# AUSTRALIAN SCREEN INDUSTRY GUILDS
## Joint Response to the Targeted Stakeholder Consultation Paper - Refined Models
## November 2023

**Who we are**

The **Australian Writers' Guild** represents Australia's performance writers: playwrights, screenwriters for film and television, showrunners, podcasters, comedians, game narrative designers, dramaturgs, librettists, and audio writers. We represent 2,500 performance writers in Australia. Established by writers for writers, the AWG is a democratic organisation run by its members, who each year elect a National Executive Council and State Branch Committees. Our members work together to represent their fellow writers across the industry in a number of committees such as the Theatre, Television and Games committees to negotiate for fair pay and conditions, advocate to government, and serve members' professional needs.

The **Australian Writers' Guild Authorship Collecting Society** is a not-for-profit collecting society for screenplay authors. With more than 2,000 members and 32 partnerships with overseas collective management organisations, AWGACS has collected more than $25 million in secondary royalties and distributed the monies owed to screenwriters from Australia, New Zealand and around the world. AWGACS continuously advocates for the rights of authors to ensure they are fairly remunerated for the secondary exploitation of their works.

The **Australian Cinematographers Society** is established to further the advancement of cinematography in all fields and give due recognition to the outstanding work performed by Australian cinematographers; keep members abreast of technology, new equipment and ideas through meetings, seminars and demonstrations; and provide a forum for cinematographers to meet with other members of the industry to discuss and exchange ideas, promote friendship and better understanding of each other's industry role.

The **Australian Screen Editors Guild** is a cultural, professional and educational organisation, dedicated to the pursuit and recognition of excellence in the arts, sciences and technology of motion picture film and televisual post production. It aims to promote, improve and protect the role of editor as an essential and significant contributor to all screen productions.

The **Australian Directors Guild** is the national association and union representing the interests of film, television and online screen directors, documentary makers and animators. We promote excellence in Australian screen direction, collaboration between directors and others in the screen industry, and provide professional support to our members. Australian directors work with writers, producers, designers, cinematographers, editors and sound designers to put Australian stories on the screen.

## Questions related to the Progressive Percentage of Expenditure Model

### Question 1 – What are the likely *monetary costs* associated with the Progressive Percentage of Expenditure Model? To the extent possible, please provide specific figures.

In its 'Australian screen content requirements on streaming services' consultation paper released in March 2023, the Department proposed an expenditure obligation of 20% of locally generated revenue to be spent on Australian commissions and acquisitions ("Model 3"). We supported this proposal and stated that a 20% re-investment obligation would deliver approximately $336 million in Australian content investment annually, creating an additional 10,000 industry jobs and over 300 hours of Australian content for streaming audiences here and around the world. This export product and intellectual property would ensure a dividend for Australians, economically and creatively. A 20% obligation would correct a long-standing market failure in our small local production sector and allow us to compete with the easy-to-import content from the world's largest content markets with which we compete – the English speaking markets.

There is a fundamental economic reality that must be acknowledged when deriving these policy settings. The English (UK) economy is, at a conservative estimate, twice as large as Australia's. The USA's is (again, conservatively) ten times the size. We are at a structural disadvantage in screen production both in terms of potential viewers and production capacity[1]. Any notions of 'competing on quality' fall down in the face of this deluge of English-language content and large foreign audience pool, and arguments that Australia does not make competitive screen products attempt to tap into our cultural cringe as a means of playing down our local content. Where we fail to 'compete' it is simply a reflection of our relative size- noting how much of a thumb on the scales SVOD providers can have here, in terms of what we are shown and when.

It does not follow from this 'lack of competitiveness' that our screen industry should be unsupported by the corporations given access to a lucrative (Australian) audience and high-quality production industry, nor does such an argument support the goals of *Revive.*

The question here is not "is our screen content worth watching?" but "do we want to be a country that has a screen industry, or not?". Which regulatory model is applied here to the multinational corporations which make content as a greater or lesser part of their business that have emerged in our market will be Government's answer to that question. None of the models proposed throughout this consultation process have been onerous, particularly compared to international regulation, some of which go as high as 40% or more.

