AUSTRALIAN FILM COMMISSION

REVIEW OF AUSTRALIAN CONTENT ON SUBSCRIPTION TELEVISION

SUBMISSION

TO

THE AUSTRALIAN BROADCASTING AUTHORITY

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AFC RESPONSE TO ABA DISCUSSION PAPER

EXECUTIVE SUMMARY

Timeframe and data

The AFC welcomes the opportunity to contribute to the ABA's review of Australian content on subscription television. The AFC is concerned that the ABA Discussion Paper poses complex questions that require more data, time and work to address thoroughly. The tight timeframe has meant that submissions had to be formulated over January relying upon the scant data that accompanied the Discussion Paper. It appears that the ABA itself lacks the data to make a fully informed evaluation of how the regulation is operating. The close monitoring anticipated by the Minister in 1999 seems not to have occurred.

The AFC is still analysing data collected by our Research Unit and will provide this to the ABA as soon as possible. We also look forward to the data that the Australian Subscription Television and Radio Association (ASTRA) is collecting and reserve the option of altering our recommendations when these data sources can be assessed.

Subscription television regulation as a standard

The AFC believes that many of the problems with the current construction of the expenditure requirement stem from it being part of the legislation, rather than operating as an ABA-administered standard.

Housing the expenditure requirement within the Broadcasting Services Act impacts upon the flexibility of the scheme. Any changes required to the scheme's construction, workability, or fundamental tenets require amending legislation and are destined to be complex and drawn out. The AFC believes that the requirement would operate more flexibly and responsively as a power delegated to the ABA to determine.

Status of the subscription television industry

Subscription television is now a well-established player in Australian broadcasting. ACNielsen's report *Australian Pay TV Trends 2001* together with more recent media coverage attests to its increasing viability, growth and reach. With subscription television being watched by close to a quarter of Australians and subscriber levels forecast to continue rising, it is clear that subscription television exerts a significant influence. According to the Broadcasting Services Act (BSA), the potential to influence justifies the level of regulation. The AFC maintains that as the reach of subscription television increases, the same principles are at stake in the regulation of subscription and free-to-air broadcasting and there is a closer relationship between their regulatory schemes.

Objectives of the regulation

The AFC supports the retention and expansion of subscription television regulation in order to foster Australian content. The AFC believes that this regulation should play an important part in the mix of measures designed to ensure that Australians have access to a diverse range of Australian programming.

As with the free-to-air content standard, the legislation has been formulated to ensure that there are minimum levels of Australian programs available to Australian audiences. The expenditure requirement has both a cultural and industry support aspect. Improvements are needed to ensure the regulation meets its cultural objectives and supports the production industry in delivering more Australian programs to Australian audiences.

Output of the scheme

In looking at what the scheme has delivered to date, the AFC takes the view that, subscription television has made an important contribution, particularly to feature film funding but it has not led to a significant overall increase in the level of new drama. The funds available from subscription broadcasters have been spread across a relatively large pool of feature films and made-for-television drama. This has meant that the scheme has not greatly encouraged innovative drama new to Australian television. In some cases, because of joint investment between subscription and free-to-air television, the funds that arise from the scheme have supplemented other investment, such as foreign deficit funding and free-to-air licence fees.

The AFC would like to see subscription television, in future, becoming an increasing source of Australian drama programming funded without free-to-air contributions, so that it becomes the originator of more programming entirely new to television. This is a longer-term goal and not achievable in the current funding environment. Consequently we recommend no change to the current definition of new to television.

In assessing the scheme, the AFC believes the ABA needs to view the operation of the expenditure requirement in the context of the entire funding base for Australian drama. Direct government investment, private investment encouraged through tax concessions, Australian and foreign distribution investments and the contributions of free-to-air broadcasters, are all more significant contributors to the underwriting of new Australian drama. The subscription television expenditure requirement plays a part, of varying importance depending on the pressures at the time on other sources of finance.

Scope of the Review

The review offers an opportunity to examine the entirety of the subscription television scheme but we note that the Terms of Reference direct the ABA to report on the 'practical operation of the [scheme] … since its enactment'. The AFC believes that the review should consider the potential offered by alternatives to augment the expenditure requirement and deliver higher levels of Australian content to subscription television audiences in a number of genres. Some options are canvassed in our submission. Our particular interest is to ensure that money spent by subscription television on Australian content results in programs that are broadcast and enhance the choices for audiences, in the genres of adult and children's drama as well as documentary.

The AFC is concerned that the review will overlook central questions in relation to subscription television. In particular we believe there is a vital need for well-informed debate about the appropriate levels of Australian content on subscription television. The content of the Discussion Paper seems to be largely focussed on the administration of the scheme and on financial issues, whereas the AFC believes the perspective of the audience deserves more attention in terms of the content levels being delivered via subscription television.

Recommendations

1. The subscription television scheme should be reviewed again in 2007. In the interim years there should be improved monitoring and reporting of subscription television data,

especially in relation to screening of Australian content, in order to better assess the impact of the regulation.

2. Subscription television regulation should be encompassed in an ABA standard, rather than in legislation. This would allow greater flexibility in the administration and monitoring of the scheme.

3. The minimum expenditure requirement on predominantly drama channels should be increased to 20 per cent, phased in over two years, in recognition of the capacity of the subscription broadcasters to fund this and of the production industry to meet any increase in demand.

4. The current definition of ‘new’ drama should be retained. This provision should be re-examined in a 2007 review to ensure that new material from subscription television is being screened. As the industry grows so should the level of subscription television programming that is new to television.

5. A three-year compliance period should be introduced that would have annual minimum percentage spending and require that any carry over needs to be spent within the compliance period.

6. A 20 per cent expenditure requirement for subscription television documentary channels should be introduced, yielding a minimum of ten hours of new eligible programming per channel, rising to 20 hours in the following two years (as recommended in our submission to the ABA in October 2000).

7. Pre-production expenditure on subscription television projects that do not go into production should not be allowed to count towards their Australian expenditure requirement (as recommended in our submission to the ABA in July 2000).

8. The ABA should enforce strict administrative sanctions for failure to comply with licence conditions, including but not limited to, suspensions and cancellations of licences, additional expenditure, as well as make-up expenditure.

9. Regulation of advertising on subscription television should be introduced in line with that applying to free-to-air commercial television, whereby at least 80 per cent of content is Australian.

10. The ABA should consider the introduction of a minimum quota for Australian subscription television content sourced from independent production, if monitoring reveals a trend towards in-house production in 2003 – 2007.

The structure of the submission responds to the issues raised by the ABA Discussion Paper, but these have been re-ordered to reflect our view of their priority.

