

16 September 1998

Ms Lesley Osborne  
Manager Standards  
Australian Broadcasting Authority  
Level 15, Darling Park  
201 Sussex Street  
Sydney NSW 2000

Dear Ms Osborne

Please find enclosed the submission which is presented by the AFC and a number of industry organisations. This has been formatted in Word for Macintosh 5.1.

As you are aware the complexity of the issues involved and the fact that a large number of organisations were involved meant it took longer than originally expected to finalise the submission.

We thank you for your patience in this matter and look forward to further consultation in the course of the inquiry.

Yours sincerely

KIM IRELAND  
Policy Advisor

**SUBMISSION**

**to the**

**Australian Broadcasting Authority's**

**REVIEW OF THE AUSTRALIAN**

**CONTENT STANDARD**

**1998**

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

**"Drama is as much part of a community's culture as its sport. In its range, from banality to brilliance, it reflects us to ourselves, helps us to know ourselves and passes on the information to the rest of the world. A community without drama is a community undeveloped, or maimed beneath the skin, no matter how much suntanned initiative it may present on the surface."**

M MacCallum in *Ten years of Television*, Sun Books, Melbourne 1968

**"Culture is like a fingerprint. Every society has one, and no two are exactly the same. New Zealand culture doesn't exist anywhere else - if it doesn't get expression here, it doesn't get expression anywhere. Television and radio are both lens and mirror - they help us to see the rest of the world, and just as importantly they help us to see ourselves."**

Tom Scott, New Zealand writer.

**"Film and television productions are an integral part of Australian life. They expose us to others' dreams and visions, tell our stories, show us to ourselves and others and ensure that future generations can see into our lives as we have lived them. At the end of the 20th century, they have emerged as the most accessible of all cultural activities and a medium in which Australian creators are able to reach the world."**

David Gonski: *Review of Commonwealth Assistance to the Film Industry*, January 1997

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## **1. EXECUTIVE SUMMARY**

The parties to this submission are firmly of the view that to treat New Zealand programs on the same basis as Australian programs is contrary to the intentions and objects of the Broadcasting Services Act (Act), and undermines the Australian Broadcasting Authority's (ABA) ability to properly discharge its obligations under s122 to make standards for Australian content.

We believe that it is not possible to reconcile the cultural objectives of the Act and the trade obligations under the Trade-in-Services Protocol to the Australia New Zealand Closer Economic Relations Agreement (CER) in any satisfactory way and that the only real solution is the repeal of s160(d) of the Act.

However, recognising the ABA has to attempt to reconcile these opposing obligations, a detailed response to the discussion paper has been developed.

The ABA's objective in redrafting the Australian Content Standard to accommodate New Zealand should be to at least maintain current levels of Australian programming and to deliver diversity, innovation and quality in that programming in accordance with its statutory obligations.

The submission discusses the cultural importance of the Standard and the related role it plays in industry support. It indicates that the minimum levels of Australian content required in the sub-quota areas of adult drama, documentary and children's drama, are very low and points to the disturbing reduction in adult drama shown on Australian commercial television since the late eighties.

Our examination of the New Zealand industry shows there are large amounts of New Zealand material available in the vulnerable categories of adult drama, documentary and children's drama.

New Zealand programs will have a cost advantage over Australian programs because they will be selling into a secondary market.

In order to meet its obligations expressed in the objects of the Act and s122, the ABA must take a thorough approach to reviewing the Standard. The purpose of the review should be to address the market distortions created by the requirement to accommodate New Zealand programs and to put programs from the two countries on an equal footing where they compete, on quality not price.

The submission proposes the following 'package' of measures.

## HOW WILL PROGRAMS QUALIFY?

1. There should be a **single quota** to be satisfied by separately defined Australian or New Zealand programs (section 5.1 of this submission).
2. The **time bands** for drama and documentary programs should be reduced and should apply from 6pm to 10.30pm (section 5.2).
3. An **expenditure test** should be incorporated into the current points system for drama, and for documentary and children's drama. The test proposed requires programs to meet a specified minimum network/broadcaster expenditure to be eligible for quota (section 5.3).

The proposed minimums are:

- adult drama
    - serials -\$100,000 per hour
    - series -\$150,000 per hour
    - mini-series, telemovies, one shot dramas -\$200,000 per hour.
    - feature films - 1.6 points where expenditure is up to \$100,000 and 3.2 points where expenditure is \$100,000 or greater.
  - documentary - \$40,000 per hour.
  - children's drama - \$55,000 per half hour.
4. The definition of **first release** should be amended so that programs which have already been shown in the 'common market' of Australia and New Zealand should not qualify as first release in Australia (section 5.4).
  5. In the adult drama area, **serials** which receive any government subsidy, and **series** which receive government subsidy of more than 15% of their total budget should not be eligible for quota (section 5.5).

## WHAT PROGRAMS ARE ELIGIBLE?

6. There should be **separate and equivalent creative elements tests** for Australian and New Zealand programs (section 5.6).
7. The **current creative elements test should be revised** and extended to ensure only genuinely New Zealand programs qualify and to protect the integrity of the remaining Australian programming (section 5.7). The proposed revised creative elements test for Australian programs has the following new elements:

- the program must be originated and developed in Australia. ie, all key creative/managerial decisions such as the initiation of the project, the hiring of director/writer/producer must be made by Australians;
- the production company must be incorporated in Australia and managed by Australians; and
- where the production company is not majority owned and controlled by Australians, both the writer and director must be Australian.

The New Zealand test would mirror the Australian.

8. **Division 10BA** certification should no longer be an automatic gateway to quota recognition. All Australian and New Zealand programs (except for Australian/third party co-productions should be assessed against the revised creative elements test (section 5.8).
9. **New Zealand/Third party co-productions** should not be given automatic access to content eligibility and the ABA should pursue the offer of the New Zealand government to record this understanding by side letter to the CER (section 5.9).
10. The parties to the submission wish to reserve their position on whether **quota levels** should be increased and address this issue later in the inquiry.

The ABA must closely monitor the impact of any revised standard particularly on the level and diversity of Australian content and initiate a further review if these diminish.

Lastly, the submission addresses other issues unrelated to the High Court decision raised in the ABA's discussion paper.

It agrees in broad terms with the proposals to refine the definitions of documentary and sketch comedy and with the proposal that additional key creative roles specific to animation should be included in the creative elements test for that genre.

The parties to this submission wish to reserve their position in respect of the proposal to allow telemovies to count as first release on commercial free-to-air television even though they may have previously been shown on pay television.

## 2. INTRODUCTION

This submission is presented on behalf of the following organisations:

Australian Film Commission (AFC)  
Australian Children's Television Foundation (ACTF)<sup>1</sup>  
Australian Film Institute (AFI)  
Australian Guild of Screen Composers (AGSC)  
Australian Screen Editors (ASE)  
Australian Screen Directors Association (ASDA)  
Australian Writers Guild (AWG)  
Communications Law Centre (CLC)  
Film Australia Limited (FAL)  
Media Entertainment and Arts Alliance (MEAA)  
Pacific Film & Television Commission (PFTC), and  
Screen Production Association of Australia (SPAA)

We welcome the opportunity to present this submission in response to the ABA's discussion paper entitled "Review of the Australian Content Standard" issued in July.

The ABA's current review arose as a result of the High Court's decision in April this year which found that the Australian Content Standard was inconsistent with Australia's obligations under the Trade-in-Services Protocol (Protocol) to the Australia New Zealand Closer Economic Relations Agreement (CER). Legal action was commenced by New Zealand producers and their lobby group Project Blue Sky. From 1995, Project Blue Sky has argued that s160(d) of the Broadcasting Services Act (Act) required the ABA to comply with the Protocol which required New Zealand persons and services to be treated no less favourably than Australian persons and services.

The parties to this submission have remained extremely concerned about the implications of the Project Blue Sky action and the High Court decision for the Australian Content Standard. We have argued that to treat New Zealand programs as Australian directly opposes the intentions and objects of the Act and undermines s122 which requires the ABA to make standards for Australian content.

We remain of the view that the impact of allowing New Zealand programs access to the Australian quota system would simply be the displacement of Australian programs by New Zealand programs.

The purpose of the Australian Content Standard since its early beginnings in the 50s and 60s has been to promote Australian cultural identity and to allow Australians to "tell our own stories, sing our own songs and dream

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<sup>1</sup> To the extent that this submission does not diverge from the ACTF submission dated 28/8/98.

our own dreams" (Tony Morphet, September 1987). The Objects of the Act expressly enshrine these objectives as statutory obligations for the ABA to achieve.

Given New Zealand is not Australia and vice versa, a situation where New Zealand programs can take up precious quota hours on Australian screens reduces the amount of Australian programs available to Australian audiences, fundamentally undermining these objectives.

There is a fundamental contradiction in the exercise that the ABA is now obliged to conduct - to create a Standard which complies with the trade obligations of CER (and the Protocol) and the express objectives of the Act, to promote high quality programming, developing and reflecting a sense of Australian identity, character and cultural diversity, and to facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs.

