



ADG AND ASDACS SUBMISSION

House Standing Committee on Communications and the Arts:
Inquiry into factors contributing to the growth and sustainability of
the Australian film and television industry

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AUSTRALIAN DIRECTORS GUILD &
AUSTRALIAN SCREEN DIRECTORS AUTHORSHIP COLLECTION SOCIETY

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1. Who are we?

The Australian Directors Guild (**ADG**) is the industry association and union representing the interests of film and television directors, writers/directors, documentary film makers and animators throughout Australia. Formed in 1982, it has over 900 members nationally and has recently been registered as an association of employees under the *Fair Work (Registered Organisations) Act (Cth) 2009*.

The Australian Screen Directors Authorship Collecting Society (**ASDACS**) is a collecting society representing the interests of film and television directors, documentary filmmakers and animators throughout Australia and New Zealand. It was established in November 1995 in response to support from the French collecting society, SACD, which had collected the director's share for Australian directors for income arising from private copying schemes. The purpose of ASDACS is to collect, administer and distribute income for Australian screen directors arising from secondary use rights.

The ADG and ASDACS welcome the opportunity to provide a submission to the House Standing Committee on Communications and the Arts on "Factors contributing to the growth and sustainability of the Australian film and television industry". Our submission covers the following areas:

1. A snapshot of Australian directors in the Australian screen industry
2. Regulation, particularly in the form of Australian content quotas
3. Australian Government support for the screen industry
4. Directors' copyright
5. The need for a review to create a coherent strategy for the future of the Australian screen industry, with reference to the Convergence Review
6. Summary

2. Snapshot: Directors in the Australian screen industry

The ADG estimates that there are approximately 500 to 1,000 Australian screen directors working in Australia and around the world in Feature Film, Television Drama, Documentary, Online, Animation, Factual, Reality, Live Action, Sport, News and Current Affairs and Event television. These Australian directors are the key creative drivers of a screen production, no matter how big or small.

Directors are critical to the creation of cinematographic films. They make creative decisions about what will appear on the screen through input into creative elements such as the development of the script, the cinematography and its style, the casting and the acting style, the production design, the makeup and costumes, the lighting, the music and soundtrack, the editing and the grading of the final print. The director also generally determines where the camera will be placed, what sort of shot will be shot, whether the actors will be fully visible or obscured and plans how the shots will be cut together. The director additionally controls the rhythms of the film. In short, the talents and skills of a director bring the story a distinctive visual style and the unique ability to convey "their message" to the audience.

Despite the critical input of directors around the world, directors' remuneration and rights vary greatly from country to country, and their ownership of the work also varies depending on the country they work in. For example, an Australian director working in the United States could expect to earn two to three times more than if they worked in Australia. They would also receive residual payments from their work and garner more respect as a key creative on any production. This is also the case in Europe and the United Kingdom.

Directors' copyright also varies around the world (See **Appendix 1** – Directors' Copyright in the World), with Australia being one of the few countries worldwide which acknowledges copyright in a film, but gives no copyright ownership in the film to the director. In most countries, directors also have "moral rights" in their work, which are separate to economic rights. This is the case in both Australia and Europe, but not in the United States. This is discussed further below.

Australian directors are known around the world for their innovation, strong story telling, creative talent and flair, directors such as GILLIAN ARMSTRONG, PHILIP NOYCE, PETER WEIR, GEORGE MILLER, DAVID MICHOD, JUSTIN KURZEL, JONATHAN TEPLITZKY, RACHEL PERKINS, GATH DAVIS, SCOTT HICKS, JOHN DUIGAN, JANE CAMPION, ALEX PROYAS, P.J. HOGAN, JOCEYLN MOORHOUSE to name a few. Although not as well known as film directors our television directors are some of the best in the world such as MICHAEL RYMER (Battlestar Galactica), KATE DENNIS (Suits), DANIEL NETTHEIM (Dr Who), JESSICA HOBBS (Broadchurch), JET WILKINSON (Nashville), MICHAEL OFFER (Homeland), KATE WOODS (NCIS) to name a few. The number of Australians working around the world is ever increasing.

It is therefore disappointing to highlight that in contrast to their unique creative talent, overwhelming Australian directors are financially struggling particularly in relation to their counterparts in film production. 50 per cent of the ADG's full members earn less than \$25,000, 19 per cent earn \$25,000 \$50,000 and 11 per cent earn \$50,000 \$70,000.¹ Over 35 per cent of these member directors have worked in the Australian film industry for more than 20 years and another 25 per cent for more than 10 years.²

3. Regulation: Content Quotas

The backbone of a successful screen industry since the 1970's has been the successful support by the Federal and State Governments of the Australian screen industry. This has come in the form of subsidy, tax concessions and quotas. The creation of a distinct television culture is totally due to the support of a quota system in television production. It is the largest employer of Australian directors in the country and is the most watched medium by Australians. In all of the surveys conducted by national organisations such as Screen Australia, Australian content on television is seen as a vital reflection of our culture and one that is valued extremely highly by Australians.

