# SCREEN PRODUCERS ASSOCIATION OF AUSTRALIA

## A SUBMISSION TO THE

## PRODUCTIVITY COMMISSION

## REVIEW OF BROADCASTING LEGISLATION

The Screen Producers Association of Australia is the industry association of the Australian independent film and television production industry. The Association represents some 450 companies involved in the production and marketing of audio-visual programs, including feature film, all forms of television, commercials and corporate video. It is also the industry's peak employer association.

The Association aims to provide Australian producers with the means to have an effective say in government decisions and in industrial relations. It represents the interests of all producers on issues which affect the business of audio-visual production and aims to create and maintain the environment and conditions under which a vigorous independent production industry can thrive in Australia.

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## EXECUTIVE SUMMARY

Television is probably the most influential medium in society. For this reason it is important that it continues to meet the public interest objectives supported by the community.

In this submission, SPAA attempts to answer some of the questions posed in the *Issues Paper* and present our view of the industry.

SPAA believes that it is important that regulation continues to be a significant part of the broadcasting industry. We do not feel that this regulation is becoming less important with the proliferation of new technologies and media and that the regulatory framework has the potential to be responsive to change.

In our view the objectives of the *Broadcasting Services Act 1992* (BSA) cannot be achieved through market forces. The role of the BSA is to ensure a broadcasting sector that balances competition with the achievement of the public interest obligations of broadcasters.

Australian Content Regulation must remain in place. It achieves social, cultural and economic goals while costing the Government nothing. It has ensured that there is a high level of Australian programming shown on Australian television, strengthening the industry and subsequently allowing Australian programs to be sold internationally. This success overseas should not be a reason to become complacent, as generally Australian programs could not be made at all without the support of Australian commercial broadcasters.

SPAA is concerned however about the imbalance of market power between the broadcasters and the independent producers. This has led to artificial restraints on program licence fees paid by the networks and a shift in the burden of compliance to the independent sector. Independent producers are struggling to production budgets for programs designed to meet the cultural obligations of broadcasters. Increased levels of deficit financing of productions are making productions more difficult to manage and threaten the long term viability of independent producers.

SPAA sees the value of continuing to maintain cross media ownership rules and has not yet seen a strong argument for their removal. Additionally, we are strongly opposed to the relaxation of foreign ownership controls. We believe that not only would these kind of changes be out of line with international practice but that they could severely threaten the diversity and integrity of Australian broadcasting.

SPAA would like to see the introduction of an independent production quota which would go some way to evening up disparities in market power and would ensure a place for the independent production sector. This kind of quota would also help to guarantee diversity on Australian television.

## 1. INTRODUCTION

Australian control of all major media forms is a critical policy issue for the Government. The regulation of broadcasting to promote Australian control of commercial television broadcasting services is linked to this larger issue. The existence of a healthy, independent production sector is essential to the vitality of the Australian film and television industry. This should be recognised in all policy positions relating to the industry, including the issue of media ownership.

The issue of whether broadcasting continues to merit special regulatory attention has been raised by this review. Trends in communications technology and services such as digital technology, convergence and globalisation, will also impact on future decisions about the preferred model for regulation of media ownership.

The local broadcasting industry is already highly concentrated and the barriers to entry are large. To the extent that the existing broadcasting networks vertically integrate further into production there is likely to be a reduction in the competitiveness of the existing market for independent production. In the present environment we can only see barriers to entry for independent production increasing. The independent production sector generates competitive pressures which enhance industry efficiency and dynamism. To ensure that these advantages are not lost will require a policy emphasis which supports the role of independent local producers.

It is SPAA's strongly held belief that completely unfettered competition and public interest objectives are simply not compatible. This has been recognised in the development of television regulation in Australia, with commercial broadcasters maintaining the benefits of a regulated oligopoly in return for meeting cultural and industry development objectives which may have otherwise been incompatible with the most profitable commercial practices.

## 2. PUBLIC INTEREST OBJECTIVES OF BROADCASTING POLICY

The Commission has been asked to inquire into the operation of the *Broadcasting Services Act 1992* (the BSA) and related legislation.

The Commission is to advise the Government on “practical courses of action to improve competition, efficiency and the interests of consumers in broadcasting services.” In directing the Commission the Government has asked for a particular focus to be placed upon “balancing the social, cultural and economic dimensions of the public interest’ having due regard to the impact of technological convergence upon broadcast markets.

In other words, the Commission’s task is to examine the public policy objectives of broadcasting, their operation in existing legislation and to make some predictive recommendations about how these objectives should continue to be realised in legislative and administrative action.

As the Government has indicated, the current legislative and administrative framework for broadcasting is designed to achieve three broad public policy objectives - social, cultural and economic. That they need to be ‘balanced’ is indicative of the tensions that exist between them and the relative weight that has been given to each from time to time.

In broad terms, each of the objectives can be seen to deal with aspects of what broadcasting is expected to deliver and why Government historically has intervened to regulate and supervise broadcasting.

### 2.1 Social

The social objectives of broadcasting encompass the ideas that broadcasting should provide wide access to news and information; will participate in the provision of general education; will be fair and accurate in the presentation of political speech and matters of public interest; will be responsive to community concerns and not promote or enhance divisions within the community; and will respect community standards of taste and decency and pay particular attention to the needs of children and their protection from harm.

All these ideas relate to the objective of broadcasting contributing to an informed and participative citizenry while at the same time reflecting and accommodating general community attitudes, standards of public morality and taking a responsible approach towards the child audience.

### 2.2 Cultural

The cultural objectives of broadcasting encompass the ideas that broadcasting will contribute to the development of a vibrant sense of national identity; reflect the diversity of cultural expression within the community; and contribute directly to the preservation of cultural heritage and endeavour to promote a degree of excellence and quality in its output.

These objectives incorporate the idea of broadcasting as being both a kind of trustee for existing cultural expressions, ensuring that they are kept alive for future generations, and that it will be an active participant in the creation of a strong national culture that builds upon what has gone before.

### 2.3 Economic

The economic objectives of broadcasting stem from the utilisation of what is still regarded as being a public resource - the radiofrequency spectrum. Here are encompassed ideas that access to broadcasting services will be competitive; there will be limitations on the market power of broadcasters through ownership and control restrictions; broadcasting will remain effectively in the economic control of Australians; and that broadcasting services will be managed efficiently to produce positive outcomes in terms of employment and economic growth and that broadcasting.

An additional economic factor is that the Government is a participant in broadcasting not only as the regulator, but as a provider of broadcasting services and, until recently, as the owner of transmission facilities.

## 3. THE BROADCASTING SERVICES ACT

The BSA replaced the *Broadcasting Act 1942* as a result of a wide ranging review of broadcasting policy. In the 50 year history of the Broadcasting Act, it took the sector from the days of radio through the introduction of television and FM radio to the imminent introduction of subscription broadcasting.

The significance of the change from one piece of legislation to the other lies as much with what was retained of the structure and public policy objectives of broadcasting as what was changed or abandoned. The vibrant and diverse structures of broadcasting developed over the previous seventy years were maintained while the legislative and policy framework was adapted by the BSA to position the sector for the expansion of new services.

When the BSA was introduced, its objectives made explicit what had been implicit for some time. The objectives reflected both the political and public expectations of what broadcasting should provide and the kind of role it should play in Australian society.

The challenge facing the Commission is to identify and understand the sophisticated nature of the broadcasting system that Australia has developed and the continuing role of Government in providing a stable and predictable framework within which a healthy and vibrant broadcasting industry can exist.

Regulation is important because the public interest does not always correspond with commercial interests. The operators of broadcasting services are responsible to their shareholders and for this reason must be primarily directed by what is likely to result in successful commercial outcomes.

In television, areas such as Australian drama, children’s television and documentary programming are particularly vulnerable to exclusion or downgrading when subject to simple market forces. They continue to need the regulatory intervention of Government to ensure their support.

