



# **REVIEW OF THE AUSTRALIAN CONTENT STANDARD**

**SUBMISSION TO**

**THE AUSTRALIAN BROADCASTING  
AUTHORITY**

**AFC Comment on the FACTS Submission**

**September 2002**

## **AFC COMMENT ON THE FACTS SUBMISSION**

The Australian Film Commission (AFC) takes this opportunity to comment on the response from Federation of Australian Commercial Television Stations (FACTS). We take the view that their strong opposition to a large number of the Australian Broadcasting Authority's (ABA) proposals is not justified by their arguments. We believe the approach taken by the ABA is a reasonable one within the regulatory framework and is based on a sound analysis of the competing public and commercial interests.

### **Objective of the Standard and the powers of the ABA**

FACTS contests the proposals of the ABA to provide for bonus point incentives in the drama sub-quota for new series and series produced by independent producers with a licence fee of more than \$300,000 per hour. In doing so they call into question the powers of the ABA and the consistency of the proposals with the objective of the Standard.

We note that the ABA is not proposing to challenge the objective of the Standard or depart from the primary cultural purpose of the standard. What it has done is to introduce a little more explicitly into the standard a modest recognition of the industry development outcomes it acknowledges have always been present. As we argued in our February submission this is supported both by a reading of the objects of the Act and the wording of the Explanatory Memorandum.

FACTS contends there is no reference to what it calls 'multiple rationales' in the Act or the Explanatory Memorandum. Looking at the Explanatory Memorandum, FACTS quotes from the section dealing with the ABA's Australian content standard making power to argue there is a single rationale stated which excludes any reference to industry development.

A rationale is a statement of reasons, and intention means the end or the object to be achieved. The whole section of the Explanatory Memorandum dealing with the Australian content standard making power sets out the reasons for the section. Thus it refers to both the potential for commercial television to influence the promotion of Australian cultural identity and the 'intention' of the Parliament in delegating the legislative power to the ABA:

*With regard to clause 122 (2)(b) it is intended that commercial television broadcasters broadcast Australian programming which reflects the multi-cultural nature of Australia's population, promotes Australian culture and identity and **facilitates the development of the local production industry.** (Emphasis added)*

The Explanatory Memorandum also makes clear in discussing the objects of the Act, the regulatory policy of the Act and the role of the ABA that there are inherent tensions between the objects of the Act. It is the role of the ABA to

have regard to these tensions in its assessment of community views and needs and its 'ability to monitor developments in the broadcasting industry'.

We also take issue with the argument advanced by FACTS that the ABA's powers are so constrained that it cannot include the measures FACTS finds offensive. We agree with FACTS the High Court ruled in *Project Blue Sky v ABA* that the ABA's standard making power at s.122 must be exercised within the framework of s.160, including consistency with the objects of the Act and the Regulatory Policy. This led the High Court to find that the Standard determined in 1995 was invalid because it was inconsistent with s.160(d).

The Court was not asked to rule on whether the Standard was consistent with other elements of s.160 and we would argue that it is FACTS opinion, not that of the High Court, that the proposed amendments would be inconsistent with s.160(a).

What is more, the High Court found that the ABA had discretion to determine program standards under s.158(j). It said that a key element of any Australian Content Standard determined under s.122 was that it must deal with 'the Australian Content of programs'. The Court did not find that the Standard it examined failed to meet this test and then went on to say:

*A standard can relate to the Australian content of programs although it also regulates other matters. Section 158(j) gives the ABA power to develop program standards relating to broadcasting including those standards referred to in s 122. There is nothing in the Act to prevent the ABA from utilising the power conferred by s 158(j) to determine program standards in a general way and at the same time carry out its obligation to determine the Australian content of programs.*

Even if FACTS is successful in its arguments that the measures it objects to fail under s.122, which we do not support, the ABA may rely on its general standard making power (subject to s.160) in s.158(j).

### **Independent Production**

The ABA is proposing two measures, one in relation to drama and the other documentary, which create incentives for independent production. FACTS are vigorous in their opposition to these measures, but the ABA proposals must be put in their proper perspective.

These are not mandatory quotas like the provisions of the UK Broadcasting Act 1990, which require (in conformity with the European Union Directive, "Television without Frontiers") 25 per cent of transmission time devoted to qualifying programs to be commissioned from companies independent of broadcasters. Nor do these measures provide a serious impediment to the broadcasters ability to run production businesses of their own, as did the US Federal Communications Commission 'finance and syndication rules' (now repealed), which prevented network participation in the ownership of most of the programming they commissioned.

