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BY EMAIL

Content & Copyright Branch

Office for the Arts

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GPO Box 594 Canberra

ACT 2601

STREAMING SERVICES REPORTING AND INVESTMENT SCHEME

1. The Australasian Performing Right Association and Australasian Mechanical Copyright Owners Society (**APRA AMCOS**) and the Australian Guild of Screen Composers (**AGSC**) are grateful for the opportunity to make this submission in response to the proposed Streaming Services Reporting and Investment Scheme (**Scheme**) to support the provision of Australian content to Australian audiences and the viability of the Australian screen production sector over the long term.
2. The Australian Government is familiar with the operations of APRA AMCOS. APRA AMCOS has been representing Australian songwriters, composers and publishers since 1926. With over 111,000 members across Australasia, our membership includes the very best and brightest of established and emerging musical talent at home and around the globe. We administer rights on our members' behalf, supporting songwriters, composers and publishers in an industry that is a flagship of Australian culture and creativity, generating billions of dollars each year for the Australian economy across live, broadcast, digital, screen and digital games platforms. We are affiliated with similar collective management organisations around the world. So when Australian and New Zealand songs and compositions are played overseas, Australian and New Zealand writers and publishers get paid. APRA AMCOS works regularly in partnership with governments at all levels to support the development and career paths in music through the cornerstones of live music, digital platforms, local venues, education and global exports.
3. The Australian Guild of Screen Composers (**AGSC**) is an industry organisation that represents Australian screen composers in film, television, and games. The AGSC, established in 1981, has included composers of such iconic Australian films as *Crocodile Dundee*, *Muriel's Wedding*, *Strictly Ballroom*, *Shine*, *Animal Kingdom*, *Australia*, *Red Dog*, *Phar Lap*, *2040* and *The Australian Dream*; and legendary television shows such as *McLeod's Daughters*, *Picnic at Hanging Rock*, *Rake*, *The Secret Life of Us*, *Offspring*, *The Code*, *Bluey*, *Doctor Doctor*, *Wentworth*, *The Gloaming*, *Bloom*, *Underbelly*, *Miss Fisher's Murder Mysteries*, *Stateless* and *Home and Away*.

INTRODUCTION

4. APRA AMCOS and the AGSC join our partners across the screen sector in supporting the Government's stated goal of sustainable growth in the Australian screen industry and delivering on the crucial public policy objective of ensuring there are Australian stories on Australian screens. We also acknowledge and support the Government's stated intent to update media regulations to correct the imbalances in the current streaming-heavy environment, with the end goal of a platform-neutral framework that allows Australian content to flourish.
5. However in reviewing the details of the Scheme, we are deeply concerned the proposed measures are not sufficient to fully realise the potential of the local screen industry and Australia's place in the world as a global partner of choice for great screen production.
6. We join our colleagues from other screen industry guilds and associations in support of the swift introduction of a twenty (20) percent Australian commissioned content expenditure requirement on global streaming businesses, with specific protections for terms of trade safeguards.
7. There has been a proliferation of local and international productions since the outbreak of COVID-19. With this in mind, our screen sector has the potential to capitalise on the benefits of Australia as both a safe, beautiful and diverse location, and also as home to a highly skilled and creative workforce.
8. Screen music and screen composition generates a significant contribution to the Australian economy each year – for example, each year APRA AMCOS receives millions of dollars from the use of Australian music in SVOD services internationally which is then distributed to APRA AMCOS' writer and publisher members as royalties. Australia has the opportunity to build on these assets and create valuable intellectual property (IP) to ensure a sustainable long term industry as well as long term revenue generation into the Australian economy. It is our strong contention that robust local content investment is required from subscription video on demand services (SVODs) to ensure the future of Australian stories on local and global screens.
9. There are hundreds of small screen industry businesses, including screen music composers, that generate valuable intellectual property for the country. For example, a typical commercial feature film will likely employ about 70 musicians, 4 orchestrators, 2 recording engineers and one mixing engineer, as well as hire specialised equipment and studio space.
10. These creators and creative businesses must be fostered to ensure that Australia is not only a premium location for international content production, but also the home to Australian stories on Australian screens.
11. APRA AMCOS and the AGSC are increasingly concerned about the imbalance in bargaining power between Australian music creators and large digital platforms such as SVODs. There are signs of an emerging global trend where composers and creative contributors are expected to sign away a full suite of their proprietary rights to the commissioning party (generally an SVOD service). In order to support a vibrant Australian screen industry, the Australian Government must turn its attention to the longer-term value of supporting our world class screen composers so that the entire screen ecosystem can benefit.
12. This is an emerging priority issue for creators globally. If this issue is not approached head-on, Australia will likely lose critical long-term intellectual property earnings, as well as the

