

**Proposed Amendments to the
Australian Content Standard**

**Submission to the
Australian Broadcasting Authority**

by



**Federation of Australian Commercial
Television Stations**

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Executive Summary

- The objective of the Australian Content Standard is a cultural one, as stated in the *Broadcasting Services Act 1992*. It is not an industry support mechanism and should not be used as one.
- The ABA's Proposed Amendments introduce layers of unnecessary complexity into the Australian Content Standard. These will result in unnecessary administrative and financial burdens on broadcasters in complying with the Standard.
- FACTS strongly opposes the ABA's recommendations to link quota points to production of programs by independent producers or to minimum licence fee or expenditure requirements.
- FACTS proposes a simplified revised points system for Adult Drama based on the ABA's revised relativities of production types and proposed increase in aggregate points as follows:

Serials (i.e. produced at the rate of more than 1 hour per week)	1.15
Feature films with no theatrical release	2.5
Series (i.e. produced at the rate of 1 hour or less per week)	3.0
Mini-series, Telemovies, Feature films with theatrical release	4.0

- FACTS opposes the proposed devaluation of serial drama and the distinction between new and subsequent series of a program. FACTS proposals rectify these objections.
- The time band for the Adult Drama quota should be extended until 11.30pm, to partially restore the hour lost in the last review.
- FACTS supports tradeable quotas for C drama, between commercial broadcasters and with the national broadcasters.
- The C drama quota should be amended to require 26 hours of new C drama and 14 hours of repeat C drama, retaining the current 40 hours of C drama overall per year..
- FACTS welcomes the proposal to introduce three year averaging of the C drama quota but a makeup provision for the final year of the cycle is necessary to allow for unforeseen events.
- FACTS opposes the ABA's scheduling and promotion recommendations for C drama.
- C feature films and telemovies in prime time should receive triple points.
- FACTS opposes the proposed changes to the documentary quota. There is no policy justification for further increase in the quota, change in the definition of documentary or the \$70,000 licence fee proposal.
- If the ABA is not minded to return the Documentary quota to pre-Project Blue Sky levels, it should remain at its current level.

Introduction

The Federation of Australian Commercial Television Stations (FACTS) represents Australia's 48 commercial television licensees. This document sets out FACTS response to the Proposed Amendments to the Australian Content Standard issued by the Australian Broadcasting Authority (ABA) in July 2002.

The rationale for the Australian Content Standard ("the Standard") is – and has always been – to deliver Australian television programs to Australian viewers. The Standard is not an industry support measure. There is no object in the *Broadcasting Services Act 1992* (BSA) that empowers the Australian Broadcasting Authority to determine a standard the object of which is industry support.

FACTS has serious and fundamental concerns with the approach the ABA has taken, as reflected in a number of provisions in the Proposed Amendments and explained in the section 'ABA Approach' at 1.4 of the Explanatory Paper.

FACTS is strongly opposed to any quota mechanism that links quota points to payment of specified licence fees or that distinguishes between in-house and independent production as recommended by the ABA in a number of its Proposed Amendments. The ABA's recommendations have been developed in response to industry submissions representing the sectoral private commercial interests of the independent production industry. They have not been founded on public interest policy considerations reflecting the needs and interests of Australian audiences or cultural considerations as required by the Act. FACTS rejects the ABA's purported justifications for these provisions in the Explanatory Paper.

The ABA acknowledges that the Standard is generally working very well. FACTS is perplexed why, by the ABA's own admission, 'some additional levels of complexity are proposed'. Many of the Proposed Amendments introduce additional complexity to the Standard without delivering audience benefits.

A number of the Proposed Amendments are aimed at achieving some additional flexibility for broadcasters to respond to audience preferences, such as permitting broadcasters to average their C drama commitments over three years. FACTS supports the ABA's aim in relation to those proposals, but believes that the ABA's measures in this regard generally fall short of achieving their goal of providing the flexibility required by broadcasters for the benefit of their viewers.

The Proposed Amendments are not acceptable to the Australian commercial television industry in their present form. The FACTS Response to the ABA's Proposed Amendments outlined in this document contains a package of proposals that will maintain the current diverse range of high quality of Australian programming on Australian television and restore flexibility to the operation of the Standard, consistent with the Standard's rationale. These proposals are set out in detail below.

FACTS' proposals are directed at achieving the Standard's objective of delivering programs to Australian viewers that develop and reflect a sense of Australian identity, character and cultural diversity. FACTS considers the Review must be re-focused on this objective.

2 The ABA Approach (paragraph 1.4 of ABA Paper refers)

2.1 Objective of the Standard

The ABA states that it considers the cultural objectives of the Standard are paramount. However, many of the ABA's Proposed Amendments are by the ABA's own admission clearly designed to favour the independent production industry.

FACTS believes this approach is inconsistent with the requirements of the Broadcasting Services Act (BSA).

The ABA's approach confuses the rationale for the Standard and outcomes that flow from its operation. The Productivity Commission in its Report on Broadcasting 2000 did not share the ABA's confusion:

"The stated rationale for Australian content policy is the promotion of social and cultural objectives, not assistance to the local production industry." The Commission's report describes assistance to the industry as 'a side effect of content regulation'¹.

This single rationale is also stated clearly in the Explanatory Memorandum to the BSA:

"The rationale for this provision is that it is widely accepted that television is a powerful medium with the potential to influence public opinion, and that television has a role to play in promoting Australians' cultural identity." (emphasis added).

