

EXPLANATORY STATEMENT

Issued by the Australian Communications and Media Authority *Broadcasting Services (Australian Content in Advertising) Standard 2018* *Broadcasting Services Act 1992*

Purpose and legislative basis

Subsection 122(1) of the *Broadcasting Services Act 1992* (the BSA) requires and empowers the Australian Communications and Media Authority (the ACMA) to determine standards that are to be observed by commercial television broadcasting licensees. Such standards include standards relating to the Australian content of programs. Section 6 of the BSA defines 'program' to include advertising or sponsorship matter, whether or not of a commercial kind.

Subsection 122(6) of the BSA provides as follows:

The ACMA must ensure that, at all times after the commencement of this subsection, there is in force under subsection (1) a standard that is, or has the same effect as, the standard in section 5 of *Television Program Standard 23—Australian Content in Advertising* as in force on 4 August 2004.

Section 5 of *Television Program Standard 23—Australian Content in Advertising* (TPS 23) sets a quota for broadcasts of Australian advertisements by commercial television broadcasting licensees.

The *Broadcasting Services (Australian Content in Advertising) Standard 2018* (the Standard) is, in accordance with subsection 122(6) of the BSA, being made to have the same effect as that provision.

The object of the Standard is to ensure that the majority of advertisements on commercial television are Australian made, by means of a flexible regulatory system that recognises the market reality of advertising.

Background

The Standard replaces TPS 23, which was due to 'sunset' on 1 April 2019. Under Part 4 of the *Legislation Act 2003*, most legislative instruments 'sunset' (that is, they are automatically repealed) on the first 1 April or 1 October that occurs 10 years after they are registered. This is an automatic process applying to most legislative instruments, regardless of their particular content.

Under subsection 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 TPS 23 and making the Standard under section 122 of the BSA.

Operation of the Standard

The effect of the Standard is to ensure that at least 80% of the total advertising time (other than the time occupied by exempt advertisements) broadcast in a year by the licensee, between the hours of 6 a.m. and midnight, is occupied by Australian produced advertisements.

To achieve this, the Standard defines 'Australian produced advertisement' and sets the minimum quota for Australian-made advertisements.

In order to be consistent with the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)¹, the Standard provides for equal treatment of advertisements pre-produced, filmed and post-produced in New Zealand or Australia, and by citizens or residents of either country.

The provisions in the Standard are largely the same as those in TPS 23. However, in making the Standard, the opportunity has been taken to make minor changes; for example:

- > to reflect current drafting practices, the instrument has been re-titled as the *Broadcasting Services (Australian Content in Advertising) Standard 2018*; and
- > minor variations have been made to the structure of the instrument, particularly the definitions, to reflect current drafting practices.

Consultation

Before determining the Standard, the ACMA published a consultation paper and a draft Standard on 22 October 2018. The consultation period was open until 26 November 2018. The ACMA also informed the industry group representing commercial television broadcasting licensees, Free TV Australia (Free TV), and Screen Producers Australia (SPA). On 26 November 2018, the ACMA received two submissions: from Free TV and SPA.

Statement of Compatibility with Human Rights

The Standard is not subject to disallowance (see item 8 in the table to regulation 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, made under paragraph 44(2)(b) of the *Legislation Act 2003*). The requirement to prepare a Statement of Compatibility with Human Rights only applies in respect of disallowable legislative instruments (see subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*).

Description of the provisions in the Standard

Section 1 Name

Section 1 names the Standard as the *Broadcasting Services (Australian Content in Advertising) Standard 2018*.

Section 2 Commencement

The Standard commences on 1 January 2019.

Section 3 Authority

Section 3 provides that the Standard is made under section 122 of the BSA.

Section 4 Revocation of *Television Program Standard 23 – Australian Content in Advertising*

Section 4 revokes *Television Program Standard 23 – Australian Content in Advertising*, originally made by the Australian Broadcasting Tribunal on 21 November 1991.

¹ A copy of ANZCERTA is available on the Department of Foreign Affairs and Trade website, at <https://dfat.gov.au>.

Section 5 Definitions

Section 5 defines terms used in the Standard, including definitions of 'advertisement', 'Australian', 'Australian produced advertisement', 'exempt advertisement' and other key terms.

Section 6 Exercising direction over creative and administrative aspects of pre-production, filming and post-production

Section 6 sets out the criteria for determining when a person is taken to exercise direction over the creative and administrative aspects of pre-production, filming and post-production of an advertisement. This is relevant to determining whether an advertisement meets the definition of 'Australian produced advertisement' in section 5 of the Standard.

Section 7 Objective

Section 7 sets out the objective of the Standard, which is to ensure that the majority of advertisements on commercial television are Australian made, by means of a flexible regulatory system that recognises the market reality of advertising.

Section 8 Obligation regarding Australian produced advertisements

Section 8 requires a licensee to broadcast Australian produced advertisements for at least 80% of the total advertising time (other than time occupied by exempt advertisements) each year, between 6 am and midnight. The quota applies to a calendar year (see definition of 'year' in section 5 of the Standard).