employment opportunities that come from locally created music. Looking globally, many mature film markets are enjoying the long-term benefits generated by locally produced content by establishing significant local investment requirements from SVOD services that ensure the ownership of valuable IP assets are not lost offshore. These countries benefit from decades of earnings as screen content is re-shown, re-broadcast and in many cases re-popularised through other distribution channels.

13. In order to support a vibrant Australian screen industry, we urge the Government to substantially lift the regulatory investment threshold for local content investment by SVOD services and to do so in a manner that supports and fosters the development of long-term intellectual property arrangements to ensure these valuable assets are not lost to other territories.
14. Australia succeeds best when the screen industry tells our stories, not just through our voice and our images, but with the beating heart of an Australian soundscape. We have the opportunity to create global best practice in screen industry policy that provides a sustainable model for economic development of the local industry, while also creating content that has both local and global appeal. We submit that the measures contained in this Scheme do not go far enough to realise this possibility.
15. On a commercial in confidence basis, we enclose with this submission a number of case studies to illustrate the significant 'job multiplier' effect of commissioning an Australian composition.

KEY POINTS

16. APRA AMCOS and the AGSC support the intent of the draft Scheme as an important next step in regulating Australia's fast-developing streaming services sector. We welcome the Government's initiative in seeking to address the issue of local content investment by SVOD services and we recognise the vital importance of ensuring the inclusion and discoverability of significant Australian content on these platforms as the global audience's appetite for diverse content grows.
17. However, APRA AMCOS and the AGSC share concerns about the impact of the proposed Scheme on their respective members, and to Australian music creators generally. We are particularly concerned about potential missed opportunities in the development and implementation of the Scheme for powerful long-term support of our members who are the songwriters, composers, musicians and sound designers who create music for the screen.
18. We view the development and implementation of the Scheme as a welcome and necessary policy initiative, but submit that the Scheme must include mechanisms for the mandatory inclusion of local Heads of Department and specifically local key music professionals, such as 'Head of Music' or 'Director of Music' in any investment-related definition of Australian content.
19. We also urge the Government to consider this opportunity to safeguard the commissioning process for music for screen, which can be a difficult and imbalanced environment for our composer members.
20. Both of these proposals, we submit, will contribute significantly and directly to a thriving screen music industry and a world-leading creative environment in Australia.
21. In our view, the Discussion Paper does accurately reflect the current problematic situation: Australia is a small market for content production and SVOD services – which have long been

reaping the benefits of a committed Australian subscriber base as well as Australia's favourable environment for screen production – have effectively zero obligations in respect of contributing to the development of Australian content and supporting the long-term economic livelihood of Australian creatives.

22. APRA AMCOS and the AGSC support the general structure of the Scheme, including the requirement that SVOD services 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. However, we say that the threshold for investment as proposed by the Scheme is far too low.
23. APRA AMCOS and the AGSC would also like to take this opportunity to draw the Government's attention to the dynamics in bargaining power between local composers and large streaming businesses. The peak industry body, Screen Producers Australia (**SPA**), has shown in submissions related to this consultation that Australian creative professionals are increasingly expected to sign away the majority, if not all, of their rights in their content to these global businesses, with little or no ongoing royalties payable to the creators.
24. We concur with SPA that the "terms of trade" for local composers when dealing with SVOD services is an issue that has not been addressed in the Discussion Paper and requires urgent attention and action from the Australian Government.
25. The Discussion Paper also makes it clear that the Government is keenly aware of international best practice in terms of incentivising local content development by SVOD services. We strongly encourage the Government to look to other appropriate jurisdictions for models, paying attention to not only local content investment thresholds, but also regulation of bargaining arrangements between SVOD services and composers, which is a vital element in the investment in local talent for a sustainable and thriving local creative sector over the long term.

