposal to increase the Location Offset from 16.5% to 30%. We support the extensive arguments put forward for this increase by Ausfilm.

## **5. DIRECT FUNDING**

The main Government funding initiatives for Australian content are through direct funding by Screen Australia, and the Producer Tax Offset for drama and documentary production (also administered by Screen Australia). Funding is also available through State and Territory screen bodies.

Screen Australia provides direct funding for Australian film, television and games producers. Television funding is provided under a number of funding initiatives, focusing on drama, children's programs and documentaries.

Under our proposal, the focus of Government support for local television production would pivot more fully to the enhanced incentive model, with less reliance on direct Government funding for television. We propose that the funds currently supporting Screen Australia's direct drama and documentary funding pools be redirected to cover the cost of increased Producer and Location Offsets.

This would address the existing difficulties Screen Australia faces in making assessments regarding the likely success and comparative merit of productions, and in assessing which projects should be eligible for limited public funds. It would also reduce application and acquittal costs for broadcasters and producers. Finally, as noted above in relation to the Offset, it would make access to Government support more market-based, which is more sustainable in the long term.

We propose that a portion of public funds be retained for programs supporting outcomes such as script development, talent development, innovation and new media. These are areas where the model of direct funding makes more sense and can have a more direct and efficient impact.

If the Screen Australia model of direct funding were to be retained, there are a range of improvements which could be made to enhance the efficiency and value of the funding.

### **Minimum licence fees**

To qualify for Screen Australia funding, there is a 'one size fits all' licence fee of \$440,000 per broadcast hour for drama – this is the amount a broadcaster must agree to pay a producer for the right to broadcast the program.

The current \$440,000 per hour requirement is another instance in which funding eligibility reflects the mass-audience, advertiser-funded model of commercial FTA productions, but does not reflect differing business models across different platforms.

A high licence fee does not make sense for subscription platforms where individual channels and services generally attract lower audiences than commercial FTA broadcasting services.

Greater flexibility is needed in this area to incentivise ongoing investment in new productions and to encourage innovation and the development of lower cost, more agile production models.

### **Rights gained**

Counter-intuitively, Screen Australia takes the view that the \$440,000 per hour should only entitle a broadcaster to rights for the broadcast platform, and that broadcasters should pay an additional licence fee for digital platforms.





Screen Australia expects projects it funds to be made available on at least one digital media platform other than broadcast television, and this is something the subscription television industry wants to do – because subscribers expect to get programs on air and digitally.

The exclusion of digital rights from the broadcaster licence fee does not reflect the modern media environment in which content providers (such as subscription TV) reach their viewers by a number of means. The ability to reach audiences on a variety of platforms is becoming an important part of the content delivery business.

In Foxtel's case, given that we broadcast our linear channels on digital platforms through Foxtel Now, we have no choice but to pay extra for those rights.

The mandated licence fee should include sufficient rights to allow broadcasters to distribute the program across numerous platforms.

### **Ineligibility of broadcasters for direct funding**

Screen Australia's Terms of Trade currently exclude broadcasters as eligible under their program funding. This is despite broadcasters playing an essential role in the production industry, providing finance, employment, training and distribution. This is also despite there being nothing in the *Screen Australia Act 2008* which suggests that broadcasters should be treated any differently in accessing the funding programs administered by Screen Australia.

The justification for treating 'in-house' production differently from 'independent' production is difficult to substantiate in an environment in which the independent sector is dominated by large foreign-owned production businesses.

In addition, the source of programming makes no difference to the audience, who benefit from seeing local stories regardless of how the production was undertaken. It also matters little to the cast and crew of a production, who stand to gain the same employment and development opportunities whether a production was 'in-house' or 'independent'.

This unnecessary barrier to financing should be removed.

## **6. LEGISLATED MINIMUMS**

In addition to Government funding and investment incentives, the other major lever in Government intervention is the setting of legislated minimums for Australian content, whether in hours (FTA television) or expenditure (subscription television).

### **Existing quotas**

Whilst it is true that there have been significant changes in industry conditions and viewer behaviour since existing quotas were established, we do not believe the underlying justification for quotas has subsided to an extent that the quotas should be relaxed or abolished.

The underlying policy rationale for Australian content quotas on FTA television may have shifted slightly, but in large part remains the same as in the past. Taking as given the important cultural objectives which are met through the free availability of local content to television audiences, the rationale for imposing quotas to achieve these objectives has traditionally made reference to the fact that FTA broadcasters occupy a privileged position as regards access to public spectrum, and are protected from new competition.

