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Fiona Cameron
Screen Australia
GPO Box 3984
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Fiona,

Dear Ms Cameron

Funding Australian Content on 'Small Screens': a draft blueprint

Free TV Australia represents all of Australia's commercial free-to-air television broadcasters. In 2011 commercial free-to-air television is the most popular source of information and entertainment for Australians, with our members providing nine channels of content across a broad range of genres, as well as rich online and mobile offerings, all at no cost to the public.

Free TV welcomes the opportunity to comment on Screen Australia's *Funding Australian Content on 'Small Screens': a draft blueprint* (the Blueprint). This submission focuses on the role of Screen Australia and the proposed terms of trade and program guidelines for the Convergent Television Fund, as the most relevant elements of the Blueprint for broadcasters. In general, Free TV supports the idea of the All Media fund as a way of providing focused development and production financing for Australian productions.

Free TV is, however, highly concerned with the inflexible, prescriptive nature of the proposed terms of trade and program guidelines put forward for the Convergent Television Fund, particularly in the context of the size of Screen Australia's contribution to the project compared with contributions made by other stakeholders. This approach stifles commerciality in dealings between stakeholders such as producers, broadcasters, investors and distributors, which in turn will limit the viability of the production sector. In particular, Free TV is concerned that:

- the increase in licence fees is unjustified and does not reflect current market conditions, particularly with respect to children's drama;
- the decision to fund only one or two series of a program will lead to the premature cancellation of programs before they have a chance to find their audience, affecting not just broadcasters but the production sector associated with these projects;
- the setting of mandatory holdback periods are inflexible and unworkable;

- the requirement to include a digital media platform as well as a television broadcaster will increase the costs of production and add unnecessary complexity and delay to an already complex financing process;
- the exclusion of programs based on 'foreign formats' from eligibility will increase development costs and prevent the Australian sector from having access to many valuable products; and
- value-based assessment of all projects will lead to Screen Australia taking an inappropriate role in judging the commercial viability of a project.

The Blueprint proposes substantial increases in the burdens placed on broadcasters by Screen Australia without providing justifications for many of the changes or identifying a market failure that needs to be addressed. Free TV is unaware of any evidence that the financing model currently utilised by Screen Australia does not provide sufficient stimulus for the creation of Australian television drama.

By making it harder for investors (including broadcasters and independent investors) to recoup and make a reasonable return on their investments, the proposed amendments will only act to discourage investment in Australian and children's drama. A better approach would be to lower the restrictions and allow maximum flexibility for financing television programming, so as to make it more appealing as an investment option. This in turn will increase the ability of the Australian television market to attract investors and grant Australia's broadcasters the confidence and support they need to grow their local content contributions.

More details on these issues are provided in the Attachment.

Thank you again for the opportunity to comment on the proposed terms of reference. Please contact me if you would like any further input or require clarification.

Yours sincerely

Julie Flynn
CEO

Free TV Australia
Specific comments on Screen Australia's
Funding Australian Content on 'Small Screens': a draft blueprint

The Role of Screen Australia

Free TV's submission in relation to this issue covers not only the specific terms of trade dealt with in the Blueprint but also Screen Australia's existing terms of trade and program guidelines.

Screen Australia has an important role to support the development and production of the Australian production industry. However, the way in which this support is provided must not inhibit and discourage the flexibility, commerciality and competitiveness of the industry and needs to be balanced amongst the various stakeholders in the industry.

Free TV is aware of support within some sections of the independent production sector for regulated terms of trade for television productions. Free TV does not support such an approach and is concerned with Screen Australia's terms of trade and program guidelines in essence operating as default terms of trade for the production industry. It is particularly important that this does not occur since:

- Screen Australia's contribution to a project as compared to other contributions to a project is relatively small and accordingly, Screen Australia should not be able to set terms for other investors and stakeholders (including producers); and
- Screen Australia's mandate is not to ensure a commercial return in projects, in contrast with other commercial investors and stakeholders.

