



Australian Government

Streaming Services Reporting and Investment Scheme Discussion Paper

February 2022



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Outline

The Australian Government intends to introduce a **Streaming Services Reporting and Investment Scheme** (the Scheme) to support the provision of Australian content to Australian audiences and the viability of the Australian screen production sector over the long term.

The proposed Scheme is a key component of the Government's media reform program, designed to modernise media regulations towards an end-state of a platform neutral framework covering both online and offline delivery of media content to Australian consumers. The elements of the Government's broader reform agenda are outlined in the Media Policy Statement.

The Scheme will require large Subscription Video on Demand (SVOD) services to report annually on their expenditure on, and provision of, Australian content, and the steps they are taking to make Australian content prominent and discoverable on their services.

If a service were to invest less than 5 per cent of their gross Australian revenue on Australian content, the Scheme would enable the Minister for Communications to impose a formal investment requirement on these services.

The proposed Scheme outlined in this discussion paper has been developed following extensive consultation with stakeholders through the *Media Reform Green Paper* and prior to that the *Supporting Australian Stories on our Screen* options paper.¹²

Informed by these processes, this discussion paper outlines the proposed design of the Scheme and seeks stakeholder comment on key regulatory design decisions including definitions, services in scope, and implementation timeframes.

The Government will use this feedback to develop the legislation necessary to implement the Scheme.

¹ Australian Government, [New rules for a new media landscape—modernising television regulation in Australia](#), 27 November, 2020.

² ACMA and Screen Australia, [Supporting Australian stories on our screens—options paper](#), 15 April, 2020.

Make your views known

The Government is seeking views from interested parties on the details of the proposed Scheme, with the submissions period closing on **24 April 2022**. Submissions received by the Department of Infrastructure, Transport, Regional Development and Communications (the Department) as part of this consultation process will be used to inform the final design of the proposed Scheme.

Making a submission

The Department is welcoming written submissions on the specific questions raised in this paper, and other matters relevant to the design of the proposed Scheme. Submissions should be received by **5:00 PM Australian Eastern Standard Time, Sunday, 24 April 2022**.

Written submissions can be lodged by:

Website: <https://www.infrastructure.gov.au/have-your-say/>

Post: Streaming Services Reporting and Investment Scheme Consultation
Department of Infrastructure, Transport, Regional Development and Communications
GPO Box 2154
CANBERRA ACT 2601

Submissions should include the respondent's name, organisation (if applicable) and contact details. Submissions with no verifiable contact details will not be considered. Questions about the submission process can be directed to content@communications.gov.au.

Publication of submissions and confidentiality

All submissions will be made publicly available by the Department unless a respondent specifically requests that its submission, or a part of its submission, be kept confidential and acceptable reasons are provided.

The Department is subject to the *Freedom of Information Act 1982* and submissions may be required to be disclosed by the Department in response to requests made under that Act.

The Department reserves the right not to publish any submission, or part of a submission, which in its view contains potentially defamatory material, or for confidentiality reasons.

The process to date

In the Government's response to the Australian Competition and Consumer Commission's (ACCC's) Digital Platforms Inquiry Final Report, it committed to commence a staged process of media reform towards an end state of a platform-neutral regulatory framework covering both online and offline delivery of media content to Australian consumers.³

The Government announced the first stage of its policy and regulatory reforms on 30 September 2020. The suite of measures included additional funding of \$53 million to support the production of Australian drama, children's and documentary programming, reforms to the Australian Screen Production Incentive, and changes to simplify Australian content obligations on free-to-air broadcasters. This was informed by consultation on the *Supporting Australian Stories on our Screens options paper*, jointly produced by Screen Australia and the Australian Communications and Media Authority (ACMA).⁴

In November 2020, the Government released the Media Reform Green Paper for public consultation, which proposed that expectations be set for large SVOD services to invest a percentage of their Australian revenue in Australian content, with services required to report to ACMA each year on performance against those expectations.⁵ As outlined in the green paper, the Minister for Communications would have the power to implement formal regulatory requirements on a service that failed to meet expenditure expectations for a period of time. It was also proposed that services make Australian content discoverable to Australian audiences.

The green paper received 110 submissions to the public consultation process, which closed in May 2021. Extensive consultation was also undertaken with relevant stakeholders, including two roundtables on Australian content matters raised in the green paper.

Stakeholders generally agreed on the importance of providing Australian content to Australian audiences. However, views differed on the best approach to regulating streaming services. Several stakeholder groups representing Australia's production sector supported the imposition of an investment obligation on streaming services. Streaming services on the other hand argued against an obligation citing no clear market failure and the risk that efforts to increase supply of Australian content will exacerbate capacity constraints in the sector.

A consistent theme from the consultation process was that any reform of Australian content regulation needs to be carefully designed to avoid unintended consequences for industry and Australian consumers.

In December 2020, the Minister for Communications, Urban Infrastructure, Cities and the Arts wrote to Netflix, Amazon Prime, Disney+ and Stan, requesting that they report to ACMA on a voluntary basis on their investment in Australian content and the availability of Australian content on their services. This initiated work that led to the establishment of a voluntary reporting framework for large SVOD services.

On 13 August 2021, ACMA released the first tranche of data from that framework, showing that Netflix, Amazon Prime, Disney+ and Stan collectively reported investment of \$153 million on

³ Australian Government, [Government Response and Implementation Roadmap for the Digital Platforms Inquiry](#), 12 December, 2019.

⁴ ACMA and Screen Australia, [Supporting Australian stories on our screens—options paper](#), 15 April, 2020.

⁵ Australian Government, [New rules for a new media landscape—modernising television regulation in Australia](#), 27 November, 2020.

Australian programs in 2019-20.⁶ A second report was released on 17 December 2021, with the same four SVOD services investing \$178.9 million in Australian programs in 2020-21.⁷

A new standard governing the provision of key genres of Australian content on commercial television broadcasting services came into effect on 1 January 2021. The *Broadcasting Services (Australian Content and Children's Television) Standards 2020* (the Standards) provide more flexibility for commercial broadcasters to acquit Australian content obligations.

⁶ ACMA, [Spending by subscription video on demand providers 2019-2020](#), 13 August, 2021.

⁷ ACMA, [Spending by subscription video on demand providers 2020-21](#), 17 December, 2021.

Government regulation of the screen sector

Current arrangements are out of date

Elements of our current regulatory framework have become out-of-date and unbalanced. Commercial and subscription broadcasters are subject to Australian content requirements, but streaming services are not, even though they are one of the most popular ways for Australians to access content.

Australia's regulatory framework has traditionally focused on the provision of key genres of programs by commercial free-to-air and subscription broadcasters. This is complemented by direct funding measures and tax subsidies that maintain a vibrant production sector with capacity to deliver quality drama, documentary, and children's content.

For commercial television broadcasters, the *Broadcasting Services Act 1992* (BSA) establishes obligations for overall levels of Australian content, along with specific requirements for the provision of key genres through the Standards. For subscription broadcasters and subscription broadcasting channel providers, the BSA establishes the New Eligible Drama Expenditure (NEDE) Scheme. The NEDE Scheme requires that licensees and channel providers invest at least 10 per cent of their total drama program expenditure for drama services on new Australian drama. Details of these requirements, and recent compliance, are outlined in Table 1.

The Government is committed to applying regulation on streaming services so that all major players within the production sector face Australian content regulation.

Table 1: Content quota requirements on Commercial and Subscription Broadcasters

Type of content	Minimum requirements	Range of reported results for 2020 ⁸
Commercial broadcasters		
Australian programming	55 per cent of all programming broadcast between 6 am and midnight on primary channels each calendar year. (s 121G BSA)	67 to 73 per cent
Australian programming	1460 hours between 6am and midnight on multi-channels each calendar year. (s 121G BSA)	2,064 to 4,422 hours
Australian genre programs⁹	250 points of first release Australian programs, including documentary, children's, commissioned drama and acquired films each calendar year. (s 13 the Standards)	Reporting to commence March 2022
Subscription broadcasters		
Australian drama	10 per cent* of a subscription television licensee or channel provider's total drama program expenditure per financial year must be on new eligible drama. (Part 7, Division 2A BSA). *The Government intends to reduce the NEDE obligation to 5 per cent.	\$13.74 million

⁸ Results reflect ACMA's [temporary relief due to COVID-19 impacts](#) on content productions and supply chains.

⁹ This new points quota for Australian documentary, drama and children's programs came into effect on 1 January 2021.

Many jurisdictions have implemented local content requirements for streaming services

Australia is not alone in grappling with the challenge of safeguarding access to content with local cultural relevance in an increasingly globalised marketplace. A number of countries have implemented regulations on streaming services to incentivise or require the provision of local programming. These generally take the form of catalogue quotas, direct investment and/or levies.

Regulation of streaming services has been introduced in a number of countries in the European Union (EU) as a result of the 2018 amendments to the Audiovisual Media Services Directive.¹⁰ From September 2020, streaming services operating in the EU were required to devote 30 per cent of their output to programs made in Europe.¹¹ Each member nation has flexibility in the way that this obligation is implemented and a significant number of EU member states – including Belgium, Croatia, Denmark, France, Germany, Italy, the Netherlands, Spain, Switzerland, Portugal and Poland – have already implemented content requirements.