Section 122, requiring the ABA to develop a standard for Australian content, and section 160(d) requiring the ABA to perform its functions consistent with Australia's international obligations are mutually exclusive and cannot be reconciled.

The only real way to maintain an Australian Content Standard is to repeal section 160(d). This is necessary to maintain the immediate integrity of the Standard - to prevent a reduction in the amount of Australian programming available on our screens; and its long term viability - because allowing New Zealand programs to count as Australian undermines its basis, making it difficult to argue that as an instrument of cultural policy, the Standard should be excluded from other international trade treaties.

Nevertheless, as the ABA must attempt to reconcile these opposing obligations, we submit that it is vital that a redrafted Standard operates to maintain current levels of Australian programming, delivers a diversity in that programming to Australian audiences and assists in facilitating an efficient, competitive and responsive broadcasting industry in Australia.

It is in that spirit that the following response to the options outlined in the ABA's discussion paper has been developed.

In the following sections we discuss the cultural and economic importance of the Australian content system.

We also examine the current Australian content levels and the potential for New Zealand programs to seriously affect these and discuss the factors which may give New Zealand program makers an advantage over their Australian counterparts. In summary the major points to emerge from our analysis are as follows:

- The operation of global television markets means New Zealand programs will be financially attractive to broadcasters.
- New Zealand programs will simply displace Australian programming. Each and every New Zealand program screened will lead to a corresponding reduction in the amount of Australian programming.
- The potential impact is particularly serious in the areas where specific sub quotas apply - adult drama, children's drama and documentaries.

It will be seen from the Executive Summary that we submit a 'package' of measures is necessary to maintain the integrity of the Australian Content Standard and the current levels of Australian programming.

The ABA is required to foster and protect Australian programming as the reflection of Australian identity and cultural diversity on commercial television; to promote the provision of high quality and innovative programming and facilitate the development of an efficient and competitive broadcasting industry in Australia which is responsive to audience needs.

The Explanatory Memorandum to the Broadcasting Services Bill 1992 proscribes the underlying policy for Australian content regulation. It stated that:

"a standard relating to the Australian content of programs should encourage the broadcast of programs which:

- reflect the multicultural nature of Australia's population;
- promote Australians' cultural identity;
- facilitate the development of the local production industry; and
- include a requirement for Australian programming for children."

The High Court recognised in its decision that:

"The objects specified in s3 of the Act make it clear that a primary purpose of the Act is to ensure that Australian television is controlled by Australians for the benefit of Australians. The objects require the Act should be administered so that broadcasts reflect a sense of Australian identity, character and cultural diversity, that Australians will effectively control important broadcasting services and that those services will provide an appropriate coverage of matters of local significance."

We believe that to fulfil these obligations the ABA must take a comprehensive approach to revising the Standard. In its discussion paper the ABA canvassed a wide range of options.

Our 'package' of measures takes up a number of these and taken together would, in our considered judgment, go some way to ensuring the current level and range of Australian programming is maintained.

We believe that notwithstanding the adoption of our proposals in full, there will still be a negative impact on current levels of Australian content as a result of revising the Standard to include New Zealand.

We are mindful that the package involves significant change and that there could be some unintended impacts for the Australian industry.

### **3. AUSTRALIAN CONTENT**

#### **3.1 THE IMPORTANCE OF AUSTRALIAN CONTENT**

Key elements of the ABA's role relevant to this review and arising from the objects of the Act are:

- the promotion of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity (s3(e));
- providing a regulatory environment to facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs (s3(b)); and
- to promote the provision of high quality and innovative programming by providers of broadcasting services (s3(f)).

As noted by the ABA itself this gives the regulator a key cultural role and also a role in industry development.<sup>2</sup>

#### ***The Cultural Objective***

The need to regulate for Australian content on commercial television was hotly debated even before television transmission began in 1956 and has continued to be one of the major planks of cultural policy in Australia to this day.

The cultural importance of Australian programming has been the subject of considerable comment and analysis over this period.<sup>3</sup> Commentators have consistently pointed to the major contribution Australian television programming has made to Australian identity, maturity and nationhood.

Gil Appleton refers to an earlier commentator, Tom Fitzgerald, who, in 1958 described the phenomenon which causes people to respond enthusiastically to programs made within their own frame of cultural reference as 'the shock of recognition'. Fitzgerald was talking about the impact of seeing one's own environment and national characteristics on the screen. He talked of "the blend of stimulation and assurance that comes from it. It plants one's feet on the ground. The workaday world is integrated with the world of the imagination".<sup>4</sup>

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<sup>2</sup> ABA *Australian Content: Review of the program standard for commercial television* Discussion Paper July 1994 p.6

<sup>3</sup> For example: Gil Appleton, "How Australia Sees Itself", May 1988. As republished in *Oz Content: An Inquiry into Australian content on television*, ABT Sydney 1991; Moran A. *Images and Industry: Television drama production in Australia*, Currency Press, Sydney 1985

<sup>4</sup> Appleton, *op cit*, p.103

The ABA stated in 1994 that "Broadcasting and Australian programming in particular, has a vital role to play in the maintenance and development of Australia's culture. Australian broadcasting policy has been based on the rationale of ensuring that Australians see themselves, their lives and society reflected on screen in reasonable amounts, and that this reflection takes account of the pluralistic nature of our society."<sup>5</sup>

As the ABA went on to note, recognising the important role broadcasting plays in the cultural life of the nation, successive Australian governments have imposed cultural obligations on commercial broadcasters through the determination of standards that relate to Australian content and children's programs.<sup>6</sup>

The discussion paper issued by the ABA for the current review reiterates the cultural significance of television and Australian programming for Australian society (pages 18-20).

Our television drama has been a major part of Australians' lives for the last twenty to thirty years. The roll call includes programs like *Skippy*, *Number 96*, *The Mavis Bramston Show*, *Patrol Boat*, *Cop Shop*, *Homicide*, *The Young Doctors*, *The Sullivans*, *A Town Like Alice*, *Flying Doctors*, *Sons and Daughters*, *Prisoner*, *Neighbours*, *Home and Away*, *Joh's Jury*, *Bodyline*, *Bangkok Hilton*, *The Dismissal*, *Cowra Breakout*, *Return to Eden*, *Fields of Fire*, *Melba*, *All the Rivers Run*, *Vietnam*, *The Shiralee*, *Blue Heelers*, *Water Rats*, *Halifax fp*, *Fast Forward*, and *The Comedy Company*.

Then there are children's drama programs such as *Skippy*, *Sky Trackers*, *The Girl from Tomorrow*, *Ocean Girl*, *Round the Twist*, and *Clowning Around*.

In their various ways programs such as these have been defining moments in Australia's cultural life.

### ***Economic/Industry Development Role***

Clearly to reflect Australian identity, character and cultural diversity on our screens there needs to be a viable film and television production industry. As the ABA noted in 1994 "the development of an efficient broadcasting industry is dependent upon the contribution by the film and video production industry in producing programs for television. The ABA also has a role to play in industry development".<sup>7</sup>

From its early beginnings when Crawfords was virtually the only production house producing local television drama the Australian industry has developed

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<sup>5</sup> ABA, op cit, p.5

<sup>6</sup> ibid, p.6

<sup>7</sup> ibid

into an internationally competitive player producing a wide range of high rating programming.

The latest figures published by the ABA put the total expenditure by commercial television on Australian programs broadcast in 1996/7 at \$549.6 million (see Appendix 1 for breakdown by program category).

In 1996/97 the value of all independently produced domestic production in feature films, mini series, series, serials and telemovies was \$366 million and the value of independently produced programs made primarily for television (ie excluding feature films) was \$236 million.<sup>8</sup>

This broke down as follows:

	<b>No</b>	<b>(\$m)</b>
Mini-series	9	81
Series and serials	21	133
Telemovies	10	22
<b>Total</b>	<b>74</b>	<b>366</b>

Employment in the industry has increased dramatically from the 60s and 70s and also over recent years. The 1996 census reveals that television services employ 14,552 people, an increase of 57% since 1991 and the film and television production industry, 7,760, an increase of 35% since 1991.<sup>9</sup>

The Australian industry has had growing success in recent years with international sales of Australian television programs. The value of television program exports rose from \$73m in 1994/95 to \$91m in 1995/96, an increase of 24.6%. This compares to exports of feature films which again declined in 1995/96 reflecting the pattern of the previous six years.

The table and graph in Appendix 2 provide more detailed information on royalties earned from exports of television programs, films and videos.

This material shows that the value of exports of television programs has been increasing since 1991/92 with particularly significant increases in the last three years.

The increased exports demonstrate the growing popularity and success of Australian programs internationally. Shows like *Home and Away*, *Neighbours*, *Water Rats* and *Blue Heelers* have had very significant overseas sales and are shown in a wide range of countries.

As Gil Appleton reflects "it must be acknowledged that it is the very Australianness of many Australian programs - however arcane and mystifying - which constitutes much of their appeal to overseas audiences."<sup>10</sup>

<sup>8</sup> AFC, *National survey of feature film and independent TV drama production 1996-97*.

<sup>9</sup> ABS Census as reported in AFC News July 1998.

