

**Members of the Australian Screen Industry Group
Submission to the
Streaming Services Reporting and Investment Scheme
Discussion Paper**

Australian Directors Guild
Screen Producers Australia
Australian Writers Guild
Australian Screen Sound Guild
Media Entertainment & Arts Alliance
Australian Cinematographers Society
Australian Guild of Screen Composers
Casting Guild of Australia
Australian Production Design Guild
Association of Drama Agents
AWG Authorship Collecting Society
Australian Drama Agents Association
Australian Screen Editors
Australian Screen Directors Authorship Collecting Society

1.SUBMISSION OVERVIEW

On behalf of the members of its organisations and guilds, The Australian Screen Industry Group (ASIG) is focused on delivering a healthy commercial environment for the screen industry through ongoing cross-sector and government engagement.

This collective dialogue ensures that our industry remains viable and growing, delivers sustained secure employment and public expectations of accessing diverse, high quality Australian content are met.

The ASIG organisations and guilds supporting this joint submission represent thousands of talented industry practitioners in front and behind camera across a diverse and highly creative cohort working across all forms and formats of screen content.

We welcome the opportunity to submit to the *Streaming Services Reporting and Investment Scheme Discussion Paper* (the 'Discussion Paper').

We welcome the continuation of the policy debate but wish to express various concerns regarding the selected direction outlined in the Discussion Paper. The opportunity to set a new regulatory framework will never exist again and it is important that this results in strong gains in the Australian screen industry and to the Australian public.

For further information about this submission please contact alaric@adg.org.au

2.EXECUTIVE SUMMARY

- We support the swift introduction of a 20% Australian commissioned content expenditure requirement on global technology streaming businesses.
- We recommend that eligibility requirements for qualifying services should be set at 500,000 subscribers or registered users and AU\$50 million per annum in Australian revenue.
- The current scheme does not deliver on well-established cultural public policy objectives.
- The scheme proposed in this Discussion Paper is weak, lengthy and one that creates an uncertain pathway to regulation.
- There is a disconnect between the policy considerations outlined in the paper as a situation requiring regulatory action, and the proposal for weak regulatory action.
- Terms of Trade should be addressed in the Discussion Paper, this is as a serious oversight that requires action from government.
- The proposal includes an alarming degree of Ministerial discretion.
- We are concerned that further delay in regulation at this late stage is damaging to the industry.
- We believe that the proposed 5% threshold for Tier 1 services will fall far short of what is required.
- We are concerned that the rate of obligation for a Tier 2 service could in fact be set at less than 5%
- We recommend that the scheme should include specific protections for critical genres of drama, documentary, First Nations, and children's content.
- We support the proposed reporting requirements for the national broadcasters
- We recommend adopting the definition contained in the Australian content standards for commercial free-to-air television as a single Australian Content definition across all aspects of the industry.
- We oppose the proposed halving of the subscription television Australian drama obligation.

3.SUBMISSION DETAIL

3.1 Expenditure Requirement and additional considerations

We support the swift introduction of a 20% Australian commissioned content expenditure requirement on global technology streaming businesses, with specific protections for critical genres and terms of trade safeguards.

A defining feature of the Australian content market that determines local production rates, is that we share the same language with two of the world's largest content markets - the UK and the US. This easy-to-access content exchange is one of the main reasons why local content requirements exist and are still needed.

After years of review and inaction, streaming services regulation is long overdue. The current era represents a unique opportunity to deliver an optimal future framework that will ensure a full range of quality and diversity of Australian content on Australian screens.

We'd note that our proposal for 20% is offset by the deficit that has been created by Government deregulatory action on commercial free-to-air platforms with modelling undertaken by SPA suggesting that the deregulation already enacted could amount to a loss of \$97 million a year in screen sector investment.

3.2 Eligibility Requirement

We recommend that eligibility requirements for qualifying services should be set at 500,000 subscribers or registered users and AU\$50 million per annum in Australian revenue. Further, as stated in our previous Green Paper submission we recommend that the investment obligation should apply to all types of SVODs, BVODs and AVODs with no exemption for services owned by a corporate structure that also owns a broadcasting licence.

3.3 Expected Scheme Shortfall against Public Policy Outcomes

The current scheme does not deliver on well-established cultural public policy objectives, nor does it address the public's expectation for meaningful levels of Australian content on streaming services, as well as ensuring a sustainable future for the local production industry.

These changes do not represent legislative innovation, but simply bring Australia into line with how advanced economies regulate sophisticated screen industries. Strong global precedents for content expenditure requirements have been established in multiple territories around the world with no adverse reaction from global streaming businesses.

Further, and perhaps more importantly, there has been no adverse consequence for the consumers and a net benefit to local industries. A failure to do so here would amount to an abdication of responsibility to Australian culture and industry, and a timidity in asserting Australia's economic interests. This intervention builds a robust local industry with jobs growth without cost to the taxpayer, making this an efficient intervention.

