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Content Division
Department of Infrastructure, Transport, Regional Development and Communications
GPO Box 594
Canberra ACT 2600

Dear Content Division,

UNSW LAW SOCIETY SUBMISSION REGARDING MEDIA REFORM GREEN PAPER
2020

The University of New South Wales Law Society Inc. welcomes the opportunity to provide a submission to the Content Division of the Department of Infrastructure, Transport, Regional Development and Communications.

The UNSW Law Society Inc. is the representative body for all students in the UNSW Faculty of Law.

Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

The enclosed submission deals with the consultation questions regarding the role of national broadcasters in providing Australian content that arise from Chapter 7 of the Media Reform Green paper. The submission reflects the opinions of the contributors, with the UNSW Law Society proud to facilitate these submissions. UNSW Law Society Inc. is not affiliated with any political party.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely,

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7.1 IS THE CURRENT AMOUNT OF AUSTRALIAN CONTENT PRODUCED AND COMMISSIONED BY THE ABC AND SBS APPROPRIATE?

Before considering whether or not to impose content obligations on the two national broadcasters, the Australian Broadcasting Corporation ('ABC') and the Special Broadcasting Service ('SBS'), it is important to ask whether these two organisations already produce and commission an appropriate level of Australian content. The answer to this question is important to help shape the nature of any obligations that may be imposed as part of the regulatory reforms.

Firstly, this submission notes that currently, the two national broadcasters do play a significant role in the Australian media landscape when considering the production and commissioning of local content. The provision of Australian content is already an obligation under the legislative instruments governing the national broadcasters: the *Australian Broadcasting Corporation Act 1983* (Cth) ('ABC Act') and the *Special Broadcasting Service Act 1991* (Cth) ('SBS Act'), whereby there is a duty to broadcast programs which showcase Australia's national identity and promote a sense of cultural diversity. The amount of Australian content produced by these national broadcasters is already largely appropriate when compared with the levels of content produced by commercial broadcasters. The ABC produces more Australian drama than the commercial networks put together.¹ In the last five years, the ABC has produced an average of 310 hours of Australian content a year² and in 2019-20, SBS/NITV reported that it broadcast 233 hours of locally commissioned programs.³ According to the Screen Australia Drama Report by Ampere Analysis, ABC and SBS are the top commissioners of Australian content and therefore, are already meeting their obligations under statute.⁴

¹ Amanda Meade, 'ABC Opposes Quotas as Coalition Plans to Force Netflix to Make More Australian Content', *The Guardian* (27 November 2020) <<http://www.theguardian.com/media/2020/nov/27/abc-opposes-quotas-as-coalition-plans-to-force-netflix-to-make-more-australian-content>>.

² Meade (n 1).

³ Australian Government, *Media Reform Green Paper: Modernising Television Regulation in Australia* (November 2020) 36.

⁴ 'Drama Report 2018/19: Spend On Australian Titles Hits All-Time High', *Screen Australia* (Media release, 31 October 2019) <<https://www.screenaustralia.gov.au/sa/media-centre/news/2019/10-31-drama-report-2018-19-australian-titles>>.

However, there is a separate consideration of what levels are ‘appropriate’ in the new media landscape.

This submission strongly suggests that the role of the national broadcasters in producing and commissioning Australian content needs to be looked in the context of the critical issue of declining viewership of free-to-air television due to increasing competition from Subscription Video-on-Demand (SVOD) services including Netflix, as well as Advertising Video-on-Demand (AVOD) such as YouTube, all of which are sourced overseas. The government’s proposal to impose an explicit requirement for the ABC and SBS to provide new Australian programming ignores the existing fulfilment of their roles under their respective Acts and does not address the overarching issue of decreasing viewership of Australian content broadcasted nationally. While the national broadcasters have created online streaming platforms for their content, namely through ABC iView and SBS On Demand, further investment in these streaming services enhances the accessibility of Australian content among foreign programs streamed on major subscription services. It is important that any additional requirements placed on the national broadcasters in producing Australian content do not disadvantage them further, especially in an era of increased competition from international providers - an issue discussed further in 7.2.1

There is also the separate but equally important question of ‘what’ is being produced - this submission believes it is important not only to analyse the levels of Australian content produced and commissioned by the national broadcasters, but also the nature of that content.

This submission wishes to highlight the lack of diversity that currently exists within the workforce of the national broadcasters. This is important because of the growing diversity of what ‘Australian’ stories are meant to look like. Statistics from the 2016 Census help to illustrate this diversity: more than 75% of Australians identified with an ancestry other than Australian, 2.8% of Australians identified as being Aboriginal, Torres Strait Islander or both, approximately 45% reported having at least one parent who was born overseas and 18% of the population were born overseas.⁵ The workforce of the national broadcasters should reflect

⁵ Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia - Stories from the Census* (Report, 2017).

that diversity if the ABC and SBS are to produce content that effectively engages with the diversity of Australia, an issue explored in depth later in this submission.