1. THE SCHEME'S CONTRIBUTION TOWARDS ACHIEVING RELEVANT OBJECTS OF THE ACT

1.1 Achieving the objectives of the Act

As stated in the ABA Discussion Paper, the objects of the *Broadcasting Services Act 1992* (BSA) relevant to the scheme are:

- promotion and availability of a diverse range of radio and television services offering entertainment, education and information (s.3(1)(a));
- provision of a regulatory environment to facilitate the development of a broadcasting industry that is efficient, competitive and responsive to audience needs (s.3(1)(b));
- promotion of the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity (s.3(1)(e)); and
- promotion of high quality and innovative programming by providers of broadcasting services (s.3(1)(f)).

The AFC submits that the scheme has contributed significantly to achieving these objectives, however improvements are needed to enhance its effectiveness in meeting the objectives of the BSA.

The scheme has contributed to the availability of Australian drama, by providing a new source of financing. The AFC understands that a number of programs funded under the scheme may not have been made at all without subscription television involvement, and that in some cases funding replaced the need to seek funding overseas. The importance of the scheme in financing Australian feature films has been significant and the Premier Movie Partnership (PMP) has become an important and essential part of the mix of financing sources for features. Increasingly, the expenditure requirement has also become an important part of funding telemovies, mini-series and higher budget series drama.

As more Australians gain access to subscription television it will become increasingly important for subscription television to play a role in promoting Australian identity, character and cultural diversity. To the extent that subscription television has commissioned new drama shown first in that medium, then the scheme ensures the promotion of high quality, innovative Australian content. Where subscription television is co-investing it is supporting the availability of such programming to the broader free-to-air audience.

Regulatory measures such as content quotas or expenditure rules inevitably carry costs for the broadcasting industry, but are an essential element to meeting the objects of the BSA. Despite consumers having more direct control over the services they purchase and hence indirect control over the type of programming screened, subscription services remain subject to market failure (as do free-to-air networks) in delivering Australian content.

1.2 Documentary

We agree with the submission of the FFC that as an important player in our media environment, subscription television documentary channels should be subject to content regulation by the same rationale that applies to subscription television drama channels and free-to-air broadcasters. We note with concern from the FFC data that the only contribution by Australian subscription television to FFC-financed documentaries has been in the form of acquisition after production.

It is over two years since the ABA reported to the Minister on the possible introduction of an expenditure requirement for documentary on subscription television. In our October 2000 submission to the ABA[1] we supported this and hold to our recommendations:

- The minimum expenditure requirement be no less than 20 per cent.
- The 20 per cent expenditure requirement should yield a minimum of ten hours of new eligible programming per documentary channel, increasing to 20 hours in the next two years.

The AFC is not privy to the ABA's report to the Minister but we believe that a strong case was made during that review for the expenditure requirement to be extended. At the time of the review of documentary on subscription television, there were five documentary channels; currently there are six (see Appendix B), an increase which lends weight to the case for regulation.

In his letter accompanying the directive to the ABA to undertake the review, the Minister wrote: "The Government recognises the important cultural role of the documentary genre, and that the ABA's Australian content standard requires commercial television licensees to meet an annual documentary quota."

The current levels of new Australian documentaries broadcast demonstrates that self-regulation cannot be relied upon and legislation is needed to ensure the representation of sufficient minimum levels of Australian content.

The local documentary production sector has the capacity to provide an ample amount of documentary material suitable for the subscription television audience – in all genres of documentary. We have a vibrant production sector in Australia making, on average, 600 hours of documentary annually, on a wide range of subjects encompassing all the program niches sought by subscription television channels. To meet the cultural objectives of the BSA, it is vital that audiences have the option of viewing Australian documentaries depicting our lives and that children watching, for example the History channel, can see a proportion of Australian history.

The AFC supports the recommendations made by SBS on documentary and agrees that a documentary expenditure requirement for subscription television services will serve to advance the aims of the Broadcasting Services Act in promoting "the role of broadcasting in developing a sense of identity, character and cultural diversity" as well as "the provision of high quality and innovative programming by providers of broadcasting services." In particular, the AFC believes that:

- audience demands for documentary would be served by a subscription television documentary expenditure requirement.
- the subscription television drama scheme establishes that there are significant benefits to be derived from a documentary expenditure requirement for the industry; and
- a requirement upon the subscription television broadcasters would relieve the strain placed upon FFC funding of Australian documentary and promote the development of independent Australian productions.

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[1] AFC Submission to the 2000 ABA Investigation into Expenditure Requirement for Pay TV Channels at http://www.afc.gov.au/resources/online/pdfs/paytvdoco.pdf

1.3 Joint investments and definition of 'new'

As the ABA acknowledges, the structure of the scheme encourages joint investment between subscription broadcasters and free-to-air broadcasters in new television drama which assists them both in meeting their Australian content requirements. It also provides producers with a means of sourcing a greater proportion of the budget out of Australia, reducing the reliance on overseas pre-sales and potentially converting them from production finance to profits.

However, the ABA argues that over time, the objective should be to see a significant increase in the amount of new Australian drama. Ideally, this would be drama that is originated solely for subscription television, even if it is subsequently shown on free-to-air television.

The AFC is uncertain whether the general effect of allowing joint investments is the exertion of downward pressure upon free-to-air licence fees. The funds available under the scheme are relatively small and the subscription television industry tends to spread the funds thinly over many programs. The scheme has not substantially increased the amount of new Australian drama that has been produced.

We recognise that joint investment represents for some producers the alternative between having a program go into production and having it fall over. This particularly seems to be the case with higher budget series drama. To that extent, the scheme has become an integral part of the funding of some forms of Australian television drama.

However, the funds available under the scheme represent only a small proportion of the amounts spent on film and television drama in Australia. For example:

- the funds represent about four per cent of total drama production activity;[2]
- the total licence fees and investments covered by the funds are less than 20 per cent of the licence fees paid by commercial television licensees for Australian drama programs.[3]

While we would ideally like to see an increasing amount of drama that was new to television being produced for subscription television, the growing reliance on joint investment for new drama does not make it feasible to amend the requirement entirely, so that 'new' means new to television at this point in time. Therefore we currently support the retention of the present definition. It is worth noting, however, that in the USA, made-for-cable programming has increased in volume and value as the sector has grown. The AFC believes that the ABA should continue to monitor how similar increases can be achieved in Australia.

1.4 Vertical integration and independent production

The ABA's analysis in the review of the Australian content standard for commercial television showed that vertical integration of drama production is an increasing trend in the free-to-air broadcasting industry.

The trend to vertical integration works differently in the subscription television industry. Australian subscription television is a distribution outlet for predominantly US programming.

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[2] Calculated as $20m divided by the sum of the production value of drama programs made for television, $313m, and the value of feature films, $171m, in the AFC's National Production Survey, *2001 - 02*

[3] $20m divided by the $107 published in the ABA's *Broadcasting Financial Results 2000-01*.

Unless Australian operators are able to feed local programming into these international distribution channels, investing in Australian programming makes little commercial sense. Australian programming is therefore most likely to be produced for and broadcast by locally-compiled channels (eg. Showtime, Channel [V]), or international channels that require some local content in order to develop an Australian look and feel (eg. Nickelodeon).

