



**The Australian Directors' Guild
& Australian Screen Directors Authorship Collecting Society
Submission on the Australian Government
Streaming Services Reporting & Investment Scheme
May 2022**

THE AUSTRALIAN DIRECTORS' GUILD

The Australian Directors' Guild (ADG) is a Registered Organisation under the Fair Work Act 2009 and union representing Australian directors who are engaged in work in the film, television, online, arts and entertainment, music clips, animation, commercial advertising, and related industries. Formed by 18 independent directors in 1982, the ADG grew to over 1,200 members by 2020 including Baz Luhrmann, Peter Weir, Gillian Armstrong, Fred Schepisi and Phillip Noyce to name a few.

Directors are responsible for creatively leading stories on the screen as well as the cast and crew behind them. ADG's members play a significant role in the production process as creators. As a cultural organization the ADG also seeks to advance an understanding of the director's role by sharing and exchanging future-focused knowledge and skills

The ADG aims to improve professional standards, conditions, and remuneration for Australian Screen Directors, protect and advance the creative rights of our members and promote a cultural voice that is truly representative of Australia's innate diversity.

The ADG is affiliated through the International Association of English-Speaking Directors Organisations (IAESDO) with the Broadcasting, Entertainment Cinematograph and Theatre Union (BECTU), the Directors Guild of America (DGA), the Directors Guild of Canada (DGC), Directors UK, the Screen Directors Guild of Ireland (SDGI) and the Screen Directors Guild of New Zealand (SDGNZ). The ADG is also a member of the Copyright Council

THE AUSTRALIAN SCREEN DIRECTORS' AUTHORSHIP COLLECTING SOCIETY

The Australian Screen Directors Authorship Collecting Society (ASDACS) is a copyright collecting society representing the interests of screen directors throughout Australia and New Zealand. It was established in November 1995 and currently has over 1400 members. The primary purpose of ASDACS is to collect, administer and distribute income for screen directors arising from international and domestic secondary usage rights.

ASDACS is a member of the International Confederation of Societies of Authors and Composers (CISAC), the world's leading network of authors' societies, and currently has 37 international collecting society partners across Europe and South America.

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1. EXECUTIVE SUMMARY

- We believe that the proposed 5% threshold for Tier 1 services will fall far short of what is required to meet Australian Audience expectations and well-established public policy objectives and deliver screen sector growth. We are also concerned that the rate of obligation for a Tier 2 service could in fact be set at less than 5%
- The ADG supports the swift introduction of a 20% Australian commissioned content expenditure requirement on global technology streaming businesses with specific protections for critical genres of drama, documentary, First Nations, and children's content.
- The Scheme proposed will mean that regulatory obligations may not take effect until 2026. This is of great concern, as policy considerations that justify urgent regulatory intervention are now evident.
- Consistent with its previous submissions, the ADG recommends that eligibility requirements for qualifying services should be set at 500,000 subscribers or registered users and AU\$50 million per annum in Australian revenue.
- We oppose the proposed halving of the subscription television Australian drama obligation. The proposed cut will substantially harm Australian subscription television audiences and is without reasonable policy justification.
- The current scheme is weak, lengthy, includes an alarming degree of Ministerial discretion and therefore one that creates an uncertain pathway to regulation. It does not deliver on well-established cultural public policy objectives. It does not deliver certainty for Australian audiences, the independent screen production sector nor the Streamers.
- Terms of Trade should be addressed in the Discussion Paper, this is as an oversight that requires action from government. Included in this, we strongly urge the government to address the lack of copyright for directors and subsequent lack of secondary remuneration schemes for online exploitation for creators in Australia by introducing schemes in-line with European Copyright Directives.
- We support the proposed reporting requirements for the national broadcasters but also support more formal expenditure minimum requirements that safeguard Australian content on these vital public services accompanied by adequate and viable levels of national broadcaster funding.
- We recommend adopting the definition contained in the Australian content standards for commercial free-to-air television as a single Australian content definition across all aspects of the industry.

2. INTRODUCTION

The ADG welcomes the opportunity to submit to the ***Streaming Services Reporting and Investment Scheme*** (the ‘Discussion Paper’). Whilst we remain encouraged by the government’s continued engagement with the sector and the continuation of the policy debate, we wish to express a number of concerns regarding the policy framework outlined in this discussion paper.