At present, ABC has 57.2% presenters, commentators and reporters from an Anglo-Celtic background, 28.7% from a European background, 9.1% from non-European backgrounds and 5% from the Indigenous community.⁶ While SBS has 0.7% presenters from an Anglo-Celtic background, 22.5% from a European background, 76.6% from non-European backgrounds and 0.2% from an Indigenous background.⁷ The need for greater diversity on our television screens also transcends to the higher positions and creative department at these networks. The 2020 report highlighted that 54% of senior management positions were held by those of Anglo-Celtic background, 25% of an European background, 21% of non-European backgrounds and 13% of an Indigenous background.⁸ In the senior editorial production and technical departments, a majority of employees were from an Anglo-Celtic background, while less than 1% were from an Indigenous background.⁹ 73% of employees in the screen production were of an Anglo-Celtic background,¹⁰ 15% were European, 11% were from Non-European backgrounds and only 1% belonged to an Indigenous background.¹¹ These rates give rise to the shortfall of stories reflecting diverse experiences and the low numbers of cast members belonging to ethnocultural minority groups employed at these networks as evident from the response of 77% of people from culturally and linguistically diverse backgrounds who reported that their background was a barrier to their career progression.¹²

It is important that analysis of the Australian content produced and commissioned currently by the national broadcasters is not limited to just considering the volume of content produced. This is because shows from the national broadcasters are most likely to spark a deep public interest in the issues raised, especially concerning the representation of First Nations history across Australian media, and the representation of general Australian community values

⁶ Media Diversity Australia, *Who Gets To Tell Australian Stories?* (Report, 2020).

⁷ Ibid.

⁸ Media Diversity Australia (n 6) 18.

⁹ Ibid.

¹⁰ Screen Australia, *Seeing Ourselves: Reflections on Diversity in Australian TV Drama* (Report, 2016).

¹¹ Ibid.

¹² Media Diversity Australia (n 6) 19-22.

among children.¹³ It has previously and clearly demonstrated that the lack of expression and representation of Indigenous stories through drama, regional language programs and in children's shows is a threat to the preservation of Indigenous culture.¹⁴

This submission believes that the consideration of the current level of Australian content produced by the national broadcasters can only tell us part of the story. Given that they already play a leading role in creating and displaying Australian stories, when considering whether to impose obligations onto the national broadcasters, more attention should be given to the specific nature of that content, an issue this submission will explore in answering consultation question 7.2.2.

7.2 HOW SHOULD A STATUTORY OBLIGATION FOR THE ABC AND SBS TO PROVIDE AUSTRALIAN CONTENT BE CONSTRUCTED?

Recommendation 1: Any new statutory obligations that are enforced should be constructed with careful sensitivity to the ABC and SBS' pre-existing obligations to inform, educate and entertain.

When evaluating how a statutory obligation should be constructed for the ABC and SBS's production of Australian content, one must have regard to the existing statutory obligations that the broadcasters must adhere to. In their Charters, both the ABC and SBS are conferred three main obligations when it comes to Australian content: to inform, educate and entertain.¹⁵ These existing guidelines do not all necessarily hold equal weight, yet vastly influence the programming of each broadcaster.

To add complexity to these statutory obligations, the ABC has an additional obligation under its Charter to foster a sense of national identity.¹⁶ Therefore, a further aim of creating a shared culture underpins the existing and interrelated aims to inform, educate and entertain. The cultivation of shared culture through television broadcasting requires a difficult balancing act, particularly in a multicultural and linguistically diverse nation such as Australia. This is

¹³ 'Supporting Australian Stories On Our Screen - Options Paper', *Parliament Of Australia* (Webpage, 2021) <<https://www.communications.gov.au/sites/default/files/consultation/pdf/supporting-australian-stories-on-our-screen-options-paper.pdf>>.

¹⁴ *Ibid* [2].

¹⁵ *Australian Broadcasting Corporation Act 1983* (Cth) s 6(a); *Special Broadcasting Service Act* (Cth) s 6(2)(e).

¹⁶ *Australian Broadcasting Corporation Act 1983* (Cth) s 6(a)(i).

somewhat echoed by the additional statutory obligation present within SBS' Charter to 'reflect Australia's multicultural society'.¹⁷

Therefore, the imposition of any further regulation when it comes to content will be a delicate procedure that is sensitive to this pre-existing matrix of information, education and entertainment.

7.2.1 SHOULD THIS FOCUS ON THE INVESTMENT IN AUSTRALIAN PROGRAMMING, OR REQUIRE THE PROVISION OF CERTAIN LEVELS OF AUSTRALIAN PROGRAMMING?

Recommendation 2: There should be a focus on investing in Australian programming by way of the ABC and SBS, supplemented with a mild quota requiring the provision of certain levels of programming.

The sufficient provision of Australian content for domestic audiences is imperative to shaping and fostering Australia's diverse cultural identity. However, in determining whether to invest in Australian programming or require the provision of certain levels of programming on free-to-air ('FTA') networks, the present circumstances and climate of the media industry must be carefully considered. Australians are rapidly shifting to new sources of content like SVOD services, on platforms not subject to the same content obligations and regulations as FTA networks such as the ABC and SBS. The ACCC *Digital Platforms Inquiry* noted that 'TV and radio broadcasting bears a significantly heavier regulatory burden' than other sectors, historically justified by its role as a 'public resource, the scarcity of spectrum and the distinctive power of broadcast media to influence public attitudes'.¹⁸ These traditional forms of media are therefore at an inherent competitive disadvantage, being disproportionately restricted by regulatory frameworks designed to maintain local content and media diversity.

The Media, Entertainment and Arts Alliance (MEAA) supported retaining the current 55% Australian content transmission quota implemented on commercial free-to-air networks.¹⁹ There is significant empirical data supporting the prominent role of quotas in implementing

¹⁷ *Special Broadcasting Service Act* s 6(1).

¹⁸ Australian Competition & Consumer Commission, Parliament of Australia, *Digital Platforms Inquiry* (Final Report 2019) 167.