There is no reference to multiple rationales for the provision in the Act or the Explanatory Memorandum (EM) or to the primary and secondary objectives that the ABA's approach attempts to import. The EM refers to expected outcomes of the provision, including industry development. But specific measures in the Standard must be directed at the rationale for the provision and objects of the Act. There is no basis for regulatory intervention directed at industry development as an end in itself, such as minimum licence fees or independent production quotas. Had Parliament intended an industry development objective for the Australian Content Standard, it would have been specifically provided as an object of the Act in section 3 of the .

The High Court ruled in *Project Blue Sky v ABA* that the ABA's standard-making power in section 122 of the BSA must be exercised within the framework of section 160 of the Act. The majority judgment described section 160 as 'the dominant provision – directing how the function conferred by section 122 is to be carried out' (at para 81). Similarly, the Explanatory Memorandum for section 122 must now be read to take into account the constraints on s.122 imposed by the High Court's ruling.

Section 160 states that 'The ABA is to perform its functions in a manner consistent with: (a) the objects of this Act and the regulatory policy described in section 4; and...'.

An effect of the High Court's ruling is that provisions in the Australian Content Standard will be invalid unless they are consistent with the objects of the Act and the regulatory policy of the Act.

In addition to the primary cultural objective in section 3(e) of the Act, the Standard must also be consistent with the object in s.3(b) – 'to provide a regulatory environment that will facilitate the development of a broadcasting industry that is efficient, competitive and

¹ Productivity Commission Broadcasting Inquiry Report 2000, page 364

responsive to audience needs'. The regulatory policy of the Act in section 4 requires that public interest considerations be addressed in a way that does not impose unnecessary financial and administrative burdens on broadcasters. Many of the ABA's Proposed Amendments would add significant additional administrative and financial requirements to the existing compliance requirements for commercial broadcasters.

Specific industry development measures such as independent production quotas and minimum licence fees are not consistent with the development of a competitive broadcasting industry. The Productivity Commission noted that if content quotas are imposed as industry assistance measures rather than for social and cultural purposes, they 'are contrary to contemporary Australian industry and competition policy'.. and would impose unnecessary financial obligations on broadcasters².

There is no doubt that the production industry greatly benefits from the broadcast of Australian programming on commercial television. Commercial broadcasters spent over \$700 million on Australian programs in 2000-01, an increase of more than \$100 million from the previous year. FACTS members underpin 78% of Australian film and television production.

However, as noted in the first FACTS submission to the current Review: "The public interest considerations involved in the Standard-making process do not involve assessing competing 'bids' from potential beneficiaries of regulatory intervention such as sectors of the production industry. The ABA has no power to take such considerations into account."³

The ABA attempts to justify its acknowledged industry support measures as follows:

"The link between cultural outcomes for audiences and the development of the production industry is recognised in the Standard. The manner in which Australian programs are defined – as programs produced under Australian creative control – reflects the aim of ensuring the availability to Australian audiences of programs that are made specifically for them."⁴

In making this comment, the ABA seeks to equate Australian creative control with independent production creative control and thereby justify its industry support proposals. This approach is deeply flawed – the productions of Australian commercial broadcasters are every bit as Australian as those produced by the production community and have always satisfied the requirement of Australian creative control. The creative elements test is designed as an objective measure of the 'Australian-ness' of a program in preference to an on-screen test for an Australian look. It has never existed for industry support purposes. Accordingly, the requirement for Australian creative control can in no way be said to be a recognition of the "close relationship" of cultural objectives with industry development.

The ABA approach as reflected in the industry development measures in the Proposed Amendments is flawed. The standards-making power that Parliament has entrusted the Authority with must be exercised with reference to the objects and regulatory policy of the Act, which does not include production industry development.

² Productivity Commission Broadcasting Inquiry Report 2000, page 415-16

³ FACTS Submission to the Review of the Australian Content Standard, 18 February 2002, page 7

⁴ Review of the Australian Content Standard, ABA Proposed Amendments July 2002, page 8

2.2 Independent production

The ABA approach to favour independent production is, as set out above, not supported by the objects of the Act.

The ABA also seeks to argue that independent production industry support is necessary to achieve diversity and innovation in programming. There are three problems with this statement:

- firstly it suggests that diversity and innovation is not being delivered under current arrangements and in fact ignores evidence to the contrary;
- secondly it equates diversity of programming with diversity of supply; and
- thirdly it assumes that the industry support measures proposed by the ABA will result in a proliferation of independent producers rather than a growth in size of existing production companies without producing evidence in support of this assertion and contrary to the experience in countries such as the UK and USA.

A diverse slate of Australian programs for audiences already exists. As noted in FACTS earlier submission to the Review, ABS statistics show that over 60% of all Australian programming (including news, current affairs and sport) is produced by the independent production sector already.⁵ This figure is significantly larger if news, current affairs and sport production, traditionally carried out by broadcasters themselves, is excluded. This compares extremely favourably with the 56/44% in-house/independent split in the United Kingdom (excluding news).

In drama, an overwhelming 85% of total Australian production comes from the independent production sector. This figure includes ABC and SBS with significant in-house production. There is absolutely no policy justification for measures that discriminate between programs produced by the independent sector or networks on the basis that there is not a diversity of supply. Diversity of supply, as measured by the proportion of in-house and independent production demonstrably already exists.