Consistent with this, Screen Australia's approach to its terms of trade and program guidelines must maintain a "light touch" to ensure flexibility and competitiveness within the marketplace. Productions are not standard products or business operations and do not lend themselves to standard terms. Productions vary greatly in budget, production financing arrangements and production models.

Free TV is aware of no evidence to suggest the current open-market approach is deficient or is delivering unwanted outcomes. Indeed, as Screen Australia's own report notes, the spend on Australian drama by the free-to-air broadcasters has risen over the last five years.

Terms of commercial arrangements are most appropriately dealt with between the commercial parties. Regulatory intervention in the determination of commercial terms, particularly through an entity such as Screen Australia, is inefficient and impractical and should only be undertaken where there is an identifiable market failing. A heavy-handed approach by Screen Australia is a significant discouragement to private investors and is inconsistent with the fostering of a market-based industry.

Further, in assessing Screen Australia's terms of trade and program guidelines it should also be recognised that broadcasters contribute to a project over and above the free-to-air licence fees through:

- **Distribution advances/guarantees**: these are payments for the acquisition of distribution rights in a project (excluding the Australian free-to-air rights). The levels of any advances/guarantees paid by commercial broadcasters have been at or significantly above market levels. Distribution advances/guarantees are provided above and beyond any free-to-air licence fees and investments made by commercial broadcasters.
- **Investment**: Commercial television broadcasters often make contributions in addition to licence fees and distribution advances/guarantees. In doing so, broadcasters take on risk as an equity investor in a project.
- **Production cashflow**: Distribution advances/guarantees, additional investment and licence fee contributions from free-to-air television broadcasters are typically paid in advance during production, well ahead of delivery of a project and at no cost to independent producers. This is a major benefit for independent producers and comes at significant cost to commercial broadcasters, particularly in the current credit market conditions. Financiers providing Producer Offset cashflow to independent producers are charging significant establishment fees and interest and obtain significant security for such loans.
- **Development cashflow**: Commercial broadcasters contribute significant development financing for projects (in some cases, all development financing is provided by broadcasters). In many cases, these projects are never commissioned and such funds are lost to the broadcasters.
- **Creative contribution**: Commercial broadcasters dedicate the significant resources of their drama departments which are very involved in the development and production of a project. Such resources contribute to the creative and commercial success of a project.
- **Promotion and publicity**: Commercial broadcasters contribute significant resources and financing to promote and publicise a program's launch and broadcast. This maximises a project's chance of ratings success and the revenue potential for exploitation of the project in other media.

It is not unusual for commercial broadcasters to provide several or all of the above contributions and the introduction of the Producer Offset has not significantly affected this. These contributions represent significant risk-taking by the broadcaster, a position not reflected in Screen Australia's terms of trade and program guidelines.

Drama licence fee increase

Free TV objects strongly to the proposed 10% increase in the minimum licence fee paid by broadcasters for Screen Australia funded projects, and the associated ongoing annual CPI increases.

Screen Australia does not provide any justification, market rationalisation, or explanation for this increase.

The licence fee increase does not recognise that there has been a change in the landscape of television viewing as a result of convergence and the introduction of multiple channels and other entertainment mediums which has resulted in fragmentation of television audiences. Where a top-rated program might once have drawn in excess of 2 million viewers, they now frequently achieve half this number. When combined with the proposed increase in restrictions on broadcasters under the draft Blueprint, this means that broadcasters are being asked to pay significantly more for significantly less value. Rather than eroding the value of what is being acquired, consideration should be given to a licence fee that reflects this loss of value or grants additional rights such as more runs or catch up rights.

Broadcasters agree that a premium should be paid to reflect the added value of Australian content in their licence fees, but even factoring this in the existing licence fee and increase proposed by Screen Australia does not reflect the current market prices for program acquisitions at a national or international level.

The licence fee increase appears to be based on the incorrect assumption that there is a negotiating imbalance between producers and broadcasters and that producers do not currently receive appropriate licence fees. There is no evidence provided for this. The production houses that currently produce popular Australian drama programs are able to command licence fees well in excess of the minimum fees currently set by Screen Australia. This reflects healthy and robust negotiations between independent producers and broadcasters. In many instances producers of Australian drama are well resourced and large corporate entities which have significant market power.