¹⁹ Media Entertainment and Arts Alliance (MEAA), 'Supporting Australian Stories on Our Screens: Response to March 2020 Options Paper' (MEAA, June 2020) 2.

the policy objective of increasing Australian programming.²⁰ Research indicates that certain types of programming, including Australian drama, documentary and children's programming, which are highly prone to market failure, are likely to be significantly less prevalent if regulations shift away from quotas.²¹ If quotas were eliminated on commercial television, children's programs would cease to be produced, drama programs would reduce by 90% and documentary programs would reduce by 50%.²²

The New Zealand experience in the 1990s may be illustrative. There, deregulation (including removing local content requirements) was associated with an increase in domestic programming but an overall decrease in the proportion of domestic content vis-à-vis their international counterparts.²³ Local content distribution on prime-time television saw a reduction from 43% to 31% from 2006 to 2016 in parallel with significant deregulation of the country's media industry.²⁴ Meanwhile domestic programming gains were largely attributable to domestic versions of popular international shows.²⁵ This illustrates that a push for domestic quantity increases does not necessarily meet desired policy objectives, and that quotas might be necessary to ensure production of minority/indigenous content. A misapplication of quotas/funding may potentially result in increased local content quantities at the expense of media diversity/domestic relevance as highlighted by a similar experience with the American FCC.²⁶ It is therefore apparent that quotas may still help ensure some domestically-relevant content.

The SBS has been a proponent for a quota on Australian content commissioned and produced by the national broadcaster, however it has noted that this imposition must be conditional

²⁰Queensland University Of Technology, Submission to Communications and Media Authority, Department of Infrastructure, Transport & Regional Development and Communications, *Supporting Australians on Our Screens* (19 June 2020) 4.

²¹Ibid.

²²Australian Communications and Media Authority, Department of Infrastructure, Transport, Regional Development and Communication, *Supporting Australian stories on our screens* (Options Paper, March 2020) 7.

²³ Geoff Lealand, 'Selling the airwaves: deregulation, local content and television audiences in New Zealand' (1991) 62(1) *Media Information Australia* 68, 69-70; Avril Bell, "'An endangered species": local programming in the New Zealand television market' (1995) 17(2) *Media, Culture & Society* 181, 191.

²⁴Ministry of Social Development, *The Social Report 2016* (Parliamentary Research Paper, June 2016) 177.

²⁵ Lealand (n 27) 70.

²⁶ Cheryl A Leanza, 'Monolith or Mosaic: Can the Federal Communications Commission Legitimately Pursue a Repetition of Local Content at the Expense of Local Diversity' (2004) 53(3) *American University Law Review* 597, 604-5.

upon adequate funding provided by the Government.²⁷ Such legislative quotas are not financially viable without the provision of specific, tied funding due to the high costs of commissioning Australian content when compared with acquiring international content.²⁸ The financial limitations of a model focused on quotas and sub-quotas is very apparent in the suspensions on all obligations to produce Australian drama and documentary programs in response to the COVID-19 pandemic; this was done to offer financial support for networks, indicating the burden of strict quota-oriented policies.

Many of the arguments against quotas are either founded in contempt for protectionism or assume that meeting these requirements are excessively burdensome. The costs such quotas could have on the viewership and profits on broadcasting corporations are considerable; they are aware of this, and in response are increasingly shifting to Broadcast Video on Demand (BVOD) platforms to mitigate these effects. As noted by the ABC, the cost of commissioning an Australian program can cost \$500,000 - \$1 million per hour, whereas importing a high-quality program costs significantly less, at \$100,000 – 300,000 per hour.²⁹ However, many Australians, especially the elderly and residents of rural regions, continue to rely on high-quality free-to-air services from these broadcasting networks. While quotas are essential for ensuring the provision of specific and desired forms of domestic programs, they must be supplemented by monetary incentives and support for broadcasters. Investment also generates value by increasing the potential and support available for diverse talent to be positioned at the forefront of the media industry. It is well evidenced that diversity in the Australian media and entertainment industry is critical for its success,³⁰ and this is acknowledged by the ABC and SBS who are both signatories to the Screen Diversity and Inclusion Network Charter.³¹

Yet, investment in local content by networks like the ABC and SBS has also decreased, largely due to lack of funding and the growth of SVOD services. This could be addressed via

²⁷ Special Broadcasting Service (SBS), ‘SBS Submission to the Department of Infrastructure, Transport, Regional Development and Communications Supporting Australian Stories On Our Screens - Options Paper July 2020’ (SBS, 2020) 1.

²⁸ SBS, *SBS Submission – Inquiry into the Australian Film and Television Industry* (March 2017) 7.

²⁹ Australian Communications and Media Authority, Department of Infrastructure, Transport, Regional Development and Communication, *Supporting Australian stories on our screens* (Options Paper, March 2020) 5.

³⁰ PricewaterhouseCoopers, *Who’s the fairest of them all? Australian entertainment & media industry needs diversity to grow* (Web Page, 8 June 2016)

<<https://www.pwc.com.au/press-room/2016/media-outlook-jun16.html>>.

³¹ Screen Diversity and Inclusion Network, *Members* (Web Page, 2021) <<https://www.sdin.com.au/members/>>.

the simultaneous implementation of two policy strategies: (1) promptly imposing equal or higher local content quotas on SVOD services, evening the commercial playing field and mitigating the competitive disadvantage and subsequent financial issues faced by broadcasters; (2) introducing or raising financial incentives for broadcasting networks to produce and invest in local content. The propositions set out in the Green Paper, to shift FTA services to a more sustainable operating model, will likely create surplus funds and savings that could be used to invest in the production and provision of local content; the nature and direction of this investment may be regulated and mandated by central authorities.