In terms of diversity of programming, one would be hard pressed to find a broader array of programming types, values and perspective than the current Australian programming offerings on commercial television. In recent months, five new drama series have been launched on Australian television, each one with its own unique approach and being quite distinct from each other. Four of these were produced by independent production companies. There is simply no evidence that diversity and innovation is not occurring and therefore no justification for regulatory intervention on these grounds.

Even if measures to achieve additional diversity of supply were justified, there is no evidence that the ABA's proposed measures will deliver this outcome. In fact, international experience suggests quite the contrary. The proposed mechanisms will deliver benefits for a small number of existing larger independent producers.

Independent production quotas and incentives in the UK and the USA have had a similar result. In the United Kingdom, where a 25% independent production quota was introduced in the 1980's, the production industry remains highly concentrated. 80% of production is carried out by 12 entities (including in-house production by broadcasters

⁵ FACTS Submission to the Review of the Australian Content Standard, 18 February 2002, page 18

such as the BBC). 80% of production companies produce programs for only one broadcaster, effectively functioning as an out-sourced production department.⁶

Similar patterns can be seen in the United States with the growth of concentrated number of large studios as a result of limits on in-house production by networks. There is simply no evidence that independent production quotas or so-called “incentives” will deliver the outcomes suggested by the ABA.

FACTS strongly opposes the ABA's independent production proposals for the drama and documentary sub-quotas. Further comment on these issues can be found at paragraphs 3.4(i) and 5 below.

2.3 Regulatory impact

FACTS concurs with the general philosophy stated at paragraph 1.4.3 - that proposed change should have minimum regulatory impact. However, this philosophy is not reflected in the Proposed Amendments, which would have an adverse effect on broadcasters through heavier and more complex regulatory requirements.

Many of the Proposed Amendments do not reflect ‘light touch’ regulation, and are inconsistent with the regulatory policy set out in section 4 of the Act. FACTS’ objections to the regulatory impact of specific measures and their additional complexity are set out in the discussion of the proposals in this submission.

2.4 Recognition of New Zealand

FACTS is disappointed that the ABA does not plan to repeal all measures introduced during the last Review in response to the inclusion of New Zealand programs. Those measures introduced additional restrictions for broadcasters in most cases solely on the basis of the anticipated impact of inclusion of New Zealand programs in the Standard. New Zealand programs have had no impact on the operation of the Standard. The changes made in response to the inclusion of New Zealand programming in the Standard are therefore no longer justified. FACTS makes further comment in relation to this issue in relation to specific proposals below.

2.5 Changing broadcasting environment

FACTS notes the ABA's views on the changing broadcasting environment. FACTS' views on Australian content regulation in this Review are made in the context of the current overall regulatory framework for broadcasting.

⁶ see “Out of the Box – The Programme Supply Market in the Digital Age” a Report for the Department for Culture Media and Sport, David Graham and Associates, December 2000 at page 31-32.

3 Proposals for the adult drama quota

3.1 New points system

FACTS' response to the proposed new points system for adult drama is based on the following principles:

- The existing points system needs to be re-weighted to provide greater incentive for the broadcast of series produced at the rate one hour or less per week, mini-series, telemovies and feature films that have had a theatrical release.
- The linkage of points to minimum licence fees paid for programs and/or the acquisition of programs from the independent production sector are pure industry-support mechanisms which are not in accordance with the objectives of the Standard and which FACTS completely opposes.
- Serial drama should not be effectively devalued by any increase in the overall points total and should maintain its current value in the overall framework.
- There should not be any points distinction between new series and subsequent seasons of a series.

FACTS proposes a revised, simplified points system for the drama quota based on the genre relativities of the ABA model but which removes the proposed licence fee, independent production and 'new' series elements, as follows:

Serials (i.e. produced at the rate of more than 1 hour per week)	1.15
Feature films with no theatrical release	2.5
Series (i.e. produced at the rate of 1 hour or less per week)	3.0
Mini-series, Telemovies, Feature films with theatrical release	4.0

3.2 Total points

The above points system is based on a 3 year total of 890 points (850 in the first 3 year transitional period) as proposed by the ABA.

3.3 Serials

The ABA's proposed model contemplates no change in the format factor for serial drama. However, by virtue of the increase in the aggregate points total, the ABA model in fact devalues serial drama. There is no discussion of this outcome in the Explanatory Paper.

The value ascribed to serial drama has traditionally formed the 'base' against which other drama genres have been compared. FACTS considers that the existing proportional value for serial drama should be maintained. This approach would ensure that the longstanding and popular Australian drama serials– *Neighbours* and *Home and Away* – and any new serial that may be created in the future are not inadvertently disadvantaged by an increase in the overall points total.

Accordingly, under the FACTS model, FACTS has proposed a small increase in the format factor for serial drama to 1.15 to maintain its relativity in proportion to the overall increase in the aggregate points level.

3.4 Series

FACTS supports a higher weighting for series drama. However, FACTS strongly opposes linking this to series acquired from the independent production sector, to any form of minimum licence fee or to any distinction between 'new' series and subsequent seasons of that series, as proposed in the current ABA model.

(i) *Independently produced series acquired for a minimum licence fee*

FACTS completely opposes distinguishing between drama programs on the basis of whether a program has been independently produced and/or the licence fee paid to the independent production company.