Producers would also benefit from this increased flexibility, as it will allow them to tailor their commercial models to the needs and demands of the market. This gives them the maximum freedom in determining the best deal for their product, as well as the broadcasters.

If there are to be minimum licence fees set, Free TV supports the existing arrangement with the licence fee being calculated based on the current licence fee floor and the percentage of the production budget. This also allows for CPI impact on a production as production budgets factor in inflation. Screen Australia has expressed the concern that licence fees calculated as a percentage of a budget can lead to artificially inflated or restricted budgets. The broadcasters' experience is that this does not in fact occur – broadcasters are active in reviewing and approving budgets and would not accept budgets formed on this basis. Further, the incremental increase in licence fees as a result of a higher budget would not be outweighed by the difficulties a producer would have in raising the additional deficit required to meet any increase in budget.

As Screen Australia has pointed out, higher licence fees will likely result in lower levels of overall production or in productions not being made at all.

Children's drama licence fees

The licence fee increase for children's drama is particularly unjustified. The minimum fee imposed on children's drama under Screen Australia's existing financing structure is already significantly inflated above appropriate market levels, making it even more difficult for children's drama producers (particularly those who are less established) to arrange financing for their productions. These inflated licence fees have resulted in two out of three of the commercial broadcasters not commissioning any Screen Australia-funded children's drama during 2009-2010. Yet Screen Australia has chosen to propose a licence fee increase which is actually greater than 10% due to rounding.

It is particularly inappropriate to overvalue children's drama as it is a product which already has low commercially viability, due to the low market demand and extensive restrictions on revenue raising through advertising. As Screen Australia notes, the challenge of recouping the cost of children's content has already forced broadcasters to enter into arrangements with second distributors in order to cover the existing licence fee of $95,000. While Free TV welcomes the Blueprint's proposed increase in flexibility intended to allow this to happen, this will not be sufficient to offset the negative impact caused by any fee increase.

Again, it would be far more appropriate to increase the flexibility available in the market for children's drama, to allow broadcasters and producers to each tailor their agreement to their product and needs.

Series financing

Limiting Screen Australia funding to just one or two series would be a negative step which would undermine the potential for Australian drama to build an audience. Many shows only find their audience after the first couple of series, and it would be disappointing to see Australian dramas with potential not given a chance to find a market. It seems particularly counterintuitive that Screen Australia will eliminate projects from eligibility for second series funding on the basis that they have been successful in their first series. This suggests that only 'unsuccessful' projects will be eligible for Screen Australia funding, a paradoxical and undesirable outcome.

The proposal to effectively favour new dramas over existing series is not consistent with Screen Australia's objectives to support or engage in the development, production, promotion and distribution of Australian programs, and build a highly creative, innovative and commercially sustainable screen production industry. While an existing series may have achieved a reasonable level of 'success' in terms of ratings, it may not be commercially viable without Screen Australia funding and hence would not be renewed for another series. This does not simply impact on broadcasters - such series provide valuable stability for the independent production sector and are as worthy of funding as new programs.

Further, the viability of a production may depend on the ability to achieve international sales which are often driven by volume. If a production is likely to only receive funding (and hence be produced) for one or two series, then this may not provide a sufficient number of episodes to attract overseas buyers. The ability to obtain funding from Screen Australia is often critical to the viability of drama series.

Overall, this approach runs the risk of neglecting the development of long-running series and flagship programs that can provide a stable base on which individual production companies and the sector as a whole can develop, in favour of dissipating Screen Australia funding through a larger number of 'new' shows that do not have any long term commercial viability.

Holdback periods

Free TV does not support any mandating of specified holdback periods for Screen Australia projects.

Holdbacks are a substantial part of the value of the rights acquired by broadcasters from producers.

