# RESPONSE

# to the

# Australian Broadcasting Authority's

# PROPOSED STANDARD November 1998

# Review of the Australian Content Standard 1998

**Australian Film Commission**
**Australian Children's Television Foundation**
**Australian Film Institute**
**Australian Guild of Screen Composers**
**Australian Screen Editors**
**Australian Screen Directors Association**
**Australian Writers Guild**
**Communications Law Centre**
**Film Australia Limited**
**Media Entertainment and Arts Alliance**

**December 1998**

**Introduction**

The parties to this submission reaffirm their previous view that a comprehensive approach is required in order to maintain the integrity of the standard as developing and reflecting a sense of Australian identity, character and cultural diversity. We are concerned that the ABA has not fully explored or utilised all possible options available to it for these purposes.

As we have previously submitted our view is that the purpose of the current review should be to ensure the cultural objects of the Broadcasting Services Act (Act) are met whilst complying with obligations to New Zealand arising under the CER Services Protocol. We acknowledge the inherent contradictions in this exercise but reiterate that any amendments to the standard must not only ensure that New Zealand productions are treated no less favourably than Australian but that Australian productions are not inadvertantly penalised or left in a position where they are not competing equally with New Zealand product as a result. We are concerned that the draft standard does not sufficiently address this.

**Summary**

In summary our submission now is as follows:

1. The ABA should give further consideration to a test for adult drama and children's drama which incorporates on screen elements;

2. The ABA should reconsider its position on the following aspects;

   - reviewing the creative elements test and in particular making it a requirement that the program be originated by Australians (or New Zealanders) and both writer and director be Australians (or New Zealanders)

   - introducing a licence fee expenditure requirement for drama and documentary in addition to that required for children's drama;

   - changing the time bands for drama and documentary to 6pm to 10.30 pm;

   - defer the decision to treat telemovies already broadcast on pay television as first release to allow more thorough consideration of the suggested benefits;

   - pursue a formal acknowledgement from the New Zealand government that New Zealand/third party co-productions will not be eligible for Australian quota.

The first aspect of our proposal clearly can not be concluded by January . In addition in relation to other aspects of the review we believe it is premature to finalise the standard by that time.

We understand the ABA's intention, contrary to past practice, is to now finalise the standard without providing the opportunity for any further comment on the content and drafting.

This review is arguably the most significant since the introduction of content quotas in the sixties in that it will allow non Australian material to be included as Australian. It is a review where a considerable number of options have been identified and partially debated. To some extent and perhaps inevitably it has been driven by complex legal considerations rather than merit.

In all these circumstances we believe it is entirely reasonable that the review should be extended to allow proper consideration of the complex issues involved.

## 1. On Screen Test

We now believe that the ABA should give serious consideration to integrating on screen criteria with the current creative elements test.
Specifically, we are proposing a two pronged test of personnel and look, both elements of which would need to be satisfied to qualify for quota.
We propose this apply to the categories of adult drama and children's drama. As the issue has not been canvassed in the documentary sector we are not proposing such a test apply to documentary programs. We disuss below the need for the creative elements test to be strengthened. In addition, to ensure adequate levels of quality Australian documentary are screened, we feel it may be necessary to develop a specific eligibility test for documentary. We would welcome the opportunity to discuss this with the ABA.

As is widely acknowledged there is a degree of 'natural protection' in areas such as sports, news and current affairs and it is reasonable that the creative elements test alone continue to apply for these.

Without attempting to supply final drafting we believe such a test could be developed along the following lines:

A program is an Australian program if:

*a) it is a program with substantial Australian content and without substantial non-Australian content.*

*In relation to the above, Australian content is material which presents or explores Australian identify, character and cultural diversity.*

*In assessing the above, the primary question to be considered is: do Australians see and /or hear themselves on the screen?*

*and*

*b) it is produced under the creative control of Australians or New Zealanders as evidenced by the program's compliance with the creative elements test set out below.*

In all the circumstances we consider such a test may well provide a more effective way of reconciling the cultural objects of the Act with the obligations imposed by s160(d).

We have sought legal advice as to whether this approach would comply with the Services Protocol, specifically Articles 4 and 5 and with Article 8 of the CER Agreement, and we attach this for your information in confidence.

