
# SUBMISSION

# to the

# SENATE ENVIRONMENT, RECREATION, COMMUNICATIONS AND THE ARTS LEGISLATION COMMITTEE

## Paragraph 160(d) of the Broadcasting Services Act 1992

**November 1998**

**"Every standard that our impressionable mass audiences imbibe is the standard of an alien culture. Like pre-Chaucerian England, tugged between Italy and France, we are also torn between the dominant cultures, those of America and England. No wonder our voices are so thin and weakly articulated as to be barely audible to visitors when they step ashore. The daydreams we get from celluloid are not Australian daydreams. Our kingdom is not of this world."**
Tom Fitzgerald writing as Tom Weir in *Nation* 1958.

**"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.

**"Commercial television has a special role to play in the promotion of Australian culture by virtue of the influence it continues to exercise over the attitudes and cultural life of the community. Commercial television is at the heart of our popular culture because it reaches into the lives of the majority of Australians. It entertains and informs Australians and has the power to shape our understanding of ourselves, our community and the world.**

**The importance of commercial television in the promotion of Australian culture is the foundation of the ABA's regulation for minimum levels of Australian content."**
Australian Broadcasting Authority, *Australian Content, Final Report*, September 1995.

**"We should say thanks in part to the regulators and their foresight in forcing us to make Australian content because I think that will be the driver for our ongoing success in the new broadcast environment."**
Bob Campbell then Chief Executive of the Seven Network, Sydney Morning Herald, 20/7/97.

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# Executive Summary

This submission argues that repeal of section 160(d) is necessary for the continued achievement of Australia's cultural objectives.

The recent High Court decision in the Project Blue Sky case found that s160(d) prevailed over the cultural objectives of the Broadcasting Services Act and over the requirement under s122 for the Australian Broadcasting Authority (ABA) to develop standards for Australian content.

The ramifications of the decision are twofold:

- New Zealand made programs will now gain access to the Australian content quotas, and consequently the amount of Australian programming available to the viewing public will be reduced.

- in the context of trade liberalisation and the accompanying pressure on cultural policy measures, the case for maintaining content regulation in the future will be undermined.

**The meeting of Australia's Cultural Objectives**
and
**Object 3(e) of the Broadcasting Services Act**

Australian content regulation for commercial television has been one of the most successful cultural policy measures of successive Australian governments.

Content regulation has been considered necessary to ensure the Australian community sees their own lives, issues and concerns reflected on commercial television.

This is as important in the twenty-first century as it was when the first regulations were introduced in 1961.

Major changes are occurring in the media landscape as a result of globalisation and technological change. Free to air television is about to go digital and the Government has ensured in its legislation that regulation for Australian content will continue on the new digital services.

The cultural policy objectives of the Broadcasting system as determined by Parliament are found in the objects of the Act and particularly object (e) which is:

- "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity."

Because of s160(d) the Australian content standard will now become an Australian and New Zealand standard.

The nature of international television markets means New Zealand programs will be cheaper than Australian programs and this will inevitably provide a strong incentive to commercial broadcasters to fill some of their quota requirements with New Zealand programs.

Repeal of section 160(d) is necessary to

- ensure Australia's cultural objectives continue to be met by maintaining the integrity of Australian content regulation;

- ensure that object 3 (e) of the Act is not undermined and that the New Zealand 'identity, character and cultural diversity' is not promoted in the place of Australian.

**The implications for Australia's international obligations and their implementation, for the conduct of its international relations, and for its international trade and trade policy interests.**

The nature and scope of s160(d) means trade obligations override cultural objectives. Retaining s160(d) means accepting that this will be the case well into the future.

This is counter to Australia's interests and not necessary for the future conduct of our international relations.

The maintenance of s160(d) is at odds with the position Australia has taken in other international contexts -most particularly in the GATT negotiations and in the MAI discussions.

In recent years there has been growing recognition of the legitimacy of countries seeking exemptions for cultural measures in trade liberalisation forums.

Unless s160(d) is repealed, Australia's ability to do this will be severely weakened.

The ramifications of s160(d) go beyond the CER treaty with New Zealand. Australia is party to a large number of international treaties. It is now open to other countries to challenge Australia's content requirements on a similar basis to that adopted by Project Blue Sky. We are aware of at least three treaties where this concern is relevant

In the context of Australia's international position, it is highly relevant to consider the key role television programs have played in promoting Australia's international profile.

The success of Australian television programs overseas has had significant 'flow on' benefits. Without the solid base provided by content regulation, the production of programs reflecting the diverse images of Australia nationally and subsequently internationally, would not be possible.

**The role and function of the Australian Broadcasting Authority in relation to the setting and administration of Australian content standards.**

Section 160(d) means the ABA is faced with conflicting obligations. On the one hand:

- it is required under s122 to determine a standard relating to the Australian content of programs; and

- it is required to do this in a way which promotes the role of broadcasting in developing and reflecting a sense of Australian identity, character and cultural diversity (Object 3(e)).

Yet on the other hand, it is required to carry out its functions "in a manner which is consistent with Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country" (s160(d)).

The High Court finding that s160(d) overrides the other provisions means that the ABA is effectively unable to properly carry out its obligations. It is now in a position where;

- it has to develop a standard for Australian **and** New Zealand content; and where;

- the broadcasting services will be promoting New Zealand identity, character and cultural diversity.

It is in our view very doubtful that this was the intended effect of parliament when passing the Act.

The ABA needs to be relieved of its contradictory obligations and the primary intention of Parliament needs to be reinstated.

## 5. The ABA's draft revised Australian content standard

The ABA's draft revised standard had only just been released at the time of finalising this submission. Accordingly we reserve detailed comment on this aspect to a later date.

What can be said is that the draft standard does nothing to change the analysis presented in this submission, or to allay the concerns about the negative impact on Australia's cultural objectives.

The AFC and other industry organisations argued in their submissions to the ABA that a comprehensive approach, involving a package of several measures, was needed to maintain current levels of Australian content.

The ABA in its draft standard has rejected this recommendation and, in its own words, opted for "minimal change". The ABA has chosen not to incorporate the key elements of our package.

The ABA's initial discussion paper, the detailed submissions from all the major parties, and now the draft standard, reinforce the analysis that there is no satisfactory way of reconciling the conflicting obligations imposed on the ABA.

Of necessity given the existence of s160(d), all options canvassed mean New Zealand programs will be 'counted as Australian and the New Zealand industry gains access to the support mechanism intended to promote Australian culture for the benefit of the Australian community.

## 2. INTRODUCTION

*"It is the duty of government to review the structure periodically, and change should be mandatory if it can be shown that change is warranted, in the light of the goals society sets for its broadcasting system."*
Senate Standing Committee on Education, Science and the Arts in 1971 enquiry.[1]

We respectfully submit this view is relevant to the current circumstances.

The regulation of broadcasting and the requirement that commercial broadcasters should broadcast minimum levels of Australian content has been a major feature of cultural policy, supported on a bipartisan basis, for many years.

The reason is very simple. Given its pervasive power as a medium it is important that Australians see something of themselves on television. It is well recognised that the economics of television, and the sheer size and power of the American industry in particular, mean market forces alone would not deliver an adequate presence for Australian programs.

Over the last thirty years we have been able to watch a wide range of programs made by Australians for Australians. The 'roll call' on page 7 indicates the diversity of these and reminds us of the key role these programs have played in our lives over the last twenty or so years. Successive generations of Australians have now been entertained, amused, outraged, stimulated and disturbed by the diverse range of Australian programs on offer.

Australian content regulation has been a key element in the mix of policy measures which successive governments have established to ensure the existence and development of an Australian film and television industry which can express local stories, idioms and concerns.

Australia has emerged as a considerable production centre and exporter of television programs, thanks, in large part, to this support.

The need for this support is as crucial today as it was when television first came to Australia in the late fifties. Indeed, the need may be even greater given the increased globalisation of all media and continued pressure for cultural measures to be subsumed by trade liberalisation measures.

