Australian Writers' Guild

Australian Writers' Guild Authorship Collecting Society

Submission to the

'Streaming Services Reporting and Investment Scheme'

Discussion Paper

6 May 2022

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 Australia wide who create 90% of the content on our screens. The AWG has fought for 60 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 Australian Writers' Guild Authorship Collecting Society (**AWGACS**) 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.

EXECUTIVE SUMMARY

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, a time 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 commercial broadcasters. 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, nor that government would ever resile from requiring a reinvestment in content by companies who benefit from access to the Australian industry.

The regulation of the streaming services is urgent and necessary to ensure the function of different content models across the sector and even the playing field between divergent transmission and production models, and to deliver competition. The 5 per cent reinvestment obligation proposed under the Streaming Services Reporting and Investment Scheme will not be sufficient to reignite a contracted screen sector, let alone stimulate the growth of a robust and sustainable one. It will not address the market failures created by some parts of the industry being subject to regulation while others are not. The arrival of the major streaming platforms in Australia is an enormous opportunity to grow our local screen industry and make us a content exporting superpower. The Government can ensure that we are best placed to take advantage of this opportunity by setting the reinvestment obligation for qualifying streaming platforms at 20 per cent**.**

KEY POSITIONS

1. Government should introduce regulation that requires eligible streaming-video-on-demand (**SVOD**) and advertising-video-on-demand (**AVOD**) services to reinvest **20%** of their Australian-sourced revenue into commissioning new Australian content. The proposed rate of 5% in the Discussion Paper is not sufficient for a sustainable screen industry, and it is out of step with the international regulatory response in jurisdictions that are comparable to Australia in terms of the level of subscription to streaming platforms. It leaves some players in the marketplace with an undue competitive advantage.

2. These content reinvestment obligations must specifically include investment in **critical genres** (such as drama, children's television and documentary) and **minimum hours** to avoid situations where monetary expenditure alone allows a service provider to discharge its obligations but, instead, encourages them to commission a variety of new, diverse Australian narrative content. Australian content must be defined to deliver on the employment and job creation opportunities a reinvestment represents.

3. The proposed reform features an **untenable level** of **ministerial discretion.** For example, the introduction of separate **'**Tier 1' and 'Tier 2' categories, with the requirement of the Minister's approval to move between categories, serves no clear purpose and introduces unnecessary opacity. If regulation were made in the terms contemplated by the paper, which we oppose, it should simply apply to a qualifying service provider that fails to meet its reinvestment obligations. Similarly, there should also be clear and transparent thresholds for the designation of a service provider as a qualifying service provider (i.e. 'Tier 1'). As previously argued, this threshold should be **500,000 subscribers or registered users in Australia** and **AU$50 million per annum** in Australian revenue.

4. The weakness of the scheme proposed is particularly disappointing given the significant amount of time it has taken to develop. The policy conversation regarding these issues has been in train for a decade and the need for meaningful regulatory action has been clear for many years. We have made a number of submissions to a number of inquiries regarding the regulation of streaming

providers, and the House of Representatives released its report late in 2021. Delay further entrenches the market failure in play.

5. We oppose the proposed halving of the subscription television Australian drama obligation. The proposal is without policy justification and is contrary to the recommendations made by the Senate Standing Committee that the Foxtel cuts be withdrawn.

6. We recommend that a statutory remuneration scheme is implemented in line with the EU Copyright Directive,[1] to protect an important stream of remuneration for Australian screenwriters. A statutory scheme will streamline the collection of secondary royalties from subscription streaming platforms and will go far in supporting Australian creatives who work in the Australian screen sector without relying on direct investment.

The Australian screen industry has waited years for Government action on the issue of streamer regulation. The scheme proposed in the 'Streaming Services Reporting and Investment Scheme' Discussion Paper (the **Discussion Paper**) falls far below the Australian content investment requirement that the sector has been united in calling for. It is insufficient to lay the foundation for the robust, sustainable and domestically and internationally-competitive screen industry that the Government claims to support, or to compensate for diminishing hours of Australian content on free to air television.