Subsidising the production of Australian content for national broadcasters to make these propositions more attractive from a business and economic perspective would increase the value of investment in this area. Similarly, revision of other available incentives such as indirect funding through tax offsets and other areas of the BSA would help acclimate regulation to the current digital and media environment.³²

To ensure continued access to Australian voices and stories, a balanced, financially feasible and fair public policy strategy must be developed. An optimal approach is thus to focus on strategies like incentives, funding and industry partnerships, with a mild quota to supplement.

7.2.2 SHOULD THE FOCUS ON AUSTRALIAN PROGRAMMING BROADLY, OR TARGET PARTICULAR GENRES SUCH AS DRAMA AND CHILDREN'S PROGRAMMING?

The media landscape has extensively changed creating high costs, declining revenue, and limited access for a broad demographic of Australians. The current national broadcasting streams face rising competition from international BVOD and SVOD services, particularly in drama and children's shows genre.³³ In these genres, the ABC & SBS are more reliant on overseas material³⁴ and previous reviews have indicated that decreases in content expenditure

³²Ibid 5.

³³ '14.5 Million Australians Already Have Pay TV / Subscription TV As Disney+ Enters The Market', *Roy Morgan* (Webpage, 2021) <<http://www.roymorgan.com/findings/8218-netflix-foxtel-stan-pay-tv-oct-2019-201912020339>>.

³⁴ Department of Broadband, Communications and the Digital Economy, *ABC and SBS: Towards a digital future* Discussion Paper (2008) 12.

are also most acute for these genres.³⁵ The Australian Children's Television Foundation (ACTF) submits that without quotas, broadcasters will cease to make children's content altogether³⁶ and it is understood that while children's programs are not always lucrative, there is a need to subsidise programs that support the enlightenment of children.³⁷ Children's programmes allow younger viewers to understand the world, acquire language skills and gain age-appropriate guidance on issues such as friendship and bullying.³⁸ A survey found that 60% of schools use ABC programs and national broadcasters play a role in lifelong education.³⁹ Currently, only one domestic programming area, education, is explicitly mandated in the charter requirement for the ABC.⁴⁰ This submission recommends revising the ABC charter to include vulnerable genres, particularly live action in children's programming which is increasingly being replaced by animation,⁴¹ and that any content obligations imposed clearly target them.

This submission advocates for program obligations representative of marginalised communities, including First Nations peoples and the LGBTQIA+ community.

A *First Nations Representation*

Recommendation 2: Create a unilateral statutory obligation mandating that 5% of all content produced be Indigenous.

Recommendation 3: The 5% obligation be divided into two.

3.1 2.5% fulfilled through Indigenous content in programming.

3.2 The remaining 2.5% fulfilled through either Indigenous programming or programming under the creative control of Indigenous peoples.

³⁵ Ibid.

³⁶ ACTF, *Submission 91*, 5. See also, Dr Anna Potter, *Submission 97*, 3.

³⁷ Ms Edgar, 'What really happened to Australian Children's Television? And where to from here?', *Submission to the Australian and Children's Screen Content Review*, (2017) 33.

³⁸ ACCM, *Submission 126*, 2.

³⁹ Department of Broadband, Communications and the Digital Economy, *ABC and SBS: Towards a digital future Discussion Paper* (2008) 15.

⁴⁰ Ibid 12.

⁴¹ Ibid 18.

Recommendation 4: Both organisations report performance to ACMA annually and face similar reprimand to commercial companies for breach.

Any statutory construction must incorporate the reconciliatory policy obligations that Australian organisations have to Indigenous peoples. E-briefs provided by Ministers in the Parliament of Australia have clearly demonstrated that the lack of expression and representation of Indigenous stories through drama, regional language programs and in children's shows is a threat to the preservation of Indigenous culture.⁴² This submission is concerned that the Media Reform Green Paper considers Indigenous peoples a total of only three times.⁴³ Only one of these addresses appropriate provision of media to and by such communities.⁴⁴ This must be given much more significance.

The ABC Charter provides that part of the Corporation's functions is to broadcast '*programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community...*'.⁴⁵ The SBS Charter provides that it must '*contribute to meeting the communications needs of Australia's multicultural society, including ethnic, Aboriginal and Torres Strait Islander communities*'.⁴⁶ The obligations to create accurate reflections of the Australian community, with a particular focus on Indigenous peoples, are at the heart of these organisations' legislative operation. However, as broadly phrased Charters – they do not ensure accountability.

These must be read alongside the Reconciliation Action Plans ('RAPs') of both organisations. The strategic goals of the ABC's plan incorporates programming to further Indigenous voices, languages and stories and promote a national understanding.⁴⁷ The SBS supports '*national efforts to close the gap and increase understanding between our nation's First Peoples and the wider Australian community*'.⁴⁸ These organisations have historically demonstrated improvement in addressing both production and commercial engagement; but

⁴² 'Indigenous Broadcasting – Parliament Of Australia', *Aph.Gov.Au* (Webpage, 2021) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/Indigenusbroadcasting>.

⁴³ Australian Government, *Media Reform Green Paper; Modernising television regulation in Australia* (November 2020).

⁴⁴ *Ibid* [11].

⁴⁵ *Australian Broadcasting Corporation Act 1983* (Cth) s 6.

⁴⁶ *Special Broadcasting Services Act 1991* (Cth) s 6(2)(a).

⁴⁷ Australian Broadcasting Corporation, *Elevate; Reconciliation Action Plan (2019-2022)* [7].

⁴⁸ Special Broadcasting Services, *Fourth Reconciliation Action Plan (2015-2018)* [2].

the aims of both the Charters and RAPs should be made an obligation to ensure a consistent and intentional effort.

