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Screen Producers Australia's submission to the ACMA's Proposal to remake the Australian Content in Advertising Standard

Screen Producers Australia welcomes the opportunity to provide a submission to the ACMA on the *Proposal to remake the Television Program Standard 23 – Australian Content in Advertising* (**Australian Content in Advertising Standard**).

For further information about this submission please contact Pravin Menon, Director of Government Relations & Operations (pravin.menon@screenproducers.org.au).

About SPA

Screen Producers Australia (**SPA**) was formed by the screen industry over 60 years ago to represent 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 appointed Policy Working Group representatives. Our members employ hundreds of producers, thousands of related practitioners and drive more than $1.7 billion worth of annual production activity from the independent sector.

On behalf of these businesses we are focused on delivering a healthy commercial environment 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.

Executive Summary

SPA recommends that the ACMA undertake the following measures as part of remaking the Australian Content in Advertising Standard:

- **Recommendation 1:** the ACMA consult with the ACCC on its Digital Platforms Inquiry, to consider the effects that digital platforms and online streaming services have on broadcasters and media content creators in the Australian market for media and advertising services.

- **Recommendation 2:** The Australian Content in Advertising Standard remove all references to "New Zealand" to ensure fair competition and that Australians are not unfairly disadvantaged by a regulatory scheme designed to protect Australian content.

SPA considers that these proposed measures will not diminish, but rather enhance, the effect of the section 5 of the Australian Content in Advertising Standard. Further, they will not be unduly burdensome to commercial television licensees, if at all, and will create tangible benefits and opportunities to Australian producers in line with the objects of the Australian Content in Advertising Standard.

Overall, SPA considers such changes will promote Australia's national interests without being inconsistent with the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement (**CER Services Protocol**). Furthermore, the proposed changes will allow the ACMA to comply with the following objects of the *Broadcasting Services Act 1992* (Cth) (**BSA**):

- providing a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs[1]; and

- promoting the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity[2].

Background

Section 122(6) of the BSA requires the ACMA to remake the Australian Content in Advertising Standard to ensure that it is not automatically repealed on 1 April 2019.

The object of the Australian Content in Advertising Standard is to ensure that the majority of advertisements on television are Australian made, by means of a flexible regulatory system that recognises the market reality of advertising[3].

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[1] See section 3(b) of the BSA.
[2] See section 3(e) of the BSA.
[3] Section 3 of the Australian Content in Advertising Standard.

Amongst other things, the Australian Content in Advertising Standard provides for quotas for Australian television advertisements. It requires commercial television licensees to ensure that at least 80% of the total advertising time (other than the time occupied by exempt advertisements) broadcast between 6am and midnight every year is occupied by Australian produced advertisements[4].

SPA notes the ACMA's preliminary view that the Australian Content in Advertising Standard is operating effectively and efficiently and the ACMA's proposal to remake the instrument without any significant changes, so as to preserve the effect of section 5 of the Australian Content in Advertising Standard.

However, the supporting material to the Australian Content in Advertising Standard dates back to the Australian Broadcasting Tribunal's *Australian Content on Commercial Television Inquiry*, which was undertaken in 1991. This predates the commencement of the BSA, the commercialisation of the internet, the creation of the ACMA and several significant developments in broadcasting services and advertising markets globally and in Australia since this date.

SPA therefore recommends that the ACMA give due consideration to the effect of these changes in remaking the Australian Content in Advertising Standard, and in particular the combined effect on broadcasters and Australian producers in the regulation of Australian content.

Changing realities of the market for media and advertising services

As the ACMA is aware from its most recent *Communications Report 2016-7*, there has been a significant surge in online advertising expenditure in Australia, which has been increasing on a year on year basis. While television advertising expenditure remained relatively stable (3% decline) between 2009 and 2016, online advertising expenditure increased by 23% over this period. The total advertising expenditure across main media categories (including TV and online platforms) as at 2016-7 was $15.3 Billion.

This trend is expected to continue in the coming years. According to PricewaterhouseCoopers (**PwC**), by 2022, internet advertising is predicted to account for 56.9% percent (approximately $11.5 Billion) of the total Australian advertising spend market[5].

Video-based content has been largely responsible for driving the growth in online advertising expenditure. PwC expects that video-based internet advertising spend will account for 25% of the total internet advertising market in Australia by 2022[6]. Australia has been leading this trend globally: in 2017, online video advertising represented 39% of internet advertising revenue in Australia, in comparison with 38% in the UK and 26% in the US respectively.

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[4] Section 5 of the Australian Content in Advertising Standard.
[5] *Global Entertainment & Media Outlook 2018*, PricewaterhouseCoopers, June 2018.
[6] Ibid note 5.

The impact of digital platforms and online streaming services on traditional broadcasters and Australian producers

Traditional broadcasters retain significant bargaining power in the media advertising market, however new market entrants (most notably Google and Facebook) who are not subject to the same regulations and more easily able to displace advertising market spend from "traditional" media into "digital". This effect is exacerbated by online streaming services such as Netflix, who are currently unregulated and therefore able to operate with the current competitive advantage of being advertising-free. Commentators consider that this trend will change soon, with Netflix and online streaming services likely to become ad-supported in the near future[7].

