

Response to Media Reform Green Paper

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We thank the Department of Infrastructure, Transport, Regional Development and Communications for the opportunity to provide input into the Media Reform Green Paper process.

This submission draws on findings from independent academic research we have been conducting since 2015 into SVOD services, including the Australian Research Council Discovery Project *Internet-Distributed Television* (DP190100978). The purpose of this research has been to clarify issues related to the entry of SVODs into the Australian market, including content availability, export dynamics, and competition, and to provide analysis and policy options for government decision-making. Since 2017 Lobato and Scarlata have also been conducting annual empirical studies of SVOD catalogs in Australia to evaluate local content availability and discoverability. Our reports on this topic – including submissions to the 2017 ACSIC review and 2020 Options Paper – are publicly available and have been cited in the Options Paper.¹

This submission addresses two specific issues within the government’s Media Reform Green Paper: **local content regulation for SVODs** (Chapter 6), and **digital discoverability of local content** (p 7 and 30).

The Green Paper identifies a significant regulatory imbalance between SVOD services and legacy television services in Australia. SVODs, notably Netflix, command a sizeable Australian audience but are not regulated for local content; whereas Australian broadcast and pay-TV services are regulated for local content but face declining audience share. The Green Paper proposes to redress this imbalance by requiring SVODs of sufficient scale to invest 5% of their Australian subscriber revenues in local production.

We broadly support this extension of production obligations to SVODs. Our research has found that the major global SVODs regard Australia as a market in which a strong US content proposition is the most important element for success. Australia, as an English-language market with a longstanding appetite for US content, is not considered to warrant the same level of original local-language production as other markets in Asia and Europe of comparable size to Australia. This assumption runs counter to longstanding Australian government cultural policy settings predicated on the cultural need for and value of Australian screen content.

The data cited in the Green Paper clearly bears this out. Local production investment by SVODs in Australia, while rising from a low base, remains modest compared to (1) overall number of commissions by broadcasters and PSBs in Australia, and (2) production investment by SVODs in comparable national markets.² **Absent regulation, Australian content production by SVODs will continue to be characterised by market failure.**

For this reason, we agree with the Green Paper’s argument regarding the need to bring SVODs into the purview of local content regulation. However, some aspects of the proposed regulatory design require improvement, as we explain below. Other elements (such as a discoverability mechanism) are briefly noted within the Green Paper but have not received detailed attention. We have sought to provide this.

Local content regulation in Australia should, in our view, be driven by the following broad principles:

1. Local content obligations should reflect the relative market power and audience reach of different video services, not just their mode of distribution (broadcast or online).
2. Major SVODs, notably Netflix, have had significant market and cultural impact in Australia. It is appropriate -- and, indeed, necessary -- to bring these services into the purview of local content regulation. To do otherwise would undermine the objectives and integrity of the local content policy system and continue to drive outbreaks of non-compliance from those so regulated.
3. Sustaining local production cannot be the only objective of local content policy. 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.

We now consider in more detail some of the policy measures proposed in the Green Paper, before returning to discoverability in the second half of this submission.

Definition of a major video service (questions 6.1, 6.4)

The Green Paper proposes to limit regulation to 'major SVODs and AVODs' producing professional, scripted television content, and generating Australian subscriber revenues of over \$100 million per year. We believe this is an appropriate definition of a major service. Excluding startups and niche services will help to foster competition and diversity within the service landscape.

However, **the most appropriate way to define qualifying services is at service-level rather than at ownership-level.** Services (channels) have long been the basis for local content policy in Australia, as in the NEDE scheme and broadcast quota. We therefore question whether holders of broadcast licences should be excluded from the production obligation. This proposed carve-out (which would apply most obviously to Stan, owned by Nine) makes little sense given Stan is a separately branded service that offers exclusive, first-release content not available on Nine. Stan is also already comfortably exceeding the proposed production obligation³, which suggests the production obligation would not negatively affect its operations. **For the regulation to be meaningful it needs to capture the major services, regardless of their ownership.** Regulation must also anticipate SVODs such as Paramount+ (a brand of ViacomCBS, owner of Ten), which may in time grow to meet scale thresholds of local content obligation. Like Stan, these

broadcaster-linked SVODs should not be artificially excluded from local content obligations based on their ownership.

The European Union's Audiovisual Media Services Directive has a well-defined definition of an eligible service, which excludes low-turnover and low-audience services. This may be useful to Australian regulators as they work towards a workable and transparent definition of eligible services.

