

Changing Standards for Australian Content on TV

**Proceedings of a workshop hosted by Network Insight, the
Australian Film Commission and Allens Arthur Robinson**

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Preface

This volume contains the full record of discussion at the workshop on changing standards for Australian content, held on 15 March 2002. This is not a topic which lends itself to a single magic solution. It is complex, because it needs to balance the economic and social interests of TV networks, film and TV producers, and audiences. Within each one of those groups there are different interests. For example, viewers are not a single mass. In any hour of the TV schedule, children want something different from adults, and the 18-24 years demographic wants something quite different from the 39-45 years demographic. Even in a single household of four people, there might be four sets of needs, each wanting Australian content of a different kind.

The complexity is why this volume may be useful. It is not a succession of set-piece positions, but rather a dialogue between experienced people sensitive to all the issues. This includes the ideas of not only the 10 discussion openers, but also about half the 100 people who participated. The immediate reason for the workshop was the 2001-2002 review by the Australian Broadcasting Authority (ABA) of the standard governing Australian content on commercial free-to-air television. The workshop was held after the first round of submissions to that inquiry, but before the later rounds of the inquiry. Thus, we hope to have added some informed problem-solving and free-ranging discussion to the necessarily more formal processes of the ABA. Apart from the obvious issues about drama, children's programs and documentaries discussed here, there are also broader issues such as:

- What are the best ways to encourage and support the production of programs that have high cultural values but may be commercially risky?
- What are the implications for the Australian content standard of WTO and other international trade pressures?
- Could the broadcasters' licence fees be returned to the sector to support Australian production?
- What is the role of public broadcasters in fostering Australian content?
- What of the standard beyond the current review, with factors such as: the multi-channel environment; pay television; possi-

ble changes to media ownership and control rules; and the end of restrictions on the number of commercial free-to-air channels?

These pages include the edited transcript of what speakers said, and the full record of discussion in each session. We sent the draft transcript to each discussion opener for additions and corrections. However, it was not feasible to contact all the speakers from the floor to check their remarks. Apologies to any whose exact words may have been mistaken for transcription reasons. This volume also includes a table with summaries from the submissions to the review by discussion openers' organisations. It is not a comprehensive or official document, but highlights some of the key positions and themes.

The workshop, and this volume, happened because of the initiative and support of the Australian Film Commission. Thanks in particular to Kim Dalton, Catherine Griff, Drew MacRae and Kim Ireland for all their efforts and contributions. The other organisation which played a vital part was Allens Arthur Robinson, which hosted the event at its Sydney office. Ian McGill, Justine Woolveridge and Melissa Yard-Smith helped us particularly. Thanks also to the discussion openers and other speakers, for sharing their valuable ideas, and Sharon Harding of Fastype for typing the transcript.

At the Network Insight end, we are grateful to Cris Abad, Nico Roehrich and Sarah Barns for all their hard work organising the workshop; and especially to Kirsten Harley for her excellent editorial work, assisted by Cris and Nico, in creating this volume. As a service to the public, Network Insight produces many publications dealing with key issues for the future of communications. For more details, please see our website at <http://www.ni.rmit.edu.au/>. Many publications are available free, and the larger ones can be ordered via the website or by fax.

Mark Armstrong
Director, Network Insight
April 2002

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Opening remarks: Kim Dalton, Chief Executive Officer, AFC

Kim Dalton graduated from the Flinders University Drama School in 1973. He then worked in Adelaide and Sydney as a freelance Production Manager and Assistant Director prior to moving to London in 1976. During five years in London, Kim completed a post graduate Diploma in Arts Administration, freelanced in the film industry, was involved in managing one of London's leading independent cinemas, and also managed an independent UK production and distribution company. Kim returned to live in Melbourne, Australia, in 1980 initially working as an independent producer and then from 1984 to 1987 as General Manager of Open Channel, during which time he co-produced the award winning television mini-series, In Between.

In 1987 Kim formed his own production company, Warner Dalton Pty Ltd, and co-produced the mini-series The Magistrate for the ABC and UK and Italian broadcasters and a telemovie, Street Angels, for the ABC. In 1992 Kim became the Australian Film Finance Corporation's Melbourne Investment Manager and in that role he was involved in the financing of numerous television projects and feature films including Muriel's Wedding and Priscilla Queen Of The Desert. Following a brief period as General Manager of the Australian Children's Television Foundation in 1994, Kim joined Beyond International Limited in February 1995 as Manager of Acquisitions and Development.

During his four and a half years at Beyond Kim was involved in the development, financing and production of a large number of television and feature film projects. He was Executive Producer of the children's television series Li'l Monsters and the award winning natural history series Wild Ones. He has also been involved in the acquisition and international release by Beyond of a number of feature films including the AFC-funded Love and Other Catastrophes.

Kim joined the AFC as Chief Executive in August 1999.

Firstly, I would like to welcome you all here this morning. We are very pleased to be co-hosting this very significant television event.

The Australian Film Commission (AFC) is all too often associated solely with film. We do however have a number of programs aimed at supporting the development of television projects and television producers. While we have not had a direct production funding relationship with the commercial networks since the end of the commercial television production fund, many of the recipients of our script and production funding go on to work in television production. We provide direct funding to independent television producers and we administer the Federal Government's co-production program, which is mostly used by television producers.

Outside of development and production funding, the AFC is involved in a very broad range of policy, research and information-gathering work. We are the primary data collection agency for the industry and we publish the national drama survey annually and the encyclopedic *Get The Picture* bi-annually.¹ In addition, we regularly publish books and reports dealing with developments in television technology and programming and, in the area of policy, we contribute to all major inquiries and discussions. Through our chair, Maureen Barron, we represent the arts and audiovisual industries on the Minister for Trade's World Trade Organization (WTO) Advisory Group. We participated in the recent Productivity Commission inquiry into broadcasting and we are now participating in the Australian Broadcasting Authority's (ABA) current review of the Australian content standard.

I outline all of this by way of impressing upon you the importance that the AFC places on television. While the media, the public and, at times, industry practitioners themselves may focus on the high profile and more glamorous successes associated with Australian films, filmmakers and actors, it makes no sense to talk about a film industry in isolation. Television is central to our industry in every respect: economic, cultural, employment, creative development and creative

¹ Now also continuously online at <http://www.afc.gov.au/GTP/>

output. In the AFC's opinion, there are few, if any, policy issues of more significance to the whole industry than Australian content. So when we address this issue, we do so with due seriousness and significant resources, and we are confident that our opinion and advice is delivered with some authority.

The AFC has of course made a long, detailed submission to the content review. It contains a number of quite specific recommendations. But rather than outline these, I wanted to set out for you three fundamental areas of concern which we believe should underpin and inform this review. In our opinion, these are principles and issues by which proposals and possible outcomes can be tested and which, to some extent I hope, will act as reference points throughout this workshop discussion.

1. Rationale for Australian content regulation

Firstly, we must restate and recommit to the fundamental rationale for an Australian content standard. This must be our guiding principle and as an industry we must deliver against it. Like many nations, Australia has seen the broadcast of local content as an essential role of the television system. It is an essential public interest obligation of privately owned television, in return for continued spectrum access and protection from competition. The object is to ensure that the culture of the nation is represented on our screens and to encourage the expression of creativity.

The underlying principles informing this position are:

- for most Australians, television is the most significant form of cultural activity, and our broadcasting system should be designed to deliver to them a diverse range of entertainment, education and information;
- television is more than a purely economic activity and has a significant impact on the development of an Australian identity, character and culture; and
- a contract exists whereby our broadcasters are given access to spectrum in return for meeting agreed social and cultural responsibilities.

For the most part, there is consensus across the industry in Australia about the reasonableness and continued relevance of these principles, even as we move into a world of digital abundance. As a consequence, our system of regulated local content is an area of agreement, shared interests and common ground. Yet we

should never let our commitment to these principles slip quietly away, unnoticed into the background, as we begin to engage with the detail of mechanism and process. It must remain in the foreground and serve as an objective and a goal around which mechanisms and processes must be designed.

