

AUSTRALIAN SCREEN INDUSTRY GUILDS

Response to the Australian screen content requirements on streaming
services consultation form



Who we are

The **Australian Writers' Guild (AWG)** 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 (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.

In preparing this submission, AWG and AWGACS have consulted with our colleagues at the **Australian Cinematographers Society**, the **Australian Directors Guild**, the **Australian Production Design Guild** the **Australian Screen Editors** and the **Australian Screen Sound Guild** who, together, represent over 3,300 members working across the Australian screen industry.

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 Directors Guild (ADG)** 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.

The ADG fully supports this submission, and we are grateful to the AWG for their extensive and rigorous work putting the submission together and for allowing the ADG and other screen guilds to contribute to the process.

The **Australian Production Design Guild** represents designers and their associates in screen, live performance, events and digital production across Australia. The APDG recognise and nurture excellence in design, raise the profile of stage and screen designers and facilitate a vibrant design community.

The **Australian Screen Editors Guild** (ASE) 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 Screen Sound Guild** represents the profession of sound in film, television, and other screen and media industries. Members include those who work in production (location sound during principal photography) and post-production (sound editing and mixing). Our members are highly skilled and well-regarded, with many of them recipients of numerous Australian and international awards.

Executive Summary

Model 3 is currently the best possible choice for a robust and sustainable local screen industry. A 20% cent 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 will ensure a dividend for Australians, economically and creatively.

A 20% obligation creates pathways to commissioning projects involving talented Australian writers and directors empowered to be bold, to take risks in the screen content they create, and to continue their creative practice in Australia. This flows on to other Australian screen industry creatives and technicians; designers and composers, cinematographers, screen and sound editors who create unique/distinctive Australian visuals and sounds.

Our ideal model is Model 3 with modifications, including:

- An expanded service criteria with the obligation applying to any VOD provider with (a) a gross subscription revenue of **\$50 million** and (b) **at least 500,000 subscribers or registered users**. minimum quota of 90 hours, apportioned pro rata based on each VOD's contribution to the total investment obligation.
- Combination model of investment comprising a 15% direct investment obligation and 5% levy.
- Incentives across the board for vulnerable genres i.e. if there are incentives for children's television and documentary, scripted drama should also be incentivised. Unscripted drama or partially-scripted reality should be expressly excluded.

- Multipliers should be no greater than x2.5.
- The works must be new commissions.
- Promotion obligations should be enforced through a points system.
- Government tax subsidies and incentives (offsets) should not be included as any part of streamer expenditure for the purpose of this obligation.

A. Expanded service criteria

We support the proposed service criteria that any service provider that offers any of the three “genres of drama, documentary or children’s programs as commissioned and/or acquired content” should be subject to an obligation.

However, we contend that the regulation should apply to **all** services delivered over the internet. In other words, the regulation should not apply only to streaming-video-on-demand (SVOD) providers but also broadcast-video-on-demand (BVOD), advertising-video-on-demand (AVOD) and any other VOD format yet to be devised. The regulation should be future-proof and keep up to pace with technology and the ways in which audiences consume content. By restricting the scope of regulation to SVOD only, loopholes may unintentionally be created which incentivise service providers to turn to other forms of technology in order to escape regulation. Therefore, for we use the term “VOD” in this response to refer to SVOD, AVOD, BVOD and all other service providers that deliver content over the internet.

Furthermore, we are concerned with the proposition that “where an entity owns a broadcast licensee that is subject to Australian content obligations under the *Broadcasting Services Act 1992*...they would be able to count commissioned content towards each of those Australian content requirements”. Stan and Binge may be owned by the Nine Network and Foxtel respectively, but they have different platforms, different revenue streams, often differing distribution agreements feeding them, and different audiences. Therefore, we recommend that 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.

Finally, in relation to the scale criteria, the industry has previously expressed unanimous support for the obligation to apply to any VOD provider with (a) a gross subscription revenue of **\$50 million and (b) at least 500,000 subscribers or registered users**.