Scope of the investment obligation (questions 6.6, 6.7)

The Green Paper raises the question of whether qualifying Australian production should only include commissioned content or could also include other forms of investment (e.g., acquisition and licensing of Australian content, or post-production work undertaken in Australia). We believe that the production obligation should follow the principles of the NEDE scheme in defining qualifying expenditure and content, by incentivising production of Australian genres subject to market failure.

First-run content

It is essential that qualifying expenditure be defined as new, first-run content. Page 32 of the Green Paper notes that services 'would have discretion to determine the genres of Australian programming that they acquired, commissioned or licensed'. We observe that screen industry financing in Australia encompasses a range of different models from fully-financed originals through to co-productions and exclusive licensing of new content. However, for the new regulation to be effective in its stated aim of encouraging and sustaining Australian screen storytelling, the policy design needs to **incentivize production of new original content that would not otherwise exist, and which adds to the national repertoire of screen stories**. Expanding the definition of eligible expenditure to include acquired content would not achieve this aim, even though it would likely add some value to existing rights to Australian content (mostly premium film and TV content). We also believe that the regulation should not allow services to claim qualifying content produced by their parent companies if that content is not intended for exclusive first-run release on the SVOD service itself.

Qualifying genres

The production obligation will be most effective in its objective of creating new Australian stories if **qualifying expenditure is limited to the core 'market-failure' genres of drama, children's content and documentary, as per the NEDE scheme**. Sport content should not be included in the scope of qualifying expenditure, as sport is not a market-failure genre requiring regulatory intervention; on the contrary, sports video markets continue to thrive in Australia.

Post-production

We do not support expanding the definition of qualifying production to include post-production as a substitute for original Australian commissions. Local content policy needs

to distinguish between (i) stories that have been locally developed by Australian creatives; and (ii) post, digital and visual effects (PDV) where cultural inputs and outcomes are typically less visible to the audience. We believe that a system that actively incentivises original commissions and co-commissions by Australian creatives is most likely to meet the policy objective of supporting Australian screen storytelling.

Having said that, a points system that can appropriately weigh production versus PDV work is a possible consideration, if robustly designed to incentivise creation of Australian stories.

Rate of the investment obligation (questions 6.2, 6.3)

The Green Paper canvasses a production obligation for major SVODs equivalent to 5% of their Australian subscriber revenues, and asks for feedback on this rate. This is a vital detail of the regulation that requires careful consideration.

Our view is that **5% is too low to achieve the policy aims of the Green Paper, and is also too low to justify the effort required to regulate in this area**. An appropriate and reasonable figure cannot be lower than **10%**. We base this on the following considerations:

1. International precedent: Several countries have introduced production obligations for SVODs. Others are currently legislating in this area. Production obligations, as a proportion of national revenues, are generally higher than the 5% figure canvassed in the Green Paper. Examples include Italy (15.5-20%), France (20-25%, proposed), and Canada (30%, proposed).⁴
2. National precedent: The longstanding NEDE rate was 10% of total programme expenditure per channel, although a reduction to 5% is planned in the Broadcasting Legislation Amendment (2021 Measures No.1) Bill currently before parliament. The NEDE scheme has been successful in underpinning a significant body of innovative scripted screen content for pay TV in Australia. We do not support the reduction of NEDE to 5%, as this significantly undermines its capacity to support local content production. While mindful of the differences between the two schemes (programme expenditure or subscriber revenues), we believe that the proposed SVOD production obligation should maintain at least the minimum standards established by the longstanding and successful NEDE scheme.
3. Performance by SVODs to date: Our analysis suggests that current production expenditure of two leading SVODs in Australia -- Netflix and Stan -- already comfortably exceeds a 5% subscriber revenue obligation, and that a 10% threshold would not be overly burdensome for these services. The purpose of a revenue-based obligation is to ensure that investment remains at recent levels, or ideally higher, over time. Allowing them to fall would constitute a significant failure of regulation.

The Green Paper asks whether obligations should be based on subscriber revenues or other metrics such as programming expenditure. In our view **subscriber revenues are the most appropriate metric upon which to calculate a production obligation**. Subscriber revenues are relatively transparent, calculable and robust for regulatory purposes. A programming expenditure model may be problematic to enforce because of the complexity and opacity of internal accounting within major entertainment and technology firms.

CAST fund / SVOD production obligation

The Green Paper proposes two new funding mechanisms to support local screen content: (i) the one-off CAST fund, funded by proceeds from spectrum auction, and (ii) an ongoing Australian production obligation for major VOD services.