¹ This is based on the yearly applications for full membership to the Australian Directors Guild for 2011.

² Ibid.

The current regulatory landscape for quotas in Australian television can be summarised as follows:

Australian content on commercial television is regulated by the Broadcasting Services Act 1992 (**BSA**), Australian Content Standard (**ACS**) and Television Program Standard 23 Australian Content in Advertising.

The BSA requires all commercial free to air television licensees to broadcast an annual minimum transmission quota of 55 per cent Australian programming between 6am and midnight on their primary channel. They are also required to provide during the same time at least 1460 hours of Australian programming on their non primary channels.³

In effect, the quotas require the following:

1. Minimum amounts of first release Australian drama programs, documentary programs and children's programs (including children's drama, but excluding preschool programs) to be broadcast by commercial television broadcasting licensees
2. Preschool programs broadcast by commercial television broadcasting licensees to be Australian programs.

Section 7 of the BSA defines 'Australian program' as one that is produced under the creative control of Australians. It also explains what 'creative control' means for the purpose of the Standard. The definition of 'Australian program' is fundamental to determining whether a program may be counted towards the licensee's quota requirement. However, it must be noted that certain programs other than 'Australian programs' may be counted towards the quotas (i.e. 'Australian official co productions', 'New Zealand programs' or 'Australian/New Zealand programs').

In the ADG's view, the Australian content quotas have created a strong and vibrant screen industry that has supported a number of free to air (**FTA**) commercial broadcasters and one cable broadcaster. Under the regulatory regime, neither the ABC and SBS are required to meet the quotas.

With the expanding delivery systems created by the Internet, new players such as Netflix, Amazon Prime, Stan and YouTube have also come into the Australian market. Unfortunately, these companies have no content obligations. They are free to exploit the Australian television market without regard to their support for a strong and vibrant screen industry. As a consequence, there have been calls by the FTA networks to reduce the contingent obligations on them by either reducing or abolishing the Australian content quotas and create a "level playing field".

In the ADG's view, the removal of the Australian content quotas would be a disaster for Australian content. A recent example illustrates what is likely to happen if Australian content

³ Australian Communications and Media Authority. (ACMA)

quotas are abolished. As part of a review of the content quotas and to take into consideration the new multi channel environment created by the FTA networks, the Australian content quotas for drama – both adult and children – were modified to allow them to claim they had met their quota on the new channels they had created. Many in the Australian screen industry protested this at the time, arguing that it would reduce the audience for children’s programming. Unsurprisingly, this is exactly what happened. It allowed the FTA networks to argue that they should not be required to have a strict quota for children’s programming as they could not generate enough revenue with such small audiences.

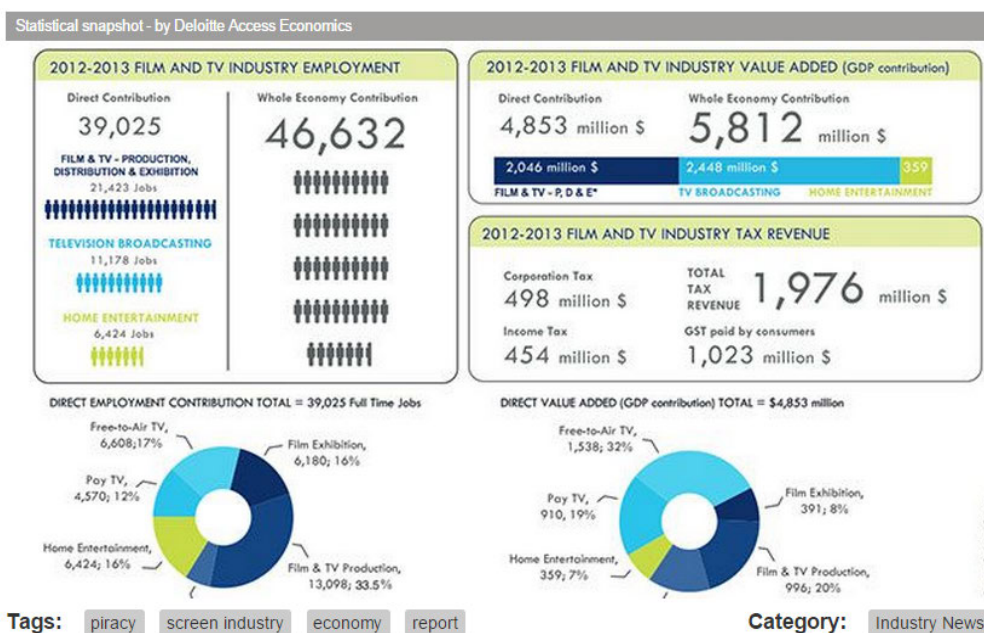
The ADG’s position is that if quotas are abolished, the reduction in Australian content on our screens would be significant. The cost of an overseas produced drama is far less than any original content and the FTA networks would opt for a better deal for their shareholders, rather than the Australian public.