<sup>10</sup> Appleton, op cit, p.105

The success of the Australian industry in cultural and economic terms is the result of many years of targeted industry development funded and underpinned by public policy measures such as content regulation and direct subsidy. As is often commented 'critical mass' is needed to achieve both financial and artistic success. The various sections of the production industry i.e film and television are closely interconnected and rely on and foster the same skills base. A reduction in domestic television production will impact adversely on other sectors of the industry leading to a loss of skills and capacity, a reduction in quality and a negative impact on Australia's international competitiveness.

As will be argued in the next section while the Australian industry has certainly come a long way since the '50s and '60s it is still vulnerable and subject to external pressures.

In this context we submit that any reduction in the current levels of Australian programming would have significant and potentially far reaching negative effects.

### **3.2 AUSTRALIAN CONTENT - THE CURRENT STATE OF PLAY**

There is no reason to be complaisant about the current health of Australian programming for a range of reasons.

#### ***Current levels***

Firstly the overall levels of Australian programming are very modest. Appendix 3 sets out the compliance results for the transmission quota and for the drama, documentary and children's drama quotas in 1996 and 1997.

Australia's overall transmission quota of 55% is comparatively low. In the United States over 95% of the schedule of the principal American networks is domestic programming. Similarly, with respect to the United Kingdom - over 80% of the programming on its principal networks is local and in Canada there is 60% domestic programming.

However, it is the areas of programming covered by the Australian sub-quotas that are particularly in need of protection. In these areas the minimum requirements placed on commercial broadcasters of 225 points of first release drama, 10 hours of first release documentary, and 32 hours of first release children's drama, are extremely modest.

The average hours of adult drama broadcast across the three Australian networks in 1997 was 168.10. This represented just 1.9% of total broadcast hours. Appendix 4 provides some comparisons of first release drama broadcast by the networks over the last decade.

The ABA's discussion paper acknowledges a widely held belief that "without regulation it is doubtful the industry would deliver an adequate

level of Australian content, that is, a level which the Australian Parliament expects" (p20). The ABA further notes at page 24 "that experience with the current and previous Australian content standards shows that without the regulatory requirements the sub-quota programs of first release drama, documentary, C drama and C and P programs are most vulnerable to replacement by imported programs".

The 1997 compliance results support these views. These indicate that the Nine Network and Network Ten just met the minimum requirement for first release children's drama, the Seven Network was under by half an hour, and Network Ten was just half an hour over the minimum 10 hour requirement for documentary. Broadly similar results were obtained in 1996 with all three networks just meeting the quota for children's drama and Network Ten, the minimum documentary requirement.

It is also very significant that Network Ten just met the overall transmission requirement in 1997 and 1996. It has been generally believed that the areas which make up the balance of the transmission quota, news and current affairs, sport, infotainment and light entertainment are less vulnerable to displacement by imported programming (see page 25 of the ABA discussion paper). However, the Network Ten transmission results indicate this may need reassessing.

### ***Decline in Australian Content?***

Appendix 1 provides total expenditure by commercial television and a breakdown by various types of programming from 1992 to 1996/97. This indicates that while total expenditure has increased, drama and documentary programming have declined.

- Expenditure on Australian drama production dropped by 4.4% from 1995/96 to 1996/97. Further, expenditure in 1996/97 was \$15.2m less than in 1992/93 an overall reduction of 17%.<sup>11</sup>
- On the other hand expenditure on foreign drama increased by 14.6% from 1995/96 to 1996/97. And since 1992/93 there has been a 21% increase in expenditure on foreign programming.
- Documentary expenditure increased in 1994/95 and 1995/96 but declined by 44.7% in 1996/97. Overall expenditure in 1996/97 was down 25.6% from the 1992/93 level.

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<sup>11</sup> It has been assumed the expenditure figures in recent years include the modest network contribution required for projects made under the Australian Commercial Television Production Fund (CTPF). The CTPF commenced operation in 1995/96 and funded programs which were not eligible for quota points. However, we understand from the ABA that network contribution to CTPF projects would be included in the information provided by the networks on programming expenditure. We have estimated the combined contribution to CTPF projects as around \$1.2million in 1996/97.

The drama decline was discussed by the ABA in its September 1995 report in the following terms:

"The ABA's financial analysis of network performance indicates there has been a steady decline in expenditure on Australian drama since 1990. There has also been a decline in the amount of drama broadcast, although this has not been as proportionately great, and all licencees continued to exceed the minimum level required under the standard."<sup>12</sup>

This analysis is supported by a closer examination of the figures showing the total value of television production (as opposed to the network expenditure.)<sup>13</sup> There was a \$28 million increase in the value of production from 1995/96 to 1996/97. However, without \$30.5m worth of production supported by the Australian Commercial Television Production Fund (CTPF) the value of production would have reduced over the two years concerned (See Table 1, Appendix 5).

The CTPF was set up for 3 years in October 1994 to "increase the amount of quality Australian programming we see on our screens"<sup>14</sup> and to fill a vacuum that it was felt existed in network programming with their emphasis on series and serials.

The CTPF has supported 36 projects to a total value of \$72.2 million. These programs, primarily a mixture of telemovies, mini-series, children's drama and documentaries<sup>15</sup> have increased the amount of Australian programming on commercial television and contributed to diversity.

CTPF projects provided an additional 26 hours of programming in 1995/96, 23 and a half hours in 1996/97, and 26 and a half hours in 1997/98. (Programs supported by the CTPF will continue to screen in future years as these are completed.) Four telemovies resulted in subsequent series. These are *State Coroner* and *Good Guys Bad Guys* (Network Ten), and *Murder Call* and *Medivac* (Nine Network).

The end of the CTPF would appear to mean fewer hours overall of Australian programming and a reduction in mini-series, telemovies, quality documentary and children's drama. Without the developmental role played by the Fund there could be a diminution of quality and diversity in the future.

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<sup>12</sup> ABA *Australian Content: Review of the Program Standard for commercial television* Final Report, Sept 1995, p.33

<sup>13</sup> Broadcaster expenditure only part funds most television production. Private finance, and, in the case of mini-series and telemovies, government funding makes up the balance.

<sup>14</sup> *Creative Nation - Commonwealth Cultural Policy*, October 1994, p.48

<sup>15</sup> See Table 2 in Appendix 4 for a breakdown of the projects supported by CTPF.

It seems most unlikely that the television networks will be prepared to fill the vacuum and fund an additional \$24 million per year of 'high end' drama. Further, given the spin-off benefits from the Fund (4 series, 3 of which went into a second series) there are likely to be longer term effects of its demise on the quality and quantity of Australian drama.

Table 1 in Appendix 4 sets out the average hours of first release drama screened from 1993 to 1997. Average hours have declined over this period from 195 in 1993 to 168.10 hours in 1997.

Table 2 sets out the average hours of first release drama in the previous four year period from 1988/89 to 1992. These figures also indicate a significant decline between the two periods - from 227 hours to 178.82. It may be thought these figures reflect a shift encouraged by the 1991 Standard from quantity to quality. However, the period has in fact seen a shift in network programming from drama to lifestyle/infotainment programs and a reduction in the amount of high-end quality drama.

## 4. THE NEW ZEALAND INDUSTRY

There are three major national networks in New Zealand - TV1 and TV2, run by TVNZ, a state owned enterprise, and TV3 controlled by the Canadian media group, CanWest Global, which is also the major holder of equity in Australia's Network Ten. All three networks are commercial. The New Zealand television industry earned US\$273.5 million in advertising in 1995 which represented 33% of all New Zealand advertising revenue.

TVNZ's two stations, TV1 and TV2 are available to over 99% of New Zealand households. Together, the two stations attract around 77% of the viewing audience (1995 figures).

Appendix 6 shows the hours of New Zealand programming shown on the three major channels from 1988 to 1997.

The following table compares the total hours of New Zealand material broadcast by New Zealand's three networks to the Australian material broadcast by the three Australian networks, by category in 1997.

### Hours Broadcast - New Zealand and Australia 1997.<sup>16</sup>

<b>Category</b>	<b>New Zealand</b>	<b>Australia</b>
Drama/comedy	336	504.3
Children's programs (general)	806	1207
Documentary	269	71.1

While no children's drama was broadcast in New Zealand in 1997 there has been an average of 21 hours per year of children's drama broadcast in New Zealand over the last 7 years. This equates to the minimum 24 hours previously required by Australian networks in 1996 and 1997 (now 32 hours).

There has been substantial growth in local programming in New Zealand since 1988 :

- total hours and prime time hours have more than doubled; and
- the proportion of prime time hours filled by first release New Zealand programs has increased from 23.5% in 1988 to 37.5% in 1997.

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<sup>16</sup> Australian figures - ABA, *Compliance Results 1997*. New Zealand figures, *NZ on Air Local Content 1997*. NB. The Australian figure for children's programs combines C and P programs as the New Zealand figures do not distinguish between children's and pre-school programming.

The increases in New Zealand material on New Zealand television in sub-quota programming has also been dramatic:

- drama/comedy increased from 39 hours in 1988 to 336 in 1997;
- children's programming increased from 325 hours in 1988 to 806 in 1997;  
and
- documentaries increased from 43 hours in 1988 to 269 in 1997.

