

**PAY TV DRAMA EXPENDITURE REQUIREMENT
ABA PROPOSAL FOR PRE-PRODUCTION EXPENDITURE**

**SUBMISSION BY THE AUSTRALIAN FILM COMMISSION AND
THE AUSTRALIAN FILM FINANCE CORPORATION**

Background

The ABA's Discussion Paper invites public comment on how development expenditure should be treated for the purposes of the new eligible drama expenditure requirement for subscription television services.

Pay TV licensees are required to expend at least 10% of total program expenditure on new eligible Australian and/or New Zealand programs. The ABA's proposal would allow development expenditure on genuine, potentially eligible projects to count towards the requirement, even if these did not proceed to production. This would require an amendment to the legislation, which currently includes pre-production expenditure on new eligible drama programs only on commencement of principal photography.

In the three years to 1997–98, the amount spent on development by Pay TV licensees was only 1.6% of their total expenditure on new Australian programs. (\$215,000 was spent on script development for less than 10 projects.). Actual expenditure on new Australian drama in the three years was \$13,156,669, which represented 6.9% of total program expenditure (the majority was spent in 1997/98).

ABA proposal

We understand the elements of the proposal are:

- 1) script development expenditure would be eligible irrespective of whether the project proceeds to principal photography;
- 2) script development expenditure would be eligible at the time it is spent, rather than when principal photography begins (as is currently the case);
- 3) script development expenditure would be limited to payments to third parties, namely, an independent producer (for the purpose of script development only), a freelance writer or a writer/director.
- 4) the project must have an Australian or a New Zealand producer;
- 5) the writer/s developing the script must be Australian or New Zealanders; and
- 6) script development should be for a project that would, if it were eventually made, be an eligible Australian program. If a project proceeds to production but is foreign, rather than Australian, the script development expenditure previously granted, would be disallowed.

AFC and FFC response

The Australian Film Commission (AFC) and the Australian Film Finance Corporation (FFC) have responded jointly to the ABA proposal. The AFC is the federal agency responsible for supporting the development of film, television and interactive media projects. The FFC is the Commonwealth's principal production investment agency.

The AFC and FFC do not support the ABA's proposal to allow development expenditure on new, potentially eligible Australian projects to count towards pay TV licensees' Australian content obligations. However, in the event that the ABA decides to pursue this proposal, we have suggested a series of amendments which are set out at the end of this submission.

We perceive that the issues are complex and that the proposal attempts to enhance development expenditure on Australian production. However the policy objectives of the legislation are to provide minimum levels of Australian production in order for Australian audiences to view Australian programs on Pay TV. The proposal does not assist in meeting this objective.

The ABA Discussion Paper demonstrates an appreciation of the critical importance of development to the quality and vigour of the Australian production industry, as stressed in the AFC/FFC joint *Report on the Film and Television Production Industry*. Nevertheless the need for additional development funding is a separate issue to that of achieving more Australian content on pay TV.

The intention of the legislation

The legislation has been formulated to ensure that there are minimum levels of Australian programs available to Australian audiences, for cultural reasons. The proposal under consideration may deliver more scripts but it would not lead to more hours of Australian content on screen. Indeed the allowance being proposed for development expenditure inevitably reduces the amount available for production. A Pay TV channel provider could spend the full 10% on development and not actually produce anything.

The legislation as it stands already acts as an incentive for development expenditure – such expenditure currently qualifies under the 10% requirement provided the program goes into production. There is nothing to dissuade a pay TV operator from spending more on development of Australian content and we would hope that this would occur in the forthcoming year when compliance is compulsory.

Parity with free-to-air broadcasters

The free-to-air networks are not in a position to attribute their development costs in complying with Australian content requirements. The ABA proposal does not provide a rationale for this differential treatment of the broadcasters. The commercial networks would undoubtedly seek parity with the Pay operators arguing that they have always funded their own development costs as part of the standard business risk required of all

broadcasters. Each network could no doubt demonstrate substantial development expenditure on Australian programs.