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1 *Second Progress Report on All Aspects of Television and Broadcasting, including Australian Content of Television Programmes*, August 1973. Govt Printer, Canberra 1974 p7. The committee was making the point that while broadcasting regulation "stopped short" of detailed program content control, there was right and need for government from time to time to change decisions and institutional arrangements. It also said, "If it is accepted that governments are entitled to make such decisions, there can be no dispute as to their right to change them."

In the late fifties and early sixties the issue was - Would there be any Australian programming? Today, the issue is - Will the Australian programming we have, continue to be available into the future?

David Gonski in his review of government subsidy to the film industry believed:

*"International trade liberalisation will challenge the legality of current local content regulation in Australia and in other countries. The project Blue Sky case is indicative of the pressure that international trade reform will bring to bear on Australian producers. Maintaining an Australian 'voice' amid growing demand for international content will present a major challenge to the Australian film and television industry."*[2]

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2 David Gonki, *Review of Commonwealth Assistance to the Film Industry*, January 1997, p16. Department of Communication and the Arts, Canberra.

## ROLL CALL

**Homicide**
**My Name's McGooley - What's Yours?**
**Number 96**
**Skippy**
**Division Four**
**The Box**
**The Mavis Bramston Show**
**The Young Doctors**
**The Sullivans**
**Cop Shop**
**The Restless Years**
**Prisoner**
**Kingswood Country**
**A Town Like Alice**
**The Flying Doctors**
**A Country Practice**
**Sons And Daughters**
**All The Rivers Run**
**Neighbours**
**Home And Away**
**E Street**
**Bodyline**
**The Bangkok Hilton**
**The Dismissal**
**The Cowra Breakout**
**Return To Eden**
**Fields Of Fire**
**Melba**
**Vietnam**
**Cyclone Tracy**
**Harp In The South**
**Dunera Boys**
**Rafferty's Rules**
**The Shiralee**
**The Battlers**
**Banjo Paterson's The Man From Snowy River**
**Blue Heelers**
**Water Rats**
**Halifax fp**
**Murder Call**
**State Coroner**
**All Saints**
**The Day Of The Roses**
**Fast Forward**
**The Comedy Company**

There are children's drama programs and series such as *Skippy, Sky Trackers, Lift Off, Falcon Island, The Girl From Tomorrow, Ocean Girl, Round The Twist, Clowning Around, The Adventures Of Blinky Bill, Ship To Shore, Cosmo Kids, The Ferals, Under The Skin* and *Adventures on Kythera*.

The High Court decision in favour of Project Blue Sky has created a situation where it is no longer possible to have an Australian content standard. Australia must now encompass Australia **and** New Zealand. The terms of 160(d), the existence of a large number of international treaties, and the continued pressure for trade liberalisation to be extended to cultural measures, has created a situation where it appears programs from other countries may also have to be treated as "Australian".

This needs to be urgently addressed. Australian society has decided through its governments that it wants and needs Australian content rules. Surely these have to be for Australian programs - not those of other countries.

This we submit is the central issue facing this enquiry.

Section 160(d) must be repealed to ensure:

- New Zealand material is not given preferential access to a cultural support mechanism set up to support Australian programs; and
- the High Court decision does not become a precedent which allows our content regulations to be challenged by other countries in the future.

## 3. AUSTRALIA'S CULTURAL OBJECTIVES AND CONTENT REGULATION

In section 2 and 3 we deal with the following two terms of reference;

(1) the implications of para 160(d) for the meeting of Australia's cultural objectives;

(2) the implications in regard to object 3(e) of the Broadcasting Servicing Act.

### 3.1 THE 'EARLY DAYS' - GROWTH OF GOVERNMENT SUPPORT FOR AUSTRALIAN CONTENT

Television began transmission in Australia in 1956. As Gil Appleton comments the Australia of the time has been described as "a country without any coherent sense of itself; a country accustomed to economic and intellectual dependence on other countries; a threatened constricted society, communicating with the world only to a small extent"[3]

The Australia of the late 1990's is a very different place. Few would argue that the amount and diversity of Australian programming over the period has played a major role in the transformation, and in developing the sense of national identity and cultural maturity Australia now displays.

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[3] Gil Appleton *"How Australia Sees Itself: The Role of Commercial Television"* as published in ABT 1991, *Oz Content: An Inquiry into Australian Content on Commercial Television,* Vol 3 p97.

Australian content regulation was first introduced in 1961 five years after the start of television. It was one of the early measures by which the government responded to the desire of the community for an end to the 'cultural cringe' and the development of distinctly Australian forms of cultural expression.

The late fifties and early sixties saw the resurgence of home grown cultural activity. Government responded positively with the essential public support needed for this to survive and thrive. This period saw the establishment of the various key bodies and programs that have underpinned the flourishing of Australian cultural activity that has occurred since that time and which younger Australians now take for granted.

A Senate Select Committee (the Vincent Committee) conducted an inquiry into Australian productions for television in 1962 and recommended the introduction of minimum quotas for drama. The sixties saw a lively public campaign supporting this recommendation under the banner of "TV - Make It Australia" and the first drama quota was introduced in 1967.

The Australian Council for the Arts (later the Australia Council) was established in 1968. In 1969 and 1970 the first grants for film production from the Commonwealth Government's Experimental Film Fund were made and in 1970 the Australian Film Development Corporation (now the Australian Film Commission) was established.

The 1971-73 Tariff Board Inquiry into Motion Picture Films and Television recommended assistance on "a variety of national, cultural, artistic and aesthetic aspirations". The Australian Film and Television School (now the Australian Film, Television & Radio School) was established in 1973 and throughout the seventies various state governments set up their own film agencies.

Successive governments continued to support these developments and introduce new measures. While policy details have differed at times, the basic premise has received bipartisan support. This is that given the dominance of foreign culture, Government support is essential for there to be a domestic industry capable of producing quality films and television programs made by Australians for Australians.

### 3.2 THE 90's - A MATURE AND SUCCESSFUL FILM AND TELEVISION CULTURE

There has been growing recognition by governments and by the community at large of the key role our films and television programs have played in Australia's social and cultural life, and in the growing national maturity and sense of identity that has marked the last thirty years.

The Gonski report described this role in the following terms:

"A vibrant Australian film and television industry can play a key role in:

- defining and exploring what it is to be Australian;
- encouraging national maturity and independence through a developed awareness of self and the capacity to honestly appraise that self image;
- recognising and exploring our own diversity;
- promoting a more inquisitive, imaginative and thoughtful society;
- projecting diverse images of Australia both nationally and internationally; and
- providing for current and future generations an historical record of contemporary issues and events that illustrate life in Australia. "[4]

Government supports this role through local content rules for free to air television and subscription television services, indirect taxation incentives and direct funding for development, production, promotion and related activities.

The interrelationship between the film and television sectors is a key aspect of the continued success of the industry.

The Gonski report summed it up as follows:

> *"The Review believes that Commonwealth assistance has been critical to the building and development of the industry to this current level of expertise and quality."*
>
> *"The Australian Film and Television industry has received significant and continuing Commonwealth assistance over the last twenty years. The Commonwealth provides this support in order to achieve its cultural objective and to enrich the cultural life of all Australians"*
>
> *"Film and television productions are an integral part of Australian life. At the end of the twentieth 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."*

Gonski also noted that while comparatively small the film and television sector "continues to be highly prized by the Australian community and recognised throughout the world for its quality and innovation."[5]

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4 Gonski, op cit p15.

5 Gonski, op cit p5, 6 & 14.

The initial impetus for content regulation and other measures of support was to provide Australian stories for domestic audiences. However as the industry has matured and diversified, it has become increasingly apparent that our films and television programs have appeal internationally and that this is based on their distinctly Australian themes, idioms and styles.

Arguably, our film and television programs have been one of the major means by which contemporary Australia has become known internationally.

Australia has a large negative balance of trade in cultural goods and services with a deficit of $3.1 billion in 1995/96. In that year we spent over four times as much importing films, television programs and videos as we earned from exporting those we produced.