What would constitute ‘Indigenous content’? It may fall into two categories. The first, relies on the content itself being of an Indigenous nature; promoting Indigenous stories through explicit programming. The second, is content under ‘creative control’ of Indigenous peoples; a modified version of the accepted definition.⁴⁹ That is, it applies to Indigenous peoples specifically, rather than all Australians.

Population data assists in quantifying the obligation. Indigenous peoples constitute approximately 3.3% of the total population.⁵⁰ An obligation for 5% of all SBS/ABC content to be Indigenous, would provide a flexible quantity for Indigenous peoples and have the potential to reach wider audiences. There is a special significance in supporting Indigenous people's stories with both pervasive false representation and underrepresentation historically transpiring in Australian media.⁵¹ Thus, the opportunity for more Indigenous peoples stories to be advocated is critical to cultural awareness in the Australian community, as well as perpetuating Indigenous storytelling.⁵² The obligation must not *only* be met through creative-control teams; Indigenous programming is paramount to establishing better relations and preserving culture.

As such, 2.5% should be met through programming that promotes Indigenous stories, values and voices. The remaining 2.5% could be met *either* through Indigenous programming, *or* programming under the ‘creative control’ of Indigenous teams. The organisations should be required to report their relevant annual performance to ACMA,⁵³ facing similar reprimand for breach, to their commercial counterparts⁵⁴ and ensuring accountability.

In sum, the Australian broadcasting companies must increase their broadcasting of Australian content across the drama and children's shows genre as these spark a deep public interest

⁴⁹ *Broadcasting Services (Australian Content) Standard 2016*, Pt 3 s 7(2).

⁵⁰ Australian Institute of Health and Welfare, *Profile of Indigenous Australians*, (Sep 2019) <<https://www.aihw.gov.au/reports/australias-welfare/profile-of-indigenous-australians>>.

⁵¹ Rehana E. Asmi, ‘Indigenous Representation in the Media and the Importance of Personal Narrative’ (2017) *Undergraduate Theses and Professional Papers, University of Montana* 174.

⁵² *Ibid.*

⁵³ Australian Communications and Media Authority

⁵⁴ Australian Government, *Media Reform Green Paper; Modernising television regulation in Australia* (November 2020) [7].

regarding the representation of First Nations history across Australian media, and the representation of general Australian community values among children.⁵⁵

B *LGBTQIA+ Representation*

Recommendation 5: Amend the ABC Charter⁵⁶ and SBS Charter⁵⁷ to account for LGBTQIA+ diversity.

Recommendation 6: Mandate specific and recurrent information-gathering and reporting of LGBTQIA+ representation in both workplaces and onscreen.

Recommendation 7: Set targets for LGBTQIA+ representation behind the screen, including decision-making positions. Targets may be pursued by quotas or by advertising workplace inclusivity and unconscious bias avoidance in recruitment processes.

Recommendation 8: Set targets for LGBTQIA+ representation onscreen, recognising the chronic underrepresentation of transgender, non-binary, intersex, and asexual characters. Targets should also reflect diversity within the LGBTQIA+ community, including intersections of identity felt by LGBTQIA+ people who are also Indigenous, CALD, disabled, and/or religious.

Recommendation 9: Formalise a recognition of authenticity and avoidance of tokenism in storytelling. This includes introducing requirements, supported by production budgets, for project research and consultation with LGBTQIA+ communities. Collaboration with LGBTQIA+ creatives and groups should be included in long-term plans.

⁵⁵ ‘Supporting Australian Stories On Our Screen - Options Paper’, *Parliament Of Australia* (Webpage, 2021) <<https://www.communications.gov.au/sites/default/files/consultation/pdf/supporting-australian-stories-on-our-screeens-options-paper.pdf>>.

⁵⁶ *Australian Broadcasting Corporation Act 1983* (Cth) s 6.

⁵⁷ *Special Broadcasting Service Act 1991* (Cth) s 6.

The LGBTQIA+ community comprises an estimated 11% of Australia’s population.⁵⁸ The community experiences significantly higher rates of suicidality and mental illness compared to the general population, with LGBTQIA+ young people are 5 times more likely to attempt suicide in their lifetime, intersex people are nearly 6 times more likely, and transgender people are nearly 11 times more likely.⁵⁹ Representation in media content assists in addressing the underlying causes of these figures,⁶⁰ including cultural assumptions of and preferences for heterosexual and cisgender identities, and their effect on education, work, personal security, and legal protections.⁶¹

Neither the ABC nor SBS have produced public records of LGBTQIA+ representation in their content. Performance must be inferred from analyses of the broader trends of content providers: Screen Australia’s 2016 report found that only 5% of characters in Australian dramas were identifiably LGBTQIA+.⁶² Of all dramas, only 27% of programs included at least one LGBTQIA+ main character and of these, most only had one such character.⁶³ There were two transgender characters, and no characters were intersex.⁶⁴ Informal observations from the community come to the same conclusion: television programs are not sufficiently representative.⁶⁵

The ABC’s ‘Diversity and Inclusion Plan 2019-22’ sets workforce targets for women, CALD, and Indigenous persons but fails to include any target for LGBTQIA+ diversity.⁶⁶ There is no statistical information for LGBTQIA+ ABC employees. Additionally, the ABC has introduced Diversity and Inclusion Commissioning Guidelines, requiring production companies to demonstrate diversity in their content by showing at least one cast member who

⁵⁸ Department of Health and Ageing, *National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy* (2012) 4.

⁵⁹ National LGBTI Health Alliance, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People* (February 2020) 2.

