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Screen Producers Australia's submission on the draft new Broadcasting Services (Australian and Children's Television) Standard 2020

Screen Producers Australia (SPA) was formed by the screen industry businesses representing large and small enterprises across a diverse production slate of feature film, television and interactive content.

As the peak industry and trade body, we consult with a membership of more than 500 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and Policy Reference Group representatives. Our members employ hundreds of producers, thousands of related industry practitioners and drive more than \$1.2 billion worth of annual production activity from the independent sector.

SPA's members are drawn from all elements of the production ecosystem, including emerging and established producers, production businesses, services and facilities. Our members vary in size from large internationally owned entities, to partnerships, to sole traders and other corporate entities, and are found in every region, state and territory of Australia.

On behalf of these businesses, we are focused on delivering a healthy commercial environment for the screen industry through ongoing engagement with elements of the labour force, including directors, writers, actors and crew, as well as with broadcasters, distributors and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

SPA welcomes the opportunity to comment on the draft new Broadcasting Services (Australian and Children's Television) Standard 2020 ('the Standard') and the associated ACMA consultation paper.

For further information about this submission please contact Holly Brimble, Director of Policy (holly.brimble@screenproducers.org.au).

Table of Contents

1	<i>Executive Summary.....</i>	3
2	<i>Draft new regulation</i>	4
2.1	Definition of ‘commissioned’	4
2.2	Production expenditure	5
2.3	Definition of ‘first release’	5
2.4	Treatment of New Zealand content	6
2.5	Definition of Australian content	6
2.6	Carry over of excess points	6
2.7	Review	7
3	<i>The impact of the proposed new standard</i>	7
3.1	Likely outcomes	8
3.2	Impact on children’s programming	10
3.3	Transition of regulation	11

1 Executive Summary

- SPA welcomes the opportunity to comment on the draft new Broadcasting Services (Australian and Children's Television) Standard 2020 ('the Standard') and the associated ACMA consultation paper.
- Whilst the focus of this consultation is on the implementation of the Government's decision to reduce regulation on commercial free-to-air television broadcasters, SPA nevertheless wishes to record its strong concerns regarding the underlying policy decision.
- It is clear that the new regulatory framework will result in a substantial reduction in the amount of Australian drama, children's and documentary television content available to Australian audiences.
- The impact will be particularly acute in relation to children's content, with the removal of mandated minimums combined with the broadcasters' stated intention not to commission this content likely to see this content all but disappear from the platform.
- SPA also has concerns regarding the drafting of the proposed new Standard, primarily in relation to the definition of 'commission', which is a key concept within the new points system.
- The proposed definition is subjective and loosely defined, and leaves open the possibility of broadcasters' financial contributions trending even further downward. It is vital that a quantitative measure be included in the definition, and SPA proposes that a broadcaster contribution of 30% of the production budget should be considered.
- SPA also supports stronger guidance regarding the scope of 'production budget' in the new standard, and raises concerns regarding the definition of 'new release', which as drafted will exacerbate the declines in original Australian content on our screens.
- Given the significant reduction in the regulatory burden applying to commercial free-to-air television, and the potentially significant impact on audiences and producers, SPA submits that the revised regulatory framework should be required to be reviewed after 1 year of operation.

2 Draft new regulation

SPA notes that the draft new regulations released by the ACMA conform closely to the *Broadcasting Services (Australian Content and Children's Television Standards) Direction 2020*, issued by the Minister and binding on the ACMA. SPA wishes to comment on several key aspects of the ACMA's implementation of that direction.

2.1 Definition of 'commissioned'

We have strong concerns that the proposed definition of 'commissioned' will not effectively guarantee meaningful financial contributions from broadcasters into the content they will use to acquit their minimum points obligation.

The ACMA has proposed a definition without a quantitative measure, instead putting forward a subjective measure which refers to a 'material and meaningful' financial contribution. This is to be assessed by the ACMA in the context of assessing annual compliance reports or in the context of an investigation.

We are concerned that it would be possible for a small financial contribution to be deemed to be 'material and meaningful', and that a subjective measure such as this cannot effectively guarantee appropriate financial contributions. For example, in financing a project, it can reasonably be argued that any particular element of the finance plan, regardless of its size, is 'material and meaningful', in that without that finance, the project may not be viable.

Whilst this may not be the intention of the ACMA or the Government in proposing this definition, we view it as an arguable position, which causes considerable concern. Given the history in recent years of broadcasters driving down their financial contribution (licence fees) in commissioned projects, it is not unreasonable to assume this behaviour would continue and in fact be encouraged by a subjective measure under the proposed new system. Broadcasters are on record in their position of wishing to reduce their financial contribution to Australian scripted content in particular,¹ and this matches the experience of independent producers in the market.