Therefore, the ADG strongly urges the Australian Government to continue the content quota system until a comprehensive overhaul of the broadcast system can be undertaken where the Government can clearly identify alternatives that ensure Australians will have access to Australian content in the future.

The ADG has outlined its support below for an approach that was originally foreshadowed in the Convergence Review of 2012.

4. Government support for the screen industry

The Australian screen industry contributed a total of \$5.8 billion in GDP, supported 46,600 full time jobs and contributed almost \$2 billion in tax revenues for the Australian economy according to the 2012/13 report by Deloitte Access Economics released in February 2015:⁴



⁴ Deloitte Access Economics, *Economic Contribution of the film and television in Australia*, February 2015 at http://www.screenassociation.com.au/uploads/reports/ASA_Economic_Contribution_Report.pdf.

The significant contribution by the screen industry to the Australian economy (which represents even more than the agricultural sector) supports the Australian Government's commitment to a smarter and more skilled country that backs innovation.

As the ADG argued in its submission to the 2011 National Cultural Policy, more than any aspect of Australian life, screen culture dominates the cultural landscape and the director plays a key role in this regard. The Australian Bureau of Statistics found that⁵ 87 per cent of Australians watched or listened to television for an average of us under three hours a day totalling Australians aged over 15 years spending an average of 42 million hours watching or listening TV each day.

The development of the Australian screen industry has meant that offshore productions like *Pirates of The Caribbean*, *Star Wars*, *The Matrix* and more recently, *Alien: Covenant* and *Thor* are able to utilise our facilities and crew investing hundreds of millions of dollars into the Australian economy and keeping our industry at the cutting edge in regards to technology. However, this has only been made possible by the ongoing development and support provided by Australian Government. The support of local production talent in all areas has meant a continued flow of offshore big budget production, boosting the Australian economy. The continued support ensures that local skills will continue to develop and offshore work will be attracted.

Screen content in Australia has been supported by Australian Government since the late 1960's. In fact, it was a Liberal Government lead by John Gorton that heralded the beginning of support for a revitalised screen industry through organisations like the Australian Film, Television and Radio School and Australian Film Commission and through regulation of our television sector. This began what has become known as a "cultural renaissance" in the arts and screen sectors. Without this support it is clear that Australians would not have the amazing screen heritage that has provided us a thriving screen industry. It would not have allowed us to profit from the visiting productions using our expertise and favourable economic conditions to film their big budget films in Australia such as *Star Wars*, *The Matrix*, *Mission Impossible*, *The Pacific* and *Alien: Covenant*.

The key funding for Australian screen content as it stands today involves a mix of Federal and State funding and incentives, as well as investment from television networks and distributors of all kinds. At the Federal level these include Screen Australia, the Australian Broadcasting Corporation, the Special Broadcasting Commission as well as support for ancillary organisation such as the AFTRS, NIDA and Ausfilm. Together they make up an ecosystem that produces the exciting and vital content that makes up the Australian screen industry. To ensure that we have a competitive and strong Australian screen sector, the ADG believes that the support for these organisations is vital.

The Australian Government also needs to offer a package of measures to keep attracting foreign film production. In the ADG's view this is ideally a mixture of tax incentives and direct

⁵ Australian Bureau of Statistics, *Arts and Culture in Australia: A Statistical Overview*, 2010.

subsidy. Both contribute to the final outcomes. It is interesting to note that recently the Fijian Government advertised a tax rebate of 47 per cent for film production. Unfortunately, this has been tried before and failed. The biggest problem for Fiji is that they do not have infrastructure – crews, studios and other – and they have to import this from Australia.