## 4. AUSTRALIA'S SCREEN PRODUCTION INDUSTRIES

The screen production sector of the economy is a motor for the creation of jobs and national wealth as we move into the information age. Copyright is the currency of the information age and the business of the audiovisual sector is based on the trade in copyright. At the very heart of job creation in the screen production is the creation of content.

Australia has one of the world's most efficient screen production industries. It is a cultural industry with both a national and an international focus. It plays an important part in the life of the nation, but also projects a powerful image of Australia to the world. Its strength and its contribution to the wealth of the nation lies in the ownership and control of copyrights created by Australians.

According to the Australian Bureau of Statistics[1] at the end of June 1997 there were 2,003 businesses in Australia involved in film and video production. The vast majority of these are small to medium sized businesses that have traditionally been the engines of employment growth. These businesses employed 9,438 people and generated income of $1,128 billion. These results represented a substantial increase on the level of activity in the industry over the last decade which was assisted by the effective intervention of government to support industry development.

Federal and State governments have in place a sophisticated package of measures designed to foster the growth of the industry and deliver economic and cultural benefits for Australia. These measures include investment in development and production, assistance for training and infrastructure development and measures designed to create a strong domestic and international audience for production. These carefully targeted measures are aimed at encouraging the production, distribution, exhibition and export of Australian audiovisual products and services. They are essential to health of the Australia's screen production industry and culture.

Despite this Australia remains a substantial net importer of audiovisual products and services, although export performance has improved significantly in recent years. The main contributor to the growth in exports and imports has been television programs. Since 1988 the value of television programming exported has risen from $48 million in that year to $91 million in 1996. In the same period imports of television programs grew from $239 million to $302 million. Any measure that encourages the further importation of television programs will affect the balance of trade and affect the size of the domestic market for Australian programs.

The main customers for Australian and imported programs are the commercial broadcasters. In 1996/97 the commercial networks spent a total of $764.5 million on programming of which 72 per cent was spent on Australian programming, the bulk being news, current affairs and sports programming. Such programming is not easily subject to import replacement and is equally difficult to export. On the other hand, drama and documentary programming has a much higher potential to earn export revenue and, despite the popularity of local drama, is more subject to import replacement.

In 1996/97 the commercial networks spent only $81.6 million on Australian drama (both adult and children's). This  represented 10.7 per cent of their total programming costs. By

[1] The following figures are taken from the Australian Bureau of Statistics publication *Film and Video Production and Distribution Australia 1996-97* 23 November 1998

comparison the networks spent $199.6 million on foreign drama, or some 26 per cent of their total program expenditure.

From 1992/93 to 1996/97 the commercial network expenditure on Australian drama has declined by 12.6 per cent, making it more difficult to fund the cost of production from licence fees and putting greater reliance upon government investment and export revenue to finance production. At the same time as the networks have reduced their expenditure on Australian drama their expenditure on foreign drama has increased by 21 per cent.[2]

It is worth noting that this does not coincide with a slump in advertising revenue or in network profitability. Figures released by the Australian Broadcasting Authority in March 1999 showed that in 1997/98 the profitability of the commercial broadcasters increased overall by 6.9 per cent. Ten network and its affiliates had a profit of $194.5 million, Nine and affiliates a profit of $177.7 million and Seven and affiliates of $84.1 million.

As can be seen at Table 1 (page 5), this situation did not improve significantly in 1997/98. While there was a small increase in the proportion of expenditure on Australian drama - from 10.7 per cent to 11.7 per cent, there was a significant jump in the proportions spent on overseas drama and overseas programming as a whole.

Over the last decade the network spend on Australian drama has declined while the value of exports has increased, so that export returns on television drama are possibly equal to that which can be earned in the domestic market. This is not a welcome outcome. It is not possible to base a successful industry entirely upon production for export. A strong domestic market is essential to the production of programs that can be attractive internationally.

Contraction of the Australian domestic market for drama is impacting on the opportunities for production and potentially reduces the capacity of Australia to export. Further, it does nothing for the development of infrastructure and a skills base in this country.

Given the rapidity of technological change and the potential for growth in the market for audio-visual product into the next century, this contraction in the domestic market is serious. The Australian film and television industry has achieved a significant level of expertise and recognition for the quality of its output. The industry's accumulated physical and human capital will become increasingly economically valuable. If we are to continue to exploit that value we must ensure that a vibrant independent production sector continues to flourish.

[2] It is important to note that private investment in series and serials is not eligible for Division 10 BA tax concessions, meaning that networks' contributions are generally the only form of Australian investment. Currently, too, investment by Government through the Film Finance Corporation (FFC) is declining and the industry no longer has access to the Commercial Television Production Fund.

**TABLE 1: Commercial Network Program Expenditure [3]**

| | 1993-94 | | 1994-95 | | 1995-96 | | 1996-97 | | 1997-98 | |
|---|---|---|---|---|---|---|---|---|---|---|
| *Drama* | 72.6 | 11.1% | 72.8 | 10.7% | 77.2 | 11.0% | 73.8 | 9.7% | 82.3 | 10.3% |
| *Children's - drama* | 3.0 | 0.5% | 4.4 | 0.6% | 7.0 | 1.0% | 7.8 | 1.0% | 11.2 | 1.4% |
| *Children's - other* | 10.7 | 1.6% | 8.0 | 1.2% | 6.6 | 0.9% | 10.2 | 1.3% | 11.8 | 1.5% |
| *News and current affairs* | 156.5 | 23.9% | 145 | 21.4% | 139.7 | 19.9% | 155.1 | 20.3% | 161.6 | 20.2% |
| *Documentaries* | 19.3 | 3.0% | 24.0 | 3.5% | 24.0 | 3.4% | 13.3 | 1.7% | 6.3 | 0.8% |
| *Sport* | 106.3 | 16.3% | 117.3 | 17.3% | 128.8 | 18.4% | 149.7 | 19.6% | 153.4 | 19.2% |
| *Light entertain - variety* | 36.7 | 5.6% | 33 | 4.9% | 49.1 | 7.0% | 62.5 | 8.2% | 47.3 | 5.9% |
| *Light entertain - other* | 38.7 | 5.9% | 51.2 | 7.6% | 49.5 | 7.1% | 68.6 | 9.0% | 79.9 | 10.0% |
| *Other programming* | 26.1 | 4.0% | 21.7 | 3.2% | 22.2 | 3.2% | 8.5 | 1.1% | 12.4 | 1.5% |
| ***Total Australian*** | ***469.9*** | ***71.9%*** | ***477.4*** | ***70.4%*** | ***504.1*** | ***71.9%*** | ***549.5*** | ***71.9%*** | ***566.2*** | ***70.7%*** |
| *Overseas - drama* | 160.9 | 24.6% | 183.4 | 27.1% | 174.2 | 24.9% | 199.6 | 26.1% | 217.6 | 27.2% |
| *Overseas - other* | 23.2 | 3.5% | 17.2 | 2.5% | 22.4 | 3.2% | 15.3 | 2.0% | 17.2 | 2.1% |
| ***Total Overseas*** | ***184.1*** | ***28.1%*** | ***200.6*** | ***29.6%*** | ***196.6*** | ***28.1%*** | ***214.9*** | ***28.1%*** | ***234.8*** | ***29.3%*** |
| **Total Programming** | **654.0** | **100.0%** | **678.0** | **100.0%** | **700.7** | **100.0%** | **764.4** | **100.0%** | **801.0** | **100.0%** |

[3] Based on data from ABA collected as part of their tracking of commercial networks activities

## 5. THE ROLE OF TELEVISION IN AUSTRALIA

> *The luminous screen in the home carries fantastic authority. Viewers everywhere tend to accept it as a window on the world, and to watch it for hours each day. Viewers feel that they understand, from television alone, what is going on in the world. They unconsciously look to it for guidance as to what is important, good, and desirable, and what it not. It has tended to displace or overwhelm other influences such as newspapers, school, church, grandpa, grandma. It has become the definer and transmitter of a society's values.*
>
> \- *Erik Barnouw*

Television is the most popular form of entertainment enjoyed by Australians and is the most influential means of communication in the lives of those who watch it. There are only three things to which people in Australia devote large portions of each day and they are work, sleep and watching television.