The Proposed Amendments provide for a so-called 'incentive' approach to acquire independently produced programs for a minimum fee. This incentive approach is inherently flawed as it is designed to allow broadcasters to trade off programming hours for industry support payments. Effectively, the regulation would signal to broadcasters that if they pay more to an independent producer for a program than they might otherwise, they can provide less Australian drama programs to their viewers. This proposed trade-off – fewer hours of Australian drama broadcast in exchange for industry support payments above marketplace levels - is not consistent with the objective of the Australian Content Standard.

FACTS' concerns with an independent production drama quota are set out in detail at pp18-20 of the first FACTS submission to this Review (February 2002) and at 2.2 above. These objections apply equally to an incentive-based system that would value independently-produced programs more highly than in-house productions.

The ABA's approach will result in broadcasters commissioning and scheduling product to comply with quotas rather than to meet audience preferences. The approach is flawed, is designed to benefit a handful of independent producers and cannot be supported by reference to viewer interests.

In summary:

- Each broadcaster should be free to organise their drama productions in the most efficient manner for them, an approach which underpins the diverse and competitive industry that currently exists. FACTS disputes the assertions made by the ABA that independent productions are necessarily more risky for broadcasters⁷ – the commercial risk for each project depends on the particular deal and circumstances in each case and is not dependent on whether or not a program is produced independently.
- Ratings data does not support a general proposition that audiences value independently produced dramas more highly than in-house productions. The top 20 Australian programs for 2001 contain both in-house and independent productions. Audiences respond to good stories, good acting and well produced

⁷ Review of the Australian Content Standard, ABA Proposed Amendments July 2002, page 16

programs, not the name of the producer. The Q score measures quoted by the ABA bear no relationship to the identity of the production entity.

- More than 85% of Australian television drama is independently-produced. This result has been achieved without any independent production quota in the Standard and there is no justification for regulatory intervention.
- Direct funding is not the only contribution to a healthy production sector – in house production gives training, reliable employment and the ability to move between projects to independent producers and other creative personnel.

FACTS' objections to minimum licence fees and expenditure related quota mechanisms are set out in more detail at pp16-18 of the FACTS submission to the Review (February 2002). In summary:

- Setting minimum licence fees cannot be justified by reference to the cultural objective of the Act, and it is inappropriate and anti-competitive for regulation to create price distortions in the marketplace.
- Minimum licence fees may lead to inflated prices, and an inefficient allocation of resources away from other program genres.
- A minimum licence fees approach ignores non-cash contributions by a broadcaster. In-kind production support is a legitimate and concrete contribution to a production budget which would otherwise need to be paid for in cash by the producer. The ABA's exclusion of these arrangements from their incentive based scheme is not explained in the ABA's paper.
- Minimum licence fees would cause unacceptable legal and financial complexity, create potential for contrived contractual arrangements compared with the transparency of the points system, and result in complex administration and regulatory oversight without delivering any audience benefits.

(ii) New series

FACTS does not support the ABA's proposal that would award fewer points to subsequent seasons of a series than its first season.

This proposal has not been based on any recommendations to the Review. In developing this proposal (without consultation with the networks), the ABA has attempted to 'second-guess' the economics and scheduling practices of commercial television broadcasters. These factors are complex and it is not necessarily the case that launching a new series is inherently more risky than commissioning a subsequent series of a moderately-performing program. It can sometimes take several seasons for a drama program to find a strong and loyal audience.

The second half of 2002 has seen each of the three commercial networks launch major new one hour drama series. The networks are monitoring their performance closely. The networks will soon have to decide whether to commission a second season of these series. This proposal in fact would create a regulatory incentive to cease production of these series and instead commission further 'new' series that would earn more points. This proposal would create economic pressures that could lead to an increased turnover

of drama programs before they have had a chance to establish their success with audiences.

Further, there is no justification for the implication in the ABA's recommendation that existing series make a lower lesser cultural contribution or are valued less by audiences than new series. This is clearly not the case.

New series should earn the same format factor as ongoing series. FACTS considers the regulatory system should encourage the nurturing of Australian drama series over time, rather than provide incentives for a constant turnover in production to more easily make quota.

Accordingly, FACTS considers that all reference to new series or those acquired for a licence fee for more than \$300,000 should be removed. The format factor for all series should be set at a single level. FACTS believes that the format factor of 3.0 proposed by the ABA should apply to all series. This would appropriately recognise the relativities between different production types.

(iii) *Mini-series and Telemovies*

FACTS supports the ABA's approach to increase the format factor for mini-series and telemovies to 4.0. FACTS notes this approach is consistent with the Gonski Review of the Australian film and television industry, which expressed support for a higher weighting for mini-series and telemovies.

FACTS agrees that the points system should provide additional incentive for high-end drama to reflect the costs and risks associated with scheduling mini-series and telemovies, and that a format factor of not less than 4.0 is an appropriate level.

(iv) *Feature films*

FACTS opposes distinguishing between feature films on the basis of the licence fee paid by broadcasters. FACTS' objections to minimum licence fees in the Standard generally are set out at paragraph 3.4(i) above. The proposed ABA model would set an arbitrary level of licence fee which would trigger the higher format factor of 4.0.

FACTS disagrees with the assertion that the format factor for feature films is anomalous and at odds with the underlying principles of the subquota (p26D3.3). Rather than a flat hours-based quota, the points system was designed to deliver a range of programming types and provide incentive for higher quality productions, so-called high-end drama.

