

EXPLANATORY STATEMENT

Issued by the Australian Communications and Media Authority

Broadcasting Services (Australian Content) Standard 2016

Broadcasting Services Act 1992

Purpose and legislative basis

Subsections 122(1) and (2) of the *Broadcasting Services Act 1992* (the BSA) require the Australian Communications and Media Authority (the ACMA) to determine standards relating to the Australian content of programs and programs for children, that are to be observed by commercial television broadcasting licensees.

The object of the *Broadcasting Services (Australian Content) Standard 2016* (the Standard) is to promote the role of commercial television broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity, by supporting the community's continued access to television programs produced under Australian creative control.

Background

The Standard replaces the *Broadcasting Services (Australian Content) Standard 2005* (the 2005 Standard), which was due to 'sunset' on 1 April 2016. Under Part 4 of the *Legislation Act 2003*, most legislative instruments 'sunset' (that is, they are automatically repealed) on the 1 April or 1 October that first occurs 10 years after they are registered.

The new Standard is very largely the same as the 2005 Standard. However, in making the new Standard, the opportunity has been taken to make minor changes (discussed below) to the 2005 Standard.

Under s 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument, unless a contrary intention appears. The ACMA has relied on the inclusion of that power in revoking the 2005 Standard and making the Standard under s 122 of the BSA.

Operation of the Standard

The effect of the Standard is to:

- require minimum amounts of first release Australian drama programs, documentary programs and children's programs (including children's drama, but excluding preschool programs) to be broadcast by commercial television broadcasting licensees; and
- require preschool programs broadcast by commercial television broadcasting licensees to be Australian programs.

To achieve this, the Standard defines 'Australian' program, and sets minimum quotas for Australian-made, culturally significant genres. Those quotas are set either by a 'points' system (as for first release Australian drama programs in s 10 of the Standard), or by a specified number of hours (as for first release Australian C drama in s 12 of the Standard).

In order to be consistent with Australia's international co-production obligations, the Standard recognises Australian official co-productions equally with Australian programs for the purposes of compliance with the Standard. Further, in order to be consistent with the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement, the Standard recognises New Zealand programs and Australia/New Zealand programs equally with Australian programs for the purposes of compliance with the Standard.

The genre-specific program quotas set out in the Standard complement the ‘overall’ Australian content transmission quotas in ss 121G(1) and (2) of the BSA. Those ‘overall’ transmission quotas require all commercial television licensees to broadcast an annual minimum transmission quota of 55 per cent Australian programming between 6am and midnight on their primary channels, and 1460 hours of Australian programming annually across the other channels broadcast by each licensee.

The provisions of the Standard are largely the same as those in the 2005 Standard. However, in making the Standard, the opportunity has been taken to make minor changes. For example, the transmission quota requirement at s 9 of the 2005 Standard has been removed, as that is now found in s 121G(1) of the BSA (see above), and there are consequential amendments consistent with the removal of that provision (such as the removal of ss 7(5) and 19(2) of the 2005 Standard). Other changes from the 2005 Standard include the following:

- updating the program licence fee figures in s 11(2), and the commencement date in the indexation formula for those figures in s 17(2);
- formatting and minor drafting changes to the instrument to be consistent with modern legislative drafting practices; and
- updating the list of countries with which Australia has international obligations under Official Film Co-production Agreements.

Documents incorporated in the Standard by reference

The Standard incorporates various provisions of the *Children’s Television Standards 2009* (CTS), which are also standards made under s 122 of the BSA. It also relies on definitions used in the *Corporations Act 2001* (Corps Act). Both the CTS and the Corps Act are available from <https://www.legislation.gov.au>.

The Standard also refers to the ‘All Groups Consumer Price Index number’ (CPI number). The CPI number is published on the Australian Bureau of Statistics’ website, at: <http://www.abs.gov.au>.

Consultation

Before determining the Standard, the ACMA published a consultation paper and a draft Standard on 23 December 2015. The ACMA also informed the industry group representing commercial television broadcasting licensees, Free TV Australia (Free TV), and others, including WIN Television (WIN), Screen Producers Australia (SPA), Screen Australia and the Australian Children’s Television Foundation (ACTF). Two submissions were received, from SPA and the ACTF, by the closing date of 15 February 2016.

Regulatory impact

On 26 November 2015, the Office of Best Practice Regulation determined that the proposed regulatory change in making the Standard is minor or machinery in nature and that no further regulatory impact analysis is required – OBPR reference number 20039.

As required under the *Human Rights (Parliamentary Scrutiny) Act 2011*, a human rights compatibility statement has been prepared by the ACMA and is attached.

Description of the provisions in the Standard

Section 1 Name of standard

Section 1 names the Standard as the *Broadcasting Services (Australian Content) Standard 2016*.

Section 2 Commencement

The Standard commences on 31 March 2016.