2. Economic state of broadcasting

Secondly, establishing the appropriate level of financial contribution on the part of the networks, and the capacity to pay it, must be the primary economic factor or test in designing and refining the content standard. We are all in agreement that standards have been set in order to establish an output of programs which are distinctively Australian and which meet the needs and interests of Australian audiences. The corollary of this must be the recognition that those programs come at a cost and that our broadcasting system must be designed in such a way that broadcasters are able to make an appropriate contribution to these costs.

As part of this equation then, we should not have a problem with, or question, network profitability: networks are businesses; owners and shareholders have a right to returns; and decisions about how to run the business should be made rationally within this context. Maximise revenues and minimise costs, but within a context: on the one hand, a set of social objectives set by Parliament on behalf of the Australian people; and on the other hand, limited competition, which provides the broadcasters with the capacity to pay. Therefore, in determining the appropriate scope and detail of the content standard and in considering issues of performance in delivering against this standard, it is essential that the questions are asked: what is an appropriate level of financial contribution from the broadcaster? and, do they have the capacity to pay in order to deliver the outcomes required of the standard?

This review of the Australian content standard is being conducted in an environment where free-to-air broadcasting remains a successful and robust business. Despite recent warnings of a tightening advertising market and reduced earnings, all three networks are in a strong financial position after a decade of growth and reconstruction. They are protected from new entrants to the market until at least 2007 and appear to be in a good position to deal with the challenges from any economic slowdown and the growth of pay TV.

The total revenue for commercial free-to-air television in 1999-00 was \$3.3 billion, of which \$2.8 billion was advertising revenue. Expenditure was \$2.5 billion, producing a surplus across the sector of \$803 million or 30 per cent, continuing a trend of growth since the early 1990s. Between 1996-97 and 1999-00 advertising revenue grew by 19 per cent while expenditure, excluding interest payments, grew by 9 per cent. Television's share of advertising expenditure in 2000 was 33.5 per cent, down slightly from 34.3 per cent in 1995. It is worth noting that earlier this week the Seven Network reported to the stock exchange a profit before tax of \$80 million, up from \$41 million. It noted that: 'The overall advertising market remains short but conditions have stabilised. The company is well positioned to capitalise on anticipated improvements in advertising demand.'²

In 2000 there was a slight increase in daily television viewing, to 3 hours 13 minutes, the same level as it was in 1991. The three commercial networks attracted nearly 82 per cent of all viewing between 6.00 p.m. and midnight in the five metropolitan markets. These few statistics are provided simply to underscore the fact that commercial free-to-air television remains a healthy and robust business. It is clear that a continuing and strong revenue base remains in place.

The AFC recognises that the recommendations about increases in drama and documentaries and the level of cost contribution to children's drama, which are being made by many members of the production sector, will have a financial impact on the broadcasters. Of itself, this should not be an impediment to full consideration of these recommendations. Rather, these proposals must be evaluated in the context of, firstly, the objectives of the *Broadcasting Services Act 1992*, and subsequently, the capacity of the broadcasters to generate sufficient revenue to support these increases in costs: the capacity to pay.

3. The content standard and industry support

The third principle relates to the role the content standard plays in the development and growth of

the Australian film and television industry. The importance of content regulation to the development of the screen production industry cannot be overestimated. It not only creates the opportunities for production, the development of skills and the supporting infrastructure, but it also creates a growing and increasingly strong domestic television market: a market in which broadcasters compete for audiences and in which producers compete to supply broadcasters with high-rating and cost-effective programs.

The existence of strong broadcasters which need to commission the production of minimum levels of Australian content has served to underpin the direct industry support initiatives by government. The popularity of Australian television is integral to the domestic market which, in turn, has produced programs which are attractive internationally.

At a time when the Federal Government has recognised the international competitiveness of the Australian film industry and its growth potential in regard to foreign production, it would be a very selective and blinkered policy approach on the part of broadcasters and the ABA to ignore the relationship between local television production and the development and underpinning of Australia's capacity to service this production. In its August 2001 film industry funding package, for the first time the Federal Government recognised the integrated nature of the film and television industry by increasing direct funding for local production, while at the same time introducing incentives for foreign production. It is no longer possible to remove the broadcasters and their regulated responsibilities in regard to Australian content from the training, employment and creative, commercial and physical infrastructure that combine to form the complex matrix which now constitutes our film and television industry. Furthermore, we would submit that it is no longer appropriate for the ABA, as the government's legislated regulator, to regard the development of the production industry as a subsidiary policy goal or outcome of the standard. It must be central to the considerations of this review.

These three points of principle which I have outlined – the cultural imperative underpinning the standard, the capacity of the broadcasters to pay for the outcomes of the standard and the industry development implications of the standard – relate to the broad social purpose and industry context of the content standard and to ensuring that the conditions exist for the delivery of the

² Figures are for six months to 29 December 2001 and corresponding first half of 2000-01. Seven Network Limited, 'Seven Network Limited records strong earnings performance' (company announcement, ASX half yearly report and ASIC half yearly accounts), Australian Stock Exchange, 13 March 2002, <http://www.asx.com.au/asx/statistics/AnnDetail.jsp?id=467652&issuerid=1694>

outcomes of the standard. I hope that they provide a useful framework for what I am sure will be an interesting range of views and opinions expressed throughout this workshop. Thank you.

Andy McIntyre, GM, Program Finance & Development, Network Ten

Andy McIntyre is general manager of program finance and development for Network Ten. In that role he takes responsibility for the commercial and legal aspects of Ten's content acquisition and production. Over the last three years Andy has developed and overseen a major content initiative focused on lifting the network's output of local prime-time programming, most particularly light entertainment and drama. He works closely with the program scheduling and production team to maintain strong business disciplines throughout the creative process. One key element of this is long term content strategy, and in this regard the formulation of a new content standard is a major focus for Andy at the present time. Andy is a strong supporter of performance based deals for local producers and is currently working with several drama producers to secure deficit funding for new series projects.

Andy joined Ten in 1996 as business manager of network programming and assumed his current role in 1999. He was formerly with Ernst & Young's corporate finance division specialising in mergers, acquisitions and restructuring. From 1990 to 1992 he was part of the team responsible for the restructuring and sale of Network Ten.

He has a degree in economics from the University of Sydney and is an associate of the Institute of Chartered Accountants in Australia and the Securities Institute of Australia.

I would like to share with you some observations from a Network Ten perspective. In doing so, I would say that Network Ten fully supports the FACTS submission and note that we have made some separate comments, particularly in relation to the adult drama subquotas, in association with the Nine Network. While I am here representing Network Ten, I am happy to speak to the various elements of the FACTS submission to the ABA, as well as the separate Nine and Ten submission.

Network Ten is in show business; but we are also in business. We have a body of sharehold-

ers who require the network to meet some strict financial performance criteria. It is in that context that we consider all of our key strategic decisions, be they commercial or creative. The challenge of our business is to find the right balance between the commercial and the creative, which is the role in which I perform my responsibilities at the network day to day.

What sets the Ten Network a little bit apart (other than our outsourcing philosophy, discussed below), is the fact that we have undergone a more radical transformation over the last ten years than our free-to-air counterparts. We have had the opportunity to rebuild the business essentially from scratch; to reconfigure it in a format that was more stable and robust, with the capacity to survive downturns and enjoy periods of strong economic growth and advertising revenue. To achieve this, it has been important to re-establish some very firm business disciplines within the network. I am pleased to say that we are in a much better position today than we might have been a decade ago.

The growth period involved some significant changes to the nature of our content relationships, both with our international suppliers and domestically. If it were not for the changes made over that period, we would not be in a position today to embark upon a very targeted content development strategy, which involves most of the key participants in the independent production sector within Australia.

Three years ago Network Ten embarked upon a 'content development plan', which was designed to lift the number of hours of Australian content in prime time. Our decision to increase the number of domestic hours in our prime-time schedule was driven by market forces. We believe that the level of audience demand for Australian programs justified their inclusion and justifies the expanded number of hours in our current schedule. The network added more than 150 new prime-time hours of Australian content to its schedule last year, and we propose to add significantly more over the next three years. That is across all formats: drama, light entertainment, reality or factual programming (love it or hate it), news, sport and current affairs.