We are therefore of the view that it is critical that a clear guide be included in the definition of 'commissioned', in order to ensure broadcaster obligations are meaningful. We note the concept of specifying minimum financial contributions already exists in the outgoing Australian Content Standard, and hence could not be construed as a novel concept.

We propose that the definition be reworded as follows:

commissioned, in relation to a program, means that a 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). **For the avoidance of doubt, a broadcaster**

¹ <https://www.freetv.com.au/wp-content/uploads/2020/07/Free-TV-Submission-to-Australian-Content-Options-Paper-6-July-2020.pdf>

contribution of 30% will automatically be considered to be material and meaningful, and this level of contribution will guide assessment of compliance more generally.

If there is a concern that a quantitative measure may fail to accommodate changes in the marketplace for commissioning, we suggest the thresholds that are adopted be subject to regular and ongoing review (in consultation with industry stakeholders). Whilst this may introduce some uncertainty into the system, we submit this would nevertheless provide more certainty than the currently proposed subjective measure of 'commission'.

An upfront signal of clear expectations regarding minimum financial contributions will far more effectively guarantee an appropriate engagement from broadcasters, when compared to a subjective measure which will only be assessed at the end of a compliance period.

2.2 Production expenditure

We also note the inclusion of a definition of 'production budget', which given the way in which the points system is stratified, will be a key concept in the new scheme. Whilst the proposed definition is reasonable, we should be mindful of any potential for production budgets to be artificially inflated, given the incentive towards higher production budgets in the proposed new points system. It would be prudent for the ACMA to commit to the publication of guidelines regarding what expenditure will be considered to be "reasonably attributable" to the making of a program, and how the ACMA will determine whether the expenditure claimed is 'reasonable'.

2.3 Definition of 'first release'

We note the proposed definition of 'first release', which will permit content to count towards the 250 point quota even where that content has already been broadcast by a subscription television licensee or distributed on an on-demand service. We note this is drawn from the Minister's direction and that the ACMA is therefore constrained in its ability to amend this definition.

However, SPA wishes to note its strong concern at this approach, which will effectively allow the same Australian programs to be used to acquit content quotas on separate platforms. This will undoubtedly place downward pressure on the amount of Australian content that will be made, on top of the already significant reductions which will arise from the reduced commercial free-to-air and subscription television quotas.

We note this proposal was not outlined in the Government's options paper, nor was it flagged in the materials associated with the Government's announcement on 30 September 2020. Industry has therefore not been provided with the opportunity to provide feedback on this deregulatory proposal, which is disappointing given the clear potential for it to result in less Australian content overall.

The likely impact will be felt by audiences, who will lose access to a diversity of Australian programming, and by the production sector, which will see a decline in commissioning.

2.4 Treatment of New Zealand content

We also note that under the new arrangements, acquired New Zealand films will still be able to be counted as Australian content. Whilst the focus in the new system on the need for broadcasters to have commissioned content is clearly intended to address the New Zealand problem, the continued availability of a loophole for New Zealand films is of concern. Successive years of ACMA compliance reports for the Australian Content Standard demonstrate a clear willingness on the part of some broadcasters to use a substantial amount of New Zealand content to acquit Australian content requirements.

SPA is aware of broadcasters, following the announcement of the new points system, actively seeking out New Zealand films for acquisition.

Further work is required from Government to close this loophole.

2.5 Definition of Australian content

We note the Minister's Direction requires the ACMA to carry over the existing definition of Australian content from the existing Australian content standard.

SPA sees this as a missed opportunity to create a harmonised definition of Australian content across regulatory and Government support mechanisms.

As noted in its submission to the Government's options paper, SPA supports a revised single test to determine whether content is eligible to be regarded as significant Australian content, across all regulatory and support measures.²

We proposed a model similar to the points-based test used by the British Film Institute³, which provides a level of certainty, objectivity and transparency, which will be extremely valuable to production businesses in forward business planning, particularly in regard to the types of content they choose to develop.

2.6 Carry over of excess points

SPA is disappointed that the proposed new regulation includes an ability for licensees to 'carry over' a maximum of 50 points from a previous year, where that licensee had exceeded the minimum 250 points in that previous year. This proposed change was not outlined in the Government's options paper and industry has not previously had the opportunity to comment.

It is highly concerning that in an environment in which the overall level of Australian content will reduce (as a result of the reduction in obligations), a further downward influence on commissioning will be included in the regulatory framework in the form of this 'carry over' provision.

