**‘Modernising television regulation in Australia’**

**Media Reform Green Paper**

Australian Writers’ Guild Submission

21 May 2021

**KEY POSITIONS**

1. Government should introduce regulation that requires eligible streaming-video-on-demand (**SVOD**) and advertising-video-on-demand (**AVOD**) services to invest **20%** of their Australian-sourced revenue into commissioning new Australian scripted content (including drama, children's television, documentary).
2. Eligibility requirements should be set at **500,000 subscribers or registered users** and **AU$50 million per annum** in Australian revenue.
3. In addition to the above, eligible service providers should be subject to genre sub-quotas for drama, children's television and documentary.
4. These sub-quotas must be accompanied by **transmission and promotion obligations.**
5. The public broadcasters should receive an **increase in direct funding.** The public broadcasters have been left with the sole responsibility of programming vulnerable genres such as children's television for local audiences and they require further support.
6. Regulation of the streaming platforms should be implemented by **1 January 2022** to reignite a contracted sector and cushion the blow from the loss of $100 million of Australian content annually, following the relaxation of quota obligations on the free-to-air broadcasters.
7. In relation to the proposed CAST fund, government should ensure that key creatives – such as writers and directors – have a say in the distribution of the fund and implement measures to protect against bureaucratic mismanagement of the fund.
8. The government must encourage investment in script development and commit to supporting and retaining local creative talent, including emerging talent.

The Australian Writers' Guild (**AWG**) is the professional association for Australian screen and stage writers principally in film, television, theatre, audio and digital media. We represent over 2,000 members who create 90% of the content on our screens. The AWG has fought for over 58 years to protect and promote the rights of writers. Our vision is to see stage and screenwriters thrive as a dynamic and integral part of Australian storytelling: shaping, reflecting and enhancing the Australian cultural voice in all its diversity. The AWG appreciates the opportunity to respond to the ‘Modernising television regulation in Australia – Media Reform Green Paper’ (**the Green Paper**).

**Minimum level of investment in Australian content**

**The AWG strongly advocates for a local content investment obligation on SVOD platforms of 20%.**

**We also support an equivalent levy on AVODs such as Facebook, Google/YouTube and Amazon (calculated as a percentage of their combined advertising revenue generated in Australia).**

**The investment requirement should only be able to be acquitted through newly commissioned scripted Australian programs. Expenditure on licensing and acquisitions should not be eligible for meeting the regulatory obligation.**

The ability and opportunity to tell Australian stories, from our own perspective and in our own voice was the result of a nationally significant public campaign: the *TV: Make It Australian* campaign in the 1960s and 1970s when Australian shows represented just 1% of content shown on television. The battle was won, and local content quotas were introduced. Our fight continues today, with the rise in popularity of digital content providers and the recent removal of genre sub-quotas on the commercial broadcasters. We agree with the authors of the Green Paper that the current “regulatory framework is inconsistent and unbalanced”. The quota system was introduced in an analogue era and has not kept pace with new modes of delivery and accessibility. It did not anticipate the rise of SVODs such as Stan, Netflix, Amazon Prime and Disney+, or AVODs such as YouTube, Google and Facebook in a convergent media landscape. These companies are immensely profitable and yet have no obligation to contribute to the local market they operate in and no obligation to give back to the audiences they are exploiting. An estimated 5.6 million Australians subscribed to Netflix at the beginning of 2020 with the figure expected to rise to 6.1 million by 2021. Yet despite this, the company’s effective Australian tax rate has recently been estimated to be 0.06%[1] and the local content in its catalogue actually fell to 1.6% in 2018 from 2.5% in 2017.[2] Service providers like Netflix have benefited enormously from the COVID-19 pandemic and enjoyed significant increases in their subscriptions in contrast to the Australian broadcasters, whose revenues and employment levels have continued to fall. For years, the industry has been united in calling on the government to act to ensure that SVODs and AVODs make their contribution to the local screen sector and to give Australian audiences the opportunity to see themselves reflected on screen. Netflix may claim that it can generate Australian content without the need for government intervention it is very uncertain whether they will be able to do so consistently and in a way that ensures continued production activity, investment and jobs. Its most recent commission – the controversial reality television show, *Byron Baes* – is an unscripted reality series which will not result in work for Australian creatives. Meanwhile, YouTube has recently changed its Australian Terms of Service to permit it to monetise all content on its platform **outside** the YouTube Partner Program (which shares ad revenue with partner channels). This will result in increased revenue for YouTube without any additional payment obligations to content creators.[3] The regulation of the SVODs and AVODs is necessary and urgent. It is unsustainable that companies with the greatest capacity to pay bear no responsibility in producing, programming and promoting Australian **scripted** content.