The format factors for made-for-television drama are approximate measures of the 'quality' of the different genres, broadly based on their value to broadcasters and audiences. The points system focuses on the differences between made-for-television drama. Feature films have always been awarded the highest format factor as they are considered to be the highest quality drama genre and warrant incentive for broadcasters to acquire to showcase to Australian audiences. A further point of distinction is that television is not the primary market for feature films so that, unlike made-for-television drama, licence fees are not required to generate their production. Unlike made for television product, broadcast licence fees are of lesser importance in the overall funding mix for feature films.

Licence fees for feature films do vary widely, and are linked to the theatrical success of a film more than other factors such as the production budget and production values of the film. Thus a low-budget successful film may command a much higher licence fee than a big-budget feature that has not had theatrical success.

Few Australian feature films enjoy success at the Australian box office, but those that receive a theatrical release are quality productions that deserve a wider Australian audience. One of the best ways to achieve this is through commercial television, which consistently attracts the largest audiences for Australian feature films.

However, Australian feature films that have only been moderately successful at the box office will attract a moderate licence fee – they involve substantial risk for broadcasters as they have already been tested in the marketplace and not found success with Australian cinema audiences. To penalise these feature films by lowering their format factor would make them unattractive (from a quota perspective) to broadcasters, and may deprive a considerable number of Australian features of a commercial television screening. This result would be to the long-term detriment of the Australian film industry, Australian film culture and viewers.

FACTS proposes that any distinction in feature films under the points system should be on the basis of the quality of the film. An objective measure of a film's quality is whether it has achieved an Australian theatrical release, by securing the confidence and backing of a distributor and exhibitors. Australian feature films that achieve a theatrical release have a higher level of professionalism and quality. They are deserving of the highest format factor under the points system to provide an incentive for broadcasters to acquire them so that they may be seen by the widest possible audience. Films that have not achieved a theatrical release should attract a format factor at the value of 2.5 as suggested by the ABA for less successful films.

3.5 The drama timeband

FACTS considers that there are compelling reasons to extend the current timeband for drama 11.30pm, to partially restore the hour lost during the last review.

In deciding not to restore all or even part of the timeband lost during the last review, the ABA states that 'all networks have met their drama requirements within the 5pm-11pm band'. This is not a justification for no change – it simply demonstrates that networks will comply with their licence conditions even if that means less scheduling flexibility for their audiences.

Commentators sometimes bemoan the fact that Australian dramas are scheduled against each other. There are a limited number of timeslots for Australian drama, which tends to be scheduled between Monday and Thursday evenings. As programs start on the half-hour in Australia, extending the timeband to 11.30pm would make the 10.30pm timeslot available, a timeslot which has proven popular for quality foreign drama series. The available timeslots are further restricted by classification restrictions which prevent the broadcast of some programs before the 9.30pm timeslot. For example, some episodes of the first series of *The Secret Life of Us* were classified MA which pushed it into the 9.30pm timeslot.

Part of the ABA's justification for not extending the timeband is that 'very little new Australian drama is regularly scheduled after 9.30pm' (at p44 D6.4). This is a surprising statement given that, currently, three Australian drama series are scheduled on free-to-

air television on Tuesday nights between 9.30pm – 10.30pm: *Marshall Law*, *Stingers* and *MDA*. Australian broadcasters are responding to viewer preferences for drama in later timeslots, with the result that three Australian dramas are competing against each other in the limited timeslots available for drama targeted at mature adult rather than family audiences.

There are approximately 3.7 million Australians watching television every night between 10.30pm - 11.30pm. This is not a marginal timeslot. Furthermore, late night viewing has increased significantly in recent years. Between 1998 and 2001 viewing by Australian households between 10.30pm and 11.30pm increased by 5%.⁸

The production industry's concerns during the last review in relation to the possibility that New Zealand programs may be broadcast in later night timeslots (cited in industry submissions as an argument for reducing the timeband to 11pm), have been proven to have no basis.

The ABA has stated that a key question in relation to the consideration of the timeband issue during the previous review 'has been whether the midnight finish was too late'.⁹

FACTS considers that the issue does not only require a choice of either an 11pm or 12pm finish. FACTS therefore proposes that the prime time band for drama should be extended to 11.30pm which provides a half-way point which fits in with scheduling practices on the half-hour and addresses concerns that a midnight finish may be too late. This half-hour adjustment to the timeband would provide additional scheduling flexibility to allow a broader diversity of programs and more timeslots for the scheduling of Australian drama across the networks.

3.6 Narrative Comedy

The ABA has proposed that narrative comedy pilots broadcast between 11.00pm and midnight may count towards adult drama recognising the commercial risks associated with this type of program. FACTS considers that if the ABA proposes that it can count if it is broadcast after prime time it equally should accept that it can be broadcast during the day. FACTS proposes that if a pilot is broadcast at any time between 6.00am and midnight (i.e. during the time band for the 55% quota for Australian content) it should count towards the sub-quota.

3.7 13 hour rule

If the timeband is extended to 11.30pm as recommended above, FACTS proposes that the 13 hour rule be retained for the 11.30 – 12 midnight timeslot.