### ***New Zealand Assistance Arrangements***

New Zealand on Air (NZOA) was established in 1989 with a mandate to enhance and protect local content on New Zealand television. This move accompanied the deregulation of broadcasting that occurred at that time.

NZOA was to be the major vehicle for pursuing public policy goals in broadcasting. It is funded by revenue from the licence fee of NZ\$110 collected from each New Zealand television household.

The largest single area of NZOA's activities is the funding of New Zealand television programs.

NZOA's funds are provided to the program maker, who may be a television network or an independent producer. In the drama/comedy area virtually all productions subsidised in the last two years were made by independent producers.

In 1996/97 NZOA funded 875 hours of programming. This included:

- 62 hours of drama
- 99 hours of documentary
- 410 hours of children's and young persons programs.

More details on NZOA's funding in 1995/96 and 1996/97 are included in Table 1 Appendix 7.

Table 2 in Appendix 7 sets out the amount of material funded by NZOA from 1990 to 1997.

This shows the significant amounts of subsidised material available in the drama, documentary and children's programming areas.

Subsidy through NZOA is available for a wider range of programs than occurs in Australia. For example, children's general programming and 'special interest' programs.<sup>17</sup>

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<sup>17</sup> 'Special interest' are programs for 'special interest' audiences, eg minority/ethnic groups, business, arts, religion

For adult drama, subsidy has been available to long running series and serials. *Shortland St* was funded for four years up to 1995/96, *City Life* received subsidy of \$192,300 per hour in 1995/96 and the high rating *Letter To Blanche*, in its third series in 1996/97, received subsidy equivalent to \$230,000 per hour in that year. *Skitz* a comedy series has been funded for four years and received funding of \$190,000 per hour in 1995/96 and in 1996/97.<sup>18</sup>

NZOA funded 410 hours of children's programs in 1997. Each Australian channel must show a total of 288 hours of children's and pre-school programs, and children's drama.

By contrast, in Australia, federal subsidy through the Australian Film Finance Corporation (FFC) is only available for adult drama programming for mini-series (up to 8 hours) and telemovies. State funding bodies provide some support for series in development and production but this is a small proportion of overall production costs.

Large amounts of documentary programming are both broadcast in New Zealand and supported by NZOA. This contrasts with Australia where the documentary production that is subsidised through the FFC and other bodies such as Film Australia rarely makes its way onto commercial television. Over a three year period up to the end of 1997, 178 first release documentaries were shown on Australian commercial television, but only 11 FFC supported documentaries were shown over the three years 1995/96 to 1997/98.

It is evident that documentary is more popular and better supported by New Zealand television than it is by commercial television in Australia. There were 269 hours of local documentary broadcast in New Zealand in 1997 in contrast to the 71 hours of Australian documentary on Australian commercial television.

In the 1996/97 year NZOA subsidy for documentary was NZ\$9.7 million which supported 99 hours of documentary production. A diverse range of documentaries are supported including sports subjects (*Jonah Lomu: Superstar*); adventure and travel (*Race to the Pole*) and (*Hillary: A View From the Top*); nature (*Whale Strandings*) and historical and social issues.

Interestingly, there has recently been increased debate in New Zealand about the need for more effective support mechanisms for local content, including the possibility of mandatory quotas. NZOA has fostered this through a number of its publications and in light of further possible changes in broadcasting, in particular the proposed privatisation of TV1 and/or TV2.

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<sup>18</sup> NZ on Air Annual Reports, 1995/96, 1996/97

The following points emerge from an examination of the New Zealand industry:

- there is a large amount of New Zealand programming available including significant amounts in the sub-quota areas of adult drama, documentary, general children's programs and children's drama;
- a range of drama programs are produced including series and serials, mini-series and telemovies;
- the pattern of subsidy is different. Most particularly in New Zealand significant levels of subsidy have been available for series and serials; and
- subsidy is also available for general children's programming, an area not subsidised in Australia.

### ***New Zealand at an Advantage***

The ABA's discussion paper discusses the economics of television and the impact of New Zealand material at some length at pages 20 to 26 and concludes that "A number of factors operate to give New Zealand a cost advantage over similar Australian programs."

The key factor is the operation of global television markets. New Zealand programs will be at a cost advantage in relation to Australian programs because they will be selling into a secondary market.

Having been made primarily for the New Zealand market and potentially with NZOA subsidy they, unlike Australian programs, will not be seeking to recover a significant proportion of their production costs in the Australian market.

Other factors which are identified in the discussion paper include differences in subsidy arrangements which may further reduce the price of purchasing New Zealand programs for Australian networks and the amount of New Zealand back catalogue material available (again, cheaper than newly commissioned programs) which would qualify under the current definition of first release.

The situation is one where Australian programs will actually be at a disadvantage in relation to New Zealand programs. It is for these reasons that a thorough review of the Standard is required.

## **5. PROPOSALS FOR REVIEWING THE STANDARD**

The history of the development of the Australian Content Standard reflects the regulator's recognition of its obligations to promote high quality, innovative and diverse programming which reflects Australian identity, character and cultural diversity, and facilitates the development of the Australian production industry, and the attempt to improve the Standard's effectiveness in achieving these objectives.

Since 1989 there has been an emphasis on refinement of the adult drama requirement to encourage high quality programs and diversity in drama programming. This began with the revised Standard effective from 1 January 1990 and continued to the current Standard which resulted from the 1994/5 review.

Other refinements include: a definition of 'Australian program' that requires programs of all categories to be produced under the creative control of Australians; an increase in the 1996 Standard in the amount of quality first release children's drama required, the introduction of a specific quota for documentary programming and a requirement that all of the mandatory 130 hours of pre-school children's programs must be Australian.

In our submission, all of these elements are in danger of being undermined as a result of the High Court decision and a broad review of the Standard is now required.

Our proposals are underpinned by two important principles:

- the need to maintain as far as possible the current levels and range of Australian content; and
- the need to carefully define Australian and consequently New Zealand to ensure that only genuinely New Zealand programs will qualify.

### **5.1 INCLUDING NEW ZEALAND IN THE TRANSMISSION QUOTA AND SUB-QUOTAS.**

The ABA puts forward two options:

- a single quota either satisfied by separately defined Australian or New Zealand programs, or eligible programs using a test open equally to Australian and New Zealand programs/nationals; or
- separate quota requirements for Australian and New Zealand programs.

We support the former option with, as set out below, a separate but parallel test for New Zealand material.

This would mean Australian content and New Zealand content would be clearly identified and required to be authentically Australian or authentically New Zealand.

We believe in the context of a package of measures this would be preferable to mandating a specific quota for each country. As will be argued further our proposals are aimed at addressing the economic advantage New Zealand would currently enjoy and making the outcome one where programs from both countries would compete on a genuinely level playing field on the basis of quality and audience appeal and not on price. We do not believe it is in the interests of Australia nor does it serve the purposes of the Act to have separate quotas for each country.

When it introduced the current standard in 1995 the ABA stressed that the new system would guarantee the current minimum levels of Australian drama.<sup>19</sup>

If separate quotas were pursued we submit it would be incumbent on the ABA to double the current sub-quota levels. This would in all likelihood be strongly resisted by the television networks.

We endorse the further arguments set in the ABA's discussion paper as to why separate quotas for each country are not desirable. Namely,

- that setting minimums for New Zealand programs such as news, sports, current affairs, etc would be unworkable for broadcasters; and
- that establishing minimum levels for the sub-quota areas would reduce broadcasters' current flexibility to decide which programs will meet their obligations under the quota.

The discussion paper advises that Project Blue Sky has proposed that the Standard set maximum levels for New Zealand programs. We note the ABA's comments on p39 that such an approach may be unlawful.

We are particularly concerned at the ABA's expressed view that this proposal would allow New Zealand programs to completely fill sub-quotas for children's drama, children's pre-school and documentaries (p39).

## **5.2 TIME BANDS FOR ELIGIBLE PROGRAMS - DRAMA AND DOCUMENTARY PROGRAMS**

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<sup>19</sup> ABA Final Report September 1995, p3

We support the proposal that the time bands be reviewed and propose the following:

*"That for first release drama and documentary the time band be from 6pm to 10.30 pm.*

*Provided that in the case of feature films or telemovies that begin before or after 9.30pm the time band can be extended."*

As the ABA attests in its paper, "In setting time bands for eligible programs, the standard seeks to ensure that Australian programs are accessible to audiences and shown at times most convenient to the broad viewing audience." (p40).

We agree strongly with the statement that if the band is intended to capture the concept of prime time viewing then it should be aligned with prime viewing periods. The ABA comments that all the evidence points to this being between 6pm and 10.30 and, on p41, that "narrowing the time band for the broadcast of eligible drama programs so it aligns more closely with prime time would better support the rationale for the sub-quota", i.e. to encourage a range of quality drama.

Amending the time bands would go some way towards maintaining current levels of quality Australian programming. A major concern has been that broadcasters may be inclined to use inexpensive New Zealand programming in time slots on the fringes of prime time, particularly late night to make up quota points. The changed time bands would require New Zealand programs to compete with Australian on quality rather than price.

