



**Submission to the 2011 Convergence Review
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This submission is made by the Australian Directors Guild (ADG), the industry association representing the interests of film and television directors, writer/directors, documentary filmmakers, animators and independent producers throughout Australia. Formed in 1980, the ADG has 500 full members nationally.

The ADG works to promote excellence in screen direction, to encourage communication and collaboration between directors and others in the industry, and to provide professional support for its members. It maintains a high profile and leading cultural and policy role through its efforts to address issues affecting the industry from a broad perspective.

The ADG is affiliated through the International Affiliation of English-Speaking Directors Organisations (IAESDO) with the Broadcasting, Entertainment Cinematograph and Theatre Union (BECTU), the Directors Guild of America (DGA), the Directors Guild of Canada (DGC), Directors UK, the Screen Directors Guild of Ireland (SDGI) and the Screen Directors Guild of New Zealand (SDGNZ)

Executive Summary

The ADG welcomes the opportunity to provide a submission to the 2011 Convergence Review.

The ADG supports a number of principles outlined in the Convergence Review – Emerging Issues Document. In particular it supports the following:

Principle 2 : Australians should have access to and opportunities for participation in a diverse mix of services, voices, views and information.

Principle 3 : The communications and media market should be innovative and competitive, while balancing outcomes in the interest of the Australian public.

Principle 4 : Australians should have access to Australian content that reflects and contributes to the development of national and cultural identity.

Principle 5 : Local and Australian content should be sourced from a dynamic domestic content production industry.

Principle 8 : Australians should have access to the broadest possible range of content across platforms, services and devices.

Principle 10 : The government should seek to maximise the overall public benefit derived from the use of spectrum assigned for the delivery of media content and communications services.

In 2009, as a member of the Australian Coalition for Cultural Diversity (ACCD) we applauded the Australian Government's decision to accede to the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 (Cultural Diversity Convention).

Importantly, the Convention recognises that: "*Cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value*"¹.

The ADG considers that the following will be crucial to the flourishing of cultural industries in a converged media and communications environment:

- ongoing support for Australia's audiovisual and cultural industries by way of direct and indirect subsidy for the production of Australian content for broadcast and online consumption;
- appropriation to adequately support public broadcasting (the ABC, SBS

¹ Convention on the Protection and Promotion of the Diversity of Cultural Expression, UNESCO, Paris, 20 October, 2005, p.2.

- and NITV);
- regulatory mechanisms, including content quotas in a multi-channel environment and in the digital landscape following the switch-off of the analogue signal in 2013;
 - the development and construction of the National Broadband Network to ensure Australians continue to have access to stories and news and information created by Australians, for Australia;
 - an effective copyright regime that facilitates the monetising of cultural output, where appropriate, to underpin income generation and enable cultural practitioners to live in dignity.

SCREEN INDUSTRY SUPPORT

The ADG recommends the ongoing support for Australia's audiovisual and cultural industries by way of direct and indirect subsidy for the production of Australian content for broadcast and online consumption.

With the impending sale of spectrum by the government in 2013 it is important to provide certainty for the screen industry. Although no conditions have been set for the sale of this spectrum, the ongoing support for the screen industry through organisations such as Screen Australia are imperative to ensure the continuing creation of original Australian content. But there also needs to be a flexible approach to this support.

An industry with opportunities for all key creative's to earn a reasonable living, practice their craft, develop skills and collaborate creatively, and communicate their stories and visions to the widest possible audience needs to be supported. The ADG supports the view that growth in enterprises and support for established production companies are a key factor to the sustainability of the industry. However, we wish to reaffirm our view that such a Program should be able to demonstrate support for the creative endeavour's and careers of directors and other filmmakers who contribute to the success of the local industry. A beneficial flow-on effect for other key creative's cannot be assumed, but must be built into the Program Guidelines of organisations such as Screen Australia.

However, the ADG believes very strongly that this goal is not mutually exclusive with rewarding entrepreneurial directors and supporting directors' rights. Directors play a key creative role in screen production, and historically in the Australian industry, have generated their own work. Indeed, it is a rare Australian director who has not been substantially involved in the development of a project they are attached to direct. Our leading directors have been the driving force of our most successful films.

Collaboration with talented producers has also been crucial to realising director driven projects, and a flexible, balanced framework for supporting endeavours from all talented key creative's is essential to the growth of the industry.

Many experienced directors also use their skill and expertise to work as producers, bringing substantial skills to the producer's role, which has a further positive effect in assisting to build the careers of the emerging directors they produce for.

The application of the new policy intentions which came into being with the establishment of Screen Australia and the Producer Offset have created a one-size-fits-all concentrated in established production companies, regardless of whether or not this is the best outcome for a project. The fact that there are only a limited number of established production companies in the industry,

with finite resources to take on new projects, whether as producer or executive producer, is also an issue that has not been adequately addressed.

It is the ADG's view that the Screen Australia guidelines need to demonstrate greater adaptability to specific circumstances to allow all talented key creative's to pursue their entrepreneurial and creative vision and share equitably in their successes. A more flexible approach has the added advantage of encouraging diversity and harnessing the full potential of the industry.