The opportunity to set a future-proof regulatory framework taking into account the significant technological and audience transitions over the two decades since the Broadcast Act was established will likely never exist again. It is imperative that any reform moves decisively and results in strong gains in the to the Australian public and to the Australian screen industry now and for future generations. The scheme, as designed, does neither.

The discussion paper acknowledges that Australian audiences need and expect to see themselves and their stories on SVOD platforms rapidly increasing in their reach and influence. It is widely acknowledged that the Australian screen industry is a valuable contributor to our national identity and our economy. However, the 5% obligation proposed in the scheme, representing less than 0.3% of these global businesses’ content spend, is unambitious and far from sufficient to deliver on well-established public policy imperatives for audience and industry. It is also far from the requirements set on streaming services by more forward-looking international jurisdictions.

The ADG is advocating for a minimum 20% investment requirement, based on strong, effective international precedents. This setting would generate hundreds of hours of new Australian content and thousands of new jobs without any additional impact on public funding

Quota obligations for streamers has been part of the Australian public policy discourse for many years, following years of policy review and enactment and the partial deregulation of commercial free-to-air television last year, it is now an urgently needed component of the media reform process. The proposed timeframes in the Discussion Paper mean that formal regulatory obligations may not be enacted until mid-2026. This delay is untenable.

The robust legislative measures we call for here and in our response to the Media Reform Green Paper have historically proven to be the only effective measures that ensure Australians continue to see themselves reflected on Australian screens. The scheme as proposed does not include the certainty required for continued investment in a high-risk sector. It also contains no certainty of regulatory outcomes for Australian audiences or streaming companies.

There are clear examples of frameworks in comparable countries for streaming services that are predictable and robust it’s these that Australia should be modelling. The Scheme put forward sets up a heavily discretionary and uncertain pathway to a possible formal obligation at an unknown rate, at an unknown time for an unknown set of businesses. The proposed discretionary approach is far from what has been ‘business as usual’ for screen sector policy.

The Australian public and the local screen sector deserve and need the consistent, and predictable outcomes delivered by arm’s length decision-making and Parliamentary scrutiny.

After years of upheaval resulting from the global pandemic, the screen industry needs and the Australian public deserves a scheme that values Australian audiences better, supports Australian stories more and provides a more ambitious and more robust plan for screen industry growth.

The ADG does welcome a number of positive policy progressions on elements included in the Media Reform Green Paper:

1. That only new Australian commissions are proposed to be included when assessing whether Tier 1 SVODs are investing in Australian content (not captured acquisitions and re-licensing). New Australian content commissions are where public policy outcomes have highest impact for both audience and industry.
2. That the Discussion Paper excludes elements from earlier proposals which excluded any streaming platforms which had ownership links with licensed broadcasters from the proposed regulatory scheme. As stated in our previous Green Paper submission, we recommend that the investment obligation should apply to all types of SVODs, BVODs and AVODs with no exemption for services owned by a corporate structure that also owns a broadcasting licence.
3. That the Discussion Paper recognises the importance of discoverability for Australian content and that Tier 1 services will be required to report on the extent to which they are making Australian content promoted to Australian audiences.

We would note that many of the issues raised in this submission have also already been addressed at length in numerous past submissions by the ADG and the Australian Screen Industry Group (ASIG) including, most recently, in the ADG's submission to the 'Modernising television regulation in Australia – Media Reform Green Paper'.

3.SUBMISSION

3.1 Expenditure Requirement and Additional Considerations

We support the swift introduction of a 20% Australian commissioned content expenditure requirement on global technology streaming businesses, with specific protections for critical genres and terms of trade safeguards.

A defining feature of the Australian content market that determines local production rates, is that we share the same language with two of the world's largest content markets - the UK and the US. This easy-to-access content exchange is one of the main reasons why local content requirements exist and are still needed. After years of review and inaction, streaming services regulation is long overdue. The current era represents a unique opportunity to deliver an optimal future framework that will ensure a full range of quality and diversity of Australian content on Australian screens.

