

EXPLANATORY STATEMENT

Broadcasting Services Act 1992

Broadcasting Services (Australian and Children's Television Standards) Direction 2020

Issued by the Authority of the Minister for Communications, Cyber Safety and the Arts

Authority

Subsection 122(1) of the *Broadcasting Services Act 1992* (BSA) requires the Australian Communications and Media Authority (ACMA) to, by legislative instrument, determine standards that are to be observed by commercial television broadcasting licensees. Under subsection 122(2), these standards must relate to programs for children and the Australian content of programs. The standards currently in place are the *Broadcasting Services (Australian Content) Standard 2016* (ACS) and the *Children's Television Standards 2009* (CTS).

The *Broadcasting Services (Australian and Children's Television Standards) Direction 2020* (the Direction) is made by the Minister for Communications, Cyber Safety and the Arts under subsection 122(7) of the BSA. Subsection 122(7) allows the Minister, by legislative instrument, to direct ACMA in relation to its power to determine standards under section 122. Under subsection 122(8), ACMA must comply with such a Ministerial direction.

Purpose

The purpose of the Direction is to reduce and simplify the Australian content obligations that apply to commercial television broadcasting licensees under the ACS and CTS, while retaining important safeguards for the protection of children. Specifically, the Direction will require ACMA, in the exercise of its powers under subsection 122(1) of the BSA, to amend (or revoke and remake) one or more Standard(s) to remove the requirements for commercial television broadcasting licensees to broadcast minimum amounts of:

- C material (including C programs);
- P material (including P programs);
- Australian drama programs; and
- documentary programs.

The Direction also directs ACMA, in the exercise of its powers under subsection 122(1) of the BSA, to amend one or more Standard(s) to introduce a new points-based Australian program quota, requiring each commercial television broadcasting licensee to provide at least 250 points of first release Australian programs in each calendar year, commencing from 1 January 2021.

ACMA is directed to provide that the new quota may be acquitted through any combination of the program genres listed in column 1 of the table at Schedule 1 to the Direction, and for the points allocated to each genre to be those listed in column 2 of the table at Schedule 1 to the Direction.

Further, the new Standard(s) should not prescribe a minimum amount of points to be acquitted from any one program genre listed in Schedule 1 to the Direction, with the exception of documentary programs, of which a maximum of 50 points per year may be acquitted.

First release Australian programs may only be counted towards the new quota the first time that they are broadcast by the licensee, and commercial television broadcasting licensees will be able to carry over points accrued in excess of the new quota from the year in which the points were accrued to the following calendar year, up to a maximum of 50 points.

Acquired programs, including acquired New Zealand programming, will not be able to be used to acquit the new quota, with the exception of acquired films that are Australian, Australian official co-productions, Australian/New Zealand programs or New Zealand programs.

Similar to the deeming measures included in the *Broadcasting Services Amendment (Regional Commercial Radio and Other Measures) Bill 2020*, the Direction will require ACMA to provide for the new quota to be deemed to have been complied with by a regional or remote commercial television broadcasting licensee if the amount of first release Australian programs broadcast by the licensee in a given calendar year is not less than the amount broadcast by a metropolitan commercial television broadcasting licensee on an equivalent metropolitan channel (where that channel is also broadcast by the regional or remote licensee) during the same year.

The Direction also directs ACMA to require commercial television broadcasting licensees to provide information to ACMA, demonstrating the licensee's compliance with the new quota, including the number of hours of programming of each genre that is broadcast, the licence fees and/or production budget per hour for each film or program claimed against the quota, and the actual expenditure by broadcasters.

The Direction requires ACMA to retain certain requirements relating to the protection of children and to require commercial television broadcasting licensees to identify any C program or P program that they broadcast using the applicable C or P symbol. ACMA will retain its role in the classification of C programs and P programs until such time as amendments are made to the *Commercial Television Industry Code of Practice* to enable commercial television broadcasting licensees to classify children's content.

The requirement that a P program cannot include any advertising immediately before, during or immediately after the broadcast of the program, will remain. C programs may include advertising and other non-program material in line with the current requirements contained in Part 3 of the CTS. The requirement for P programs broadcast by commercial television broadcasting licensees to be Australian programs will be removed.

Simplifying obligations on commercial broadcasters and subscription television providers will reduce the regulatory burden on these businesses and incentivise them to produce higher quality Australian content.

