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## Targeted Consultation Paper – Refined Models

### Consultation Response Form

#### Summary

- It is important that any model of streaming regulation achieves the policy goals and expectations of the National Cultural Policy *Revive* and delivers more genuinely Australian stories of cultural worth on our screens, including:
- A minimum 20% of revenue investment obligation by the steaming services or a certain and legislated pathway that will reach this goal within three years.
- A strong definition of ‘Australian content’, that will deliver screen stories of Australian cultural value.
- A ‘terms of trade’ framework to ensure that ownership of intellectual property in Australian creativity is secured for Australians and treated as a valuable national asset.
- Ensuring the majority of regulated commissioning is done as an arms-length transaction with independent screen producers and minimising in-house commissioning that obscures accountability and Australian industry sovereignty.
- A threshold of \$50 million in revenue or 500,000 subscribers to trigger regulation obligations and to capture all commercially viable streaming services.
- Minimum levels of investment by streamers in scripted drama, documentary, and kids’ content to be legislated and a rejection of any so-called ‘multipliers’ that will in fact dilute overall investment in vulnerable genres.
- An investment obligation that focuses on new commissions and limit investment in acquisitions of titles more than three years old and excludes “in-house” spend.

## Response related to the Progressive Percentage of Expenditure Model

It is important that Australia has a robust, transparent and incorruptible regulatory model that all Australians can have confidence in and that will take our industry forward, meet the promise to Australian audiences of *Revive*, and demonstrates the Australian Government policy objective to grow the Australian screen industry as an important future industry for our economy in a screen content-hungry world.

The Expenditure model (which could also be described as the “Hollywood creative accounting model”) has little accounting integrity and minimal accountability. Stakeholders have not been provided with any information on how this model will be verified, nor has it provided any data on the expected investment outcome, leaving industry with no confidence in this approach.

Given that these businesses are global technology businesses not known for their transparency or accountability, the Australian Government is already facing a challenge in seeking to apply any form of regulation. Anything less than a robust model will very easily be manipulated by digital streaming platforms to lessen their current levels of investment in Australian content and undermine the local screen industry.

### *Canadian Commission’s decision on revenue-based approach*

It is relevant to note that no other jurisdiction that SPA is aware of that regulates streaming platforms has adopted an expenditure-based model – instead, every other regulating country has applied regulation to revenue or turnover. This is not a coincidence – it is because for the reasons outlined above, an expenditure model is a bad model and should be abandoned for the unsound approach that it is.

As evidence of this, SPA cites the recent findings of the Canadian CRTC following their examination of submissions on this issue:

52. The Commission considers that a revenue-based threshold is a relatively simple and objective criterion that can be applied by all online undertakings, regardless of their business models. Bundled services such as Amazon Prime have methods of allocating revenues for their subscription-based broadcasting undertakings.

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54. In regard to using multiple criteria, the Commission notes that there is generally a strong relationship between the number of subscribers and the level of revenues of an undertaking. Adding a subscriber threshold would therefore be largely redundant and burdensome. Further, using numerous indicators would make registration much more complex, thereby making it more difficult for the Commission to track information and communicate the requirements for registration. Finally, none of the interveners provided compelling evidence that using other indicators would be a significant improvement to the proposed approach based on an annual revenue threshold.

55. In light of the above, the Commission finds that a monetary threshold based on annual Canadian gross revenues would be the clearest and most comprehensive way to

determine which online undertakings are to be exempted from the requirement to register with the Commission.<sup>1</sup>

### *Problems with NEDE scheme*

As evidence of the negative outcomes to be expected from this model, the expenditure figures for the NEDE scheme, on which this model is based, demonstrate a rapidly declining expenditure over time. That downward trend is borne out in the ACMA reporting for NEDE, extracted below:

Table 1: Compliance snapshot

Compliance snapshot	2016–17 (\$ m)	2017–18 (\$ m)	2018–19 (\$ m)	2019–20 (\$ m)	2020–21 (\$ m)
Total spending on new Australian drama in financial year	\$51.95	\$56.72	\$24.67	\$13.74	\$8.75
Were all minimum spending requirements met?	Yes	Yes	Yes	Yes	No

ACMA, NEDE results 2020-21 [Spending and targets | ACMA](#)

These figures provide a warning about the utility of the outdated NEDE scheme and its applicability to streaming regulation. While a number of factors have contributed to the declining expenditure on drama by the cable subscription platform, including market consolidation, changes to platform delivery and a lack of overall transparency in reporting, SPA also notes that this scheme is no longer fit for purpose and has not delivered any growth in drama expenditure.

The Screen Australia *Drama Report* for 2022-23 also notes that investment by subscription TV has a five-year average of 5% with no evidence of growth. Irrespective of the application of a progressive percentage rate of subscribers, there is nothing in this model that would set a floor in expenditure, as claimed, and nothing that would prevent a streaming platform from decreasing its expenditure while increasing its subscriber numbers.