This balancing of privilege and obligation continues to have relevance today as FTA broadcasters now pay considerably less for access to public spectrum, with licence fees recently having been abolished (to be replaced with a lesser transmitter tax in the future). Whilst it is true that new providers of television-like content are creating increased competition for incumbent broadcasters, there still remains a legislative



prohibition on additional FTA broadcasters who could compete on equal terms, with equal access to every Australian home over broadcast spectrum.

It remains appropriate for the Australian public to expect a dividend from the FTA broadcasters' privileged access to public spectrum, in the form of existing local content requirements. Despite the proliferation of alternative entertainment choices, FTA broadcasters also continue to attract mass audiences, making the platform well suited as a destination for mandated local content.

However, these requirements should be monitored on an ongoing basis to ensure they continue to meet cultural objectives and are justified by FTA regulatory privileges. If the enhancements to existing incentives proposed in this submission were implemented, the ongoing monitoring of FTA quotas should also take into account the impact of those enhanced incentives.

One adjustment that would encourage cooperation and coproduction would be to remove the restriction which says that to count towards a FTA quota a program must screen first on the FTA broadcaster. This dramatically reduces any incentive for cooperation between subscription TV and FTA television, given that it would be highly unusual for a platform like Foxtel to want a new program that had premiered on FTA. If cooperation could be fostered it may lead to higher budget productions which might be more attractive to international markets.

As regards subscription television quotas, Foxtel plans and budgets to exceed its quota and understands the importance of distinctive Australian content to its audiences. In this environment, we see no pressing need to reconsider the existing New Eligible Drama Expenditure scheme, however, this should also be monitored on an ongoing basis.

#### **FTA children's television quota**

FTA broadcasters are on record indicating their support for a reconsideration of children's content quotas on their platform. The arguments behind these proposals appear to have some merit.

Firstly, it is true that children are leading the trend away from linear, appointment viewing towards on-demand and online viewing, making restrictive requirements on the broadcast platform harder to justify. Children now have access to a large number of alternative options, including two dedicated ABC kids' channels, free of charge. These options did not exist at the time the children's television standards were introduced and the standards have not kept pace with changing audience behaviour.

If the assumption is made that there is value in producing compelling Australian children's content, it makes no sense to mandate that this content must be created for a platform which children are migrating away from. This is not an efficient use of scarce production funding.

Secondly, there is a quality, depth and variety in children's content production outside of FTA television that was not in existence when the FTA quotas were first introduced. In terms of the industry sustainability objective, FTA quotas are not strictly still required.

There may be merit in moving away from specific children's content quotas, with offsetting increases to overall FTA Australian content quotas or the diversion of investment into a consolidated and fully contestable children's content fund.

## **7. POSSIBLE NEW QUOTAS**

We are aware of proposals for Australian content obligations to be introduced for on-demand services provided over IP. We acknowledge the general principle that providers which are sourcing significant revenues from the Australian market should be required to contribute in some way to the achievement of cultural policy objectives.



However, it is clear that an hours-based quota is not conceptually suited to on-demand (library) services, and we are not of the view that revenue or expenditure-based alternatives would be workable or effective.

For example, a revenue-based quota could be difficult to derive, with different company structures across online providers making it unclear how revenue could be apportioned to different parts of a single business.

Similarly, an expenditure-based quota could result in perverse outcomes, with Netflix spending around US\$6 billion on content in 2017.<sup>1</sup>

In the absence of a robust quota model for on-demand content providers, an alternative means of encouraging their participation in the creation of local content is required. Under our proposal, on-demand content providers should be able to access the enhanced range of tax offsets on equal terms to incumbent content producers. The increased local production activity that this would incentivise would result in on-demand content providers contributing to important cultural and economic objectives in a sustainable and market-driven way.

## **8. CONCLUSION**

There is little debate that the production and distribution of high quality Australian content is an important cultural policy objective and economic good. Locally produced content continues to be extremely popular with Australian audiences and continues to sustain a vibrant, productive industry.

The underlying economic and market conditions which justified Government intervention to achieve these policy objectives have largely remained, despite substantial sector disruption. Hence, it remains appropriate for Governments to enact policies which support local content production, whether through incentive arrangements, direct funding or legislated minimums, or a combination of all these.

However there have been significant changes to the business environment of content production and distribution since existing measures were last reviewed, and hence it is timely to reconsider whether they remain fit for purpose.

There are a range of straightforward yet powerful enhancements which can be made to incentives and direct funding which would see existing interventions more suited to the modern media environment.

However, given the fast pace of change in the television and content sectors, Government interventions should be the subject of ongoing review, to assess whether further enhancements or more substantial reform is warranted.

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<sup>1</sup> <http://variety.com/2017/digital/features/ted-sarandos-netflix-original-movies-shonda-rhimes-1202527321/>