Background

As part of its response to the recommendations of the Australian Competition and Consumer Commission's (ACCC) Digital Platforms Inquiry, the Australian Government determined that there should be an immediate focus on Australian content obligations on free-to-air television broadcasters (including drama and children's content). In April 2020, the Government released an Options Paper prepared by ACMA and Screen Australia – *Supporting Australian Stories on our Screens* (the Options Paper). The Options Paper considered Government intervention and support for Australian screen content and stories, particularly drama, documentary and children's programming.

Submissions to the Options Paper observed that the current regulation faced by commercial and subscription television broadcasters can be complex, overly prescriptive and burdensome. This is jeopardising the ability of these businesses to continue to operate and produce quality Australian content.

Declining audiences have led to decreasing revenues for the advertising-reliant business models of the commercial free-to-air broadcasters. However, as the revenues of commercial free-to-air broadcasters have declined, they have still been required to meet Australian content obligations.

While broadcasters are comfortably meeting the overall 55 per cent Australian content transmission quota in section 121G of the BSA – which requires that 55 per cent of all programming broadcast between 6 am and midnight on primary channels each year to be Australian – they have indicated that they are struggling to meet sub-quota requirements for drama, documentaries and children's content.

These sub-quota obligations are costly for broadcasters and in some cases can be difficult to monetise. It can be significantly more profitable for broadcasters to broadcast other genres which are not regulated, such as light entertainment and news, as these have may have lower production costs and higher audience numbers.

For children's content, the current system of quotas is also disproportionately burdensome for commercial broadcasters, requiring that they show large volumes of C and P programs which may be expensive to produce, difficult to monetise due to strict advertising restrictions, and consistently attract lower audiences when compared to G-rated programming.

Consultation

The Government has conducted extensive consultation on Australian content regulation over the last ten years, most recently in 2020 with the Options Paper process. Other notable consultations include the 2012 *Convergence Review*.

Supporting Australian Stories on our Screens

The Options Paper was released for consultation between 15 April 2020 and 3 July 2020. The paper presented a number of options for reform:

- status quo – retain existing regulations and incentives, focussing on traditional platforms;

- minimal change – fine-tuning and modernising existing regulatory and funding arrangements;
- significant change – establishing platform-neutral, future facing obligations and incentives which reflect the business models; and
- deregulation – removing all regulation and removing or revising incentives.

The Minister for Communications, Cyber Safety and the Arts also conducted a number of roundtable discussions and meetings with a wide range of stakeholders.

The majority of submissions provided strong support for the continued production of Australian content and for Government support for the sector through incentives and offsets.

The bulk of submissions also indicated support for the retention of some form of quota or investment obligation to produce Australian content, and for the extension of these demand-side obligations to streaming services.

ACMA was consulted during the preparation of this Direction.

Regulation Impact

A Regulation Impact Statement (RIS) has been prepared in relation to the Government's Screen Content Reforms, which include the new Australian content quota (reference number 42957). The RIS is available on the website of the Office of Best Practice Regulation: www.pmc.gov.au/regulation.

Statement of Compatibility with Human Rights

As section 42 of the *Legislation Act 2003* does not apply to this instrument, being exempted under Part 4 of the *Legislation (Exemption and Other Matters) Regulation 2015*, a Statement of Compatibility with Human Rights is not required under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Further details of the Direction are set out at Attachment A.

The Direction is a legislative instrument for the purposes of the *Legislation Act 2003*. However, this instrument is not subject to disallowance, as it is a direction by a Minister to a body (see item 2 of the table in section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

Notes on sections

Section 1 provides that the name of the Direction is the *Broadcasting Services (Australian and Children's Television Standards) Direction 2020*.

Section 2 provides that the Direction will commence the day after it is registered.

Section 3 provides that the Direction will be self-repealed on 1 July 2021.

Section 4 states the legislative authority for the Direction as being subsection 122(7) of the BSA.

Section 5 defines the terms used throughout the Direction.

The definitions largely reflect existing definitions in the BSA, ACS and CTS.

The definition of *amend* has been included to clarify that it is intended to be open to ACMA to revoke, or revoke and remake, one or more Standard(s) to give effect to the Direction.

The definition of *acquired* differs from the definition in the ACS as it specifically excludes a program that is commissioned by a licensee. This change relates to the different points that may be acquitted for commissioned programs and acquired films.

The definition of *Australian drama program* reflects the existing ACS definition with subparagraph 6(c)(ii) removed. The effect of this change is that an Australian drama program for the purposes of the Direction will include an Australian children's drama, including partially scripted programs.