The ACMA report [Spending by subscription video on demand providers 2022-23](#) showed that drama expenditure is declining as an overall share of Australian programs made available on services in Australia. For example, in 2019-20, adult and children’s drama represented 49% of overall hours and 47% of overall programs. In 2022-23, it has declined to 15% of overall hours and 26% of overall programs. A model that provides an incentive for a streaming platform to decline its investment in drama by reducing its expenditure on drama is a highly flawed model.

A further flaw in this model is that Total Drama Expenditure for Australia is defined as including Australian drama acquisitions of any age. This detracts from a regulated investment obligation that should be confined to new commissions and co-commissions for the established and sound reasons that only these categories drive the creation of new stories and add to the overall library of Australian content available to audiences. Enabling streaming platforms to acquit any part of their obligation by selling any of their catalogue to each other would further allow streamers to undermine this approach.

Similarly, allowing a streaming platform to acquit any part of its investment obligation from ‘in-house’ production spending weakens regulation and incentivises internal cost manipulation.

<sup>1</sup> Canadian Radio-television and Telecommunications Commission, Broadcasting Regulatory Policy CRTC 2023-329 and Broadcasting Order CRTC 2023-330, 29 September 2023, p 11.

It is assumed that “first-on-platform” acquisitions means that only a first-run acquisition is counted as included in the regulated expenditure acquittal. This is a novel term that has not been defined in the Consultation paper and requires further explanation.

There is nothing about this model that would provide any benefit to Australian audiences or the Australian screen industry. Indeed, this model is so flawed that it makes the dubious *Streaming Services Reporting and Investment Scheme* proposed by the previous Australian Government with an investment obligation of 5% somewhat appealing by comparison.

This is a complex model riddled with loopholes that could easily be exploited by streaming businesses to undermine their investment in Australian content. It would likely provide a challenge for any regulator to administer and enforce, requiring considerable sophisticated skills and significant resources to manage.

A significant challenge with this model (for which no explanation has been provided) is how “Licensed Australian territorial expenditure on drama” will be determined and verified. On the face of it, determining this would be a significant challenge for any regulator and would be near impossible to verify. It is unclear whether the measure will be based on territorial audience numbers, revenue share or other criteria. It is also likely to be another loophole that is open to manipulation by streaming businesses.

### *Conclusion*

SPA was provided with data for this model earlier this year and our analysis of this NEDE-based model showed that the projected drama expenditure of \$33.51 million would see 87% less hours and 87% less jobs than currently is the case. A sharp decline of this magnitude would take the Australian screen industry backwards and be an unacceptable regulatory outcome. Despite the application of a progressive obligation through subscriber growth numbers, the reasons for rejecting this as a flawed and inappropriate model are unchanged.

## Response related to the Percentage of Revenue Model

SPA has long advocated for a revenue-based model of streaming regulation. Such a model is flexible, as it rises and falls in line with advertising revenue and subscriber numbers; it is fair as it ensures a modest percentage of revenue paid by Australian subscribers is returned to them as a “cultural dividend” in the form of Australia screen stories; and it provides regulation that ensures an important industry of Australia’s future growth is sustainable by embedding terms of trade and a recognised role for the independent industry.

As an important integrity measure, a streaming platform should not be able to include any taxpayer funded subsidies or tax rebates as part of the acquittal of any investment obligation including where are streaming platform “bank-rolls” the offset loans.

SPA has argued for a 20% revenue obligation as a key plank of any regulatory approach. This is a reasonable ask of any streaming business. In May 2023, the Department’s Consultation Paper estimated that a 20% obligation would equate to a modest \$341.5 million in expenditure on new Australian content.

According to the most recent [ACMA report](#), the five major streaming platforms spent \$777 million on Australian and “Australian-related” content in 2022-23. Even accounting for acquired content in these numbers, it is clear that streaming businesses have solid commercial reasons for investing in Australian screen stories at a level that exceeds a 20% investment obligation. Based on these figures, a revenue obligation of 20% cannot reasonably be argued to be a commercial detriment to these screen businesses. To continue to do so is highly disingenuous.

SPA notes that the 10% investment obligation proposed in this model pertains to the portion of investment by streaming platforms in drama only. This would take account of the 50% drama component of the minimum investment model of for genres outlined in more detail below. With the addition of the remaining components of children’s, documentary and flexible genres, this could reach the desired 20% investment mix.

### *All services delivered over the internet to be captured*

SPA is concerned that the obligation would only apply to “SVOD” revenue. This excludes advertising revenue from growing BVOD and AVOD services that are also “services delivered over the internet”. The exclusion of these additional online content services is problematic as it creates an incentive for existing “SVOD” services to move to an AVOD business model, as Netflix currently offers.