In a converged environment where the way we produce content will vary depending on the platforms that content creator's use, support for these content creators needs to also vary.

The ADG would therefore recommend the following:

- An increase in the funds made available to Screen Australia by the government;
- A review of the programs and guidelines prior to any increase in funding to Screen Australia with direct input by industry practitioners;
- Widening of the programs and ways that content creators, in particular directors, can access these additional funds;
- An increase in the Producer Offset for Television from 20% to 40%;
- The establishment of a content creation fund directly from the sale of new spectrum to be used for the Australian Screen Content Industry.

PUBLIC BROADCASTERS

The ADG urges the government to provide adequate appropriation to support public broadcasting, specifically, the ABC, SBS and NITV.

All three of these organisations have been the primary source of content creation for new Australian programs. The increased funding to the ABC has clearly benefitted directors by allowing for additional hours of television production and the ADG is wholly supportive of additional support to the public broadcasters to increase the level of Australian content on their networks.

As well as additional funding for the public broadcasting sector it is also important that they be subject to the same regulation that governs the

commercial sector. It is therefore recommended that all three public broadcasters adhere to the Broadcast Services Act 1992 and the Australian Content Standard.

REGULATION

It is crucial that the government maintain regulatory mechanisms, including content quotas in a multi-channel environment and in the digital landscape following the switch-off of the analogue signal in 2013.

“We are now on the cusp of converting our free-to-air television services from analog to digital. This process begins this year and will be completed by the end of 2013. It will release a large amount of spectrum – a digital dividend – which will provide us with a once-in-a-generation opportunity to encourage the introduction of new digital services and to improve existing services.”²

We agree with Minister Conroy that this is a “once-in-a-generation opportunity” to build on the potential of the production sector in the content creation industries.

The ADG notes with concern the new digital multi-channels that the commercial free-to-air broadcasters now operate. This has come without any additional local content regulations or increased subsidy for the local screen content industry. The result is the flooding of offshore programming on all these new channels providing a worrying precedent for the screen industries.

The introduction of transmission of screen content over the Internet in a converged environment will allow for unregulated content being delivered to Australian homes. Under the Copyright Act 1968, “over the internet”³, is exempt from the Broadcast Services Act (BSA).

There are two ways that the government can support a healthy screen content creation industry in Australia – through regulation and subsidy. The regulatory environment that now exists under the BSA and the Australian Content Standard has ensured the creation of Australian content on Australian screens. This has also been supported by finance through Screen Australia both as direct subsidy and through the tax system.

The ADG believes that the new “pipelines” for screen content should have the

² Senator Stephen Conroy, “Digital Dividend Green Paper, p.iii, January 2010.

³ Copyright Act, 1968, Section 135ZZJA(1).

same regulation that applies to the traditional delivery systems, i.e. the maintenance of the Australian Content Standard. This will deliver to the screen content producers an opportunity to build on the success they already have with the creation of new programming across a range of platforms.

Any easing of this regulation will see a diminution of Australian content on Australian screens.

NATIONAL BROADBAND NETWORK (NBN)

The ADG supports the development and construction of the National Broadband Network to ensure Australians continue to have access to stories and news and information created by Australians, for Australia.

We note, however, that the discussion on content delivery on this new and important piece of Australian infrastructure is sorely lacking. A number of initiatives have been announced including a \$13m fund to support new ideas in the use of the network. This Digital Economy Initiatives is specifically looking at business opportunities that can be developed using the NBN. We believe similar scheme-targeting screen content should be developed.

It is clear that the new delivery technologies such as IPTV will take advantage of the NBN to deliver content in direct competition with the existing media players. As the owner of the NBN the government needs to ensure that they are not providing a Trojan horse that will bring down the screen content creation industries.

COPYRIGHT

Since the Australian film industry emerged in the mid 1970s, Australian film directors have become very significant cultural exports and often the driving force behind some of our best-loved and successful films. The list includes Phil Noyce (*Newsfront, Patriot Games, Rabbit Proof Fence, Salt*) Baz Luhrman (*Australia, Moulin Rouge, Strictly Ballroom*), Gillian Armstrong (*My Brilliant Career, High Tide, Little Women, Death Defying Acts*), Peter Weir (*Gallipoli, Witness, Master and Commander, The Truman Show*) and Kriv Stenders (*The Illustrated Family Doctor, Boxing Day, Red Dog*) to name a few. They are also television directors who are closely involved in creating the distinctive flavour of some of Australia's most popular television shows, directors such as Kate Woods (*Police Rescue, GP, All Saints, House, NCIS, Law & Order – Special Victims Unit*), Peter Andrikidis (*Underbelly, Home & Away, Wildside, Water Rats, East West 101*). These directors are the backbone of our television drama industry.

The key creative role of the director is now not only better understood but

revered. In this context it would be reasonable to say that the absence of directors as co-creators and joint copyright holders along with producers, writers, musicians and music publishers in the Copyright Act was an historical oversight. Although this has been addressed in the change to the Copyright Act in 2005, directors are still not receiving the remuneration they are entitled to under the act.