The definition of *children* is amended to refer to people younger than 15 years of age. This change will make the meaning of children consistent with the definition of children in the *Commercial Television Industry Code of Practice*. The effect of this is that the meaning of children will include anyone from 0 to 14 years of age.

A new definition of *commissioned* is inserted. 'Commissioned' is defined as where a commercial television broadcasting licensee or program supplier has made a material and meaningful financial contribution to the production of a program before the production has been completed. This includes in-house production and domestic co-productions such as with national broadcasters, streaming video services or subscription broadcast channels. While 'material and meaningful' is not defined in the Direction, this construction is intended to ensure that licensees only count their commissioned programs towards the new quota where the financial contribution by the licensee or the program supplier is not insignificant. In addition to establishing that the contribution amount as a proportion of the overall production budget was significant, consideration may also be given to whether the contribution was reasonable in the circumstances.

New definitions of *equivalent metropolitan channel*, *metropolitan commercial television broadcasting licensee*, *metropolitan licence area*, *regional/remote commercial television broadcasting licensee*, *regional/remote licence area* and *relevant regional channel* are included. These definitions are relevant to the requirement in paragraph 6(2)(k) of the

Direction. Under paragraph 6(2)(k) of the Direction, the obligations of the new quota to be created by the ACMA will be deemed to have been complied with by a regional/remote commercial television broadcasting licensee if the amount of first release Australian programs broadcast by the licensee in a given calendar year on the relevant regional channel is not less than the amount broadcast by a metropolitan commercial television broadcasting licensee on the equivalent metropolitan channel during the same year.

Relevantly, the definition of *equivalent metropolitan channel* is central to the circumstances in which the deeming provision is to have effect. An equivalent metropolitan channel, in relation to a relevant regional channel, is one that: is broadcast by a metropolitan commercial television broadcasting licensee; is the subject of an affiliation agreement between the metropolitan and the regional/remote commercial television broadcasting licensee; and (by reason of that agreement) contains program content that is the same, or substantially the same, as the relevant regional channel. The *relevant regional channel* is defined to mean the channel broadcast by the regional/remote commercial television broadcasting licensee.

A definition of *film* is provided to replace the references to ‘feature film’ in the current ACS. This definition of film will be able to extend to films that are not released in cinemas, such as films released online on-demand or on streaming video services as well as tele-movies. The definition includes scripted films and documentary films but excludes a program that is not stand-alone, or a program that is part of a series, serial or mini-series or a pilot.

The definition of *first release* in the current ACS is amended to provide that a program (including a program that has been previously broadcast by a subscription television broadcaster) can be used to acquit the new quota if it is broadcast within 2 years of completion of the program production. The note to the definition confirms that the definition does not prevent a program from being defined as first release if it has already been made available on a subscription or broadcast video on demand service.

Section 6 is the main operative section, and requires ACMA to exercise its powers under subsection 122(1) of the Act, to amend one or more Standard(s) to remove the requirements for commercial television broadcasting licensees to broadcast minimum amounts of material listed at paragraph 6(1)(a) of the Direction.

Paragraph 6(1)(b) requires ACMA to remove a number of requirements associated with the material listed at paragraph 6(1)(a).

Paragraph 6(1)(c) requires ACMA to remove the concepts of the C band; P band; C material; P material; C period; P period; and prime time.

Paragraph 6(2)(a) directs ACMA to introduce a new points-based Australian program quota and sets out the detail of the new quota and its application.

Paragraph 6(2)(b) provides that the new quota is to commence from 1 January 2021.

Paragraph 6(2)(c) provides that the new quota may be acquitted through any combination of the program genres listed in Schedule 1 and for the points allocated to each genre as listed in Schedule 1.

Paragraph 6(2)(d) directs ACMA to allow for the production budget and licence fee figures listed at Schedule 1 to increase, but not decrease, annually according to the All Groups Consumer Price Index.

Paragraph 6(2)(e) directs ACMA to ensure that first release Australian programs can only be used to acquit the new quota the first time that they are broadcast on commercial free-to-air television.

Paragraph 6(2)(f) specifies that only relevant programming which is broadcast between 6:00 am and midnight each day may be used to acquit the new quota.

Paragraph 6(2)(g) directs ACMA to not prescribe the minimum amount of points to be acquitted from any one program genre, in order to allow broadcasters the flexibility to determine what content they broadcast to meet the overall new quota. It is intended that this approach will better balance the regulatory burden across platforms.