We submit it is important for similar reasons to introduce a time band requirement for documentaries. As we have demonstrated, New Zealand has a thriving documentary sector and the subject matter of the documentaries supported by NZOA is diverse. These are, by and large, the types of documentaries screened by Australian commercial television networks.

It can be assumed that New Zealand documentaries would be available at prices significantly discounted from Australian with the added advantage of being highly subsidised (NZOA met 71% of production costs of supported projects in 1995/6 and 62% in 1996/7).

Introducing a time band requirement for documentary which accords with peak viewing times would mean New Zealand documentaries would have to compete on quality. It would go some way towards removing the incentive for networks to purchase cheap New Zealand material as "quota fillers" as the ABA's research indicates that eligible documentaries are mostly scheduled in prime time.

### **5.3 EXPENDITURE REQUIREMENT**

*We propose an expenditure test be incorporated in the current points system for drama, and be introduced for children's drama and documentaries.*

#### ***Drama***

The revised drama test proposed is as follows.

"The format factor is:

- (a) 1 in the case of an Australian drama program that is a serial or series produced at the rate of more than one hour per week and which has, in the case of an independent production, secured network/broadcaster expenditure of at least \$100,000 per hour.
- (b) 2 in the case of an Australian program that is a serial or series produced at the rate of 1 hour or less a week and which has, in the case of an independent production, secured network/broadcaster expenditure of at least \$150,000 per hour.
- (c) 3.2 in the case of an Australian drama program that is:
  - (i) a feature film; or
  - (ii) a telemovie; or
  - (iii) a miniseries ; or
  - (iv) a self contained drama of less than 90 minutes duration

and which in respect of (ii) (iii) and (iv) above, where the program is produced by an independent production company, it has secured network/broadcaster expenditure at least \$200,000 per hour.

In paragraphs (a) (b) and (c) above the term network/broadcaster expenditure relates to the amount paid to broadcast the program four times over seven years on commercial free-to-air television within Australia. It is recognised that such expenditure may be comprised of a licence fee and other elements such as equity investment and facilities arrangements.

This test will apply only to programs produced by independent production companies and licensed to broadcasters. Productions produced directly by networks/broadcasters will qualify by means of the other aspects of the drama test.

### ***Feature Films***

Introduce the following scale of points for feature films based on network/broadcaster expenditure.

- 1.6 points where expenditure is below \$100,000
- 3.2 points where expenditure is \$100,000 or greater.

### ***Children's drama***

Introduce an expenditure test for children's drama produced by independent production companies whereby eligible programs are those where network/broadcaster expenditure is at least \$55,000 per half hour.

### ***Documentary***

Introduce an expenditure test for documentaries produced by independent production companies to require network/broadcaster expenditure of \$40,000 per hour.

### ***Mini Series***

While series and serials are in effect defined in the standard there is no definition of mini-series. We consider this is needed and propose the following.

*"mini-series is a drama production made for television which is broadcast in the form of a limited number of episodes, is less than eight hours in length and contains a major plot continuing from one episode to the next."*

The amounts set out above are based on the best information available to us on current licence fee/network expenditure levels. The guiding principle was that a test such as this should be based on current fee/expenditure levels and where these vary for particular types of programs, set at the bottom end of the range rather than an average.

The question of a network/expenditure test for film has to be approached somewhat differently because of the widely varying range of licence fees currently paid for Australian feature films. It is not appropriate to set one level only. We understand licence fees range from \$50,000 or less for relatively unknown (and perhaps older) films to around \$500,000 for a recent film which has had a very successful theatrical release.

The proposal for a two tier system recognises this range. The alternative would be to set the test at a higher level which could act as a disincentive for the sale of some Australian films.

We believe it is as necessary to have an expenditure test for feature films as it is for other programs. Feature films are currently accorded high

points, ie. 3.2, on the basis of representing quality programming and contributing to diversity in respect of Australian content.

An expenditure requirement must encompass feature film to ensure the continued presence of a range of quality Australian features in television programming.

We consider an expenditure test is one of the most effective ways of maintaining the integrity of the Australian Content Standard. It removes the ability of New Zealand programs to undercut Australian and means Australian and New Zealand programs will compete equally.

It is important to combine expenditure with the current factor test as proposed rather than adopting a gross expenditure test per network as is proposed for pay television. The factor test was introduced to ensure diversity and quality in drama programming and was a key and widely supported aspect of earlier reviews of the Content Standard.

As the ABA comments in its discussion paper "the format factors recognise the relative production values of different types of drama programs. Serials, the cheapest form of drama to produce have a format factor of 1, series have a factor of two and mini-series, telemovies and films, the most expensive types of drama to produce, have a factor of 3.2" (p.39).

This underlying basis for the factor test was discussed by the then Australian Broadcasting Tribunal (ABT) when setting out its reasons for the revised standard introduced in early 1990 (TPS14). The Tribunal stated:

"The quality factors for drama have been based on accepted industry average purchase price per hour for the various drama program formats. For example, the average purchase price per hour of an Australian serial is assumed to be \$110,000 and therefore has a factor of 1.1; while the average purchase price per hour of an Australian mini-series or telemovie is assumed to \$350,000 which translates to a factor of 3.5. The purchase prices paid by networks are relevant indicators of their assessments of program quality. They are also quantifiable and have relativities which are less likely to change than those of average production prices."<sup>20</sup>

The issue was discussed again in the context of the 1994/95 review when there was considerable support from the producer community for a licence fee test.

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<sup>20</sup> *Oz Content: An Inquiry into Australian Content on Commercial Television*, Volume 1, ABT 1991, p34

The ABA referred to views put to it that 'the quality factor' developed by the ABT was based on the prices paid in 1989 and further that "there was a strong belief that the quality factor was intended by the ABT to require each network to spend a minimum amount on new Australian drama".<sup>21</sup>

The ABA went on to say that "in the view of the ABT it was the relative value placed by the networks on each format that was important rather than the actual prices paid."

The debate in the 1994/95 inquiry between the ABA and producers centred on the suggestion that higher fees than those indicated by the ABT in 1989 should be set because of the passage of time and concern that actual fees applying in the industry were low. Therefore, the ABA's comments at the time need to be read in this context.

What is clear is that the ABT used licence fee levels as a guide when developing the format factor in 1989 and that in its statements in 1995 the ABA endorsed the principle that the format factor is based on a clear relationship between cost and quality.

That underlying principle is fundamentally undermined in the current circumstances. New Zealand programs, including those with high production values, will be able to be sold at prices that bear no relationship to their actual production costs or to the level of licence fees currently paid for Australian programs. Unless this issue is addressed by imposing minimum expenditure requirements on each format it will undermine the position of quality 'high end' Australian drama contrary to the principles of the Standard and the objects of the Act.

In the 1994/95 enquiry the ABA concluded that "s122 did not empower it to incorporate a mechanism to set licence fees into a program standard relating to Australian content" (p35).<sup>22</sup> However, the High Court decision now makes it clear that the ABA has extremely wide discretion to determine how it carries out its obligations under s122 and we believe, has clarified that an expenditure test is within the ABA's power.

We note the comments in the ABA paper on the practical aspects associated with this approach. We urge the ABA to fully utilise its information gathering powers and take all steps necessary to ensure the accuracy of the data provided.

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<sup>21</sup> ABA, Final Report, September 1995, p34

<sup>22</sup> *ibid*

## 5.4 FIRST RELEASE

We propose the following amended definition of first release.

- (1) *Subject to subclause (2), a program is a first release program when it is first broadcast in the licence area.*
- (2) *A program is a first release program on the occasion of its first broadcast in the licence area by a licensee, if the program is a feature film which has been broadcast by a subscription broadcasting service in the licence area;*
- (3) *A program is not a first release program if the occasion of its broadcast in the licence area occurs more than two months after its broadcast on free-to-air television anywhere in Australia and New Zealand.*
- (4) *A licensee may count towards the quota a program whose broadcast occurs more than two months after it is broadcast in any part of Australia or New Zealand where the licensee acquired the right between 1 January 1996 and the commencement of the revised standard to broadcast the program.*

Paragraphs (1) and (2) above are the same as the current definition. The intention of paragraph (3) is to require that programs that have already been broadcast in the 'common market' of Australia and New Zealand cannot qualify as first release while at the same time recognising that in Australia not all programs are screened simultaneously across the country.

Paragraph 4 is proposed to protect existing contractual arrangements entered into on the basis of the current standard.

As the ABA indicates the current definition would allow programs however old and previously broadcast in New Zealand to count towards a broadcaster's quota obligations since such programs would be 'new' to Australian audiences when first broadcast in a licence area. There would be a substantial cost difference between 'shelf' or back catalogue New Zealand programs and first release Australian programs.

In respect of Australian and New Zealand programs the objective is again to put the two countries on an equal footing. The need for this results from the consequential creation of an aggregated market as a result of the High Court decision.

In the absence of this approach, Australian programs would be at a clear disadvantage as there would be two primary markets for New Zealand programs and only one for Australian.