Australia must look to international precedent in SVOD and AVOD regulation and the strong push for these platforms to invest in the local screen industries of the countries they operate in. The Green Paper cites the European Union's requirements that all SVODs operating in their region are to secure "at least a 30% share of European work in their catalogues and ensure prominence of those works."[4] SVODs operating within France will be asked to reinvest up to 25% of their revenue into local productions. Similarly, Canada is working to harmonise regulation on domestic broadcasters and cable TV companies (which are currently required to invest between 25% and 45% of their revenue into Canadian content) and "online

[1] Miranda Ward, 'Netflix reveals Australian tax bill for 2020', *Australian Financial Review*, 28 October 2019.
[2] Ramon Lobato and Alexa Scarlata, 'Local film and TV content makes up just 1.6% of Netflix's Australian catalogue', *The Conversation*, 15 October 2018.
[3] Megan Graham, 'YouTube will put ads on non-partner videos but won't pay the creators', CNBC, 19 November 2020.
[4] Article 13, EU Audiovisual Media Services Directive (2018).

companies" like the US SVODs and AVODs.[5] It is worth noting that Canada and France have the fifth and sixth largest Netflix subscriber bases worldwide (with approximately 8 million subscribers in 2020), followed by Australia (with 5.6 million subscribers in 2020). Despite this, and as it was made clear in Figure 10 of the Green Paper, the number of Australian Netflix original series (current and upcoming as of Q2 2020) was approximately 35% of France's total for local original series and 26% of Canada's total for local screen content. Our regulation of streamers needs to be brought in line with those with of other countries, otherwise our local industry becomes uncompetitive and we lose jobs and weaken the sector, risking 50 years of government investments.

The Australian government's proposed reinvestment obligation of 5% falls far short of the international regulatory response. Modelling by Screen Producers Australia shows that the relaxation of the local content quotas on the commercial free-to-air broadcasters in 2020 will result in an annual loss of $100 million of local content. A 5% quota obligation will barely be enough to compensate for this loss. In contrast, a 20% rate of obligation would deliver approximately $366 million in Australian content investment annually,[6] driving an additional 10,000 industry jobs creating over 300 hours of Australian content to streaming audiences each year. If the government is committed to promoting the growth and sustainability of the local industry, it must impose a rate of obligation closer to the French and Canadian models.

**Eligibility criteria**

An SVOD or AVOD platform should be subject to the above reinvestment obligations if it meets the following requirements:

- Their primary purpose of the platform is to provide professionally produced content delivered over the internet to Australians; and
- The service provider has at **least 500,000 subscribers or registered users**; and

[5] Etan Vlessing, 'Canada to Force Netflix, Amazon Prime to Pay for Local Content', The Hollywood Reporter, 3 November 2020.
[6] Based on the Australian SVOD market figures published by PwC. See PwC, 'Australian Entertainment & Media Outlook 2020-2024' report, 32-3 (2020).

- The service provider generates **AU$50 million per annum** in Australian revenue.

We argue that an SVOD or AVOD platform that meets these criteria should **not** be exempted based on their corporate structure. The investment obligation should apply to all types of SVOD, AVOD and broadcaster video-on-demand (BVOD) services with no exemption for services owned by a corporate structure that also owns a broadcasting licence. Stan and Binge may be owned by the Nine Network and Foxtel respectively but they have different platforms, different revenue streams, and different audiences. A decision to exclude such platforms is inconsistent with the policy aim to harmonise regulation across all service providers. It could also become a perverse incentive for a large company to acquire a free-to-air license in order to avoid the reinvestment obligation.

**<u>Quota measured in expenditure and hours</u>**

We have argued in previous submissions that **the ideal quota system is a combination of expenditure and hours** to measure local content obligations for each service provider, taking into account relevant factors such as the type of programming for each platform, revenue, the time of day the program will best reach its audience (for terrestrial broadcasters), or the number of views or downloads (for digital platforms). **We support a sub-quota of minimum hours** to avoid situations where monetary expenditure alone allows a service provider to discharge its obligations resulting, for example, in situations where huge amounts of money are invested in single, high-budget productions (calculated to entice new subscribers to the service, not necessarily to retain them). This is essential so that Australians continue to have access to new, diverse programming to choose from, available on the platforms we use.

**<u>Genre sub-quotas</u>**

In introducing the reinvestment obligations, eligible service providers should be subject to an additional **genre sub-quota, triggered by the platform's engagement with non-Australian content in that genre (including drama, documentary, children's).** A proportion of the regulatory obligation should be acquitted through commissioning of First Nations content.

