

7 December 2020

Ms Creina Chapman
Deputy Chair and CEO
Australian Communications and Media Authority

By email: Creina.Chapman@acma.gov.au

Dear Ms Chapman

Changes to the Australian content and children's television standards

Thank you for your letter dated 16 November regarding the *Changes to the Australian content and children's television standards consultation paper* (consultation paper) and the draft *Broadcasting Services (Australian Content and Children's Television) Standards 2020* (the draft standards) and for the opportunity to comment on the draft standards.

Free TV welcomes the draft standards which will implement measures to support Australian content by replacing the existing sub-quotas for Australian drama, documentary and children's programs with a new simplified and reduced quota obligation. These reforms provide broadcasters with greater flexibility to respond to audience demands and will support the sustainability of the television production industry and in turn, the entire Australian content production ecosystem.

While we warmly welcome these reforms, Free TV has identified the following key areas where we are concerned the draft standards either do not achieve the intended public policy outcome or their intended operation is unclear:

- The revised definition of 'first release' means that many acquired films, and in particular feature films, will not be able to be counted under the new quota. In addition, it imposes a new restriction on commissioned programs, effectively requiring them to be scheduled for broadcast within 2 years of completion of production. We believe, this is contrary to the intention of the reforms.
- Under the definition of 'commissioned', a financial contribution should be considered 'made' once a commitment to pay has been made, consistent with current practices.
- Consistent with the Minister's Direction, 'meaningful and material' should not be constrained by inclusion of any quantitative measures in the explanatory or guidance material accompanying the new standards.
- Section 17 should be amended so that broadcasters are not required to report on licence fees or production budget cost per hour per program – this is highly commercially sensitive information.
- Subsection 43(2) should be amended to clarify that programs commissioned before 1 January 2021, and broadcast after 1 January 2021, should be able to count for the section 13 points quota for any future year.
- Obligations should not be placed on individual licensees (which do not acquire or commission programs) but rather on the network.

We set out our comments in relation to each of these issues in detail below.

1. Definition of first release

The definition of first release in the direction provides:

“First release means a program that is first broadcast in a licence area (whether or not the program has already been broadcast in the licence area by a subscription television broadcasting service) within 2 years of the completion of production of the program.”

While this is consistent with the *Broadcasting Services (Australian Content and Children’s Television Standards) Direction 2020* (Ministerial Direction), the proposed new definition is problematic for two reasons:

- A. Films - it will prevent many acquired films, and in particular feature films, from counting towards the new quota obligations, due to windowing of this type of content; and
- B. Commissioned programs - it also effectively introduces a new scheduling restriction on broadcasters’ commissioned programs, which would also be required to be ‘first release’ and therefore ‘broadcast within 2 years of completion of production’, in order to count towards the new quota.

A. Films

Current industry practices for feature films involve them first having a cinematic release, followed by pay per view window, followed by subscription broadcast or streaming platform followed by free-to-air broadcast. The windowing of feature films is illustrated by the timeline below:



A number of feature films are not available for free-to-air broadcast until 2 - 4 years or more after production has completed.

While we are now seeing in a number of cases a new lifecycle for films that do not have a theatrical release in response to the growth and scope of streaming services, in the absence of a theatrical window, the first paid window, Pay 1 Window, will often be extended, having anywhere from 12-24 months of exclusivity depending on the fee. This leaves little to no time for free-to-air broadcasters to access and play the film.

The removal of the theatrical release can also result in an additional pay window following the Pay 1 and Pay 2 windows set out above with a further window for streamers. We are now seeing this in markets such as the US. In cases where there is a Pay 3 window, placed 6 months before the free-to-air window, there is almost certainly no time for a free-to-air release within 2 years from completion of production.

For example:

- ***The Very Excellent Mr Dundee*** - completed production in January 2020. It did not have a cinematic release however Amazon bid to buy out the cinematic window as well as the Pay window and secured exclusivity from July 2020 until July 2022. The film was therefore unavailable for broadcast until **2 years 6 months** after the conclusion of production.
- ***Ride like a girl*** – completed production in February 2019 and was released in cinemas in September 2019. The first Pay window started in April 2020 for a period of 9 months and the second Pay window will start in January 2021 for a period of 6 months. The film will be available for free-to-air broadcast in July 2021, **2 years and 5 months** from completion of production.
- ***Reaching distance*** – completed production in June/July 2018 and had a cinematic release in late October 2018. The first Pay window started in April 2019 for 12 months and the second Pay period started in May 2020 or 6 months. The film was available for free-to-air broadcast in November 2020, **2 years 4 months** from completion of production.

The current ACS provides that a feature film will count towards a broadcasters' quota when first broadcast in the licence area if it has been acquired within 5 years of completion of production, which would allow for all of these films to count towards quota obligations. This definition should be retained in respect of acquired feature films, or the proposed definition amended to 'within 5 years of completion of production'. Alternatively, '2 years from the date the relevant rights are acquired' would be preferable to '2 years from completion of production'.

B. Commissioned programs

In relation to commissioned programs, the proposed draft standards appear to introduce a new requirement on broadcasters' own commissioned programs to broadcast them within 2 years of completion of production in order to be considered to be 'first release' and therefore to count towards the new quota.