Its significance in the lives of Australians is therefore substantial. It is commonly accepted that television has the ability to influence the way the audience looks at the world. This view has remained an essential part of community attitudes and has informed the development of public policy towards television and its development. It is also the reason for such strong regulation relating to issues such as sex and violence, political speech, advertising or Australian culture.

Since its inception, television has been viewed as a strongly influential force, even if there has been less agreement about what direction its influence takes. In 1969, Spiro Agnew, Vice President of the United States, complained that a "small group of men" decided what the country would learn each day and that they had acquired the power to make or break politicians or policies.[4] These arguements are reflected in the recurrent debate over ABC "bias". This debate would not take place if politicians considered it was irrelevant how they were perceived on television. As it stands, the perception of bias on the ABC has remained a strong area of debate about media policy.

The influence of television is not only seen in the area of politics. Its influence upon social and cultural norms is considered to be extremely strong. Whenever there are reports regarding extreme violence in the community, an explanation is constantly sought in the visual images to which individuals have been exposed. Films and television are often seen as one of the greatest problems in the development of what is viewed as an increasingly violent society. Actual studies on the impact of television violence and its relationship with those committing violent crimes are varied and often contradictory. Nonetheless, the strongly held community belief is that television plays a significant role.

Sex on television is another area of strong community concern. The guidelines relating to community standards have recently been updated and strengthened in response to concerns from the public and Government that there was an unreasonable increase in the amount and explicitness of sexual activity depicted on television.

Television has also had a significant effect on culture, particularly with younger people. The lexicon of programs such as *Seinfeld*, *The Simpsons* and *South Park* has clearly entered into every day conversations, just as it did for an older generation of programs which live again in repeats or on cable channels devoted to nostalgia television. Rather than referring to literature for comparisons and allegories, most people use television. Television programs which involve regular characters and on-going storylines are the

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[4] Agnew, cited in Douglas Kellner *Television and the Crisis of Democracy* Westview Press USA 1990 p3

topic of conversation and discussion - what has been branded in the US as “water-cooler television” ie what people will discuss the next day during their coffee breaks. People will construct social events around television programs - regular *Melrose Place* parties were a feature in the early nineties. Final episodes, such as that of *Seinfeld* or *A Country Practice*, can bring entire cities to a halt. With the diminishment of a sense of community for many people, television recreates a bond between people.

While it may be impossible to prove empirically that television is probably the most influential force in many people’s lives, it is possible to demonstrate that people consider it so. The final illustration of this is the fundamental economic underpinning of the commercial television industry - advertising.

The main source of revenue for the commercial broadcasters is from advertising. Television is still viewed as the most effective form of advertising and companies will spend large amounts of money utilising this medium.

While there has been some reduction in the advertising spend on television in recent years, television still remains the dominant area of expenditure. For example, in 1998, the overall expenditure on motor vehicle advertising was $589 million. Of this 61 per cent was spent on television advertising. Similarly in the area of communications advertising, with overall expenditure worth $189 million, 58 per cent was expended on television advertising.[5]

Because of its pervasive nature and its potential to influence behaviour and opinion television continues to be a highly regulated medium. The objectives of that regulation have been to promote the greatest public benefit from the use of a scarce public resource.

## 5.1 Structure of Television

Australia was an early adopter of television and in doing so was one of the first countries to establish both privately owned and public broadcasters. Many other countries went down the path of developing television as state run monopolies.

This model, despite being heavily oriented towards public service objectives, also created an overly bureaucratic structure that could afford to largely ignore the creation of a commercial market place for production, distribution and advertising. It is in order to adapt their television systems to the international environment these countries broke up their state owned monopoly broadcasters and introduced competition from privately owned broadcasters in the early nineties.

Australia developed a strong privately owned and advertiser financed commercial broadcasting sector alongside a publicly funded and publicly owned national broadcaster. It was modelled upon the structure that had already developed for radio in this country and was the main feature of the Australian broadcasting system until the early nineties, when the BSA was introduced.

The commercial television broadcasters were developed as a regulated oligopoly of three national networks. In return for protection from competition and the profits from the oligopoly, the networks returned a portion of their income in licence fees and were required to meet cultural and industry development obligations.

[5] These figures and those across other industry segments can be found in Ad News, 12 March 1998 pages L1-L6

This system has also been subject to strong government supervision in pursuit of the public policy goals for broadcasting. In broad terms these have been to ensure that broadcasting remained under the ownership and control of Australians, that audiences were provided with a diverse range of quality programs, that there was balance and fairness in the presentation of news, current affairs and political speech, that community standards of taste and decency were met and that Australian identity and cultural integrity was preserved and enhanced.

### 5.2 Pressures for Change

As we approach the new millennium there are a number of pressures for change that are acting upon the television environment in Australia and internationally. However, these pressures that are sometimes referred to as convergence will not necessarily lead to the death of television as we currently consume it.

As Frances Cairncross has observed in *The Death of Distance*:

> *In a decade's time, television will have become a far more diverse medium and will be watched in many more places than it is today. Moving video pictures, professionally assembled, will become the only common theme...But there will also continue to be television that recognisably descends from what people watch today. This familiar programming will be delivered, not to a computer, but to a distinct sort of machine used for particular activities, most of them fairly passive and most linked to entertainment rather than to shopping or an information search. Indeed, in the first decade of the next century, the quality of sets will improve, as wide screens become commonplace, bringing big-screen quality- and, incidentally, making the television set even more different from a PC than it is now. Digital delivery and a flat screen that hangs on the wall will make television feel more like genuine home movies.*

Rather than the introduction of digital delivery systems leading to the merging of the television and the PC, the direction of development points to television remaining the dominant source of what will remain an essentially passive form of home entertainment.

This is a trend that has been occurring for some time. In the early eighties the attachment of the VCR to the domestic television receiver opened up a huge new market for the consumption of pre-recorded video tape. Shortly after that, the development of gaming consoles allowed the television to be used for the playing of interactive videogames. In the nineties the connection to the television of an integrated receiver and decoder supplied by a pay television service allowed television homes to expand the number of channels they could access.

In the future as digital terrestrial television is introduced into this country we will see the increasing advent of widescreen, high definition receivers utilising flat screen technology that will allow for a greatly enhanced experience of all those programming streams coming into the home.

The increasing introduction of digital delivery systems will not only increase the quality of the viewing experience but the consequent increase in bandwidth will lead to the possibility of more channels and the increasing use of the broadcast spectrum for telecommunications and data services. It is in these latter services that we will see the increasing application of interactivity for information retrieval and for e-commerce, but it is more likely that most such services will be accessed through PC like connections rather than the television.

The introduction of pay television into Australia has meant that for an increasing number of Australians television has ceased to be “free”. ( It was in the early seventies that Australia ceased to require that consumers pay a licence fee to own and operate a television receiver as continues to occur in the UK and New Zealand.) Instead, television is becoming increasingly transactionally based. More viewers will begin paying for access not only to basic subscription services, but as penetration increases premium services or pay per view events will lead to increased tiering of services according to cost.

Levels of subscription to Pay TV are likely to increase given the new approach to the bundling of services such as telephony, internet and Pay TV.

Not only will this segmentation of the market increase the revenue streams available to subscription television, but it will affect the overall revenues and costs of television. We are already witnessing the increase in the costs of rights to premium content, such as sport, as competition between subscription and free to air television intensifies. While there are anti-siphoning laws, they do not prevent the migration of all events to Pay TV. The recent coverage of the cricket tour of the West Indies by FOXTEL is a case in point.