B. Combination model of investment

We are supportive of a combination model of investment consistent with with jurisdictions like Canada, France, Portugal and the Czech Republic have chosen to use a **combination** of direct

investment obligations and a levy obligation. The Model 3 quota would be broken down as follows under a combination model:

- (a) 15% 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
- (b) 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.

C. Hours sub-quota

Each SVOD service provider should comply with a specific sub-quota on hours of Australian work produced within the locally generated revenue. This sub-quota could be negotiated on a case-by-case basis with ACMA. ACMA could impose a percentage of Australian content calculated in proportion to the total hours of content (or number of titles) available in the platform's catalogue within the year, which is the approach taken in many European jurisdictions, such as Germany and Italy.

Alternatively, a flat minimum of **90 hours** could apply across the qualifying VODs. As in our response to Question 9, the quota would be applied pro rata depending on each VODs contribution to the total investment obligation pool.

Model 3 would result in approximately 134 hours of scripted drama using the '\$2.5 million per hour' benchmark. We propose a quota of 90 hours as a middle ground that guarantees a diversity of content – and therefore opportunities for Australian talent – while also giving the VODs flexibility around budgeting and the kinds of works they commission. If producing 90 hours of Australian drama approximately costs \$225 million, then the balance – i.e. \$111 million – could then be freely spent on projects with larger budgets.

In the absence of a sub-quota on **hours** of content, VOD platforms will be incentivised to discharge their investment obligations by monetary expenditure alone. 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 and diverse programming, while also creating more jobs for Australians working in the screen sector. A diversity of storytelling and excellence in Australian stories is critical here, not simply expenditure.

D. Genre multipliers to include scripted drama, multipliers no greater than x2.5

Model 3 does not stimulate the production of scripted drama with a multiplier despite the fact that scripted drama is a vulnerable genre. Scripted drama requires more practitioners and writers in pre-

production, more crew, more craftspeople in the physical production. Documentaries require less crew and staff. Children's programs require more staff but, with animation being expensive locally, many of these programs are animated abroad, resulting in fewer local jobs for an entire sub-set of children's content. 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. It is certainly a "vulnerable" genre in the same way that children's television and documentary are. While we support the emphasis on documentary and children's programming, it should not be at the expense of scripted drama.

We support genre sub-quotas for vulnerable genres but the proposed multipliers are too generous overall. We recommend a multiplier no greater than x2.5 for any model. While steep multipliers incentivise the creation of works within the vulnerable genres (except drama), the obligations will be too easy to meet and hamper the effectiveness of the regulation. When the Morrison Government relaxed and eventually reduced the quotas on the commercial broadcasters, predictably reducing employment in the sector and a narrowing of the story pipeline. The attainment of points under the new broadcast license is no hardship at all, given the generous multipliers and removal of genre sub-quotas. In 2021, Seven was able to satisfy almost half of its points obligation (48%) by producing *Home and Away* alone. In the same year, it showed just 6.5 hours of new Australian kids' content due to the relaxation of the sub-quota obligations.

E. Commissions only

We support regulation that **includes commissions only** and **excludes acquisitions**. Any investment quota must encourage the creation of new Australian content and platforms should not be able to satisfy the quota simply by licensing or purchasing pre-existing Australian content. When regulation commences on 1 July 2024, all content previously produced will comprise the total 'back catalogue' of Australian screen content. If a VOD service can comply with their quota obligations by spending on this back catalogue of content, then the regulation will unintentionally encourage a trading scheme of pre-existing Australian content between the streaming services without actually resulting in a net increase in Australian work. Existing rights holders may benefit as properties move between owners, but such an arrangement will not stimulate production nor generate new Australian stories.

An investment quota that includes acquisition will unintentionally encourage a trading scheme of pre-existing Australian content between the streaming services without actually resulting in a net increase in Australian work. The purpose of the quota is to encourage the **creation of new Australian content** and platforms should not be able to satisfy the quota simply by licensing or purchasing pre-existing Australian content.