⁸ See ratings analysis and charts based on OzTAM and ACNielsen data set out in the Nine and Ten submission to the Review of the Australian Content Standard, February 2002, pp8-9 and Attachments 1-2

⁹ Review of the Australian Content Standard, ABA Issues Paper, November 2001, page 51

3.8 Financial and administrative complexity

As noted above, the ~~BSA~~ requires the ABA not to impose unnecessary financial and administrative burdens on broadcasters. The ABA acknowledges this by stating “wherever possible proposed change should meet the tests of simplicity, transparency and accountability”.

The expenditure and licence fee based proposals of the ABA do not meet this requirement. In order to take advantage of the ABA’s proposals, detailed additional reporting of confidential project financing deals would be required. Broadcasters do not currently report the cost of individual programs to the ABA, nor is it appropriate that they should be required to do so.

Further, the additional complexity in the ABA’s proposals would of themselves give rise to considerable administrative burdens in ensuring compliance.

4 Children's Drama

FACTS' first submission to the Review set out in detail¹⁰ the deficiencies in the C drama quota's operation, in particular the lack of appeal of most children's drama programs with the target audience relative to their high cost and the far greater popularity of other children's programs.

While welcoming proposals such as the three year averaging and removal of the minimum licence fee, FACTS considers that the Proposed Amendments do too little to address the fundamental problems with the operation of the C drama quota.

FACTS has considered further ways to address these problems. FACTS proposes a range of measures that will provide much-needed flexibility in meeting the quota without reducing the quality or quantity of children's drama available for the child audience. These are set out below.

4.1 Tradeable quotas

FACTS has given further consideration to the issue of tradeable quotas as raised in the ABA's Issues Paper. FACTS proposes that the Standard should allow tradeable quotas in relation to the C drama quota. This would require each broadcaster to be responsible for either broadcasting the requisite C drama programming or making arrangements at its expense for another broadcaster to do so. The tradeable quotas proposal would maintain the broadcast of the aggregate first release C drama quota output on Australian free-to-air television.

There are two aspects to this proposal:

(i) *Tradeable quotas between commercial broadcaster*

The proposal would allow commercial broadcasters to enter into an arrangement whereby one broadcaster agrees to assume some or all of the other's C drama obligation in respect to a particular year in exchange for the corresponding amount of C transmission quota.

For example, two broadcasters may agree to a commercial arrangement whereby Broadcaster A agrees to assume some or all of Broadcaster B's annual C drama obligation. The proposal would require both participating broadcasters to sign an ABA Form which would need to be lodged in advance of the broadcast of the programming by Broadcaster A. The Form would need to specify the title of the C drama program/s and the number of hours and the relevant year/s to which the quota trade relates.

Upon lodgement of the Form, broadcaster B would be relieved of its C drama quota obligations to the extent nominated in the Form, which would then be transferred to broadcaster A. In exchange, the corresponding number of hours of the general C transmission quota would be transferred from Broadcaster A to Broadcaster B. A failure to broadcast the nominated C drama programming would result in broadcaster A, but not Broadcaster B breaching the Standard. Broadcaster B would still need to broadcast the requisite 260 hours of C programming, but the lesser amount of C drama as nominated in the Form could be shown. All commercial broadcasters would still show the same

¹⁰ FACTS Submission to the Review of the Australian Content Standard, 18 February 2002, pages 20-33

amount of C programming, but the proportions of C drama amongst the networks may vary.

The proposal is transparent and able to be easily monitored by the ABA. The proposal would not allow retrospective transferring of obligations. At any point in time each broadcaster's quota obligation would be clear and enforceable.

(ii) Tradeable quotas involving a national broadcaster

FACTS proposes that a commercial broadcaster should also be able to make arrangements with a national broadcaster to broadcast some of its C drama quota.

Under this proposal, a commercial broadcaster would enter into a commercial arrangement with a national broadcaster to screen nominated C drama programming on its behalf. It is intended that this would be additional children's drama programming to that which the national broadcaster would otherwise provide. The national broadcaster would have an enforceable agreement with the commercial broadcaster to secure the underlying commercial arrangements between them. The programming would need to obtain C certification from the ABA.

The national broadcaster and the commercial broadcaster would sign and lodge a Form with the ABA in which the national broadcaster would undertake to the ABA that:

- It will broadcast the nominated program/s and hours in the particular year to which the Form relates; and
- The programs are being broadcast under a commercial arrangement with the commercial broadcaster and would not have been broadcast except for this arrangement.

Upon lodgement of the Form the commercial broadcaster would be relieved of its C drama quota obligation to the extent nominated in the Form.

The process would be transparent and able to be easily monitored by the ABA. FACTS acknowledges that the ABA does not have the statutory capacity to take enforcement action against a national broadcaster if it ever defaulted on its undertaking to broadcast the nominated programming. However, FACTS considers that the responsible governance of the national broadcasters ensures that a default on such an undertaking would not occur. A public commitment lodged with the ABA to broadcast the nominated C drama programming is all that would be required from a national broadcaster to ensure that the requisite C drama programming would be broadcast.

In summary, tradeable quotas would result in the same amount of first-release C drama programming being broadcast for the child audience, whilst allowing for the possibility of some additional scheduling flexibility across the networks. FACTS would be pleased to discuss the proposal in further detail with the ABA and the national broadcasters.

4.2 Sub-quota level

The Standard requires the broadcast of 40 hours of C drama each year, comprising 32 hours first-release and 8 hours of repeats. FACTS proposes that the weighting of first-release and repeat C drama material within the overall total should be adjusted to 26 hours first-release/14 hours repeats.