One-off funds such as CAST are certainly welcome, and have the potential to generate investment for a limited time. However, there is uncertainty about the size, longevity and accessibility of the proposed CAST fund, not to mention that the proposed dual trust scheme may never eventuate. The funds are finite and will eventually expire. In contrast, the SVOD production obligation scheme provides an ongoing source of funding for reinvestment in new Australian screen production.

In our view, one-off funding is generally less effective as a long-term measure for incentivizing Australian screen production, and should not be considered a panacea to the present challenges for the production industry. **A one-off fund such as CAST would be a welcome additional measure if introduced alongside the SVOD production obligation, however it is insufficient on its own terms as a solution to the policy objective of sustaining Australian content into the digital future.**

Discoverability and prominence of local content

Discoverability of local content is described on pages 7 and 30 of the Green Paper as an essential element of a revised *Broadcasting Services Act*. However, the Green Paper does not offer further detail on this important issue.

Availability, discoverability and production of local content are intertwined issues: each comprises an essential part of the overall local content system. Digital discoverability -- which refers to the 'likelihood of discovery' of particular content within a digital interface, and how this is shaped by 'industry dynamics, strategies, negotiations and curation' -- is perhaps the most novel challenging aspect of this overall system.⁵

In the case of VOD services, there are at least two different discoverability scenarios each requiring policy attention. The first relates to *discoverability of Australian content* -- how VOD services present particular content within their home screens, search, and recommendations (e.g., visibility of Australian content on the Netflix home screen). The second relates to *prominence of Australian and international services/apps* -- how connected TV devices present VOD apps and content within their own interfaces (e.g., integration of recommendations by Australian AVOD and SVOD services--including iView and Stan--within the smart TV home screen, in comparison to those of major global players such as Netflix, Amazon, Disney, etc.).

Our view is that the Australian government needs to build a detailed evidence base and undertake further research to establish the scale of regulatory intervention needed to ensure discoverability of local content. Government must clearly set out what the regulatory options are and seek a further round of responses. International precedent must be considered here, as government has the opportunity to draw on precedents from other territories which are already dealing with these issues in some depth.

In the European Union, there is a developed set of policy exemplars (including both the European content 'promotion' principle within the AVMSD, and the regulatory approaches emerging at national level). Germany's revised Rundfunkstaatsvertrag (Interstate Broadcasting Treaty) specifies a general principle of nondiscrimination, such that content cannot be unreasonably hidden; plus, an additional provision for positive prioritisation of PSB content and other commercial 'programmes that contribute to plurality'⁶. Canada's proposed media law, Bill C-10, brings discoverability into scope of current audiovisual regulation and grants the Canadian Radio-Television and Telecommunications Commission the power to make orders imposing conditions on 'the presentation of programs for selection by the public, including the discoverability of Canadian programs' on SVOD services.⁷ The British regulator Ofcom has proposed a new legislative approach to PSB prominence that secures priority placement for British PSBs, and thus British content, on smart TVs.⁸ These and other precedents were discussed in more detail in our Options Paper submission and in other recent research.⁹

These international developments underline the need for production and discoverability supports to be developed in an integrated manner. The Options Paper¹⁰ referred to 'flexible,

principles-based promotion and discoverability requirements for Australian content [to be] applied across all platforms'. In terms of the design of such requirements, we recommend a two-stage process of monitoring, consultation and voluntary undertakings followed – if necessary – by more direct regulatory intervention.'

Stage 1: 'minimalist' model

This stage would involve engaging the major SVOD players around the following issues:

1. *Voluntary undertakings – metadata standards*: Tagging Australian content with appropriate metadata (and therefore making it discoverable via user searching) is the basis for effective discoverability. Our research suggests that not all services record country of origin within metadata, or do so unevenly. Many SVOD services do not make this information publicly available to the user. There are also definitional inconsistencies regarding Australian content to be addressed, e.g., whether service-level classifications align to definitions enshrined in legislation. ACMA could work with industry to adopt and implement common metadata standards for video-on-demand services. This will help to improve the overall quality of title metadata, which is the essential foundation for effective discoverability.
2. *Reporting requirements*: SVOD services could be asked to provide the following data, as a basis for determining whether Stage 2 regulation is appropriate:
 - relative performance of local content titles within their platforms (e.g., number and ranking of any Australian titles appearing within the top 500 most-viewed titles by viewing hours, or equivalent metric);
 - aggregate data on which discovery actions are most consequential (e.g., proportion of viewing actions driven by recommendations, search, or promo carousel spots);
 - contextual information on what variables are taken into account in determining relative prominence and discoverability of titles across each element of the interface;
 - explanation of any system design features and other voluntary measures taken by the service to increase discoverability of local content.