Section 3 Revocation of *Broadcasting Services (Australian Content) Standard 2005*

Section 3 revokes the *Broadcasting Services (Australian Content) Standard 2005*.

Section 4 Object of standard

Section 4 sets out the object of the Standard, which is to promote the role of commercial television broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity, by supporting the community's continued access to television programs produced under Australian creative control.

Section 5 What this standard does

Section 5 describes how the Standard meets this object, including an acknowledgement of international production obligations and recognition of New Zealand programs.

Section 6 Definitions

Section 6 defines terms used in the Standard, including definitions of the various genres (such as 'Australian drama program', 'documentary program', 'sketch comedy program') and other key terms.

Section 6A Independent producer

Section 6A defines 'independent producer'. This definition is relevant for the purposes of the quotas for first release Australian drama programs and first release Australian C drama programs.

Section 6B Commencement of commercial television broadcasting service

Section 6B defines when a licensee is deemed to have commenced providing a commercial television broadcasting service. This is relevant where a new licensee begins providing such services on or after 2 January in a year, in which case relevant quotas (in ss 10, 12, 13 and 16) are adjusted on a pro rata basis, using a formula described in s 6C below.

Section 6C Meaning of *pro rata formula*

Section 6C provides the pro rata formula for calculating the quota requirements where a new licensee has commenced providing a commercial television broadcasting service on or after 2 January in a year.

Section 7 What is an Australian program

Section 7 defines 'Australian program' as one that is produced under the creative control of Australians. It explains what 'creative control' means for the purpose of the Standard. The definition of 'Australian program' is fundamental to determining whether a program may be counted towards the licensee's quota requirement. However, it must be noted that certain programs other than 'Australian programs' may be counted towards the quotas (i.e. 'Australian official co-productions', 'New Zealand programs' or 'Australian/New Zealand programs').

Section 8 What is a first release program

Section 8 defines what a 'first release program' is for the purposes of the Standard.

Section 8A Application of this standard

This section applies to a commercial television broadcasting licence allocated after 30 December 2005. It provides that Parts 6 to 9 of the Standard, which set out the relevant quotas, only apply to a licensee on and after the day the licensee commences to provide a

commercial television broadcasting service. This is a machinery provision to facilitate the application of the pro rata provisions to calculate quotas for new licensees which commence broadcasting on or after 2 January in a year.

Section 10 Australian drama programs requirement

Section 10 sets the minimum amounts of first release Australian drama programs to be broadcast in prime time by commercial television broadcasting licensees as:

- > each calendar year (250 points)
- > each three-year period (860 points).

The point score for this quota is worked out in accordance with s 11 below. The first three-year period commenced on 1 January 2002, with the current triennium comprising 1 January 2014 to 31 December 2016.

Subsections (3) through to (7) set out the conditions under which drama programs may be taken to have been broadcast in 'prime time' for the purpose of the quota.

Section 11 What is the drama score for an Australian drama program

Section 11 provides the formula for calculating the first release Australian drama score prescribed by s 10. The equation used for determining the drama score (drama score = format factor x duration (in hours)), takes into account the format/type of each drama program (series, miniseries, feature film etc.) and the attributed value that format has for the purposes of meeting the first release Australian drama quota.

Section 12 Australian C drama — first release programs

Section 12 sets the minimum amounts of first release Australian children's drama programs to be broadcast in designated children's viewing times¹ by commercial television broadcasting licensees as:

- > 25 hours in each calendar year
- > 96 hours in each three-year period.

Subsection 12(3) provides incentives for licensees to broadcast certain types of first release Australian C drama in prime time, by deeming certain 'prime time' programs to have longer durations for the purpose of working out how many hours the program contributes to the quota.

Subsection 12(4) provides for flexibility in meeting the triennial children's drama requirement where the licensee exceeds its quota in a previous period and certain conditions are met.

The first three-year period commenced on 1 January 2003, with the current triennium comprising 1 January 2015 to 31 December 2017.

Section 12A Australian C drama – deferment of quota hours

Section 12A provides for flexibility in meeting the triennial children's drama requirement where an independent producer (see s 6A) fails to provide programs it has agreed to give to the licensee, as those events are outside of a licensee's or program supplier's control.

¹ The Standard incorporates the definition of the 'C band', which appears in s 5 of the CTS, another standard made under s 122 of the BSA. The relevant times are: 7am-8.30am Monday to Friday; 4pm-8.30pm Monday to Friday; and 7am-8.30pm on weekends and school holidays.

Section 13 Australian children’s drama – repeat programs

Section 13 provides that licensees must broadcast 8 hours of non-first release Australian children’s drama programs (i.e. repeats) during the children’s viewing times (see footnote 1) in each calendar year.

Section 14 C programs (Australian children’s programs)

Section 14 provides that, in each year, at least 50 percent of a licensee’s broadcasts during ‘C periods’ must be first release Australian C programs. Section 9 of the CTS requires licensees to broadcast 260 hours of children’s programs annually in C periods.