Therefore, we request that the Australian Government take the following actions for the future:

1. Guarantee funding with CPI increases for screen content on the ABC & ABS for drama, children's and documentary
2. Increase the television offset from 20 per cent to 40 per cent
3. Increase the offshore offset from 16.5 per cent to 30 per cent
4. Increase funding to Screen Australia by \$50m per year
5. Maintain funding with CPI increases to the AFTRS, NIDA and Ausfilm.

5. Copyright

Australian directors make vital contributions to culture, diversity and economic growth in Australia. Directors are creative and talented individuals which form the basis of all film, television and dramatic productions. Their work brings people together both emotionally in a shared appreciation for art and physically in theatres and lounge rooms across Australia. In addition to providing entertainment, their work also educates and builds empathy in our community, instilling an appreciation of history, our unique Australian culture and perspective on other cultures.

Yet for close to 50 years, Australian directors have been denied any meaningful “ownership” of their films due to an outdated and unfair interpretation of Australian copyright law. This has been reinforced in industry practice which provides the majority of economic rights to producers as deemed “makers” of the film. This contrasts with Europe where directors are recognised as creators of films.

Directors do not have economic rights by virtue of the Act *except in relation to retransmission rights*. In 2005, the Australian Government agreed to look at the issue of extending a share of copyright in films to directors⁶ and enacted the *Copyright Amendment (Film Directors' Rights) Bill 2005* symbolically recognising directors as copyright owners for the purposes of the statutory retransmission scheme.⁷ This is an entitlement to royalties when a free to air television broadcast is retransmitted across a different network. Directors are not entitled to a share of these royalties if they have not retained their right to receive royalty income in their contracts or where the film is a ‘commissioned’ film. This is different to the position in other territories, where the right is unalienable. At a practical level, an assignment of copyright by Australian directors is commonplace industry practice.

⁶ The Hon. Philip Ruddock, Attorney-General, *House of Representatives Hansard*, 17 March 2005, p. 1.

⁷ Section 98 of the Act.

Despite victories in gaining moral rights and a small stream of retransmission royalty income over the last 15 years, directors in Australia face strong opposition to enforcing even these minor rights. In the vast majority of cases, directors are the weakest party in negotiations with production companies and are unable to individually negotiate fair deals, forced to accept buy out deals for the transfer of all their rights without fair compensation. As a result, directors often receive no benefit from the future success of their work, including through the growing digital market and have no body of work from which to derive future incomes.

Yet, it is imperative that directors should be allowed to make a living from their creations.

ASDACS on behalf of Australian directors, is seeking a sustainable creative industry for directors through improved recognition of their creative contribution. Australian directors should be granted an inalienable right of remuneration for the ongoing exploitation of their films through copyright ownership in their films.

The campaign for “fair remuneration for directors” sits in parallel to the broader international focus of audio visual societies worldwide through their umbrella body, CISAC and Writers & Directors Worldwide.

6. Visas for foreign directors

The future of a healthy screen industry requires creating and nurturing opportunities for film directors to practice their craft and earn an income. One of the most crucial avenues for this has traditionally been through Australian television commercials.

Indeed, many of Australia’s greatest film directing talent has emerged from television commercials and some continue to work in commercials. Examples of these include: Ray Lawrence (Lantana, Jindabyne), Gilliam Armstrong (My Brilliant Career) and Andrew Dominik (Chopper, the Assassination of Jesse James by the Coward Robert Ford). Garth Davis, who recently directed Lion (which was nominated for six Academy Awards) is perhaps one of the best examples. Davis developed his skills through television commercials and to this day, continues to direct them.

Unfortunately, this once traditional and crucial area of opportunity for film directors is rapidly being eroded by the enormous influx of foreign commercial directors entering Australia on short term work visas, directing Australian commercials for the Australian market, and then flying home taking both the experience and income with them.

The ADG is of the view that in many cases, foreign directors have been granted a short term visas despite them clearly not satisfying the required Net Employment Benefit test.

Despite recent changes to the *Migration Regulations* 1994 (Cth), the visa regime applicable to film directors remains far too relaxed, allowing for foreign directors to enter Australia to direct Australian commercials to the detriment of Australian directors. It is, in fact, so easy for foreign directors to obtain a short term work visa that the ADG is unaware of a single application that has been refused by the Department of Immigration and Border Protection.

This is in stark contrast to our major competitor, the U.S., that has an extremely strict, onerous and prohibitively expensive work visa regime that is only getting more and more onerous. In Australia, there are effectively no barriers to entry to foreign commercial directors.

In this section we address the following issues that relate to the visa regime that applies to foreign directors of Australian television commercials:

1. The history of the current 408 visa regime (previously the 420 visa)
2. The applicability of the visa regime to Australian television commercials
3. The Net Employment Benefit test
4. The prohibitive visa regime in the United States
5. The ongoing damage that Australian directors continue to suffer.