In addition to the 30 per cent catalogue requirements, many countries have elected to apply levies.¹² The majority of financial contribution requirements are set at 2 per cent or lower of providers' local revenues. Belgium, Croatia and Denmark are set at 2 per cent; Poland is set at 1.5 per cent; Germany is between 1.8 per cent and 2.5 per cent depending on the service's annual revenues. In Germany, Netflix initially challenged regulation that would require it to contribute to the German Federal Film Board.¹³ Recently, however, Netflix committed to investing €500 million (around \$800 million AUD) for German-language titles from Germany, Austria and Switzerland between 2021 and 2023.¹⁴

France and Italy are the only jurisdictions to impose higher requirements to date. In addition to implementing a 5.15 per cent levy, France requires large streaming services to spend between 20 and 25 per cent of revenue earned in France on French content creation – attaching earlier access to theatrical releases to the higher contribution.¹⁵

Italy has imposed direct investment obligations that require up to 20 per cent of net revenue raised in Italy to be reserved for the production, pre-purchase and purchase of European works produced by independent producers in the last five years. A sub-quota of 6.25-10 per cent of net annual revenue raised in Italy is to be reserved for works of Italian original expression.¹⁶

In Canada, the government has committed to re-introducing legislation post-election to update the Broadcasting Modernisation Act, identifying a revised version of Bill C-10 as an immediate priority. In its original form, this Bill proposed to empower the Canadian Radio-television and Telecommunications Commission (CTRC) to regulate streaming platforms. Under the Bill, expenditure requirements could be imposed for the purposes of developing, financing, producing or promoting of Canadian programs, and training and supporting their creators.

¹⁰ Directive 2018/1808 of the European Parliament and of the Council (14 November 2018).

¹¹ Gershgorn D (27 December 2018) 'The EU is giving Netflix and Amazon two years to make 30 per cent of their catalogs European', *Quartz*; Pimlott N and Peters J (2020) *Bringing the web into the net*, FieldFisher website

¹² Komorowski et al. (2021) *Obligations for VOD providers to financially contribute to the production of European works, a 2021 update*, Brussels: imec SMIT-VUB.

¹³ Blaney M (16 February 2019) 'Netflix finally agrees to contribute to Germany's national film fund', *Screen Daily*.

¹⁴ Grater T (15 September 2021) 'Reed Hastings Talks Netflix German Series '1899'', *Deadline*.

¹⁵ Keslassy E (30 June 2021) 'France Issues AVMS Decree to Set Rules, Regulations For Streamers', *Variety*.

¹⁶ Komorowski et al. (2021) *Obligations for VOD providers to financially contribute to the production of European works, a 2021 update*, Brussels: imec SMIT-VUB.

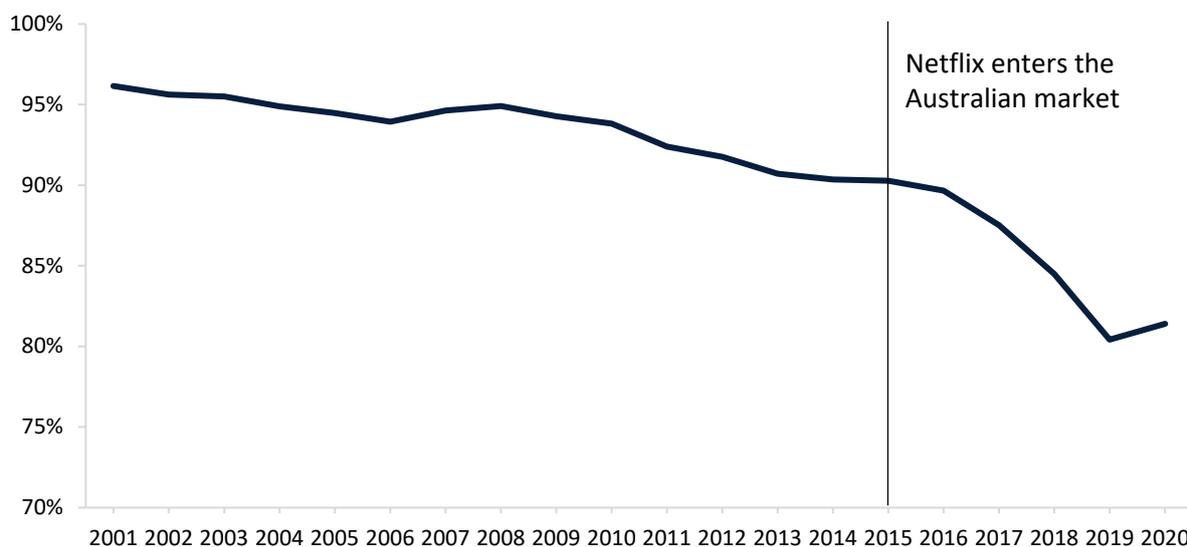
The need to regulate SVOD services

The Government is committed to Australian content regulation that is proportionate to the impact and influence of the services Australians use to access content; an existing goal of the BSA. As Australian audiences are migrating to new, unregulated platforms such as SVOD services, the current regulatory framework needs to be updated.

Australians are increasingly turning to SVOD services for screen content

Over the past decade, audiences have shifted away from the linear consumption of audio-visual content in favour of online and on-demand platforms. The viewership of free-to-air television has declined (Figure 1) as the uptake of SVOD and Broadcast Video on Demand (BVOD) services has increased (Figure 2).¹⁷

Figure 1: Percentage of Australians who viewed free-to-air television over a seven day period



Source: Roy Morgan Single Source, Australians aged 14+, 2001 – 2020 (Calendar Years).

Research commissioned by the Department in 2021 showed that SVOD services have overtaken commercial free-to-air television as the most popular way to consume screen content, with 62 percent of respondents using SVOD services over the past seven days compared to 58 per cent using commercial free-to-air TV.¹⁸

Over three quarters of Australian households have a subscription to at least one SVOD service;¹⁹ close to half of households have more than one service; and 10 per cent have five or more subscriptions.²⁰ The growth of SVOD and BVOD platforms is highlighted in Figure 2.

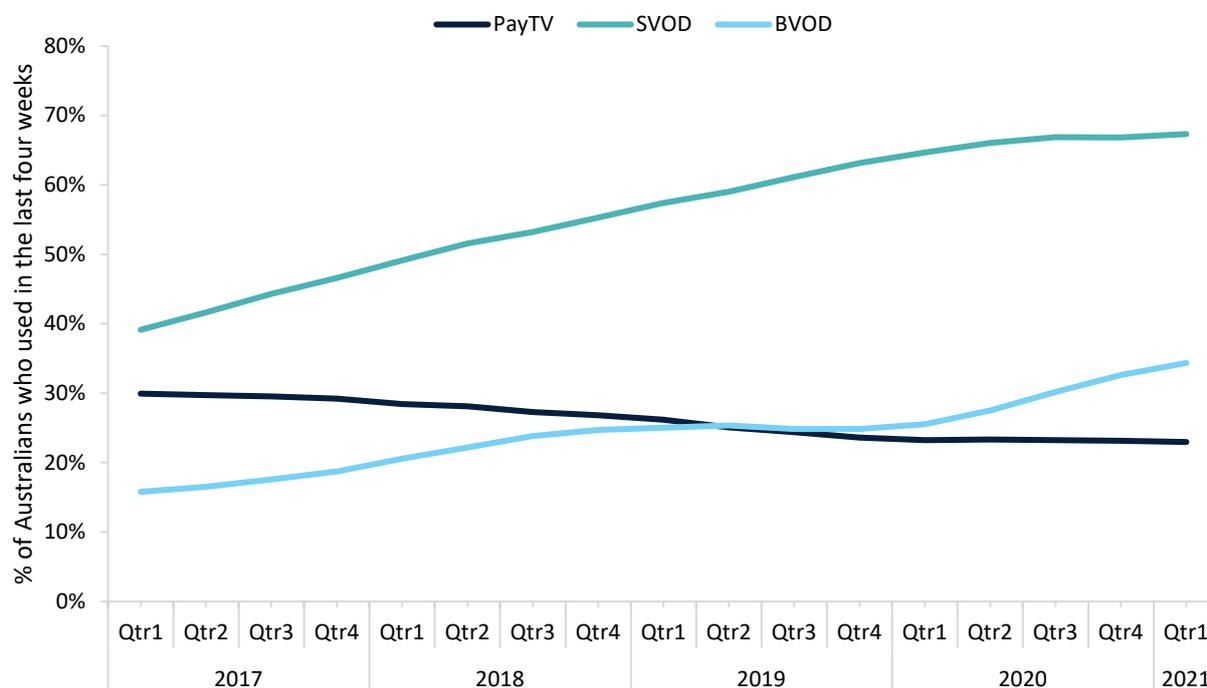
¹⁷ Deloitte (2021) [Media Consumer Survey 2021](#).

¹⁸ Social Research Centre (2021) [Media Content Consumption Survey](#), pp 4-5, report to the Australian Government Department of Infrastructure, Transport, Regional Development and Communications.

