



SPAA Submission to the Proposed Reforms
to the
Broadcasting Regulatory Powers of the Australian
Communications
and
Media Authority

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Screen Producers Association of Australia

SPAA is the industry body that represents Australian independent film and television producers on all issues affecting the business and creative aspects of screen production.

- SPAA members include television, feature film, animation, documentary, TV commercial and interactive media production companies as well as services and facilities providers such as post-production, finance, distribution and legal practices. Members supply broadcasters with a range of program types including tele-movies, series and serials, documentaries, game shows and reality TV.
- Television programs commissioned from the independent sector are rarely fully funded by local broadcasters, therefore an increase in delivery risk can affect independent producers' international standing.

In summary SPAA supports the;

- Inclusion in the new legislation of a specific Object that gives the ACMA the responsibility to facilitate independent film and television production in Australia. This may include, where necessary, direct interventions in the market place. **See Appendices 1**
- Extension of the Australian Transmission Quota and the Australian Content Standard for adult and children's drama and documentary to the Australian Broadcasting Corporation (ABC). **See Appendices 2**
- The ACMA to have the authority to review the effectiveness of the ABC's charter and the role of the public broadcaster in the future. **See Appendices 2**
- Increase of ABA and now ACMA's ability to collect data from broadcasters, both financial and schedule information in a timely and detailed manner. Whilst SPAA believes a major barrier to collection of data has been adequate resources, there is benefit in ACMA gaining increased power to insist on detailed and timely reporting requirements.

There is a serious concern that by changing the nature of the code of practice from voluntary to enforceable undertakings, and by providing additional courses of action in the area of program content, this will create unintended consequences. SPAA limits the remainder of its comments to the specific issues that these proposed changes raise for independent producers as suppliers of content.

SPAA Interest

- SPAA members are key stakeholders directly affected by both the requirements contained within, and the administration of the Australian Broadcast Standard.
- SPAA members are significant strategic suppliers to free-to-air broadcasters yet the relationship is one of imbalance. SPAA members report continued deterioration in the terms of trade between free-to-air broadcasters and independents. It is, from our members' viewpoint, at an all time low.
- The survival of the independent production industry is dependent on local broadcaster commissions.
- Independent production companies' programs are made with reference to requirements and responsibilities within the voluntary code of practice, guided by the licensee.

Content Regulation

- Broadcasters and independent production companies have no creative nor commercial incentive to create work that will not be broadcast, threaten the public standing of the broadcaster and/or jeopardise the broadcasters license or standing with ACMA or the broadcasters' own advertising clients.
- There is a delicate dynamic in the creation of content between creative vision, broadcaster market vision and broadcaster license conditions. Historically, SPAA is unaware of any breaches or concerns involving independently produced programs that the ABA and now ACMA have been unable to resolve within the current framework.
- SPAA does not believe the current high level penalties lack meaning or sense of consequence in the area of content creation.
- The Objects within the ABS are quite different in nature to those listed within ACCC, ASIC. They are broader, softer, more interpretive and vulnerable to subjective interpretation and/or social political pressures e.g. ABS Section 1 (h) states an object of the act is to *'encourage providers of broadcasting services to respect community standards in the provision of program material'*. It is a delicate cultural, social instrument operating within a commercial sphere. Therefore there is a social benefit to ensure a high onus of proof exists before intervention into program content can occur.

- There are critical commercial and cultural implications in adopting the proposed reform to ACMA's regulatory powers in the area of independently produced creative content that are not adequately addressed in the current proposal.
- Free-to-air television's use of external suppliers creates unique issues that are less likely to arise in other broadcaster environment where the content creation is almost exclusively controlled by the broadcaster licensee or its direct agents.
- ACMA and free-to-air broadcasters share a direct relationship, yet production companies can be directly affected by imposition of additional conditions, injunctions and program fines or penalties proposed in the current report without any legal right to defend, provide witness or seek appeal or compensation.
- Independent production companies' commercial survival is based on the creation and delivery of commercial content. Any legislative powers that effect the creation of content need to recognise the commercial and creative interests of all parties. Given ACMA's licensing agreement is between the broadcaster and ACMA, there is the potential that independent production companies will bear the burden of the new penalty compliance measures third hand, with neither the access nor means to meaningfully partake in the negotiation of the issues.

As the weaker party in broadcaster negotiations, production companies are less able to resist any push by broadcasters to transfer the additional risks inherent in the current proposals. Further, production companies are the least able to fund legal challenge should such a right exist.

Current Strength, Future Vulnerabilities

- SPAA does not believe major areas of concern exist in relation to free-to air program compliance as guided by the current code of practice.
- SPAA is not aware of any serious content breaches under the current code of practice that have not been effectively addressed through consultation and negotiation. The introduction of the wide ranging and all encompassing powers as outlined in the current proposal is heavy handed in the area of content standards and has the potential to negatively impact on commercial dynamics between broadcasters and

independent production companies and the wider issue of freedom of expression and creative innovation. Further the proposed changes may increase the ease and propensity to intervene in program content, with increased potential to accelerate penalties, and interventions which, as we have seen in the past, can be subject to highly emotive responses and political pressure.