We do not support the option that programs should have their first international release in Australia. Australian programs are regularly released overseas before being shown in Australia. This occurs most often with documentaries and some high end drama where the production has been partly financed by international sources.

We would be concerned if retaining the current window allowing feature films broadcast on Australian pay television to count toward commercial free-to-air quota would require a similar concession to feature films previously broadcast on New Zealand pay television. We raise this for the ABA's further consideration.

## **5.5 SUBSIDY**

*We propose that adult drama programs which qualify as format factor 1 in receipt of subsidy and adult drama programs which qualify as format factor 2 in receipt of subsidy levels of more than 15% of their total budget, not be eligible for quota points.*

Subsidy to be defined as investments, loans and other forms of financial support, excluding development support, from government film and television agencies, public broadcasters and any related distribution companies. With respect to cash flowing assistance by discounted loans we believe the subsidised element is the discounted rate rather than the amount of the total loan.

As discussed in the section on the New Zealand industry subsidy arrangements in New Zealand differ in some significant ways to those in Australia. These can be summarised as follows:

- In overall terms a broader range of programs is subsidised. Areas subsidised in New Zealand but not in Australia are general children's programs and "special interest" programs - programs for specialist audiences including arts/music programs, business programs and programs for specific cultural/ethnic groupings.
- The full range of drama programs are subsidised in New Zealand whereas in Australia subsidy is primarily available for mini-series and telemovies (although some State funding agencies in Australia provide small amounts of funding for series).
- Funding for series and serials is the area of most significant difference in the subsidy arrangements of each country. Australia does not subsidise these formats which puts Australian program makers at a disadvantage compared to their New Zealand counterparts who can access significant levels of subsidy for series and serials. New Zealand series and serials with NZOA subsidy include *Shortland Street*, *City Life* and *Letter to Blanchy*. There have also been a number of comedy series subsidised.

Proposing a 15% cap for series subsidy recognises that Australian State funding agencies provide some limited support to series.

We wish to reserve our position on whether there should be a provision relating to subsidy and eligibility for other program formats, most particularly, children's programs. Our research indicates that most of the general children's programming on New Zealand television is in receipt of subsidy.

## **5.6 ELIGIBLE PROGRAMS - DEFINING AUSTRALIAN AND NEW ZEALAND CONTENT**

***Introducing separate and equivalent Australian and New Zealand creative elements tests (for Australian and New Zealand programs respectively) or a combined creative elements test for trans-Tasman programs.***

*We support separate and equivalent tests for Australian and New Zealand programs.*

This recognises the reality of separate identities and cultures. As the ABA acknowledges "A parallel test recognises that New Zealand programs are not Australian programs, and are included in the standard solely because of Australia's obligations under the CER protocol" (p29).

A separate test should enable easier analysis and research of future programming. We consider it is essential that the amount and nature of New Zealand programming broadcast under a revised standard be closely monitored. Separate tests are essential to achieving this.

A trans-Tasman test would not differentiate between programs that were wholly New Zealand or wholly Australian, or a hybrid of the creative involvement of both Australian and New Zealand nationals. Therefore, we believe such a test would make it extremely difficult to assess the operation of the Standard in promoting Australian cultural identity and achieving objects 3 (b), (e) and (f) of the Act.

## **5.7 REVISING THE CREATIVE ELEMENTS TEST**

We strongly support this option and specifically propose the following.

"A program is an Australian program if:

- (A) the producer of the program is, or the producers of the program are, Australian, (whether or not the program is produced in conjunction with a co-producer or an executive producer who is not an Australian); and the production company is incorporated in Australia and managed by Australians, and

- (B) it is originated and developed by Australians as evidenced by:
- (a) key decisions relating to the acquisition of underlying works, direction, casting, story-line, and hiring of director/s writer/s producer/s are made by Australians. For the purposes of this definition key creative decisions do not include the exercise of customary rights of approval.
 

"Customary rights of approval" means where a producer submits to an off-shore source of financing elements for approval which may include director, major cast and final shooting script; and
  - (b) two out of three of the following criteria are satisfied:
    - (i) the director/s are Australian;
    - (ii) the program is based on an original creative work written by an Australian/s or an interpretation developed and written by an Australian/s, of an original creative work;
    - (iii) the production company is incorporated in Australia and is majority owned and controlled by Australians.
- (C) not less than 50% of the leading actors or on-screen presenters appearing in the program are Australians; and
- (D) in the case of a drama program not less than 75% of the major supporting cast appearing in the program are Australian; and
- (E) the program:
- (i) is produced and post-produced in Australia but may be filmed anywhere; and
  - (ii) in the case of a news, current affairs or sports program that is filmed outside Australia, may be produced or post produced outside Australia if to do otherwise would be impractical; and

The separate New Zealand creative test would be identical, replacing Australian with New Zealander.

The requirement to treat New Zealand programs as Australian for quota purposes makes it crucial the creative elements test is revisited. There are two imperatives:

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

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

With its deregulatory climate and other factors New Zealand has been the location of choice of many offshore producers. For example the 1996/97 New Zealand production survey reported that offshore television drama production was valued at \$73 million and domestic production just over \$26 million.<sup>23</sup>

It is crucial that the programs made in New Zealand with high levels of foreign content not be able to qualify as Australian content.

It is worth noting that by adjusting the number of non-New Zealanders in major supporting roles and engaging more New Zealand directors or writers, a program like *Xena, Warrior Princess* could qualify under the current creative elements test. New Zealand directors are currently used for some episodes of *Xena*.

The issue of how to define Australian has been debated long and hard in the past particularly in the course of the review that led to the 1990 Standard. The consensus that emerged was that a creative elements test is a more reliable measure than some kind of 'on screen' look test. This is based on the concept that if Australians have creative control the programs they make will be Australian.

The changes we are proposing introduce some additional elements, namely that:

- the program must be originated and developed by Australians (or New Zealanders under the separate New Zealand test) and accordingly;
- key decisions relating to the initiation and production of the program should be made by Australians.

These amendments recognise that there are key creative/managerial decisions which go to the heart of the character of a project. These are the decisions to initiate the project in the first place, to undertake and manage the development process and to hire the key creative personnel such as writer, director, producer and actors.

The same underlying principle for a creative element test has been applied. That is, if Australians (New Zealanders) carry out these roles, the program made will be Australian (New Zealand) and not a program made in Australia (New Zealand) primarily for an overseas market.

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<sup>23</sup> Project Blue Sky and Screen Producers and Directors Association of New Zealand, *1997 Production Survey of New Zealand Film and Television Industry*.

The proposal that two of the three elements required in (B) (b) would need to be satisfied, gives some flexibility for Australian producers making genuinely Australian projects. While the majority of Australian television programs have Australian writers and directors, it has been suggested that particularly in relation to high budget projects it may be considered necessary for financing and/or artistic reasons to have a foreign director or writer.

Our proposal would give this flexibility to Australian (New Zealand) controlled and majority owned companies.

On the other hand, companies which are not Australian (New Zealand) controlled and majority owned could and do make programs which are genuinely Australian. The proposal means that projects produced by these companies will have to meet the origination/developed and managed tests in addition to having an Australian (New Zealand) writer and director.

A number of these elements were included in the test for Australian in the 1990 Standard. The preamble to that Standard referred to "Australians exercising direction over the creative decisions involved in the development, casting, appointment of key creative personnel...".

Further, development of the screenplay was a specific criteria used to test Australianness (Clause 24 of TPS14).<sup>24</sup>

In 1995, the ABA stated "The test, in effect, spells out what it means for a program to be under Australian creative control".<sup>25</sup>

We believe in the current circumstances, the test needs to be expanded as indicated to more accurately reflect what Australian creative control means.

In 1995, the ABA believed the creative elements test needed to be simplified. It said it saw the need for certainty for program makers and broadcasters while providing some flexibility in relation to writers, directors and actors. We submit these elements are retained in our revised test which clearly allows some foreign elements.

The comments of the ABA in 1994 are very relevant. It stated that "Notwithstanding the above (the recognition that individual programs may need to have foreign components for financing purposes without compromising their Australian nature), the objective of the standard is a

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<sup>24</sup> Under TPS 14 there were 'degrees of Australianness' - full points were awarded for satisfying all 7 elements and half points if a foreign director or writer was involved.

<sup>25</sup> ABA, Final Report, Sept 1995, p28

cultural one. With this in mind any standard for Australian content is not designed to define off-shore productions, made in Australia by overseas interests, as 'Australian'.<sup>26</sup>

The proposal may require some change to the current methods used by the ABA for checking compliance. However, we believe the proposed new criteria can be measured objectively and the ABA's wide information gathering powers provide the means for it to collect any further information which may be required.

Most importantly, we submit that expanding the test is necessary to maintain the integrity of the Standard. If that means the test becomes slightly more complex that is, in our view an unavoidable consequence.

### **5.8 REMOVING 10BA AS A GATEWAY FOR RECOGNITION OF QUOTA ELIGIBLE PROGRAMS OR ADDING AN EQUIVALENT NEW ZEALAND GATEWAY.**

On the assumption that the ABA would be required to equally recognise programs certified under the New Zealand Film Commission Act, we support the removal of 10BA as an automatic gateway to content eligibility.