However the area of television programs has seen increased overseas sales in recent years and is making a significant contribution to reducing the gap. The value of television exports rose from $73 million in 1994/95 to $91 million in 1995/96, an increase of 24.6%. Overall, in the period 1992/93 to 1995/96 the increase has been 133%. (See Appendix 1 for more detail.)

Water Rats has sold to 169 countries, Murder Call to 100 countries, Neighbours and Home and Away have been very successful in the UK and have sold to around 120 countries between them. Neighbours has been on the BBC for 10 years. Blue Heelers has sold to 76 countries. (FACTS ABA submission and Variety 19-25 January.)

The children's programs Skippy, Crocadoo and Spellbinder have sold widely around the world. As the Gonski report noted Australian children's television programming in particular, "has established a niche market in supplying quality programming to English-speaking international markets which are generally under-supplied by other nations."[6]

# 4. THE ROLE OF CONTENT REGULATION

## 4.1 THE IMPORTANCE OF TELEVISION

Because of the pervasiveness and popularity of television, the encouragement of Australian content is the most far reaching of the various forms of cultural support the government provides to the community.

Television is the most popular form of entertainment enjoyed by Australians and is the most influential means of communication.

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6 Gonski, op cit, p14.

The 1997 AC Neilson survey of viewing trends shows that average daily viewing time for people in metropolitan areas is 3 hours and 13 minutes and in regional areas, 3 hours and 23 minutes. The report also shows that 33% of all people watched television between 6pm and 12 midnight.[7]

A 1992 ABS survey found that watching television was the top leisure time activity of Australians. People spent 133 minutes per day doing this, followed by listening to radio, compact discs - 121 minutes, and talking 114 minutes.[8]

As Stuart Cunningham notes:
*"Television has been called overwhelmingly the most pervasive contemporary mass medium. Across the industrialised world and now almost universally through the developing world television's centrality is recognised by its reach, power and influence, and its popularity. Television in Australia is no exception. Television is a standard feature of virtually every Australian home."*[9]

## 4.2. THE BROADCASTING SERVICES ACT (ACT) AND OBJECT 3 (e)

The Act which came into force in 1992 continued the emphasis on cultural objectives and re-emphasised it in a number of ways.

Most significantly at a time when elements of self regulation were being introduced into the broadcasting system, Parliament determined that Australian content and children's television were not matters for self regulation and that the ABA must determine standards in these areas.
"The requirement for an Australian content standard reflects a parliamentary recognition of free-to-air television's high level of importance and influence in Australian cultural life."[10]

Object 3(e) of the Act sets out the specific objective regarding Australian content which is:

> "(e) to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity."

Related to this is objective (b):

> "to provide a regulatory environment that will facilitate the development of a broadcasting industry that is efficient, competitive and responsive to audience needs."

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7 A.C.Neilson, *TV Trends*, 1998.
8 ABS & Australia Council, *Public Attitudes to the Arts, Australia*, November 1997, RIS.
9 S. Cunningham & G. Turner, (ed) 1997, The Media in Australia, Allen & Unwin p90.
10 ABA Discussion Paper, July 1998, *Review of the Australian Content Standard*, p19.

The Explanatory Memorandum to the BSA Bill 1992 sets out the underlying policy for Australian content regulation.

It is intended that commercial broadcasters broadcast Australian programming which:

- reflects the multicultural nature of Australia's population
- promotes Australians' cultural identity
- facilitates the development of the local production industry.
- includes a requirement for Australian programming for children.[11]

The memorandum here recognises the close connection between objects (e) and (b) of the Act. To have programs reflecting Australian cultural identity you clearly need to have an Australian industry and Australian program makers.

Section 122 of the Act deals with the ABA's power to determine standards. It provides that the ABA must determine standards that are to be observed by commercial television broadcasting licensees, for children's programs and for the Australian content of programs.

The standard under threat sets minimum levels of Australian programming and in particular requires that minimum amounts of first release Australian drama, documentary and children's programs are broadcast on commercial television.

It defines "Australian" to mean a citizen or permanent resident of Australia. An Australian program is one that is produced under the creative control of Australians who ensure an Australian perspective, "by reference to a set of objective criteria".

Section 160 imposes general obligations on the ABA in these terms.

"The ABA is to perform its functions in a manner consistent with:

(a) the objects of this Act and the regulatory policy described in section 4; and

(b) any general policies of the Government notified by the Minister under section 161; and

(c) any directions given by the Minister in accordance with this Act; and

(d) Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

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11 Ibid p13

Applying the principles of statutory interpretation the High Court found that section 160(d) is the dominant provision which directs how the ABA's functions must be exercised, including the determination of the standard under section 122.

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."*

The High Court decision has shown that section 160(d) is an impediment to the achievement of the objects of the Act.

By requiring that New Zealand programs be treated as Australian it fundamentally undermines the object in s 3(e). The standard is no longer an Australian standard but becomes an Australian and New Zealand standard. The Act will promote New Zealand culture on our television screens at the expense of Australian, and it will promote the development of the New Zealand film and television industry.

### 4.3 THE CURRENT RULES

The current Australian content rules are by any measure modest.
There are two main aspects.[12]

1. The transmission quota.
   Australian programs must be 55% of programming broadcast between 6.00 am and 12.00 midnight.

2. The sub-quota areas
   Each licensee must broadcast the following minimum amounts of Australian programming.

| | |
|---|---|
| ***Adult drama*** | 225 points per year. Points depend on program type with 1 per hour for serials, 2 per hour for series and 3.2 per hour for mini-series, feature films and telemovies. |
| ***Documentary*** | 10 hours per year |

[12] See Appendix 2 for more detail on the standard.

| | |
|---|---|
| ***General Children's Programs*** | 130 hours of "C" programs[13]<br>130 of "P" programs |
| ***Children's Drama*** | 32 hours per year |

It is the subquota areas of adult drama, children's drama and documentary which are particularly vulnerable to replacement by imported programming. There is a natural protection in the other areas which make up the bulk of the transmission quota - news, current affairs, sports, and light entertainment, where production costs are lower and where it would not make sense to broadcast large amounts of foreign programming.

Tom O'Regan comments that Australia behaved like other countries in applying program quotas to particular categories where local programming cannot be taken for granted. He also emphasises that content regulations were designed not to 'protect' the industry but to ensure an Australian supplement as "Imports continued to dominate prime-time and off prime-time in the drama category."[14] This continues to be the case.

Mandatory requirements in the subquota areas are minimal. In practice, the drama requirement provided in 1997 an average of 168 hours of Australian drama per network - just half an hour a day and a mere 1.9% of all programming.
(See Appendix 3 for more detail on network compliance with the content standard).

## 4.4 WHY REGULATION IS NEEDED

The answer is clear. As economists Molloy and Bergin put it, *"It is a fairly uncontroversial statement that, apart from the USA, at least in the English speaking world, no significant national film (audio visual) industries would exist without government support"*.[15]

Successive governments have supported the retention of minimum content rules understanding that without regulation there was a very real danger that levels of local content would fall to unacceptably low levels.

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13 "C" programs are those which are suitable for primary school children according to laid down criteria. "P" programs are those which are suitable for pre school children.

14 Tom O'Regan, *The Janns Face of Australian Television*; Local and Imported programming, in A Moran (ed) p100, *Film Policies: An Australian Reader*.

15 S.Molloy & B.Burgan, *The Economics of Film and Television in Australia*, AFC, 1993, p11.

In his address to the industry at the 1997 conference of the Screen Producers Association of Australia, Senator Richard Alston acknowledged:

*"An appropriate regulatory framework is required to enable Australian television audiences to have access to Australian film and television product."*

This is primarily because of the economics of television markets internationally and the wide disparity of prices obtainable in primary and secondary markets. Television producers aim to recover all, or most of their production costs from their home market. Sales to secondary markets are made at a level which the market can bear but have little relationship to the initial production cost, since the cost of duplicating the original is a fraction of the cost of creating the program.

Consequently imported programs are always significantly cheaper for broadcasters to purchase, than home grown ones are to produce. Thus top rating American programs which cost around US$1 million or more an hour to make, sell into Australia for $19,000 an hour. By contrast the cost of producing Australian 'strip drama', the cheapest form of drama, is around $100,000 per hour.