Whilst some streaming providers have pursued engagement with local audiences and industry stakeholders through Australian content without regulation, it is not true of all providers. The level of voluntary local content production remains susceptible to changes in management, strategy, international regulatory frameworks and indeed fluctuations in the perceived risk of any future regulatory intervention here. The provision of Australian content on Australian screens cannot be at the sole strategic discretion of these global businesses. These highly profitable businesses rely on the publicly-owned National Broadband Network (NBN) infrastructure to deliver their services. The reciprocal public interest obligation should be reflected in our regulatory framework. Provision of Australian content on these highly profitable streaming services must be by way of consistent, and certain regulatory obligation.

We'd note that our proposal for 20% is offset by the deficit that has been created by Government deregulatory action on commercial free-to-air platforms with modelling undertaken by SPA suggesting that the deregulation already enacted could amount to a loss of \$97 million a year in screen sector investment. Our assessment of the appropriate rate of obligation for streaming platforms at 20% is built around not just the transitioning of this lost level of investment (and capturing existing streamer productions levels) but seizing the opportunity to capitalise on a high growth market and deliver stronger levels of production to deliver significant incremental investment in skills and jobs without any additional impact on public funding.

A timely implementation of obligations in-line with international precedents is important for several reasons including the real risk to Australia from streaming platforms directing production spend to jurisdictions in which there are mandated minimum investment levels.

The ADG submits that expenditure on acquisitions and licensing should not be eligible for meeting regulatory obligations and that these obligations should include minimum hours of Australian content. This will avoid situations where monetary expenditure alone allows a service provider to discharge its obligations and encourages them to commission a variety of new, diverse Australian content.

3.2 Eligibility Requirement

We recommend that eligibility requirements for qualifying services should be set at 500,000 subscribers or registered users and AU\$50 million per annum in Australian revenue. Further, as stated in our previous Green Paper submission, we recommend that the investment obligation should apply to all types of SVODs, BVODs and AVODs with no exemption for services owned by a corporate structure that also owns a broadcasting licence.

3.3 Expected Scheme Shortfall against Public Policy Outcomes

The current scheme does not deliver on well-established cultural public policy objectives, nor does it address the public's expectation for meaningful levels of Australian content on streaming services, as well as ensuring a sustainable future for the local production industry.

These changes do not represent legislative innovation, but simply bring Australia into line with how advanced economies regulate sophisticated screen industries. Strong global precedents for content expenditure requirements have been established in multiple territories around the world with no adverse reaction from global streaming businesses.

Further, and perhaps more importantly, there has been no adverse consequence for the consumers and a net benefit to local industries. A failure to do so here would amount to an abdication of responsibility to Australian culture and industry, and a timidity in asserting Australia's economic interests. This intervention builds a robust local industry with jobs growth without cost to the taxpayer, making this an efficient intervention.

3.4 Lengthy and Uncertain Pathway to Regulation

The scheme proposed in this Discussion Paper is weak, years-long and is one that creates an uncertain pathway to regulation. It features an untenable level of Ministerial discretion and could likely result in less new Australian content on streaming services. Our view is that this is not a framework for much-needed industry growth but at best, may only serve to maintain an inadequate status quo.

3.5 Disconnect between policy considerations and regulatory action

There is a clearly recognised need for more Australian content on these streaming services, a need which is recognised by the Government itself in this Discussion Paper. There appears therefore to be a strange disconnect between the policy considerations outlined in the paper as a situation requiring regulatory action, and the proposal for weak regulatory action.

The rapid shift to streaming being the means by which most Australian engage with screen content has disadvantaged existing Australian broadcasters and left an uneven playing field, hindering their ability to compete with the under-regulated parts of the sector. We believe the pre pandemic quota system on local free-to-air and cable broadcasters is appropriate and in the national interest. This pre-pandemic regulation is still fit for purpose; so much so that it should be applied to all new entrants to the market in the form we have suggested.

In refusing to apply and enforce a meaningful 'Australian Commissioned' content expenditure requirement on global streaming businesses, the Government is facilitating and entrenching disadvantage for Australian broadcasters, which in turn disadvantages the entire Australian screen sector.

The answer here cannot be to further weaken the industry by further relaxing content requirements for free-to-air broadcasters, but to require the large streaming services to engage meaningfully in the marketplace by competing for quality Australian content and re-investing in our local industry.