The Progressive Percentage of Expenditure Model would **not** correct the market failure in Australian drama and children's television. It would certainly not correct the market failure in documentary which the current Consultation Paper no longer considers a 'vulnerable genre', in a shift that has been criticised by the sector (though we acknowledge the Department has advised that it has not yet decided that documentary should no longer be considered a vulnerable genre).

The subscription-video-on-demand (SVOD) providers spent $324 million on Australian programs in the 2022–23 financial year. They spent $453 million on acquiring, producing or investing in Australian-related programs. Screen Australia's Drama Report shows that streaming services **decreased** their spend on Australian drama by $47 million (an 11% decrease from 2021-2), which has resulted in 9 fewer titles (a 30% decrease from the previous financial year) and 22 fewer hours of Australian drama produced (a 16%

[1] https://www.unsw.edu.au/newsroom/news/2023/04/content-quotas-are-a-start---but-australia-s-screen-industry-nee

decrease).

This has had commensurate flow ons to the jobs in our sector and represents an overall shrinkage. We cannot recruit and retain a skilled creative workforce with such fluctuations, and the large streaming services are well able to bear a re-investment obligation similar to those in place overseas.

We note the cost of acquiring/licensing non-Australian content for Stan and Foxtel's catalogue are unknown and that information has not been provided by the Department.

The frameworks and cost models SVOD providers navigate internationally are relevant to any Australian model. We need not invent the system ourselves, and the SVOD providers are familiar with them.

In the first model proposed in the Department's most recent paper, the costs incurred by multinational streamers for commissioning and licensing programs are **expressly excluded** from the definition of 'Total Expenditure for Australian market'. This includes popular original series like *Stranger Things, The Wheel of Time, Andor* and *Ted Lasso* as well as licensed content like *Breaking Bad*, *Frasier*, and *Friends*.

Even if we assume the Australian streamers' total spend on licensing non-Australian content (e.g. *Chernobyl*, *Normal People, Barry, Yellowstone*) is around $500 million, this results in a total drama obligation of $197 million. That is well under the $336 million that a 20% obligation based on expenditure would generate (i.e. Model 3 from the March 2023 consultation). It is also less than the projected expenditure under the Percentage of Revenue Model at its lowest setting.

It bears saying that this is not a giveaway of money, a tax, or some other imposition from which the SVOD providers see no return. A quota simply ensures there is Australian content made, not what it is, or how these projects are made, elected, sold, and marketed. It is in the interests of the streamers to make good content, and there is no suggestion of intervention in what is made: just that it be made. It is a minimalist obligation to return something to the community and our shared culture in return for Australia providing both a desirable production location and a secure, growing and outsized subscriber audience.

The projected investment under the Progressive Percentage of Expenditure Model is only barely enough to sustain a shrunken local screen sector, but it is not enough to promote growth in line with the vision put forward in *Revive*.

As already stated, the Australian screen sector suffers from historical market failure for reasons unrelated to the quality of our screen product. It is also in a state of shrinkage due to recent past policy decisions. The previous Government's relaxation of the local quotas for terrestrial broadcasters and the introduction of a 'point system' resulted in the commercial networks halving their investment in local drama from $107m in 2018/19 to $54m in 2020/21. We are still at a net loss of jobs and content from that time.

Government must ensure that a whole of industry view is taken when this regulation is introduced, which means looking at the totality of jobs and activity in our industry. SVOD providers have not yet stepped up to fill the gap left by the cut to terrestrial broadcast production, despite being the means by which most of us get our content. SVOD providers have taken the benefits of replacing the terrestrial broadcasters but seek to evade the community license to do so of making content here.

Streamers are very responsive and can turn production up and down, and indeed have done so as this year's Screen Australia figures demonstrate. What this regulation needs to achieve is security of the jobs pipeline for workers and businesses in screen.