Foxtel is the only subscription television licensee with television studio facilities, but these are used primarily for production of non-drama programs. The only drama program produced by Foxtel in-house to date is *Crash Palace*. Foxtel states on its website:

> [Foxtel's] digital TV centre houses two studios that are used to produce a wide range of live and pre-recorded programmes including *Bill Collins' Golden Years of Hollywood*, *Beauty and the Beast*, *Inside the Arena*, Channel [V] live programmes and hostings, and FOX Kids programmes.

As part of the content sharing agreement with Optus, Foxtel has undertaken that it will spend three million dollars on independently-produced Australian programs per financial year (indexed to the CPI to 2010 or the expiration of the content sharing agreement with Optus).[4] The AFC does not consider this undertaking to represent any great gain for the independent production sector. It is likely that Foxtel and its channel providers already spend more than $3 million on independently-produced Australian drama. The undertaking does not appear to provide any additional funding to the Australian production industry. Moreover, the connection between the proposed fund and the expenditure regulation is not clear; we assume that the $3 million would be included in their obligations.

The AFC would be concerned if Foxtel tended towards drama produced in-house. Just as the commercial free-to-air review identified the need to monitor a trend towards in-house production, the AFC considers that it is even more important in the case of subscription television to ensure that the independent sector is undertaking the majority of production.

1.5 Television commercials

The AFC believes that the current standard requiring commercial television licensees to broadcast a minimum percentage of Australian television commercials should be extended to subscription television broadcasters. The AFC envisages that the level of advertising will increase in future years on subscription television and that the same cultural arguments that apply to the broadcast of Australian television commercials on free-to-air television apply equally to subscription broadcasters.

The AFC acknowledges that this may involve some additional compliance costs for licensees, but we also envisage that for channels compiled in Australia the commercials broadcast will generally be drawn from the same pool as those broadcast on commercial television. We submit that subscription broadcasters should be able to rely upon the classification of Australian content given to commercials by the Commercials Acceptance Division of Commercial Television Australia, thus reducing compliance costs.

In the case of pass-through channel providers where it is likely that non-Australian commercials are being inserted outside Australia it may be necessary to consider an exemption for these channels.

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[4] Foxtel 2002, *Undertaking to the ACCC by Foxtel Management Pty Ltd and Foxtel Cable Television Pty Ltd*.

The AFC also acknowledges that for the sake of clarity it may be necessary for the legislation to specify that the ABA has more than the power but the obligation to make such a standard, as is the case with Australian content standards for commercial television.

2. POSSIBLE AMENDMENTS TO LEGISLATION

2.1 Expenditure requirement as a Standard

The AFC believes that many of the problems with the current construction of the expenditure requirement stem from it being drafted into the legislation, rather than operating as an ABA-administered standard.

Housing the expenditure requirement within the Broadcasting Services Act impacts upon the flexibility of the scheme. The only flexibility currently provided is found in the discretionary power of section 103L, which allows the ABA to make determinations about what constitutes program expenditure.

Furthermore, any changes required to be made to the scheme's construction, workability, or fundamental principles cannot be made quickly, given the nature of legislative timeframes and priorities.

The AFC argues that the scheme could be more constructive if it were determined by the ABA as a standard. This could be similar in form to the commercial television standards the ABA already administers in relation to Australian content and children's television. In developing the subscription television drama expenditure requirement as a standard, the ABA could be empowered with either complete discretion in creating a standard as in the case for commercial television standards or the legislation could impose minimum requirements upon that discretion. Such legislative models were canvassed in the 1997 ABA report, *Australian Content on Pay TV*. Previous to 1997, the Broadcasting Services Act included a voluntary scheme for subscription television in s 102. The ABA recommended in 1997 that the legislative models most appropriate in moving away from this voluntary scheme to a legally enforceable scheme would be a class licensing scheme or a registration scheme. These foresaw the introduction of either an Australian Content Standard developed and maintained by the ABA or a registration scheme determinable by the ABA.

The AFC believes that these options must be re-examined in order to provide an administratively flexible scheme for the future that also maintains regulatory certainty.

2.2 Pre-production expenditure

The AFC is extremely concerned that the future treatment of development expenditure is still unclear despite the topic being reviewed over two years ago. We believe that the ABA has proposed to allow development expenditure on eligible programs to count towards the ten per cent expenditure requirement, even if the program does not proceed to production. This proposal is unprecedented in broadcasting regulation: commercial television broadcasters can only count programs that they have actually broadcast towards their content quotas. To achieve the objects of the BSA, programs must be broadcast for their cost to count towards regulatory requirements.

Pre-production expenditure on subscription television projects that do not go into production should not be allowed to count towards their Australian expenditure requirement (as recommended in our submission to the ABA in July 2000).

2.3 Increasing the requirement

The AFC recommends the following amendments to the scheme:

- increase the overall minimum expenditure requirement to 20 per cent; and
- allowing averaging of the expenditure requirement over a fixed three-year period, with a minimum annual spend of 15 per cent.

The AFC considers that the increase is justified on a number of grounds. Expenditure levels are not as high as those assumed by the ABA[5] in 1997 when it made its recommendations to the Minister regarding the scheme (a ten per cent requirement was forecast to result in expenditure on $28 million in 2001-02). Further, movie and non-movie channel providers became profitable much earlier than had been forecast (2001-02).[6]

In 1997, the ABA concluded that:

> … a 20 per cent requirement could result in difficulties for [the movie] channels, a doubling of the level of obligation for movie channels is problematic for the pay TV industry …Unlike movie channels whose obligation increases as the pay TV industry grows, achieving an increase in Australian drama expenditure by non-movie channels will require an increase in the level of the obligation. On BTCE estimates it would seem reasonable to impose such an increase around the year 2000-01, when these channels are forecast to be in a better financial position.[7]

It would appear that the movie channels are no longer in such a vulnerable state, and that the Bureau of Transport and Communications Economics (BTCE) correctly forecast that there would be little growth in expenditure by the non-movie channels.

Australian subscription television services renegotiated their Hollywood movie supply contracts in 1998 and 1999. This can be expected to have reduced expenditure by the movie channels to levels significantly lower than those assumed in the ABA's 1997 report. The AFC understands that the movie channels are possibly the most profitable of the subscription television services. PMP's claim that it spends 75 per cent of its program expenditure on eligible Australian content indicates that the ten per cent requirement is not an impost on its channels.

In 1997, the ABA found that a 20 per cent requirement, resulting in an additional forecast expenditure of about $5 million for 2000-01,[8] would not adversely affect non-movie channels.

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[5] The ABA drew on a report prepared by the then Bureau of Transport and Communications Economics for the purpose of the investigation.

[6] ABA 1997, *Australian content on pay TV – Investigation in connection with ss.215(2) of the Broadcasting Services Act 1992*.