As the structure of channels change with the introduction of specialist news, movie, sport, lifestyle, music, children’s and documentary channels on subscription television many of the genres of programs upon which they are based become more marginal on free to air television. However, the explosion in channels does not necessarily create a huge demand for new programming. The cost structures of subscription television are such that they are not able to afford the same levels and range of original programming. The increase in channel choice only partially increases the amount of material and mostly presents the opportunity to access the same material more often or at more convenient times.

Free to air television will continue to attract the vast majority of television advertising in the foreseeable future. This is because free to air will continue to deliver to those major brand advertisers what they need, which is the aggregation of large numbers of viewers into accessible audiences for programs. Subscription television audiences will remain extremely fragmented and subscription broadcasters will continue to find that they can earn substantially more from making individual consumers pay for programming rather than trying to attract large enough audiences for any but the most specialist or niche advertiser.

## 6. ECONOMICS OF BROADCASTING

It is important to understand that the cost of producing films and television programs is independent of the number of people who consume them. This means that the cost of production is not reduced by the number of people who consume these products; even if the revenue generated might be increased. Unlike manufactured goods where the unit cost of production is reduced by volume manufacture, this is not generally the case for film and television.

The cost of producing a feature film like *The Castle*, for example, remains the same whether one person saw it or 100,000. Obviously the producer endeavours to make a film at the lowest cost without compromising those factors which make it attractive to the audience. This helps to maximise potential profit.

However, the cost to the consumer remains the same irrespective of the cost. For example, viewers of *Titanic* did not pay a premium to view this film because of its costs.

The same applies to television programs. While there are some cost savings in production of volume television, they are not of the same order as can be achieved in pure manufacturing. Nor do broadcasters necessarily increase licence fees in response to ratings success.

Distribution and licence fees paid to producers are only indirectly related to the audience who sees their products. Producers do not get a share of the first dollar from theatrical exhibition and video rental. Nor do they share in the revenue to broadcasters from advertising or subscriptions. Program licence fees are largely independent of production costs, and equally, the costs of advertising time can bear little relation to the cost of program purchases. The cost of advertising time is dictated more by audience share and demographics than by the cost of the program. Broadcasters are also positioned to demand licence fees that do not cover the costs of production.

The business of commercial television is to sell audiences to advertisers. To be successful commercial television needs programs that attract the audiences advertisers want to reach. But they also need programming that is cost effective relative to the revenue they can generate. Ten years ago networks fully funded a greater range of programs.

Australian content regulation encourages broadcasters to fund the production of some programs they might otherwise not have supported, particularly high quality drama[6]. Certainly the broadcaster will not fund the whole cost of production of these programs themselves because the cost far outweighs any advantage to them in terms of revenue or compliance with their Australian content requirements.

Given the amount of broadcast hours, the average cost of domestic and imported programming for the three commercial television networks is very low. While program costs are higher in those timeslots that attract peak audiences and revenues, there is a strong incentive for broadcasters not to allow overall programming costs to exceed revenue, except in a few exceptional cases.

Equally, while advertisers may be willing to pay a premium for programs that attract large audiences, the willingness of advertisers to pay is not limitless. No matter how popular a particular program, broadcasters cannot simply increase advertising rates to cover program costs without driving advertisers to seek more cost effective means of advertising.

In this equation Australian programming is expensive relative to imported programming and to its potential to generate revenue, even if much Australian programming may be more attractive to audiences than foreign programs.

While each network currently exceeds the minimum drama requirements of the Australian Content Standard, they do so largely with series and serial production, which are cheaper to produce even if the licence fee is under the cost of production. Although there has been an increasing trend for broadcasters to maintain licence fees and expect producers to fund the deficit between their licence fee and the cost of production. Telemovie and mini-series require higher licence fees to be paid by the Australian broadcaster, as well as significant overseas investment or sales to underwrite their production. Even with the encouragement of regulation and with ongoing audience demand, the market generally

[6] When referring to “quality” drama/television in general, SPAA means television with strong, well-written scripts, good acting/performances and high production values

fails to fully support drama production despite the on-going demand for these kinds of programs. The majority of drama programs are now deficit financed, including *Water Rats*, *Murder Call* and *Neighbours*. Despite the ratings popularity of a program like *State Coroner*, failure to gain overseas sales led to its demise.[7]

This problem was one of the motivations for the creation of the Commercial Television Production Fund which allowed a number of innovative but expensive productions, particularly mini-series. This program lasted for three years and produced a series of successful productions. The opportunities for Australian producers have subsequently been curtailed since the demise of the CTPF.

### 6.1 Broadcasters' Income

The principal source of income for commercial networks, and their principal business, is the selling of advertising time.  The revenue from advertising sales is then used for program production, acquisition investment and returned to shareholders as profits.

The networks do, however, have other sources of income. These include sale of programs, return on investment in production and merchandising. Broadcasters will shortly have a new revenue stream from the retransmission of their broadcasts on Pay TV.

Most broadcasters produce some of their programming in-house. Much of this is local current affairs, infotainment or sport, which is generally not saleable internationally. Some of the commercial networks do have relationships with airlines and similar organisations, providing news services and programming for in-flight entertainment. Any drama productions or documentaries made by the networks, such as *Home and Away*, are sold internationally, with returns accruing to the broadcaster. In other cases, format rights to in-house 'lifestyle' programs and quiz shows can be licenced to broadcasters or producers in other countries.

In the past, networks usually paid purely licence fees for independent productions. In the area of drama in particular this has changed significantly in recent years. The commercial networks are characterising a significant proportion of what would formerly have been a licence fee as an equity investment in a production. Often they will contractually privilege their investment, so that the broadcaster is the first after the distributor to recoup its investment, when the producer makes overseas sales. This means that broadcasters gain an on-going revenue stream and may recoup a significant proportion of what they have paid for the program.

The portion of network contribution to the cost of production which is characterised as investment does not mean they are carrying a risk. The networks get the use of the program, which is their primary need; they get the support of advertising, and the benefit of any overseas sales. In the past decade there has been a change to the level of risk assumed by the producer where the network no longer pays the full cost of production. Now the producer assumes a significantly larger risk than that of the network.

### 6.2 Financing Program Production

[7] For a discussion of the problem facing the financing and overseas sales of Australian drama series see Variety May 3-9 1999, p52 "O'Seas Sales Slip Stings
Prod'n"

The manner in which Australian drama programs have been financed has changed significantly over the past twenty years. Up until early this decade, Australian programs were funded entirely from licence fees from the commercial broadcaster who commissioned the program. This is no longer the case.

Before most drama programs, and particularly series, can be made in Australia, there must be a commitment from a broadcaster for production. This rule is sometimes broken for co-productions where there is significant international investment.

In Australia, as in other markets, foreign programs can be purchased cheaply due to the operation of primary and secondary markets. For drama productions, without exception internationally, the costs of the program are largely recovered from sales into the domestic (or primary) market. This is especially true for programs originating in the United States, where the operation of the networks and the process of syndication often means that a production is generally in profit before it is sold into international markets. Hence a program such as *Seinfeld* which cost over a million dollars per episode to produce can be sold in Australia (or other secondary markets) for around $30,000 per episode. Generally it would therefore be more profitable for Australian commercial channels to show primarily foreign, and particularly American, produced programs.

The secondary markets internationally for television programs means that international sales of program to individual markets will be worth a fraction of the costs of production. Therefore, it is nearly impossible to guarantee the profitability of a program without a domestic presale.