The competition between broadcasters and online streaming services / platforms in the media and advertising services market has significant downstream effects. When advertising revenues become stagnant, broadcasters seek cost savings elsewhere, such as through cheap, second-run New Zealand programs (discussed later in this submission), increasing the extent of their in-house production or engaging in more onerous contractual terms and rights deals with the independent sector.

As the independent sector is largely made up of small businesses, the significant imbalance of bargaining power makes it commercially unviable for many producers to operate, which in turn diminishes their capacity for innovation and the quality and diversity of Australian content.

The value of Australian produced advertisements to the independent sector

The production of advertisements and commercials for broadcast on television and other media plays an essential part of the production ecology in Australia. Australian film and television projects are often resource intensive and have long gestation periods before being able to be financed, executed and realised.

Pre-production, production and post-production are also highly specialised industries in their own right, involving performers, producers, writers, directors, crew, special effects, animation and a host of other niche and support services.

There is often considerable overlap between the skills required to make Australian advertisements and Australian film and television content. Advertising projects plays a pivotal role in providing stable employment and training opportunities so as to ensure a high degree of quality, availability and transferability of services and talents across the entertainment industry. This is crucial in minimising issues of job insecurity, mental health and other occupational health and safety issues that significantly affect small businesses in Australian's entertainment industry.

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[7] *Netflix is testing ads for its original content that will play while you binge watch, and users are not pleased*, Business Insider, August 2018

Recommendation 1

SPA recommends that the ACMA consult with the ACCC on its Digital Platforms Inquiry, to consider the effects that digital platforms and online streaming services have on broadcasters and media content creators in the Australian market for media and advertising services.

As the ACMA is aware, the current legislative scheme under the BSA requires the ACMA to administer the national regulatory scheme for internet content. This currently is limited to illegal and offensive content under Schedule 5 and 7 of the BSA.

Neither online streaming services nor online platforms that provide broadcast services have any requirements to show Australian regional and children's content, meet advertising or classification requirements, or meet minimum expenditure requirements on Australian drama.

Section 4(1) of the BSA explicitly states, amongst other matters, that it is Parliament's intention that different levels of regulatory controls ought to be applied to broadcasting services, online services and online content services according to "the degree of influence…[such services] are able to exert in shaping community views in Australia."[8] Section 4(2)(b) of the BSA also makes it explicitly clear that it is Parliament's intention that "broadcasting services be regulated in a manner…that will readily accommodate technological change."[9]

SPA considers that current regulatory scheme is insufficient to address the growth of online platforms and streaming services and the downstream effect on competition this has on both traditional broadcasters and Australian producers. It falls within the ACMA's functions to not only give consideration to the cultural objectives that underpin Australia's screen industry, but also the underlying economic conditions that support the sustainability of the entire broadcasting industry[10].Regulating online content service providers and online streaming services to include local content obligations (including Australian content in advertising when this arises) would alleviate these concerns and preserve the overall effect of section 5 of the Australian Content in Advertising Standard.

SPA notes that the ACCC's Digital Platform Inquiry explicitly considers these matters to the extent they relate to media content creators and advertising services[11]. A preliminary report is due to the Treasurer's office in December 2018. Given the importance and timeliness of this inquiry and the overlap in concerns, SPA recommends that the ACMA engage in consultation with the ACCC to consider what effect this has on both Australian broadcasters and producers.

[8] Section 4(1) of the BSA.
[9] Section 4(2)(b) of the BSA.
[10] See Note 1 and Note 2
[11] *Digital Platforms Inquiry Issues Paper*, ACCC, February 2018.

Recommendation 2

The Australian Content in Advertising Standard remove all references to "New Zealand" to ensure fair competition and that Australians are not unfairly disadvantaged by a regulatory scheme designed to protect Australian content.

Section 6(1)(a) of the Australian Content in Advertising Standard (and the equivalent provisions of the draft *Broadcasting Services (Australian Content in Advertising) Standard 2019* (**Draft Standard**)) states that an advertisement is Australian produced if it is "wholly pre-produced, filmed and post-produced in Australia or New Zealand, or partly in Australia and partly in New Zealand."

It is unclear how the operation of section 6(1)(a) is not already encompassed by section 6(1)(b) of the Australian Content in Advertising Standard, as it is hard to imagine how an advertisement would be wholly pre-produced, filmed or post-produced in Australia without an Australian being in some way involved in the direction of creative and administrative aspects of pre-production, filming and post-production.

Rather, section 6(1)(a) of the Australian Content in Advertising Standard appears to have the effect of conferring unilateral benefits upon New Zealand producers and/or New Zealand citizens or residents without any express legislative purpose.