Such data would assist in establishing the scale of engagement with Australian content on SVOD services and would inform decision-making as to whether or not more significant discoverability requirements are appropriate. If necessary, reporting could be on a confidential basis with ACMA. There would be no need to divulge commercially sensitive information such as number of views, subscriber numbers, or algorithm design.

3. *Discoverability audits of SVOD services*: ACMA could consider carrying audits of local content discoverability in SVOD services, and other services (BVOD, TVOD) as appropriate. Data could be collected on a regular basis via manual or automated coding. An appropriate data framework for these audits would include:
 - the number of Australian titles that feature on the home screen, noting differences between desktop, smart TV and mobile interfaces;

- the relative 'screen real estate' devoted to these recommendations (i.e., accounting for the difference in prominence between featured autoplay trailers at the top of the screen and recommendation row inclusions);
 - to account for the effects of personalisation, clean profiles can be used as a proxy or multiple profiles can be trained to simulate a range of distinct viewing habits.
4. *Audience research*: A programme of independent qualitative audience research would provide valuable insight into discovery practices and awareness of local content in current SVOD services. This research would complement the Department's recent Media Content Consumption Survey (2021), which included stated preferences for local content availability, by investigating the actual usage conditions and decision-making processes of audiences navigating multiple SVOD platforms, who encounter local content differentially -- or in some cases not at all.

If the measures above establish that there is a local content discoverability problem of sufficient scale to warrant more formal intervention, a second stage would then be triggered.

Stage 2: Introduction of formal regulation

In our view the best template for regulation would be the European Union's AVMSD revision and the various transpositions of the AVMSD into national law. Once evidence becomes available on the effectiveness of discoverability policies in the EU, ACMA would be in a better position to formulate an appropriate discoverability regime here in Australia, if necessary.

We observe that some of the options referenced in the AVMSD will be easier for services to implement than others. For example, introducing a local content search option should be practicable for most SVOD services; similarly, requiring that a modest proportion of slots in the rotating promo carousel at the top of the home screen relate to Australian content should also be practicable given that these sections are already wholly or partly human-curated according to strategic objectives (e.g., promoting new originals). Other options that may be more complex for services to implement include a minimum percentage of local titles appearing across all recommendation rows, or a relative prioritisation of local titles via adjusting the algorithmic weighting of country of origin.

We note that services currently carrying little or no Australian content, such as Disney+, will obviously struggle to meet any discoverability requirements no matter how modest. This underscores the need for discoverability measures to be articulated to production obligations.

We agree with the argument that services should be given sufficient flexibility to address the discoverability policy objectives in ways appropriate to their individual interface design, and that some room for negotiation be built into any regulatory framework. The importance of digital discoverability and prominence will only increase in coming years because it is a crucial underpinning of the cultural rationale for regulation. It is prudent for the Australian government to begin scoping some of these options and engaging with industry now so as to be prepared to introduce such measures in coming years.

General principles guiding discoverability regulation

In both the minimal and significant scenarios, we recommend attention to the following principles:

- *Government should keep regulatory options open and sufficiently flexible to account for future innovations in technology, service design, and user experience.* Digital services are evolving very rapidly. An important issue in the years ahead will be hardware-level discoverability (e.g., recommendations delivered on the home screen of a smart TV, game console or streaming stick), which co-exists with the in-app recommendations that have been the focus of discussion to date (e.g., recommendations on SVOD home screens). Future innovations in device, service and interface design will add further complexity to this picture. We suggest that any discoverability principles enacted in legislation or regulation should be sufficiently broad as to account, where necessary, for the emergence of new kinds of hardware and services without requiring new legislation. We also expect that PSB prominence (ABC and SBS) on connected TV platforms is likely to emerge as a major issue for Australian media regulation in coming years, as has been the case in the UK and EU. FreeTV's submission to the ACCC's Digital Platform Services Inquiry makes the point that 'being prominently featured is extremely important to the sustainability of our industry'.¹¹ **We therefore recommend that the Australian government consider the prominence of PSB apps and content in conjunction with local content discoverability.** A robust digital prominence regime would help to achieve maximum cultural value from the local content investment of SBS and ABC, including the new PSB production obligations canvassed in the Green Paper.
- *Discoverability depends on catalog depth.* Our research has shown that discoverability features alone will not help users discover Australian content if it is not there to be discovered (i.e., if titles are not present in the catalog in sufficient quantity). This is why discoverability cannot be divorced from production obligations; these elements need to be considered in tandem.
- *Leverage international best-practices.* ACMA should continue to engage with regulatory agencies and experts overseas so that Australia may benefit from the implementation and consultation work carried out by groups such as Ofcom, European Audiovisual Observatory, European Regulators Group for Audiovisual Media Services, and Canadian Radio-television and Telecommunications Commission.
- *'Ghettoization' of Australian content may not be a desirable outcome.* While obligatory carriage of a local content recommendation row on SVOD services, such as Australian TV or Australian movies, is a possible option, we expect that some Australian creators and IP holders may instead prefer their content to be featured alongside quality international content rather than being contained within a nationally labelled row or section. Hence, it will be valuable to engage with the local production industry and rights-holders when deciding which if any of the possible discoverability mechanisms to adopt.