- There is significant potency in the ability to achieve positive social outcomes via voluntary rather than enforceable undertakings. Up until now, voluntary codes of practice/undertakings have been agreed to by broadcasters in an environment of co-operation and a willingness to achieve responsible outcomes. Operating under the voluntary code, there has been willingness by broadcasters to amend and update codes of practice as issues arise.
- The negotiated process of the voluntary code has delivered good outcomes in the area of television content and ensured a fluid approach to the ABS objects, which, as previous observed, are far more interpretive than objects within other regulatory environments.
- Entering voluntary codes of practice into law in the form of enforceable undertakings is not a simple matter; the two approaches are different in nature.
- The change from a voluntary code to enforceable undertakings and the move to civil penalties over criminal penalties may create a litigious relationship between the broadcasters and ACMA.
- The shift to enforceable undertakings and increase in compliance penalties introduces a new structurally adversarial relationship between ACMA and the broadcasters and is more likely to increase legal defense and resistance. It will also change the current climate of discussion, negotiations and willingness to work together.
- SPAA has specific reservations in relation to expanding the ACMA's powers to allow injunctions in civil matters where these civil matters potentially include *'failure to comply with a notice issued pursuant to s141, a direction to cease breaches of license conditions and **certain codes of practice**'*. The ability of ACMA to issue an injunction that may stop the broadcast of a specific program raises further issues for the independent production company. If there is a possibility that a program can be injected before it has been broadcast and negotiations to resolve such issues are limited to

the broadcaster and ACMA, then production companies carrying commercial delivery responsibilities and liabilities, including for example delivery to co-financers internationally, are at risk. The local broadcaster may freeze production and or production cash flow pending resolution without the rights of the third party being considered. The ability of production companies to seek a review or damages with regard to ACMA's conduct is also prohibited.

- SPAA believes the proposed changes in ACMA's regulatory powers in there current for have created an unintended downside that has the potential to damage the broadcast service and the industry environment.
 - The introduction of a legal dimension will not necessarily increase direct compliance. SPAA believes there is a clear argument to suggest that to avoid precedents or the threat of moving up the 'pyramid' of penalties, broadcasters will robustly defend even the smallest breaches.
 - The relative ease, speed and potential regularity in which penalties operate at a detailed level is effectively moving from an environment of facilitating a broadcaster to achieve and maintain standards to one of policing broadcasters in an active and detailed way. SPAA submits that in the area of content creation, the proposed changes do not support the object (ABS 1 f) *to promote the provision of high quality and innovative programming by providers of broadcasting services.* They are likely to increase internal pressure on broadcasters and program makers to avoid breaches through seeking 'safe compliance'. By this we mean, approaching content creation so conservatively that, for example, legitimate areas of exploration in contemporary adult television content creation is stifled.
 - Given the relatively weak position of independent producers' to negotiate favourable terms of trade with broadcasters, SPAA is concerned that broadcasters will seek additional indemnity clauses in their commissioning contracts so as to reserve the right to stop payment, withhold payment, deduct penalties or seek other protection to give effect to ACMA negotiated changes to production.

Conclusion:

- The current legislation has operated as an effective system for free-to air program content. Broadcasters and program suppliers have worked with the regulatory authority co-operatively to resolve issues responsibly.
- SPAA recognises that the ABA has previously sort and failed to achieve a widening of its injunction powers to allow possible injunction for any breach of the ABA.
- It is SPAA's position that granting ACMA the power to seek injunctions for all matter of breaches is neither desirable nor necessary- highly interpretive matters should not be included, rather such action should be limited to operating a broadcasting service without a licence.
- Given the uneven terms of trade that currently exists between independent producers and broadcasters, ACMA penalties may in-directly be forced down onto the production company; the least able to pay and the party that is not assured access to participate in ACMA negotiations.
- The ability to enforce content change and or limit its broadcast is a serious power that affects freedom of speech and the public's potential access to diversity.
- Increased speed in applying penalties without proper consultation does not necessarily mean public benefit is assured.
- The current legislation states that it seeks to facilitate development of a broadcasting industry 'to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs' (ABS 1a). For the reasons stated above SPAA believes the current proposal contains a key structural weaknesses in that it will actually change the environment of the broadcasting industry without assurance that the public will receive any real content benefit and the potential that the production industry itself will be less innovative and carry greater risk.

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Appendices 1/

Facilitate Independent Production

- In the act of transferring the roles and responsibilities of the ABA into ACMA, an oversight in the drafting of the Broadcasting Services Act 1992, (BSA) needs to be remedied.
- An additional object to those listed in the Preliminary Section 3 - Objects, of the BSA needs to be inserted at the time of establishing new legislation for ACMA in order to recognise the role of ACMA in facilitating Australian independent production.
- It was the intent of the 1992 legislation that a core objective planned for the then new ABA was to facilitate independent production. The associated Explanatory Memorandum and Minister's parliamentary speech introducing the legislation clearly specify the intent of the legislation in this area. It is generally accepted that the failure for this to be written into legislation was a drafting error.
- The ABA has as recently as 2002 attempted to act on this intention through the introduction of independent producer criteria in accessing Australian drama content points.
- The cultural relationship between broadcast content and independent production is established internationally. Europe (including UK), Canadian and Korea carry legislation to support the ongoing activities of their independent production industries.
- It would be remiss for the omission to be carried over into a new organization, especially given the terms of reference of the Senate Committee to benchmark the new authority against "world's best practice".

Appendices 2/

Expansion of Content Monitoring and Regulation Minimums to National Broadcasters

- The ABA does not presently regulate the ABC, except in the area of complaints made about compliance with the Code of Practice.
- The ABC is an important instrument in providing Australian audiences with a range of diverse programming. As a minimum, ACMA needs to be granted the additional authority to apply basic Australian content standards to the ABC.
- The ABC is a counter balance and /or counterpoint for general Australian audiences to the viewing choices available via the commercial broadcasters. There is a particular need to ensure a level of content certainty, a base line to ensure that Australian adults and children's drama programs broadcast by the public broadcaster are never allowed to fall below that required of their commercial counterparts. Therefore SPAA recommends an extension of the Australian Television Content Standard to include the ABC.
- SPAA believes the ABC has at times suffered from a distracting level of politicisation in relation to the implementation of its broadcasting charter.