F. Modified SAC test

While we would need more detail on what would be contained in the "modified" SAC test, we express general support for it over the ACCTS definition used in Models 1 and 2.

G. Discoverability

In order to improve the discoverability of Australian content, VOD platforms could:

- Consistently identify Australian content through country-of-origin metadata;
- Give prominence to Australian **works** during a search through country-of-origin metadata (for example, searching the word 'Australia' might yield content with 'Australia' in the title as well as titles that are not Australian starting with an 'A' or an 'Au').
- Promoting a minimum percentage of Australian content in banners, carousels and other tools;
- Showcase Australian content on the "front page" of the service;
- Implement a dedicated Australian works section on its homepage directly accessible in its entirety; and
- Meet a quota to promote Australian works when advertising the service as a whole.

We support a **points system** for promotion and discoverability. This approach provides greater flexibility to reflect the different permutations of user interfaces and market changes over time.

For example, in Italy the national regulator, AGCOM, is required to set out a series of options, each worth a number of points, from which VOD providers established in Italy must choose to reach the necessary score and comply with the requirements

ACMA could set out options (such as those given in our response to Question 2) that increase prominence and discoverability for Australian works.

Each item would be assigned a certain number of points and ACMA would set a mandatory 'prominence score', giving SVOD platforms a choice as to which items to implement in order to meet that score.

H. Other issues raised in our submission

(a) Enforceable minima for arts workers

We recently surveyed our membership regarding their contracts with international streamers. The feedback we have received both from writers and agents, is that it is clear that streamers generally do not comply with the minimum terms of the industry agreements negotiated between the Australian Writers' Guild and Screen Producers Australia: being the Series and Serials Agreement (SASA), Miniseries and Telemovies Agreement (MATA), and Children's Television Agreement (CTA). Under the SASA, writers are entitled to ongoing payment of residuals; under the MATA writers are (sometimes) entitled to a share of the budget and, in some cases, royalties.

In our survey results – and in information we have collected over the last five or so years – we know that “backend” remuneration is hardly ever included in contracts with streamers. Streamers “buy out” the rights in the work in the sense that any ongoing remuneration a writer would be entitled to under the industry agreements is removed from the contract. Furthermore, where a writer might be paid a percentage of the budget for an episode script – with the rationale being that a writer should benefit for writing any script that is able to generate a large amount of funding – that fee is capped.

Significantly, under the AWG-SPA agreements, rights to different foreign territories are purchased on a piecemeal basis. The streamers **always** secure rights throughout the world, in all media, with no (or a very slight) ‘bonus’ applied to the upfront writer’s fee. This represents a very real wage cut since writers are being paid **less money** in exchange for **greater rights in favour of the SVODs**.

With some exceptions, Australian-owned production companies are generally compliant with the AWG-SPA agreements. It is the international streamers and US-owned production companies **in particular** that disregard these industry standards. It is also common practice for international streamers and US-owned production companies to insist on authors works being deemed a “work made for hire”. “Work made for hire” is a US doctrine that is inconsistent with Australian copyright law, but *nevertheless* works to disentitle writers to secondary royalties collected in some jurisdictions. We understand that this issue may be outside the scope of this paper, but we would be happy to consult with Government on this critical issue in the future.

(b) Return quotas on FTA broadcasters to previous levels

We call on Government to restore the local content obligations on the commercial broadcasters to previous levels. As mentioned earlier in this response, the obligations on the commercial broadcasters to produce a certain number of hours of Australian content were suspended, and eventually reduced, by the Morrison government during COVID. By reducing the number of hours of drama on television, the previous government reduced employment for thousands of Australians in the screen sector and worsened the pandemic-created under-employment and unemployment crisis, weakened the career trajectories of content creators and limited opportunities for emerging writers from all backgrounds to develop their craft. In order to facilitate the industry’s recovery, these changes must be reversed **in addition to** the regulation of the VODs.