¹⁹ ACMA (Australian Communications and Media Authority) (2021) [Communications and media in Australia: Supply and use of services 2019–20](#), ACMA, Australian Government.

²⁰ Ampere Analysis (2021) [The future of streaming in Australia](#).

Figure 2: SVOD and BVOD are growth platforms



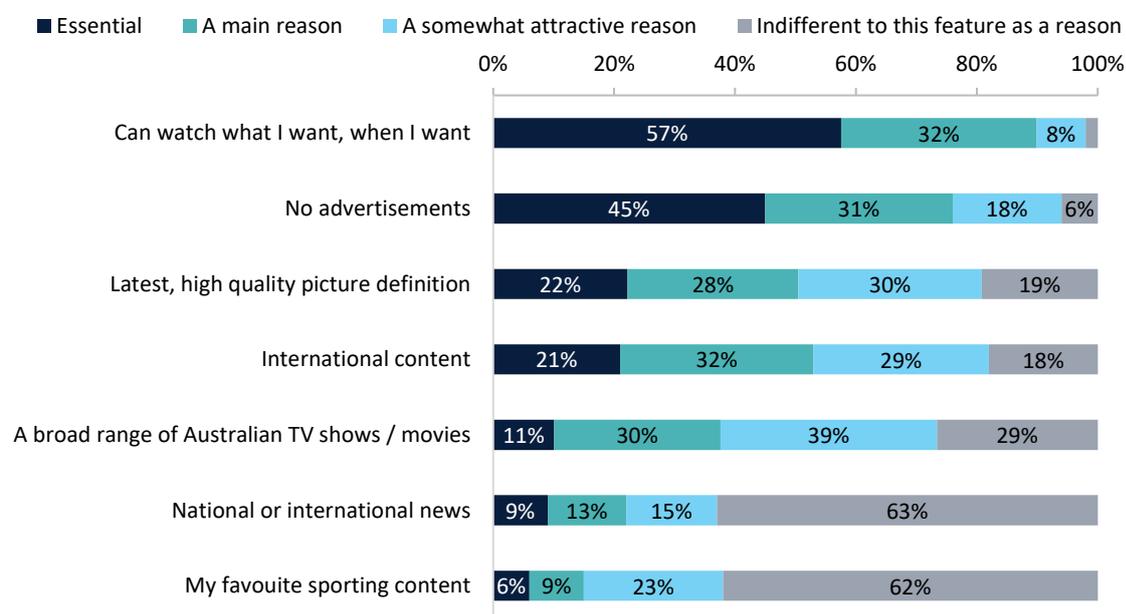
Source: Roy Morgan Single Source, Australians aged 14+, April 2016 – March 2021 (Rolling Years by Quarters).

PwC estimates that the SVOD market in Australia is worth over \$2.5 billion, and predicts that this will increase to over \$3.6 billion by 2025.²¹ While Netflix is the most popular service, new SVOD services continue to enter the market and are enjoying rapid growth.²²

This has enhanced the content available to Australian consumers and presented new opportunities for our local production sector. SVOD services are providing viewers with increased choice of content and the ability to watch content when they want to watch it and without advertisements. This flexibility is highly valued by consumers, as shown in their reasons for watching online subscription services (Figure 3).

²¹ PwC (PricewaterhouseCoopers) Australia (2021) [Subscription TV | Global Entertainment & Media Outlook 2021-2025](#).

²² Deloitte (2021) [Media Consumer Survey 2021](#).

Figure 3: Reasons for watching online subscription services

Source: Social Research Centre (2021) *Media Content Consumption Survey*, report to the Australian Government Department of Infrastructure, Transport, Regional Development and Communications.

Global SVOD platforms have also provided Australian content producers with opportunities to expand into new markets. Digital technology has spurred innovation and encouraged efficiency in the media sector, including the creation of new platforms, experiences and business models.

Australians want more Australian content on SVOD services

The Deloitte Media Consumer Survey, released in September 2020, found that 34 per cent of respondents consider it 'very important' to be able to access Australian film content on SVOD services.²³ While the SVOD services operating in Australia are increasing their provision of Australian content, a significant proportion of Australians don't believe that this is enough. In September 2021, 47 per cent of Australian adults felt that SVOD services don't have enough Australian content.²⁴

Although Australians want access to Australian content on SVOD services, the amount of content currently available varies significantly between services and, in some cases, makes up a very small proportion of the overall content catalogue. Estimates from Ampere Analysis, as shown in Figure 4, provide a comparison of Australian titles available on a variety of SVOD services. Figure 5 presents Australian content as a proportion of each service's overall catalogue.²⁵

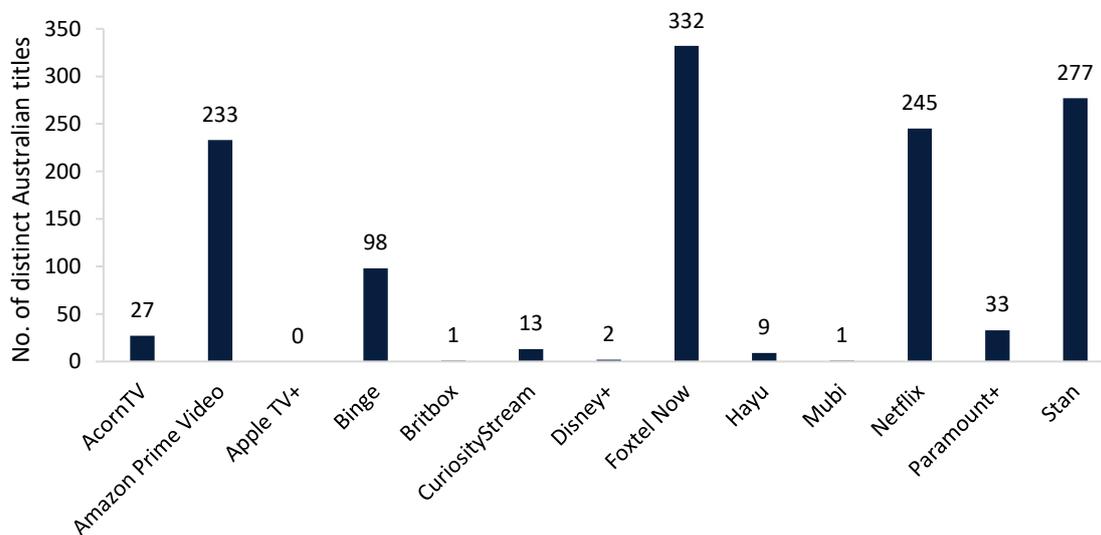
This analysis demonstrates that some services have no Australian content, while others devote only a small proportion of their catalogues to Australian content. As an example, Netflix, Australia's most popular SVOD service, is estimated to devote 3.3 per cent of its catalogue to Australian content.

²³ Deloitte (2020) *Media Consumer Survey 2020*.

²⁴ Social Research Centre (2021) *Media Content Consumption Survey*, p 32, report to the Australian Government Department of Infrastructure, Transport, Regional Development and Communications.

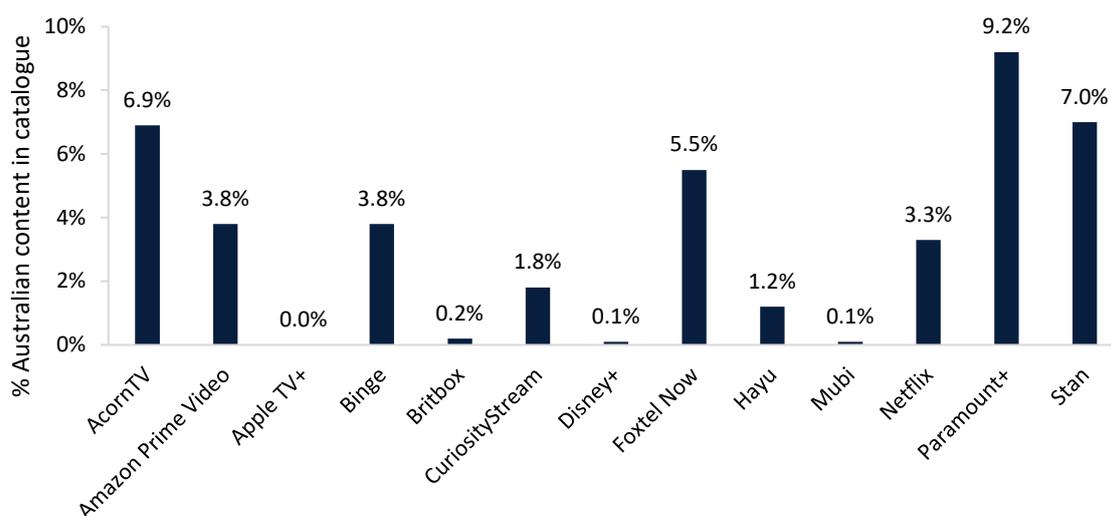
²⁵ Ampere Analysis may use different definitions for Australian content to the definition applied by ACMA. Data from Ampere Analysis is not comparable to SVOD Australian content data published by ACMA.