You will see that the opinion of our barrister is that such an approach may not discriminate against New Zealand programs and would therefore comply with Articles 4 and 5 and not offend against Article 8. His analysis turns on the legal definition of 'discrimination' which, he advises must amount in a practical sense to requiring one party to do something which is not required of another party.

We would argue that, as both the creative elements component and any overlying on screen criteria would place the same restrictions on Australians and Australian productions as would be placed on New Zealanders and their productions, that it is legally possible to amend the standard in this manner.

Our advice has also considered the requirement to meet the criteria imposed by the *Herald Sun* case and whether pre-classification (and therefore an amendment to the Act), would be required to implement our proposal. Whilst acknowledging the complexity of the drafting task, he concludes that it would be possible to comply with *Herald Sun* without requiring preclassification.

We consider our proposal does not have the same policy difficulties that have been associated with previous broader proposals for on screen criteria. In particular, while programs made by New Zealanders could qualify, programs made by persons other than Australians and New Zealanders would not be eligible.

The advantage of the above approach is that it maintains the importance and relevance of the cultural objects of the Act. In the limited time available we have not been in a position to seek senior counsel's advice. However, we would urge the ABA to reconsider its view of the obligations

imposed upon it by the Protocol and in particular its view of the restrictions which Article 8 imposes on it. In our view, the opinion of the legal effect of Article 8 of the CER Agreement impacts on the ABA's consideration of a number of elements recommended in our earlier submission which were rejected by the ABA as not complying with the Protocol.

## 2. Creative elements test.

Proposal

*Amend the creative elements test to require*

*a) that the program be originated by Australians (or New Zealanders), and*

*b) that both writer and director are Australian (or New Zealand)*

As stated in our previous submission the creative elements test needs to be revisited given the following imperatives:

ï the need to ensure that any New Zealand programs that qualify are genuinely New Zealand material and not foreign programs with some New Zealand elements; and

ï given the reduction in Australian programming that will result from displacement by New Zealand programs, the need to ensure the integrity of the programming that remains Australian.

We urge the ABA to incorporate an 'origination' test in the standard, and to require both writer and director to be Australian (or New Zealand). Our proposal for the former is as follows:

> *The program must be originated and developed by Australians as evidenced by:*
>
> *key decisions relating to the acquisition of underlying works, direction, casting, story-line, and hiring of director/s writer/s producer/s are made by Australians. For the purposes of this definition key creative decisions do not include the exercise of customary rights of approval.*
>
> *"Customary rights of approval" means where a producer submits to an off-shore source of financing elements for approval which may include director, major cast and final shooting script; and*

We remain convinced incorporating these two elements would provide the most reliable way of identifying genuinely Australian (and New Zealand) programs.

The discussion at pages 4 and 5 of Attachment D of the ABA's November paper shows there is a recognition of the need to ensure that essentially foreign productions with some local elements do not qualify for quota and displace locally originated productions.

We understand the provision which would give the ABA discretion to exclude programs which have significant non-Australian (or New Zealand) content, has now been withdrawn. We refer to the legal advice we provided previously to the effect that such a provision would offend the principles established by the *Herald Sun* case.

There is now clearly a need for an alternative to achieve the same objective.

The requirement for origination and for both writer and director to be Australians (or New Zealanders) would go a considerable way towards safeguarding the cultural specificity of local programs.

It is worth reiterating that a program such as "Xena - Warrior Princess" would only have to make relatively minor adjustments to meet the current creative elements test.

The vast majority of qualifying Australian programs (excluding official co-productions) are originated by Australians and have both an Australian writer and director. Indeed we are unable to identify a project which does not have an Australian writer and director. These measures would not, therefore, mean any significant change for the Australian networks and the production industry.

It is necessary to have the origination aspect as well as writer and director. There are essentially foreign projects which have used Australian writers and directors.

In its November discussion paper the ABA expresses concern about difficulties it feels are involved in proposals dealing with ownership and control. It will be seen that our proposal on origination avoids these issues as it focuses of the nationality of the persons making the key decisions that shape the nature of a project, rather than the ownership of corporate structures.

What it does do is recognise that decisions such as initial selection of program, and hiring of key creative personnel are key to determining the nature of the project.

We believe an origination test does not raise major practical difficulties. The ABA could require that the information needed be provided by way of warranty with the right for the ABA to go behind this if necessary to look at documentation such as agreements. Similar practices now occur in the

industry, for other purposes such as funding and this experience could be drawn on.
We would welcome the opportunity to discuss the practical aspects further with the ABA.