FACTS initially proposed that the scope of the C drama quota be broadened to include high quality diversity programming. FACTS continues to maintain that this approach would be the most appropriate mechanism to address the deficiencies in the operation of the existing C drama quota.

However, FACTS acknowledges that this proposal has not been supported, with the ABA deciding to confine the quota to drama. In its initial submission FACTS indicated its view that if the C drama quota was not broadened, the level of the quota would need to be reduced in recognition of the unsustainability of current quota levels¹¹.

FACTS notes the ABA does not support a reduction in the quota. However, FACTS considers that an adjustment to the balance between first and subsequent runs in the overall 40 hours quota would achieve the objective of ensuring the same amount of children's drama is broadcast, whilst freeing up some resources for other quality children's programming.

As C drama series are produced in 13 or 26 parts, a first-release figure of 26 hours is better suited to scheduling arrangements. A 26 hour first release quota would still provide, each year, 30 hours more of new product than the longstanding 16 hours first-release quota that applied during most of the 1990s. This proposal will relieve some of the unsustainable financing pressures that the doubling in the quota has caused. This small adjustment of just 6 hours per year would not impact at all on the opportunity for children to watch C drama, particularly as children often enjoy watching repeat programs and will have access to the same amount of Australian children's drama overall.

4.3 Three- year averaging

FACTS welcomes the ABA's proposal to introduce averaging of the C drama quota over 3 years, consistent with the approach of the adult drama quota. This will allow much-needed scheduling flexibility.

However, FACTS opposes the condition that links to the availability of three-year averaging to stringent scheduling requirements. Broadcasters need flexibility to adapt program schedules in response to a range of circumstances and cannot commit to a fixed 3 year schedule which this proposal would effectively require. The requirement may also act as a disincentive to trial a C drama series in a more ambitious timeslot as it would not be able to be moved without causing a breach of the licence condition if averaging is being utilised.

While on occasion some C drama programs have been rescheduled, in the main C drama programs are consistently scheduled. The most common reason for interrupting a series' run is if the annual quota has been achieved halfway through a series, in which case the remaining episodes are held over to the following year. This problem is addressed by the averaging provisions on their own – as they would allow flexibility to enable all episodes in a series to be run consecutively as the episodes in excess of 32 hours would be able to be counted towards the three year quota. That is, the imperative to cut the series in half is removed.

FACTS considers that the scheduling conditions would make it difficult to access the benefits of the averaging proposal, undermining a key aspect of the flexibility the C

¹¹ FACTS Submission to the Review of the Australian Content Standard, 18 February 2002, page 28

drama quota requires. FACTS notes that similar scheduling provisions do not apply to access the 3 year averaging of the adult drama quota, which has worked well.

4.4 Makeup provision

FACTS is disappointed that the ABA has not agreed to allow a makeup provision at the end of the three year cycle. FACTS believes this is necessary to enable the workable operation of the C drama quota and to properly address the problems the averaging provision was designed to remedy. On a number of recent occasions producers have defaulted on their delivery obligations to broadcasters, causing difficulty in meeting the quota through no fault of the broadcaster.

In such circumstances, the broadcaster is placed in breach of its quota obligations through circumstances beyond its control. This problem is currently not adequately addressed by the averaging proposal. If a broadcaster chose not to access averaging due to the current scheduling requirements attached to that proposal, or if the default occurred in the final year of a triennium, averaging would not provide any assistance to remedy this problem.

FACTS proposes that the Standard include a provision that the ABA may allow a broadcaster to carry over up to 7 hours at the end of its three year quota (or at the end of each year if averaging is not being utilised under the current proposal), if the broadcaster can demonstrate that the failure to meet the quota is due to circumstances beyond the broadcaster's reasonable control.

In addition, FACTS proposes that C drama hours broadcast in excess of quota requirements in the final year of the three year period should be able to be carried forward to the subsequent three year period if the additional hours have been broadcast to avoid "splitting" a series and enabling the broadcast of the complete set of episodes in the relevant series.

4.5 Definition of children

FACTS notes the ABA's acknowledgement of the inconsistency in the Children's Television Standards wherein children are defined as aged under 14, yet C certification requires programming to be targeted at the primary school age group. Of course, by age 13, children have left primary school. The revision of the Children's Television Standards to fix this anomaly by removing reference to primary school is supported.

However, FACTS considers the definition of 'child' should be extended to 'age 14 and below' for the reasons set out in the initial FACTS submission¹² (at pp28-29). FACTS considers that the so-called 'tween' audience includes 14 year olds as well as 13 year olds. FACTS notes that this definition of children is consistent with accepted classification provisions that apply restrictions to viewing for children aged 14 and below. FACTS considers that raising the age by one year to age 14 and below would enable broadcasters to provide a greater range of appealing and challenging Australian programs for a broader child audience.

FACTS notes that changes to the definition of "child" will require consequent changes to the CTS guidelines and assessment procedures to reflect this alteration in approach. FACTS welcomes the ABA's proposed review.

¹² FACTS Submission to the Review of the Australian Content Standard, 18 February 2002, pages 28-29.

4.6 Promotion proposal

FACTS strongly opposes the Proposed Amendments relating to promotion of C drama programs.