⁶⁰ Sarah C. Gomillion MS & Traci A. Giuliano PhD, ‘The Influence of Media Role Models on Gay, Lesbian, and Bisexual Identity’ (2011) 58(3) *Journal of Homosexuality* 330, 346.

⁶¹ Darrel Higa et al, ‘Negative and Positive Factors Associated With the Well-Being of Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning (LGBTQ) Youth’ (2014) 46(5) *Youth & Society* 7-9.

⁶² Screen Australia, *Seeing ourselves: Reflections on diversity in Australian TV drama* (2016) 4.

⁶³ Ibid.

⁶⁴ Ibid 17.

⁶⁵ Shannon Molloy, ‘Where are all the gay characters on Aussie TV? Is it true ‘gay doesn’t rate’? Four insiders weigh in’ *News Corp Australia Network* (online at March 4 2016) <<https://www.news.com.au/entertainment/tv/where-are-all-the-gay-characters-on-aussie-tv-is-it-true-gay-doesnt-rate-four-insiders-weigh-in/news-story/b5fde43b27adc2aaf8b237ac246d572a>> .

⁶⁶ Australian Broadcasting Corporation, *Diversity & Inclusion Plan 2019-22* (2019) 14.

identifies as LGBTQIA+.⁶⁷ It is unclear yet how effective this will be in achieving LGBTQIA+ representation specifically rather than a broad pool of diversity.

Similarly, the SBS conducts an annual Diversity and Inclusion Survey. As of October 2019, 12.6% of respondents identified as members of the LGBTQIA+ community.⁶⁸ Taking into consideration the proportionally low amount of LGBTQIA content, this figure challenges the assumption that employee representation and inclusive workplaces automatically result in sufficiently representative content production. Policies must therefore address both workforce and onscreen representation separately.

7.2.3 TO WHAT EXTENT SHOULD THE OBLIGATION DIFFER FOR THE ABC AND SBS TO ACCOMMODATE THEIR DIFFERING ROLES AND REMIT?

Recommendation 10: Any investment or statutory obligation should be significantly relaxed for the SBS compared to the ABC, to reflect the SBS’ significantly lower funding and inherent dependence on foreign content.⁶⁹

The imposition of any statutory obligation will need to recognise the fundamental differences between the two public broadcasters. The ABC has an obligation under its Charter to foster a sense of national identity.⁷⁰ Therefore, a nationalistic lens is added to the interrelated aims to inform, educate, and entertain in creating a shared culture. The cultivation of shared culture through television broadcasting requires a difficult balancing act, particularly in a multicultural and linguistically diverse nation such as Australia. This is somewhat echoed by the additional statutory obligation present within SBS’s Charter to ‘reflect Australia’s multicultural society’.⁷¹

⁶⁷ Australian Broadcasting Corporation, *Commissioning for Diversity and Inclusion Guidelines – Screen Content* (2021) 7.

⁶⁸ Special Broadcasting Service Corporation, *Annual Report 2020* (2020) 84.

⁶⁹ Tyson Wils, ‘Funding for the national broadcasters’, *Budget Review 2018-2019 Index* (Funding Review, May 2018)

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/Budget_Review201819/Fundingforationalbroadcasters>.

⁷⁰ *Australian Broadcasting Corporation Act 1983* (Cth) s 6(a)(i).

⁷¹ *Special Broadcasting Service Act* s 6(1).

The SBS' greater focus on minority Australian cultures will likely present difficulties in meeting a stringent statutory obligation, as reflected in the SBS' local content proportion of 27% in 2018-19,⁷² and 21% in 2019-2020.⁷³ There are several potential explanations for this relatively low presence of local content. The first is that the SBS' current targets are too low. In 2019-2020 the SBS noted that it exceeded its targets for new locally commissioned programs.⁷⁴ Theoretically, increasing this target would increase the local content quantities, but would risk the downsides of quotas as discussed prior. Secondly, SBS' production of minority-related content (e.g., news, sports, documentaries) generally requires greater foreign content. By contrast, programs like SBS Food and NITV contain significantly greater local content,⁷⁵ given their narrower focus.

Therefore, the imposition of any further regulation when it comes to content will be a delicate procedure, ensuring that the pre-existing matrix suffers minimal interference. The imposition of an investment quota or one that is based on monetary value could be problematic, particularly when considering the shifting societal needs that define the operations of each broadcaster. It would likely over-emphasise the 'entertain' requirement, given the larger budgets required for drama and comedy programs and may limit the capacity for to deliver informative and educational programs. Similar concerns too may arise should there be a quota for hours of content per genre. This is not to say that entertainment, informative, and education programs all warrant an equal budget. Entertainment programs are typically far more expensive to produce. However, it must be ensured entertainment, educational and informative programming receive adequate funding and can be delivered on a regular basis in accordance with societal needs and expectations. This will then allow both the ABC and SBS to foster a sense of national identity and showcase multicultural Australia respectively.

7.3 WHAT IMPACT WOULD THE IMPOSITION OF A CLEAR AUSTRALIAN CONTENT OBLIGATION FOR THE ABC AND SBS HAVE ON THE AUSTRALIAN SCREEN PRODUCTION INDUSTRY, AND THE PROVISION OF AUSTRALIAN CONTENT MORE BROADLY?

Recommendation 11: Australia should incentivise Australian television and media companies with grants, rather than imposing strict content obligations.

⁷² *Special Broadcasting Service* (Annual Report, August 2019) 134.

⁷³ *Special Broadcasting Service* (Annual Report, 30 June 2020) 128.

⁷⁴ *Special Broadcasting Service* (Annual Report, 30 June 2020) 90.