The regulation should also be future-proof and keep up to pace with technology and the ways in which audiences consume content. We recommend that as far as possible the regulation aims for simplicity and clarity so as to avoid unintentional loopholes that can be exploited. The broad trend is that audiences are shifting to online and on-demand content and away from linear consumption. According to the “Media Reform Green Paper”, the audience for linear free-to-air television has declined at an annual rate of 6 per cent from 2014 to 2019 (in contrast, the audience for SVOD increased by almost 50% since 2016). It is not onerous for the regulation to apply to all services delivered over the internet – this is simply how modern Australian audiences consume their content. We submit that the regulation should not apply only to SVOD providers but also broadcast-video-on-demand (BVOD), advertising-video-on-demand (AVOD) and any other VOD format yet to be devised. By restricting the scope of regulation to SVOD only, service providers are incentivized to turn to other forms of technology in order to escape regulation.

Similarly, we oppose the exclusion of “niche and thematic services” from the regulation for the same reasons. Simplicity and clarity are key and the potential creation of exploitable loopholes must be avoided. Without a definition of these services, it is hard to comment beyond the theoretical, but it would seem to create an incentive for all services to so define themselves as ‘niche’.

The question of what ‘niche’ means can be addressed and dealt with through landing on an appropriate subscriber figure; for simplicity’s sake we propose that a ‘niche’ service (i.e. one not captured by quota obligations) should be considered one with fewer than 500,000 Australian subscribers, with the self-explanatory idea that that a service is niche when it is not seeking (or reaching) a broad and large audience of subscribers. Indeed, this smaller number was one of the few areas of consensus from earlier Roundtables with the Ministers.

A service like Britbox or Crunchyroll, which respectively have 3 million and 10 million worldwide subscribers, would not be considered niche on such a subscriber-based definition, and should not be. A service is definitionally niche if it attracts a small number of subscribers to a specific product offering (horror, anime, live performance recordings, for example) and any other determination (on genre, or commissions, or content type) being made by a regulator risks skewing the behaviour of streamers while increasing costs, and complexity, for the regulator. It would constrain streamers in terms of production outputs more than a flat obligation.

Finally, for any entity that owns a broadcast licensee that is subject to Australian content obligations under the *Broadcasting Services Act 1992* we recommend that only the <u>actual</u> spend by a platform within any corporate entity can be counted as part of each platform’s regulatory obligation acquittal. The free-to-air platform must be the first release platform for any new content for the purpose of their regulation under the *Broadcasting Services Act 1992.*

It must be acknowledged that the industry as a whole is in a rapid state of change, of which the alignment of streaming services with traditional broadcasters in our market is one symptom. The industry trend seems likely to be towards consolidation of services, rather than further fragmentation, but it is a fool’s errand to predict what may happen here. We urge the Department to take care in putting too much stock in dire hypothetical scenarios where the only outcome that can resolve said hypothetical issue is minimising quotas.

We understand there have been consistent warnings from SVOD providers they will abandon the Australian market if quotas are introduced. However, if SVOD providers were on the brink of leaving our lucrative market (as unlikely as it seems) then the next logical step before doing that from a business point of view is mergers, brand and channel integration or diversification. We see this already in the shift to including advertising on subscription platforms; such decisions are being made now without quotas in place. This is businesses responding to a dynamic environment and not all these choices are taken through the prism of quotas.

Exiting our market seems unlikely given how lucrative we are as a nation of subscribers, and in our view this is simply a bargaining tactic: “take the small number of jobs we offer at our total discretion, or we’ll go and you’ll have none”.

Of course, the reliance of the local industry and of local subscribers on these services is precisely why we should require the relationship becomes more mutual, not less. SVOD providers (as with terrestrial broadcasters) get a great deal from our community; they should be returning something to us.

We are not aware of any streamers that left the European markets after the introduction of quotas; we simply saw greater integration into local production ecosystems. This is a question that should be put to the SVOD providers: **if quotas are such a problem, why did they not leave Europe after the introduction of quotas there? How did they respond when quotas were introduced elsewhere?**

This is relevant as the European Union considers tightening its definitions of what constitutes European content[2] and established streamers meet or exceed the 30% target and ramp up production of local content[3].

Notions of the end of streaming in Australia seem overblown, and the idea there is unprofitability of streaming as a business is not supported by facts. There are over 200 streaming services in the USA, with this representing 11% growth[4]. Australian subscriptions continue to grow[5].