As set out in FACTS' initial submission, there is no evidence that the lack of audience for C drama programs is due to their lack of promotion. Other children's programs in similar timeslots that do not receive promotion manage to attract greater audiences in general than most C drama programs. Further, the occasions when C drama programs have received on-air promotion has not resulted in attracting sufficient child audiences compared with other programming options.

The Standard is about delivering programming to viewers, not delivering promotions and advertising to viewers. C drama programs are already disproportionately expensive compared with other programs. The promotion strategy proposal will involve additional expense and administration for broadcasters, and divert resources away from other children's programming.

The promotional package considered by Zenith media on behalf of the ABA would involve considerable expense. As noted FACTS earlier submission C drama is already a disproportionately expensive production genre compared to other production types such as adult drama. Further expenditure on promotional strategies for C drama is not warranted or appropriate.

Moreover, FACTS has a fundamental objection to broadcasters having to submit promotion strategies to the regulator for its approval. Broadcasters are best placed to determine the promotion strategies and priorities for the programming in their schedules. To require the diversion of additional funds into promotion for C drama programs is outside the purpose of the Standard. Children's programming budgets should be focused on the acquisition of programming, not diverted through regulation into C drama advertising. FACTS objects to this proposal in the strongest possible terms.

4.7 C feature films and telemovies

The proposed bonus scheme for C telemovies and feature films does not provide sufficient incentive to acquire and schedule such programs in primetime.

FACTS notes that this bonus scheme was proposed by representatives of the children's television production industry, but that it contemplated a triple-points bonus.

The ABA discussion of this proposal (at E5) discusses the acquisition cost relativities of a telemovie/feature film compared with episodes of a C drama series. FACTS considers that this discussion understates the likely cost to a broadcaster of a children's telemovie/feature film. For example, four episodes of a C drama series at the FFC minimum licence fees would cost a broadcaster \$300,000, whereas a telemovie generally requires a minimum licence fee of \$700,000 – over twice as much.

Moreover, the ABA discussion only addresses the cost relativities: it does not take account of the primetime requirement attached to the proposal. There is additional regulatory incentive required to broadcast a C drama telemovie or feature film in primetime due to their more limited appeal than other family-oriented programming, and

the advertising restrictions that attach to C programming. The current 'double-points' proposal does not address this factor.

FACTS considers this proposal should allow triple points to offer any chance that it may be utilised.

4.8 Assessment of programs

FACTS welcomes the review of the ABA's assessment procedures and supports the terms of reference for the review set out at pp27-28 of the Explanatory Paper. FACTS looks forward to contributing to the review process over the next few months.

5 Documentary

FACTS' made extensive submissions in relation to the documentary quota in its earlier submission to the Review.¹³ FACTS continues to press the views expressed in that submission, that is that the increase in the documentary quota from 10 to 20 hours occurred as a result of the anticipated impact of inclusion of New Zealand programs on the Standard and that as broadcasters have not scheduled New Zealand programs to meet the quota it should be returned to its earlier level.

FACTS strongly opposes the ABA's proposed changes to the documentary quota.

There is absolutely no justification for further increase in the documentary quota. The quota was doubled to combat the inclusion of New Zealand programming, which has proven to have had no impact on the quota. There is no demonstrated audience demand for additional documentary programming on commercial television.

The proposal to award bonus points for presales over \$70,000 is directly aimed at assisting independent documentary producers and is an industry support expenditure measure. As discussed above in sections 2.2 and 3.4 of this Response, this measure is inconsistent with the rationale of the Standard and should not be adopted in the amended Standard.

FACTS rejects the ABA's view that the proposal involves a quality/quantity trade-off. FACTS refutes the implication that a documentary acquired from an independent producer for \$70,000 is of higher 'quality' than other documentaries. The breadth of subject matter and styles of documentary make it impossible to justify such an assertion. Nor does the ABA present any supporting evidence on which to base such a statement.

The proposal is not a quality/quantity trade-off; it is a programming/industry support trade-off. The regulation would encourage broadcasters to trade-off the proposed increase in the quota if they spend minimum amounts of money on the independent production industry. It is a deliberate industry-support measure.

The Regulatory Impact Statement asserts without any explanation that the proposal 'should deliver benefits to the commercial television industry...' (at p112). FACTS rejects this assertion, and questions on what basis the ABA has reached such a conclusion. If this impact statement has contributed to this proposal, the underlying analysis is flawed as the proposal will deliver costs, not benefits to commercial broadcasters.

FACTS also strongly disagrees with the analysis that considered one year's documentary quota compliance level to form the basis of the impact on broadcasters. If broadcasters choose to exceed a quota in a given year, that should not be used to justify an increase in quota levels. Audience preferences are notoriously cyclical. The fact that audiences may choose to watch documentary programs in any particular year and that broadcasters meet that need should not be the basis for a quota increase. The quota should be a safety net, not a scheduling tool – raising the quota requirement to 26 hours will result in broadcasters being required to schedule to comply with the quota rather than to meet audience needs.

¹³ FACTS Submission to the Review of the Australian Content Standard, 18 February 2002, pages 33-34

FACTS notes the ABA proposes to consider issues relating to the definition of documentary. FACTS opposes any change to the definition that would restrict the range of documentaries broadcasters can provide to viewers.

There is no policy justification whatsoever for the proposed changes to the documentary quota.

If the ABA is not minded to reduce the quota to pre-Project Blue Sky levels, the quota should remain at its existing level of 20 hours.

10 September 2002