3.6 Terms of Trade & Copyright in Changed Industry Dynamic

One of the foundations to the sustainability of independent screen businesses and high quality, diverse screen stories is independent Australian screen producer's and Australian author's (Directors/Writers) ability to secure fair and equitable terms and to retain revenue generating copyright with commissioning platforms.

We are concerned that the rise in prominence of streamers in the screen production sector is giving rise to a changed dynamic in bargaining power between Australian content producers (most commonly SMEs) and global streaming businesses where Australian producers and creative contributors are increasingly expected to sign away a full suite of proprietary rights over a longer period. For example, worldwide screening rights in perpetuity and valuable intellectual property. Australia is lagging other countries such as the UK, and France in addressing these imbalances.

This shift, known as "terms of trade", affects the risk/reward proposition for Australian producers and authors (Directors/Writers), more commonly to the detriment of the Australian screen industry ecosystem. This should have been addressed in the Discussion Paper, this is as a serious oversight that requires action from government.

Long-term financial outcomes derived from ongoing copyright ownership is critical to sustaining and retaining talented authors, including directors, in Australia. Australian directors derive an important ongoing income stream from their retention of copyright tied to an initial broadcast of content on a linear broadcast network, royalties being generated when content is retransmitted on a different network. We strongly urge the government to address the lack of copyright for directors and subsequent lack of secondary remuneration schemes for online exploitation for creators in Australia by introducing schemes in line with European Copyright Directives.

All European Union member states recognise the principal director of a film or audiovisual work as an author—and therefore first owner of copyright—of that work. This is enshrined in Article 2.2 of the Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on article 2 of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.

Under Article 18-22 of the Directive on copyright and related rights in the Digital Single Market EU/2019/790 of April 2019 '*Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration*'¹. This Directive further ensures authors such as Directors and Screen Writers, as well as creators including Performers are fairly compensated for the online exploitation of their work through an effective collective management model. An unassignable right to remuneration, as is in place in Spain

¹ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.130.01.0092.01.ENG

and Italy, successfully addressed the lack of bargaining power of authors and ultimately incentivised the creation of new content as exemplified by strong economic growth in the screen sector in both countries².

3.7 Excessive Ministerial Discretion

We are concerned that the proposal includes an alarming degree of Ministerial discretion, which brings with it untenable risk of inadequate and inconsistent regulatory action and does not place any obligation on future Ministers to act in any particular way. Under this framework, Australian content becomes a matter for the uncertain preferences of future Ministers, who are subject to intense lobbying efforts of large commercial corporations which our industry has seen the negative effects of during the pandemic, without a strong regulatory framework to bind them to important public interest principles.

The proposal creates significant uncertainty for the Australian industry when compared to other territories and will likely lead to a migration of production and the associated talent and investment offshore.

3.8 Impact from further delays to regulation

The policy conversation regarding these issues has been in train for a decade, the need for meaningful regulatory action has been clear for many years. We are concerned that further delay in regulation at this late stage is damaging to the industry, exacerbated by the weakness of the scheme proposed.

In previous submissions, it was argued that this regulation should have been implemented by 1 January 2022. Failing that, regulation should be finalised and implemented as soon as possible. The Scheme proposed will mean that regulatory obligations may not take effect until 2026. This is of great concern, as policy considerations that justify urgent regulatory intervention are now evident.

Government has already embarked on a shift in regulatory emphasis from linear broadcasters. As stated above, SPA modelling suggests that the deregulation already enacted could amount to a loss of \$97 million a year in screen sector investment. It is imperative that it takes urgent action to complete its work by implementing an appropriate regulatory framework for streaming platforms operating with significant reach and influence.