It may well be the market cannot sustain this many services, and thus there is a possible future in which Australian audiences will only be using three or four large, multinational content services to access their media content and those services will acquire commercial broadcasters here as part of a vertical integration strategy – as has already occurred with the 10 Network and the CBS Entertainment Group.

That being the case, it should not be that this regulation is contorted to manage what would otherwise be the normal turnover, consolidation or fragmentation in the market. If a streamer fails in the Australian market, it cannot be assumed (as predicted by some) that failure is due solely to requiring them to reinvest in Australian content. The evidence has not borne this out overseas.

If it is not feasible for as many streamers as are currently in the market competing for subscribers to continue to exist, then this is not a result of regulation but simply the industry correcting to market conditions and consumer demand. Creative workers should not see our industry deliberately shrunk by government because of what was going to happen to streaming services anyway as they collectively test the upper limit of consumer appetite for streaming services. Quotas requiring local reinvestment are not the only reasons streamers may fail, merge or change practices in the coming years; the European experience suggests it may be only one among many other market factors.

Having equity among streamers requiring those over a subscriber threshold to compete on the quality of their product by requiring them to make it is a good thing. The competition for Australian subscribers can be on the quality of their Australian content, and other content, and not about which service can game the

[2] https://tbivision.com/2022/12/09/exclusive-streamers-push-back-as-european-commission-explores-origins-of-content/#close-modal
[3] https://variety.com/2022/digital/global/netflix-30-europe-content-quota-avms-1235286587/
[4] See, for example, data on ‘Video Streaming Services in the US - Number of Businesses’ here: https://www.ibisworld.com/industry-statistics/number-of-businesses/video-streaming-services-united-states/#:~:text=There%20are%20206%20Video%20Streaming,increase%20of%2019.4%25%20from%202021
[5] https://www.smh.com.au/business/companies/streaming-subscriptions-continue-to-grow-despite-surge-in-cancellations-20230728-p5ds4r.html

system best, to make as little of that content as possible and still comply with the rules.

We return to this theme of exploitable loopholes in our discussion of the Percentage of Revenue Model's 'nonsport ratio' below. However, the above feedback relating to general policy settings applies to both models proposed in this Consultation Paper.

### Question 2 – What would be the other *business costs* associated with the Progressive Percentage of Expenditure Model?

N/A

### Question 3 – What are the other likely *costs/challenges* associated with the Progressive Percentage of Expenditure Model?

**Total Expenditure for the Australian market**

The proposed definition for 'Total Expenditure for the Australian market' is too narrow. We recognise that the Department must accommodate local streamers like Stan and Foxtel but we feel the obligation is no hardship at all for the multinational streamers and seems to perversely encourage a reduction in Australian expenditure from those multinationals.

Total Expenditure for the Australian market is defined as:

> *All (Australian and non-Australian) drama expenditure by an SVOD for the Australian market, including commissions, acquisitions, Australian-related content and licensed Australian territorial drama expenditure.*

It was further clarified by the Department that "licensed Australian territorial drama expenditure" would exclude content globally commissioned, licensed or otherwise not subject to licensing payment for the Australian market."

The definition **excludes** all non-Australian original programming commissioned by a multinational streamer, i.e. the non-Australian original programs on Netflix, Amazon Prime, Disney+, Paramount+ and Apple TV. These original programs tend to be the "most watched" on each platform.

The definition also **excludes** programs that are globally licensed.

This means, then, that the product by which the large streaming multinationals make profit is excluded.

The streamer business model is a departure from traditional broadcasting. Instead of making something in one territory and then paying the costs of licensing and broadcast to other territories, the streamers simply show their content everywhere through their platform and cut out the broadcast and licensing component.

The business and profit rationale for commissioning this content is frictionless (license-free) delivery via a global platform. It removes one large cost factor in the making of content and represents a huge efficiency for the SVOD producers over terrestrial broadcast.

Failing to take this into account excludes from the accounting most of the business model of these platforms, and reflects, perhaps, a terrestrial/traditional broadcast mindset. The streaming business model is different and it follows the regulation needs to be different. It cannot just be based on a pre-existing New Eligible Drama Expenditure (NEDE) scheme that only worked (to the extent that it did) for preplatform based delivery subscription television.