In order to preserve vulnerable genres such as children's television and documentary we submit that the genre quotas must be retained. In introducing the reinvestment obligations, eligible SVOD or AVOD platforms should be subject to an additional genre sub-quota, triggered by the platform's engagement with non-Australian content in that genre. For example, a platform like Disney+ which screens international children's content must also be obliged to acquit a proportion of its overall regulatory obligation into new Australian children's content.

In April 2020, the government suspended content obligations for commercial television broadcasters. The government claimed that this was a necessary response to the interruptions to the supply of this content caused by COVID-related shutdowns in the production industry. The government's goal was to alleviate pressure on commercial broadcasters, who suffered a decline in advertising revenue. This suspension stayed in place for months, causing great uncertainty in the sector. On 30 September 2020, the government announced that the quotas would return albeit in a relaxed form.[7] The AWG has received feedback from members and producers that, within a week of this announcement, Nine Network and Channel Seven cancelled two productions that were in development. This of course led to a significant loss of income and work for the key creatives involved as well as the cast, crew, costume designers, sound engineers, editors and administrators who would have been contracted on these projects.

International precedent has shown that the removal of quotas inevitably results in an enormous reduction of the amount of local content. In 2003, the United Kingdom government downgraded children's content from Tier 2 to Tier 3 in response to Public Service Broadcasters (PSB) complaints that it was no longer economically viable to make in an age where the advertising revenue it generated was significantly lower than other areas of programming. PSB no longer had to meet their quantitative targets for children's programming and this resulted in a 95% reduction in spend on children's content on television between 2003 and 2015.[8] In 2017 – and after a long and hard-fought

[7] Department of Infrastructure, Transport, Regional Development and Communications, Modernising Australian Screen Content Settings.
[8] Robert Kenny and Tim Suter, *Children's television – a crisis of choice: The case for greater commercial PSB investment in Children's TV*, 26 February 2015.

campaign by Save Kids' TV UK – the UK government reintroduced the power to set quotas. They are now spending taxpayer money to seek to reinstate children's content to former levels. The Australian government needs to act soon to avoid a similar situation. If forward-thinking and simple reforms such as local content quota obligations and genre-sub quotas on SVODs and AVODs are implemented now, the local industry will be able to sustain itself and the cost to the government will be relatively small.

## Discoverability requirements

These obligations must additionally be coupled with transmission and promotion obligations. Both the European and Canadian models include requirements to ensure that region-specific products are promoted and given prominence across the platforms for local audiences. In the absence of a transmission obligation to deliver and promote the content to Australian audiences, a service could potentially invest in Australian productions that intentionally or inadvertently might not be seen by Australians.

## Timeline for implementation

The new investment obligations on SVODs and AVODs should commence as soon as possible, on **1 January 2022.** While the changing and introducing regulation may be time-consuming, we note the proposed timeline is similar to the regulatory changes made after the 'Supporting Australian stories on our screens – options paper'.

The Green Paper currently proposes that the regulation on SVOD and AVOD platforms will not be implemented until July 2022, for the 22-23 financial year but this delay will have an enormous negative impact on production. Nine Network and Network 10 both failed to meet their annual quota of first release Australian drama last year, while the Seven Network failed to produce the minimum amount of children's programs. Network 10 and Seven Network both failed to meet the quota for Australian preschool programs. Due to the pandemic, ACMA accepted the non-compliance by commercial broadcasters.[9] As mentioned earlier in this submission, this relaxation of regulation will result in an annual reduction in local production

[9] Sophie Elsworth, 'TV networks forgiven for content shortfalls', *The Australian* , 10 May 2021.

of approximately $100 million and the industry is feeling its effects. The number of hours of Australian drama on Seven, Nine and Ten will be halved. Seven and Ten will now be able to satisfy their obligations by producing *Home and Away* and *Neighbours* alone. Nine, without a serial, can reduce its current annual drama production by 50% from 84 hours to 40 hours (with a standard budget of $1 million an hour). Foxtel will only be required to invest 5% of drama expenditure in local content (from 10%) annually from 1 July 2021. These are enormous losses and the government must act with urgency to compensate for the reduction in local production investment. We cannot wait until July 2022 for the regulation of the SVODs and AVODs. There is likely to be a damaging contraction in the sector before this time with an estimated loss of $225 million of Australian content from April 2020.

## ABC and SBS

**The AWG strongly recommends an increase in direct funding to the ABC and SBS, specifically tied to new Australian scripted drama, children's content and documentary.**

The public broadcasters are not subject to local content quotas, but their contribution to the local screen industry is essential. We strongly support increased funding to the ABC and SBS to ensure they can continue to commission new Australian scripted drama, children's content and documentary.