Paragraph 6(2)(h) directs ACMA to specify that, in the case of commissioned documentary programs, a maximum of 50 points may be acquitted each year.

Paragraph 6(2)(i) enables commercial television broadcasting licensees to carry over points accrued in excess of the new quota from the year in which the points were accrued to the following calendar year, up to a maximum of 50 points.

Paragraph 6(2)(j) provides for Australian official co-productions, New Zealand programs and Australian/New Zealand programs to be recognised equally with Australian programs for the purposes of the new quota. As such, where the Direction refers to ‘Australian’ programs elsewhere in sections 6 to 8 and in Schedule 1, these references should be taken to incorporate this recognition in paragraph 6(2)(j).

Paragraph 6(2)(k) provides for the new quota to be deemed to have been complied with by a regional/remote commercial television broadcasting licensee if the amount of first release Australian programs broadcast by the licensee in a given calendar year is not less than the amount broadcast by a metropolitan commercial television broadcasting licensee on an equivalent metropolitan channel (where that channel is also broadcast by the regional/remote commercial television broadcasting licensee) during the same year. This deeming provision is intended to provide relief to a regional or remote broadcaster that does not carry the full suite of multichannels that the relevant metropolitan affiliate uses to broadcast content to acquit the new quota.

Paragraph 6(2)(l) directs ACMA to require commercial television broadcasters to provide it with information that demonstrates broadcasters’ compliance with the new quota, and specifies the kinds of information that may be required.

Section 7 deals with transitional arrangements which will apply during the introduction of the new quota.

Paragraph 7(1)(a) directs ACMA to remove the quota obligations listed in subsection 6(1) above from 1 January 2021.

Paragraph 7(1)(b) allows annual reporting obligations for the 2020 compliance year to continue to apply, but directs ACMA that any triennial reporting obligations are to cease from 1 January 2021, with the exception of Australian C drama. New reporting obligations are put in place from the 2021 compliance year onwards.

Paragraph 7(1)(c) provides that any first release Australian films acquired before 1 January 2021, and any other first release Australian programs commissioned before 1 January 2021, which are broadcast on or after 1 January 2021, may be used to acquit the new quota for the 2021 compliance year.

Paragraph 7(1)(d) directs ACMA not to allow other Australian first release programs acquired before 1 January 2021 to be used to acquit the new quota. However, these programs may still be used to acquit the overall Australian content transmission quota in section 121G of the BSA.

Paragraph 7(1)(e) directs ACMA not to allow licensees to carry forward any points or program hours accrued in excess of the annual sub-quotas which applied during 2020. However, programs or films commissioned or acquired (respectively) before 1 January 2021 can be used to acquit the new quota for the 2021 compliance year, as per paragraph subsection 7(1)(c).

Section 8 covers the measures intended to protect children from the possible harmful effects of television. The intention is that, should commercial free-to-air television broadcasters choose to broadcast material which meets the criteria for C and P programs, the existing child protection measures contained in the *Children's Television Standards 2016* (CTS) will continue to apply.

Subparagraph 8(1)(a)(i) directs ACMA to retain those requirements which relate to the protection of children that are equivalent to those set out in CTS 30 – CTS 34.

Subparagraph 8(1)(a)(ii) directs ACMA to retain child protection requirements equivalent to those set out in Part 3 of the CTS (excluding CTS 30 – CTS 34), but to specify that these protections apply to any C program or P program broadcast between 6:00am and midnight (rather than at all times as currently).

Paragraph 8(1)(b) will require commercial television broadcasting licensees to identify any C program or P programs broadcast by using the applicable C or P symbol, and to include these symbols in broadcast schedules, electronic program guides and on their websites.

Paragraph 8(1)(c) directs ACMA to continue to classify C and P programs, until relevant amendments are made to the *Commercial Television Industry Code of Practice* (the Code) to enable commercial television broadcasting licensees to classify children's content. This is intended to ensure consistency in the classification of programming by commercial television broadcasting licensees.

Paragraph 8(1)(d) provides that a P program cannot include any advertising immediately before, during or immediately after the broadcast of the program.

Paragraph 8(1)(e) provides that a C program can include advertising and other non-program material in line with requirements relating to advertising and other non-program material contained in Part 3 of the CTS.

Paragraph 8(1)(f) removes the requirement for P programs broadcast by commercial television broadcasting licensees to be Australian programs.

Section 9 directs ACMA to make any other amendments to the Standard(s) that it considers necessary or convenient to give effect to this Direction.

Schedule 1 describes the genres and point allocations to form part of the new quota.