With global expenditure excluded, a non-Australian streamer's Australian content obligation would always appear to be a fraction of its existing Australian content expenditure. It would be very easily met by the multinational (non-Australian) streamers each year and because a streamer is only **obliged** to spend 10% - 30% of what it is currently spending on Australian content, nothing is preventing it from reducing its Australian content expenditure over time.

It uncouples streamers' obligation to the Australian public from any notion of it being a return on the benefits and profits generated from the Australian public. Australians are among the largest consumers of steamer media in the world. According to the "Media Reform Green Paper", Australians are the seventh largest subscriber base worldwide, behind Canada and France.

If this Government is committed to promoting the growth and sustainability of the local industry to reflect our culture and our ideas, it must impose a rate of obligation closer to the French model. Australian audiences deserve to see our loyalty and consumption returned as a re-investment and to have our culture flourish.

The purpose of the reinvestment quota, consistent with *Revive,* is to promote a robust and enduring screen sector and deliver Australian creative industry jobs that Australian creatives can turn into sustainable careers.

**<u>Vulnerability to changes in regulator</u>**

The Progressive Percentage of Expenditure Model is highly vulnerable to changes in regulator, and the regulatory posture of the regulator.

There are no penalties on a streamer for supplying inaccurate data about its own costs. In our view, this makes the regulation meaningless and we return to our earlier proposal that should this failure occur, a one-off fine be paid to Screen Australia in recognition of this failure to ensure that the gap in production is not felt long-term by the Australian industry.

To regulate and apply the highly complex test in the Progressive Percentage of Expenditure Model will require a staffing increase for the regulator, as well as mechanisms for accessing and storing confidential information. There is no way for a regulator to check the veracity of the information a streamer may provide. There is no way for the industry to be confident in the regulator's decisions without the disclosure of highly confidential information, the provision of which has been a sticking point for the consultation on the regulation itself.

The high degree of complexity in the proposed model invites service providers to work around it, and structure finance, crew, key creatives and other staff in such a way as to avoid the obligation.
It will require the regulator to examine in detail the mechanics of individual deals and productions to decide if it is on or out.

This also presumes that the regulator will be funded to, or have an interest in, such an examination.

In contrast, an obligation based on "gross Australian revenue" like the Percentage of Revenue Model, and previous models proposed by the Department, are much more difficult to game and exploit. Gross revenue is a transparent figure easily accessible to the public (unlike expenditure which is reported by the regulator in aggregate). A streamer's "gross Australian revenue" is also often heavily reported in media. It can be accessed by the public through the streamers' annual reports, and it can be approximated fairly easily by multiplying the number of subscribers by the annual subscription cost.

### Question 4 – What are the likely *benefits* of the Progressive Percentage of Expenditure Model?

In the previous round of consultation, the Department advised that an expenditure obligation of 11% of revenue ("Model 2") would generate $188 million in expenditure across the sector. We argued that this *"should be considered the bare minimum expenditure obligation for promoting industry growth"* and we stand by these remarks.

The Progressive Percentage of Expenditure Model is out of step with international precedent, and represents a novel departure from any comparable regulatory scheme. In this way it will increase complexity for the streamers in terms of regulatory compliance as well as failing to deliver stability, let alone growth, for the industry. In our view, departing from other like systems has not been justified and any such novelty is of concern.

In Canada, the *Online Streaming Act* allows the Canadian regulator to require streaming services to financially support and promote Canadian media content. Currently, broadcasters need to invest up to 30% of gross revenue made in Canada on Canadian content and contribute to the Canadian Media Fund which supports underrepresented genres such as drama, documentary and children's television as well as interactive digital media content, including games. Consultations are currently taking place to determine the level of obligation for streaming services.

In France, subject to the Decree on on-demand audiovisual media services, online media service providers must spend up to 25% of their net revenue on EU content and pay a levy of 5.5% to the National Cinema Centre (for a total of 30.5% reinvestment quota) to subsidise French original content across film, television, video games and digital.