Figure 4: Number of titles on SVOD services that are Australian, June 2021



Source: Ampere Analysis

Figure 5: Percentage of SVOD service catalogue that is Australian content, June 2021

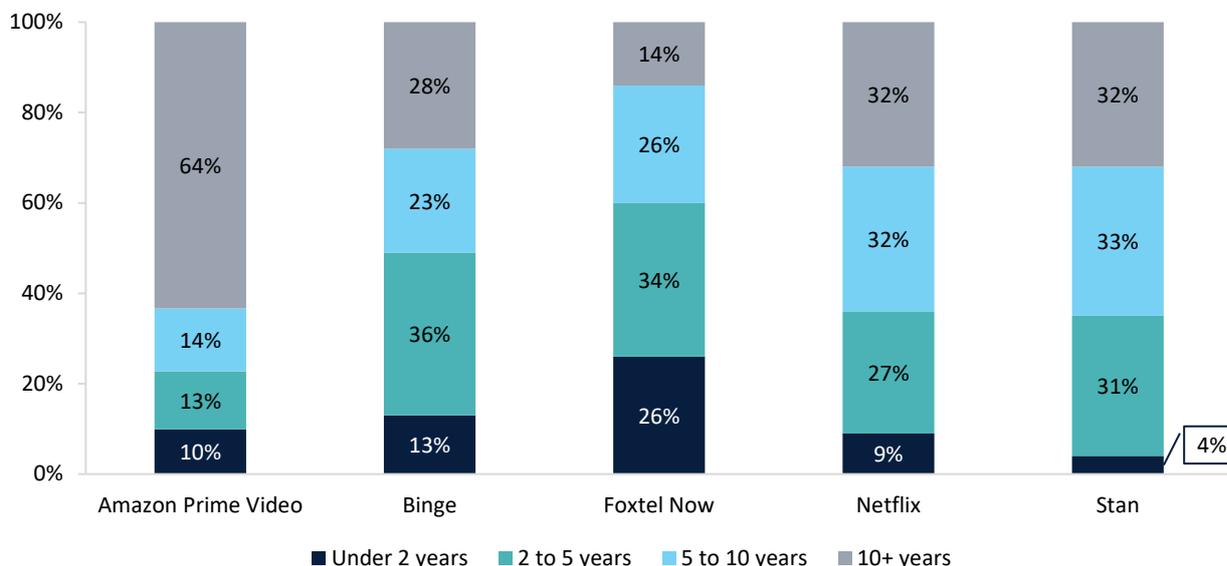


Source: Ampere Analysis

Care needs to be taken in interpreting these percentages, as the overall size of the catalogue will influence the relative proportion of Australian content (the larger the total catalogue, the smaller the percentage of Australian content). Nonetheless, it is clear from Figure 4 that a number of established and emerging SVOD services offer very few Australian titles to their Australian subscribers.

The Australian content that is available on these services also tends to be older content. The majority of Australian content on Netflix, Stan and Amazon Prime is more than five years old (see Figure 6). Amazon Prime in particular carries mostly (64 per cent) content that is more than a decade old.

Figure 6: Age of Australian content available on SVOD services, June 2021



Source: Ampere Analysis; SVOD services providing at least 98 Australian titles

The age profile of Australian content is not surprising as SVOD services provide subscribers with access to very large catalogues of content covering a breadth of genres and catering to a wide range of tastes and preferences. Services will naturally hold a back-catalogue of older material. However, the fact that that 10 per cent or less of the Australian titles on 3 of the 5 most popular SVOD services are 'new' (<2 years old) indicates that the Australian content holdings are relatively dated.

Australian content investment is increasing but not guaranteed

While streaming services are lifting their investment in Australian content, this is not guaranteed over the long term.

In 2020, the Government asked large SVOD services operating in Australia – Disney+, Stan, Amazon and Netflix – to report voluntarily to ACMA on the provision of Australian programming and their investment in Australian programming. These services collectively reported investment in Australian programs of \$153 million in 2019-20 and \$178.9 million for 2020-21.²⁶

In 2020-21, 58 per cent of total expenditure by SVOD services was on commissions, down from 80 per cent in 2019-20. The four services claimed \$450 million of Australian-related expenditure (up significantly from \$115 million in 2019-20). Australian-related content is a broader definition than Australian program, and includes programming that meets any one aspect of the Australian program definition (e.g. an Australian director or producer).

While this investment by SVOD services in Australian content is significant, it coincides with a period of growth in Australian production activity. Over the past 18 months, Australia has been an attractive destination for filming relative to many other countries as a result of its low COVID-19 case numbers

²⁶ ACMA, [Spending by subscription video on demand providers 2020-21](#), 17 December, 2021.

early on in the COVID-19 pandemic and system of incentives. Competitive incentives, such as the Location Incentive and Location Offset, have supported an influx in foreign investment through attracting international footloose productions to film in Australia.

The investment and training opportunities these productions bring are invaluable in growing our local screen sector. However, there is no requirement for productions accessing the Location Incentive or Location Offset to meet any Australian content test. The Australian Government also provides support for Australian production through direct funding from Screen Australia and through the Producer Offset tax rebate which requires productions to meet the Significant Australian Content (SAC) test.

Large SVOD services operating in Australia have each indicated their intent to continue investing in Australian productions, Australian content and the capacity of the Australian production sector. In its submission to the green paper, Amazon Prime stated:

“Since 2019, Prime Video has commissioned 14 Amazon Original series in Australia, investing \$150 million in local productions, which has resulted in more than 2,500 jobs across Australia.”²⁷

Amazon Prime Australia’s Head of Content, Tyler Bern, has indicated that the company is committed to commissioning Australian content:

“We don’t have a [future] number that we’re working towards, what we can say is we’re commissioning more... we have a big development pipeline, we’re going to make several more announcements over the course of the next year and continue commissioning Australian content long term.”²⁸

Netflix has committed to significant investment in Australian content. In its submission to the media reform green paper it stated:

“In 2020 alone, Netflix invested in 16 new Australian titles. To provide an example of the scale of our contribution to new content production, Netflix invested over AUD\$52.04 million in the recent original series Clickbait.”²⁹

However, there is no certainty that this projected growth in investment in Australian content will continue without a regulatory framework in place and attractive production incentives to support them. Australia remains a small market for content production and SVOD services in Australia are under no obligation to contribute to the development of Australian content. In comparison, a number of countries have imposed local content requirements on major SVOD services and many countries are considering imposing them. This disparity in regulation may influence the investment by SVOD services in Australian content over the long-term.

²⁷ Amazon Prime Video [submission](#) to the *Media Reform Green Paper*, May 2021, p 1.

²⁸ Ward M (18 May 2021) [‘Amazon Prime ploughs \\$150 million into Australian productions’](#), *Financial Review*.

²⁹ Netflix [submission](#) to the *Media Reform Green Paper*, May 2021, p 2.

A Streaming Services Reporting and Investment Scheme

The Government's media reform green paper proposed that a requirement be set for large SVOD services to invest a percentage of their Australian revenue in Australian content.

- Under this proposal, services would be required to report to ACMA each year on their performance against those expectations, with the Minister able to implement formal regulatory requirements on a service that failed to meet expenditure expectations for a period of time.
- It was also proposed that services make Australian content discoverable to Australian audiences.

Following significant stakeholder consultation through the green paper process, the Government has decided to implement a Streaming Services Reporting and Investment Scheme. The Scheme will be proportionate and will underpin the positive contributions SVOD services are already making to the provision of, and investment in, Australian content.

A graduated, two-tiered scheme

The Scheme would be implemented as a two-tier framework that would enhance the transparency of the investment of large SVOD services in Australian content before consideration is given to the imposition of enforceable regulatory obligations.

The Minister for Communications would have the power to designate large SVOD services in two tiers.

- **Tier 1** services would be required to report annually to ACMA on their investment in, and provision of, new Australian content, and the extent to which they are making Australian content discoverable to Australian audiences.
- If a Tier 1 service were to invest less than 5 per cent of their gross Australian revenues in new Australian commissions, the legislation would enable the Minister to designate the service as a Tier 2. **Tier 2** services would face a formal investment obligation of an amount to be determined in the designation instrument, in addition to reporting requirements.

Whether a service is considered 'large' would be assessed with respect to eligibility criteria relating to the number of subscribers in Australia and / or revenue in Australia.

This tiered approach responds to the feedback provided through the green paper consultation process.

Amazon Australia stated that they:

"believe that continued flexibility remains important and prescriptive obligations could have unintended consequences," and "view that any regulatory interventions at this early stage should be appropriately limited and cautious."³⁰

Netflix also expressed support for a more cautious approach to regulatory interventions, noting:

"it is critically important that any policy or regulatory recommendations are directly informed by the first stage of the Government's response - the voluntary investment reporting process that has just commenced between streaming entertainment companies and the ACMA. The

³⁰ Amazon Prime Video [submission](#) to the *Media Reform Green Paper*, May 2021, p 3.

evidence from this data reporting over a sufficient sample of time (a minimum two to three years) should form a key component of the ongoing policy work in this area.”³¹

The Australia New Zealand Screen Association (ANZSA) favoured the:

“approach in gathering data from VOD services through voluntary arrangements. However, we caution against creating greater uncertainty in the form of significant regulatory obligations.”³²

The tiered system would codify the voluntary reporting arrangements that were implemented in 2020 and enliven regulatory obligations only where this is warranted in the circumstances.