The requirement that advertisements transmitted by commercial television licensees be either produced in Australia or New Zealand dates back to before 1988. This over 30-year requirement is no longer in step with current Australian cultural attitudes or global market conditions. There does not appear to be any justifiable reason why New Zealand producers and/or New Zealand citizens or residents should obtain unilateral benefits from a regulatory scheme designed to protect Australian content in a way that unfairly disadvantage Australian producers.

SPA is aware of the decision of the High Court of Australia in *Project Blue Sky vs Australian Broadcasting Authority*[12], but notes that this only related to clause of 9 of Australian Content Standard as it applied then and, for that matter, "Australian programs". Since that date, section 160(d) of the BSA has been repealed and there are otherwise no provisions in the BSA allow for New Zealand made advertisements to be substitutable for Australian made advertisements.

The supporting material to the Australian Content in Advertising Standard makes it clear that the emphasis is that production of advertisements be carried out *by Australians*. SPA's position is that the current references to "New Zealand" is inconsistent with the object of the Australian Content in Advertising Standard, which is to ensure the majority of advertisements are *Australian made*.

Accordingly, SPA recommends that the Australian Content in Advertising Standard be amended to remove references to "New Zealand'. This will ensure that Australians are not unfairly disadvantaged by regulatory arrangements designed to protect Australian content. Similarly, the definition of the term "Australian" in the

[12] *Project Blue Sky vs Australian Broadcasting Authority*, HCA 28 (28 April 1998).

Australian Content in Advertising Standard (and the equivalent provisions of the Draft Standard) should be amended so as only to refer to a person who is a "citizen of, or ordinary resident in, Australia."

As the ACMA is aware, section 122(1) of the BSA requires the ACMA to consider section 16 of the *Australian Communications and Media Authority Act 2005* (Cth) (**ACMA Act**) when determining program standards for Australian content. This states that the ACMA must exercise its powers relating to broadcasting and content functions in a manner consistent with Australia's obligations under the CER Services and any instrument made under the CER Services Protocol.

SPA does not consider these changes would be inconsistent with Australia's obligations under the CER Services Protocol or any instrument made under the CER Services Protocol, for the following reasons:

- advertisements should be treated as goods under the Australia New Zealand Closer Economic Relations Trade Agreement (**ANZCERT**) and not services under the CER Services Protocol. The Australian Content Standard therefore does not fall under the scope of Article 2.3 the CER Services Protocol or section 16 of the ACMA Act;

- in any event, ANZCERT explicitly states that its object is "to develop trade between New Zealand and Australia *under conditions of fair competition*"[13] (emphasis added). It contains several provisions which demonstrate Australia's sovereign need to "protect its own producers or manufacturers of like or directly competitive goods"[14] as well as the need for safeguards goods in the same industry to "achieve conditions of fair competition"[15].

- even if advertisements were to be classified as services, article 5 of the CER Services Protocol is not applicable, given that section 6(1)(a) of the Australian Content in Advertising Standard is currently more favourable to New Zealand and its service providers in that it confers unilateral benefits to New Zealand producers and/or New Zealand citizens or residents with no express legislative purpose. Australian producers are unfairly disadvantaged as there are no regulatory arrangements for local content in New Zealand 'in like circumstances' that Australian producers could benefit from.

- further, the continued operation of section 6(1)(b) of the Australian Content Standard (or the equivalent provision of the Draft Standard) would also ensure that access rights between Australia and New Zealand under Article 4 would not be diminished. For the same reasons, Article 8 of the CER Services Protocol would not be infringed.

[13] See Article 1(d) of the ANZCERT.
[14] See Article 11(a)(i) of the ANZCERT.
[15] Article 17.8 of the ANZCERT.

On a separate but related note, SPA notes that under the current rules for Australian content, Australian television broadcasters are able to use New Zealand programs to acquit their quota obligations under the Australian Content Standard[16]. Commercial broadcasters have exploited this loophole to broadcast significant amounts of New Zealand programs, often without counting this towards their local programming requirements. For example, in 2017, 25% of first release drama on the Nine Network was from New Zealand, as was 27% of Ten's and 17% of Seven's first release documentaries respectively[17].

SPA considers that these regulatory arrangements are out of step with current Australian cultural attitudes and economic conditions and a detrimental effect on Australian audiences, Australian producers and the many thousands of Australian workers in the screen industry. These views have been mirrored by other industry participants in the ACMA's recent *Australian Content Conversation*[18]. The House Standing Committee on Communications and the Arts has considered this issue recently (insofar as it relates to Australian content) and recommended that there be a redefinition of "first release" under the Australian Content Standard to ensure that already broadcast New Zealand content cannot fill new content quotas in Australia[19]. SPA supports this view and considers it consistent with the recommendations of this paper.

[16] See *Australia-New Zealand Closer Economic Relations Trade Agreement*, Department of Foreign Affairs and Trading.
[17] *Compliance with Australian Content Standard and Children's Television Standard*, March 2018.
[18] *Conference Overview Report: Australian Content Conversation*, ACMA, May 2017.
[19] *Report on the Inquiry into the Australian film and television industry: House of Representatives Standing Committee on Communications and the Arts*, December 2017, p.74.