While we do not deny that *any* obligation will result in an increase in drama and children's programs (though, importantly, **not** documentary in this case) the rising costs of production will mean that those funds will dry up very quickly. Such investment is not enough to promote industry growth. And any growth that results will not be due to any real requirement to invest, but from the near-to-zero starting point of the under-represented genres, particularly children's' content. Making two hours of children's television each per SVOD provider would be an unprecedented growth, but that is only because we start so low.

We reiterate here our support for a "combination model" of investment consistent with jurisdictions like Canada, France, Portugal and the Czech Republic. These jurisdictions have chosen to use a **combination** of direct investment obligations and a levy obligation. We propose the following regulation:

(1) 20% of gross subscription revenue generated in Australia is directly invested into the creation of new Australian drama, children's' television or documentary, with commensurate reporting obligations similar to that proposed in the 2022 Streaming Services Reporting and Investment Scheme Discussion Paper; and

(2) 5% of gross revenue generated in Australia paid into a Screen Australia fund dedicated to the development of new Australian drama, children's television and documentary. This 5% levy would include a commitment to inclusive policies supporting the careers of underrepresented writers and directors such those who belong to First Nations, Disability, People of Colour and LGBTQI communities.

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### Questions related to the Percentage of Revenue Model

### Question 1 – What are the likely <u>*monetary*</u> *costs* associated with the Percentage of Revenue Model? To the extent possible, please provide specific figures.

We are alarmed that the Percentage of Revenue Model allows a platform to reduce its drama obligation by its “nonsport ratio”.

Aggregate spending on sport by the SVOD platforms was $70.98 million in 2022-23 according to ACMA. The total expenditure was $324 million which nets a non-sport expenditure of $253 million. Therefore, the aggregate non-sport ratio in 2022-23 is 0.78.

The total drama obligation for that same period would therefore be **$210 million** (10% * approximately $2.7 billion * 0.78) which is slightly higher than what will be generated by the Progressive Percentage of Expenditure Model but is still $126 million less than what Model 3 proposed in the previous round of consultation would have resulted in.

This amount is also well within the capacity of the streamers to afford.

If the intended purpose of these investment obligations is to catalyse **growth** in an industry that has historically suffered from market failure **and** promote recovery post-pandemic and cuts to pre-existing content quotas, the Percentage of Revenue Model with its current settings will not achieve that. A 10% obligation is far too low and the ‘nonsport ratio’ is too easy to manipulate in order to reduce that obligation further.

### Question 2 – What would be the other *business costs* associated with Percentage of Revenue Model?

N/A

### Question 3 – What are the other likely *costs/challenges* associated with the Percentage of Revenue Model?

<u>**Nonsport ratio**</u>

We anticipate a hollowing out of Australian storytelling capacity and uniquely Australian stories as services seek to reduce their quota with sporting content. This also doubly benefits streaming services with an existing broadcasting license which can rely on the ‘anti-siphoning’ scheme.

We repeat the recommendation made earlier in this submission that simplicity and clarity is critical to avoid the seeking out of loopholes, which in this case means incentivising service providers to purchase sport content to reduce their overall obligation. The drama obligation must be a straightforward calculation based on gross revenue.

It is Government's role to ensure that Australian stories are given the same protections and the same elevation that Australian sports are given. An incentive to purchase more sporting content at the expense of Australian drama and children’s television has no place in this regulation.

This is particularly gratuitous in the context of there being no market failure for sport. Australians enjoy engaging with sport, and providers generate revenue based on sports consumption and the associated retail and other spending. Including sport in this way is the opposite of using sport to cross-subsidise the production of Australian culture and jobs.

**Children's TV and documentary incentives**

As noted above, it is disturbing to see the removal of the incentive to produce documentary from this regulation. It is, again, out of step with the regulation introduced in international markets that most closely resemble Australia's. Canada defines "underrepresented genres" to include drama, documentary, children's and youth. In France, service providers must invest in specific genres that they typically include in their catalogues, including children's television and documentary (for example, Disney+ must invest in both).

Our preferred incentive for the underrepresented genres is a flat percentage obligation, as per the drama obligation. For example, a drama obligation of 10% and then a further percentage obligation on top of that (e.g. 5%) for children's content and documentary specifically.

**Role of the regulator**

We submit that the level of obligation should be tied to subscriber count. Dominant players like Netflix, Disney+ and Amazon should be subject to a greater 20% obligation from the outset.