The proportion of the total cost of production which a network's investment represents has dropped significantly in the nineties (further detail of this will be forwarded to the Productivity Commission as a confidential submission). This change in the level of financing available has meant that independent production companies must find other investment or distribution advances must be cashflowed into the production of domestic drama. A distribution advance is a guarantee of return from an international sales agent. When international sales are then made, this advance is recouped by the sales agent, along with a commission, before any further payments are made to the production company and equity investors. As it is often the case that there is privileged investment, such as that of the broadcaster, producers often do not make a profit, or, if they do, it is often some time after the production is made.

Significantly, the international market is becoming much more difficult[8]. This is due to several factors including the amount of product in the international market, the increasing number of output deals which are being made and an international trend increasing emphasis on local production and the impact of local content quotas. It is not however, due to the quality of Australian drama product. *Water Rats*, for example, is sold in more territories than any other program - 169 - and there are two other Australian programs in the top ten of international sales.

Nonetheless, many small independent producers live a virtually hand-to-mouth existence while larger companies have had to rely on Government subsidy, private fundraising and expanding their businesses into areas such as distribution. It is also the case that most programs will not be made without the interest of an international sales agent At present there is very little money to be made out of the production of television drama. Should the

[8] Australian Financial Review "Screen stars fade as foreign markets prove fickle" 12 April 1999 and The Weekend Australian "Drama suffers in big turn-off" 10 April 1999. Also anecdotal evidence from production companies which are members confirm the difficult nature of the market at present.

trend in both licence fee levels and overseas markets continue, it will become unviable for independent producers to make drama programs, significantly reducing the diversity which is available on Australian television and employment levels in the industry.

Due to the need to make international sales, it is necessary for producers to ensure that programs are not only attractive domestically, but are also saleable overseas. For this reason some distinctly Australian projects may never be produced, because the producer cannot offset the cost in the international market place. As networks increasingly pretend that part of the cost of acquisition is an investment, they are not increasing their level of risk and are using investment to increase their share of the back end of revenue.

Along with decreasing licence fees, the networks make other demands upon the producer. They seek a greater level of creative control over the content of the program; demand extended numbers of runs; want control over the copyright in the program and seek to limit the producers' ability to further exploit the program in markets such as Pay TV.

### 6.3 Market Power

We have outlined a situation of decreasing licence fees and contractual conditions for independent producers. The question could be posed why would independent producers accept declining terms and conditions which risk making them unprofitable?

The substantive issue here is one of an inequality of market power. As discussed above, it is not possible for Australian independent producer to make a program and in particular series or serial form drama without the participation of a network, often from the inception of the project. This puts independent producers at a significant disadvantage when it comes to negotiating adequate terms of trade.

The independent production sector in Australia is a very competitive and efficient industry. There are six major independent television production houses along with over 20 smaller producers. For this reason, there is no lack of potential programming from which the networks can chose. Conversely, there are a limited number of options for an independent producer with a project to pitch.

Beyond the three commercial networks, options are extremely limited. The ABC has increased the outsourcing of its productions providing a new opportunity for independent producers. However the ABC has a poor track record in the amount of funding it has provided to Australian drama. The nature of SBS means that it is severely limited in the types of Australian programming it is likely to commission and is focussed primarily on documentaries. And until Pay TV providers increase their level of revenue, their participation in Australian drama production will tend to be limited to commissioning occasional special events, feature films and telemovies.

Generally therefore, independent producers must deal with the commercial broadcasters if they are to produce programs. For larger production companies who have significant organisations it is important that they maintain on-going levels of production. Independent producers are forced to accept the terms and conditions which are offered to them by the broadcasters who are able to enforce a high level of competition between suppliers. Trade practices restrictions prevent producers agreeing amongst themselves to floor prices and minimal contractual conditions at the same time writers, directors and performers expect increased compensation for their work.

Subsequently competition between producers coupled with a limited oligopoly of broadcasters works to artificially reduce licence fees. Broadcasters are generally aware of the international sales of a program, and therefore can reduce their contribution accordingly, so that while the licence fee being offered may still make it feasible to produce a drama series, the profitability of that program is curtailed or diverted to the broadcaster because they say they have a privileged investment. In this respect it is the success of Australian drama internationally together with the market imbalance between producers and broadcasters makes profitability difficult, unless still more international sales can be made.

Despite a history of sourcing programs from the independent sector, we are witnessing an increase in the amount of inhouse production and co-production with multinational companies with significant international distribution infrastructure. Broadcasters are doing this in a bid to reduce their costs and gain greater control over content. This puts additional pressures on Australian independent producers.

The networks are involved in a number of businesses but their core business is the sale and broadcast of advertising. They occupy an oligopoly position and control the access to audience and advertisers. The business of producing television programs is secondary to that and there is no reason why they should increase their monopoly control of this business. While they compete only with each other in the sale and broadcast of advertising, they compete with the independent sector in the area of production. As large vertically integrated entities with access to significant amounts of finance capital, it is inevitable that this competitive playing field is not a level one.

### 6.4 Increase in Competition in Service Provision

On the surface, the idea of increased competition in the provision of broadcasting services would seem to go some way towards solving the problem of unequal market power. SPAA contends that this is not necessarily the most appropriate solution for a number of reasons.

While superficially attractive, SPAA has a number of concerns about the introduction of a fourth commercial channel. The international experience has shown that new channels tend to fragment the market for advertising that can support new programs and increase reliance upon imported programming and cheaper locally made programs. This has an effect upon the quality of the service provided to the viewer and the ability of television to fund new production.

Over the last decade the UK has introduced multichannel television and a new terrestrial television service - Channel 5. Prior to this the UK had a very high level of domestic production financed by a highly regulated but well funded broadcasting sector. Multichannel television increased the range of choice for the consumer, but has not greatly increased the level of domestic production. Program expenditure by new services was diverted to increased costs for premium sports and movies and to the importation of foreign programming. As a consequence the UK now has a substantial trade deficit in television programs that is one of the reasons the UK Government has announced an inquiry into the export and distribution of UK television programs.

At the same time a recent report by the British Independent Television Commission heavily criticised programming on Channel 5:

> "Original new drama fell woefully short of target, documentaries

> such as *The Real Monty* were 'overly voyeuristic' and too many entertainment shows were not only low-budget but poor quality"[9]

Part of the reason for the lack of quality is perceived to be the lack of funding for Channel 5. As a new channel, it has had problems attracting substantial advertising revenue. Without decent (and subsequently more expensive) programs, it is unlikely that Channel 5 will attract substantial audiences and therefore ratings. The New Zealand experience has been similar.

Any new channel in Australia could face similar problems. Without a massive initial investment, a new channel would be likely to depend initially on repeats and low budget light entertainment programs. In this sense, it would provide a new programming source which was not dissimilar to many Pay TV channels, subsequently not increasing the diversity of programming available, nor extending the outlets for original Australian programs. This problem would be further exacerbated if there was any diminishment in the strength of Australian Content regulation.

The second major concern that SPAA would have with any proposal for an additional channel is the dilution of advertising expenditure. As discussed above, the main source of income for broadcasters is advertising. However, the advertising dollar is not infinite. There are already concerns held by many in the broadcasting industry that new forms of technology as well as Pay TV will erode the level of FTA television advertising expenditure.

Clearly, given the finite nature of advertising expenditure, a significant problem could be that an additional commercial channel could lead to a reduction in the amount of revenue gained by individual channels, leading to a drop in the amount of money networks have to invest in individual programs. In other words, the same amount could just be spread more thinly. If this were to occur it would mean that the problems described above with respect to the financing of programs could become worse. Networks may be unwilling, or indeed unable, to continue to spend at the same level while returning a similar profit to their shareholders. The result of this would be a diminishment in the quality of local productions would in turn make them more difficult to sell internationally.

### 6.5 Independent Production Quota

SPAA has consistently proposed the introduction of an Independent Production Quota. An independent production quota would ensure diversity by making it impossible for Australian content requirements to be merely produced in-house or by large off-shore companies in Australia with exclusive deals with networks.