In working with the independent production sector, we have found that each time we have pushed the traditional boundaries, we have met with success. The network principally targets the under 40 years demographic, although our drama programs have a broader target of 25-54 years. With all of our programs, such as *The Panel* or *The Secret Life of Us*, we have found that working with local producers on innovative, edgy and somewhat alternative formats has struck a chord with our audience. That is certainly something that we would like to continue to do into the future.

With those things in mind, the review of the Australian content standard is extremely important to us. We hope that the current debate will ensure that the content standard, as it exists for the next three years, helps to enhance rather than inhibit our content development aspirations. As an outsourcer of production, we believe that the independent production community will benefit significantly from that. Network Ten and the independent production community are joined at the hip. Our CEO, John McAlpine, has said very publicly that we want to re-weight our total program expenditure in favour of Australian programs. Each time we redo a deal with Hollywood that delivers improved yield, better efficiency and some more dollars to spend, they go straight into the pockets of the independent production sector, which in turn works well for us. This decision was taken not because of any regulatory implication but because the broadcast model made sense for Network Ten.

Rather than go through all of the elements of the individual submissions, I would like to concentrate on a couple of the key areas where we believe some fine tuning of the standard would not only assist Network Ten, but continue to promote some diversity in the programming on offer across the free-to-air commercial broadcasters. The last thing we would want is to see the standard operate as a 'cookie cutter', so that all of the programs end up looking the same. This is particularly the case with adult drama, where we feel that some re-weighting of the format factors would help to match the risks and rewards in a beneficial way, and see formats such as sitcom and sketch comedy return to our screens and hopefully a greater volume of bigger-budget telemovies and mini-series. We have been working with the FFC on this issue.

One reason for the disappearance of sitcom and sketch comedy from commercial free-to-air television is that the relative risks involved in

the formats are too high in relation to the costs and the format factors that would be achieved. We believe that some adjustment to the format factors, together with recognition of sitcom pilots and allowing some shorter-form scripted drama elements within other programs, would be terrific stimulants to finding new and exciting comedy formats for free-to-air television. We don't think that this would be disadvantageous to anybody: it would be beneficial to the audience, the broadcasters and the producers who are more involved with comedy and light entertainment production than the traditional one-hour drama series format.

In addition, we believe that the introduction of a points differential for feature films where networks have made an equity contribution would promote a valuable additional source of finance in the feature film sector. The Ten Network has been involved with equity participation in a number of feature films this year. Our preference is to be involved with lower-budget comedies that would work well with our audience, but that is not the limit of our thinking. Many of you will be familiar with the Nine Network's aspirations to fund some new feature film projects through their current prospectus as well.

We don't believe that the introduction of some more ambitious format factors would result in any material impact on the number of drama hours broadcast. The current standard provides for a range of drama hours, depending on the formats that a network chooses to broadcast: you could have as few as 80 hours of drama a year or as many as 258 hours to achieve the minimum criteria under the standard. From a Ten Network perspective, we remain perplexed about the recent argument that changes to the format factors would result in a reduction in the number of hours. What we are looking to do is to skew our drama production towards that higher end: the more expensive series produced at the rate of 26 hours per year or less, the high-budget telemovies, the mini-series (Network Ten wants to see at least two mini-series a year back on our network) and feature films.

One area where we will meet with some difference relates to the overall points that are required each year. We don't believe that the current amounts – 258.3 on average for 775 in total – warrant any adjustment. It is very, very difficult to finance dramas at the moment, despite the fact that the networks are making a more substantial contribution to the overall licence fees than ever before. I question some of the

statistics that have been aggregated to suggest that overall licence fees have fallen: that certainly is not the Network Ten experience, at least not in the past six years.

Turning to time bands, the Nine and Ten submission talks about the benefits of restoring the time band for qualifying drama back to mid-night. I do appreciate the variety of industry submissions, and some of the concerns that have been expressed, on this point. From a Network Ten point of view, one of the things that we really want to work hard at, particularly in the area of sketch comedy and sitcom, is to use those late night time bands to nurture some edgier, more innovative comedy formats. Prime time is very tough, and being able to use a late night timeslot as a nursery to develop and hone our skills on new comedy formats would be distinctly beneficial. For Network Ten, the fringes of the current drama band (5.00-6.00 p.m. and 10.30-11.30 p.m.) are occupied by news and current affairs, consistent with our philosophy to show alternate-style programs and to counter-program as often as we possibly can. We believe the time band would work extremely well as an incentive to encourage comedy formats back onto free-to-air television.

There is a bit of confusion about the 'short form element'. What we are talking about is quite strictly scripted elements of programming within a non-drama program. To use a Ten example, within a program like *Rove Live*, we might develop a 5-minute, fully-scripted, weekly episodic program, which may possibly, down the track, have the opportunity to develop into a full blown half hour sketch comedy or sitcom. We would like the development activity and the expenditure on that programming to be recognised towards the overall drama subquota each year.

At the risk of inviting adverse comment, the networks don't support an expenditure-based quota. I don't believe that it is an efficient basis for allocating resources. It certainly does not promote innovative deal structures, something Network Ten is proud of. Most of our deals with Australian producers include performance-based incentives. We believe that ratings-based bonuses, based on key demographic achievements, is the best possible way of aligning the performance and success indicators.

There are some problems with expenditure under the current drama standard. At one end of the scale, you could satisfy the minimum 258 points' requirement with 80 hours of telemovies and mini-series, which would have combined

budgets in the order of \$150 million per year. At the other end of the scale, if you were to achieve your drama points through serial production, those 258 points could be achieved with a total budget somewhere in the order of \$35 million. So you can see the disparity. We do currently have some format factors that attempt to make important distinctions between the categories and costs of drama, but it is simply not working to the extent that is necessary to encourage those high-end formats to continue.

I'm happy to deal with children's and New Zealand programs (which are easily dealt with) later on in response to questions.

I would encourage you, and the ABA, to help us to maintain the philosophy that has worked so well: for Network Ten, for our relationship with the independent production sector, and for our audience. That is, we dare to be different. We would like to continue to push those boundaries. We certainly want to see a content regulation regime that rewards effort in that regard and allows us to continue to be different and offer the fresh, alternative programming to the audience that we target.

Ian McGill, Partner, Allens Arthur Robinson

Ian McGill is Senior Executive Partner, Integration & Client Services, at Allens Arthur Robinson. His specialist area of legal practice is media and telecommunications. He was Deputy Managing Partner of Allen Allen & Hemsley from 1998-2000, Managing Partner from 2000-2001 and is a member of the first board of Allens Arthur Robinson.

Ian's role at AAR is to assist the leadership team to maintain the firm's position of leadership in the practice of law through its high standard of client service, technical knowledge and the contribution that it makes to the wider community. Ian implements the firm's client care and integration strategies determined by the board, through a range of operational initiatives. These include, but are not limited to, the proper functioning of the firm's seven legal departments, 22 regional practice groups and many client service teams.

Allens Arthur Robinson is pleased and honoured to be hosting this important conference with the unique Mark Armstrong and the Australian Film Commission. These are important topics we are debating. I have to take a legal view, which is my training: so settle back, relax, hang on for the ride. I will drill down into Australian content and what it actually means, including what the judges have said that it means, which raises some concerns. Then I will go from that micro level and have a look at the macro policy issues.

Coverage

- A standard relating to the Australian content of programs
- Broadcasting law and culture
- Broadcasting law and industry policy
- International and market development
- Some conclusions and solutions

I wanted to have a look at what the law says about what is a standard relating to the Australian content of programs, which is, after all, the subject of this workshop. There will be an ex-

curus into broadcasting law and culture, and broadcasting law and industry policy. Then we will turn to international and market developments, because this discussion and the ABA inquiry need to be seen in that context. I will try to offer some conclusions, and perhaps some solutions, to some of the problems raised.