Alternatively, the greater 20% obligation could apply after a specified period of time has passed (e.g. one year).

Once any other streamers pass a given threshold (e.g. 3 million subscribers), the regulator should increase their obligation from the baseline 10% to 20%.

If there is to be a graduated increase from a starting percentage to a final percentage, this gradual increase in obligation must be set out in the legislation itself to ensure it is delivered.

Any failure to do so will in practice set a ceiling, not a floor. If not obliged to meet a benchmark, SVOD providers will do as little as they are required to do (noting, as above, likely regulator appetite for penalties and enforcement).

Such a scheme could be regulated as follows:

| Year | % reinvestment required |
|---|---|
| 2024 | 15% (with subquotas articulated) |
| 2025 | 17% |
| 2026 | 19% |
| 2027 | 20% |

## Question 4 – What are the likely *benefits* of the Percentage of Revenue Model?

Of the two choices presented in this paper, the Percentage of Revenue Model is plainly the better option. As we explained in Question 1 above, it could result in around $210 million in investment.

Yet because of the shortcomings stated above at Question 3, it is still *less* desirable than the Model 3 that the Department proposed in its previous consultation paper. In our view, both models in this paper are a backwards step, and Percentage of Revenue Model is slightly less of one only relative to the paucity of the Progressive Percentage of Expenditure Model.

We would, nevertheless, be satisfied with the Percentage of Revenue Model provided that:

- The concept of the nonsport ratio is removed **and**
- The increase or decrease of the revenue obligation could be tied to an objective standard, such as number of subscribers that a streaming service has **and**
- The percentage of obligation will be set at a level that can deliver stability and growth in the industry.

We recommend that further changes are made to the model as outlined below.

## General Question

### Question 1 – Of the two models proposed, which is preferred by your organisation?

We support the Percentage of Revenue Model with the following modifications:

- Removal of the nonsport ratio;

- In increasing obligation from 10% to 20%, regulator must consider subscriber numbers **or** a graduated increase from 10% to 20% is included in the legislation;

- Streaming services with over 3 million subscribers should automatically be subject to a steeper 20% obligation;

- Regulation should apply to **all** services delivered over the internet, including SVOD, AVOD and BVOD.

- Additional 5% obligation to invest in children's television and/or documentary, on top of the 10% drama obligation, if a more growth-oriented percentage is not adopted.

- For any entity that owns a broadcast licensee that is subject to Australian content obligations under the *Broadcasting Services Act 1992* only the actual spend by a platform within any corporate entity can be counted as part of each platform's regulatory obligation acquittal. The free-to-air platform must be the first release platform for any new content for the purpose of their regulation under the *Broadcasting Services Act 1992.*

- Reduced scale criteria: The obligation should apply to any streaming service with (a) a gross subscription revenue of **$50 million and** (b) **at least 500,000 subscribers or registered users**.

- Hours sub-quota: As argued in previous submissions, a sub-quota on **hours** of content is essential. Without one, streaming services will be incentivised to discharge their investment obligations by monetary expenditure alone in large, singular projects. This could be done, for example, by producing one-big budget film where writing and direction are not Australian, but the property is sufficiently 'Australian' to utilise the various incentive and location schemes available.

  As we have argued elsewhere, a sub-quota based on hours will encourage **multiple productions** that will allow Australian audiences to access more new, diverse programming while also creating more jobs for Australians working in the screen sector- and creating more products for streamers to test with international audiences. A diversity of storytelling and excellence in Australian stories is critical here, not simply expenditure. It is also consistent with the hours obligations applied to terrestrial broadcasters, leveling some of the playing field. A total sub-quota of 90 hours apportioned to each streamer based on revenue would be satisfactory.

- Levy obligation: We support the introduction of a levy in addition to the direct investment obligation. We propose that a separate 5% of gross revenue generated in Australia is paid by the streaming services into a Screen Australia fund dedicated to the development of new Australian drama, children's television and documentary. This levy would include a commitment to inclusive policies supporting the careers of underrepresented writers and directors such those who belong to First Nations, Disability, People of Colour and LGBTQI communities.