Subsection 14(2) provides incentives for licensees to broadcast certain types of first release Australian C drama in prime time. Subsection 14(3) provides that, for calculating compliance with s 14(1), make-up hours broadcast in accordance with s 12A are taken to have been broadcast in the preceding year.

Section 15 P programs (Australian preschool programs)

Section 15 provides that all P programs broadcast by a licensee in accordance with CTS 8 must be Australian programs. Licensees are required by CTS 8 to broadcast 130 hours of P programs annually (see CTS 5 and 9).

Section 16 Australian documentaries requirement

Section 16 requires a licensee to broadcast at least 20 hours of first release Australian documentary programs each year, between 6 am and midnight.

Section 17 Licence fees – CPI increases for 2017 and later years

Section 17 provides the formula for use in calculating increases to program licence fees based on the Consumer Price Index. The formula is applicable to the licence fees prescribed in s 11(2) which specifies ‘format factors’ for different formats of Australian drama programs. The format factor forms part for the calculation of a program’s drama score, for the purpose of meeting the annual and triennial drama score quotas imposed by s 10.

Section 18 Programs other than Australian programs recognised by this standard in fulfilment of Australia’s international obligations

Section 18 allows a licensee’s quota obligations under the Standard to be reduced by the extent to which a licensee broadcasts official Australian co-productions, New Zealand programs or Australian/New Zealand programs. That is, a program which is not an ‘Australian program’ may nonetheless count towards the Australian content quotas described above, if it is an ‘Australian co-production’, a New Zealand program’ or an ‘Australian/New Zealand program’. Those terms are defined in subsequent sections of the Standard.

As explained in detail in the note after s 20, these kinds of programs are given the same treatments as Australian programs because of various international agreements between Australia and other countries.

Section 19 What is a New Zealand program

Section 19 defines what a New Zealand program is for the purposes of the Standard as one that is produced under the creative control of New Zealanders.

Section 20 What is an Australian/New Zealand program

Section 20 defines what an Australian/New Zealand program is for the purposes of the Standard, with reference to the definitions of ‘Australian program’ and ‘New Zealand program’

in s 7 and s 19 respectively. In essence it is a program where creative control is shared by Australians and New Zealanders.

Section 21 Licensee reports on compliance

Section 21 provides that a licensee must provide information to demonstrate compliance with the Standard in a form, and at the times, specified by the ACMA.

Statement of Compatibility with Human Rights

Broadcasting Services (Australian Content) Standard 2016

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in s 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Broadcasting Services (Australian Content) Standard 2016* (the Standard) is made under s 122 of the *Broadcasting Services Act 1992* (the BSA).

Together with requirements set out in the BSA, the Standard aims to promote the role of commercial television broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity, by supporting the community's continued access to television programs produced under Australian creative control. To this end, the Standard sets quotas in culturally significant genre-specific categories (including drama, documentaries and children's programming) that complement the overarching transmission quotas imposed by the BSA.

Human rights implications

Australia is a party to a number of international human rights treaties. In developing this legislative instrument, the human rights implications have been considered in the context of **the Convention on the Rights of the Child (the CRC)** and **the International Covenant on Civil and Political Rights (the ICCPR)**.

The Standard engages several human rights, including:

- > the right to freedom of expression, including the freedom to receive information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other chosen media (Article 19(2) of the ICCPR);
- > that the mass media disseminate information and material of social and cultural benefit to the child (Article 17 of the CRC).

The Standard requires free-to-air commercial television broadcasting licensees, which are required by the BSA to be corporate entities, to broadcast minimum levels of culturally-significant programming (which includes Australian drama, documentaries, and children's drama programming). The Standard does not restrict the audience's freedom to receive information and ideas of all kinds that would be disseminated through television programs, consistent with Article 19(2) of the ICCPR, because:

- it does not restrict the nature of the information and ideas that may be disseminated in programs that will satisfy the quotas imposed, but rather imposes requirements in respect of the citizenship or residence of persons exercising creative control of the programs;
- audiences may still receive information and ideas which are not 'Australian content' in the programming time which is not devoted to meeting the quotas.

By requiring free-to-air commercial television broadcasting licensees to broadcast minimum levels of Australian children's drama that is of social and cultural benefit to the child, the Standard engages and promotes the rights of the child, including those of Article 17 of the CRC. The Standard further promotes this right by requiring the broadcast of specified proportions of first-release Australian children's drama programs and by requiring that all preschool programming be Australian.

Conclusion

This legislative instrument is compatible with human rights, as it promotes the freedom to receive information and ideas of all kinds in the form of art or through any other chosen media, and ensures that children have access to information and material on free-to-air commercial television broadcasting services that is specifically made for them and which aims to enhance their understanding and experience.