A standard relating to the Australian content of programs

- Not defined in the Broadcasting Services Act.
- Australian content defined in the standard by reference to Australian creative control.
- Obligation reduced by New Zealand programs and Australian official co-productions.
- *Blue Sky* shows that, under the BSA as currently drafted, Australian creative control is either irrelevant (Brennan CJ) or not a necessary condition to Australian content (McHugh, Gummow, Kirby & Hayne JJ)

What is a standard relating to the Australian content of programs? The first thing to notice is that it is not defined in the *Broadcasting Services Act*. The ABA defines it in the Australian content standard. For a number of years now, Australian content has been defined by reference to, in broad terms, Australian creative control. The standard defines the content by reference to who is included in the making of it.

An interesting effect of the High Court's *Blue Sky* decision is that the obligation imposed by virtue of the standard is reduced. The standard remains, but the obligation is satisfied by New Zealand programs and also by Australian official co-productions. That amendment was made to the standard to ensure that the standard was valid under the *Broadcasting Services Act*.

The views of the judges of the High Court of Australia, in the *Blue Sky* decision, were that as the Act is currently drafted, Australian creative control is either totally irrelevant (Brennan CJ) or is not a necessary condition to there being Australian content. First of all, the Chief Justice said that ““Australian” is the adjective describing the matter contained in the program; but the matter contained in a program is not its provenance”.³ That implies that it would be invalid to

³ Brennan CJ, *Project Blue Sky v. Australian Broadcasting Authority* [1998] HCA 28 (28 April 1998) (*Blue*

seek to regulate by reference to provenance. Now Brennan CJ was in the minority on that particular point. All of the judges had an attempt at trying to define Australian content. The majority found in this way: ‘A program will contain Australian content if it shows aspects of life in Australia or the life, work, art, leisure or sporting activities of Australians or if its scenes are or appear to be set in Australia or if it focuses on social, economic or political issues concerning Australia or Australians.’ However, ‘[n]othing in the notion of the Australian content of programs [and that’s the existing formulation of the Act] requires ... that a standard made pursuant to s 122 must give preference to Australian programs. Nor does the phrase “the Australian content of programs” in s 122 require that such programs be under Australian creative control’.⁴ So that is what the law is.

Broadcasting Law and Culture

- The BSA objects include the promotion of the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity.
- In *Blue Sky* the High Court held that cultural objectives can be fulfilled without requiring preference to be given to Oz programs over NZ programs.
- How? Because anyone can make Australian content.

So how does the law deal with cultural imperatives? The objects of the *Broadcasting Services Act* include the promotion of the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity. In *Blue Sky*, the High Court held that cultural objectives can be fulfilled effectively without requiring preference to be given to Australian programs over New Zealand programs. How did they do that? The necessary conclusion to the way the courts looked at this issue is that anyone can make Australian content – anyone.

Broadcasting law & industry policy

- Audiovisual industry support is not an objective of the BSA.
- Creative involvement of Australians under the standard by implication is industry support.
- Minimum licence fees payable to Australian creators is industry support.
- By a flick of the legislative pen the BSA and the content standard will give way to conventions and agreements.
- Both BSA cultural objectives and industry policy implied objectives hang by a thread.

This brings me to my next point, which is broadcasting law and industry policy. Audiovisual industry support is not an objective of the *Broadcasting Services Act*. Reference is frequently made to the second reading speeches that do refer to an Australian industry: but nine judges considered the question of what Australian content of programming is, and those judges did not have any need to refer to the explanatory memorandum. They worked it out for themselves. You can comment on their reasoning. Inclusion in the standard of creative involvement of Australians is by implication industry support. The payment of minimum licence fees, as occurs for children’s programming, is by implication industry support. However that is an interesting form of industry support, because it is taken from one form of industry and given to another.

A more important point, as we talk about the importance of industry policy, is that the *Broadcasting Services Act* and the Australian content of programming must, as the High Court has found, give way to conventions and agreements that the Australian Government enters into. In the *Blue Sky* decision the relevant agreement was the CER (Closer Economic Relations with New Zealand). The ABA must perform its functions in a way that is consistent with Australia’s obligations and any agreement between Australia and a foreign country.

This all means that the express cultural objectives, and indeed the implied industry policy objectives, hang by a thread. The Australian government could, for example, decide to bargain access to US markets for lamb, wool and iron-ore in return for American requirements for most favoured nation status for American programming. That may or may not be a realistic example. If they chose to do that and entered into such an arrangement, then, as the High Court has informed us, you can have a valid

Sky Case) at paragraph 22, http://www.austlii.edu.au/au/cases/cth/high_ct/1998/28.html

⁴ McHugh, Gummow, Kirby and Hayne JJ, *Blue Sky Case* at paragraph 88

standard for Australian content which gives effect to that arrangement by entirely giving way to the foreign treaty. To take what the High Court said to its logical conclusion: if by reasons of an obligation under a convention or an agreement with a foreign country, it is impossible to make an Australian standard that is consistent with the obligation, the ABA is precluded from making the standard. So that is the logical conclusion that we get to.

International and Market Developments

- WTO
- Pay Television and Digital TV

Against that backdrop, there are market developments that everybody is aware of. The first, which the Film Finance Corporation is following very closely, are the developments at the World Trade Organization (WTO). If my analysis is correct, the failure to follow those developments could be fatal. The other market development relates to pay television and digital television. The most interesting potential benefit of the Foxtel/Optus deal that was announced recently is the potential increased penetration of pay television through the ability of Optus and Telstra to bundle pay television products with telephony products. The other interesting possibility which is being debated is the so-called dual front-end box that can be distributed to people's homes. Now the various players are starting to line up on that issue. Lachlan Murdoch was interviewed in *The Bulletin* about that and he thought that it was an interesting idea. Judi Stack was quoted in *The Australian* media section on 14 March 2002 as saying that certainly the free-to-air networks were very interested in that possibility. If that possibility emerges, then there could be a win-win situation for the market participants, in the sense that digital television's take up of receivers can be driven upwards by the fact that consumers can buy a set top unit that will engage with the pay television network as well as the digital broadcasts of the free-to-air networks. If that happens, then the pool of money available for

Australian content would be enhanced, because the success of Foxtel, Optus and digital television must feed into the success of programming more generally.

Conclusions and Solutions

- Culture and industry policy should be merged - the maintenance of Australian national identity and the role of Australian arts, entertainment and audiovisual industries.
- Developments at the WTO will need to be closely monitored.
- Policy debate will have to shift to a holistic policy mix of Government funding, tax incentives, investment incentives, industry development schemes.
- Content/output regulation by reference to Australian creative control is too narrow and uncertain basis to underpin the future.

I'll finish with some conclusions. There is a rather arid debate that goes on at conferences about cultural policy and industry policy. I think that we need to merge those concepts, because what we are talking about at the end of the day is the maintenance of an Australian national identity, which is a proudly independent identity, perhaps more complex than the identity represented by *McLeod's Daughters*. In that context, we need to recognise that it is an Australian arts, entertainment and audiovisual industry that is best placed to deliver an Australian national identity; not the High Court formulation that anyone, including a New Zealander, could theoretically deliver that result.

Obviously the WTO needs to be closely monitored, and where the government is heading has to be extremely closely monitored. I think that the policy debate needs to shift from a very narrow view, on using output regulation as support for Australian industry, to a more holistic view, where we have a mix of government funding, tax incentives, investment incentives, industry development schemes and the like (as we currently have). Finally, output regulation by reference to Australian creative control, as formulated by the ABA, is too narrow and uncertain a basis to underpin the future of Australian audiovisual industries.

Bob Donoghue, CEO, Premium Movie Partnership

Bob's recent work history is as follows:

1981-89: Channel Ten (Commercial network) representative in the USA. Based in Los Angeles. Acquisitions and marketing assistance. Manager news operation.

1990: Program Director Channel 10 in Sydney.

1991-95: Director of Programs ABC Television (Public Broadcaster).

1995-Present: CEO Premium Movie Partnership. Supplier of movie channels SHOWTIME and ENCORE to FOXTEL Pay Television. Overseeing Finance, Legal and Business Affairs, Programming, Production, Operations, Marketing, Acquisitions and Investments.