## 3. Hybrid Australian/New Zealand programs

We understand the ABA is of the view that Australia's obligations under the Protocol make it necessary to create this category to cover projects other than official Australian / New Zealand co-productions.

The ABA has also advised it will closely monitor the impact on the standard of granting New Zealand programs access, and will review the situation in two years. We welcome the ABA's recognition of the importance of careful monitoring. We make further comments on the review process at the end of this submission.

The need for monitoring of hybrid programs along with Australian and New Zealand programs demonstrates again the need for the creative elements test to be strengthened. Presumably the intention is to catch programs which are in effect co-productions where creative control is shared and to be able to measure the relative amounts of Australian and New Zealand content.

We believe a number of different types of projects will fall into the hybrid category. To accurately categorise projects and monitor the Australian and New Zealand content, the ABA will need to know the identity of the key decision makers involved in the origination and development of the project as well as the identity of writer, director and lead actors.

We urge the ABA to consider carefully what information and mechanisms will be needed to accurately monitor the hybrid program category and to consult with the industry about this.

## 4. Expenditure Requirement

*We strongly support the proposal to introduce a minimum broadcast licence fee for children's C drama.*

*We urge the ABA to reconsider the issue of a minimum licence fee for adult drama and documentary.*

*The issue of the definition of' licence fee' needs further consideration.*

We support setting the minimums as follows:

Adult drama

- series or serials produced at the rate of more than 1 hour per week (factor 1 programs) $60,000

- series or serials produced at the rate of 1 hour or less per week(factor 2 programs ) $150,000

- mini series and telemovies $200,000

- film 1.6 points where expenditure is up to $100,000 and 3.2 where expenditure is $100,000 or greater.

Documentary $40,000 per hour.

We welcome the ABA's decision to introduce a licence fee requirement for children's drama and agree that this should assist in maintaining current levels of quality Australian children's drama.

Clearly the ABA believes such a test is needed for policy reasons and is possible administratively. The same surely applies to drama and documentary.

We are most concerned at the ABA view that a similar safety net is not needed for adult drama. In the ABA's July Discussion paper there was considerable discussion about the role of, and need for regulation given the nature of international television markets. Implicit in the discussion was the analysis that adult drama is cost driven as well as affected by ratings considerations.

We submit it is well established that audience preference is not the sole criterion determining programming choices. A study of compliance results bear this out. For example, in the last two years the Nine network has fulfilled a significant proportion of its quota obligations with often older feature films shown late at night.

The view that audience preference will ensure current levels of drama are maintained does not sit well with the decline over the nineties in network expenditure on Australian drama and in the number of hours broadcast. Further high audience ratings have not been sufficient to ensure continued network support for quality mini-series which are now a rarity on commercial television.

We reaffirm our view that the establishment of a minimum licence fee test is necessary to address the price disadvantage Australian drama and documentary programs face, and to put programs from the two countries on an equal footing. We cannot agree with the view outlined on p 11-12 of the ABA's November Paper that the difficulty of setting appropriate minimum levels and 'possible operational and monitoring difficulties' mean that it should be dismissed. Clearly if it is possible for children's drama, it is possible for other categories.

We would reiterate our previous submission that the introduction of a licence fee test is necessary to ensure the objective of the standard in delivering diversity and quality in Australian drama is met. The inclusion of New Zealand programs selling at secondary market prices, and general changes in the market since the standard was introduced make this measure crucial to give clarity and surety to the purpose of the standard.

In relation to documentary while we support the increase in quota from 10 to 20 hours, we are concerned that in the absence of a licence fee test, this will not be an adequate safety net. As the ABA is aware, Network Ten, just met the 10 hour requirement last year and it would be possible for it to fill the additional 10 hours with inevitably (due to secondary market considerations) cheaper New Zealand documentaries.

Definition of Licence Fee

In respect of children's drama the ABA uses the term "minimum commercial television broadcast licence fee". We understand from this that the proposed requirement is that the cash amount of $45,000 covers commercial free to air broadcast only, ie, that no other rights, such as payment for pay television rights, can be included.

The definition also needs to recognise the industry practice that the licence fee covers a limited number of broadcasts over a given period of time. In our previous submission we proposed this be 4 times over 7 years. It may that some variation of this is more appropriate for children's drama.