[7] ABA 1997, *Australian content on pay TV – Investigation in connection with ss.215(2) of the Broadcasting Services Act 1992*, pp.96 and 98.

[8] ABA 1997, *Australian content on pay TV – Investigation in connection with ss.215(2) of the Broadcasting Services Act 1992*, p.97.

The AFC National Production Survey suggests that average annual expenditure by non-movie channels was and still is significantly lower than the forecast $5 million.

In 2001/02, the new drama requirement was at a level of $20.6 million from total drama expenditure of $206 million. In 1999/2000, the last year for which figures are available, the commercial networks spent $354 million on drama. Of this they spent 29% ($113 million) on new Australian drama. Subscription television is approaching the levels of expenditure on drama by commercial networks, but has a much lower proportion of spending on new drama.

At the present level of 10% the total program expenditure of the drama channels would have to increase to over $1 billion before subscription television was matching the levels of new Australian drama expenditure by the commercial networks.

Given the level of increasing co-investment with free-to-air television, we submit that it is not unreasonable to expect the level of commitment from subscription television should increase to 20%. An increase of the expenditure requirement in 2000/01 to $41 million would still have represented less than 50% of the level of expenditure by commercial networks. It is not unreasonable to expect that Australian content expenditure should match a similar proportion to the expenditure of free-to-air networks.

2.3.1 Three-year Averaging

The AFC does not consider that the current make-up rule is overly burdensome. Extending the make-up period would add considerably to the complexity of the scheme, adding to its administrative costs and the already significant confusion surrounding the operation of the make-up provision.

At the end of 2001/2002 the carry forward makeup provision stood at over $8 million and had increased over the previous year. The AFC is concerned about the potential for these amounts to be continually carried forward so that they are effectively not available to the production sector.

If this situation has arisen because of difficulties in predicting actual expenditure then we think there is merit in the proposal of the FFC that the expenditure requirement be based on the previous year's expenditure rather than the current year. However, we also believe that there needs to be a minimum amount of the obligation expended in any one year and that there be a limit to the time in which amounts can be continuously carried forward.

The AFC recommends that an averaging mechanism be introduced to increase the flexibility of the scheme. The AFC recognises that subscription television services may wish to 'pool' its required expenditure over more than one year to stage an investment in a drama production over time. This averaging proposal, similar to the annual three-year drama quotas for commercial television, would allow subscription television services to carry over some expenditure to later years, but still guarantees the minimum spend at the end of any three-year period.

We suggest that in the first year of this new requirement the minimum spend in any one year should be set at 60% of the annual obligation, increasing to 75% after three years and remain at 75% for each successive three-year period.

2.3.2 Carrying forward spending over and above the expenditure requirement

The AFC does not support carrying forward expenditures above the scheme's minimum requirement. Allowing the carry over of expenditure from the previous year, or allowing averaging of expenditure over a number of years, would effectively set the minimum expenditure requirement as a maximum.

The make-up rule already allows channel providers considerable flexibility in meeting the expenditure requirement. Further, it is unlikely that a contribution from a small non-movie channel provider would be significant enough to affect the viability of most drama series. Under the rules, drama series that are primarily made for free-to-air television must receive funds before they are first broadcast, limiting the period in which the expenditure must occur. Those few programs made for subscription television will of course require funding upfront. In this situation, however, the timing of payments is a strategic financing or business decision rather than a regulatory-based decision in order to meet the scheme's rules.

2.4 Alternative regulatory options

2.4.1 Transmission requirement

The current scheme does not require that any of the programs in which investment has been made to actually be transmitted on subscription television. In practice it would appear that most feature films are screened first on subscription television and that most other drama programs are broadcast first on free-to-air television and subsequently on subscription television.

An alternative regulatory option to the expenditure requirement is a transmission requirement similar to that for free-to-air television. Like the free-to-air model it could include all Australian content or it could relate more specifically to new Australian content. If the transmission model were to be a percentage of overall time then the level would need to take into account the repeated transmissions over a relatively short period of time that do not occur in the free-to-air model, as well as the different types of drama channels available.

In the 1997 review, the ABA concluded that the application of a quota model similar to the Australian content standard for commercial television would not be desirable. It considered that:

> *It is clear from the legislation that Parliament intended pay TV would be subject to lighter regulation. Transmission quotas are unlikely to reflect this policy. They are less flexible than an expenditure requirement and if not set at the appropriate level can be counter productive.*

The AFC considers that currently, transmission quotas could be effective as an addition to an expenditure rule. A transmission quota would ensure a minimum amount of new-to-television programming exclusive to subscription television services. Further, the safety net created by a transmission quota would help ensure that any falls in program expenditure resulting from further consolidation within the subscription television industry will not result in a decrease in either expenditure on Australian drama or hours of Australian drama broadcast by subscription services.

Other approaches could include setting a transmission quota so that it is equivalent to a number of new drama or documentary series. Here, the quota could be based on a points system similar to the Australian content standard's adult drama sub-quota. This would balance the relative cost and risk of different types of drama program material, and minimise the incentive for subscription services to broadcast only low-cost programs. Alternatively, different quotas could be set for movie and non-movie channels, to reflect the different types of drama programming typically broadcast by these channels.

The AFC is not in a position to recommend specific settings as being more appropriate at present given the total lack of transmission data of Australian content on subscription television.

2.4.2 Setting the requirement as a proportion of revenue

An alternative to setting the expenditure requirement as a proportion of program expenditure would be to calculate it as a proportion of revenue.

One weakness of the expenditure-based minimum is that the amount required to be spent by subscription services will stabilise as the industry matures. This means that the level of expenditure could become constant in the long run. The expenditure requirement potentially has a greater impact on the subscription television industry in its early growth phases than it will once the industry's growth has slowed.

The revenue approach would have the significant advantage of allowing the level of expenditure on Australian content to grow as the subscription television industry grows.

The AFC considers that it is not too late to change the calculation basis of the scheme. The subscription television platforms are yet to become profitable and face still further investment costs. The three-year averaging proposal described in the previous section could also be applied to a revenue-based program expenditure requirement.

The proportion of subscription television licensee and channel provider revenue that the requirement should be set at would require careful consideration, and more information about the finances of the subscription television industry than is currently available to the AFC. The ABA would need to ensure that the level is set so that if the new calculation method was applied in the last year of the old scheme, the required expenditure would be approximately constant. However, there may be some constitutional difficulties if it is seen to have the same attributes of a tax.

2.4.3 Establishing a subscription television investment fund

The AFC considers there is merit in the establishment of an industry-wide subscription television investment fund. Investing in new Australian drama programming would appear to fall outside the usual business practices of smaller non-movie channels. An industry fund could assist these channels to direct their required drama expenditure as efficiently as possible, both for the subscription television and production industries. One of the existing government funding agencies or a newly created body could run the proposed fund.