Both 10BA and section 18(2) of the New Zealand Film Commission Act allow for a wide discretion to be subjectively exercised when determining if a project is Australian (or New Zealand) in character. As the discussion paper notes such wide discretion could lead to quite different decision making processes and outcomes in the two countries. It seems entirely inappropriate for eligibility for the purposes of the Australian Content Standard to be determined at the discretion of officials in Wellington.

We are very concerned that having a 10BA type test applying to New Zealand productions could mean projects which have significant foreign (ie. non-New Zealand) elements, and which would not otherwise qualify under a revised creative elements test, would be eligible for quota. We are also concerned that given the wide and subjective discretion involved, New Zealand certification could be decided on the basis of quite different criteria to those applying to Australian projects.

In our submission there should be one gateway which is as objective as possible and responsibility for monitoring compliance with this should be in the hands of the ABA.

Our proposed revised creative elements test incorporates elements of the current 10BA criteria such as company ownership for this reason.

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<sup>26</sup> ABA Discussion Paper, July 1994, p15

Taking this course of action does not, of course exclude programs with 10BA certification from being eligible for content purposes. It just means for quota purposes they would be assessed against the creative elements test. This was the situation prior to 1996.

## **5.9 OFFICIAL CO-PRODUCTIONS**

***Maintaining Australian official co-productions as a gateway for recognition of quota eligible programs, with New Zealand co-productions with third party countries qualifying to the extent that they meet the test for eligible programs under the standard.***

Official Australian co-productions are given full Australian status for the purpose of the Standard. We are extremely concerned at the possibility that the Protocol would require New Zealand/third party co-productions to also be eligible under the Australian Content Standard.

The ABA takes the view that this is not required. "An Australian content standard which includes New Zealand need not provide national treatment to official New Zealand co-productions with countries other than Australia" (p35). In our view, this ignores the obligations of the Protocol to treat New Zealand persons and services no less favourably than Australian. A New Zealand person may provide a service equally in a New Zealand co-production as in a New Zealand program.

We also understand the New Zealand Government and Project Blue Sky have indicated their willingness to agree that the obligations of the Protocol not apply to New Zealand/third party co-productions and to record this in a side letter to the Protocol.

We urge the ABA to pursue this course of action so that this ambiguity is removed.

On the assumption this issue can be satisfactorily resolved we do not wish to submit further argument on it at present. However, we reserve the right to revisit it in the course of the inquiry if necessary.

## **5.10 INCREASES IN QUOTA**

We wish to reserve our position on increases to quotas and to address this further in the inquiry.

We note and agree with the ABA's comments at pages 36 and 37 of the discussion paper, regarding the vulnerability of the sub-quota areas. We share the ABA's view that children's drama and documentaries are areas "where even low levels of New Zealand programs would have a substantial proportional effect on the operation of the quota" (p 36).

We submit that adult drama could also be substantially affected. As previously discussed, the minimum levels of Australian drama required are low, and the actual hours screened have decreased significantly in recent years as has network expenditure. We are concerned that significant displacement could occur in this area.

For example, if one network bought just one New Zealand strip drama and screened it five nights a week over 40 weeks it would meet over half that network's adult drama obligations and would displace 100 hours of Australian drama.

Similarly, a network could make up a significant proportion of its points with inexpensive back catalogue New Zealand films perhaps combined with a New Zealand short form drama series or comedy series.

Our considered view is that it is not possible to predict the level of increase in the quotas which may be necessary. This question depends very much on the extent to which the Standard is modified to deal with the distortions created by the High Court decision.

It would be easy to suggest that all sub-quota levels should at least be doubled. However, such a proposal would probably be regarded as putting excessive requirements on the Australian television networks. Further, in the case of documentary for example, even if the quota was doubled it is hard to see how this would protect Australian levels in the absence of other measures.

Our considered view is that the package of measures we have outlined would go some considerable way towards maintaining the integrity of the Australian Content Standard and the current levels of Australian content. We are firmly of the view that some modest increase in quota levels by itself would in no way guarantee continuing minimum levels of Australian content.

Accordingly, we feel we would be in a better position to make a more considered submission on this matter later in the inquiry.

### ***Incorporating on screen criteria in the test for eligible programs***

We share the ABA's concerns set out in on page 33 of the discussion paper about the policy and administrative difficulties of "on screen" tests.

This issue was thoroughly considered in earlier enquiries regarding the Standard and the consensus that emerged was that an on-screen test is not the most appropriate way to measure Australianness. As the ABA argues "If eligible programs were determined by means of an on screen test alone, the nationality of those making the program would not matter and programs from anywhere in the world could be eligible under the standard" (p32).

Nevertheless, we feel we are not in a position to completely dismiss the option of incorporating 'on-screen' criteria with other elements of the test. We would also like the opportunity to further comment on this matter in the course of the inquiry if necessary.

## **6. OTHER ISSUES**

We now address the issues raised by the ABA's discussion paper which are not directly relevant to the High Court decision.

### ***Definition of Documentaries***

The ABA advises there has been some uncertainty about the documentary definition and in particular that the boundary between documentary and infotainment and magazine programming has not always been well understood.

There has been uncertainty as to the distinction between light entertainment and documentary programs and the extent to which sports coverage and sports news come within the exceptions in the Standard.

The current definition of documentary is

"A program that is a creative treatment of actuality other than a news and current affairs program or a magazine or infotainment program".

We support the amendment proposed by the ABA, namely the exclusion of sports and light entertainment from the definition.

Further, we consider it may be appropriate to provide definitions of magazine and infotainment programs in the Standard. It appears that a considerable amount of the material being currently categorised as documentary is very close to magazine/infotainment programming.

We have examined the lists of documentary titles screened by commercial broadcasters in 1996 and 1997. We note that there is a certain sameness in the subject matter being largely adventure, travel, or hobby related, for example, fishing. It would appear the goals of high quality and innovative programming that reflect Australian identity, character and cultural diversity are not being adequately met by the current operation of the documentary quota.

We understand both Film Australia and the SPAA/ASDA Documentary Council have made submissions dealing in detail with specific documentary issues. We support the thrust of those submissions aimed at further refining the definition of documentary and reviewing the operation of the documentary sub-quota so it better serves the cultural objects of the Act.

### ***Sketch Comedy***

We support the ABA proposal to amend the definition to ensure it is clear that sketch comedy is not stand up comedy or an incidental sketch that is a

component of another program of another kind and to ensure that such programs are original works that do not comprise substantial amounts of stock footage or other recycled material.

### ***Creative Elements Test for Animation***

We share the view of the ABA that the creative elements test does not take the nature of animation into account and that consequently there may be uncertainty about the level of Australian content in some animated drama. We endorse the proposal that the key creative roles involved should be included in a creative test for animation.

We agree the following should definitely be added:

- storyboard supervisor;
- layout artist; and
- key animator.

The ABA had listed three other roles for possible inclusion,

- background artist;
- animation director; and
- editor.

We understand that there are other key creative roles which should also be considered for inclusion, namely,

- character designer;
- production designer;
- composer; and
- sound designer.

We consider the ABA should consult directly with interested parties to finalise the list of key creative positions which should be held by Australians.

### ***Alignment of distribution windows for Pay television and free-to-air television i.e. allowing telemovies to count as first release drama if they have been broadcast on pay.***

Currently a feature film can still count as first release on free-to-air television (and towards quota) when it has already been shown on pay television. The pay television industry has been arguing that the same situation should apply to telemovies. They argue the current situation is a disincentive for free-to-air and pay television to co-produce television drama, in particular, Movie of the Week-type telemovies.

We are not currently in a position to make a submission on this matter. We are aware the issue is controversial and in our view its needs more thorough consideration.

As the ABA paper points out "such an amendment (ie in relation to telemovies) would be difficult to justify in terms of the objects of the Act if the result were to be simply a reduction in the costs of compliance for commercial networks with no net increase in overall amount or value of Australian content."

We are mindful of the fact that the system of Australian content regulation for pay television is still under review and we have some concerns about dealing with an issue relating to pay television in isolation. We hope to be in a position to make more detailed submissions on this issue in the course of the inquiry.