Tier 1

Under the Scheme, the Minister for Communications would have a power to designate large SVOD services, such as Netflix and Amazon Prime, as Tier 1 services. These services would be required to report annually to ACMA on their expenditure on, and provision of, Australian content, and the steps they are taking to make Australian content prominent and discoverable on their services.

Large SVOD services have voluntarily reported to ACMA on their expenditure on Australian programs and the availability of Australian programs on their services since 2021. The mandatory reporting process envisaged for Tier 1 services would replace this voluntary arrangement and provide greater consistency of reporting each year as part of the Scheme.

ACMA would have the capacity to issue guidance on the type of information to be supplied by designated services. This guidance would also specify the aggregated information that the regulator would publish. Providing this clarity would remove the need for ACMA to negotiate and consult with individual services on discrete data points and enable the regulator deal with reported information consistently. Further detail of the proposed reporting arrangements is provided below.

SVOD services would be able to seek to be designated as Tier 1 services should they wish to be regulated under this aspect of the Scheme.

Tier 2

If a Tier 1 service failed to report within 60 days of the end of the preceding financial year, or failed to satisfactorily demonstrate investment in Australian content of 5 per cent of gross Australian revenue in any given financial year, this would enable the Minister to consider designating the service under Tier 2 of the Scheme.

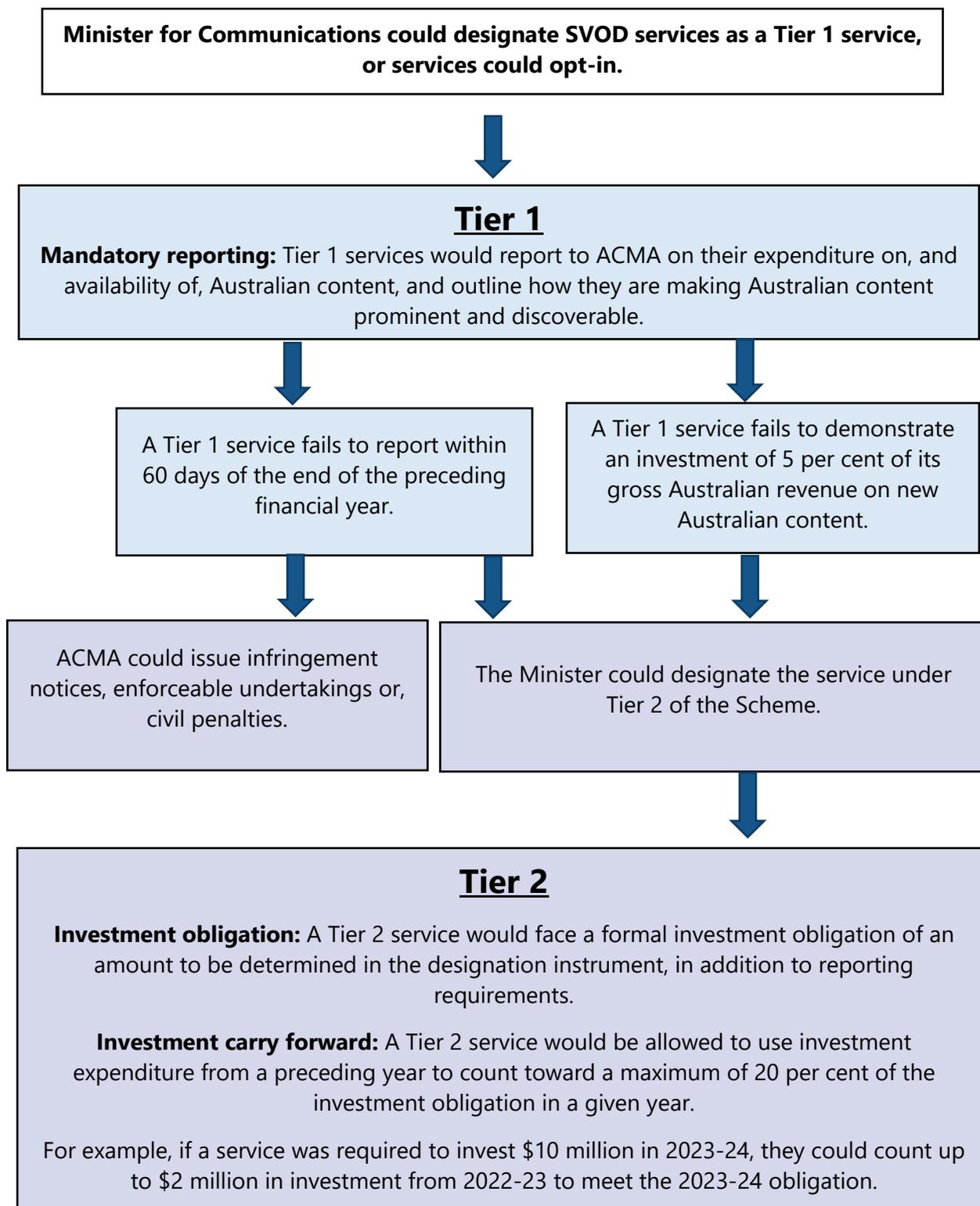
Tier 2 services would face a formal investment obligation of an amount to be determined in the designation instrument, in addition to reporting requirements.

A service could only be designated as Tier 2 if it has first been designated as Tier 1 service, and the designation notice has been in effect for a full 12 month reporting cycle. This would provide assurance to industry that services would not be immediately designated as Tier 2 and face mandatory obligations before they are required to report.

³¹ Netflix submission to the *Media Reform Green Paper*, May 2021, p 49.

³² Australia New Zealand Screen Association submission to the *Media Reform Green Paper*, May 2021, p 27.

The designation process



Timing and sequencing considerations

A Tier 1 or Tier 2 designation instrument could be made at any time. Designation would commence from 1 July of the financial year following the making of the instrument, provided there was a period of at least 6 months between the making of the instrument and the commencement date. This is intended to provide services with sufficient lead time to prepare to meet the obligations.

It is proposed that the Minister must provide a service with 60 days' notice for a proposed designation. Again, this is intended to provide adequate notice to services of a proposed designation.

Tier 1 and Tier 2 designation instruments would have a duration of 3 years, or another period specified in the instrument.

Consultation questions

1. Will the 60 day period for the provision of notice of a proposed designation provide entities with sufficient time to prepare for designation? Should this period be longer or shorter?
2. Will the commencement date for designated services – 1 July of any given financial year with no less than 6 months between the making of the instrument and its commencement – provide entities with sufficient time to meet the obligations under the Scheme?
3. Is the three year duration of the designation instruments appropriate, or should a different period be considered?

Designation criteria

The green paper proposed that services meet a number of eligibility tests relating to scale and size of the service. For example, it was suggested that regulation only apply to services with significant paid subscribers – at least one million paid subscribers or registered users per year, and at least \$100 million per annum in gross Australian revenues.

SPA supported the notion of revenue and subscriber based designation criteria. However, they noted that they:

“do hold concerns that the levels proposed in the green paper are too high and would act to exclude relatively mature and stable businesses with significant reach and who are deriving substantial benefit from operating in Australia.”³³

Media Entertainment and Arts Alliance (MEAA) also considered the proposed thresholds too high, noting that it:

“supports the regulatory capture where an SVOD service has 500,000 subscribers. The revenue test should also be half the amount contemplated in the green paper – i.e. content rules should apply where a service has \$50 million (or more) in Australian revenues in a given year.”³⁴

³³ Screen Producers Australia [submission](#) to the *Media Reform Green Paper*, May 2021, p 15.

³⁴ Media Entertainment and Arts Alliance (Equity and Entertainment, Crew and Sports Sections) [submission](#) to the *Media Reform Green Paper*, May 2021, p 10.

ANZSA noted that metrics could be difficult to verify, given the confidential nature of the information:

“any regulatory intervention that is based on revenue thresholds will have difficulty in enforcement due to lack of available data due to commercial confidentiality requirements.”³⁵

Reflecting this feedback, the proposed Scheme would not specify in primary legislation the thresholds for the inclusion of a service under the Scheme. This avoids the potential for such thresholds to be rapidly out of date and the need for future amendments to primary legislation. However, the legislation would specify a process to be followed for a service to be designated under either Tier 1 or Tier 2 of the Scheme.

Tier 1 designation

In considering whether to designate a service as a Tier 1 service, the Minister would be required to consider whether the service is a ‘large’ service based on eligibility criteria relating to the number of subscribers in Australia and/or revenue in Australia. The Minister would determine the eligibility criteria for what constitutes a large service.

Tier 2 designation

The Minister would have the capacity to determine whether a service is a Tier 2 service, noting that only Tier 1 services that had been designated as such for a full 12 month reporting cycle would be able to be designated under Tier 2 of the Scheme. In considering whether to determine that a service is a Tier 2 service, the Minister would be required to consider:

1. Whether the Tier 1 service continues to be a large service, assessed at the time that the Tier 2 designation is being considered.
2. Whether the Tier 1 service had failed to report within 60 days of the end of the preceding financial year, or failed to satisfactorily demonstrate investment in Australian content of 5 per cent of its gross Australian revenue in any given financial year.
3. The contribution of the Tier 1 service to the production and availability of Australian content for Australian audiences, considering as a whole the contribution of the service together with any related bodies corporate.³⁶

Consultation questions

4. Is the proposed designation process for Tier 1 and Tier 2 services under the Scheme appropriate? Should this be modified or adjusted and if so, in what way?
5. Are there additional criteria that should be considered for designation under Tier 1 or Tier 2 of the Scheme?