⁷⁵ *Special Broadcasting Service* (Annual Report, 30 June 2020) 30-3.

Recommendation 12: If content obligations are imposed, to ensure the efficacy, it is recommended that the ABC and SBS's market impacts are assessed more effectively, perhaps by instituting an **external regulator** that has the power to carry out systematic reviews as has been done by the BBC and Ofcom in the UK.⁷⁶

Recommendation 13: The imposition of strict guidelines for the quality of the content produced, accounting for relevant indicators such as sourcing, diversity, political pluralism, and freedom of expression.

This submission recognises the benefits that come with imposing a content obligation for the ABC and SBS, however the simultaneous issues evident with an obligation, heavily outweigh the positives. These include heavy budgetary implications as well as potential for a downgrading of content quality. These claims will be supported with evidence from similar schemes in other Commonwealth nations.

This submission notes the American media has a clear global monopoly over television, and Australian media does not currently carry nearly the same amount of cultural clout, nor the ability to shape global discourses in the same manner.⁷⁷ Consequently, much of the world has been Americanised with American pop culture and politics dominating public conversation, and Australia is no exception.⁷⁸ Distinctly American ideas are now witnessing a resurgence in the minds of the general Australian public, due to the constant bombardment of US-centric media and accordingly US political ideals and rallying cries. This has led to the dangerous conflation of American rights with our own as well as a general ignorance and confusion, such as those who mistakenly believe that the right to free speech is enshrined in our Constitution and who have taken it upon themselves to champion this cause.⁷⁹ Therefore, a

⁷⁶ Department for Culture, Media & Sport (UK), *A BBC for the future: a broadcaster of distinction* (2016) 14.

⁷⁷ Thomas McPhail, 'eColonialism Theory: Hegemony and the Role of American Media' (2008) 1(2) *The Global Studies Journal* 45.

⁷⁸ Mikki Cusack, 'We've Become America's Identical Twin', *The Sydney Morning Herald* (4 November 2016) <<https://www.smh.com.au/opinion/weve-become-americas-identical-twin-but-weve-got-too-much-to-lose-2016-1101-gsfp0w.html>>.

⁷⁹ Misha Ketchell, 'Australia Doesn't Protect Free Speech, but It Could', *The Conversation* <<http://theconversation.com/australia-doesnt-protect-free-speech-but-it-could-118448>>.

content obligation to produce distinctively Australian media, as the ABC and SBS already produce, bolster a national identity and reinforce Australian voices and culture.

Yet, this submission highlights the practical effects a content obligation would have on the ABC and SBS. The imposition of content obligation poses significant budgetary implications. The ABC already produces more Australian content than all commercial networks, producing 24 Australian drama productions as opposed to 21 from other networks.⁸⁰ However, the ABC has noted that a content obligation would enable the government to directly dictate its budget spending.⁸¹ The ABC and SBS are currently experiencing budget cuts as the ABC's funding freeze has now been extended. This is in conjunction with the Federal budget decreasing the ABC's operating budget from \$880.6 million to \$866.5 million, which 'represents a 3.7% decrease in real terms from 2020-2021 to 2022-2023'.⁸² The provision of quality content becomes a challenge when considering the substantial costs associated with its production as noted earlier in this submission. Inadequate staffing, as the ABC and SBS are currently experiencing, only furthers these issues.⁸³

The current global pandemic has also stifled the capacity of the ABC and SBS to produce quality content. This is because the SBS and the ABC were the two major national broadcasters that were hit hardest by the COVID-19 pandemic as the Public Interest News Gathering Program (PING)- the COVID-19 relief package for journalism, did not provide any fiscal assistance to the two major broadcasters, instead solely focussing on regional companies.⁸⁴ Though the Australian government is proposing an injection of \$53 million as

⁸⁰ Amanda Meade, 'ABC opposes quotas as Coalition plans to force Netflix to make more Australian content', *The Guardian*, (online, 27 November 2020) <<https://www.theguardian.com/media/2020/nov/27/abc-opposes-quotas-as-coalition-plans-to-force-netflix-to-make-more-australian-content#:~:text=Under%20the%20current%20rules%20only,55%25%20obligation%20remained%20in%20place>>.

⁸¹ *Ibid.*

⁸² Guardian Staff, 'The Overlooked Parts Of The 2020 Australian Budget You Should Know About', *The Guardian* (online, 7 October 2020) <<https://www.theguardian.com/australia-news/2020/oct/07/the-overlooked-parts-of-the-2020-australian-budget-you-should-know>>.

⁸³ Amanda Meade and Paul Karp, 'ABC to slash programming and services as it grapples with Coalition funding cuts', *The Guardian* (online, 10 June 2020) <<https://www.theguardian.com/media/2020/jun/10/abc-to-slash-programming-and-services-as-it-grapples-with-coalition-funding-cuts>>.

⁸⁴ Alexandra Wake and Michael Ward, 'Regional Media Get COVID Lifeline But ABC, SBS Remain In Peril', *The*

part of their federal budget of 2020-21, to assist in the development of local film and television; with regards to the ABC and SBS specifically, this will not offset the budget cuts that they are currently experiencing as the \$53 million is being dispersed throughout the Australian media industry.⁸⁵ It is uncertain whether these costs can be recovered, and this may mean that over time, broadcasters will be unable to meet quota requirements, ultimately resulting in industry failure and hindering future investment in Australian content.