History of the current 408 visa regime (previously the 420 visa)

The current regime for subclass 408 “temporary activity” visas was introduced through amendments to the *Migration Regulations 1994* (Cth) (the **Regulations**) by the *Migration Amendment (Temporary Activity Visas) Regulation 2016* in Schedule 2. It received Royal Assent by the Governor General on 10 November 2016.

Prior to these recent amendments, under Regulation 2.72D of the Regulations, subclass 420 similarly allowed visa holders to work temporarily in Australia in the entertainment industry in film, television or live productions in either a performance or a behind the scenes role.

The applicability of the visa regime to Australian television commercials

The ADG is strongly of the view that neither the current 408 temporary activity visa regime nor the previous 420 visa regime were ever intended by the Australian Parliament to include Australian television commercials. This position is confirmed by a legal opinion from John Hennessy SC of 8 December 2015 (see **Appendix B**).

The legal opinion clearly states that that the previous 420 visa regime does not cover Australian television commercials. This also extends to the current 408 temporary activity visa regime for the following reasons:

1. The Regulations continue to only refer to “a film, television or radio production that is to be shown or broadcast in Australia” (Regulation 408(5)(a)(i)) and do not cover television commercials
2. The word “commercial” is not mentioned until Regulation 408(8), which expressly refers to “documentary programs” and “commercials” for overseas markets, not the Australian market.

As a simple matter of construction, Regulation 408(5)(a)(i) uses the words “film, television or radio production that is to be show or broadcast in Australia” while the words “commercial” and “documentary program” are specifically left out of the Regulation until subsection 8 where both “commercial” and “documentary program” are expressly used. Therefore it is clear that the legislation does not intend television commercials to fall within any of the activities set out in the Regulation other than that set out in subsection 8, i.e. commercials or documentary programs for an overseas market.

Even on a layman's view, a television commercial is not a "film, television or radio production". It does not belong to any of these industries and is a very different type of production to any of these.

The ADG's view, therefore, is that if the legislation intended television commercials to be included under subsection 5(a) then it would have expressly mentioned television commercials for the Australian market in the same way that it does in subsection 8, which specifically mentions commercials for use outside of Australia. As it does not, then the only circumstance in which a 408 temporary activity visa can be approved for a commercial is where the activity satisfies the criterion subsection (8) i.e. that it is, where it is a commercial or documentary for an overseas market.

The Net Employment Benefit test

Even on the erroneous assumption that the 408 temporary activity visa applies to Australian television commercials, under the Regulations the intended activity must bring a Net Employment Benefit (the **NEB Test**) to the Australian entertainment industry.

The NEB Test is now defined in Regulation 408.111, which states as follows:

net employment benefit: an activity which a person seeks to enter or remain in Australia to carry out is taken to bring a net employment benefit to the Australian entertainment industry if:

(a) the person seeks to enter or remain in Australia to carry out the activity individually or in association with a group; and

(b) the Minister is satisfied that the carrying out of the activity would lead to greater employment of Australian citizens or Australian permanent residents (or both) than if a person normally resident in Australia undertook the activity.

In the ADG's view and based on its extensive involvement in visa application consultations (as required under the Regulations), rarely does an application for a 408 temporary activity visa for a television commercials director satisfy the NEB Test. This is because the financing of television commercials generally does not depend on the director. Furthermore, the majority of the applications do not meet the spirit and intention of the Regulations. These issues are discussed in more detail below.

Financing of films

Historically, the 420 visa was introduced in response to the feature film industries' need to secure film finance. In short, it allowed producers of feature films to attach high profile foreign actors to a production. In doing so, the producers of the feature film would have a stronger chance of securing finance for their project from the international financing market.

Put simply, in some cases, unless a feature film has a high profile internationally recognised actor or director attached, it may experience difficulty in attracting the finance needed for a feature film (often many millions of dollars). In this case, granting a temporary activity visa to a foreign actor with a high profile increases the likelihood of the project being financed and

produced. This, in turn, results in jobs being created for Australians and a healthier feature film industry in Australia. The same can be true of attaching a high profile foreign director to an Australian feature film. That is, it increases the likelihood of the project being financed and produced. This results in jobs being created for Australians and a healthier feature film industry in Australia.