3.4 Lengthy and Uncertain Pathway to Regulation

The scheme proposed in this Discussion Paper is weak, years-long and is one that creates an uncertain pathway to regulation. It features an untenable level of Ministerial discretion and could likely result in less new Australian content on streaming services. Our view is that this is not a framework for much-needed industry growth but at best, may only serve to maintain an inadequate status quo.

3.5 Disconnect between policy considerations and regulatory action

There is a clearly recognised need for more Australian content on these services, a need which is recognised by the Government itself in this Discussion Paper. There appears therefore to be a strange disconnect between the policy considerations outlined in the paper as a situation requiring regulatory action, and the proposal for weak regulatory action.

The rapid shift to streaming being the means by which most Australian engage with screen content has disadvantaged existing Australian broadcasters and left an uneven playing field, hindering their ability to compete with the under-regulated parts of the sector. We believe the pre pandemic quota system on local free-to-air and cable broadcasters is appropriate and in the national interest. This pre-pandemic regulation is still fit for purpose; so much so that it should be applied to all new entrants to the market in the form we have suggested. In refusing to apply and enforce a meaningful 'Australian Commissioned' content expenditure requirement on global streaming businesses, the Government is facilitating and entrenching disadvantage for Australian broadcasters, which in turn disadvantages the entire Australian screen sector.

The answer here cannot be to further weaken the industry by further relaxing content requirements for free-to-air broadcasters, but to require the large streaming services to engage meaningfully in the marketplace by competing for quality Australian content and re-investing in our local industry.

3.6 Impact on Terms of Trade from Changed Industry Dynamic

We are concerned that the rise in prominence of streamers in the screen production sector is giving rise to a changed dynamic in bargaining power between Australian content producers (most commonly SMEs) and global streaming businesses where Australian producers and creative contributors are increasingly expected to sign away a full suite of proprietary rights over a longer period. For example, worldwide screening rights in perpetuity and valuable intellectual property. Australia is lagging other countries such as the UK, and France in addressing these imbalances.

This shift, known as "terms of trade", affects the risk/reward proposition for Australian producers and creative contributors, more commonly to the detriment of the Australian screen industry ecosystem. This should have been addressed in the Discussion Paper, this is as a serious oversight that requires action from government.

One of the foundations to the sustainability of independent screen businesses and high quality, diverse screen stories is independent Australian screen producer's ability to secure fair and equitable terms with commissioning platforms. There is a failure of the market to provide fair and equitable terms in deal making, due to the power retained by a concentration of buyers in the market (commissioning platforms). The absence of consideration of this issue is of major concern.

3.7 Excessive Ministerial Discretion

We are concerned that the proposal includes an alarming 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.

3.8 Impact from further delays to regulation

The policy conversation regarding these issues has been in train for a decade, the need for meaningful regulatory action has been clear for many years. We are concerned that further delay in regulation at this late stage is damaging to the industry, exacerbated by the weakness of the scheme proposed.

The timelines proposed in the Discussion Paper will mean that regulatory obligations may not take effect until 2026. This is of great concern, as policy considerations that justify urgent regulatory intervention are now evident.

Government has already embarked on a shift in regulatory emphasis from linear broadcasters. As stated above, SPA modelling suggests that the deregulation already enacted could amount to a loss of \$97 million a year in screen sector investment. It is imperative that it takes urgent action to complete its work by implementing an appropriate regulatory framework for streaming platforms operating with significant reach and influence.

3.9 Tier 1 Threshold

We believe that the proposed 5% threshold for Tier 1 services will fall far short of what is required to ensure the regulatory scheme meets public policy objectives regarding the availability of Australian content to audiences, and the support of a vibrant and sustainable local production sector.

We support the swift introduction of a 20% Australian commissioned content expenditure requirement on global technology streaming businesses, with specific protections for critical genres and terms of trade safeguards.

ASIG notes the development in Europe of the Audiovisual Media Services Directive ¹ which requires streamers to offer a 30% quota of European content and additionally allows individual EU countries to introduce legislation to make streamers directly reinvest a percentage of their revenues in each European country where they operate.

In the explanation in the Discussion Paper regarding the 5% threshold, we are concerned that inappropriate comparisons have been made to jurisdictions which do not share the same market and industry conditions as exist in Australia.

For example, the paper references the Czech Republic, Slovenia, Denmark, Belgium, Croatia, and Germany as benchmarks where a 5% investment obligation (or levy) has been imposed.

A 20% expenditure requirement is a very low return on the reported \$2 billion in revenue the global streaming technology businesses derive from Australia consumers and a minuscule proportion of the \$37 billion streaming platforms reportedly spend on content worldwide.

3.10 Tier 2 Threshold

We are concerned that the rate of obligation for a Tier 2 service could in fact be set at less than 5%, and that there is no provision for public consultation when setting a Tier 2 obligation.