Mandating for Australian content has been a part of the broader system of broadcasting regulation designed to achieve important public policy goals.

As mentioned, in Australia the sixties saw intense public support and agitation for local content regulation and particularly for drama quotas.

The impulse for this was the dearth of Australian drama at the time. For example, only one Australian drama was produced in 1959.

The purchase by HSV7 of *Homicide* produced by the Crawfords in 1964 is widely considered to be the watershed for Australian television drama.

The period following the introduction of Australian content requirements showed a steady and sustained increase in the overall amount of Australian programming on television.

There has been some debate about the extent to which the growth of Australian drama has been due to quota protection or audience demand. Some commentators point to the ratings successes of certain programs and argue that regulation is no longer needed as Australian drama content is now audience driven. This same argument is regularly made by the commercial networks.

However the predominant view is that content regulation has played a key role, in ensuring diversity and quality as well as quantity, in local programming for Australian audiences.

Jacka and Cunningham state that the quotas have been " the most significant regulatory stimulus to the development of a production industry with export potential."[16]

As the ABA put it in 1994 "Australian content regulation has helped create an environment within which the preference for and popularity of Australian programs has been fostered and given an opportunity to be demonstrated."[17]

## 4.5 A CONTINUING NEED

The need for regulation to achieve cultural objectives was most recently reaffirmed by the Gonski review. The review concluded that without support mechanisms there would still probably be some Australian drama but it would be restricted to low cost series and serials. Further, the Australian content standard should be supported as a major form of assistance provided to the Australian film and television industry.[18]

The ABA stated:

*"Experience with the current and previous Australian content standard shows that without regulatory requirements the subquota areas of first release drama, documentary, C drama and C and P programs are most vulnerable to replacement by imported programs."*[19]

The compliance results for 1996 and 1997 continue to illustrate this point. While all three networks exceeded their adult drama points in both years, they just met the children's drama quota in 1996. In 1997, two networks were in the same position and one, Channel 7 was half an hour under the minimum requirements. Further, Channel 10 only just met the minimum 10 hour documentary requirement in both years.

The fact that broadcasters have just met or are just below quota levels is compelling evidence of the continued relevance of the quotas.

A salutary lesson can also be learned from the outcome of the relaxation of restrictions on imported commercials from the beginning of 1992. In the course of the debate leading to this relaxation, advertisers assured the ABA there were "natural limits" to the use of foreign advertisements given audience preference for Australian faces and images in television commercials.

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16 S.Cunningham and E.Jacka *Australian Television and International Mediascapes*, Cambridge University Press 1996, p58

17 ABA

18 Gonski, op cit, p57.

19 ABA, 1998, op cit, p24.

Yet a 1994 study conducted by Mervyn Smythe and Associates showed there was a significant increase in foreign advertisements, particularly high budget ones screening in peak viewing times. Smythe's research showed the loss to the local production sector was over 30 per cent. The audience preference for Australian was clearly not enough to outweigh the economic incentive to use cheaper foreign commercials. [20]

The decline in expenditure on Australian drama and in hours broadcast also counters the view that network response to audience demand is sufficient to ensure adequate levels of local drama.

- From 1995/96 to 1996/97 network expenditure on Australian drama dropped by 4.4% while expenditure on foreign drama increased by 14.6%.

- The 1996/97 levels were $15.2m less than in 1992/93, a reduction of 17%. (See Appendix 4 for further information on expenditure by commercial networks on Australian programs).

The following table sets out the average hours of first release drama screened from 1993 to 1997.

**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.*

Average hours have declined over this period from 195 in 1993 to 168.10 hours in 1997.

Further, hours of Australian drama were significantly higher in the preceding four year period - ie. 1988/89 to 1992. The yearly average in this period was 227 hours.

**This occurred over a period when a number of Australian drama series have enjoyed consistently high ratings.**

20 M.Smythe, *Foreign Content in Television Commercials*, Culture and Policy, Vol 8, No 1, 1997, p181-185.

Consistently high ratings are only achieved by some Australian programs. A 1988 study of ratings for Australian programs classified programs as 'successful', 'moderately successful' and 'unsuccessful'. It also showed there could be geographic differences in the ratings of particular programs between say, Sydney and Melbourne. [21]

Ratings and the consequent ability to chase high advertising rates do not apply to children's programming. It is generally agreed that without quotas there would be virtually no quality Australian children's drama on television.

Given the predominance of foreign programming on Australian screens, top rating Australian programs are still outnumbered by top rating foreign programs. In 1994, six of the twenty top rating programs were Australian. In 1995, that figure was four.[22]

Of the thirty top drama programs on Sydney television in 1995, four were Australian. In 1994, six out of twenty-nine were Australian.

It is important to note that many Australian drama programs which ultimately achieve high ratings start out slowly. This was the case for instance with *Prisoner, Sons and Daughters, A Country Practice, Blue Heelers, Neighbours, Home and Away* and *Water Rats*.

The 1998 study referred to above pointed to the 'Neighbours' case. The program first screened on Channel 7 in 1985 in the 5.30 to 6.00 pm slot and was dropped because of poor ratings. It was then acquired by Channel 10 and broadcast in the 7.00 to 7.30 pm time slot where it initially trailed behind 7 and 9. It started to gain ground in Melbourne in 1986, and in Sydney in 1987, going on to become one of the most successful Australian drama series domestically and internationally earning significant export dollars.

Molloy and Burgan and others have commented that the demand for Australian programs was "ratcheted up" by the availability of indigenous material over the last fifteen years.

*"However it must be pointed out that the television networks must take into account the cost of programs as well as ratings, and it is quite possible that the 'ratchet' is not a perfect one and that, under cost pressure, networks might decrease the level of Australian content resulting in a fall in the Australian*

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21 ABT Australian Content Inquiry Discussion Paper, *Ratings of Australian Drama Series, Mini-Series, Films and Telemovies*, March 1998.

22 AFC, *Get the Picture - 4th Edition,* p228 & p234.

*cultural content of Australian television programs which would obviously represent a frustration of government's cultural objectives. In the absence of Australian content requirements it is possible that at least one network might find that the lower cost of foreign programming might offset the reduced ratings associated with switching to all foreign programming."*[23]

### 4.6 CONTENT REGULATION ELSEWHERE

Regulations for domestic content regulation have been adopted by the majority of Western countries with the notable exceptions of the US and New Zealand. As with Australia this has been done for the purposes of promoting a national cultural identity.

A recent survey of different regulatory schemes found that, "Invariably over 50% of the air time is reserved for domestic programming" (Franco Papandrea p233).[24]

Papandrea says "to a large extent, the regulations are an attempt to limit the dominance of the United States in the world supply of television programs" p233.

Appendix 5 provides more information on the systems that apply in a number of overseas countries.

## 5. AUSTRALIAN CONTENT AT RISK

### 5.1 THE ECONOMICS OF TELEVISION

There will be a strong economic incentive for Australian broadcasters to purchase New Zealand programs to fill a part of their quota requirements. Australian content levels are at risk because for New Zealand programs, Australia is a secondary market and they will be sold at significantly lower prices than comparable Australian programs.

The economics of television have been summarised in the following terms.

*"Broadcasters costs are largely fixed. Programming costs whether as payments for use to rights owners or the cost of in-house production comprise the largest*

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23 Molloy & Burgan, op cit, p112.

24 Franco Papandrea, 1997, Cultural Regulation of Australian Television Programs, Bureau of Transport and Communications Economics, Occasional Paper 114, AEPS

*element. These and the costs of signal generation and transmission are independent of the number of consumers and predominantly fixed. The cost structure of 'traditional' free-to-air broadcasters is thus independent of the actual number of viewers.*

*Similarly the costs of production are largely fixed relative to the number of buyers. Such variable costs as exist, eg cost of prints or tapes and transaction costs, are insubstantial compared to the costs of production. High fixed and low marginal costs mean that programs can be sold to many buyers."* [25]

Sales to secondary or international markets can be pursued on the basis that the low marginal costs involved can be easily recovered and the program can move into profit.