Further, an influx of international production driven by our relative COVID safety and \$400m in Locations Offset top-ups has created increased production capacity, provided strong employment growth for local crews and a much-welcomed economic boost to screen industry infrastructure and technology companies. However, this is abating as the world goes back to normal, there is present risk that any sector capacity and skills gains will be lost. Inevitably comparable or better financial incentives will be introduced by competing jurisdictions in closer time zones to the US with more favourable exchange rates as they stimulate recovery in their own screen sectors. If staged correctly and swiftly the implementation of streamer content

²See CISAC Case Studies on 'Spain's audio-visual sector: fair remuneration and economic growth' <https://www.cisac.org/Newsroom/articles/spains-audiovisual-sector-fair-remuneration-and-economic-growth> and 'Italian's audio-visual sector: fair remuneration and economic growth' <https://www.cisac.org/Newsroom/articles/fair-remuneration-directors-and-screenwriters-italian-case-study>.

obligations has every opportunity to provide employment continuity for these cast, crews, and businesses.

3.9 Tier 1 Threshold

We believe that the proposed 5% threshold for Tier 1 services will fall far short of what is required to ensure the regulatory scheme meets public policy objectives regarding the availability of Australian content to audiences, and the support of a vibrant and sustainable local production sector.

The Australia Institute found that 60 per cent of Australian adults supported regulation of the large streaming services and they supported a minimum rate of 20% reinvestment in local content.³ Deloitte's 2021 Media Consumer survey found that 47% of adults felt that SVOD services did not have enough Australian content.⁴

Consistent with the findings of the House of Representatives Standing Committee on Communications and the Arts in its 'Sculpting a National Plan' Report⁵, we support the swift introduction of a 20% Australian commissioned content expenditure requirement on global technology streaming businesses, with specific protections for critical genres and terms of trade safeguards.

The ADG notes the development in Europe of the Audiovisual Media Services Directive⁶ which requires streamers to offer a 30% quota of European content and additionally allows individual EU countries to introduce legislation to make streamers directly reinvest a percentage of their revenues in each European country where they operate.

In the explanation in the Discussion Paper regarding the 5% threshold, we are concerned that inappropriate comparisons have been made to jurisdictions which do not share the same market and industry conditions as exist in Australia. Many of the jurisdictions cited have the natural barrier to cheaper content substitution from dominant English speaking markets by virtue of language. For example, the paper references the Czech Republic, Slovenia, Denmark, Belgium, Croatia, and Germany as benchmarks where a 5% investment obligation (or levy) has been imposed.

A 20% expenditure requirement is a very low return on the reported \$2 billion in revenue the global streaming technology businesses derive from Australia consumers and a minuscule proportion of the \$37 billion streaming platforms reportedly spend on content worldwide.

The ADG proposes that the investment obligation should only be able to be acquitted through newly commissioned programs, and that expenditure on licensing and acquisitions should not be eligible for meeting regulatory requirements. The ADG also submits that regulated entities be required to work with independent Australian production companies with a minimum requirement of 80% of their expenditure obligation spent in the independent sector.

³ <https://australiainstitute.org.au/post/polling-majority-want-video-on-demand-services-to-put-20-of-revenue-toward-australian-content/>

⁴ <https://www2.deloitte.com/au/en/pages/technology-media-and-telecommunications/articles/media-consumer-survey.html>

⁵ https://www.aph.gov.au/Parliamentary_Business/Committees/House/Communications/Arts/Report

⁶ <https://digital-strategy.ec.europa.eu/en/policies/audiovisual-and-media-services>

3.10 Tier 2 Threshold

We are concerned that the rate of obligation for a Tier 2 service could in fact be set at less than 5%, and that there is no provision for public consultation when setting a Tier 2 obligation.

The Discussion Paper proposes that a failure to report/invest at least 5% of revenues in Australian content would not automatically trigger hard regulatory obligations. The Discussion Paper states that the Minister would “*consider* designating the service under Tier 2 of the scheme.” This appears to leave it open to government to take no further action in response to this scenario.

New Australian content commissions are where public policy outcomes have highest impact for both audience and industry. The Minister's ability to take into consideration investments other than new commissions lessens the sound proposal in the Discussion Paper for only new Australian commissions to count in the trigger calculation

The ADG considers it advisable to include a short period public consultation process on any proposed designations for tier 1 and tier 2. In Canada public consultation on Canadian content obligations is a feature of its regulatory process, we believe parliamentary scrutiny here would be an essential and invaluable program element.

3.11 Protections for Critical Genres

We have consistently recommended that any scheme should include specific protections for critical genres including drama, documentary, First Nations, and children's content with investment in content falling away in the absence of regulatory supports.