Because they are optional incentives, they may have no impact if the broadcasters choose not to utilise them.

We would also like to correct some of the information presented by FACTS and relied upon for their arguments about overseas experience. On page 6 of their submission, FACTS makes a favourable comparison between the UK and Australian independent sector share of the market. They utilise figures published by the ABS on levels of production expenditure in 1999/2000 and in the report by David Graham Associates (DGA) "Out of the Box - The Program Supply Market in the Digital Age". FACTS argues that the independent sector in Australia has a larger market share (60 per cent) than the UK independent sector (44 per cent). The sources they quote do not support this argument.

The ABS report for 1999/2000 details, at page 13, total expenditure, including news and current affairs, on programming for television. This shows broadcasting industry businesses, that is broadcasters, made 61 per cent of expenditure. Pay television channel providers and independent producers shared 39 per cent of expenditure. The ABS does not disaggregate expenditure by independent producers, but it is obviously less than 39 per cent. As we noted in our February submission the independents/channel provider share of expenditure has fallen from 49 per cent in the last survey in 1996/97.

By contrast the measure used by DGA in the UK to assess market share is the proportion of commissioned hours. That is, hours of new programs commissioned by broadcasters from independent producers and from other broadcasters' production businesses. DGA estimates that in 1999 33 per cent of commissioned hours, including news and current affairs, was from the independent sector. Similar figures do not exist for Australia, nor are there figures on expenditure in the UK. Therefore, it is impossible to say that the independent's market share, in the absence of any regulatory intervention, compares favourably with the UK.

FACTS also quote DGA to say that there is concentration of the production industry in the UK and that in the UK 80 per cent of production is carried out by 12 companies and 80 per cent of production companies produce for only one broadcaster. Their argument being that similar outcomes would occur in Australia. There are two things to say in response.

While DGA does estimate that 12 companies dominated first run programming in 1999, only five of them could be described as independent of broadcasters and the BBC and Granada together had a 54 per cent share of first run production.

Secondly, DGA argues that the UK broadcasters practice of fully funding production, with a production fee on top and a very small share of any back end has led to the situation where there is no incentive for many production companies to take a risk and grow their companies. This is not the case in Australia where independent producers are financially independent of

broadcasters and highly competitive with each other. Even so, DGA estimated there were 38 production companies in 1999 that produced for more than one channel.

### **Adult Drama Sub-quota**

We have commented above on FACTS opposition to a small incentive for independently produced drama and suggested that they have overstated the case against it. The same applies to their objections to a bonus for “new” series. We understand the ABA’s objective trying to reward the risks involved in commissioning a new drama series. FACTS contends that a broadcaster could cancel an established series that was working with audiences to earn an extra half point an hour from a new series. However, for a new series of 20 one-hour episodes this would amount to an additional 10 points. If a broadcaster felt they needed to earn the additional 10 points it would be more cost effective to commission two telemovies at a fraction of the cost of commissioning a new series.

### **Points System Proposed by FACTS**

FACTS has proposed a new weighting for the format factors which it argues is designed to give more incentive to the production of series and give greater weighting to serial drama.

FACTS says that the increase in the aggregate points total from 775 points over three years to 890 points devalues serial drama and it says that ‘the existing proportional value for serial drama should be maintained’.

We agree that the ABA’s proposed format factor scores will change the value of the score for serial drama relative to series and telemovies and mini-series. Currently a serial point score of 1 represents 50 per cent of the value of the series drama score and 33 per cent of the value of the telemovie and mini-series score. The ABA proposal, by increasing the series drama score to 2.5, reduces the serial drama score to 40 per cent of the value of a series drama score.

However, the FACTS proposal devalues the serial drama score even further, since a serial drama score of 1.15 is 38 per cent of the value of their proposed series drama score of 3 and 29 per cent of the value of their proposed score for other drama formats. How this meets the objective of maintaining the existing proportional value of serial drama is difficult to see.

The only other explanation for the change in the score is that it would maintain at 258 hours the minimum amount of serial drama required if a network did no other kind of drama. However, if this were the logic applied then FACTS should be arguing that the series score is set at 2.3 and the telemovie and mini-series score be set at 3.65. This would allow the new points target of 890 to be met while maintaining the current range of hours between 80 and 258.

FACTS does not address the analysis by the ABA at page 13, Appendix D, which shows the relativity between serial drama and series drama licence fees has changed. The ABA is applying the principle of relative value based on licence fees which has always underpinned the design of the format factor scores. Thus the real value of a series relative to a serial is 2.5, with bonus half points for new and independently produced series.