The Discussion Paper proposes that a failure to report/invest at least 5% of revenues in Australian content would not automatically trigger hard regulatory obligations. The Discussion Paper states that the Minister would “*consider* designating the service under Tier

¹ <https://digital-strategy.ec.europa.eu/en/policies/audiovisual-and-media-services>

2 of the scheme.” This appears to leave it open to government to take no further action in response to this scenario.

New Australian content commissions are where public policy outcomes have highest impact for both audience and industry. The Minister's ability to take into consideration investments other than new commissions lessens the sound proposal in the Discussion Paper for only new Australian commissions to count in the trigger calculation

ASIG considers it advisable to include a short period public consultation process on any proposed designations for tier 1 and tier 2. In Canada public consultation on Canadian content obligations is a feature of its regulatory process, we believe parliamentary scrutiny here would be an essential and invaluable program element.

3.11 Protections for Critical Genres

We recommend that the scheme should include specific protections for critical genres of drama, documentary, First Nations, and children's content with investment in that content falling away in the absence of regulatory supports.

The 2021 Screen Australia Drama Report shows that investment in Australian drama by commercial free-to-air television was half the amount in the last full year of the outgoing regulatory framework (\$107m in 2018/19, down to \$54 million in 2020/21).²

The report shows that the amount of Australian drama made for commercial free-to-air television also sharply declined because of deregulation, down from 434 hours in the last full year of the previous regulatory framework, to 282 hours in 2020/21. The number of programs was down also from 25 in 2018/19 to 11 in 2020/21.

The impact on children's content is of particular concern. Under the new regulatory framework for commercial free-to-air television, there are no minimum requirements for children's content. Screen Australia's data shows that whilst spend was steady on last year (\$48m compared to \$51m), the number of titles halved (7 down from 14) and the number of hours more than halved 39 down from 87).

3.12 Proposed Reporting Requirements for National Broadcasters

We support the proposed more rigorous reporting requirements and accountability measures for the national broadcasters but also support more formal expenditure minimum requirements that safeguard Australian content on these vital public services. We would welcome further engagement with government in developing these regulatory elements. In particular, we feel there would be benefit to development of content production mechanisms which ensure the direct flow of appropriate levels of Government funding into the independent production sector. These requirements should be accompanied by adequate and viable levels of national broadcaster funding.

3.13 Australian Content Definition

We support a single Australian Content definition across all aspects of the industry. We recommend adopting the definition contained in the Australian content standards for commercial free-to-air television, given the regulator's experience and expertise in applying these and the precision with which that definition is applied.³

² <https://www.screenaustralia.gov.au/fact-finders/reports-and-key-issues/reports-and-discussion-papers/drama-report>

³ <https://www.legislation.gov.au/Details/F2020L01653>

3.14 Subscription Television Drama Obligation

We oppose the proposed halving of the subscription television Australian drama obligation. The proposed cut will substantially harm subscription television audiences, who will lose access to high quality Australian narrative content. The proposal is without reasonable policy justification.

The NEDE scheme has created a wealth of high-quality award winning content, including such notable titles as *Top of the Lake*, *Hacksaw Ridge*, *Lion*, *Love My Way*, *Wentworth*, *Devil's Playground*, *Deadline Gallipoli*, *Fight Season*, *Mr Inbetween*, *Picnic at Hanging Rock*, *Secret City*, *Upright*, *Wentworth* and *Tangle*. This not only is of great benefit to Australian audiences, Pay TV also benefits financially from its ability to recoup investments from international sales and market awards successes to drive subscriber growth.

The NEDE scheme is significantly less onerous and inherently more flexible than the mandated annual quotas subsequently placed on Commercial Free-to-air Broadcasters. Pay TV's Australian Drama spend obligation tracks with overall drama spend and business performance – a decision to invest less in drama overall results in a requirement to invest in less Australian drama. The fact that recent levels of investment are at or about the minimum required amount suggests regulation is the determining factor in Australian drama content being created.

We agree that there is a need to correct regulatory imbalance across traditional and new on-line platforms, but we do not agree that the appropriate response is to substantially reduce or remove regulation on traditional platforms rather impose sensible and proportionate regulation on new platforms.

3.15 Other Developments

ASIG welcomes a number of positive policy progressions on elements included in the Media Reform Green Paper:

- I. Only new Australian commissions are proposed to be included when assessing whether Tier 1 SVODs are investing in Australian content (not captured acquisitions and re-licensing). As stated above, New Australian content commissions are where public policy outcomes have highest impact for both audience and industry.
- II. The Discussion Paper does not include elements from earlier proposals which excluded any streaming platforms which had ownership links with licensed broadcasters from the proposed regulatory scheme. As stated in our previous Green Paper submission we recommend that the investment obligation should apply to all types of SVODs, BVODs and AVODs with no exemption for services owned by a corporate structure that also owns a broadcasting licence.
- III. The Discussion Paper recognises that importance of discoverability for Australian content and that Tier 1 services will be required to report on the extent to which they are making Australian content promoted to Australian audiences.