Molloy and Burgan have described this situation in the following terms.

*"The implication of this for Australia is that the US majors can price low enough in the Australian market to undercut local production. This is seen particularly in the prices paid by television networks and stations worldwide for television programs. This is a market where discriminatory pricing is quite apparent. This ability to charge different prices in different markets shows that although US television programs cost the local networks between half and one fifth of local programs, the US sellers could charge much less and still trade profitably as they do in other territories. This in spite of the fact that the US programs have budgets ten times the size of Australian production."*[26]

So, in the US with its large domestic market, (100 million television households) high budget production is viable and the cost can be recouped in the home market. The average production cost for US drama series is US$1.2m per hour and the prices paid by US networks are around this figure or above as the following 1996 examples show:[27]

| | | |
|---|---|---|
| ***Seinfeld*** | - | US$2.2m per hour |
| ***The X files*** | - | US$1.2m per hour |
| ***Murder One*** | - | US$1.3m per hour |
| ***NYPD Blue*** | - | US$1.495m per hour |
| ***Roseanne*** | - | US$1.050m per hour |

The most recent series of *ER* has sold for US$13m per episode - a big jump from its initial price of US$1.2m.

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25 ABA, 1998, op cit, p21.

26 Molloy & Burgan, op cit, p115.

27 Hollywood Reporter 16/9/96.

Considerable additional revenue is available in the US for cable rights and repeats on broadcast television. For example US$900,000 was paid for the cable syndication of the *X Files*, $600,000 for 'off network' rights for *Party of Five*, and *Buffy-the Vampire Slayer* earned US$1m an episode in cable and repeat fees (Variety 2-8 March 1998).

The costs and licence fees paid for programs below the top ranking group range between US$500,000 to US$1m. A considerable proportion of these also completely recoup their initial production costs from the licence fee paid for initial free to air broadcast. (The Hollywood Reporter, 16 September 1996.)

In the case of both very successful and moderately successful programs the information on prices paid for free to air and other uses shows they would be well into profit before any overseas sales.

US programs can then be sold in secondary markets for whatever the market can bear.

The following table sets out the range of prices paid per episode for American programs in a number of countries.

| | **Half Hour series** | **Hour Drama series** | **TV Movies** | **Documentaries** |
|---|---|---|---|---|
| Australia | $8K-15K | $20K-40K | $15K- 90K | $5K-20K |
| Canada | $10K-45K | $15K-130K | $50K- 200K | $3K-20K |
| South Africa | $1K-3K | $2K-8K | $5K-15K | $3K-5K |

*Source: The Hollywood Reporter, 8 April 1997.*

Molloy and Burgan note that Australia pays higher prices for US programs than other countries relative to its population.[28]

The ABA cites O'Regan who comments that the fact that Australia buys more Hollywood programming than Australian and pays relatively higher prices, means a diminished pool of funds is available for local program production.[29]

By contrast, without regulation the Australian domestic market of 6.8 million television households is too small to generate sufficient revenue to cover the costs of production of relatively high budget programs such as drama, documentary and children's programs.

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28 Molloy & Burgan, op cit, p114.

29 ABA Discussion Paper, 1998, p23.

The following table sets out the licence fees and production costs applying in Australia.

| Type | Licence fee per hour in A$ | Production Cost per hour in A$ |
|---|---|---|
| serial drama | $100,000 - $125,000 | $120,000 - $150,000 |
| series drama | $150,000 - $270,000 | $200,000 -$500,000 |
| mini-series | $200,00-$250,000 | $750,000-$800,000 |

*Source: AFC Research & Information.*

The above table also demonstrates the role of content regulation in Australia. The requirements mean Australian broadcasters have to pay higher prices for Australian programs than for imported programs, making it possible for these programs to be made. Moreover, the prices paid by Australian networks represent a substantial proportion of the production costs of series and serial drama.

However, licence fees for mini-series and telemovies only meet a small proportion of the budget. The production of programs in these categories requires additional incentives which are provided in the form of direct subsidy from the Australian Film Finance Corporation.

Molloy and Burgan point to the substantial difference between the audio-visual industry and other industries arising as a result of the proportion of high fixed costs and low marginal costs.

*"It should be emphasised that the low marginal cost of film product is not a case of market failure, but merely a characteristic of the economic environment that film and television producers inhabit. It is a factor which places the Australian producers of audio-visual product at a large disadvantage. This disadvantage is different in kind to the cost disadvantage that, say, car producers face in Australia. Even if the Japanese car makers can produce cars at a lower cost than their Australian counterparts, it will always be the case that the marginal cost of producing cars will be a relatively high proportion of the purchase price. Thus there is a relatively high floor, below which prices will not fall in the long run. In contrast, this floor for audio-visual product is very low which makes it difficult for Australian producers to compete."*[30]

30 Molloy & Burgan, op cit, p115.

In summary:

- Australia is a secondary market for the US, which dominates the world film and television industry.

- In the US programs typically cost US$1.2m per hour to produce. They are sold to US networks for around US$800,000 per hour and subsequently sold around the world at whatever price the secondary market will bear.

- A top rating US drama costs Australian broadcasters A$30,000 to $40,000 per hour. Other American programs cost significantly less.

- This is a small proportion of the cost of producing Australian programs which range from $100,000 per hour for 'strip drama' to $750,000 - $800,000 per hour for mini-series.

- This differential is international meaning imported programming from any country is always cheaper than locally produced programs.

New Zealand is no exception.

New Zealand has no local content quotas imposed on its domestic broadcasters. New Zealand content occupies only 21% of programming on the three main television networks.[31] Project Blue Sky constantly refers to the high levels of Australian programming on New Zealand television, arguing a need to balance this with equivalent amounts of New Zealand programming on Australian television.

New Zealand is a secondary market for Australian product and the prices paid reflect this. Figures provided by the Australian Film Finance Corporation for the period January 1994 to June 1997 show fees paid for five Australian programs ranged from US$2,500 to one at US$17,000 per hour.

The latest figures published by Television Business International show the average prices paid for imported programming in New Zealand in US$.

| | | |
|---|---|---|
| ***Drama*** | - | 4,000 to 12,000 per hour |
| ***Telemovies*** | - | 7,500 to 15,000 per hour |
| ***Documentaries*** | - | 3,000 to 4,000 per hour |

31 NZ on Air, *Local Content, 1997*, p1.

Some Australian programs have found favour with New Zealand audiences and been economically attractive to New Zealand networks. In the absence of local content quotas they are cheaper than buying or commissioning New Zealand programs, notwithstanding the subsidy available through NZ on Air for some New Zealand programming.

Australian programs also provide some diversity for New Zealand audiences from what is otherwise primarily American, and to a lesser extent, British programming.

Importantly, before the High Court decision, New Zealand programs had exactly the same access to the Australian market as Australian programs had to the New Zealand market, ie, as imported programs. The High Court decision has moved New Zealand programs into a more favourable position - that of quota protected domestic programs. However in New Zealand, Australian programs must still compete with all other international product.

Supported by its content rules, the Australian television industry has 'grown up' in the last thirty years and has developed to a point where it is capable of consistently and efficiently producing quality programming that is successful in Australia and internationally.

Therefore, and given the well documented trend of product flowing from larger domestic markets to smaller ones, it is not surprising that more Australian product sells in New Zealand than the other way around.

## 5.2 NEW ZEALAND AT AN ADVANTAGE

The ramifications of the New Zealand action and the High Court decision are to put New Zealand in an advantaged position in two ways:

- it gives New Zealand programs access to the Australian content support mechanism without providing the same treatment for Australian programs in New Zealand; and

- inside the Australian quota zone, New Zealand programs will compete at a price advantage.

There is a major contradiction in the position taken by Project Blue Sky and supported by the New Zealand government. New Zealand's deregulated market has meant low levels of New Zealand content on New Zealand television and a perception by some New Zealand producers that by contrast there is too much Australian programming on New Zealand television.