The 2021 Screen Australia Drama Report shows that investment in Australian drama by commercial free-to-air television was half the amount in the last full year of the outgoing regulatory framework (\$107m in 2018/19, down to \$54 million in 2020/21).⁷

The report shows that the amount of Australian drama made for commercial free-to-air television also sharply declined because of deregulation, down from 434 hours in the last full year of the previous regulatory framework, to 282 hours in 2020/21. The number of programs was down also from 25 in 2018/19 to 11 in 2020/21.

The impact on children's content is of particular concern. Under the new regulatory framework for commercial free-to-air television, there are no minimum requirements for children's content. Screen Australia's data shows that whilst spend was steady on last year (\$48m compared to \$51m), the number of titles halved (7 down from 14) and the number of hours more than halved 39 down from 87).

There is no element of the proposed regulatory framework for child audiences, who will still have no guaranteed access to Australian content. It is expected that SVODs would rely primarily on acquired overseas children's content. This would be unacceptable to Australian parents. Similarly, there is no consideration in the proposed Scheme for screen content that directly incentivises or requires the production of content from First Nations people. The ADG believes this is a substantial oversight.

⁷ <https://www.screenaustralia.gov.au/fact-finders/reports-and-key-issues/reports-and-discussion-papers/drama-report>

3.12 Proposed Reporting Requirements for National Broadcasters

A greater certainty and predictability in the investment levels and objectives and genre priorities of the ABC & SBS would be welcomed by the local screen sector and would be of great assistance in respect of business planning and creative development.

We support the proposed more rigorous reporting requirements and accountability measures for the national broadcasters but also support more formal expenditure minimum requirements that safeguard Australian content on these vital public services. We would welcome further engagement with government in developing these regulatory elements. In particular, we feel there would be benefit to development of content production mechanisms which ensure the direct flow of appropriate levels of Government funding into the independent production sector. These requirements should be accompanied by adequate and viable levels of national broadcaster funding.

3.13 Australian Content Definition

We support a single Australian Content definition across all aspects of the industry. We recommend adopting the definition contained in the Australian content standards for commercial free-to-air television, given the regulator's experience and expertise in applying these and the precision with which that definition is applied.⁸

3.14 Subscription Television Drama Obligation

We oppose the proposed halving of the subscription television Australian drama obligation. The proposed cut will substantially harm subscription television audiences, who will lose access to high quality Australian narrative content. The proposal is without reasonable policy justification and is contrary to the recommendations made by the Senate Standing Committee considering the Broadcasting Legislation Amendment (2021 Measures No.1) that the Foxtel cuts be withdrawn, and a review of streaming services be expedited.

The NEDE scheme has created a wealth of high-quality award winning content, including such notable titles as *Top of the Lake*, *Hacksaw Ridge*, *Lion*, *Love My Way*, *Wentworth*, *Devil's Playground*, *Deadline Gallipoli*, *Fight Season*, *Mr Inbetween*, *Picnic at Hanging Rock*, *Secret City*, *Upright*, *Wentworth* and *Tangle*. This not only is of great benefit to Australian audiences, Pay TV also benefits financially from its ability to recoup investments from international sales and market awards successes to drive subscriber growth.

The NEDE scheme is significantly less onerous and inherently more flexible than the mandated annual quotas subsequently placed on Commercial Free-to-air Broadcasters. Pay TV's Australian Drama spend obligation tracks with overall drama spend and business performance – a decision to invest less in drama overall results in a requirement to invest in less Australian drama. The fact that recent levels of investment are at or about the minimum required amount suggests regulation is the determining factor in Australian drama content being created.

We agree that there is a need to correct regulatory imbalance across traditional and new on-line platforms, but we do not agree that the appropriate response is to

⁸ <https://www.legislation.gov.au/Details/F2020L01653>

in a requirement to invest in less Australian drama. The fact that recent levels of investment are at or about the minimum required amount suggests regulation is the determining factor in Australian drama content being created.

We agree that there is a need to correct regulatory imbalance across traditional and new on-line platforms, but we do not agree that the appropriate response is to substantially reduce or remove regulation on traditional platforms rather impose sensible and proportionate regulation on new platforms.

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