The Premium Movie Partnership is a joint Partnership between Twentieth Century Fox, Universal Studios, Paramount Pictures, Columbia TriStar and Liberty Media.

I noticed that Professor Armstrong has described me in some of the notes about this workshop as a 'guru', which I guess means that I am the oldest participant, so, first, a history lesson. I would like to start off by asking you all if you can tell me what these four American programs have in common: *My Favourite Martian*, *F-Troop*, *Dr Kildare* and *The FBI*. Answer: they were all on the ABC; none of them premiered on any of the commercial channels. Leaping forward to today, can you imagine what the 'Friends' of the ABC and the ABC Advisory Council would have said if there was an ABC schedule out there today with those four American programs in it. What I am really saying is 'one small cheer' for the marketplace, because somehow that does seem to keep the balance right in Australia. And Australian cultural identity is enormously resilient, far more so than many of us give it credit for.

Leaping forward to when I was program director at the ABC, and when Professor Armstrong was the Chair, we had a Managing Director who was, well, 'obsessive' about Australian content: so much so that at my first meeting with him he said, 'Bob, please get some of that pommy s**t off the air.' And we set about trying to do what we could to put the 'Australian' back into the Australian Broadcasting Corporation, by trying to get more Australian productions on air. We

started off in a cosmetic fashion by making sure that, no matter how difficult it was, we would try not to have two British programs together and we would never have two British promotions for British productions together. Then we asked all of the departments of the ABC to look at their budgets carefully and deliver us more programs.

That wasn't enough for the Managing Director. He said 'If we don't have the money, let's use other people's.' So we did. We went to the marketplace and they helped to fund a number of programs that were on the ABC. In retrospect it seems to be the Golden Years to me, if not to many others. It was a time of pioneering in reality television and we saw the introduction of two of the greatest programs ever to hit Australian television, commercial or public: the documentary series, *Labor in Power*, and the hilarious drama, *Frontline*. My conspiracy theory is that the success of *Frontline*, and its obvious satirical look at commercial networks' current affairs programs, caused a great deal of angst at the networks, and into their lap fell a negative story. A freelance journalist complained that she was doing a story for ABC TV on 'wonderful things to do with aluminum' or something, and she was asked by the owner of the aluminium factory to do her 'stand up' right in front of the company's logo. Afterwards, she quickly went onto a free-to-air program (I think it was *Sunday*) to say that she felt 'soiled' because she was doing a program for the ABC and had to stand in front of a commercial corporate logo. This got a lot of coverage and, in fact, had some disastrous results for the ABC. What didn't get much coverage was the fact that the segment never actually went to air: the intelligent people at the ABC who put these programs together realised that it would be ludicrous to broadcast it, and so the ABC's internal editorial policies worked very well. As a result of all that, and the resulting scandal, a whole lot of Australian programs disappeared from the schedule. Some of them were not missed so much; some of them, like *The Investigators*, were. Now, eight years on, the ABC still looks more like the BBC than I personally think it should. I don't know how *Gardening Australia* survived, but good luck to them anyway! The only reason I mention this is that the ABC regulated itself to within an inch of its life

as a result of this ‘scandal’, and the regulations simply meant that there was less Australian content on the ABC. I will never concede that that was a good idea.

Jumping back into the past again, both Andy McIntyre and Ian McGill were reminding me that Channel Ten faced bankruptcy in 1992. I can remember back in the 1970s when Channel Ten almost became a bowling alley: it was just performing so badly, with a lot of old British programming and a lot of old American programming. As one last, desperate effort, they turned to Australian content to save them and keep them on air. And they came up with a program called *Number 96*, which broke an enormous amount of new ground in Australian drama, some of which has not been topped to this day. That was quickly followed by programs like *The Box*, *Prisoner*, *The Restless Years* and the wonderful Graham Kennedy series called *Blankety Blanks*. Night-time football was introduced to the general public and Channel Ten never looked back until inexperienced management got hold of it some years later.

I think that Channel Ten is the best television school in Australia to work your way through. And I think that Channel Ten continues an absolutely fine tradition of interesting and innovative programming. Andy McIntyre mentioned *The Secret Life of Us*, *The Panel* and *Rove Live*, which I think gives a very exciting new look to the old talk show concept.

Shifting times again, while I was at the ABC I was offered a job by those ‘greedy’, ‘avaricious’ Hollywood studios to run a pay television movie channel that would be available on Foxtel. I’m sure that most people would be surprised to hear that my first instruction from the four Hollywood studios that own it was to ‘Australianize’ the service. The fact was that when I went there, the two movie channels, Showtime and Encore, were programmed in Denver and delivered directly to Australian consumers out of Los Angeles. Needless to say, they were not good. Hollywood studios do more research than just about any other entity on the planet, and they realised that if these channels were to be successful, they would have to look ‘Australian’ and feature Australian content. They even picked up the legislative imposition to spend 10 per cent of their programming costs on Australian productions, which legislatively is the requirement of the delivery systems.

This led us to the decision that, as we were a movie service, we should invest as much money as possible in a wide range of Australian theatrical features; hopefully to give them a kick-start to get them going. I am happy to say that through pre-licensing and investments, working closely with government funding bodies, we have been able to assist in the production of 54 Australian movies. At Encore, which is a library service that features older Australian movies, we have screened 174 Australian movies since we started on air. These include movies that many people would have thought had been lost in time. We have assisted in reconstructing some of these films, which were just about to fall off their sprocket holes before we got hold of them, making available wonderful little time capsules of the way Australians used to live over a long, long period of time. I take no credit at all for the selection of those films or the movies that we helped fund, but I like to think that I helped to create an atmosphere where this kind of endeavour would be encouraged.

This is one small ‘cheer’ for the market place, which I think can be self-corrective in many areas. The area I don’t include is children’s television, which I must confess I do not, and probably never will, understand. I realise that there has to be regulation in place so that people will continue to make suitable programs for children. Unfortunately, it seems to me that the ‘suitable programs’ tend to be made by adults who think that they know what children want, and therefore we get a lot of programs with adults acting like children and children acting like adults. And unfortunately, the ratings continue to show that while many of these programs are beautifully made, children continue to watch *Neighbours* and *Home and Away* and *The Simpsons* and *Rugrats*, because they have pooh and fart jokes in them and kids behave badly in them. Somewhere, someone will know that there is a middle ground between the two, and we can produce high quality programs for children that children will want to watch.

I emphasise the point that Australian cultural identity is enormously resilient. Yes, we will have regulation; and yes, we probably must have regulation; but we should never underestimate the power of the market. Thanks.

Discussion

Nick Herd, Sandstar Films: This is a comment and question for Ian McGill. I agree that the industry needs to take careful note of what the WTO is doing and developments in trade policy. But on your specific point about the legal interpretation of the High Court, I think that since the High Court judgement, the Act has been amended so that the ABA only has to take account of the CER and not of more general trade agreements. That means that if the government decided to trade away Australian content for lamb chops, there would have to be some form of legislative intervention to force the ABA to change the standard.

Ian McGill, Allens Arthur Robinson: You're absolutely right: I was hoping that nobody would know that! That may take a bit of force away from my point, but what I was really talking about was a theoretical possibility, not a realistic possibility. If we ever got a government that decided that trade policy ought to win out in this particular circumstance then it would have to amend the Broadcasting Services Act, and the full debate would then be on.

Mark Armstrong, Network Insight: We are in a bit of a strait-jacket if we talk about the current Act. The parliament amends the telecommunications laws at least once a year. Access to telecommunications networks, which actually affects pay TV, is a good example. Whenever people don't like something they go straight to Canberra, as a matter of course, to seek changes to the rules in the Act, a further review, a direction from the government or whatever. So I don't feel quite as inhibited as Ian does by legislative requirements. Basically, as a community we can do whatever we want through changing the law, and whatever the High Court says about the Act can be changed by legislation, as it often is.

On the other hand, I do take your point pretty seriously about what might happen in WTO negotiations or the next time the Prime Minister wants an elephant stamp from the President of the US for being a good deputy. Most of the forces in Canberra would regard the subject of this workshop as some archaic and dreadful diversion from where they want the country to go. You only have to step outside of the broadcasting, film and audiovisual spheres to encounter that attitude. It needs only a few votes to change

in the Senate, and the whole Australian content regime could change.