This is also inconsistent with the Australian Government’s rationale for an Australian content obligation which is set out on page 87 of *Revive*: “a place for every story, a story for every place”. Why exclude some [online] places? This has the potential to prompt unforeseen structural changes in the Australian VOD market that might require subsequent legislation to address. SPA believes that ensuring regulatory consistency to any VOD regulation is a better approach. The use of the term “services delivered over the internet” is also consistent with terminology used in the *Broadcasting Services Act* and “Alston Determination”.

### *Growth mechanism to be legislated*

Any model of regulation must provide a legislated pathway from 10% to 20%. It is unacceptable to the screen industry for any detail of this to be left to the regulator to deal with at a vague and uncertain future date. After having waited so long, regulatory certainty is essential.

SPA notes that if a staged approach to reach 20% is adopted, that the Italian model should be noted which progressed from 15% for year 2021, 17% for year 2022, 18% for year 2023 and 20% from year 2024. SPA believes this approach is a persuasive model for Australia to adopt.

#### *Commissions only to be counted*

The investment obligation must focus on new commissions and not acquisitions. The purpose of the regulation is to generate new skilled jobs and new content and is not to create a secondary trading market where companies sell their libraries to each other. An acquisition of a program from more than three years should not be included in any investment or expenditure calculation. However, if any acquisitions are included in any spending obligation, these should be first release titles only and only a relatively small, agreed percentage of the overall acquitted investment obligation with the remainder on new commissions.

#### *Co-commissions with broadcaster*

SPA does not believe that allowing a media group with both broadcast and SVOD services to count commissioned content towards each of their Australian content requirements would result in good policy outcomes for Australian audiences. In effect, this allows for “double-counting” of content for each separately regulated platform which would have the result of evading the ACCTs obligations on services such as Nine and Network Ten which have streaming platforms within their media groups. Given this, only the actual spend by a platform within a media group should be counted. Any spend counted within a media group should not add up to more than 100% for the purposes of any media regulation framework.

As previously submitted by SPA, a better approach would be for the free-to-air platform to be the first release platform for any new content counted as part of this regulation for a media group in this situation. This is consistent with the approach of the ACCTs for commercial broadcasters.

#### *Minimum investment in scripted drama, documentary, and kids' content*

Minimum levels of investment by streamers in scripted drama, documentary, and kids' content, should be legislated as part of their investment obligation. The reason for this is that there is a clear case of market failure in these genres which is borne out in the [ACMA report](#) on streamer spend. Investment in these specific genres is also consistent with the commitment made by the Australian Government in *Revive*.

Any so-called ‘multipliers’ that will in fact dilute overall investment in vulnerable genres and undermines the intent of what is to be achieved from regulation and should be rejected. For the same reason, SPA also rejects the proposed 1.2x multiplier for streaming services content released first in cinema.

SPA proposes minimum spend obligations for specific vulnerable genres linked to the programming offered by a streaming platform through the application of spending minimums in the genres distributed by the streamer should be applied. These minimums will ensure that streamer investments will meet the objectives of the National Cultural Policy by guaranteeing a proportion of Australian stories in key genres.

The following ratios should be applied to the quantum of expenditure to identify minimum levels:

If a mix of genres are offered by a platform, then the ratio of investment expenditure should be:

- Minimum 50% on Australian drama (defined as all scripted content for audiences above 15 years of age)
- Minimum 15% on Australian children's programs (all content for children 15 years and below)
- Minimum 15% on Australian documentary
- Remaining 20% could be acquitted on any Australian content genre.

Additional considerations:

- If only one of the genres (ie only children's, or only documentary or only drama programs) are offered by a platform then all of the investment obligation is to be provided on that Australian genre
- If one of genres (drama, children's or documentary) are not offered in a mixed genre offering then that percentage should be allocated evenly to the other identified minimum spend genres offered on the platform but leaving the remaining 20% (any genre) investment static.]
- No expenditure on games or sport can be included as part of the investment obligation.

### *Terms of trade needed*

Intellectual property is the end product of the screen industry. Ownership of intellectual property in Australian creativity must be treated as a valuable national asset to be retained by Australians. Australian taxpayers invest significant funds into the development of screen programs, we are entitled to share in the value-added to our output and share in the success of this investment as well as the jobs and economic activity it generates.

SPA has presented extensive evidence to the Australian Government of the abuses of market power being experienced by the creative workers in the Australian screen industry at the hands of powerful screen businesses. Australia is not alone in needed to address this urgent task. Other comparable nations have acted to address this issue by instituting a "terms of trade" framework (the UK), are actively considering ways to expand existing protections (EU) and to implement legislation to protect these (Canada).