- *Scale thresholds should apply.* As per the Green Paper, production and discoverability obligations should apply only to major SVOD services attracting significant audiences and revenues in Australia, and not to niche services.

In summary, discoverability is looming as a major policy issue for Australian media producers, institutions, and regulators. The discoverability problem is also closely tied to the local content reforms canvassed in the Green Paper. While we feel it is premature to recommend the introduction of one or more specific discoverability requirements at this stage, our evidence in this submission has focused instead on scoping the possible options – in line with international best-practices – and outlining a reporting programme that would more concretely establish the scale of intervention needed.

¹ Ramon Lobato and Alexa Scarlata, 'Australian content in SVOD catalogs: availability and discoverability', submission to the Australian and Children's Screen Content Review, September 2017, <http://apo.org.au/node/134926>; Lobato and Scarlata, 'Australian content in SVOD catalogs: availability and discoverability – 2018 edition,' report, RMIT University, October 2018, <https://apo.org.au/node/196611>; Lobato and Scarlata, 'Australian content in SVOD catalogs: Availability and discoverability - 2019 edition', Report, RMIT University, Melbourne, October 2019, <http://apo.org.au/node/264821>; Lobato and Scarlata, 'Response to ACMA/Screen Australia Options Paper, June 2020', June 2020, <https://www.communications.gov.au/sites/default/files/submissions/sass-school-media-and-communication-rmit-university.pdf>

² Bureau of Communications, Arts and Regional Research, 'Subscription video on demand in Australia: chart pack', via <https://www.communications.gov.au/departmental-news/subscription-video-demand-services-continue-boom>; Ampere Analysis in Green Paper, 34.

³ Netflix et al, ACMA/Screen Australia Options Paper submission, 3 July 2020, <https://www.communications.gov.au/sites/default/files/submissions/sass-stan-netflix-prime-video-and-disney-plus.pdf>

⁴ Ivana Kostovska, Tim Raats and Karen Donders, 'The rise of the 'Netflix tax' and what it means for sustaining European audiovisual markets', *Innovation: The European Journal of Social Science Research*, 33:4 (2000): 423-441.

⁵ Eleonora Maria Mazzoli and Damian Tambini, 'Prioritisation uncovered: the discoverability of public interest content online', Council of Europe report, 2020, 12.

⁶ Mazzoli and Tambini, 21.

⁷ Parliament of Canada, Bill C-10, 23 September, 2020, https://parl.ca/Content/Bills/432/Government/C-10/C-10_1/C-10_1.PDF

⁸ Ofcom, 'Review of prominence for public service broadcasting: Recommendations to Government for a new framework to keep PSB TV prominent in an online world', London, 2019.

⁹ Lobato and Scarlata, 2020; Lobato and Scarlata, 'Regulating discoverability in subscription video-on-demand platforms' in *Digital Platform Regulation: Beyond Transparency and Openness*, ed. Terry Flew and Fiona Martin, forthcoming.

¹⁰ ACMA/Screen Australia Options Paper, 15 April 2020, <https://www.communications.gov.au/have-your-say/supporting-australian-stories-our-screens-options-paper>, 41.

¹¹ FreeTV Australia, submission to ACCC Digital Platform Services Inquiry – March 2021 report on app marketplaces – Issues Paper, 17 November 2020, <https://www.accc.gov.au/system/files/Free%20TV%20Australia%20%2816%20October%202020%29.pdf>, 11.