Frank Goodman, Project Television: I noticed that Ian McGill mentioned an increased pool for Australian production. One of the things that interactivity gives is the ability to switch off, whether it is advertisers or party political statements. My belief is that the current switch to interactive media means that there will be a severe revenue crunch. Could somebody comment and tell me why I'm wrong?

Andy McIntyre, Network Ten: I'm happy to start. It has been interesting to see the US experience, where the companies which manufacture TIVO, Replay TV, and to a lesser extent DishPlayer, have not achieved anywhere near the levels of success that they expected those relatively straightforward consumer devices would achieve. Notwithstanding the fact that in many respects they revolutionise the way that viewers look at television, there has been no discernable change thus far in either the level or manner of advertising revenue generated by the US broadcasters. Normal commercial spots continue to be the principal source of advertising revenue. Over time you may find a situation where there is more integration between program content and sponsors, for instance with tonight shows doing live commercials. However, the Ten Network continues to believe that there will remain sufficient concentrations of revenue in the one place to allow Australian viewers to watch the programs that they want to watch. That means we must ensure that Australian producers make those programs. It would be untenable to have an environment where we saw this country's relatively small advertising expenditure spread across more and more and more media, to the point that everyone shared a little bit of it and it was almost impossible to get anything of any substance and quality made for Australian audiences.

At the risk of suggesting a 'field of dreams' argument, I think that people will come and the dollars will come. We are a very long way away from there being any significant inroads made into the traditional advertising models.

Mark Armstrong: Andy, while you are thinking about that, could you go on and say where the multi-channel ingredients, including pay TV and digital TV, will fit into that picture in five

years. Five years bring us to 2007, when current restrictions on numbers of free-to-air channels will end. Consider the trend where pay TV is managing to get itself back together into viable co-operation, as recently decided in this very building through the Foxtel/Optus agreement. Incidentally, Ian McGill was the person who hosted and presided over all those discussions about Foxtel/Optus co-operation, in this very room at Allens Arthur Robinson.

Andy McIntyre: I will gaze into the crystal ball for a minute, which I preface by assuring you that I am almost guaranteed to be wrong, at least in some way. It is very difficult to look ahead on that kind of time scale, but I will address the points individually

Digital has obviously come at an enormous cost to the free-to-air industry in Australia. Collectively, more than \$1 billion is being spent in the digital rollout across the commercial networks, both metropolitan and regional, and that does not bring in one iota of additional revenue in the short term. That has presented us with some additional challenges to satisfy the ever increasing demands of shareholders. So, there is no particular revenue upside in digital broadcasting for us in the short term. Furthermore, the triple-casting legislation exacerbates that condition. That is not to say that the Ten Network won't be complying with its obligations; it certainly will be. I would point out however, having regard to the American experience in particular and our continued association and reliance on US-sourced content for a significant part of our programming schedule, that the difficulty in obtaining high definition content for the free-to-air broadcasters will become an issue as we move into the regime in 2003, when we are required to start broadcasting 20 hours of high definition television per week. While we are in a position to manipulate our domestic slate to comply with that obligation, our expectation that between 60 and 70 per cent of that content could be sourced internationally is a very long way from being the case. Once again, there is another cost taking money that we would prefer, if we had our way, to be investing in new Australian programs, rather than paying for high definition content. I understand the reasons for that, however.

Multi-channelling is interesting. Obviously the penetration of subscription television in this market has not had a significant impact thus far on the viewing habits of the audience, notwithstanding some of the terrific pay TV channels on offer. The key concentrations are in *Showtime*

and feature films on Foxtel, and also in sports. Notwithstanding the private views the networks might have on the recent announcements, it will certainly benefit Australian audiences to see more money spent on content, rather than infrastructure, in any broadcasting environment. As far as free-to-air multi-channelling is concerned, that really depends on your content model, which in turn depends on your aspirations to develop sports or other specific program genres. I can say from a Ten Network perspective that, with our current content model, neither subscription multi-channelling nor free-to-air multi-channelling makes commercial sense at the moment, given our current formats. I am yet to see a business model that puts up any sort of compelling case for multi-channelling in the short term, even three to five years out.

Craig Collie, SBS TV: I would like to underline the point that Andy McIntyre was making about the content rules, that they need to have the flexibility to allow for the development of new formats. It works against the interests of the development of the industry if the content rules set in concrete program formats and viewing habits of the baby-boomer generation. We need to be able to develop to the changing interests of generations coming through and comedy is certainly a key area. Having gone through the process of developing a couple of comedy series ourselves, we know how hard it is, and you need the sort of flexibility to be able to work that up. The more the content rules restrict that possibility, the more they will work against the interests of the industry and against the interest of viewers as they are developing.

Mark Armstrong: Probably the most central area of discussion that has arisen as a result of the ABA announcing its inquiry involves format factors, and how to encourage programs that have high cultural value. There are a whole range of views. Do you re-balance, or get more specific about, the points formula; or do you go the other way, become more relaxed, and allow more experimentation? Both views are, in a sense, encouraging risk. One view says 'let's oblige people to take some risks in certain areas' and the other, coming mainly from networks, is saying 'no, we are best equipped to take the risks if we are not obliged to do specific things.' That seems to be the biggest issue. Does anybody want to put a view?

Judi Stack, FACTS: Mark, I would like to take issue with what you just said then, making one very simple point that Australian programming,

and particularly Australian drama, is always risky. The Australian television landscape is littered like a graveyard with failed Australian dramas and failed Australian comedies. Certainly there are many that work, and the Seven Network is extremely proud of its record in taking risks and succeeding with its drama series and other Australian programs, but this is not something that is easy. I don't think that it is something that you can legislate for, because there are so many factors other than money in developing creative programs, such as good script writing, good talent and development, which is incredibly important. At the Seven Network we take two years to develop each of our programs. We are not developing programs in a very short-term window. Words like 'risk' are bandied about here. I can assure you: it is always risky. Our views might be slightly clouded by the fact that in the last twelve months, each of the commercial television networks has had an Australian drama program which was launched and which worked. That is unusual in the history of television that I can remember over the last 20 years.

Donna Andrews, Dandy Productions: This is a question for Andy McIntyre about children's television. I wonder if you could outline the issues that are a concern for Ten, and also if Nine echoes those concerns.

Andy McIntyre: I should say first and foremost that all members of FACTS are in agreement on the key issues relating to kids' drama, and as a consequence, all the elements are within the FACTS submission, rather than individual submissions. From a Ten Network perspective, the C drama issue is problematic, for a number of reasons.

The programming that we commission and receive from the key children's producers in this country is without parallel: it wins awards all over the world; the creative elements are absolutely terrific; an enormous amount of effort goes into every creative element. It couldn't be better. We have a close relationship with Jonathan Shiff, who is at this workshop.

The product looks great, but why won't the kids watch it? We are not sure. I think that we have done as much as any network to showcase the best of our kids' drama in what we believe to be terrific timeslots. We have tried 6.00 p.m. on weekends in order to establish one of Jonathan's programs, *Cybergirl*. It was given extensive promotion, and supported with cross-promotional elements within our early morning kids'

programs as well. But at the end of the day, it did not achieve the level of performance that our program director believed was necessary to keep it there for its full duration. That was disappointing. We can assure you that there was no group more disappointed than us. We have responded to the suggestion that promotion, in addition to what is currently there, may be beneficial. There is certainly some merit in that and the FACTS' proposals support that.

At the end of the day, one of the things that we felt may have been worthwhile for discussion was a broadening of the definition of high-quality children's programs from just drama to bring in some diversity elements. To be specific on that, an area I think would be of significance would be high end kids' documentaries. Potentially, we could have eight to ten hours, say, of high-end children's documentaries per year, to which we could contribute significant resources: both production resources and obviously financial resources if they were to be outsourced. We could provide those programs, whether they were in one hour or half hour blocks, as part of the overall 32 hours' obligation, and see whether, on a trial basis, that may find more favour with the children audience. If anyone is interested, we can provide a sizzle tape to highlight the kinds of production values and elements those kinds of programs would contain.