In arguing for this, the screen industry is asking the Australian Government to help protect Australian cultural works and keep their ownership and control in Australian hands. After considering various international approaches to this, SPA has settled on the most administratively effective and straightforward approach in which licensing rights in screen titles should revert back to Australians creatives after a fixed period of time to count as part of this investment obligation.

### *Enshrine independence for Australian screen industry*

The Australian screen industry should retain its independent character that currently ensures a diversity of screen stories and supports expression of our unique character and culture. Independent storytellers are the engine room that drives creativity and make a vitally important contribution to telling unique Australian stories.

Fostering a commercial relationship between global streaming platforms and independent SME producers also supports a pathway for First Nations screen stories. SPA has seen a strong growth in Aboriginal and Torres Strait Islander majority-owned screen production businesses amongst its membership, now numbering 18 companies and signalling the capacity that is building in the sector. Supporting independent producers will ensure this growth continues through market-driven commissioning.

Our independent (SME) screen industry can be maintained and supported by ensuring the majority of regulated commissioning is done as an arms-length transaction, thereby minimising in-house commissioning by streaming services that obscures accountability and Australian industry sovereignty.

The retention of intellectual property is inherently linked to the role of the independent producer, that is, the creative enterprise not commercially aligned to the commissioner. That is why, in order to maintain a sustainable domestic screen industry and the industry profile that is composed of hundreds of SMEs, regulation should require a streaming platform to expend at least 80% of their expenditure obligation with an independent Australian production business.

The test of what constitutes an independent producer will be determined by consideration of the following factors:

1. The production business is a non-related corporate entity as an arms-length commission;
2. Ownership in the intellectual property rights is retained by the Australian production business;
3. The licence granted to the commissioner for the use on their streaming business reverts back to the Australian production business after a fixed period of time of three-five years.
4. To be clear, this licence would exclude any rights as a co-producer or distributor because this undermines the independence of the production business.

#### *Lower thresholds required*

The threshold of \$50 million in revenue or 500,000 subscribers for a service to trigger regulation obligations. This would capture all to capture all commercially viable streaming services, while ensuring smaller, more niche services and new entrants are exempt. Even at this level it is markedly higher than other nations.

For example, the Canadian Radio-television and Telecommunications Commission (CRTC) has considered the appropriate threshold to trigger registration of streaming businesses for the purposes of regulated investment obligations and has adopted a threshold of \$10 million:

the Commission has adopted an exemption threshold of \$10 million in annual Canadian gross revenues, as proposed in the Notice. Such a threshold should provide the Commission with sufficient information about online undertakings operating in the Canadian broadcasting market, while allowing independent smaller online undertakings to reach a certain level of revenues before being required to register.<sup>2</sup>

It should further be noted that for a media group (which includes a broadcasting service and a streaming service), the Canadian approach captures revenue of the entire media group as the relevant revenue threshold.

#### *Sport expenditure to be excluded*

The inclusion of sport expenditure to discount a revenue obligation is not appropriate and only serves to create complexity and ambiguity. In the context of seeking to increase

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<sup>2</sup> Ibid, p 23.

audience access to arts and culture in Australian life, diminishing this by including expenditure on sport is counterintuitive.

Sports rights attract extraordinarily high and increasing levels of expenditure, audiences and business monetisation. Recent ACMA figures on subscription video on demand spending show that sport programs are rapidly growing in prevalence on streaming services, seemingly at the expense of other genres. Sport programs now represent around 57.5% of program hours, whereas two years ago it was just 37.5%.

To include a commercial and market leader of sport in any model to calculate expenditure on highly vulnerable genres, distorts the public policy outcomes. As a matter of principle, sports expenditure should have no place in a policy framework to deliver on Australia's National Cultural Policy.

In addition, the inclusion of sports expenditure could inadvertently influence the market behaviour of streaming businesses with a number of unintended consequences that will serve to lessen their overall investment obligation such as:

- Streaming platforms that currently don't include sport in their programming will be incentivised to do so;
- Streaming platforms doing a small amount of sport programming will be incentivised to do more;
- Media groups with both broadcasting and streaming platforms will be incentivised to allocate more expenditure [expensive sports rights] to their streaming business.

## Preferred model response

SPA has long advocated for a revenue-based model, for sound public policy reasons: it can be verified by government, it is straightforward, certain, flexible and fair. Of the two models proposed, only an amended Percentage of Revenue approaches what the Australian screen industry needs for a sustainable future.

This model needs the following specific adjustments:

- Sport expenditure to be excluded.
- Legislated growth mechanism to reach 20%.
- Multipliers for any screen content should be rejected.
- Minimum investment levels in vulnerable genres including children's and documentary.
- Commissions and co-commissions only.
- Recognition of role of independent sector through terms of trade.