Many of the issues raised in this submission have also already been addressed at length in numerous past submissions by the AWG and the Australian Screen Industry Group (**ASIG**) including, most recently, in the AWG's **attached** submission to the 'Modernising television regulation in Australia – Media Reform Green Paper' (**the Green Paper**).

[1] Article 18, EU Copyright in the Digital Single Market Directive (2019).

1. 20% reinvestment obligation

The AWG has long argued that qualifying streaming platforms should invest **20 per cent** of their Australian-sourced revenue in commissioning new Australian content. A 20 per cent rate is needed for two reasons. Firstly, it will ensure that streaming platforms are competing for viewers and quality products to produce on an even playing field with established free-to-air commercial networks.

The streaming platforms and free-to-air broadcasters operate in fundamentally different ways in terms of audience attraction, how audiences access their product, stakeholders (to take but one example, advertisers) and infrastructure.

Both, however, operate in a competitive marketplace, seeking good content to screen and thus attract audiences. The differences in business models aside, at present, streaming companies have an advantage in not being required to produce any local content in Australia at all. This is not a reason to remove content quotas for everyone; quite the opposite. It is a reason to fully implement the logic of Australian content regulation, and ensure a functional domestic and international market for it.

Obligations to produce local content do exist elsewhere in the world, with no discernible damage to the streamers' businesses.

The current regulatory system represents a market failure in that streaming platforms and commercial broadcasters compete to attract good Australian shows to make (a good thing) where the streamers are given an artificial advantage (the market failure). This has the effect of leaving the industry subject to severe peaks and troughs of activity and destroying the capacity of workers to build a sustainable career, and unfairly tipping the scales in favour of some players.

If we are to accept the cultural, domestic and international good that is Australian content, it follows that we have to build as robust an industry as possible and ensure all players can compete on the success of their business model and quality of their product, not on the basis of an outdated regulatory model favouring some.

A reinvestment requirement will also help balance the loss of production that has been reported since the drama, documentary and children's sub-quotas were relaxed in 2020 for the commercial networks (Seven, Nine and Ten). Data from Screen Australia shows that the

commercial broadcasters halved their investment in local drama from $107m in 2018/19 to $54m in 2020/21, following these changes.[2]

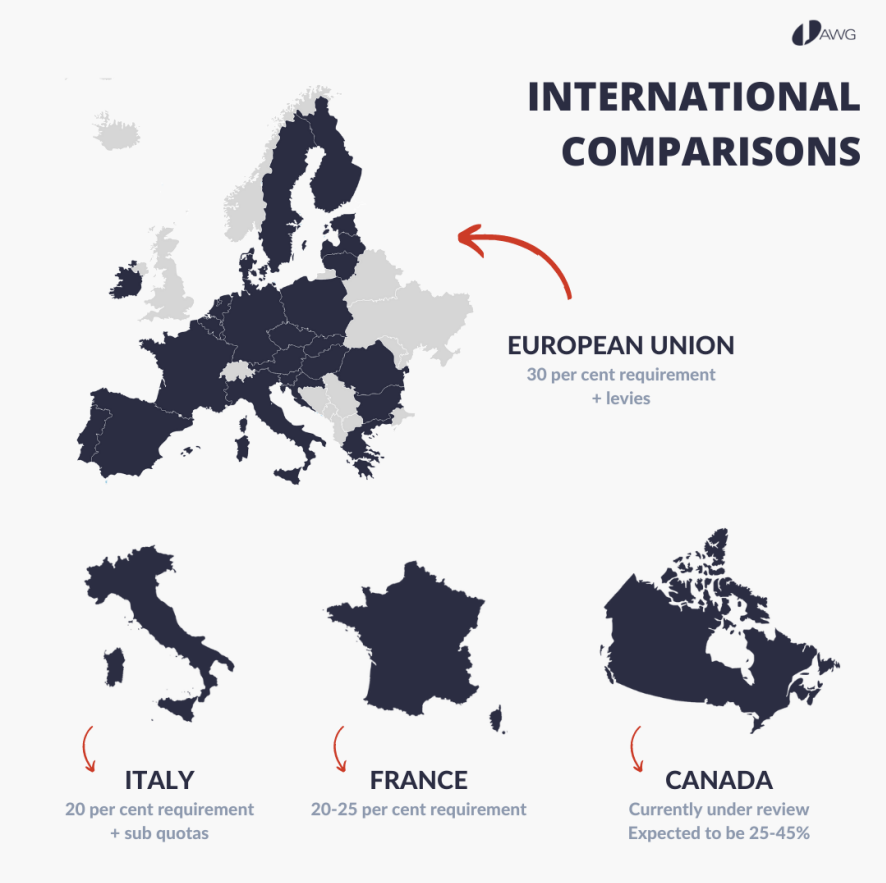
A five per cent obligation on the streamers is barely enough to compensate this loss. It will not stimulate growth or take advantage of the opportunity that has been presented to our local screen sector with the entry of the major streaming platforms into the Australian market. A 20 per cent rate of obligation would deliver approximately $366 million in Australian content investment annually, driving an additional 10,000 industry jobs creating over 300 hours of Australian content to streaming audiences here and around the world each year. Research from the Queensland University of Technology has tracked a 68% decline in Australian drama hours on free to air TV between 1999 and 2019.[3]