² <https://assets-us-01.kc-usercontent.com/89c218af-4a5a-00a2-9d83-3913048b3bc7/e1a32a48-4342-4b0d-aacc-e356ed16b9e1/20200702%20-%20SPA%20Options%20Paper%20submission%20-%20v%206.pdf>

³ <https://www.bfi.org.uk/film-industry/british-certification-tax-relief/cultural-test-video-games/summary-points-cultural-test-film>

2.7 Review

Given the significant reduction in the regulatory burden applying to commercial free-to-air television, and the potentially significant impact on audiences and the wider screen sector, SPA submits that the regulatory instruments should be required to be reviewed after 1 year of operation.

It will be crucial to have an opportunity to assess the outcomes of the revised points system in terms of broadcaster investment and commissions and in terms of the amount of Australian content available to Australians for free on these universal services. Several of the concepts in the revised points system are new to this area of regulation (for example, the focus on production budget and the practical definition of 'commission') and a review will allow an assessment of how they have been implemented.

If this can't be implemented by the ACMA because of the constraints of the Minister's Direction, SPA urges the Government to commit to such a review in 2022.

3 The impact of the proposed new standard

We note the indication from the ACMA that it is inviting comments on the draft standard, to the exclusion of comments on the policy approach taken by the Government.

SPA nevertheless wishes to record its strong concerns regarding the likely impacts for audiences and industry of the proposed new points system for commercial free-to-air television.

Australian content quotas on commercial free-to-air television have been the cornerstone of Government intervention to ensure the production and widespread distribution of Australian screen content, alongside subscription television regulation, tax incentives and direct funding. In its submission to the Government's options paper review, SPA recognised that the quota system had come under pressure from changing technology and consumer habits, as well as a regulatory disparity with emerging platforms. SPA therefore proposed widespread reform to bring all content platforms under a modernised and harmonised regulatory scheme.

The Government has decided against pursuing a complete modernisation opportunity and has instead announced a substantial lessening of commercial free-to-air and subscription television quotas and left the underlying differences between these two systems in place.

SPA has assessed the new points system, and in relation to drama alone, estimates the impact will be in terms of \$100 million less investment in production and a loss of 2,800 jobs caused by isolating the reduction in the regulation.

We are aware of claims that this modelling has limitations, because it does not take into account an offsetting increase in demand from new platforms and services. However, in our view it is difficult to come to a conclusion regarding an offsetting increase without clarity on the final shape of regulation on new platforms and services.

SPA notes, and welcomes, the continued policy conversation regarding regulation of streaming platforms in the Government's recently released Media Reform Green Paper. However, we note with concern that new regulations are not intended to be operational until the 2022-23 financial year and that they potentially propose a different and therefore third type of regulation.

This leaves a significant gap between the deregulation of commercial free-to-air television and a new regulatory model for streaming platforms.

We also note that the preferred model currently for some streamers is acquisitions, or commissioning as a second investor behind the primary commissioning entity rather than being the primary commissioner. This strategy avoids the risks and challenges of development of content. Acquisitions do not provide the same financing support for a project as direct commissioning, and hence any increased acquisition activity is not a like-for-like substitution for commissioning activity.

We also remain concerned that the revised content requirements for commercial free-to-air television will result in a reduction in access to Australian content on ubiquitous and freely available services (with a disproportionate impact on lower socio-economic groups). It is our view that when commercial free-to-air services are properly motivated, they are able to develop and program content for a range of Australians in a way appropriate to the investment made by Australian tax payers in their services (through spectrum access and other regulatory benefits).

Our ongoing belief is that there is a substantial role for commercial free-to-air television across a range of genres of content, including scripted content for adults and a range of programming targeted for Australian youth.

3.1 Likely outcomes

In terms of adult drama, in what is a fairly straightforward analysis, it is apparent that a broadcaster could all but reach their required points output with a serial (soap opera). For example:

- Assume 1.5 points per hour (<\$450k production budget per hour)
- 130 hours per year (as reported in ACMA compliance reports for 2019)⁴
- 130 hours x 1.5 points = **195 points**

⁴ <https://www.acma.gov.au/publications/2020-06/report/2019-compliance-australian-and-childrens-content-compliance-tv-content-standards>

With the assumption that 50 points are acquitted through documentary, this leaves 5 points, which could be filled through a small run of special episodes of the serials.