Canada provides a model for this where the Canadian Television Fund (CTF) operates as a partnership between the subscription broadcasting sector and the Canadian Government, with the broadcasters contributing about 50% each year to the total funds of the CTF. It makes investments not only in subscription programs, but also in programs that are broadcast on free-to-air television. For more information see
www.canadiantelevisionfund.ca/.

3. THE IMPACT OF THE SCHEME

3.1 The overall impact of the scheme

The Australian subscription television and production industries can be defined broadly to include all subscription television licensees, all channels compiled, either overseas or domestically, for viewing on Australian subscription television and all program producers with the potential to create programs for viewing within Australia.

In actual practice, the subscription television new eligible drama expenditure scheme does not affect all participants in the subscription television and production industries. Instead it has cost and revenue implications for:

- those subscription television licensees that sell a branded subscription television service package (ie. Austar, FOXTEL and Optus, and not services such as ACTEW or Neighbourhood Cable);
- those channel providers and pass-through providers that provide drama services (see Appendix A); and
- producers of television drama programs and feature films.

Given the lack of public data, it is not possible to identify whether the subscription television industry or its customers carries the impact of the expenditure requirement. In a mature industry, the channel providers would be expected to pass on additional costs to their customers, the subscription television licensees, and the licensees would be expected to pass the costs on to customers. The Australian subscription television industry, however, is generally regarded as immature, although competitive, and it is possible that subscription television services, in particular licensees, are absorbing costs in order to maintain subscriber levels. Certainly the overall losses by the industry are an indication that the full cost of the services is not being passed on to subscribers.

Into the future, the ability of the subscription television industry to absorb increases in expenditure on new eligible drama (whether by increases in the percentage or as total expenditure increases) will depend upon both subscriber growth and the payments to channel providers, which are linked in turn to subscriber numbers. The scheme needs to be sufficiently flexible to take account of future growth.

The AFC understands that while the provision of subscription television services may not yet be profitable for licensees, it is profitable for a number of channel providers, particularly the movie channels. Their greater profitability means that these channels may be stabilising financially and that further increases in expenditure may be less likely, or not as great, as in previous years.

The capacity of the industry to produce is discussed later in the submission, but it is worth noting that in 2001/02 new eligible drama expenditure represented only six per cent of the total value of Australian domestic production. This indicates that even a substantial increase in the current level of $20 million could be absorbed by the production sector.

3.2 Impact of the scheme on broadcast hours

The AFC does not have access to subscription television broadcast data, so cannot provide detailed information about the effect of the scheme on broadcast hours. Given the relatively small number of programs supported by the scheme and the obligation to review this, the AFC expected the ABA to be monitoring this. Similarly, monitoring of whether programs were broadcast on channels other than those that made the financial commitment.

However, we estimate that the programs currently supported by the scheme would amount to a very small proportion of the hours broadcast by the drama channels. The estimate made by the BTCE in 1997 of two per cent transmission time seems reasonable.

The AFC's Research and Information Unit is currently attempting to compile some transmission data. We also look forward to being supplied by the ABA with transmission and other data being compiled by ASTRA to enable a proper amendment of the scheme.

3.3 Impact of the scheme on movie channels

As the submission of the FFC shows, the movie channels have become an important part of the funding mix for Australian feature films through the contribution of both equity investment and pre-sale commitments.

The ABA notes the concerns expressed in 1997 by the operators of the movie channels that Australian features would not be available in sufficient numbers to meet their demand. In 2002, the AFC's annual survey of Australian film and television drama production found 27 of the 30 Australian feature films had investment from television (free and subscription) and private investors. What is more, the survey reported that:

> In 2001-02, feature film investment by Australian broadcasters (free and pay) increased substantially. This was mainly due to higher contributions from pay TV channels but spending by free to air networks rose as well…[9]

The AFC cannot comment in detail on the effect of the scheme on commercial viability of the movie channels. However, it seems likely that the overall cost of the scheme to the movie channels is significantly less than the ten per cent of total drama expenditure required. This is because expenditure incurred on Australian programs by the movie channels either would have occurred anyway, or it has substituted for expenditure on foreign films. The minimum expenditure requirement is not, therefore, an additional expenditure item for these channels.

For example, PMP has always maintained that acquiring local productions as a subscription driver was a key part of the PMP business strategy. At the 2001 ABA conference, PMP's Tony Pollitt said:

> PMP is committed to providing Australian audiences with two diverse, quality-driven movie services that not only cater to Australian audience tastes, but also reflect elements of the Australian culture, both past and present of the domestic film-making community. PMP's commitment can be shown by its involvement in the marketplace, in terms of investment in Australian film and the acquisition of film licences for products to be exhibited on our services…
>
> In terms of investment in films, we have to date invested in excess of 30 titles. As at 31 March [2001] PMP has spent almost $12 million on Australian film investment (actual amount $11,994,000). Of our total expenditure requirement, the investment in Australian films counts for approximately 75 per cent of cash expenditure…It remains PMP's vision

[9] AFC 2002, *National Survey of Feature Film and TV Drama Production 2001-02*, p.5.

> to maximise our support for Australian films in order to create channel loyalty and an empathy with our Australian audience.[10]

PMP in particular has provided an important new source of funding for the Australian feature film industry, to some extent reducing producers' reliance on foreign funds at a time when these funds are increasingly difficult to access. For example, in July 2002, PMP announced a cooperative alliance to back Australian films through pre-sale and investment financing. PMP is also a first-look partner in 'Family Matters', a short feature initiative with the Australian state government film financing agencies, initiated by SBSi.[11]

It is likely that the movie channels' program expenditures are reasonably stable and that their expenditure on Australian programming is unlikely to fall significantly in the near future. The exorbitant program supply deals struck by Australis and Optus with the Hollywood studios in the mid 1990s have been replaced: Foxtel abandoned the Australis contracts after it gained control of Australis' assets in 1998 and Optus renegotiated its contracts in 1999.[12] The AFC understands, however, that the Australian cost of movie programming per subscriber is still higher than in other countries. The content sharing agreement between Foxtel and Optus may therefore lead to consolidation in the number of movie channels available in Australia, and lower overall expenditure levels.

What may affect the movie channels is the absence of private sector investment in feature films. The pilot Film Licensed Investment Corporation (FLIC) scheme is nearly completed but all investment of concessional capital had to be made by the end of the 2001/02 financial year. This led to a sharp increase in private investment in features in that year, which is not expected in the current financial year. The Government is yet to decide whether the FLIC scheme will continue.

3.4 Impact of the scheme on non-movie services and licensees

As with the movie channels, the AFC is not in a position to comment in detail on the effect of the scheme on the commercial operation of the non-movie channels. It is clear, however, that most of the funds spent on television drama has gone to programs primarily made for free-to-air television.

The attraction for non-movie channels in acquiring drama that is broadcast on free-to-air is that if the program proves to be popular they get access to it much earlier than if they were simply acquiring the program as part of a package. In other words, the subscription window is brought forward to a time that is close to the program going on free-to-air. At the same time it would appear that free-to-air broadcasters may be actively encouraging producers to approach non-movie channels to assist with the finance package for new drama.