Importantly, unlike feature films, television commercials do not require financing from the international finance market to be produced. The finance for a television commercial is provided entirely by the advertiser i.e. the client. Due to the nature of the advertising industry, therefore, whether a television commercial has a high profile foreign director or an Australian director makes no difference at all to whether it will be financed and produced. The advertiser simply allocates a budget for the television commercial at early stage and then several production companies and directors are asked to tender or pitch for the production of the commercial. This means that, unlike a feature film, the project will not fall over if a high profile international actor or director is not attached.

These very different financing structures are vitally important when calculating whether or not there is a NEB when considering an Australian television commercial under the 408 temporary activity visa compared to a feature film.

The definition of NEB provides that the Minister must be satisfied that the carrying out of the activity would lead to greater employment of Australian citizens or Australian permanent residents (or both) than if a person normally resident in Australia undertook the activity. Put another way, the total number of Australian citizens or permanent residents who would be employed as a result of the foreign director directing the Australian television commercial must be more than the number who would be employed if an Australian director were to direct the television commercial.

As set out above, it is important to remember that, unlike attaching a high profile actor to a feature film, the financing of television commercials is generally not dependant on the director. This means the cast and crew will be employed whether the television commercial is directed by an Australian or a foreign director. That is, each Australian member of the cast and crew will be hired regardless.

Applying the NEB Test, where an applicant under the 408 temporary activity visa is a foreign director for an Australian television commercial, the total number of Australians employed as a result of the foreign director directing the television commercial therefore, is less than the total number who would be employed if an Australian director were to undertake the activity. Ultimately this amounts to a net employment loss to the entertainment industry, not a NEB.

To take this example further, say the cast and crew of a particular television commercial amounts to 50 people (not including the director):

- Using an Australian director, the total number of Australian residents on the crew amounts to 51
- Using a foreign director, however, the total Australian residents on the crew amounts to only 50.

Simply applying the NEB test under the Regulations, therefore, the ADG's position is that the majority of applications for a 408 temporary activity visa for foreign directors of Australian television commercials ought to be rejected as they do not satisfy the NEB Test. This is the likely position for the majority of applications that the ADG is aware of.

Spirit and intent of the Regulations

It goes without saying that the NEB Test must also be read with the intention of the legislation. That is, to foster local talent and ensure that opportunities for Australian artists are not jeopardised (in this regard, refer to page 9 of Department of Immigration and Border Control's *Discussion Paper: Review of the Temporary Work (Entertainment) Visa (Subclass 420)* in 2015).

However, every time a foreign director directs an Australian television commercial it means that an Australian director loses, firstly, the job. Secondly, he or she also loses the training and skills that he or she would gain if he or she were to complete the job. Thirdly, the pool of work opportunities for Australian directors will ultimately shrink.

Currently, in the Australian advertising industry a culture exists whereby if a television commercial has a significant budget, involves a celebrity actor, or is a comedy the advertising agency will seek to bring an overseas director to Australia to direct it. While this practice is occurring on mass the opportunities for Australian directors will continue to be drastically and rapidly depleted.

Unfortunately, in the future there are likely to be limited opportunities for existing Australia directors to direct television commercials, let alone any opportunities for new directors to direct television commercials. This is in direct conflict with the intention of the Regulations, as stated by the Department itself in 2015, being to foster local talent and ensure that opportunities for Australian artists are not jeopardised.

In conclusion, while foreign directors are continuing to dominate the Australian television commercial industry:

- a. Local talent is not being fostered
- b. Opportunities for Australian directors are being decimated
- c. There simply will be no industry for Australian directors to work in for the future.

Regime should be no less onerous than our key competitor, the United States

The reality is that Australian directors *cannot* simply fly into the United States, direct a project and fly out. In fact, unlike Australia, there are very significant barriers to entry for Australian directors.

There is no 'short term' visa available for the entertainment industry in the United States. Rather, an Australian director needs to apply for an 'alien of extraordinary ability' visa (known as an O1 visa) which is a three year temporary visa. As the name suggests, the director will

need to prove extraordinary abilities in the form of international awards. Secondly, to apply for an O1 visa, the applicant needs to spend thousands of dollars in lawyers' fees and Department of State fees. Thirdly, the applicant will also then need to join the Directors Guild of America (**DGA**) which usually costs around \$10,000 before he or she can work on a program in the United States.

The ADG understands that, in addition to these hurdles, the process takes around six months to complete. This ought to be compared with Australia, where foreign directors literally apply for a visa *after* they have already been awarded a commercial job and receive it within one to two weeks. Additionally, as mentioned above, despite the NEB test, it is so easy for foreign directors to obtain a short term work visa in Australia that the ADG is unaware of a single application by a foreign director being refused by the DIBP.