The quota would require that a significant proportion of programming on commercial networks was produced by independent Australian producers by setting minimum levels of independent production. It could run the gamut of programming and include areas as diverse as sport and adult drama.

There are international precedents for such a requirement. In 1989, the European Council introduced Directive 552, the "Television Without Frontiers Directive". The Directive has been amended since then most recently in 1997. The preamble to the Directive states that:

[9] Broadcast "Channel 5's bum rap" 9 April 1999 p18

> “Whereas a commitment, where practicable, to a certain proportion of broadcasts for independent productions, created by producers who are independent of broadcasters, will stimulate new sources of television production, especially the creation of small and medium-sized enterprises; whereas it will offer new opportunities and outlets to the marketing of creative talents of employment of cultural professions and employees in the cultural field; whereas the definition of the concept of independent producer by the Member States should take account of that objective by giving due consideration to small and medium-sized producers and making it possible to authorise financial participation by the coproduction subsidiaries of television organisations;”

In relation to independent producers the Directive makes the following recital:

> " whereas Member States, in defining the notion of 'independent producer`, should take appropriate account of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights;".

The Television Without Frontiers Directive of the European Commission requires that at least 10% of transmissions within member states must consist of European works made by independent producers. The provision of support for independent production is part of a general European strategy to strengthen the European based audio-visual industry and its share of its own market.

Following the EC directive the UK established such an independent production quota in 1990. This requires that at least 25 per cent of eligible programming be taken up by independent productions.

In essence the introduction of such a quota would be an extension of the Government’s policy towards national broadcasters in the wake of the Mansfield report. The Gonski report supported the recommendation on the outsourcing of non-news and current affairs television by the ABC on the grounds that it would encourage diversity. The same principle should apply to commercial networks. A greater number of sources of Australian production will ensure that there is a greater diversity of images of Australia being shown on Australian television.

## 7. THE AUSTRALIAN CONTENT STANDARD

Australian content regulation has over the years encouraged commercial television to provide Australian audiences with a choice of Australian programs that would not have been available to them if the market had been left to work on its own. The rules currently applying under the BSA are as follows:

**Commercial TV broadcasters** are required to transmit, each year -

- 55 per cent Australian programs between 6am and 12 midnight;
- 80 per cent of commercials between 6am and 12 midnight must be Australian must be Australian;
- a points target for first release Australian adult drama screened in prime-time, equivalent to approximately 260 hours of serials, 130 hours of series or 80 hours of miniseries, telemovies or features;

- 260 hours of children’s programs (of which 50 per cent must be first release Australian children’s programs) and 130 hours of pre-school programs (all of which must be Australian) screened in nominated children’s time-slots;

- 32 hours of first release Australian children’s drama programs; and

- 20 hours of first release Australian documentaries.[10]

**Subscription television broadcasters’** transmitting 'predominantly drama channels' are required to spend 10% of the program budgets for these channels on 'new Australian drama'. The government has recently agreed to amend the legislation to enforce this requirement. Changes in proposed legislation will correct deficiencies which currently render the requirement ineffective.

### 7.1 Australian Content regulation

Australian content regulation represents an act of will on the part of Australian governments to carve out a place for distinctly Australian programs. The forces of the market, if left to their own devices, would have seen Australian television continue to be dominated by foreign, mainly US, programs.

The original impulse for regulation of Australian content was a reaction against the early domination of Australian television by the cultural products of other nations. This came about because the nature of the trade in television programs made it possible for foreign programs to be purchased cheaply. The regulatory answer acknowledges the tension between the ideal of complete free trade and the creation of a strong and vibrant culture.

Despite an early commitment to high levels of Australian content when television first started, by the late fifties there was significant concern about the impact of mainly American programs on the development of a strong Australian culture. The first Australian content requirements for commercial television were introduced in the early sixties and coincided with other government interventions designed to promote the development of a strong audio-visual culture in Australia.

Although Australia was a pioneer of the cinema at the start of the century, by the late fifties/early sixties the state of screen production in this country was at its lowest ebb. The production of feature films was sporadic and largely unsuccessful and the impact of television production was only just beginning to be felt.

Regeneration of the industry occurred through a combination of nascent industry lobbying and a series of measures by government to establish an infrastructure to support creativity and development. Successive governments have affirmed the role of government in maintaining a sustainable level of independent production, encouraging development and growth in the industry and ensuring audiences have access to high quality Australian programming.

The introduction of the Australian Content Regulation in conjunction with a matrix of other support measures such as direct funding by Government, concessional tax arrangements

[10] The new Australian Content Standard which was introduced on 1 March 1999 also includes New Zealand programs as equivalent to Australian programs (with the exception of NZ co-productions with a third country) in line with the High Court’s decision in the Project Blue Sky case.

for investment in production and the support given to training and skills development helped the establishment and development of a strong independent production sector in Australia.

We referred earlier to the relationship between primary and secondary markets. This allows American television programs to recover their costs in their domestic (primary) market and be offered internationally at a small fraction of the cost of local production. Precisely for this reason Australia and many other countries introduced local content rules. Because of the size of the US market, it is unlikely that the secondary market price situation will change in the foreseeable future.

The Australian Content Standard has secured a place for some Australian drama on Australian television. The viewing public has an expectation that there are Australian made programs available for viewing. Subsequently, some of these program currently gain significant ratings.

While these ratings could ensure that currently popular series continue to be made, the absence of the Content Standard or a similar mechanism would be likely to undermine the number of new and original series, mini-series and telemovies that would be produced. A new series often takes time to “bed down” with respect to ratings, and it is likely that risk-averse commercial channels would eschew new Australian drama for tried and true American programs or new American dramas with which less risk is taken due to the relatively low cost.

The effect of strong Australian content regulation cannot be overestimated. It has not only provided the opportunities for production, the development of skills and the support of infrastructure, but created a growing and increasingly strong domestic television market.

The existence of strong broadcasters committed to the production of Australian content not only served to underpin the direct industry support initiatives by the government, but helped to create a culture of popular Australian television integral to the domestic market and which has produced programs that have proved to be attractive internationally.

Another benefit of the Australian Content Standard is that it maintains the quality of international programs shown on Australian television. There is a huge amount of foreign television product available internationally. As the commercial networks have limited ability to broadcast international programs, what tends to be screened in Australia are the programs at the higher end of the market. In New Zealand where there is not local content regulation, and less competition between broadcasters, not only is there a minimal level of local programming, but there are many low quality international programs which have been purchased extremely cheaply to fill programming hours. In comparison in Australia, the networks tend to fill their more limited slots with the best of foreign programming as it is more likely to guarantee them ratings success, particularly if it has a strong track record in its country of origin.

### 7.2 Alternate Means for Australian Content

Many of the alternative means of ensuring that the same levels of Australian programming remain on Australian screens would be costly to the Government or administratively awkward for commercial television networks. In Canada, the Government maintains several schemes to encourage local production. In addition to strong local content quota regulation, the Government provides “top ups” to licence fees as well as equity investment in television production. A similar approach whereby the Government “tops up” the amount of a licence fee to make Australian products price competitive with foreign programs could be effective, but would be extremely expensive. While SPAA would like to see a similar program developed in Australia, it is unlikely that either the current Canadian model or any approach taken by the Australian Government would be adequate to maintain the current level of Australian programming.

There is an argument that there should be more similarity between the Pay TV and the FTA models of Australian content regulation. This is invalid for a number of reasons. Most important, is that an expenditure requirement is unlikely to achieve the social and cultural goals attained by the Australian Content Standard. While the networks currently spend over 70 per cent of their total expenditure on Australian content, as can be seen from Table 1, the majority of this is on news and current affairs and sports, while double what is spent on Australian drama is spent on overseas drama. An expenditure requirement is a rather blunt instrument, while the Australian Content Standard is able to differentiate between areas, creating important sub quotas.