FACTS does not appear to follow this principle in determining the new scores it proposes, but does not propose an alternative method of calculation other than maintaining the serial drama score as a 'base' and increasing the series drama score. Consequently, the changes to both the serial and series drama scores appear arbitrary, particularly as there is also no proposal to change the three year points target.

The FACTS response does not address the methodology used by the ABA in determining the new points score target and simply states that the target should remain at 890 points over three years, as proposed by the ABA. The AFC has looked at how the FACTS scoring system would apply to the last triennial compliance period and has come up with the following results based on Table D4:

	<i>3 Year Hours</i>	<i>3 Year Points</i>
Seven Network	639	1337
Nine Network	380	1173
Network Ten	581	1006

As can be seen all three broadcasters would have comfortably met a three-year target of 890 points. This is largely due to the increase in the scores for series and serials. We are concerned that this would increase the disincentive to broadcast telemovies and mini-series since the Seven Network would have achieved the target on series and serials alone and the Nine Network and Network Ten would have needed only a few additional hours to do the same. This is particularly worrying given that preliminary results of the AFC's 2000/01 National Drama Production Survey indicate that for the first time in over 20 years not one mini-series, Australian or foreign, was produced in Australia.

Applying the ABA methodology and looking at the ratio of points to hours, the minimum number of hours required under the FACTS proposal to meet the minimum points score over three years shows this would have fallen from 476 hours to 405 hours. Intentionally or not, the FACTS proposal presents the potential for the current safety net to be lowered.

We do not support the new point system proposed by FACTS. However, if the ABA decides to accept all (or some) of the FACTS' proposed scorings, we would argue that the three-year target also needs to be increased to 1050 points and the one-year minimum to 300 points, so as to maintain the safety net level.

## **Tradeable Quotas for C Drama**

We remain opposed to the idea of tradeable quotas for children's drama. This is essentially a mechanism designed to hold drama output to a minimum, rather than provide any incentive for hours to increase above the minimum set by the standard. The AFC's submission in February sets out our arguments against this proposal.

Allowing a broadcaster to trade their C-Drama obligation to another broadcaster is potentially anti-competitive since it means that two broadcasters are agreeing with each other about how much drama they both will broadcast and how much they will pay for it. This would alter the structure of the current market where five broadcasters compete with each other on the basis of their own commercial decisions and regulatory or statutory obligations. We also believe that it undermines the notion that the public is entitled to see a range of children's programming across all channels.

We assume the system is intended to work so that the broadcaster wishing to relieve themselves of their regulatory obligation pays the cost of acquiring the programming for the other broadcaster. The commercial arrangements, presumably would also involve payments to compensate for any advertising revenue forgone.

Given the arguments advanced by the broadcasters that children's drama is commercially unattractive to them we question why any broadcaster would be motivated to take on the additional amount of drama to assist a competitor, even if the cost of acquiring it is met by the other broadcaster.

The involvement of the national broadcasters in the scheme also makes it more difficult to monitor, given that the ABA's regulatory supervision of the national broadcasters is limited. Our concern is not like FACTS that the national broadcasters would default on their obligation to show the traded program. Our concern is that given the funding constraints they might take the very rational decision to replace programs which they commission and fund with those paid for by a communal broadcaster. Thereby reducing the total amount of children's drama available.

## **Documentary**

FACTS asserts that the proposal from the ABA to offer a bonus to show higher budget documentaries is purely an industry support mechanism. However, while the measure would be of assistance to independent documentary producers this is not its only justification.

The ABA correctly identifies a problem that is impacting on the quality and diversity of documentaries being offered to audiences – declining expenditure on documentary programs and a tendency to acquire rather than commission programs. The ABA's proposal is an incentive to address this problem and deliver a better outcome for audiences.

FACTS also rejects the ABA's arguments about a quality/quantity trade-off in documentaries on the basis that the breadth of subject matter and style make it impossible to justify. This is curious because elsewhere FACTS has apparently accepted the principle of a quantity/quality trade-off in relation to adult and children's drama. The additional weighting given to telemovies and mini-series in the format factor test is a quantity/quality trade-off. So too is the proposal in relation to C classified features and telemovies. In both these cases FACTS accepts the principle, but contests the level of reward that broadcasters should receive for accepting the incentive offered by the ABA.

The link between budget and quality is well established. The ABA has consistently tried to apply that link through a measure of what the broadcasters are willing to pay to purchase a program of a higher quality. We believe this is a reasonable test to apply to documentary.

Again we make the point that the proposal is optional for broadcasters. There is no obligation to take up the incentive.