We note several welcome developments in this model, relating to acquisitions being within a set rolling timeframe to encourage more production, if acquisitions are to be included in quotas.

We would also like to see further articulation of the prominence/discoverability provisions, and would urge the Department to seek detailed feedback on objections to replicating the European tests. These are high level and do not require the disclosure of any commercially sensitive information, and are easily tested and examined by regulators, the industry and consumers. If the European model is asserted to not be feasible here, then those objecting should say why.

It is not sustainable to take a position that there be no prominence requirements, as the SVOD providers have complete control over discoverability and could thus game the system to ensure no consumers ever see, or can ever find, Australian content. At this point we would anticipate they would be more than happy to share their viewership data as part of making a case for removing quotas.

This is aside from the imperatives of *Revive* around helping Australian culture thrive, and making Australian content available to Australia is obvious in this context.

**Defining 'Australian'**

We note also that how much is returned to the Australian industry and community depends on how 'Australian' is defined. We refer to our earlier submissions on this:

*Modified SAC test*

| **Current SAC test** | **Proposed modified SAC test** |
|---|---|
| *Income Tax Assessment* Act – section 376-70(1)<br><br>(1) In determining for the purposes of section 376-65 (certificate for the producer offset) whether a *film has a significant Australian content, the *film authority must have regard to the following:<br><br>(a) the subject matter of the film;<br>(b) the place where the film was made;<br>(c) the nationalities and places of residence of the persons who took part in the *making of the film;<br>(d) the details of the *production expenditure incurred in respect of the film;<br>(e) any other matters that the film authority considers to be relevant. | In determining whether a film/series has significant Australian content, the regulator must have regard to the following:<br><br>(a) the subject matter of the film/series;<br>(b) the place where the film/series was made;<br>(c) the nationalities and places of residence of the persons who took part in the making of the film/series<br>**(d) the extent to which creative control rests with Australian creative talent;**<br>**(e) the extent to which the series/film contracts employing creatives is compliant with Australian copyright law and industry-agreed minima**<br>(f) the details of the production expenditure incurred in respect of the film/series;<br>(g) any other matters that regulator considers to be relevant. |

In relation to the proposed sub-clause (c), we propose that the executive producer/showrunner, producer, creator (where the work is a series), writer(s) and director(s) (of each episode, if applicable) **must** be Australian citizens or residents to satisfy the modified SAC test.

The current SAC test is based on the proportion of Australians compared to non-Australians, with special emphasis placed on the abovementioned roles.

We would also support a modified SAC test that required the majority of lead cast members and **all** key creative heads of department (the director of photography, production designer, editor, costume designer, sound designer and composer; and other cast, crew and service providers: for example, post-production houses) to also be Australian.

The current SAC test guidelines as administered by Screen Australia, lists "other matters" that the film authority should take into account, including:

- *the extent to which creative control rests with Australian citizens or residents; the extent to which copyright ownership resides with Australians – in particular,*
- *whether this is commensurate with the proportion of the budget provided by Australians;*
- *the extent to which there is recoupment and profit participation for Australian nationals or residents, and the extent to which that is commensurate with ownership;*
- *the policy purposes of the Producer Offset, such as the impact of the project on creating a sustainable Australian film and television production industry, or whether it supports the development and employment of Australian key creatives to make Australian films;*
- *and anything else that we or you consider relevant*

We submit that "creative control" resting with Australians is a sufficiently significant aspect of what it means for a work to have "Significant Australian Content" and should be a primary consideration.

We also submit that the "policy purposes" of the Producer Offset and SVOD regulation should be a primary consideration – i.e. the extent to which the film/series develops Australian creative talent and contributes to a robust and sustainable local screen industry. This means that Australians **must** be employed as key creative talent and that those creatives are treated fairly and paid, at least, industry agreed minima (where such minima exist) so that a career in screen, in Australia, is a sustainable and viable option compared to pursuing work in the US or UK. This is the rationale behind the proposed sub-clause (e).

Additionally, the reference to "Australian copyright law" is intended to prevent companies from incorporating US legal doctrines into Australian contracts with Australian creatives (e.g. clauses which disentitle writers to writing credits or deem works to be a "work made for hire").