Free from commercial considerations, public broadcasters have historically commissioned landmark work that has pushed the envelope in terms of the kinds of stories being told and the diversity of Australians represented through those stories, often demonstrating the potential audience to its commercial counterparts. This vital role must be continued and supported.

In particular, the ABC has become an essential portal for Australian kids. Following the removal of quotas on commercial broadcasters for children's content, the government sought to compensate Australian audiences for the loss by providing $20 million in funding to the Australian Children's Television Foundation (ACTF). However, there was no announced increase in direct funding to the ABC and SBS who have been left with the sole responsibility of programming Australian kids' content for local audiences. If there is to be any return on the government's investment, the public broadcasters must be incentivised to purchase that content and they can only do so if they receive an increase in direct funding.

**<u>The Create Australian Screen Trust (CAST)</u>**

As mentioned earlier in this submission, we firmly believe that a robust and competitive screen industry can only exist when creative decision-making is placed in the hands of creators. In the event that the proposed spectrum auction proceeds, we submit that measures should be put in place that recognise this fact. Representatives from the AWG and Australian Directors Guild should expressly form part of the CAST decision-making panel, so creators have a voice in its allocation. This will result in public money being invested in high-quality, commercially viable and internationally competitive Australian projects. To encourage accountability and transparency, we recommend that the key decision-makers managing this fund (and, indeed, all other Screen Australia development funds) are rotated on a regular basis.

The government's proposed CAST fund is to be administered by Screen Australia "with recommendations for allocation of funding made to the Board of Screen Australia by the trustees of CAST, which would include people with experience across finance, business, distribution, content development, sales and acquisition sectors." The Green Paper makes no mention of the key creatives – particularly the writers and directors – who are responsible for generating this scripted content in the first place and who are more keenly aware of what it takes to make an entertaining television series or feature film.

We also recommend that the funding is distributed across all state funding bodies (through state-federal agreements), to encourage regional and state diversity in production activity.

**Incentives to invest in script development and support for local creative talent**

The government claims that it wants screen content with "higher production values and programs with a better prospect of being sold into the global content market."[10] In order to achieve this, it cannot rely on direct investment to funding bodies or increased tax offsets. Firstly, it must stimulate demand by creating platform neutral content quotas. Secondly, it must encourage increased investment in script development and implement measures to support and retain Australian creative talent.

This could, for example, be a percentage allocation of the CAST fund specifically tied to script development. If then spectrum auction does not proceed as planned, the regulation could instead take them form of a mandated minimum investment in script development. The AWG would be happy to advise government further to ensure this regulation is properly implemented to deliver the outcomes.

In any case, the government must realise that script development is vital to the creation of profitable, exportable and sophisticated screen products. Greater investment in script development yields better outcomes. We have seen with the rise of the 'Nordic noir' genre how shows like *Borgen*, *The Killing* and *The Bridge* – shows which were developed in countries with relatively small screen industries like Australia's – can achieve massive global success due to investment in development. Script development is to successful screen content as 'research and development' is to science and technology: early development investment is vital. An Australian screenwriter's story – with the right investment and production budget – can not only be sold and watched internationally but it also has the potential to become a successful franchise or series and the beginning of a successful business. Companies like Matchbox Pictures and Playmaker Media, Bazmark and Kennedy Miller Mitchell, are a few examples of this: large international companies that employ not just writers but creatives across the board, and that began with well-developed feature films and television shows.

Development is the cornerstone of the industry. It feeds production. But it is also a speculative process and the Australian writers that we need to create these screen products need time

[10] Hon Paul Fletcher, Minister for Communications, CyberSafety and the Arts, 'Media Release: New Funding Budget to Deliver Australian Screen Content' (30 September 2020).

and support. The government must therefore commit to growing and retaining the world-class creative talent we have in this country by providing market incentives for writers to work in Australia. This can be done through quota regulation, as this submission has argued. By generating demand for local content there are increased opportunities for commission. In order to meet that increased demand, however, we also need to support and retain our Australian creatives. Emerging writers need to be able to gain experience in their local industry. Many Australian screenwriters have forced to work in overseas markets, such as the US and the UK, in order to maintain consistent screenwriting careers. A lot of them never come back to work in Australia. By ensuring that there are more pathways to commissioning, fair remuneration, and respect for the writer's role in the creative process we can retain the creative talent that we need to export globally competitive screen products. Talented Australian writers will continue to work in in this country if they are empowered to be bold and to take risks in the screen content they create. Experienced writers must be given the opportunity to oversee their projects from development and throughout production. The acclaimed ABC series *Wakefield* is a recent example of this: putting power in the hands of creators is fundamental to producing the commercially-successful, popular, and authentic television shows that audiences want to see.