This restriction has not previously been applied in relation to commissioned programs. The existing ACS does not require that commissioned programs be broadcast within a certain timeframe. The introduction of this new requirement appears to be contrary to the intention of the reforms - the Minister's announcement and accompanying fact sheets do not refer to any requirement that commissioned content also needs to be 'first release' or broadcast within a specific time period.¹

Logically it also does not make sense for programs that broadcasters commission at great expense to be excluded from the quota, merely because of delays in getting the program to air, either as a result of legal claims, or any other extraneous circumstances. This would be a concerning interference into the commercial decisions of broadcasters that would discourage investment in the development of programs dealing with real-life events that, which while clearly in the public interest, need to be delayed because the public interest in broadcasting the program needs to be balanced against defendants' interests in a fair trial. For example, programs that would not be considered to be 'first release' under the draft standards include:

- ***Australian Gangster*** – This series was commissioned by Seven West Media from Village Roadshow, with investment from Screen Australia in association with Create NSW. While the series was completed and set to premier in **2018**, legal advice was obtained that the series could not run due to a criminal trial of one of the real-life characters. As the date of the trial was postponed several

¹ See [file:///C:/Users/SWaladan/Downloads/fact-sheet-modernising-australian-content-regulation_1%20\(9\).pdf](file:///C:/Users/SWaladan/Downloads/fact-sheet-modernising-australian-content-regulation_1%20(9).pdf)

times, there was significant uncertainty in relation to when the program could be broadcast, and the series is now set to premier in 2021.

- **Blue Murder** – A highly acclaimed drama mini-series based on career criminal Neddy Smith in the 1980s, was released for broadcast across most states in Australia from 1995 however could not be broadcast in NSW or the ACT until 2001 - 6 years later - because Smith was charged with seven counts of murder just before the program was due to be broadcast in 1995. The program was only released for broadcast in 2001 following the DPP's decision not to proceed with the remaining outstanding charges.

There was clearly a strong public interest value in investing in these programs. In Free TV's view, commissioned programs should therefore always count as first release when they have been broadcast for the first time in a particular licence area, as they do under the current ACS.

2. Definition of 'Commissioned'

The draft standards provide that:

'Commissioned, in relation to a program, means that a commercial television broadcasting licensee or its program supplier has made a material and meaningful financial contribution to the production of a program before the production has been completed (and includes in-house production).

We seek to clarify that a financial contribution would be considered 'made' under this definition once a commitment to pay has been made, for example under a contract, regardless of whether or not payment has actually been made. This flexibility is important because it accommodates existing practices, for example, it would allow for circumstances where there may be other financiers and the agreement with the producer allows for the previously agreed broadcasters' contribution to be made following completion of production.

We would also note that in relation to the wording 'material and meaningful financial contribution' – consistent with the Minister's direction, any guidance material should not include specific quantitative references which would constrain the ACMA's discretion to determine whether a particular contribution is 'material and meaningful' in all the circumstances of the particular production.

3. Reporting

In relation to reporting, Free TV is concerned that proposed clause 17 is not practical as currently drafted.

Clause (b) requires broadcasters to provide the ACMA in writing, the licence fees and/or production budget cost per hour for each program claimed against the quota for that year. This information is highly commercially sensitive. Specific cost information should not be a matter that broadcasters are required to report on.

Subsection (b) should be removed and replaced with a requirement that broadcasters report on the categories of programming that they have commissioned or acquired to acquit their 250 points, as well as the number of points against each genre/category. This is consistent with the existing drama points model whereby broadcasters report on format factors but are not required to provide any associated cost information. If necessary, this information could be verified by a statutory declaration from a suitable executive within the broadcaster that they have accurately categorised their programming and complied.



Free TV members are also concerned that cost-related information is commercially sensitive, and may be subject to confidentiality provisions, and should not be publicly available or otherwise published by the ACMA.

In relation to regional licensees, subsections (b) and (c) will not be applicable in most cases in any event, as content will often not have been acquired or commissioned directly by the licensee and the financial information therefore will not be available to them. We note that the forms that broadcasters are required to use to report on matters contained in subsection (1) should recognise this and streamline reporting to the ACMA so that licensees are not required to unnecessarily duplicate matters that they are not best placed to report on.

In addition, we note that the existing ACS provides by way of a note that the ACMA will consult with representatives of the commercial television industry in relation to reporting requirements. In our view this should continue.

4. Transitional provisions

Section 43(2) provides:

*"Any first release Australian program commissioned before 1 January 2021, and broadcast on or after 1 January 2021, may be used by a licensee to satisfy the section 13 points quota **for the 2021 year**, if it otherwise meets the applicable requirements of these standards."*

While we do not disagree, we note that the words 'for the 2021 year' are not required. Programs commissioned before 1 January 2021, and broadcast after 1 January 2021, should be able to count for the section 13 points quota for any future year. To avoid confusion, the words 'for the 2021 year' should be removed.

5. Reference to 'the licensee'

The draft standards refer to 'the licensee' throughout (for example, including in relation to the definition of 'commissioned', the definition of 'licence fee' and the reporting obligations). We note that while a number of licensees hold broadcasting licences in different licence areas, it is not generally the 'licensee' in a particular licence area that commissions or acquires the relevant program. Rather, companies upstream in the corporate structure are responsible for the commissioning/acquisition while the licensee broadcasts it pursuant to a commercial agreement between the entities within the corporate structure. The draft standards should reflect this, and the obligations drafted in such a way that they do not place requirements on each of the 64 individual licensees.

Please do not hesitate to contact me if you wish to discuss any matter raised in this letter.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Bridget Fair". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bridget Fair
Chief Executive Officer