Additionally, while SPAA has argued in the past that the Pay TV expenditure requirement should be lifted to 20 per cent (and still supports this position) it is important to realise that given the different structures and funding of the two delivery platforms, it would be impossible to have equality in the requirement between the FTA and Pay TV broadcasters and still achieve the public policy objectives of high levels of Australian content in the broadcast sector. In other words, equality may bring FTA down to the minimal levels required of Pay TV.

While the ABC plays an important role in preserving and transmitting social and cultural values through its programming, it is limited in scope and could not be seen as solely fulfilling the Australian Content concerns currently fulfilled through the BSA. In the past, the ABC has had an uneven record regarding its showing of Australian content. In many years, it has lagged behind the commercial networks.

First, diversity would be severely curtailed if there was to be only one source of significant Australian programming. Second, to provide a level of Australian programming which came close to replacing that which would disappear from the commercial networks should the Australian Content Standard be removed, the ABC would require substantial increases in its level of funding given that domestically produced product is more expensive than that purchased from foreign sources. Third, this change in emphasis could limit the diversity of international product shown in Australia as the ABC would no longer necessarily have the funds or the slots for some of the forms of international programs it currently screens. Many of these programs would not be taken up by commercial networks as they would be viewed as too costly or risky.

### 7.3 Regulation of Children's Television

Content regulation for children's television remains extremely important. Like much adult focussed television, during the 1960s and 1970s almost all children's programming was from the US.

As a consequence, the Australian Broadcasting Tribunal introduced the Children's Television Standard in 1979 to provide a regulatory framework that would improve the quality and quantity of Australian children's television. Nonetheless, an Australian children's drama quota was not introduced until 1984.

Children's television is a particularly vulnerable area of programming if left to market forces. Nonetheless there is a strong community demand for quality children's programming. While FTA television continues to attract a mass audience it has a responsibility to be comprehensive. Children's programming must be provided as a service to those who cannot afford to receive Pay TV. If FTA networks wish to provide a continually narrowing range of services, they should become Pay TV operators instead.

As we have discussed above, there is strong community concern and expectations regarding the role of television. Children's television remains a strong area of community concern, with focus on providing child specific entertainment, on the educative role of children's programming and about levels of "adult" content to which children are exposed.

Regulation and funding to encourage the production and broadcast of children's television has been very successful in Australia which in many respects has established world's best practice in this area. Other nations are looking to Australia as a model for the approach to children's television.

In recent years, there has even been recognition in the United States that children's television is an area of significant market failure. In order to counter what has been a marked depreciation of the quality and standard of children's television, regulation has recently been introduced to ensure an improvement in standards.

## 8. OWNERSHIP OF BROADCASTING

### 8.1 Cross Media Ownership

SPAA does not hold a strong position on the issue of cross media ownership. Nonetheless, we would draw the attention of the Commission to the findings in Research Note 20 1998-99 of the Parliamentary Library entitled "Convergence and the Cross-Media Rules." This report demonstrates that it is disingenuous to talk of new media such as the internet and Pay TV providing new sources of news which make traditional cross media rules obsolete. The finding that all the popular Australian news sites on the internet as well as the only Australian news channel on Pay TV are owned by traditional media groups, provides a strong argument against the notion that the internet and Pay TV have made these rules irrelevant. In fact, some could argue that rather than removing them, it may be necessary to see them strengthened.

The arguments for the removal of these rules seems to turn around the idea that convergence has made the divisions between media increasingly irrelevant. However, this appears to be a misapplication of the idea of convergence. It is true that technological developments have lead to the increased application of computing to telecommunications and to broadcasting, bringing about increases in bandwidth and other advantages of digitisation. This has the potential to increase the number of delivery channels and in recent years has increased the number of gateways available to consumers.

Yet the number of gateways have not increased to the extent that it is impossible to gain some form of monopoly control over the gateways. Technology also brings with it new means of restricting access through such things as encryption systems and proprietary software. As Frances Cairncross has pointed out there are three ways in which companies can control gateways - by owning the hardware of communications (eg Telstra), by owning the dominant software (eg Microsoft) or by developing or buying the must have content (eg news services). While these means still exist the relevance of ownership rules that mitigate the tendency toward monopoly or excessive market power will remain.

A case in point is the introduction of subscription television under the terms of the BSA. In 1992 the then Government proposed satellite broadcasting to be the primary means of delivering subscription television and sought to ensure by legislative means that this be the case. Cross media rules were introduced to apply to the initial satellite licences issued to "provide for the introduction of a new and independent media player via that licence and to prevent the common carriers of services becoming vertically integrated in, and potentially dominating, services and their delivery." However, similar cross media rules were not introduced to cover subscription services delivered by cable or by MDS. As a result we now have extensive cross media ownership of subscription television services by established broadcasting, newspaper and telecommunications interests along with vertical integration of both service and delivery systems. It remains as difficult as ever for a new and independent media player to gain access to this market.

### 8.2 Foreign Ownership

Similarly, the argument for removing foreign ownership rules seems to hinge on the increased diversity available due to new technologies. With respect to diversity and the ability of the public to access an Australian controlled and created news service, a relaxation of the foreign ownership rules is likely to threaten long term viability of access. Already we see that the Nine Website is a joint venture with Microsoft, a US company. The internet is dominated by US based content, and trends towards globalisation may leave Australia without a purely Australian viewpoint.

The other concerns about ownership and control of broadcasters is the possible ramifications for diversity in local and international content should one of the commercial networks be purchased by a foreign network or studio/distributor. As foreign entities establish or purchase Australian based production companies there are already instances whereby "output deals" that ensure broadcasters access to popular overseas programs can be linked to investment in programs made by the Australian affiliate.

The independent sector has already suffered from the broadcasters mania for output deals in the late eighties that burdened them with heavy financial commitments to major US studios and restricted their ability to invest in Australian programming. Similarly the ability of some subscription channels to invest in Australian production has been restricted by large subscriber guarantee payments that ensure their access to premium movies.

Were a entire network to be owned or controlled by a foreign concern with substantial international distribution infrastructure and ties to locally based production companies then access by Australian independent producers could be severely curtailed. Equally, as a smaller and less significant part of an international conglomerate, an Australian network could be forced through such a relationship to purchase more international product. These problems would be further exacerbated by any diminishment in Australian content regulation.

Australia is hardly unique in its approach to the regulation of foreign ownership. The US has restrictions on foreign ownership of broadcast licenses which can be found at sections 310(a) and 310(b) of the US *Communications Act.* These restrictions limit direct foreign ownership to 20 percent and indirect foreign ownership to 25 percent of total ownership. The FCC does however have discretion not to impose the 25% limit based on a public interest test. There is no general procedure for not applying the 25% limit. However, the FCC has approved only one exception, that of an American businessman associated with an Australian firm ie Rupert Murdoch and News Corp. At the time the FCC was at pains to make it clear that this approval was one-off and did not set a precedent.

The UK also has foreign ownership rules with respect to its media including the Free To Air broadcasters. Individuals who are neither resident nationals of an European Economic Area (EEA) member State nor residents of the UK, the Isle of Man or the Channel Islands are disqualified from holding any of those licences. Such licences can only be held by bodies corporate if they are formed under the law of an EEA member State which has its registered or head office or principal place of business within the EEA or are incorporated under the law of the Isle of Man or Channel Islands. There are no nationality restrictions on Pay or Satellite television.

### 8.3 Geographical Limits

Before the introduction of satellite delivery of program services in the early eighties and the subsequent move to networking, the way that business was transacted between independent producers and commercial broadcasters was quite different. Competition between not only the channels but each broadcast entity in each state meant that the entire cost of production was sometimes achieved through the sale to a broadcaster in one state with sales to broadcasters in other states representing profit.