At the same time, New Zealand programs have had difficulty competing on equal terms with other imported programming in the Australian market.

Rather than looking at ways to better develop and support the New Zealand industry, the response was to seek access to Australian support mechanisms.

Prior to the High Court decision New Zealand and Australian programs competed on an equal playing field. Despite the rhetoric, the result of the New Zealand action, tips the balance against Australia.

The attraction to Australian networks of being able to fill some of their quota requirements with cheaper New Zealand programming will be overwhelming.

The Federation of Australian Commercial Television Stations (FACTS) has said that Australian programs rate well and they do not intend to replace them with New Zealand programs.

However it would, we believe, not be wise to regard this comment as an assurance about current levels of Australian content and a reason why formal action is not necessary.

The content regulations ensure diversity and quality in Australian programming as well as minimum levels of quantity. This is achieved through the sub-quotas for children's drama and documentary and in the adult drama area, by giving greater weighting to "high end" and consequently more expensive drama.

As previously demonstrated not all these areas are ratings driven and are therefore vulnerable to replacement by cheaper programs. Children's drama is a good example.

A number of Australian adult dramas do rate well and it is probably unlikely all such programs would immediately be replaced with cheaper New Zealand material.

However not all adult drama rates well or is shown at peak viewing times. This suggests networks will be attracted to the cost reduction opportunities offered by New Zealand programs to make up a part of their requirements particularly on the fringes of prime time. (The time band for first release Australian drama required by the quota is between 5.00 pm and midnight - whereas peak viewing times (and advertising rates) are regarded as being from 6.00 pm to 10.00 pm).

There is existing evidence that networks are attracted to cheaper programming at the edges of the time bands. For example, in the last two years Channel 9 has made up a significant proportion of its quota points by screening Australian films after 10 pm. In 1997, one third of its drama points were from films. Over the two years 1996 and 1997, 23 of the 35 films it showed as part of its content requirements were shown after 10.00 pm. Many of these were older films which were likely to have been at the lower end of the price range.[32]

These are refered to as "quota quickies". New Zealand films and other New Zealand back catalogue product could serve a similar purpose and would still be cheaper than Australian.

Further, all television programs have a life and at some point the decision is taken to wind them down. At this point a New Zealand program could successfully pitch for the replacement. It is apparent from reading the New Zealand trade press and from Project Blue Sky's public comments that the New Zealand industry intends to gear production to the Australian market. It is also worth noting that the last few years has seen the growth and consolidation of three to four major production groups in New Zealand capable of supplying product of sufficient quality to replace Australian series.[33]

NZ on Air has been increasing its subsidy percentages in recent years. Further Project Blue Sky's stated strategy is to encourage "NZ on Air and the New Zealand Film Commission to widen funding criteria to allow New Zealand ideas which are designed for the international market."[34]

As this trend continues in New Zealand, Australian networks will be able to draw on a bigger pool of New Zealand produced telemovies and high quality series at significantly lower costs than paid for similar Australian programs.[35]

The downward trend in both expenditure and hours by Australian networks on Australian drama indicate that the networks professed commitment to Australian content is tempered by commercial considerations.

A further indicator of the vulnerability of Australian content levels is the downward trend in the level of Australian licence fees paid by networks over

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32 Licence fees paid by broadcasters for feature film vary widely from $50,000 or less for relatively unknown and older films to around $500,00 for very successful films.

33 These are Commuicado, the Gibson Group, South Pacific Pictures and more recently Isambard. *Variety*, October 13-19, 1997.

34 Project Blue Sky, *The Six Key Goals,* Project Blue Sky background paper.

35 It is worth noting that NZ on Air has just provided NZ$4.1m for a series of "Duggan" a murder mystery set in the picturesque Marlborough Sounds. "Duggan", produced by the Gibson Group and staring John Bach was previously supported by NZ on Air as two telemovies which rated highly in a prime time slot on TV1 and according to *On Film* (a New Zealand trade journal) is "aimed primarily at the international market".

recent years. In 1990 the ABA put the average purchase price per hour of a serial at $110,000, a series at $220,000 and a mini-series or telemovie at $350,000. In 1998 prices paid were:

| | | |
|---|---|---|
| ***serials*** | - | $100 - $150,000 |
| ***series*** | - | $175,000 - $250,000 |
| ***mini-series*** | - | $200,000 - $250,000 |

Licence fees have not increased from 1990 levels and indeed that there has been significant downward pressure.

This downward pressure has been associated with the success of Australian programs overseas so that producers have been increasingly expected to meet a proportion of their production costs from overseas pre-sales thereby reducing profit margins.

## 5.3 THE NEW ZEALAND INDUSTRY

The question no one can answer with any certainty is how much New Zealand programming will be purchased by Australian networks.

All that is possible is to examine the potential of the New Zealand industry.

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

Table 2: Hours Broadcast - New Zealand and Australia 1997.[36]

| **Category** | **New Zealand** | **Australia** |
|---|---|---|
| Drama/comedy | 336 | 504.3 |
| Children's programs (general) | 806 | 1207 |
| Documentary | 269 | 71.1 |

While no children's drama was specifically broadcast in New Zealand in 1997 there has been an average of 21 hours per year of children's drama broadcast there over the last 7 years.

[36] 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.

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.

The increase in New Zealand material on New Zealand television in the Australian sub-quota categories 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.

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 information on NZOA funding is found in Appendix 6.

This shows the significant amounts of subsidised New Zealand drama, documentary and children's programming available.

Subsidy through NZOA is available for a wider range of programs and to a significantly higher percentage of a program's budget than is available in Australia - for example, long running series and serials for which no subsidy is available in Australia. *Shortland St* was funded by NZ on Air for four years, *City Life* received subsidy of $192,300 per hour in 1995/96 and the high rating *Letter To Blanchy*, in its third series in 1996/97, received subsidy equivalent to $230,000 per hour in that year.

NZOA funded 410 hours of children's programs in 1997. The Australian requirement for each broadcaster is a total of 288 hours of children's and pre-school programs.

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 price vulnerable 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 which are not subsidised in Australia; and

- subsidy is also available for general children's programming, an area not subsidised in Australia.

It would not be difficult for New Zealand programming to have a significantly negative effect on current levels of Australian programming.

Consider the following:

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

- If one Australian network chose to screen half an hour a week of New Zealand children's drama programming it would fulfil 80% of its Australian children's drama quota. If it bought one New Zealand children's series of 13 half hour episodes, it would fulfil 20% of its Australian children's drama requirement.

As the ABA summarised in its 1998 Discussion Paper;

"A number of factors operate to give New Zealand a cost advantage over similar Australian programs". These are:

- The fact that New Zealand will be selling to a secondary market and therefore at prices significantly below Australian levels;

- Differences in subsidy arrangements which may further reduce for Australian networks the price of purchasing New Zealand programs particularly series and serials; and

- The amount of New Zealand back catalogue material available (again, cheaper than newly commissioned programs) which would qualify under the definition of first release in the Australian content standard.[37]

There are two additional concerns about the implications of the High Court decision.

***Co-productions***

Under the Australian content standard, official co-productions made pursuant to Treaties or Memoranda of Understanding between Australia and other countries are automatically treated as Australian and get full quota status.

Given the terms of the Services Protocol to the CER we believe the legal position is that New Zealand/Third Party co-production would have to be treated as if it were an Australian co-production, and be given full quota status in Australia. This is also the view taken by the New Zealand government in its submission to the ABA enquiry.

New Zealand currently has co-production treaties with Italy, the United Kingdom and Canada, an Administrative Arrangement with France, and a memorandum of Understanding with Australia.

Twenty-two projects have so far been produced under New Zealand's co-production program. Fifteen of these were made with countries other than Australia, and if our view is correct will now qualify as Australian.

11 of these 15 co-productions are television programs (as opposed to feature films). The predominance of television programming in New Zealand's co-production program is significant. As this includes series and serials, in addition to mini-series and telemovies, the television hours involved are much greater than is suggested by 15 programs.

Some examples include:

- The Adventures of Black Stallion: 26 half hour episodes of a New Zealand/Canadian/French co-production.