3.5 Impact of the scheme on the production industry

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[10] Pollitt, T. 2001, 'Delivering Australian content – the Premium Movie Partnership experience', presented at the ABA conference *Radio, Television and the New Media*, 3-4 May, Canberra.

[11] PMP 2002, Press Release, 5 May, available at http://www.screenwest.com.au/whatson/displaynews.cfm?newsID=1&articleID=325 and http://www.if.com.au/Press/2002_05_05_Press.html.

[12] Westfield, M. 2000, *The Gatekeepers*, p. 373; Optus 1999, Press Release, 16 June.

As the Discussion Paper indicates, one of the concerns examined in the 1997 Review was that of the ability of the production industry to deal with an increased demand for drama programs.

The table below sets out the number of Australian feature films, telemovies, mini-series and series and serials produced in Australia between 1996 and 2002. This indicates that apart from a spike in telemovies in 1999/00, a dip in the number of series in 1998/99 and no mini-series produced in 2001/02 the level of television drama production was relatively static over the period. The spike in telemovie numbers in 1998/99 was caused by two series of three telemovies – *Halifax fp* and *Dogwoman*. The AFC has no information as to whether they were sold to subscription television or were claimed as eligible Australian drama.

The number of feature films has fluctuated more than television drama, but the trend seems to indicate fewer features being produced now than there were six years ago.

Table 1: Number of Australian Drama Productions 1996-2002[13]

Year	Feature Films	Telemovies	Mini-Series	Series/Serials
1996/97	32	8	2	19
1997/98	37	7	3	19
1998/99	41	8	2	14
1999/00	31	16	2	17
2000/01	26	7	2	20
2001/02	30	8	0	20

The drama expenditure requirement has contributed to increased levels of production. The demand for new Australian drama has remained well within the capacity of the industry.

The scheme has not placed a significant additional or excessive burden on the production industry. However, over the period 1996 – 2002, the number of foreign productions coming to Australia has increased. The AFC's recent research report on foreign film and television drama production in Australia[14] found that, despite an increase of 139 per cent in foreign film productions in Australia there have not been problems in sourcing local production crews for large and complex productions like *Star Wars* and *The Matrix*. Comments from US based producers expressed amazement at the amount of talent and infrastructure available for the size of Australia. Key informants for this report stressed that the Australian production industry has demonstrated itself to be highly elastic and has the capacity to expand with increased demand.

Recently there has been a high level of investment forecast for new industry infrastructure in Melbourne Docklands; in Sydney, Serenity Cove; Kuring-gai; Lane Cove; while there has been expansion at both the Gold Coast and Fox Studios this year.

The effect of the scheme on the number of programs that could be feasibly produced using subscription television funding is also much less than its potential. Even if this trend were to change in the future and there was an increase in the amount of new drama wholly or substantially funded by subscription television, the potential increase in production is within the capacity of the industry.

[13] Source: *AFC, National Survey of Feature Film and TV Drama Production 1996-2002*
[14] AFC, *Foreign Film and Television Drama Production in Australia,* July 2002 at http://www.afc.gov.au/ftp/foreignprod.pdf

The scheme has contributed potentially $20 million a year over the last two years. Using the average production budgets calculated by the AFC for the ABA's review of the Australian content standard for commercial television, these amounts equate to something in the order up to 50 hours of drama series or about three new drama series programs fully funded by subscription television: see Table 2.

Based on television drama production hours in 2001/02, an increase of 50 hours of new drama would have taken output from 573 hours to 623 hours. This level of output is well within the 798 hours achieved in 1997/98.

Table 2: Potential gain in production hours from the scheme[15]

Drama genre	***Average production budget per hour 1999-2001***	***Potential average hours for $20 million***	***Maximum potential number of programs***
Drama series	$410,000	48.8	3
Telemovie	$970,000	20.6	10
Mini-series	$2,460,000	8.1	2
Feature film	$1,580,000	12.7	6
C drama series, animated	$742,000	27.0	4
C drama series, live action	$504,000	39.7	6
C drama telemovie	$989,000	20.2	10

Currently the funds are spread more thinly: in 2001-02, for example, 50 feature films, 14 drama series, nine short films and two telemovies received either investment funding or licence fee payments.

It is possible that the concern expressed about the capacity of the industry to meet new demand was based on the idea that the expenditure requirement would contribute to a significant increase in the level of production over that in 1997. Instead what appears to have happened is that the expenditure requirement's main function has been to maintain levels of production as other sources of finance have become harder to source.

4. ACHIEVING THE REQUIRED LEVEL OF EXPENDITURE

Under the BSA, the only subscription television services that require a licence are the service providers. Channel providers, whether they are located in Australia or overseas, are not

[15] Sources: ABA 2002, *Review of the Australian content standard – proposed amendments*
Notes: Assumes drama series are 13 hours long, telemovies and feature films are two hours, mini-series are four hours and C drama series are 6.5 hours.

required to register with or obtain a licence from, the broadcasting regulator. There is, therefore, no way of obliging channel providers to comply with regulations under the BSA.

To licence channel providers would require a major policy and legislative shift that the AFC expects would be strongly resisted by the subscription television industry.

At this stage it is not clear what effect there would be of allowing licensees to offset channel provider shortfalls in the year the shortfall incurred. If licensees were allowed to offset channel provider shortfalls in the year the shortfall incurred, this would bring expenditure forward and be of benefit to the production community. This is particularly the case if the current scheme is encouraging licensees to delay expenditures to the next make-up year. The AFC would support a change if it were clear that overall expenditure requirements would not decrease.

5. THE OPERATION OF THE SCHEME IN A CHANGING INDUSTRY

The ABA's questions about the future of the subscription television industry are complex and require considerable foresight about, and study of, the likely technical and strategic developments in the broader communications industry.

Such work would appear to be beyond the scope of this review, and certainly is beyond the time constraints that submitters have been presented with. The following paragraphs provide some observations about possible development paths for the subscription television industry. These observations are not necessary underpinned by research, but represent the general views of the AFC.

5.1 Digitalisation

Until recently, subscription television services in Australia have attempted to minimise non-programming-related costs to balance high programming costs. It is likely, that large-scale investment in digital cable infrastructure may drive the need for subscription television services to attract new customers, rather than further cost constraints.

Current trends already point to a move towards attracting higher audience numbers. The ACCC's decision to allow Telstra to re-sell Foxtel services has allowed Telstra to bundle subscription television with telephony and Internet services, so that consumers can benefit from discounts of ten per cent. (Optus has offered similar bundling deals for some time). The Foxtel-Optus content sharing agreement has resulted in increases in subscriber numbers beyond the expectations of the licensees.[16]

Higher subscription television audience numbers directly relate to higher subscription television profitability, both for service and channel providers. Higher market penetration should therefore also equate to increased funds available for Australian and other new innovative content.