It is also possible that the total budget per hour of a serial such as this could increase in a way designed to access the new 30% Producer Offset threshold (with the removal of the 65 episode cap), making the overall cost of the production cheaper to both the broadcaster and production company and meaning that the serial drama could graduate into the next points category and attract 4 points per hour. This would translate to:

- 130 hours per year x 4 points = **520 points**

This would negate the need to commission any other quota programming and could see the amount of hours reduce without causing any compliance issues.

It is clear that under this model the amount of drama, children's and documentary commissioning will reduce substantially in the coming years. We do not consider it likely that this impact will be fully offset by the additional funding announced or by voluntary commissions from streaming platforms (in advance of a mandatory requirement for 2022-23, as outlined in the Media Reform Green Paper).

Indeed, the extent to which the new regulatory framework for streaming services can offset the reduction arising from the new commercial free-to-air content standards will not be able to be assessed until the details of the new regulatory framework is known.

In our response to the Government's Media Reform Green Paper, SPA will be highlighting the need to expedite the transition to a robust regulatory framework for streaming platforms.

We are also concerned that the new system does not incentivise a level of investment by the broadcaster, instead focussing on the overall production budget. This system will reward content that potentially has a high level of investment from other sources, including the Government (through tax offsets and direct funding). The points applicable to various categories of content appear to have been subjectively determined and as analysis has pointed out:

*"That means there's little incentive for a broadcaster to commission shows costing more than \$1.4 million an hour. In fact, the absolute sweet spot would be a show costing \$450,001 per hour. That's worth four points, a cost of just \$112,500.25 per point, versus \$200,000 (or more) at the top end."*⁵

This would suggest that an intent to stimulate higher budget programming with this points system will likely fail.

We are not aware of a comparable approach in any other jurisdiction and this approach is not harmonised with, for example, the subscription television regulatory framework (which assesses expenditure by the platform on programming).

⁵ <https://www.smh.com.au/culture/tv-and-radio/let-s-hope-good-intentions-in-film-tv-reforms-don-t-pave-way-to-hell-20201001-p5610w.html>

3.2 Impact on children's programming

Australian children's television producers foresee a substantial threat to their viability arising from the changes to commercial free-to-air television quotas. Content commissioned by commercial free-to-air broadcasters would regularly appear on other platforms as second or third windows and receive high cumulative audiences both in Australia and overseas. Notwithstanding the additional funding announced for children's content, on the basis that it won't in itself trigger commissioning, it is likely Australian children will have substantially less Australian content on their viewing platforms as a result of the reforms.

The changes will leave only one readily available door for producers, the ABC, and in the absence of significant additional funding to either it or SBS/NITV, these platforms will not be able to replace the demand taken from the market through commercial free-to-air quota changes.

The lack of commissioning from broadcasters will also create significant financing challenges. Most Australian children's productions are co-financed with international territories, but Australian producers are dependent on local broadcasters to trigger tax offsets and other funding which attracts international investment. The Government's changes will remove broadcaster commissions and the flow-on effect is a collapse in all connected domestic and international production investment.

The industry has been aware for some time of a momentum building to change minimum children's obligations from commercial free-to-air television. However, the industry has engaged in ongoing conversations with government and with free-to-air broadcasters and their representative body about the appropriate means for transition, and the need for a new paradigm for children's content.

What has been sought has been measured and thoughtful changes permitting a transition of some regulation to new platforms while ensuring that some minimums of service continue to be provided to audiences on a range of free platforms, or to incentivise commissioning in any other way. The extent to which the proposed new regulation of streaming platforms incentivises commissioning of children's content will be crucial for the viability of many children's production businesses and the continued capacity of the sector to make great Australian children's content.

Whilst the announcement of additional funding to the Australian Children's Television Fund (ACTF) is welcome, the industry is concerned the funding will not offset the reduction in demand, as it does not directly stimulate the commissioning of projects.

Australia now faces a situation comparable to that in the UK following the removal of minimum children's television requirements in 2003 when the amount of culturally relevant children's content available to UK audiences plummeted.⁶

⁶ Emma Dawson, *Stories to Tell – Protecting Australian Children's Screen Content*, 2017, p 16

3.3 Transition of regulation

The impacts outlined above mean that the transition of Australian content regulation to new streaming platforms becomes urgent. Hence, SPA welcomes the release of the Government's Media Reform Green Paper, and the ongoing policy conversation regarding Australian content on streaming platforms.

SPA will engage with the Green Paper in due course, however in light of the impact of the draft new Standard, we note there is a need to ensure the decision-making process is expedited. SPA will also put forward proposals to ensure the new regulatory framework for streaming services stimulates the creation of an appropriate amount of Australian content and supports a sustainable independent production sector.