In the US the continued existence of geographical ownership limits, regulatory control of network relationship with affiliates and, until recently, extreme limitations on the ability of the networks to own and distribute programs has created a large secondary market for programming. There the producer has had a greater degree of freedom to control and to benefit from the exploitation of rights. In Australia a commercial network will purchase all Australian rights to a program which they will then on-sell as part of their programming feed to regional stations. The producer has not benefited significantly from and is largely locked out of the revenue stream from the extension of networking over the last decade.

SPAA understands it is not possible to turn back the clock in this respect and that the extension of networking has given greater access to television services in regional Australia. However, to the consolidation of the major capital city broadcasters into individual networks has only served to entrench and extend market power.

## 9. INTERNATIONAL AGREEMENTS - THE CER

In 1988 the Government of Australia entered into a treaty with the Government of New Zealand known as the Trade in Services Protocol (the Protocol) to the Australia-New Zealand Closer Economic Relations Trade Agreement (the CER). The general objectives of the Protocol are to liberalise the barriers to trade in services between the two countries, establish a framework or transparent rules to govern such trade and to facilitate competition in such trade.

To achieve these objectives Article 4 of the Protocol reads as follows:

> "Each Member State shall grant to persons of the other Member State and services provided by them access rights in its market no less favourable than those allowed to its own persons and services provided by them."

Article 5(1) reads as follows:

> "Each Member State shall accord to persons of the other Member State and services provided by them treatment no less favourable than that accorded in like circumstances to its persons and services provided by them".

The Protocol provided for each country to reserve from the terms of the Protocol certain services by inscribing them in the annex to the Protocol by 31 March 1989. This allowed for specific measures to be maintained by the contracting parties, which are inconsistent with the general provisions of an agreement. Alternatively the contracting parties ‘carved out’ particular areas, such as taxation, and provided a specified framework of exceptions for future actions, such as measures to prevent crime or disorder.

At the time that the Protocol was being negotiated the Australian screen production industry was consulted by the Australian Government and advised that Australia should seek an reservation for measures, such as the Australian Content Standard, that are designed to preserve and encourage cultural integrity and which affected the trade in audio-visual services. Despite this advice the reservation did not eventuate in the final form of the Protocol and it has never been satisfactorily explained why this did not occur.

Since the signing of the Protocol there has not been, as far as we can determine, a general law passed by the Parliament designed to specifically give effect to the terms of the CER or the Protocol. For example, Australia did not follow the practice of the Canadian Parliament when it gave effect to the Canada-United States Free Trade Agreement in 1988 by the passage of a law specifying how the Agreement was to be translated into domestic law.

In the absence of such a specific enactment by the Parliament the question of how the treaty is applied in domestic law needs to rely upon more general requirements in enactments to have regard to international conventions. Such a provision is that included in s.160(d) of the BSA.

As the High Court has pointed out s.160(d) is not dissimilar to others relating to international treaties and convention included in Commonwealth legislation, although they often are more limited to the conventions relevant to the subject of the legislation. For example, the *Civil Aviation Act 1988* requires the regulatory authority to “perform its functions in a manner consistent with the obligations of Australia under the Chicago

Convention and any other agreement between Australia and any other country or countries relating to the safety of air navigation."

In this regard it is worth noting that the New Zealand Parliament has not thought it necessary to translate the obligations of the CER into the domestic broadcasting law of New Zealand. Therefore no similar obligation rests upon the New Zealand Broadcasting Commission (known as NZ On Air)in the fulfilment of its functions.

The functions of NZ On Air are to "reflect and develop New Zealand identity and culture by promoting programmes about New Zealand and New Zealand interests; and promoting Maori language and Maori culture." NZ On Air does this "...by making funds available, on such terms and conditions as the Commission thinks fit, for...the production of programmes to be broadcast..".

Although NZ On Air does not regulate in the same manner as the ABA its function is to promote the presentation of New Zealand culture and identity on New Zealand television. In practice this means providing subsidy to New Zealand producers to make programs about NZ and NZ interests.

The Canadian Broadcasting Act has objectives and regulatory policy similar to that of the Australian Act. The Canadian Parliament has given to the Canadian regulator the Canadian Radio and Telecommunications Commission (CRTC) extensive powers to determine and implement strong Canadian content requirements for broadcasters.

To the extent that the CRTC is bound by any international agreements the Canadian Parliament has first specified in the legislation what agreements are to apply and second that the decision as to application to be made by the Governor of Canada on the recommendation of either the Canadian Government or the CRTC. The issue does not arise in relation to the North American Free Trade Agreement with the US and Mexico. The Canadian government ensured that all Canadian cultural industries were exempt from the terms of the NAFTA Agreement.

Consequently the practice in Australia and in similar common law jurisdictions indicates the extent to which the obligation imposed upon the ABA by s.160(d) is onerous and not necessary to comply with Australia's treaty obligations.

The recent findings of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee inquiry tend to support this position, although it was the Committee's understanding that the removal of 160(d) would not remove the international obligation upon the ABA, although it would mean that it was not unlawful in a domestic sense to discriminate against New Zealanders in the Australian Content Standard. One of the recommendations of the Committee, which is strongly supported by SPAA and the production industry in general is that the Government should renegotiate with the New Zealand to exempt audio-visual industries in the manner originally discussed with the industry. It is interesting to note that the Committee had a majority of Government members.

The Government has decided to reject this approach at present, opting instead to change the legislation so that no country *other* than New Zealand need be included in the Australian Content Standard. This has placed the ABA in the farcical position of having to include New Zealand programs in the Content Standard when its objective is:

> "to promote the role of commercial television broadcasting

> services in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to television programs produced under Australian creative control."[11]

This is highlights the fundamental conflict between the policy of cultural integrity underpinning the regulation and the effects of liberalising trade in cultural services. Australian culture cannot be made elsewhere by people who are not Australian. For this reason the regulation of Australian content has long been about allowing Australians to make our own television culture.

It is inconsistent with this principle to allow New Zealand programs to count as Australian content. New Zealand is another country and another culture. Allowing New Zealand television culture to stand in the place of Australian damages the principle of regulation for Australian content.

It also creates anomalies in the drafting of the Standard. By trying to exclude New Zealand product, the Standard limits the options available to Australian producers and constrains the commercial broadcasters.

However, this issue is wider than the particular relationship with New Zealand. As we move towards a further round of discussion at the World Trade Organisation about trade liberalisation there is growing concern about the impact of trade agreements on culture. UNESCO and the World Bank have put culture firmly on the agenda for policies aimed at the developing world, but the concern is also deep amongst nations of the developed world about the need to preserve cultural integrity and independence. As a nation that has benefited from the application of strong domestic cultural policies it is in our interest to ensure their legitimate role continues to be recognised.

An indication of the growing concern is the recent development of the International Network on Cultural Policy which grew out the International Meeting on Cultural Policy in Ottawa, in June 1998. This was a ministerial level meeting to discuss international cooperation on cultural policy. Australia was not represented, but a number of our trading partners concerned about international cultural policy took part, including Canada, the United Kingdom and a number of other members of the European Community.

Canada and the approach it has taken to preserving and enhancing its cultural heritage provides a useful example to Australia of what can be achieved by concerted government policy. Canada has taken a leading position in promoting international debate on culture and trade. An example of this is the work of the Cultural Industries Sectoral Advisory Group on International Trade to the Canadian Ministry of Foreign Affairs and Trade. The group drawn from the leaders of the Canadian cultural industries has recently released a report "New Strategies for Culture and Trade: Canadian Culture in a Global World" which bears examination for the ideas it puts forward for dealing with cultural policy in the framework international trade liberalisation.

The future health of Australian cultural industries will be strongly influenced by the stance Australia takes in the international debate on trade and culture.

[11] *Broadcasting Services (Australian Content) Standard 1999* Part 1 Section 4 p3