- White Fang 2: 52 episodes of a New Zealand/Canadian/French co-production.

- Mysterious Island: 44 half hour episodes of a New Zealand/ Canadian co-production.

[37] ABA, 1998, op cit, p36.

We are aware that the ABA believes it is possible to maintain the current position of recognising Australian co-productions while not extending quota status to New Zealand/third party projects.[38]

We are not convinced this is the correct legal position.

Unless corrective action is taken we will have the extraordinary situation of having New Zealand/Canadian, New Zealand/British and New Zealand/Italian programs having to be regarded as Australian.

***Backdoor for Foreign Productions***

There is also a separate concern that essentially foreign programs with some New Zealand elements could qualify as Australian. New Zealand has promoted itself as an offshore location and significant amounts of foreign television product are shot there. It would be possible for such projects to structure themselves in such a way that they meet the creative elements test currently imposed in the Australian standard. For example the program "Xena - Warrior Princess" already meets aspects of this test. To qualify it would only need to employ more New Zealanders in major supporting roles and use New Zealand directors more regularly.

## 5.4 WHO BENEFITS?

The debate has been characterised at times by sentiments such as Australia should be prepared to help New Zealand out, and by unsubstantiated claims from Project Blue Sky about how it will somehow be for the benefit of the combined industries of both countries. For example in a letter to members of the Australian industry dated 18 May 1994, Jo Tyndall the Executive Director of Project Blue Sky, said "Project Blue Sky sees CER as a tool which can be used to mutual advantage, rather than a threat to the prosperity of either industry".

However there are real questions as to who benefits.

### NEW ZEALAND PROGRAMS SUBSTITUTED FOR AUSTRALIAN-NO CHANGE IN NEW ZEALAND

The table in Appendix 7 makes some projections about the impact on the separate Australian and New Zealand industries and the combined "Australasian" industry of New Zealand programs being eligible for content quotas. It is based on modest assessments of the amount of New Zealand material likely to be broadcast, ie, from 1 to 3 programs in total in a year.

38 ABA, 1998, op cit, p35.

The table is based on the assumption that there will be no additional production in New Zealand as a result of the change. We consider this to be a likely outcome with Australian broadcasters either buying existing programs "off the shelf" or making a contribution to new programs made for New Zealand television by way of pre-sales.

The accompanying notes show the outcome in some detail.

In terms of the combined Australian/New Zealand markets the outcomes are likely to be:

- no change in the total hours of Australian/New Zealand drama broadcast;

- licence fees paid by broadcasters are reduced significantly; and

- the combined value of production in the two countries is reduced as a result of the contraction.

Clear beneficiaries out of this would be Australian networks in that they would be paying less to fulfil their local content obligations. New Zealand broadcasters would also benefit by being able to reduce the costs of New Zealand programming

The New Zealand production industry would benefit to the extent that sales 'off the shelf' of existing material would represent additional income. The availability of Australian presales for new programs would only be of benefit to the extent that New Zealand licence fees were not reduced.

In the short term at least there is no apparent benefit to the New Zealand public and of course a negative impact on the Australian community as a result of the reduction.

**SOME CHANGE IN NEW ZEALAND**

There are two possibilities.

1. <u>Enhanced quality through higher production values.</u>
   A variation of the above is that the additional revenue from Australian sales could act to enhance the quality and export potential of New Zealand drama. As noted already a key strategy of Project Blue Sky has been to increase foreign exchange earnings by way of foreign investment and overseas sales and accordingly to gear production more to the international market.

2. Increase in Quantity.
   A somewhat different picture from that outlined above would apply if there was an actual increase in the amount of New Zealand drama. This could occur as the viability of some New Zealand producers was enhanced by the additional income from the Australian market. Moreover supplemented by Australian licence fees, NZ on Air funding would be able to stretch further and fund more production. The extent of any increase in output would depend very much on whether the probable downward trend in New Zealand licence fees can be resisted.

If New Zealand programming were to increase in quantity and/or quality there would be benefits for the New Zealand audiences (presuming that relevance and appeal to New Zealand audiences doesn't suffer in the process of gearing production to Australian and other international markets).

Under both possibilities, unless the quantity of the new New Zealand programming is greater than the amount of Australian production displaced (a most unlikely outcome), the outcomes for the combined Australian/New Zealand industries are likely to be as follows:

- no change in the combined value of the Australian New Zealand industries;

- no increase in the quantity of local programs broadcast in the two countries taken together; and

- likely downward pressure on licence fees in both countries.

## 5.5 QUESTIONS RAISED IN NEW ZEALAND

There has been considerable debate in New Zealand in recent months about whether there are indeed benefits for New Zealand culture and the New Zealand industry arising from Project Blue Sky's successful action in the Australian courts. This has arisen in the context of growing concern about the low levels of New Zealand content on New Zealand television. This issue has been discussed in a number of New Zealand on Air reports and publications and is covered in virtually every issue of New Zealand's main trade magazine, "On Film".

In effect there has been growing recognition that the regime established in New Zealand in 1989 with the deregulation of its broadcasting system has not delivered public policy outcomes and should be reconsidered. In particular, there has been a growing call for content quotas similar to those applying in Australia.

In its 1997 local content report, David Beatson, the chairman of NZ on Air said;

"Few developed countries in the world have such a low level of local content on their free to air television channels as New Zealand. New Zealand's system of intervention is facing a significant challenge in terms of reflecting and promoting our own culture through the influential medium of television. The challenge of securing an adequate level and diversity of local content on our screens clearly increases as more viewing options dominated by programs from other countries are provided to New Zealand viewers."[39]

The great irony is that any such regulation would currently require Australian programs to be counted as New Zealand programs. The Australian programs that already successfully screen on New Zealand television would then fall into the category of quota protected New Zealand content and there would quite likely be no increase at all in locally produced New Zealand programming.

The editorial and letters in Appendix 8 from "On Film" reflect the growing concern about this situation and clearly demonstrate that the benefits to New Zealand are very questionable.

Keith Hunter, President of the New Zealand Screen Directors Guild:

*"The argument for a local content quota only holds if we argue we're unique, different from everyone else including Australians. But the moral of the PBS argument is that New Zealand culture is the same as Aussie culture. How do we argue for local content if local content is Australian?*

*"If one drama series will do for both Australia and New Zealand, why would two be made, one for each country? If the answers (to this and other questions) indicate that no one, or very few, in the production industries of both countries will benefit from the PBS campaign and that only the broadcast channels in each country will come out winners, is it too late to change our minds?"* [40]

The problem with the New Zealand position has also been articulated by Roger Simpson, a leading producer/creator of Australian television drama and a New Zealander by origin. In a speech delivered in June this year he said;

> *"By seeking to access Australian quota, the New Zealanders admit defeat and the Kiwis have forgotten what they were fighting for; not a piece of our industry - but one of their own*." (See Appendix 9 for full text.)

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39 NZ on Air *Local Content 1997*, April 1988, p1-2.

40 *On Film*, September 1998, p60.

The New Zealand industry argued strongly in the negotiations for the international Multilateral Agreement on Investment (MAI) that New Zealand culture and its film and television industries should be protected from trade/investment liberalisation. SPADA the New Zealand association representing screen producers and directors, which is closely linked to Project Blue Sky, outlined concerns with the proposed MAI treaty relating to co-productions, public funding and broadcasting policy. In particular, SPADA opposed foreign investors being able to access public funding in New Zealand and sought a reservation for the introduction of local content regulation.[41]

## 5.6 FLOW ON TO PAY TV

Following an ABA inquiry into local content on Pay TV, the Government announced it would introduce amendments to the Act to ensure the Australian content rules for pay television are able to be enforced. Action on this was put on hold pending resolution of the New Zealand issue.

The High Court's decision covered significantly worsened the situation that currently exists in relation to pay television and Australian content.

The current voluntary requirement under s 102 of the Act is that predominantly drama channels are required to spend at least 10% of program expenditure on Australian drama.

The ABA's recommendation to the Government was that the 10% should not be increased but should be made enforceable.