There is a simplistic view in the marketplace that the value for a broadcaster is the grant of the right to broadcast a program for a specified number of runs. However, significant value also lies in a broadcaster's ability to provide exclusivity for a program against other media platforms. This exclusivity is the most effective means by which a broadcaster can maximise revenue from a program, with the period that a viewer can only access a program through the free-to-air broadcast vital to enabling the broadcaster the best opportunity to recover the licence fee paid. It also grants other benefits, such as driving viewers to the broadcaster and building audience loyalty. Such exclusivity recognises the significant value created by broadcasters in respect of the launch and promotion of a program; an investment which improves the chance of success for the program and provides a platform from which a producer can exploit other rights.

Further it would be impossible for a prescriptive approach to holdbacks to work, as a broadcaster has to take into account a myriad of considerations in considering the length of a holdback. These considerations include for example: the creative characteristics of a project, when is the best time to schedule a program to maximise its chances of success, how far in advance of delivery of a program a broadcaster commits to a program, how the broadcaster can use a program on its multi-channels, the length of the licence period, licence fee, and online rights. Given these uncertainties, holdbacks should, as they have been in the past, be left to negotiation between broadcasters and producers. These negotiations have yielded to date acceptable solutions for both parties.

Screen Australia has also raised the point that programs partly funded by Australian taxpayers should be available to the nation to view. Free-to-air broadcasters provide an extremely effective means of delivering program content to all Australians. If Screen Australia is concerned that material produced for other forums is not meeting this requirement, a provision aimed specifically at that material should be provided.

Further, it is inappropriate for Screen Australia to use terms of trade agreed between the ABC and SPAA for setting conditions such as holdbacks for the commercial broadcasters. The ABC is not a commercial operator and is not subject to the same commercial imperative that drives the commercial broadcasters' licensing decisions and accordingly is able to view issues such as holdbacks very differently than a commercial broadcaster.

Digital media platform as an attachment

The proposed requirement that all projects funded under the Convergent Television Fund must have not only a broadcaster but a digital media platform as an attachment has the potential to increase the complexity of arrangements and force producers to delay production to negotiate an artificial digital media deal that does not add to the financing pool or the value of the project. Even where the attached broadcaster has a catch up service which may fulfil this requirement, many technical, commercial and even legal factors may influence the decision as to whether to include the material on this service. Once again, this amounts to an artificial restriction on the flexibility of commercial negotiations with little commercial justification. This requirement will also add to the costs of a project as specific content and delivery materials will need to be produced to meet the requirements of such platform.

Foreign formats

It is counterintuitive to exclude Australian produced programs from eligibility for financing simply because they are based on foreign-originated formats. The origin of the idea for a program does not affect its ability to tell Australian stories or benefit the Australian production and cultural sectors. This restriction would disqualify projects such as SBS's *Who Do You Think You Are* which, while based on a foreign concept, uses such a concept to tell Australian stories.

The argument that designing a program around an existing foreign format means that the intellectual property for that program 'does not rest in Australian hands' is specious. The largest part of the intellectual property for any program revolves around the content of the program itself – the scripts, episodes and footage. The more esoteric elements of the basic format covered by international agreements are only a very minor part of this. For this reason, format licence fees quite rightly form only a small percentage of the budget of any production. If the project is being filmed here in Australia, is within Australian creative control and is employing Australian staff and facilities, there seems little argument that a small portion of the financing going offshore somehow makes it of less value to the sector. Indeed, sourcing successful formats from overseas can be an effective way of increasing the efficiency and effectiveness of an Australia production, reducing the need to spend money on risky and costly development processes which could be better spent on production.

Project assessment

Finally, Free TV is concerned with the proposal that Screen Australia will undertake more value/creative based assessment of all projects that apply for financing. In Free TV 's view, the fact that a broadcaster is attached to a program (as the fund already requires) is a significant indicator that a project will, for example, 'connect with its target audience.' Furthermore, judging projects on criteria such as their 'national and cultural significance' is likely to artificially manipulate the market towards programming seen as particularly 'Australian' or 'worthy' in nature and away from projects that, for example, may be more popular, commercially viable or likely to succeed in international distribution. That a production may be 'popular' does not make it less culturally significant. Diversity should not be placed above the marketplace demand for a project. Free TV therefore proposes that the current approach of only assessing projects based on the strength of marketplace attachments continue.