The Discussion Paper argues that the 5 per cent figure is broadly consistent with regulatory arrangements in place overseas, such as in Denmark, Czech Republic, Belgium, Croatia and Germany, who have imposed levies or investment obligations at less than 5 per cent.[4] This is an unconvincing line of reasoning when those countries to which Australia is being compared to predominately speak a language other than English. For those who wish to watch TV in German, the only place that can be produced is in Germany. All the jurisdictions listed in defence of this argument in the Discussion Paper have a 'natural' quota in place, simply by virtue of the language spoken in them.

Australia, as a predominately English-speaking country, is more vulnerable to US and UK-content saturation, and therefore a greater obligation is essential.

The EU has required streaming services to devote 30% of content to European programs and other countries (with levels of subscription to streaming services comparable to Australia's) go much further than this. As we argued in our submission to the Green Paper, Australia has the seventh largest subscriber base worldwide, behind Canada and France. 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 model.

[2] Screen Australia, Drama Report 2020/2021 (2021), 28.
[3] Lotz, Amanda D, Potter, Anna, McCutcheon, Marion, Sanson, Kevin, & Eklund, Oliver 'Australian Television Drama Index, 1999-2019' (2021).
[4] Department of Infrastructure, Transport, Regional Development and Communications, Streaming Services Reporting and Investment Scheme Discussion Paper (Discussion Paper), 24.