As such, it is clear that there is no level playing field between Australia and countries like the United States. Further, the new Trump Administration is openly concerned with putting the United States first and all indications (including from immigration lawyers in the United States to ADG members) are that the O1 visa process for Australian directors is set to become even more onerous. Meanwhile and in contrast, Australia offers foreign directors, including those from the United States, no barriers to entry whatsoever. This is clearly an absurd and economically inequitable situation.

At the very least, therefore, the ADG submits that any Australian temporary entertainment visa regime should be *no less onerous* than that of the United States.

Ongoing damage suffered by Australian directors

The Australian television commercials industry is an example of an industry that is *already* being severely hampered by the influx of foreign directors who are slipping through the visa regime. The ADG is aware that the number of foreign directors entering Australia has increased exponentially over the past two years. During this time (the ADG has created a confidential database to track the increase). Australian directors are losing more and more jobs to foreign directors, fewer and fewer opportunities are being created for existing commercials directors and there is virtually no scope for new directing talent to be fostered and break into the television commercial industry.

Put frankly, the ADG is concerned that we now have an untenable economic situation in which Australian directors can no longer make a living directing commercials. Yet, at the same time, American directors have unfettered access to their market and ours. In the ADG's view, this is a situation that needs to be addressed by the Australian Government urgently.

7. A future strategy

In March 2012, the Federal Government released its "Convergence Review" (the **Review**) which was established in 2011 to:⁸

⁸ Convergence Review, Final Report, 2012, p.vii.

to examine the operation of media and communications regulation in Australia and assess its effectiveness in achieving appropriate objectives for the convergent era.

The Review looked into the way Australia regulates, and more importantly, how a future regime of support for the screen industry could be developed. The basic recommendation of the Review was to replace the quota system with a content fund that would require those that produced work to contribute to this fund. These “content service enterprises” would contribute to the fund, depending on their scale of their enterprise but not according to their platform of distribution. This was in effect, a “platform agnostic” approach to supporting Australian screen content recognising the inherent value of Australian content.

In particular, the Review stated in its Executive Summary:

From the Commonwealth Government’s “Convergence Review” Executive Summary.

Both the public and most industry stakeholders told the Review that it was important to ensure Australian stories and voices continued to be represented in our media. Despite Australian content regularly rating in the top 20 television programs, the Review has found that the high costs of Australian production relative to buying international programs mean that there is a continued case for government support of Australian production and distribution. The Review found that Australian drama, documentary and children’s programming requires specific support as it would not be produced at sufficient levels without intervention.

While digital television multichannels are introducing new opportunities for content, these channels are not currently subject to Australian content requirements. Similarly, a new range of internet-delivered channels and services with television-like content are becoming available. These two factors are reducing the proportion of Australian content across all media available today. With the high costs of producing some Australian content, such as drama, documentary and children’s programs, the Australian content obligations should be spread more evenly over the range of competing services.

The Review proposes a ‘uniform content scheme’ to ensure that Australian content continues to be shown on our screens. The uniform content scheme will require qualifying content service enterprises, with significant revenues from television-like content, to invest a percentage of their revenue in Australian drama, documentary and children’s programs. Alternatively, a content service enterprise will be able to contribute a percentage of its revenue to a ‘converged content production fund’ for reinvestment in traditional and innovative Australian content.

Not all content service enterprises will be required to contribute under the uniform content scheme. To qualify for the scheme, content service enterprises will need to meet both ‘scale’ and ‘service’ criteria. The scale criterion will require the content service enterprise to meet minimum revenue and audience thresholds for the supply of professional television-like content to the Australian market. These thresholds should be set at a high level so only significant media enterprises will be required to invest in Australian content. As an example, if a new internet-delivered service grew revenue and audience from providing professional television-like content to a level comparable with today’s established television broadcasters, it would then have obligations to contribute to Australian content.

In addition to the scale threshold, there will be a ‘service’ criterion. The service criterion will mean that only content service enterprises that offer drama, documentary or children’s programs will be subject to the uniform content scheme.

Both the scale and service criteria can be reviewed over time as providers emerge and grow, and to take account of any changes to the targeted genres.

Adoption of the uniform content scheme will mark a significant departure from the present obligations. The Review therefore proposes a transitional framework to allow the government to address the challenges of producing Australian content while working on the implementation of the uniform content scheme.

The key features of the transitional framework are:

> For commercial free-to-air broadcasters there should be a 50 per cent increase in Australian sub-quota content obligations for drama, documentary and children's content to reflect the two additional channels each broadcaster currently operates that do not attract any quotas. The broadcasters should be able to count Australian content shown on the digital multi-channels towards meeting the expanded sub-quota obligations.