PROPOSED REGULATORY INVESTMENT THRESHOLD IS TOO LOW

26. As proposed, the Scheme will be implemented as a reporting requirement at first instance, with a two-tier framework based on an SVOD service's investment in new Australian commissions as a percentage of their gross Australian revenues (**Investment Threshold**).
27. APRA AMCOS and the AGSC submit the proposed five (5) per cent investment threshold is simply far too low. If the Government intends to meet the stated public policy objectives of delivering Australian content to Australian audiences, as well as ensuring a thriving long-term local production industry, the Tier 1 investment threshold must be set at no less than twenty (20) per cent of gross Australian revenues in new Australian commissions.
28. On this basis, APRA AMCOS and the AGSC endorse the submission of the other screen industry guilds and associations who are advocating for a minimum twenty (20) per cent investment requirement, which is based on international precedent in comparable markets. SPA projects that this level of local investment could create an additional 300 hours of Australian content and 10,000 additional jobs. It has been made clear in submissions from the creative sector that a threshold of over twenty (20) per cent lifts Australia to a competitive position internationally and will ensure world's best practice in sustainable local content investment.

29. APRA AMCOS and the AGSC submit the Government's metrics for local content investment must be properly aligned with the appropriate content markets overseas. The Discussion Paper states that the proposed 5 per cent threshold is:

"broadly consistent with regulatory arrangements in place in overseas markets. The Czech Republic, Slovenia, Denmark, Belgium, Croatia, and Germany [which] have all imposed levies or investment obligations at less than 5 per cent of revenue."

With respect, APRA AMCOS submits that this approach is flawed and inappropriate, as none of these countries are primarily English-language media markets.

30. In APRA AMCOS' and the AGSC's view, the concept of substitutability is a fundamental tenet of local content protection and, as a result, Australia's threshold for local content investment must be comparable to Anglophone countries in similar media market positions. Australia (like, for example, Canada) is an attractive market for the importation of high levels of Anglophone content from the two largest content markets – the U.S. and the UK, which acts to frustrate and depress the natural levels of local content production in Anglophone countries like Australia. Given that Australia is in a very different position to countries like Slovenia or Belgium, we submit that the Government must look closely at developments in more comparable countries.
31. Australia must not fall behind the global trend in local content investment regulation in leading content-creating regions. In fact, Australia, with its rich history of major screen productions and its powerful creative talents that shine on the world stage, must be a leader in this charge.

THE TEST FOR AUSTRALIAN CONTENT MUST BE RIGOROUS AND INCLUSIVE

32. It is imperative that the test for what constitutes Australian local content is rigorous and inclusive; and designed specifically to uplift and support Australian creators, including screen composers and those in key music roles in all aspects of screen production. The opportunity to define Australian content for the purposes of investment by SVOD services will likely only come along once, and the chance must be seized by the Government to ensure and entrench the success of Australian composers as these services continue to grow and dominate our market.
33. In assessing whether new content is Australian, the Government is proposing that the Scheme import the existing Significant Australian Content test from the current Producer Offset scheme (**SAC Test**), as administered by Screen Australia. The Discussion Paper asks whether use of the SAC Test will support the efficient operation of the Scheme and minimise the burden on industry.
34. APRA AMCOS and the AGSC support the use of the SAC Test to assess whether an SVOD service has met the Investment Threshold, albeit with some crucial adjustments. The Producer Offset Guidelines (**SAC Guidelines**) state that the SAC Test measures the level of Australian content in a holistic way, looking at the subject matter of the film; the place where the film was made; the nationalities and places of residence of the persons who took part in the making of the film; the details of the production expenditure incurred in respect of the film; and any other relevant matters.
35. APRA AMCOS and the AGSC submit that the SAC Guidelines have a problematic tiered system built into its test architecture in terms of the weight given to "persons who took part in". APRA AMCOS

and the AGSC submit that it is of the utmost importance that the Government take this opportunity to update these assessment guidelines underpinning the test.