³⁵ Australia New Zealand Screen Association [submission](#) to the *Media Reform Green Paper*, May 2021, p 29.

Services in scope of the Scheme

Definition of 'subscription video-on-demand service'

It will be essential for the Scheme to clearly establish the types of services may be within the scope of a designation instrument made under the Scheme.

It is proposed that the Scheme include a definition of an 'SVOD service' that builds upon the definition of 'online content service' included in Schedule 8 to the *Broadcasting Services Act 1992* (BSA).

Schedule 8, section 3, provides that a service is an 'online content service' if it is:

- (a) a service that delivers content to persons having equipment appropriate for receiving that content, where the delivery of the service is by means of an internet carriage service; or
- (b) a service that allows end-users to access content using an internet carriage service.

But only in the case where that service:

- (c) is provided to the public (whether on payment of a fee or otherwise); and
- (d) has a geographical link to Australia.

There are also a range of services that are explicitly excluded from the definition of an 'online content service', which are also relevant and appropriate for the Scheme. They are supplemented by further definitions under Schedule 7 of the BSA and include services that are:

- (a) an exempt online simulcast service (essentially a live online stream of a broadcasting service);
- (b) an exempt Parliamentary content service, which would include recordings of Senate Estimates or other Parliamentary proceedings;
- (c) an exempt court/tribunal content service, or an exempt official-inquiry content service, such as Royal Commission Hearings;
- (d) a service that enables end-users to communicate, by means of voice calls or video calls with other end-users;
- (e) an email, instant messaging, SMS or MMS service that enables end-users to communicate with other end-users;
- (f) a service that delivers content by fax;
- (g) an exempt data storage service or an exempt back-up service; and
- (h) a future type of service determined by the ACMA in a legislative instrument to be excluded.

Working from the definition of online content service, it is also proposed that a number of additional elements be set out under the definition of SVOD service for the purpose of the Scheme.

1. An SVOD service is a service that predominantly provides content that is 'professionally produced'.

ACMA would have a power to issue guidance on what constitutes professionally produced content. However, it is intended that this would relate to productions that involve a producer, director and writer, with higher production values than what would be expected of user-generated content.

The 'predominantly provides' element of this definition would permit services to provide an element of user-generated content, but the majority of content would need to be professionally produced in order to be within the scope of the Scheme.

2. An SVOD service is a service that makes content available to the public by means of payment of a subscription fee (drawing from the definition of subscription broadcasting service in the BSA), with subscription fees continuing to be the predominant source of revenue for the service.

In this way, the definition would exclude services that make content available on a pay-per-view or transactional basis, and services that make a content available as part of an advertising-funded model where advertising is the majority source of revenue.

3. An SVOD service would not include:
 - a) a 'broadcasting service' or a 'datacasting service', within the meaning of the BSA.
 - b) a service that provides content that would constitute Refused Classification (RC) or X18+ content.
 - c) services that predominately provide non-scripted content (e.g. sport and news).

ACMA would also have a power to determine, via legislative instrument, that a service, or a part of a service, falls within the definition of an SVOD service. This will be an important 'reserve power' given the complexity of businesses operating in the audio-visual media market. ACMA would be able to utilise its information gathering powers – outlined below – to inform any determination under this arrangement.

Consultation questions

6. Should the Scheme utilise the definition 'online content service' in Schedule 8 to BSA as a base for the definition of an 'SVOD service'? Are the inclusions and exclusions under the online content service definition appropriate for the regulation of SVOD services?
7. Should the definition of an 'SVOD service' be limited to entities that predominantly produce professionally produced content?
8. Are the proposed elements of the definition related to a subscription service appropriate for the Scheme: requiring the payment of a subscription fee, with those fees being the predominant source of revenue?
9. Should the definition of an 'SVOD service' exclude: broadcasting and datacasting services; services that provide RC or X 18+ content; and services that predominantly provide non-scripted content, such as news and sport?

Maximum flexibility for the rate and type of investment

The rate of investment

It is proposed that SVOD services designated under Tier 2 of the Scheme would be required to meet a rate of investment stipulated through a Tier 2 designation instrument.

The Minister for Communications would determine an appropriate rate for the service having regard to the criteria specified for the Tier 2 designation process.

This proposed approach would enable the Scheme to be calibrated to changing market conditions and other relevant factors over time. Flexibility will be important given the rapidly evolving market for streaming services. It is notable that despite their growth, SVOD services are relatively new in Australia.

- Netflix commenced its Australian service in March 2015 and this was the catalyst for the mainstream take up of SVOD services.
- Amazon Prime (June 2018), Disney+ (November 2019) and Paramount+ (August 2021) all entered the market, with local service Stan having commenced in early 2015.
- Existing service providers such as Foxtel have also developed subscription-based streaming services.
- SVOD subscribers have grown from 300,000 in 2014 to 17.3 million in 2021.³⁷

It will be important for the Scheme to be able to accommodate future changes in market structure and consumer preferences, without requiring changes to primary legislation.

Through the green paper consultation process, the possible rate of investment required of SVOD services elicited starkly different views from stakeholders.

SVOD services argued strongly against any mandated rate of investment.

Amazon Australia stated:

“Amazon Australia does not believe there is any cogent justification for requiring it to invest a proportion of Prime Video’s gross Australian revenue in new Australian content. Ultimately, we do not believe that any market failure can be demonstrated, such that a regulatory response is warranted.”³⁸

Netflix argued that:

“implementing a narrowly focused content obligation applicable only to international streaming entertainment services, risks incentivising those services to treat these obligations as a minimum investment floor which, in reality, could act as a cap.”³⁹

In contrast, the production sector advocated for an investment rate of 20 per cent of gross Australian revenues. SPA stated that it:

“supports a rate of 20% as an internationally competitive rate which will deliver a rich dividend of Australian content for audiences and ensure a sustainable and vibrant independent production sector.”⁴⁰

The Australian Directors’ Guild (ADG) indicated that it:

“does not support a proposal that the rate of streaming obligation should be matched to the rate of obligation that is proposed to apply to subscription television (5%). The ADG proposes that Eligible SVOD and AVOD services should invest 20% of their Australian-sourced gross revenue into commissioning new Australian content.”⁴¹

³⁷ Roy Morgan (2020), [Subscription TV viewers soared to 17.3 million Australians during 2020](#).

³⁸ Amazon Australia [submission](#) to the *Media Reform Green Paper*, May 2021, p 3.

³⁹ Netflix [submission](#) to the *Media Reform Green Paper*, May 2021, p 39.

⁴⁰ Screen Producers Australia [submission](#) to the *Media Reform Green Paper*, May 2021, p 30.

⁴¹ Australian Directors’ Guild [submission](#) to the *Media Reform Green Paper*, May 2021, p 12.

Although the proposed Scheme would not mandate a required rate of investment for Tier 2 services through primary legislation, the Minister for Communications would be permitted to do so via a designation instrument only where a Tier 1 service's investment in new Australian commissions falls below 5 per cent of its gross Australian revenue.

In this way, the imposition of an investment obligation under the Scheme would not be predetermined. If a service designated under Tier 1 of the Scheme invests 5 per cent or more of their Australian revenue in commissioned Australian programs, and continues to do so over time, then there is no prospect of the service being subject to a Tier 2 designation.

This approach would incentivise SVOD services to commission new Australian content, rather than subject them to an ex ante obligation from the commencement of the Scheme.

Importantly, the 5 per cent 'trigger' for the consideration of a Tier 2 designation would not be determinative of what a Tier 2 instrument may specify as the required rate of investment. Rather, the 5 per cent figure is intended to signal to Tier 1 SVOD services that the Parliament expects these entities to invest in new Australian content, and that regulatory action is possible if they fall below the 5 per cent level.

The adoption of a 5 per cent trigger rate for the consideration of regulatory action has been chosen with careful regard to the levels of investment in Australian content by SVOD services in Australia.

- The four largest SVOD services – Disney+, Stan, Amazon and Netflix – collectively reported investment of \$178.9 million in Australian programs in 2020-21.⁴²
- While there is likely to be variation between services and over time, this overall level of investment is estimated to exceed 5 per cent of the aggregate Australian revenues for these services.
- The 5 per cent trigger rate is also broadly consistent with regulatory arrangements in place in overseas markets. The Czech Republic, Slovenia, Denmark, Belgium, Croatia, and Germany – have all imposed levies or investment obligations at less than 5 per cent of revenue.⁴³

Consultation questions

10. Does the stipulation of a required rate of investment through legislative instrument provide sufficient flexibility to accommodate changes in the SVOD market in Australia?
11. Is the proposed 5 per cent 'trigger point' for the Minister to designate a Tier 2 service appropriate and if not, what level should this be?