Jonathan Shiff, Jonathan M Shiff Productions: I wanted to pick up on a couple of things. Firstly, Andy McIntyre mentioned the prospect that when the networks re-negotiate their Hollywood deals, the money will be passed onto the independent sector, which I think is fabulous news. And I think that we should spare a moment for Kim Williams today in Hollywood at the doorway of those studios and wish him all the best because I'm very sure that Foxtel and Optus will pass on all that to the independent sector too.

I enjoyed Bob Donoghue's reminiscing about the last century: it was going so well until we got to kids' TV. What program in particular are you referring to when you say that it is made by adults and not enjoyed by children; and what evidence do you have that kids did not like it?

Bob Donoghue, Premium Movie Partnership: Jonathan, I don't have actual evidence that the kids did not like it, but all of the free-to-air networks, public or commercial, live or die by their ratings. My most recent example dealing with children's programming, which was eight years ago now, was a children's program made for the

ABC that received every possible resource we could put behind it to make sure it went well. It seemed like a breakthrough in children's programming. It was a show called *Round The Twist*. It had enormous production values, and the scripts were written and re-written and re-written, and the promotional campaigns were laboured over mightily. But in my experience, it just did not break through to the target audience. All I am saying is that it seems so hard to do. I don't begrudge people trying and I believe that there should be regulation. I just don't know what the formula is: how do you get through to kids?

Jenny Buckland, ACTF: I'm from the Australian Children's Television Foundation that produced *Round the Twist*, which I believe was the first television drama series ever in profit for the FFC. It was certainly one of the most commercially and critically successful programs. It is a good example, because I think what the broadcasters fail to recognise in the FACTS submission is that you have to build a culture of viewing, and a timeslot where children want to watch, to have a successful program. Everybody, including the commercial broadcasters, acknowledges that the ABC is now the most successful broadcaster of children's programs, through screening programs regularly at 4.00-6.00 p.m. Children know that the programs are there; they are branded. Any Australian children's drama that screens in that timeslot, including *Round the Twist*, does extremely well.

For the Ten Network to give *Cybergirl* eight weeks at 6.00 p.m. on Saturday nights, when that is not the time that children are used to watching, is just not a fair comparison. The ABC has had a similar experience with programs like *Round the Twist*, which are incredibly popular when children are known to watch. I have noted from the FACTS submission that when they took *Cybergirl* off after eight weeks it had achieved the highest ratings so far. Who knows what it was going to go on to achieve? That timeslot was not built up and the program was not given an opportunity to rate.

As someone who distributes these programs around the world, it never ceases to amaze me how seriously the broadcasters around the world take their publicity kits. They ask for more; they ask for on-air promotions; and they promote these programs. So, what is happening with *Round the Twist* right now? I can tell you that 75 per cent of the children between 5 and 17 years in Denmark are watching that program right

now, because those programs are incredibly well promoted and organised by those networks.

There has definitely been a self-fulfilling prophecy on the part of the commercial networks in Australia not to support those programs. I would like to note from the FACTS submission how well the Foundation program *Crash Zone* rated on Channel 7 at 9.00 a.m. Saturday. If you look at the FACTS' figures, you will find that as many five to twelve year olds were watching *Crash Zone* at 9.00 on a Saturday morning as watched *Neighbours* (more in fact) or *Home and Away*. The Foundation has gone through the FACTS submission very carefully, and we will be putting in a supplementary submission because FACTS' own figures don't make their case.

Catriona Hughes, AFFC: I was just going to confirm that *Round the Twist* went into profit. The FACTS submission infers that there is a waste of public money in relation to investment by the public sector in children's drama. However, overall our revenues in children's drama are much higher than in the area of adult drama.

Lynn Gailey, MEAA: A question for Andy McIntyre: if ratings are all, as we know that they are, could you please say something about how the 11.00 p.m. graveyard shift will become a nursery, and how you would be able to use it to test programs? What would you test them against? If you use that timeslot for programs which are in a nursery situation, you will potentially be programming them to other demographics than the ones for which they were designed. Could you please say something about how that will work?

Andy McIntyre: Certainly. If you look at the HUT (households using television) figures and the people figures, there are lots of people still watching television up until midnight. We believe that it would make a lot of sense for the Ten Network to trial some of the formats that I mentioned after our regular *News* and *Sports Tonight* commitments. You can be a little edgier and irreverent at that time of night, and the bar is not so high. We could potentially schedule a sketch comedy program or a sitcom in that timeslot. In fact, before I left to come to this workshop we were talking about doing precisely that, in order to give it a trial and see whether, relatively speaking of course, the audience responded positively even in that late timeslot. The networks do not use those later timeslots as efficiently as they could for development. That band is extremely valuable, and it is wasteful to

use it for B-grade international programs or other programs that do not have any upside for the network but come under make-weight obligations with their studio deals. If we could use that in some clever way to develop new local formats, it would make a lot of sense.

Frank Goodman: This is about the use of the graveyard shift as a nursery for programs. Would you consider using it for inappropriate programming, such as children's television pilots, and then cross-promoting them in the normal children's time for using the VCRs or digital recorders as a time-shift mechanism?

Andy McIntyre: In short, no we would not. Despite the fact the kids are probably the most adept at working the VCR, I don't think that we would get a terrific audience for kids' programs late at night.

One additional point, if you look at what the Nine Network is doing with some very high quality international programs, such as *Sopranos* and *The West Wing*, the 10.30-11.30 p.m. day-part obviously attracts a very significant audience interested in watching quality drama programs. For the Ten Network, that time band is denied us because we have our traditional news and sport commitments then. But we believe that the flow-on from those commitments into 11.30 p.m. would still be significant.

Mark Armstrong: This is an interesting case-study about what you do with a minority but important audience, like children, in the current context. For better or for worse, the immediate inquiry by the ABA is about some refining of the current Australian content rules. Even that is within a context where existing networks, including the public broadcasters, are struggling a lot with the scheduling issue: which timeslot do you use to concentrate the highest audience? Yet we now have subscription television, which is not so sensitive to the time when things are shown and where there are major ingredients of a children's television channel, because there are dozens of channels. It is actually possible to screen children's programs in prime time. Around the corner is digital TV, which can eventually be used for multi-channelling. As has already been pointed out, even if PVRs (personal video recorders) and similar devices are not doing brilliantly at the moment, they are likely in time to give children more opportunity to choose their own timeslot; more easily than the current model VCRs.

If we were not inhibited by the regulated positions in which all players have to operate on the

field, in terms of technology, control and ownership of the media, and competition laws obstructing co-operation, the optimal solution might be a single free-to-air children's channel funded by existing networks. Participation in this channel would relieve networks of their obligations to provide children's programs on the main channel. That would need some co-operation so that existing networks and even some new players could contribute to it. I know that we can't pursue that now because it does not fit into the position that anybody is locked into.

If we were Scandinavians, who always seem to be able to work these things out co-operatively, then everybody, including industry and government, would sit around a big table. Somebody would say unashamedly: 'Fellow citizens, how are we going to solve this problem?'; and so would emerge the Scandinavian Co-operative Children's Channel. Children would win, and networks would make a lot more money than they do now out of children's television. So would producers. That is just an illustration, but if anybody ever seizes the opportunity to look at these things in a more creative environment, please share it with us.

Nick Herd: I want to come back to some points that Ian McGill and Kim Dalton made, particularly about the issue of what the legislative framework currently is and what direction the policy debate might be going in. There is an important issue here about the way in which, if I can use the word 'convergence', cultural policy and industry policy are converging or need to converge, and the way in which we need to reframe the debate about what cultural policy means. You can find this in some of the work which the ABA did with the Australian Key Centre for Cultural and Media Policy and the paper released in 2001.⁵ There are important issues here that need to be thrashed out. They go beyond the specifics of what the ABA might do within the context of the standard, as important as that is. The commercial television industry need not feel that a narrow industry development policy is being imposed; they are actually part of a wider framework in which the debate and government policy are moving. They need to participate in that debate, rather than be de-

⁵ Ben Goldsmith, Julian Thomas, Tom O'Regan and Stuart Cunningham, *Cultural and Social Policy Objectives for Broadcasting in Converging Media Systems*, May 2001, http://www.aba.gov.au/tv/research/projects/local_cont.htm

fensive and say that they are the only ones who have to bear the burden of this.