36. The SAC Guidelines set out the hierarchy applicable to this tiered system:
 - a. the nationalities and place of residence of the **producer, writer and director** will be considered to be *“particularly important”*;
 - b. the nationality and place of residence of **lead cast members** is also considered to be *“very important”*; and
 - c. Screen Australia will simply *“consider”* the nationality and place of residence of key creative heads of department, such as **director of photography, production designer, editor, costume designer and music composers**.
37. APRA AMCOS and the AGSC’s position is that the key music professionals, such as ‘Head of Music’ or ‘Director of Music’ of a production, must be elevated in the hierarchy to a level commensurate with *“particularly important”* or *“very important”* tiers, given the opportunity of these positions to generate high-value screen music and return ongoing revenues to the Australian economy long term.
38. In respect of *“Any other matters that Screen Australia considers to be relevant”*, APRA AMCOS and the AGSC notes that two of these matters are highly relevant to our members:
 - a. *“The extent to which copyright ownership resides with Australians, in particular, whether this is commensurate with the proportion of the budget provided by Australians”*; and
 - b. *“The extent to which there is recoupment and profit participation for Australian nationals or residents”*.
39. We submit that these matters must also be given significant weight within the SAC Test, given the economic importance to music creators of copyright ownership and the rights to earn royalties of the future exploitation of content containing their music.

THE IMPORTANCE OF AUSTRALIAN MUSIC ONSCREEN

40. – 42. *[COMMERCIAL IN CONFIDENCE – NOT FOR PUBLICATION]*

THE SCHEME MUST DEAL WITH TERMS OF TRADE

43. APRA AMCOS and the AGSC’s submission on the proposed Scheme starts from the position that the proposed Investment Threshold of five (5) per cent falls well short of the investment required to maintain a sustainable Australian screen industry and incentivise local content production, including local music. Furthermore, APRA AMCOS and the AGSC urge the Government to seize this opportunity to also ensure there are healthy and sustainable terms of trade between SVOD services and Australian composers.
44. APRA AMCOS and AGSC have observed a recent shift in the terms of trade for commissioning of screen compositions by SVOD services. Music creators are increasingly being asked to agree to US-centric ‘buyout clauses’ that require the creator to surrender full control of their work in exchange for an upfront lump sum payment. In these circumstances, the creator must forego shares in

ongoing income derived from additional or subsequent exploitation of their copyright protected work. The amount of the lump sum or 'buy out' fee is significantly impacted by the weaker negotiating power of local music creators (mostly small to medium businesses) as compared to the large, often multinational, SVOD service operators. When these 'buy out' clauses are in place, the commissioning SVOD services are able to secure rights that would have previously remained with, or reverted to, local composers. These are future earnings that simply vanish from the Australian creative economy.

45. To support a vibrant Australian screen industry, we urge the Government to consider the long-term value of intellectual property arrangements to ensure these valuable assets are not repeatedly lost to overseas partners.
46. Australia is very much lagging behind international best practices in this area. The Scheme presents a golden opportunity to ensure that Australia IP remains with Australian creators and we submit that the continuation of a weak Australian content regulatory framework for SVODs will simply entrench these terms of trade imbalances. To this end, APRA AMCOS submits, in line with the recommendations of Lateral Economics as put forward by SPA, that Australian content requirements for SVODs should incorporate a terms of trade regulatory scheme to address the significant concerns raised by industry regarding negotiating conditions between music creators and digital streaming platforms.
47. APRA AMCOS and AGSC will continue to collect information on global trends for SVOD service 'Terms of Trade' and 'Buyout' provisions and would welcome the opportunity to provide these to the Government at the next available opportunity.

FURTHER RESPONSES TO THE DISCUSSION PAPER CONSULTATION QUESTIONS

48. The Discussion Paper puts forth a number of questions for consultation, primarily concerned with the structure and mechanisms of the Scheme.
49. APRA AMCOS and AGSC endorse SPA's responses to the consultation questions contained in the Discussion Paper, with some additional notes as below.

Question 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?

Question 5: Are there additional criteria that should be considered for designation under Tier 1 or Tier 2 of the Scheme?