## APPENDIX 1

### Expenditure by Commercial Television on Australian Programs

	92/93	93/94	94/95	95/96	96/97	change 95/96 - 96/97
Aust Drama	89.0	72.6	72.8	77.2	73.8	-4.4%
Children's Drama	4.4	3.0	4.4	7.0	7.8	11.3%
Documentaries	17.9	19.3	24.0	24.0	13.3	-44.7%
<b>Total Australian</b>	<b>517.6</b>	<b>469.9</b>	<b>477.4</b>	<b>504.0</b>	<b>549.6</b>	<b>9.0</b>
Foreign Drama	164.9	160.9	183.4	174.2	199.6	14.6
<b>Total OS</b>	<b>183.2</b>	<b>184.1</b>	<b>200.6</b>	<b>196.5</b>	<b>214.9</b>	<b>9.4</b>
<b>Total Spending</b>	<b>700.7</b>	<b>654.0</b>	<b>678.0</b>	<b>700.6</b>	<b>764.5</b>	<b>9.1</b>

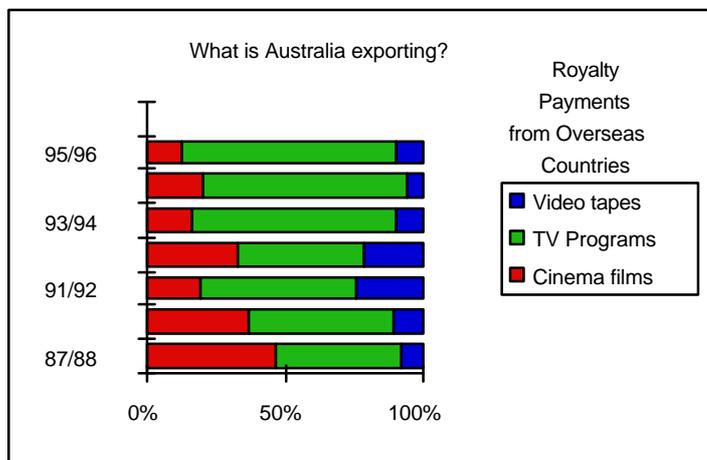
Source: ABA Broadcasting Financial Results 1996/97

Note: The figures for children's drama in 1995/96 reflects the increases in the children's drama quota introduced then. Prior to 1996 the requirement for first release children's drama was 16 hours and there was no requirement as there is now for 8 hours of repeat children's drama.

## APPENDIX 2

### Value of Exports by Media

Exports \$m	Cinema films	TV Programs	Video tapes
87/88	49	48	8
89/90	23	33	7
91/92	12	35	15
92/93	28	39	18
93/94	13	60	8
94/95	20	73	6
95/96	15	91	11



Source: AFC News Nov/Dec 1997

## APPENDIX 4

**Table 1 - First release Australian drama broadcast by Australian commercial television networks: 1993-1997**

Year	Commercial Free-To-Air Television	
	Drama Hours (average of 3 networks)	Australian Drama As % of Total Hours
1993	195	2.2%
1994	180	2.1%
1995	168	1.9%
1996	183	2.1%
1997	168.10	1.9%
5 year average	178.82	2.04%

*Source: Australian Broadcasting Authority Australian Content compliance results.*

**Table 2: First release Australian drama broadcast by Australian commercial networks 1988/89 - 1992 (hours)**

	1988/89	1990	1991	1992	4 year average
Average per year	206	236	238	227	227

*Source: AFC Get The Picture 3rd Edition, AFC 1994 p.97*

## APPENDIX 5

**Table 1 - Television Production 1995/96, 1996/97**

	<b>94/95 M\$</b>	<b>95/96 M\$</b>	<b>96/97 M\$</b>
Total value	162	208	236
Increase		46	28
Value of CTPF production		25.5	30.5
Increase without CTPF production		20.5	-2.5

*Source: AFC National Survey of Feature Film & independent TV drama production 1996-97, and CTPF.*

**Table 2 - Projects Supported by the CTPF 1995/96 to 1997/98**

	<b>1995/96</b>	<b>1996/97</b>	<b>1997/98</b>
Telemovies	6	3	3
Mini-Series	2	2	
Series Pilot		1	1
Feature	1		
Children's Drama	1	2	5
Documentary		5	4
Total	10	13	13

*Source: CTPF*

## APPENDIX 7

**Table 1 - NZOA TV Program Funding 1995/6 & 1996/7**

	hours	'96/97 funding (\$000)	% of total production cost	hours	'95/96 funding	% of total Production Cost
Drama/						
comedy	62	\$15,998	55%	77	\$13,914	60%
Documentaries	99	\$9,758	62%	107	\$9,329	71%
Children and young persons	410	\$10,790	78%	391	\$9,179	79%
Special interest programs	204	\$10,790	85%	247	\$11,755	80%
Total production funding	775	\$44,841		822	\$44,177	
Plus development funding		\$260			\$751	
Total television funding		\$45,101			\$44,928	

Source: NZ on Air Annual Reports 1995/6 p x and 1996/7 p.x (put in page)

**Table 2 - NZOA Subsidised Television Program Funding 1990-1997 (Hours)**

Program Type	1990	1991	1992	1993	1994	1995	1996	1997
Drama	49	77	187	213	229	218	77	62
Documentaries	60	119	112	214	200	169	107	103
Children's	162	283	410	447	476	469	391	410
Maori	74	118	145	118	116	n/a	n/a	n/a
Special interest	189	91	90	134	148	210	247	204
Total	534	688	944	1126	1169	1066	822	779

Source: NZOA Annual Reports 1994/95 (p37), 1995/96 (p38), 1996/97 (p27)

NOTE: Since 1994 most support for Maori programming has been through NZ On Air to Te Manga: Paho, the separate and independent Maori broadcasting funding agency - hence these figures are not now published in NZ On Air Annual Reports.

**APPENDIX 3**

<b>Network compliance with the Australian Content Standard 1996 and 1997</b>										
	<b>Transmission Quota</b> %		<b>Australian Drama</b> total annual				<b>Australian Documentary</b> total hours of 1st release		<b>Australian C Drama</b> total hours of 1st release	
<b>Minimum annual requirement</b>	<b>50%</b>		<b>225</b>		<b>hours</b>		<b>10hrs</b>		<b>24hrs</b>	<b>28hrs</b>
<b>Station</b>	1996	1997	1996	1997	1996	1997	1996	1997	1996	1997
<b>7 Network</b>										
<b>ATN</b>	56.4	52.7	335.69	263.93	25.3	188.17	20	34	24	27.5
<b>HSV</b>	57.35	56.01	334.63	259.93	244.9	186.17	20	42	24	27.5
<b>BTQ</b>	57.61	53.86	331.69	268.43	251	189.95	19	32.5	24	27.5
<b>SAS</b>	60.98	61.08	324.29	261.48	233.25	186.68	17	34.5	24	27.5
<b>TVW</b>	60.54	58.95	327.69	267.82	245.15	190.13	19	35	24	27.5
<b>9 Network</b>										
<b>TCN</b>	60.6	62.9	268.7	272	149.6	124.8	19.5	24	24	28
<b>GTV</b>	59.1	60.0	271.7	269.6	149.9	124	19.5	23	24	28
<b>QTQ</b>	62.5	63.5	270.8	270.8	148.8	124.2	19.5	27	24	28
<b>10 Network</b>										
<b>TEN</b>	51.32	50.9	248.4	266.5	183	189.5	10	10.5	24.25	28
<b>ATV</b>	51.32	50.9	248.4	266.5	183	189.5	10	10.5	24.25	28
<b>TVQ</b>	51.32	50.9	248.4	266.5	183	189.5	10	10.5	24.25	28
<b>ADS</b>	51.32	50.9	248.4	266.5	183	189.5	10	10.5	24.25	28
<b>NEW</b>	51.32	50.9	248.4	266.5	183	189.5	10	10.5	24.25	28

*Source: ABA Discussion Paper: Review of the Australian Content Standard. July 1998 Attachment C*

**NOTE:** In 1997, the Seven Network and regional station STQ failed to comply with the minimum annual quota for the broadcast of first release Australian C drama and repeat C drama programs. The licensee's have undertaken to commission and broadcast additional programs to compensate for the shortfalls.

## APPENDIX 6

### Hours of New Zealand Programs on New Zealand Television 1988-1997

Program Type	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1997: First Release
Drama / Comedy	39	59	55	86	223	264	283	357	357	336	170.88
Sports	509	691	1653	1283	1735	1075	1531	1545	1077	865	864
News & C Affairs	550	709	997	924	1009	1023	1087	1045	1198	1440	1437.50
Entertainment	292	458	528	525	886	588	364	454	302	482	230.08
Children's	325	440	534	739	1264	1019	861	745	745	806	366.58
Children's drama	12	21	25	20	33	27	2	28	12	0	
Maori	131	144	143	111	163	170	156	173	173	256	181
Documentaries	43	36	107	139	175	190	207	257	252	269	189.01
Information	213	253	208	213	226	431	477	415	867	1147	771.77
<b>Total NZ Content</b>	<b>2112</b>	<b>2804</b>	<b>4249</b>	<b>4039</b>	<b>5715</b>	<b>4788</b>	<b>4969</b>	<b>5018</b>	<b>5066</b>	<b>5601</b>	<b>4210.85</b>
% of Schedule	23.9	31.8	24.2	31.7	30.2	23.2	23.2	19.7	19.2	21.3	16.0
<b>Total First Release NZ in Prime Time</b>	<b>686</b>	<b>943</b>	<b>1189</b>	<b>1281</b>	<b>1640</b>	<b>1769</b>	<b>1821</b>	<b>1546</b>	<b>1586</b>	<b>1636</b>	
<b>% of Prime Time</b>	23.5	21.6	27.2	29.3	37.5	40.5	41.7	35.4	35.4	37.5	

Source: NZOA, Local Content Research New Zealand Television 1995, pp4, 15

- (1) Figures for 1988-96 are all programs including first release and repeats. 1997 total figures and first release are shown separately.
- (2) New Zealand on Air came into existence in 1989.