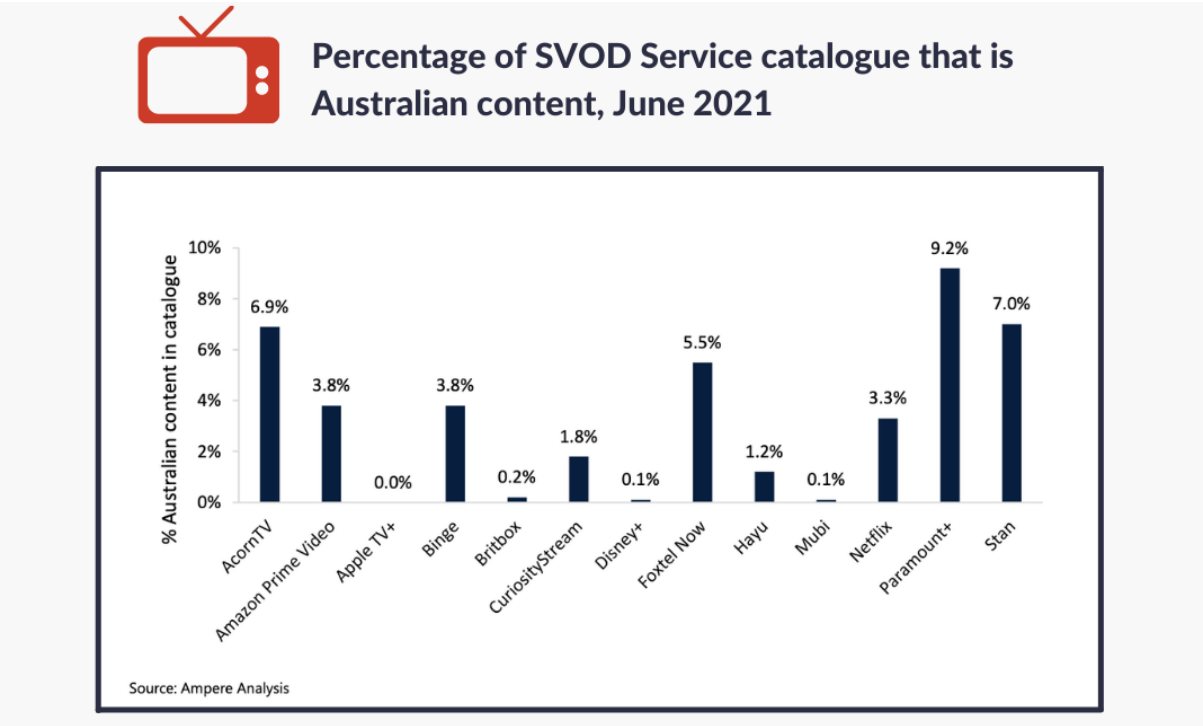
Any Australian regulation introduced should be in line with these countries, otherwise our local industry becomes uncompetitive and we lose jobs and weaken the sector, undermining 50 years of government investment that has produced works lauded around the world. Worst of all, we risk utterly capitulating in the fight to ensure new Australian stories have their rightful place on the world stage – as those stories have had for generations now.

2. Protection of critical genres and minimum hours of content produced

As we have argued in the past, any reinvestment obligation should aim to protect vulnerable genres of scripted content such as drama, children's television and documentary. This is consistent with the findings of the House of Representatives Standing Committee on Communications and the Arts in its 'Sculpting a National Plan' Report. The Committee recommended that streaming services should be required to spend 20 per cent of locally sourced revenue on Australian content and that 20 per cent of that 20 per cent quota should be allocated to local children's content and drama.[5]

[5] Standing Committee on Communication and the Arts, 'Sculpting a National Plan' (October 2021).

The ideal reinvestment obligation should consider both expenditure and hours of content. If the regulation does not do this then, contrary to the Government's stated intentions, there will likely be less Australian content produced. Streaming platforms may discharge their obligations by investing huge amounts of money in single, high-budget productions (calculated to entice new subscribers to their service, not necessarily to retain them) rather than incentivising a variety of content and consistent local production. A similar, flawed system was implemented for the commercial networks, following the relaxation of content quotas in 2020. Under the new 'points' system, commercial broadcasters are incentivised to produce high-budget drama. This has predictably reduced the number of hours of drama on television and reduced the opportunities for writers to work in the industry and develop their craft.



3. Excessive ministerial discretion

We are concerned that the proposal includes an excessive degree of Ministerial discretion which brings with it untenable risk of inadequate and inconsistent regulatory action.

Under this framework, Australian content becomes a matter for the uncertain preferences of future Ministers, who are subject to intense lobbying efforts of large commercial corporations which our industry has seen the negative effects of during the pandemic, without a strong regulatory framework to bind them to important public interest principles or provide transparency on the reasoning behind decisions.

The Australia Institute found that 60 per cent of Australian adults supported regulation of the large streaming services and they supported a **minimum** rate of 20% reinvestment in local content.[6] Deloitte's 2021 Media Consumer survey found that 47% of adults felt that SVOD services did not have enough Australian content.[7]

In the framework proposed in the Discussion Paper, the Minister will determine which service providers are 'Tier 1' service providers by considering whether the service is 'large' based on eligibility criteria also determined by the Minister.