The type of investment

To the extent possible, the Scheme would draw on established and well-understood definitions and concepts, including the definition of Australian content.

Definition of Australian content

The green paper proposed that services designated under the Scheme would be required to invest in new Australian content using the 'Australian content' definition in the *Broadcasting Services (Australian Content) Standard 2016*, which was effectively replaced by the Standards from 1 January 2021. Under

⁴² ACMA, [Spending by subscription video on demand providers 2020-21](#), 17 December, 2021.

⁴³ Komorowski et al. (2021) [Obligations for VOD providers to financially contribute to the production of European works, a 2021 update](#), Brussel: imec SMIT-VUB.

the Standards, a program is defined as an 'Australian program' if it is produced under the creative control of Australians.

Some stakeholders supported the use of the definition in the Standards as it would be consistent with the current approach for free-to-air and subscription broadcasting. However, others argued that it would be too narrow for global streaming services and suggested that a broader definition be used.

Amazon Australia contended that:

"the definition of Australian productions should be broad and reflect the diversity of stakeholders involved in today's multinational production model."⁴⁴

ADG cautioned against the creation of another definition of Australian content, arguing that this would create uncertainty and complexity.⁴⁵ ADG, ANZSA, and a number of other stakeholders proposed that an Australian program be defined in line with the SAC test that is utilised under the Producer Offset, a refundable tax offset for producers of Australian feature films, television and other projects, which is currently administered by Screen Australia.⁴⁶

When seeking the Producer Offset, Screen Australia assesses a production to determine if it demonstrates 'substantial Australian content' by examining a production's subject matter, where it has been made, the nationalities of those who took part in its creation, the details of expenditure incurred, and any other details deemed relevant.

SPA supported the adoption of either the Standards definition or SAC test, arguing that:

"the creation of another, separate definition would add complexity and uncertainty and is not desirable."⁴⁷

Stakeholders have also explained that the SAC test has set a precedent for producers and large streaming services that are already seeking the Producer Offset for the Australian content they are making.

There is a strong case for the Scheme to utilise an existing definition of Australian content and an assessment process that the industry is already undertaking to access other support measures. This would minimise costs and duplication of effort.

It is therefore proposed that the Scheme utilise the existing SAC test for assessing whether new content is Australian, as it will maintain consistency across legislation by avoiding the creation of a new definition. Utilising the SAC test would streamline administrative processes for both the Scheme and the Producer Offset, avoiding unnecessary regulatory duplication.

Genres

The green paper proposed that the investment obligation would not set any requirements for the genre of content, with services having the discretion to determine the genres of Australian programming. This aspect of the proposal generated mixed views from stakeholders.

Streaming services, such as Amazon Australia, were supportive of:

⁴⁴ Amazon Australia [submission](#) to the *Media Reform Green Paper*, May 2021, p 4.

⁴⁵ Australian Directors' Guild [submission](#) to the *Media Reform Green Paper*, May 2021, p 12.

⁴⁶ The Producer Offset is administered by Screen Australia under Division 376 of the Income Tax Assessment Act 1997 (ITAA, as amended) and the Producer Offset Rules 2018 (the Rules).

⁴⁷ Screen Producers Australia [submission](#) to the *Media Reform Green Paper*, May 2021, p 18.

“the scope of relevant investments in any model being wide and not limited to specific genres.”⁴⁸

Netflix indicated that it was already investing significantly in vulnerable genres, noting:

“In the financial year 2019-20, the ACMA reports that the total investment on adult drama and children’s content from all commercial broadcasters was \$89.7 million. In the same period Netflix’s investments in adult drama and kids’ content totalled just over \$111.5 million.”⁴⁹

In contrast, production sector stakeholders called for the protection of genres such as scripted drama, documentary and children’s content. The Media Entertainment and Arts Alliance noted that without genre requirements the production of important content areas will not be pursued.⁵⁰

The Australian Children’s Producers proposed that a children’s sub-genre quota of 20 per cent of the total investment requirement be imposed on SVOD services. They argued that:

“children represent approximately 20% of the Australian population and are therefore entitled to be supported by a pro rata level of Australian content.”⁵¹

Voluntary reporting published by ACMA has demonstrated that services are already investing in a wide array of genres, with a particular focus on those generally considered ‘at-risk’ due to their high production costs – drama, children’s, and documentary content.⁵²

It is therefore proposed that Scheme would not impose restrictions on the genres of Australian content that designated SVOD services provide. This acknowledges that large SVOD services are already investing in ‘at risk’ genres, and provides these services with the flexibility to develop services that meet the preferences of their audiences.

Commissioned content

The green paper proposed that investment by services in Australian content be in the form of commissions, co-productions and acquisitions.

A number of production industry stakeholders argued that permitting acquisitions to count towards an investment obligation would provide minimal support for Australia’s film and media industry.

SPA stated that restricting the Scheme to commissions is:

“necessary to encourage the participation of the platforms in financing and creative decisions at the outset of projects, which is fundamental to their success.”⁵³

The Australian Children’s Television Foundation (ACTF) also submitted that the obligation should:

“only apply to new Australian commissioned content (as opposed to acquiring existing content) in order to stimulate new production.”⁵⁴

New commissions are the most stimulatory activity for the Australian production sector, and also support indirect activity in tourism, transport, catering, and other industries. A focus on the

⁴⁸ Amazon Australia [submission](#) to the *Media Reform Green Paper*, May 2021, p 4.

⁴⁹ Netflix submission to the *Media Reform Green Paper*, May 2021, p 2.

⁵⁰ Media Entertainment and Arts Alliance (Equity and Entertainment, Crew and Sports Sections) [submission](#) to the *Media Reform Green Paper*, May 2021, p 10.

⁵¹ Australian Children’s Producers Group [submission](#) to the *Media Reform Green Paper*, May 2021, p 8.

⁵² ACMA, [Spending by subscription video on demand providers 2020–21](#), 17 December, 2021.

⁵³ Screen Producers Australia [submission](#) to the *Media Reform Green Paper*, May 2021, p 31.

⁵⁴ Australian Children’s Television Foundation [submission](#) to the *Media Reform Green Paper*, May 2021, p 10.

commissioning of new productions would incentivise services to make contemporary Australian content, increasing the chance of successfully exporting content to other jurisdictions and enhancing the reputation of Australian content around the world.

It is therefore proposed that the Scheme only apply to new Australian commissions. 'New' would be defined as closely as possible to the definition in the New Eligible Drama Expenditure (NEDE) Scheme. Under the NEDE Scheme, a program is 'new' if expenditure is incurred before the program has been televised on a broadcasting or streaming service in Australia or New Zealand. This approach would allow for co-productions between SVOD services and broadcasters to be counted under the Scheme.

Investment carry forward

The commissioning and production of Australian content can be sporadic and 'lumpy' over time. Existing regulatory arrangements governing the provision and production of Australian programming permit regulated services to carry forward additional expenditure or points, beyond their requirements in a given year, to a future period.

It is therefore proposed that a carry forward arrangement be used for Tier 2 services, based on the precedent set through the Standards. The Standards effectively provide for a 20 per cent carry forward: 50 points from the previous year can be carried forward to the next in meeting the annual 250 point requirement.

It is therefore proposed that Tier 2 services be permitted to utilise investment expenditure from a preceding year to count toward a maximum of 20 per cent of the investment obligation in a given year. For example, if a service was required to invest \$10 million in 2023-24, they could count up to \$2 million in investment from 2022-23 to meet the 2023-24 obligation.

It is not proposed that carry forward arrangements be put in place for Tier 1 services, as this tier of the Scheme relates only to reporting and the intent is to provide an accurate gauge of actual expenditure in any given year.

Consultation questions

12. Will the use of the Significant Australian Content test support the efficient operation of the Scheme and minimise the burden on industry?
13. Are there any limitations with using the Significant Australian Content test that have not otherwise been raised through consultation processes to date?
14. Is the focus of the Scheme on commissioned content appropriate, or should acquired content also be permitted?
15. Will the use of a definition similar to the 'new' content from the NEDE Scheme support co-productions and stimulate activity across the production sector?
16. Is it reasonable to permit Tier 2 services to meet an investment obligation using up to 20 per cent of the expenditure from the preceding year?

Reporting requirements

An effective reporting framework will be important for the efficient and effective operation of the Scheme. Information from SVOD services regarding their provision of Australian content, their investment in such content, and related matters will inform the consideration of the designation of

entities under the Scheme. It is also be important for the public to understand the contribution that SVOD services are making to the provision of Australian content and Australian screen culture.

The Government initiated a voluntary reporting process in 2020 under which large SVOD services were asked to report to ACMA on their investment in, and provision of, Australian content. This information has been published in aggregate for the financial years 2019-2020 and 2020-21.

Submissions to the green paper process from SVOD services generally argued that this voluntary framework should be allowed to run for several more years to develop an evidence base for SVOD services' contribution to the Australian production ecosystem.