It should be recognised though, that cost items such as programming do not necessarily grow in line with profit. As the industry stabilises, growth in expenditure on programming will level off. Also, it should be noted that innovative and interactive digital content is notoriously expensive. It could be the case that in any year a small amount of Australian interactive content will completely absorb one subscription television service's expenditure requirement.

[16] 'Hot Product – Pay TV', *BRW* January 16-22, 2003, p.16.

The only real model available for what digitalisation might do to growth in the sector is the UK. There, digitalisation has led to growth in subscriber numbers and in what subscribers are willing to pay for services. In the US, growth in the 1990s appears to have been driven by new channel offerings and by the availability of near-video-on-demand (NVOD) like services through direct broadcast to satellite (DBS).

Another unknown is how important advertising revenue will become for the sector into the future. In the US, advertising revenues account for about a quarter of all subscription revenue. Total subscription television advertising revenue in Australia is estimated at about $60 million,[17] about two to three per cent of the total television advertising market.

5.2 Near video on demand

Near video on demand (NVOD) should be treated within the scope of an expenditure rule. In particular, NVOD channels should not be able to preclude themselves from the scheme by defining themselves as narrowcasters.

An NVOD channel provider can be expected to acquire feature film broadcast rights in a similar manner to standard movie channel providers, or they may acquire the rights on a cost-per-view basis. Using either model, at least twenty per cent of a NVOD movie channel's expenditure should be on new Australian content.

NVOD highlights the continuous need for a make-up provision, as total rights payments directly dependent on consumer sales cannot be predicted in a given financial year.

6. ADMINISTERING AND INTERPRETING THE SCHEME

6.1 Administrative burden

Anecdotally, the AFC understands that subscription television industry has found the scheme and its underlying legislation to be exceedingly complicated. The 50-plus pages of legislation in the BSA suggest that its drafters struggled in their attempt to develop a regulatory scheme that both reflected the complex structure of the subscription television industry, and applied to all subscription drama services.

At its base this complexity stems from the attempt to bring the channel providers within the scope of the Act, without going to the extent of making the channel providers licensees. The drafters of the 1992 Act established a structure for subscription television that is different from the one that ultimately emerged and failed to understand the crucial role that channel providers undertake in the making of decisions about programming.

Despite the complexity, the AFC is unaware of any evidence that suggests the administrative burden is so great that licensees and channel providers are unable to cope with it.

The AFC would support simplification of the scheme, if possible, providing that any simplifications do not reduce the subscription television industry's expenditure obligations under the scheme. For example, we would support the ABA having greater discretion to determine the rules and respond to changing circumstances, similar to the ABA's standards-making power in

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[17] Pay TV Glee is a Pain for Free', *The Age* 17 November, *2002*, 'www.theage.com.au/articles/2002/11/16/1037080961566.html.

its regulation of Australian content for free-to-air television. The legislation could be modified so that it is less prescriptive and the ABA has some power to apply its discretion, providing advice to subscription television services and producers and determining whether program expenditures are eligible under the intention of the scheme.

The AFC recognises that the cash basis of the scheme presents an administrative compliance cost to those services that maintain accounts on an accruals basis. However, the AFC strongly opposes changing the scheme to accruals reporting if it results in delayed payments to producers. An accruals system allows the reporting of expenditure in the year that it is first committed, not in the year when the money changes hands. Since it makes business sense to hold on to monies for as long as possible, an accruals system will strengthen the incentive for subscription television services to delay making payments to producers for as long as possible. This will exacerbate producers' financing problems and minimise the effectiveness and usefulness of the scheme to the production industry.

6.2 Sanctions

The ABA currently has a range of administrative sanctions that it may take against a licensee for failure to comply with a licence condition, such as the expenditure requirement. These include suspension or cancellation of the licence. The AFC would support the extension of these administrative actions to include the power for the ABA to require that the licensee make additional expenditure, as well as make-up expenditure, for failure to comply with the licence condition.

6.3 Reporting and monitoring of subscription television data and confidentiality

As indicated above we are concerned at the lack of information that is available about the operation of the scheme and the level of resourcing devoted to monitoring by the ABA. We argue that monitoring of the industry is a primary function of the ABA and that the absence of information inhibits the ability of the ABA to undertake the full range of its duties while making it impossible for others to assess the impact of the scheme. In contrast to the ABA's recent commercial free-to-air television review, there is virtually no data accompanying the Discussion Paper. There is not even an appendix listing the subscription television drama channels, even though the ABA publishes this information annually in media releases.

The ABA should use its powers to gain access to confidential information on particular programs in order to assess compliance. We also believe that it is essential to have transmission data in terms of judging whether the scheme is meeting its objectives. We understand that the ABA has sought this information from ASTRA but the AFC feels this exercise should have been undertaken earlier to inform the review and should continue on an ongoing basis.

6.4 Exchange rates

Subscription television services involved in international transactions are large global organisations that make international deals as a matter of course in their normal business. It is standard business practice to hedge (effectively insure) large international transactions to ensure a predictable exchange rate outcome. The AFC does not consider that Government should be providing insurance for exchange rate fluctuations, either directly or indirectly through the scheme.

6.5 Differentiating between licensees and channel providers

If it is the intention of the legislation that a licensee meets its expenditure requirements in the year in which they are incurred, the AFC considers that the legislation should not make it possible to delay expenditures by setting up a related legal entity. Foxtel, for example, would currently benefit from the separation of its licence-holding and channel-provider entities (Foxtel Management Pty Ltd and Foxtel Cable Television Pty Ltd).

In its 1997 review, the ABA concluded that it is not always possible for a service provider to predict program expenditure accurately. This argument would appear to apply regardless of whether the service provider is a licensee or a channel provider.

7. OTHER ISSUES

7.1 Australia's position in the international market

It is widely accepted that the US is the largest audio-visual market in the world, followed by the European Union and Japan. One measure of the size of the market is the revenues generated by its various parts. This was done by Debande and Chetrit in "The European Audiovisual Industry: An Overview",[18] based on data gathered by the IDATE. Debande and Chetrit estimated the combined value of the US, EU and Japanese audio-visual markets, based on revenue, to be 228 billion Euros (approx $US200 billion) in 2000. Of this, the US was estimated to account for 56%. In comparison, the AFC estimates that in the same year, the audiovisual sector in Australia generated revenues of less than 2% of these combined markets.

The revenue sources examined by Debande and Chetrit were television advertising, licence fees collected by public broadcasters, subscription television revenues, home video entertainment and cinema box office. Not reported, was the revenue generated by international trade or computer games, which could be expected to add significantly to the above estimates.

Large companies, most of which are multinational conglomerates, dominate the audio-visual sector internationally. The European Audiovisual Observatory (EAO) estimates the combined audiovisual revenue of the 50 leading audiovisual companies internationally in 2000 to be just over $US200 billion. Of these 50 companies, the 16 based in the US accounted for 55% of turnover in 2000.