Ten per cent target

The continuing poor performance by Pay TV drama channels was highlighted by the ABA's News Release of 13 July 2000. Ten per cent is far from an onerous obligation and we are disappointed at the low levels of Australian production on Pay TV to date. The amount of money entailed by the ten per cent obligation is so small that it could be covered for a channel provider by the production of a couple of feature films or series.

Pay TV position

Our Pay TV drama channel providers are dominated by overseas interests who take a global perspective in their content provision and are not necessarily committed to Australian productions. Hallmark, one of the imported drama channels carried by Foxtel, provided no information to the ABA in the 1998 – '99 financial year and appears resistant to regulatory compliance. During that year we note with dismay that three channel providers and two of the three pay TV broadcast platforms spent nothing on new Australian drama. Such results do not inspire confidence that these same operators will turn around and make significant investments in Australian content beyond the minimum levels prescribed.

Administration of the regulation

In outlining the proposal, the ABA has given considerable attention to the administrative arrangements intended to ensure that a genuine script development exercise was carried out. Nevertheless the AFC and FFC believe that the proposal is open to abuse and would be complex to administer.

Under the ABA proposal, a script could be developed by an Australian producer for a pay TV licensee, be counted towards the 10% expenditure but be sold and made overseas. The ABA would not be in a position to track such productions and they may never be screened here. Australian producers can have 'housekeeping' arrangements with overseas companies, leading to Australian scripts being produced off-shore.

The AFC and FFC recognise the considerable administrative burden arising from this legislation and we are concerned about the ABA having sufficient resources for the task. Given all the additional expectations of the ABA in relation to digital television, datacasting, internet monitoring and so on, we question whether real verification of pay TV expenditure is possible without extra funds being allocated for the purpose. Even if development expenditure were found to be low or ineligible, it would be a very long process to uncover and then to apply sanctions.

Public accountability of the proposed regulation

The AFC and FFC urge that compliance with the legislation is transparent and can be assessed by interested parties, rather than simply checked by an auditor. Reporting mechanisms should reveal the performance of individual pay TV licensees.

The AFC has previously requested the release of program titles reported by pay TV channel providers and licensees under the eligible drama rules. While the ABA affirmed an intention to make available as much information as possible, the response was immediately qualified by reference to commercial sensitivities and marketing strategies. The AFC and FFC are concerned that despite the ABA's good intentions there could always be restrictions on the release of information if the pay TV providers focus on commercial issues. We would argue that this is inappropriate because there is a public benefit entailed in the legislation which overrides commercial interests.

2003 Review

The AFC and FFC welcome the provision in the legislation for a Review to be conducted before 31 March 2003. We believe that the Review provides an opportunity to examine the question of development expenditure and pay TV.

Suggested Amendments to the Proposal

If the ABA as a result of their consultation recommends to the Minister that the legislation be amended as outlined in the proposal, we have put forward some amendments.

For the purposes of the ABA proposal, development expenditure is only counted in terms of the script. The focus on script may be favoured because it assists the objective of ready verification by the ABA. Given the critical role, costs and risks to the producer in development, we believe that development costs incurred by an independent producer (in addition to options and purchase of rights) are equally legitimate and capable of verification.

In the event that the ABA proceeds with its proposal, the AFC and FFC would recommend:

- that genuine development expenditure by third party producers (in addition to expenditure on script development) also be eligible;
- only that development expenditure which forms part of the production budget should be counted;
- that sufficient resources be allocated by the ABA towards administration and verification of the Australian content expenditure; and
- that compliance with the requirement be transparent and published in a level of detail which allows independent assessment.

The AFC and FFC look forward to attending the planned workshop where the ABA will explain the Pay TV annual return and reporting requirements. We would welcome discussion with ABA staff about their current proposal and our response.