Ian McGill: I agree that this debate needs to be fixed in a wider context, which was really my whole point. But in the way that this is proceeding, which is just a function of the way the industry works, we are talking about the 1999 content standard, with its particular historical development. We are talking about that in complete isolation from a review of the subscription television standard, which I think will be conducted by the Department, not the ABA, before March 2003. What we have is a very fractured approach to policy development, and not a holistic approach. I agree with Nick and I applaud the idea that the ABA might be trying to encourage a broader front. There is a plea in what he is saying, that people approach this on a much broader front, which I completely agree with.

Mark Armstrong: Does anybody want to give us the latest intelligence on the inquiries into Australian content on subscription television? Is there a definite proposal floating around Canberra or isn't there?

Debra Richards, ASTRA: I could be corrected by the ABA here, but there are two ABA inquiries that were conducted. One was about whether development funding prior to actual production should be counted towards the drama expenditure for drama channels on pay TV. That was an inquiry conducted by the ABA two years or 18 months ago. That has gone to the Minister, but there has been no publication or response from the Minister. The other is whether a similar expenditure requirement should be imposed on documentary channels. That was conducted about 18 months ago as well, and went to the Minister just before the election. There has been nothing about it since then. But there is a statutory requirement to review the drama expenditure, which has to be done before March 2003: that is what Ian is referring to.

Durham Grigg, Minter Ellison: I wanted to ask members of the panel if they could comment. In the context of this Australian content review, I have not heard anything about the arts. My personal view is that there is a self-fulfilling prophecy within the commercial world that sport makes sense: it pays the bills and everyone wants to watch sport. But when you look at the amount of sport that is broadcast, it is almost a self-fulfilling prophecy. If you keep showing sport to people, they will keep watching it. I wonder if there is any change of attitude, in terms of saying 'let's look at including more

Australian art broadcasting and see if that creates more profit for us.'

Andy McIntyre: It is fair to say that there is very little sport in prime time. While we look at all of our programming genres in terms of what they do for our ratings, and of course the ever important bottom line, I don't think that we are seeing any increase in sports programs, or indeed any other form of news or factual programs, at the expense of arts programs; not from our perspective, anyway.

Catriona Hughes: A question for Andy McIntyre: what is the lowest price that you have paid for an Australian feature film?

Andy McIntyre: Catriona, with respect, that is commercial-in-confidence. I would suggest to you that, from time to time, Australian feature films have represented fairly cost efficient points for the Ten Network.

Catriona Hughes: Let's assume, for example, that a network acquires a feature film for \$50,000. That could be generous, because we could take that down to \$30,000. Could you explain to me why you think that such an acquisition price should entitle full quota points for the network? And a second question: you are talking about recalibrating features, which I understand is the Nine and Seven proposal, but you are not very particular about levels of equity. In certain projects, we have had a \$5,000 equity investment, and there would be a general range from \$50,000-\$100,000 up to \$1 million and over. It is all very well to make proposals about equity, but would you be prepared to put a lower limit on the amount?

Andy McIntyre: Both very good questions, which I will answer in turn. The supplementary submission by the Nine and Ten Networks did not propose any change to the format factor of 3.2 for acquired features. Yes, from time to time they do represent fairly efficient points in terms of overall cost per drama point. Those relatively efficient points help us to get towards the optimum mix of high-end drama, serial drama and series drama. However, we would not suggest that the ABA do anything to act as a disincentive for the commercial networks to showcase Australian feature films. From time to time, the decision is taken that a certain Australian feature film, which may be regarded as arthouse, may not be of sufficient interest to warrant a first-run Friday or Sunday broadcast. On those occasions, yes indeed, the licence fees paid for them can be quite modest. But I think you will find that on the balance of occasions, the licence fees paid

for the higher performing Australian feature films are quite substantial. We would like to see the mix and the format factors retained as they are.

In relation to the equity contribution, you are right in saying that there has not been any formal proposal about the minimum level of equity to achieve what we are proposing as the higher format factor of 5. I can only comment from a Network Ten perspective. We would be comfortable with a level of equity investment that was commensurate with the base licence fee for an FFC-financed feature film.

Lesley Osborne, ABA: I was wondering if you could expand a little bit more on your proposal that the requirement for C drama might include requirements for other quality children's programs. I'm asking this in the context of the obligation already for 290 hours of quality children's programs, of which 32 hours is drama. What do you see as the difference between this new category of quality children's programs and what you are already providing, or should be providing, under the overall requirement for C programs?

Andy McIntyre: Notwithstanding the somewhat modest contribution that the networks make to the overall budget of C dramas, the cost per hour is still significant. Our children's program *Totally Wild*, which is produced in Brisbane, rates terrifically well. If we had the opportunity to displace some of the funds that are currently committed towards the 32 hour C drama subquota, and apply those in some meaningful way to bolster the resources of that unit or indeed to commission independent producers to deliver us high-end kids' documentaries, the overall cultural objectives of the standard would still be met and we would not find ourselves at the mercy of the international financiers, who on a whim can make a C drama program fall over. We have been in that position within the last 12 months, and it makes it very difficult from a quota perspective.

Jonathan Shiff: Just to follow up, Andy. Would I take it that if you were paying the \$400,000 cost of the production to meet the regulatory requirement, that would also displace resources? That was just a facetious question, but it seemed to me that children's television is being discussed in terms of revenue rather than diversity or content. There are 290 hours of C-classified children's material, as opposed to C drama, which I think represents an avenue for diversity and innovation in itself. Why attack 32 hours of

drama which represent a choice for kids? Rather than answer in terms of revenue, I am talking about the content, the type of program, the choice.

Andy McIntyre: It does indeed represent a choice. What troubles us is what the kids are choosing to do. One of the difficulties that we have with the C drama subquota, as it currently stands, is that despite the levels of research into the appeal of the programs to kids, you do not get the level of ratings that you would expect when those programs are broadcast. I can understand to some extent the level of cynicism surrounding our decision to broadcast *Cybergirl* in what we considered to be a timeslot worthy of the quality of the program. It was not a cynical attempt. It was not an attempt to make a point. It was an attempt to showcase a terrific piece of television in a good timeslot. The kids are not watching it. We are not sure why. We believe that experimenting with some higher end non-drama formats that may involve a similar level of costs could be a viable alternative and give kids the opportunity to themselves vote and determine whether that would be a workable compromise. It is not all about dollars and cents.

Mark Armstrong: To finish this discussion, I set each of our discussion openers the exercise of saying what they would do if they could change any one thing about the current arrangements. Have any of you four people been able to think of one thing that you would change? We won't hold you to it! What would you change, Ian?

Ian McGill: I think we should keep lawyers out of the debate.

Bob Donoghue: I don't feel that I would change anything. I actually believe in the regulations. I just hope that the people who are doing the regulating will keep at least one ear out to the marketplace.

Mark Armstrong: You remind me to say something else. I don't want to single out individuals, but it is really good the way people from the ABA will come along and listen and even participate in a discussion such as this. You might on occasions get cranky with the ABA as an institution, ladies and gentlemen, but in my observation there are many regulatory authorities in the country that don't even make the attempt to listen and to be around and to chat with people over a cup of coffee. Andy, what would you change?

Andy McIntyre: Let me say simply this: let's as an industry work together to maximise the cross-

over between what we are obliged to do and what we choose to do in relation to content. In that situation, everybody wins: the shareholder, the audience and the independent production sector.

Mark Armstrong: Kim?

Kim Dalton, AFC: It is the other predictable response to what Andy just said. It would be great if the networks and the broadcasters could have embraced and participated in the intended culture and outcomes of the standard, rather than all too often coming at it from a point of view of revenue and expenditure.

Mark Armstrong: Thanks very much to these four courageous people who have dared to float a whole range of ideas.