> For subscription television providers the 10 per cent minimum expenditure requirement on eligible drama channels should be extended to children's and documentary channels.⁹

The Review has identified a number of other measures to directly support content production, including raising the Producer Offset from 20 per cent to 40 per cent for television drama and recommending the establishment of an interactive entertainment offset.

The increased offset for television drama recognises the significant investment being made in Australian television drama and the high production values and cultural benefits inherent in this genre. The new interactive entertainment offset would assist Australian industry to continue to develop emerging formats, which are expected to grow significantly. Adoption of the interactive entertainment offset would also recognise that games and other interactive genres make a significant contribution to cultural identity and innovation.

The Review has recommended the creation of a converged content production fund. This fund should have a broad focus that supports traditional Australian content, new innovative content, and services for local and regional distribution. The converged content production fund should also play a role in supporting Australian contemporary music. In addition to direct funding from government, this fund could be supported by spectrum licence fees from broadcasting services and contributions from content service enterprises under the uniform content scheme.

Further details on the Review's recommendations on Australian screen content can be found in Chapter 5.

The Review considered Australian music quotas on analog commercial radio. The Review found that the quotas are generally effective, and recommends that they apply to content service enterprises that offer both analog and digital commercial radio services. Occasional or temporary digital radio services should be exempted from this requirement. The diversity and emerging nature of internet-delivered audio services would make it difficult and ineffective to apply quotas to these services at this time.

Further details on the Review's recommendations on Australian radio content can be found in Chapter 6.

⁹ Convergence Review, March 2012. p. xi-xii.

The importance of local news to regional communities was one of the key messages from the Review's consultations around Australia. Commercial free-to-air broadcasters using spectrum should continue to program material of local significance. The existing rules around complying with local programming can, however, be onerous and a more flexible reporting regime should be implemented. The Review recommends removing the current rules triggered by a change in control of a commercial radio broadcasting service that require minimum levels of local presence and additional local content requirements.

Content providers should also have access to the converged content production fund to encourage a diverse range of local services on new platforms.

In the ADG's view, it seems timely that we start this conversation again and look holistically at the ecosystem that is the Australian screen industry. Technological advances demand that we adjust our thinking in a broad range of areas. Therefore, a holistic review of the Australian screen industry in line with the 2012 Convergence Review is warranted.

8. Summary

The ADG and ASDACS welcome the opportunity to provide a submission to the House Standing Committee on Communications and the Arts on "Factors contributing to the growth and sustainability of the Australian film and television industry".

In summary, we strongly urge the Australian Government to implement the following in order to support a vibrant and successful Australian screen industry for the future:

1. **Continuing existing content quota regulations** – The Australian Government should continue the current regime of Australian content quotas for television. This must apply to all players who capitalise on our market, particularly new players such as Netflix, Amazon Prime, Google/YouTube and Stan. The Australian content quota system should stay in place until a new system of support for Australian content is developed by the Australian Government in consultation with the broader screen industry. This should be done as a priority due to the changing broadcast and distribution environment.
2. **Ongoing Australian Government support** – It is clear that the level of Australian Government support for the Australian screen industry should continue and respond to the changing cultural and economic environment. We recommend the following:
 - a. Guarantee funding with CPI increases for screen content on the ABC and SBS for drama, children and documentary
 - b. Increase the television offset from 20 per cent to 40 per cent
 - c. Increase the offshore offset from 16.5 per cent to 30 per cent
 - d. Increase funding to Screen Australia by \$50m per year;
 - e. Maintain funding with CPI increases to the AFTRS, NIDA and Ausfilm.
3. **Increased recognition of directors' copyright** – there is a need for the Australian Government to provide a sustainable creative industry for directors through improved recognition of their creative contribution through copyright. Australian directors should

be granted an inalienable right of remuneration for the ongoing exploitation of their films through copyright ownership in their films.

4. **Review the regime for visas for foreign directors** – the ADG is concerned that we now have an untenable economic situation in which Australian directors can no longer make a living directing television commercials despite the fact that these are imperative to nurture and grow Australian directing talent, including for feature films and televisions. This is because Australia’s visa regulations effectively allow foreign directors unfettered access to directing television commercials in Australia, in contrast to countries like the United States. This is a situation that needs to be addressed by the Australian Government urgently.

5. **A review to create a strategy for the future of the Australia screen industry** – The Australian Government should set up a review of the Australian screen industry along the lines of the 2012 Convergence Review in partnership with the industry to develop a coherent strategy for the future of the Australian screen industry.

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