The introduction of a second category – 'Tier 2' – and a further layer of ministerial discretion is unnecessary. Under the proposed scheme, the Minister can in certain circumstances designate a Tier 1 service provider a Tier 2 service provider. A formal investment obligation would be imposed on the Tier 2 service "of an amount to be determined in the designation instrument" [8] and which could in fact be set at less than 5%. There is no provision for public consultation when setting a Tier 2 obligation.

The Government has decided to remove the formal threshold requirements for a service provider's designation as a "large" service provider, as originally proposed in the Green Paper.[9] The Discussion Paper states that this decision is a response to the feedback of stakeholders, including SPA and MEAA, who argued along with AWG, that the thresholds proposed at the time were "too high."[10] To be clear, the screen production sector has never argued that eligibility tests should be done away with completely, only that the test proposed in the Green Paper fell short. The eligibility of service providers should be subject to clear and transparent thresholds and not determined at the Minister's discretion alone.

[6] Australia Institute, 'Polling – Subscription-video-on- demand services' (May 2021).
[7] Deloitte, 'Media Consumer Survey 2021' (2021).
[8] Discussion Paper, 18.
[9] Department of Infrastructure, Transport, Regional Development and Communications, Media Reform Green Paper (November 2020), 31
[10] Discussion Paper, 19.

A two-tiered scheme is unnecessary and, as previously argued, a service provider should be subject to the reinvestment obligation if:

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

4. Timeline for implementation

The scheme proposed is weak, years-long and is one that creates an uncertain pathway to regulation. It is particularly disappointing given the amount of time it has taken to develop: the policy conversation regarding these issues has been in train for a decade and the need for meaningful regulatory action has been clear for many years.

In previous submissions, we argued that this regulation ought to have been implemented by 1 January 2022. Failing that, regulation should be finalised and implemented **as soon as possible** to reignite a contracted sector and cushion the blow from the loss of Australian content, as recently reported by Screen Australia, following the relaxation of quota obligations on the free-to-air broadcasters. It is also needed to give confidence to local businesses and small businesses, and kick-start the production of quality content.

5. Drama expenditure requirements for subscription

It is equally disappointing to see that the Government appears to be resolute in its intentions to cut drama expenditure requirements for subscription television broadcasters in half. This proposal lacks any policy justification, particularly when examined alongside the weak regulatory scheme proposed in the Discussion Paper. This cut will be extremely damaging to an already weakened screen sector, contrary to the Government's intentions.

We note that Government proposed these changes in 2021 but the Senate Committee considering the *Broadcasting Legislation Amendment (2021 Measures No.1) Bill 2021* recommended the Foxtel cuts be withdrawn and called for the Government to expedite its review of streaming service regulation.

6. Statutory remuneration scheme

AWGACS is concerned with the adequate and proportionate remuneration of screenplay authors through secondary royalty streams. Looking to international precedent, we know that the best way to protect writers' rights to secondary remuneration is to make that remuneration unwaivable and inalienable through statute (as seen in Europe with the EU Copyright Directive introduced in April 2019).

In order to create globally competitive screen products, we need talented Australian writers to continue to work in Australia**.** They need to be supported and empowered to work here instead of being forced to work in the US and the UK industries just to sustain their careers and their families. We believe that there are a number of ways to achieve this. The most effective way would be for Government to stimulate demand by creating platform neutral content quotas consistent with the French model. However, Government can also implement measures to support and retain Australian creative talent through increased script development investment (as argued in our Green Paper submission) as well as through copyright law reform.

Australia is becoming a laggard in this area and action is needed to catch up with the changing landscape of authors' rights across the globe and secure royalties owed to screenplay authors, particularly royalties collected from subscription streaming platforms. A statutory remuneration scheme, modelled on Article 18 of the EU Copyright Directive, will secure an important stream of income for writers without relying on direct investment. Further examination is needed to ensure this regulation is properly implemented to deliver outcomes.

As noted throughout, the process for determining the appropriate regulatory framework for the future of our industry is overdue. The screen industry has made its position clear and presented a vision for a robust, internationally-competitive industry. We are of course willing to present evidence as part of a Committee or Parliamentary process in relation to this proposed scheme and to give further detail on what the scheme might mean for our screen sector.

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