Also, this submission argues that a degradation of content quality is a risk if a potentially extreme content obligation is imposed. Quality of content is not a condition in the quota policy and this may encourage the spread of ‘quota quickies;’ cheaper productions devoid of cultural value and damaging to television ratings.⁸⁶ If the average level of quality of televised content falls as a result, the implementation of a clear content obligation would be counter intuitive as individuals would become increasingly gravitated towards international content due to its higher calibre of content, hence decreasing viewership of domestic content. Micova argues, from her research in European countries, that quotas have done little to increase viewership or protect creative industries,⁸⁷ but have conversely had an unintended effect of causing higher politicisation of media content as news and political programmes often dominate national agenda.⁸⁸ Hence, this submission notes the issues with content obligations.

Consequently, in determining whether to impose a quota, it is useful to look to similar international schemes. Implementation of content obligations internationally has generally not been well received. In 2015, the Canadian Radio-television and Telecommunications Commission eliminated the 55% Canadian content quota during the day, as stations were repeatedly playing old content in order to satisfy the rule.⁸⁹ Similarly, the South African government announced in 2016, they were implementing a content quota for their public

Conversation (online, 15 April 2020)

<<https://theconversation.com/regional-media-get-covid-lifeline-but-abc-sbs-remain-in-peril-136394>>.

⁸⁵ Paul Fletcher, ‘New Funding In Budget To Deliver Australian Screen Content’ (Media Release, 30 September 2021).

⁸⁶ Sally Broughton Micova, ‘Content Quotas: what and whom are they protecting?’ [2014] *LSE Research Online* 12.

⁸⁷ *Ibid* 13.

⁸⁸ *Ibid*.

⁸⁹ CBC News, ‘CRTC eases Canadian-content quotas for TV’, *CBC* (online, 12 March 2015)

<<https://www.cbc.ca/news/business/crtc-eases-canadian-content-quotas-for-tv-1.2992132>>; Sora Park et al., *Domestic Content Policies in the Broadband Age: A Four-Country Analysis* (Report, January 2015) 25.

broadcaster's channel, SABC 3. Yet, critics argue the SABC 3 is struggling to meet their 80% requirement in producing local content, whilst remaining of a high quality; with added concerns of decreases in advertising profit, a key source of revenue for many media outlets, as a result of poor quality content.⁹⁰ Thus, international examples highlight the issues that are paired with a content obligation, therefore suggesting one not be imposed.

Therefore, this submission is not in favour of inflicting a content obligation due to its imposition on the ABC and SBS, two key Australian media identities which already produce high amounts of Australian content, with the risk of fiscal restraint and a decline in quality content, evident.

V SUMMARY OF RECOMMENDATIONS

1. Any new statutory obligations that are enforced should be constructed with careful sensitivity to the ABC and SBS' pre-existing obligations to inform, educate and entertain.
2. There should be a focus on investing in Australian programming by way of the ABC and SBS, supplemented with a mild quota requiring the provision of certain levels of programming.
3. Create a unilateral statutory obligation mandating that 5% of all content produced be Indigenous.
4. The 5% obligation be divided into two.
 - a. 2.5% fulfilled through Indigenous content in programming.
 - b. The remaining 2.5% fulfilled through either Indigenous programming or programming under the creative control of Indigenous peoples.

⁹⁰ Jared Borkum, 'Local content quotas on TV are global – they just don't work everywhere', *The Conversation* (online, 9 June 2016) <<https://theconversation.com/local-content-quotas-on-tv-are-global-they-just-dont-work-everywhere-60656>>.

5. Both organisations report performance to ACMA annually and face similar reprimand to commercial companies for breach.
6. Amend the ABC Charter⁹¹ and SBS Charter⁹² to account for LGBTQIA+ diversity.
7. Mandate specific and recurrent information-gathering and reporting of LGBTQIA+ representation in both workplaces and onscreen.
8. Set targets for LGBTQIA+ representation behind the screen, including decision-making positions. Targets may be pursued by quotas or by advertising workplace inclusivity and unconscious bias avoidance in recruitment processes.
9. Set targets for LGBTQIA+ representation onscreen, recognising the chronic underrepresentation of transgender, non-binary, intersex, and asexual characters. Targets should also reflect diversity within the LGBTQIA+ community, including intersections of identity felt by LGBTQIA+ people who are also Indigenous, CALD, disabled, and/or religious.
10. Formalise a recognition of authenticity and avoidance of tokenism in storytelling. This includes introducing requirements, supported by production budgets, for project research and consultation with LGBTQIA+ communities. Collaboration with LGBTQIA+ creatives and groups should be included in long-term plans.
11. Any quota or statutory obligation should be relaxed for the SBS compared to the ABC, to reflect the SBS' significantly lower funding and inherent dependence on foreign content.⁹³
12. Australia should incentivise Australian television and media companies with grants.
13. If content obligations are imposed, to ensure the efficacy, we recommend that the ABC and SBS's market impacts are assessed more effectively, perhaps by instituting an **external regulator** that has the power to carry out systematic reviews as has been done by the BBC and Ofcom in the UK.⁹⁴

⁹¹ *Australian Broadcasting Corporation Act 1983* (Cth) s 6.

⁹² *Special Broadcasting Service Act 1991* (Cth) s 6.

⁹³ Tyson Wils, 'Funding for the national broadcasters', *Budget Review 2018-2019 Index* (Funding Review, May 2018)

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/Budget_Review201819/Fundingforationalbroadcasters>.

⁹⁴ Department for Culture, Media & Sport (UK), *A BBC for the future: a broadcaster of distinction* (2016) 14.

14. The imposition of strict guidelines for the quality of the content produced, accounting for relevant indicators such as sourcing, diversity, political pluralism, and freedom of expression.