50. The Discussion Paper proposes that if a Tier 1 SVOD were to invest less than five (5) per cent of its gross Australian revenues in new Australian commissions, the Minister would have the discretion to designate the service as Tier 2 - a designation that may bring with it more regulatory oversight and potentially enforceable obligations and reporting requirements (albeit we note that extent of regulatory obligations that may be imposed on a Tier 2 SVOD is left undefined in the Scheme and subject only to Ministerial discretion).
51. APRA AMCOS and AGSC take issue with the degree of Ministerial discretion in the designation of a Tier 2 SVOD, noting the potential to open up the process to political influence from powerful lobbying interests in the SVOD sector. The Scheme, as currently proposed, would also allow the Minister to merely consider demoting an SVOD service to Tier 2 status via a designation

instrument (with the attendant obligations and oversight that comes with that designation), rather than it being an automatic trigger based on reported investment in the previous cycle, or rather than incorporating some element of independent or public input into the designation.

52. As noted in our response above, APRA AMCOS and the AGSC submits the proposed five (5) per cent investment threshold is simply far too low. In that regard, we also note there is flexibility proposed regarding the level of obligation under a Tier 2 designation that could result an even lower threshold for a Tier 2 SVOD service. As noted in the Discussion Paper, the proposed rate of investment to be required of SVOD services elicited starkly different stakeholder views during the Department's green paper consultation process. As a result, we would expect that the rate of investment expected for a Tier 2 SVOD service is an important issue that should be subject to public consultation and addressed with transparency in the Scheme.
53. APRA AMCOS and the AGSC are also concerned that the proposed matters that the Minister is required to consider in respect of making a Tier 2 designation includes (alongside the operational scale of the SVOD service and its reported investment in content) a nebulous element:

"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."

Such criterion has the potential of allowing an SVOD service to make the case that its investment in Australian content can be pegged to, for example, its own capital expenditure in production facilities (which may not directly benefit Australian music creators into the future), or its acquisition of existing content (which may not incorporate rights that flow royalties to Australian composers).

Question 5: Are there additional criteria that should be considered for designation under Tier 1 or Tier 2 of the Scheme?

54. The Discussion Paper proposes that the regulator will issue guidance on the type of information to be supplied by designated services and that this guidance would also specify the aggregated information that the regulator would publish. We submit that the mandatory criteria of including Australia senior musical personnel in the creation of this Australian content be put forward in the guidance to SVOD services and be made public.

Question 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?

55. APRA AMCOS has developed a sophisticated and specialised definition for SVOD services in the course of negotiating the APRA AMCOS SVOD Licence Scheme (**SVOD Scheme**) with streaming services. In the SVOD Scheme, an SVOD service is defined as:

"a subscription video on demand service operated by the Licensee in the Territory, under the Service name and as more particularly described in the Service Details, in the course of which the Licensee makes Films available to Subscribers by means of Streaming and/or Tethered Downloads, transmits Films over the internet or IP network at the request of a Subscriber to the Subscriber's Device".

We submit that using a definition of an SVOD service such as the example above would ensure that all the relevant operations of a streaming are captured within the definition; and we encourage the Government to incorporate a definition such as this in the Scheme. Noting recent media reports that some major SVOD services are considering including advertisements within their subscription services, APRA AMCOS submits that this definition is more future proof than a definition that will require the regulator to continually assess which is the “predominant source” of revenue for each service subject to the Scheme.

Question 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?

56. APRA AMCOS and AGSC submit that the Government must consider the changing business models of digital content delivery platforms to ensure the continued and consistent application of the intended policy objectives of the Scheme.
57. It is APRA AMCOS and AGSC’s view that the Scheme should cover all other types of ‘on demand’ services, including Transactional Video On Demand (**TVOD**) and Advertising Video On Demand (**AVOD**) services and hybrid services. We submit this on the basis that original music cues composed by our composer members appear in all of these service types and we see little reason to exclude these services from a Scheme that is designed to ensure that large digital content services invest in significant Australian creative content, including music composed for screen.

We thank you for the opportunity to respond to the proposed Streaming Services Reporting and Investment Scheme.

If we can provide further information, or be of assistance in any other way, please do not hesitate to contact Nicholas Pickard, Executive Director, Public Affairs & Government Relations at APRA AMCOS.

Nicholas Pickard
Executive Director, Public Affairs & Government Relations
npickard@apra.com.au
0439 227 656

ANNEXURE – COMMERCIAL-IN-CONFIDENCE

[COMMERCIAL IN CONFIDENCE – NOT FOR PUBLICATION]