Amazon Australia urged:

“the Government to continue to collect data and to review the situation over the next several years. If in several years' time there is a problem with the levels of investment, then some action may be necessary. However, at present we do not believe the data shows a lack of investment in Australian content and Australian production capacity by the sector.”⁵⁵

Similarly, Stan noted it was important to:

“collate the industry data and other important information over a multi-year period in order to fully understand the real numbers and trends before deciding on its long-term policy approach.”⁵⁶

In contrast, production sector stakeholders highlighted the importance of the availability of information from streaming platforms, including for providing producers with an ability to assess the value of their work to streaming services. As SPA stated in their green paper submission:

“All streaming platforms should be required to publicly report annually on a range of key indicators. This is to enable the regulator to assess compliance with minimum requirements, to assess the overall health of the regulatory system and to enable tracking of the size and scale of platforms that have not yet met eligibility thresholds for inclusion in the scheme.”⁵⁷

On balance, there is a strong case for the Scheme to include an annual and ad hoc reporting framework if it is to achieve its stated aims.

Annual reporting

It is proposed that the Scheme codify and replace the voluntary reporting process that has been in place since 2020.

- Tier 1 and Tier 2 services would be required to report annually to ACMA on their provision of Australian content, and investment in Australian content.
- ACMA would have the ability to issue guidance to specify reporting items and templates.
- The regulator would also have the power to request information, relevant to the performance of its functions under the Scheme. This would include audited financial reports.

⁵⁵ Amazon Australia [submission](#) to the *Media Reform Green Paper*, May 2021, p 3.

⁵⁶ Stan [submission](#) to the *Media Reform Green Paper*, May 2021, p 2.

⁵⁷ Screen Producers Australia (SPA) [submission](#) to the *Media Reform Green Paper*, May 2021, p 23.

The reporting under the Scheme would, at a minimum, include the same metrics as in the voluntary reporting framework. These metrics are broadly consistent with the Australian content reporting for commercial and subscription television broadcasting licensees. These include:

- expenditure on the commissioning and acquisition of Australian programs
- Australian program titles and hours made available on services in Australia as at specific dates, including details of program genres
- numbers of Australian programs made available on SVOD services outside Australia as at specific dates
- information on the broader contribution of SVOD services to the Australian content production ecosystem.

Annual reporting would be required within 60 days of the end of each financial year, and as needed in response to specific requests from the regulator.

Publication

ACMA would publish aggregated information annually on the availability of Australian content and expenditure on Australian content, including by genre, in line with the reporting arrangements for commercial and subscription broadcasters. This is expected to be in line with existing voluntary framework for SVOD services that has included:

- aggregated Australian program expenditure information
- aggregated numbers of Australian program titles and hours by genre
- identifiable numbers of Australian programs made available on SVOD services outside Australia.

Additional information gathering

ACMA would also have the power to request information, at any point in time, to support the discharge of its duties under the Scheme. This would include requests for information relevant to the matters the Minister is required to consider as part of the designation process.

Importantly, any such requests could be made to any SVOD service, not just those designated as Tier 1 or Tier 2 services. This would be important to ensure the Minister's deliberations regarding designation are fully informed. ACMA would provide advice to the Minister on information provided to it, annually at a minimum, ad hoc as needed, or in response to a request from the Minister.

Information would be required to be provided to the regulator within 60 days of the issue of the request notice, or another timeframe specified by the regulator, and there would be penalties or ACMA enforcement actions for non-compliance. As with the annual reporting arrangements, ACMA would be able to request specific information, including audited financial reports.

Consultation questions

17. Are the proposed annual reporting and publication arrangements reasonable?
18. Is the 60 day period for designated entities to provide reports to ACMA at the end of each financial year appropriate? Should this period be longer or shorter?
19. Is the proposed processes for additional information requests reasonable, and are there ways in which these could be improved?
20. What information should be publicly disclosed through the mandatory reporting process? Which metrics should be aggregated across industry, and what information should be delineated by service?

Discoverability reporting

Another issue of importance is the extent to which Australians are able to access Australian content on large SVOD services. This is often referred to as 'discoverability'. In the SVOD context, this concerns the degree to which an SVOD service makes Australian content easily accessible through mechanisms that enhance the prominence of particular content to users.⁵⁸

The green paper canvassed the inclusion of a discoverability requirement as part of the proposed investment obligation on streaming services. This is a material issue for Australian audiences. A 2021 survey found that only 30 per cent of Australians find it easy or very easy to find Australian content on SVOD services.⁵⁹ While it is important that SVOD services are investing in the production of Australian content, it is also important that this content be made available to audiences in Australia.

The mechanisms used by SVOD services to organise and make content visible to their subscribers are varied. Most use algorithmic recommendations to surface new content to users, while others utilise pre-defined categories. For example, Netflix allows users to search for 'Australian' items and identifies a range of productions that fall into this category, cutting across different genres. Amazon Prime's search function, in contrast, only surfaces productions that have 'Australia' in their title.

In submissions to the green paper process, SVOD services noted that they are already incentivised to promote Australian content and make it discoverable when such content is of interest to viewers. They also outlined the efforts they had gone into promoting Australian content through front page features, categorisation, recommendation algorithms and external advertising.

Amazon Australia stated that:

"It is important that any proposed obligations concerning discoverability be carefully nuanced in a world where selecting a program to watch is no longer a largely passive exercise of choosing between relatively few linear broadcasts."⁶⁰

⁵⁸ For discussions on the definition of discoverability, see García Leiva MT. VoD platforms and prominence: a European regulatory approach. *Media International Australia*. 2021;180(1):101-115. doi:[10.1177/1329878X20967456](https://doi.org/10.1177/1329878X20967456) and McKelvey F, Hunt R. Discoverability: Toward a Definition of Content Discovery Through Platforms. *Social Media + Society*. January 2019. doi:[10.1177/2056305118819188](https://doi.org/10.1177/2056305118819188).

⁵⁹ Social Research Centre (2021) [Media Content Consumption Survey](#), p 33, report to the Australian Government Department of Infrastructure, Transport, Regional Development and Communications.

⁶⁰ Amazon Prime Video [submission](#) to the *Media Reform Green Paper*, May 2021, p 4.

Netflix further noted that its recommendation algorithms are informed by viewing habits. They argued that any distortion to those weights as a result of regulation would lead to a disappointing experience for the user.⁶¹

A number of academics also provided views on the issue of discoverability, and highlighted the need for a more robust evidence base and further consultation on potential regulatory options.⁶²

Associate Professor Ramon Lobato, Distinguished Emeritus Professor Stuart Cunningham, and PhD candidate Alexa Scarlata noted that:

“National audiences’ access to and engagement with Australian stories is the prime cultural purpose of regulation. Discoverability therefore needs to be considered as an integral element of the overall policy system, alongside production and availability. A discoverability mechanism is likely to need careful consideration in future, to ensure that Australian stories are discoverable for Australian audiences as they navigate the interfaces of SVOD services and connected TV hardware.”⁶³

It is proposed that the reporting framework of the Scheme (outlined above) include a requirement that entities designated under Tier 1 or 2 include information on how they are making Australian content discoverable to Australian audiences.

Australian content would not be limited to new, commissioned content, and would include all content on a given service that would meet the Australian content definition (including older content and acquired content).

This approach would improve the transparency of the actions and methods used by SVOD services to make Australian content available, without imposing rigid regulatory obligations.

- Designated services would be required to report to ACMA on how they make Australian content discoverable to Australian audiences as part of the broader reporting framework for Tier 1 and Tier 2 services.
- This element of the Scheme would outline the general expectations of the Parliament for discoverability, but would not stipulate the process or mechanism by which services meet these expectations. This would be intended to provide flexibility for services and accommodate differing service models.
- ACMA would have the power to issue guidance on the reporting required. The regulator would also have the power to request, via legislative instrument, information to support the performance of its functions.

While ultimately determined by ACMA, the reporting on discoverability could include details regarding:

- how a service makes Australian content discoverable to Australian users, including on its landing page, through tagging and search retrieval functions, algorithmic-driven processes, and any other mechanisms that may be relevant;

⁶¹ Netflix [submission](#) to the *Media Reform Green Paper*, May 2021, p 33.

⁶² Lobato, Cunningham and Scarlata, [submission](#) to the *Media Reform Green Paper*, May 2021, pp 7-11.

⁶³ Lobato, Cunningham and Scarlata, [submission](#) to the *Media Reform Green Paper*, May 2021, p 3.

- relevant features, drop-down menus or other user interface elements that promote the discoverability of Australian content;
- the extent to which the service categorises or identifies Australian content, and the method by which this categorisation or identification is presented to subscribers;
- the extent to which Australian content is recommended to users based on their content preferences or viewing history; and
- any other contextual information that a service considers to be relevant.

ACMA would publish summary information annually on how services are making content discoverable as part of its broader publication process.

Consultation questions

21. What aspects of discoverability should ACMA consider specifying for services to report on through the Scheme?
22. How should discoverability information be publicly disclosed, given that services may take differing approaches to discoverability?

Next steps and implementation

Submissions to this discussion paper will close on Sunday, 24 April 2022. The Government will use the feedback from submissions to finalise the legislation necessary to implement the Scheme.

The Government has provided ACMA with additional funding of \$3.3 million over the four years to 2024-25 to support its new role in the implementation and administration of the Scheme, along with new responsibilities under the National Broadcasters Reporting Framework for Australian Content for the ABC and SBS.