The ten largest companies in the EAO survey generated 61% of this revenue. These companies have grown in size over the last decade as a result not only of mergers, but because the world audiovisual market has also expanded. In 1993, the EAO estimated the turnover of the 50 largest companies to be $US118 billion. In the seven years to 2000, revenues grew by almost 70%. Two major factors driving this growth have been the growth in revenues to television, from advertising or subscription services, and the solid growth of home video entertainment.

[18] European Investment Bank, September, 2001

Table 3: Ten Largest Audiovisual Companies by turnover 2000[19]	
	$US million
1. Time Warner (pre-merger with AOL)	19,069
2. Walt Disney (including ABC)	18,609
3. Viacom (including CBS)	15,910
4. Vivendi Universal (including Canal+)	15,777
5. Sony	14,262
6. News Corporation (including BskyB)	11,154
7. Bertelsmann (including Radio Television Luxembourg)	10,736
8. General Electric (including NBC)	6,797
9. Hughes Electronics (Direct TV)	5,238
10. NHK (Japan's National Broadcaster)	4,974

The above table represents revenue generated by audiovisual activities only and does not reflect additional revenue generated from related media and entertainment activities, such as publishing, newspapers, theme parks and retail. The economies of scale that are generated by vertical integration allow conglomerates to participate along the whole value chain of audiovisual production and distribution. This is important in understanding the relative strength of the US audiovisual industry in the world.

Based on revenues the AFC estimate that the audiovisual sector in Australia in 1999/2000 was worth just over $A6.8 billion. This is broken down as follows:

Table 4: Australian Audiovisual Sector Revenues 1999/2000[20]	
	$A million
Broadcast Television (including ABC/SBS)	3,865
Cinema Exhibition (includes other revenue including advertising and 'candybar' sales)	1,046
Video - Wholesale	403
- Retail	595
Subscription Television	911
Total	**6,820**

This does not take into account $427 million generated by the computer games industry or $108 million in royalty export revenue.

The Australian content requirement for subscription television requires that channels that predominantly screen drama spend ten per cent of their program expenditure on new Australian

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[19] European Audio-visual Observatory
[20] AFC, *Get the Picture*, 6th Edition, http://www.afc.gov.au/gtp/

drama. In 1999/2000 the obligation amounted to $A12.7 million dollars, which the AFC estimates to have been less than five per cent of total program expenditure for the sector.

7.2 International comparisons

Australia's production expenditure requirement for Australian drama on subscription television is minor when compared to local content rules for subscription television found throughout the world.

Within the OECD, the regulation of local content on subscription television is considerable and is largely centred upon requirements that a certain percentage of programming hours – ranging from five per cent to 60 per cent – be of national or regional origin. In Europe, most countries impose a local programming requirement – many complement this with an expenditure requirement for independent European production. This mix of an hours-based requirement with an independent expenditure requirement is in compliance with the European Television without Frontiers directive, which states, "where practicable, television stations should reserve a majority proportion of their broadcasting time for European works. Further, ten per cent of transmission time or programme budget should be reserved for independent productions"[21]. Support for these directives has been demonstrated not only by the implementation of these regulations, but with the implementation of regulations over and above that required by the Directive. For example, France has increased its local programming requirement from 50 to 60 per cent. Both France and the Netherlands have also imposed significant domestic quotas for local language programming, 40 per cent French-language programming for France, and 40 per cent of Dutch or Frisian-language programming for the Netherlands.

Outside of Europe substantial local programming requirements for subscription television also prevail. Korea enforces a 50 per cent programming requirement, while Mexico has a seven to eight per cent local production requirement in tandem with an 80 per cent Spanish-language programming requirement. South Africa, a non-OECD country, imposes a local content requirement of either five or 20 per cent of a service's programming to be South African, depending on whether it is encoded or not.

As canvassed in the ABA Discussion Paper, the UK imposes a ten per cent independent production expenditure quota for subscription television. Canada imposes local content expenditure requirements upon subscription television services of five per cent of their gross annual broadcasting revenues. Significant local programming transmission quotas ranging from 25 to 100 per cent complement this expenditure requirement.

In addition to these local content regulations, most OECD countries, including the United States, have imposed must carry rules on their subscription television services. Must carry rules involve the compulsory simultaneous carriage on subscription television services of public broadcasters, local free-to-air broadcasters and community broadcasters. They are designed to ensure that cable subscribers still have access to freely available services. In the US, cable systems above a certain channel capacity must also provide access for community, educational and government channels if requested. Canada also imposes a requirement that educational programmes must be screened. Australia does not impose any must-carry rules.

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[21] *OECD Communications Outlook 2001*

The table at Appendix C lists the must-carry and local content requirements of 29 countries. This table demonstrates that the majority of developed nations impose significantly greater local content regulation upon their subscription television broadcasters than Australia.

Appendix A

Subscription Television Drama Services 1997/1998 – 2002/01					
	2002/01	**2001/00**	**1999/2000**	**1998/1999**	**1997/1998**
				Arena	Arena
	Cartoon Network		Cartoon Network	Cartoon Network	Cartoon Network
		Cartoon Network/ Turner Classic Movies	Cartoon Network/ Turner Classic Movies	Cartoon Network/ Turner Classic Movies	
	Disney Channel	Disney Channel	Disney Channel	Disney Channel	Disney Channel
	Encore	Encore	Encore	Encore	Encore
	Fox 8	Fox 8	Fox 8	Fox	Fox
	Fox Kids/ Classics	Fox Kids	Fox Kids		
	FX	FX	FX	FX	FX
	Hallmark	Hallmark	Hallmark	Hallmark	Hallmark
	Movie Extra	Movie Extra	Movie Extra	Movie Extra	Movie Network
	Movie Greats	Movie Greats	Movie Greats	Movie Greats	Movie Greats
	Movie One	Movie One	Movie One	Movie One	Movie One
	Nickelodeon	Nickelodeon	Nickelodeon	Nickelodeon	Nickelodeon
	Oh!	Oh!	Oh!		
	Optus NVOD				
	Showtime	Showtime	Showtime	Showtime	Showtime
			The Comedy Channel	The Comedy Channel	The Comedy Channel
	TV1	TV1	TV1	TV1	TV1
	Turner Classic Movies		Turner Classic Movies	Turner Classic Movies	TNT
	UKTV	UKTV	UKTV	UKTV	UKTV
Total	**17**	**15**	**18**	**17**	**16**

Source: ABA News Releases: NR 144/2002; NR85 2001; NR 38/2001; NR 46/2000; NR 39/1999

APPENDIX B

	Documentary Channels 2003 and 2000	
	2003	**2000**
	Discovery Channel	Discovery Channel
	National Geographic	National Geographic
	Animal Planet	Animal Planet (Also had other formats)
	Odyssey	Odyssey (73%)
	History Channel	The History Channel (Part channel with Fox Kids)
	NG: Adventure One	
Total	**6**	**5**