The ADG believes that the digital distribution landscape offers an opportunity to redress this anomaly. In addition, a new remuneration model for all key creative's is crucial to the sustainability of the industry. Already directors are finding that the need for content in a multi-channel and multi-platform environment is providing new opportunities for rights holders that they do not benefit from.

The Directors Guild of America negotiated with all studios and producers to agree that the directors of screen content would be entitled to share in the revenue from all digital uses of the screen content on a defined residual basis. It is the ADG's view that in the Australian context, a "fair compensation" rate could be set by the Copyright Tribunal every few years, similar to the compulsory licence fee for mechanical reproduction of a musical work would be the most effective mechanism.

With the imminent arrival of the National Broadband Network, the government must ensure that directors are finally appropriately recognised, along with other key creative's for the very significant role they play in the creation and success of the content that is at its very foundation.

One way to approach this anomaly is to develop non-assignable statutory rights schemes.

These schemes assist key creative's to support themselves between projects, explore new ideas and establish sustainable careers by providing income streams. This leads ultimately to a more robust ideas market, and less reliance on direct government support. In addition, statutory schemes are relatively efficient to administer and take the onus off production companies, who may be under-resourced, to ensure that royalties are paid accurately and in a timely fashion.

The failure of the amendment to section 98 of the Copyright Act 1968 to adequately recognise directors and properly reward their creative work (through a share in retransmission royalties flowing to directors as intended by the legislation) in the six years since it was enacted, further supports the need for a non-assignable rights scheme.

Aside from our high profile feature film directors, the vast majority of working directors in Australia have little bargaining power when it comes to negotiations with producers. It is a buyers market with a limited range of projects for the suppliers of creative services such as directors. Almost no producers have agreed to allow directors to reserve their retransmission rights

contractually in the last five years and the only projects where these rights are conferred to directors in the absence of a contract, are 'guerilla' films with limited commercial potential. Therefore it is the view of the ADG that the amendment to section 98 of the Copyright Act 1968 is ineffective legislation, and that the 'market failure' in terms of the intention of the legislation needs to be urgently addressed by government if directors are to continue to provide their unique creative contribution to the Australian screen sector and be properly remunerated.

Directors in Australia are in the unenviable economic position of benefitting from neither the European tradition of collective administration which collects remuneration for cable retransmission, rental rights, private copying and other secondary uses, nor from the support of a strong union like the Directors Guild of America or Directors Guild of Canada which have established and equitable residual arrangements with producers and studios.

The ADG is a professional organisation rather than a union, as well as being small and under-resourced in comparison to the Screen Producers Association of Australia (SPAA). Its attempts to negotiate on behalf of directors for residuals or a share of retransmission monies have always been resisted by the production companies and producers on the basis that as directors have no rights, they have nothing to claim. While this argument is not compelling, as directors in the United States who also do not have rights have been able to negotiate standard conditions of secondary and subsequent use income, it further highlights that in the absence of a power balance between the two organisations, securing secondary income streams for directors through collective negotiation is an unrealistic expectation in the current context. In this sense the experience of the ADG mirrors that of individual directors attempting to negotiate with producers.

The biggest hurdle for Australian directors is shifting industry practice to recognise and value their contribution. As there is no history of secondary income streams or residual payments flowing to directors in Australia, it is near impossible to achieve the contractual changes that would address this. By contrast actors, musicians, composers and writers are all recognised in statutory schemes or award-style arrangements that reward their endeavours.

The stated intention of the Parliament in the introduction of the Director's Rights share of retransmission royalties provisions of the Copyright Act was to provide director's with a share of income from secondary use of their work, yet the industry has managed to circumvent that intention by requiring director's to assign that right to retransmission royalties to the Producer. The Parliament should enact an amendment to section 98 of the Copyright Act to delete the concept of a "commission film" and make the right non-assignable, similar to the Composer's right to public performance royalties, and an actor's right to residuals for the use of their performance in various media.

While retransmission rights represent only a small proportion of the rights pie, and therefore will provide only a modest secondary income stream at best, it is the ADG's view that any progress made in terms of strengthening directors

rights in the current industry context will encourage directors to remain in the Australian industry, to be entrepreneurial and will assist them in developing their skills and projects.

- **A new model for future rights management including remuneration for directors from digital distribution must be established by government as a matter of urgency.**

In Australia, a cinematograph film is protected by copyright as “other subject matter” under the 1968 Copyright Act. The Act is silent on the issue of who is an author of a film. The “maker” the producer or production company is vested with first ownership of a film. The framing of the Act in respect of film is a consequence of the period in Australia in which the legislation was drafted and enacted in the 1960s. That is, before there was clear understanding of the film director’s role or a professional guild for directors.

In this new converged media environment it is vital that the directors role as creator and author of screen content be recognized and appropriately remunerated to support and healthy and growing pool of screen directors.

IN CONCLUSION

The ADG sees an opportunity to support and develop the screen content industry in Australia. The expansion of the means of delivery of content in Australia needs to be controlled by Australians. The benefits of this new expanded network should go to Australians.

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