Other issues may also arise and we believe there should be further consultation with the industry before this aspect is finalised.

We also seek information from the ABA on how it will monitor and ensure compliance with the licence fee requirement.

## 5. Time Bands

*We urge the ABA to reconsider this issue. Our proposal as before ,is that the time band for adult drama and documentary should be from 6pm to 10.30 pm provided that in the case of feature films or telemovies that begin before 9.30 pm the time band can be extended.*

While we appreciate that the ABA has reduced the time band we are concerned the proposed reduction is inadequate.

For the reasons discussed in our initial submission we consider a time band from 6pm to 10.30 pm is needed to assist in maintaining current levels of Australian content.

## 6. Definition of first release.

*a) We support the proposed redefinition of first release'to require that all first release programs must be broadcast within 18 months of completion. In addition, we propose that to qualify as first release, feature films must be broadcast within 4 years of completion.*

*b) Further we urge the ABA to reconsider the proposal that programs which have already been shown in the 'common market' of Australia and New Zealand should not qualify as first release.*

There is no reason not to apply the same approach (albeit with a different time limit) to feature films as the ABA has applied to television programs.

However in relation to feature films a longer time period is required given the current pattern of distribution windows.

New Zealand has a significant back catalogue of films and has a considerable reputation as a producer of interesting and often innovative features. Movies attract the highest number of points (along with mini-series and telemovies).

The ABA's November paper points to the general agreement that back catalogue should be excluded. In setting the 18 month time limit the ABA also refers to the desirability of providing an on going limitation on the use of less recent productions.

These are sound policy reasons which relate back to the cultural objects of the Act and the Standard and we urge the ABA to extend this approach to feature films with an appropriate time limit, ie 4 years.

In addition, our proposal is that the amendment should go further and require that programs which have already been shown in the 'common market' of Australia and New Zealand should not qualify as first release.

We rely on the legal analysis of Article 8 of the CER agreement provided in relation to our on-screen proposal in support of our view that this would not legally discriminate against New Zealand programs.

## Co-productions

We recognise that the ABA has taken the view that New Zealand/Third party co-productions should be excluded under the standard and has accordingly included co-productions in a new section dealing specifically with Australia's international obligations.

As discussed previously we are especially concerned to ensure that New Zealand/Third party co-productions are not eligible for quota and urge the ABA to seek a side letter with the New Zealand government on this aspect prior to finalising a new standard.

Without such an agreement we remain of the view that the standard could be challenged for excluding New Zealand co-productions other than those with Australia.

## Telemovies first broadcast on Pay Television

*We urge the ABA to defer this matter to allow more thorough consideration.*

We are concerned that the ABA considers it appropriate to proceed with this significant change when a minimalist approach is being taken to the issue that lies at the heart of the inquiry- the implications for Australian content levels of the requirement to include New Zealand programs.

There has been no time to fully explore this proposal and to assess whether the benefits claimed would result. We are aware that other submissions expressed concerns about this proposal and specifically about the possible pooling of licence fees which would mean the promise of increased investment and additional Australian production would not eventuate.

We consider the proposal to be a significant one with potentially far reaching implications for future content regulation for free to air and pay television. We believe it is more appropriate for the proposal to be further examined in the forthcoming debate on content regulation for pay television.

Accordingly we would urge the ABA to reconsider and defer any final decision on this matter until more rigorous examination of the issue can occur.

## Review

The ABA has advised that it will monitor the impact of the changes and undertake a review in two years to assess how well the standard is achieving its cultural purpose.

We consider it would be useful for there to be early consultation on the nature of the review, the monitoring process and on research that could be undertaken leading up to the review.

We also ask that the ABA reserve the right to initiate a review at an earlier time if the circumstances warrant this.

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| Creation Date: | 17/12/98 13:53 |
| Change Number: | 1 |
| Last Saved On: | 17/12/98 13:53 |
| Last Saved By: | simsd@l15_syd@aba |
| Total Editing Time: | 1 Minute |
| Last Printed On: | 18/12/98 9:58 |

As of Last Complete Printing

| | |
|---|---|
| Number of Pages: | 13 |
| Number of Words: | 3,288 (approx.) |
| Number of Characters: | 18,745 (approx.) |