There are a number of avenues for eligibility as an Australian drama program including meeting the creative elements test that applies under the content standard for free to air television.

The Court's declaration of the limitation on the ABA's powers to determine the Standard potentially applies equally to any local content requirements for pay television in so far as they relate to the definition in s6(f). The judgment may oblige the ABA to consider expenditure on New Zealand programs by channel providers and/or licensees as meeting the requirements for minimum expenditure on Australian content on pay TV.

With New Zealand programs already screening on some drama services, these channel providers would not even have to change their program schedules to meet the Australian expenditure requirement for pay television. In these new

41 On Film, April 1998.

circumstances, the proposed amendments to make the current local content rules for pay television enforceable may result in Australian program finance being diverted to New Zealand (or New Zealand based) productions. As the test for pay television is an expenditure test, it would be possible to satisfy it with one or two high-budget New Zealand films.

# 6. AUSTRALIA'S INTERNATIONAL OBLIGATIONS

In this section we argue that repeal of s160(d):

- is necessary not only because of the New Zealand issue but also because of the broader ramifications, given the existence of a large number of other international treaties;

- would be entirely consistent with the approach Australia has taken on the need for cultural support mechanisms to be protected in other forums;

- would not harm Australia's international relations;

- is necessary to maintain the benefits to Australia's international profile that result from the exposure overseas of our film and television product.

## 6.1 THE SCOPE OF SECTION 160(D)

The broad scope of s160(d) was noted by the ABA at p15 of its discussion paper. The drafting of the section is such that it goes far beyond the obligations placed on other government agencies.

Following an examination of all Commonwealth Consolidated Acts, John Corker, now the ABA's Chief Legal Counsel advised he could find no other provision "which is as sweeping as 160(d) of the Broadcasting Services Act in imposing on a government agency a direct requirement to comply with all of Australia's international obligations.[42]

As Corker points out other Commonwealth Acts either:

- require the relevant government agency to simply 'have regard to' Australia's obligations and specify the actual agreements which are to be considered; or

- give power to the Minister to make regulations which allow specified international agreements to be incorporated into domestic law.

42 John Corker, "The 'Not So Neat Treaty' Provision" Communications Law Bulletin, Vol 17 No 2 1998 p7.

The ABA's position can be contrasted with that under the Radiocommunications Act 1992 where the Australian Communications Authority has to only have regard to international obligations when carrying out its functions.

As Corker also points out there are ramifications beyond the Australian content standard. He points to Article 12 of the International Convention on Civil and Political Rights and identifies a range of questions arising for the ABA in registering codes of practice or determining standards for promoting accuracy and fairness in news and current affairs programs'.

It seems quite inappropriate for the sensitive area of broadcasting to be treated differently from others and to have such an onerous requirement placed upon it.

The scope of s160(d), as the PBS case shows, means Australia has effectively surrendered its sovereignty in respect of regulation of the commercial broadcasting sector for cultural and other public policy purposes.

It seems doubtful that Parliament intended this when it enacted the broadcasting law in 1992.

## 6.2 OTHER INTERNATIONAL TREATIES

The ramifications of the finding that 160(d) overrides the cultural objectives of the Act go far beyond the CER treaty with New Zealand.

At paragraph 60 of the joint decision the High Court said:

> *"...the direction in s160(d) contains the potential for conflict with the objects of the Act because it requires the ABA to perform its functions in a manner consistent with Australia's obligations under any convention to which Australia is a party or under any agreement between Australia and a foreign country. It is not difficult to imagine treaties entered into between Australia and a foreign country which may be utterly inconsistent with those objects."*

The Court also drew attention to the difficulties that arise in international law.

> *"Furthermore while the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate*

> *language as a result of compromises made between the contracting State parties..." "The problems that might arise if the performance of any function of the ABA carried out in breach of Australia's international obligations was invalid, are compounded by Australia being party to about 900 treaties"* (paragraph 96 joint decision).

We are aware of three international treaties which appear to pose considerable difficulties for the cultural objects of the Act.

**OECD Code of Current Invisible Operations.**

Article 2 (a) of the OECD Code requires members to provide open access to each other for specific "current invisible operations" including television broadcasts along with films and other recordings.

Australia listed a reservation under article 2(b) in respect of television broadcasting that applies to:

- Foreign-produced advertising material for television broadcasts; and
- Time-quota limitations on the television screening of programmes which are not of Australian origin.

The OECD Code of Liberalisation of Current Invisible Operations (the OECD Code) provides in Article 9 that:

> *"A Member shall not discriminate as between other Members in authorising current invisible operations which are listed in Annex A and which are subject to any degree of liberalisation."*

The reservation has no operation in relation to the obligation imposed on Australia by Article 9 of the Code not to discriminate between members.

Article 10 of the OECD code provides for an exception to the principle of non discrimination if two countries have formed a special customs or monetary system. In such a case they must inform the OECD of the provisions they have agreed which have a bearing on the code.

The CER Protocol has not been identified by Australia and New Zealand pursuant to Article 10 of the Code and the application of Article 10 to the CER protocol was specifically left open in a report to the OECD on the CER Protocol in 1989.

In the process involved in this 1989 report the expert witnesses from both Australia and New Zealand argued that the Protocol on Services had not modified the restrictions under their respective reservations. Clearly neither country thought the Protocol would afford New Zealand preferential access to the Australian Content Standard.

The result is that the proposed preferential treatment of New Zealand television programs appears to be in breach of Article 9 of the OECD Code. By giving New Zealand access to quota limitations, Australia exposes itself to challenge by any of the OECD members seeking similar treatment.

It is interesting to note that in Australia's case an old concession Australia had accorded to New Zealand regarding television advertising was examined. It was found that while it predated either country's accession to the Code and obviously predated the Protocol, it nonetheless represented preferential treatment and was in breach of the Code. Australia advised the matter would be resolved.

If the OECD was of the view that an old and forgotten concession in respect of television advertising that predated both Australia or New Zealand acceding to the Code represented a breach, it is highly unlikely that they will consider New Zealand being granted equal access to the Australian Content Standard as anything other than discriminatory.

Twenty seven countries are signatory to the OECD Invisibles Code including the United Kingdom, Canada, the United States, Ireland, and a number of European countries.

**Basic Treaty on Friendship and Cooperation between Australia and New Zealand.**

The Basic Treaty of Friendship and Co-operation between Australia and New Zealand ("the Basic treaty") came into effect in 1977.

Article 9 provides:

> *"Each Contracting Party shall accord within its territory to the nationals of the other Contracting Party fair and equitable treatment with respect to matters relating to their business and professional activities, provided that in no case shall such treatment be discriminatory between nationals of the other Contracting Party and nationals of any third country.*

The minutes relating to the treaty confirmed that the intention was to accord each other's nationals "treatment no less favourable than that accorded to nationals of a third country". The minutes also show the term "matters

relating to business and professional activities is broad and includes" generally the conduct of all types of commercial, industrial, financial and other business activities as well as professional activities."

The broad scope of this term arguably requires that the obligation to accord within Australia "fair and equitable treatment" to Japanese nationals with respect to their business activities includes an obligation in relation to the broadcast of television programs.

The obligation then on Australia would appear to be that Japanese nationals should be accorded the same treatment as provided to New Zealand nationals under the CER Services Protocol.

It might be thought unlikely that Japan would ever want to argue its programs be quota eligible under the Australian standard. However Japan could well see an advantage in pursuing such a claim in respect of children's programs. Japan has a thriving animated children's program industry and a number of such programs have been shown on Australian television. Animated programs are already dubbed, ie in the original language so redubbing in English does not have the same difficulties from the audience point of view that dubbing drama has.

**General Agreement on Trade in Services**

The General Agreement on Trade in Services (GATS) is part of the World Trade Agreement which came into force in January 1995. The GATS has established the basic framework for trade liberalisation amongst the majority of the world's nations.

Article II of GATS obliges members to

> *" accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than it accords to like services and service suppliers of any other country."*

Article V states that the GATS "shall not prevent any of its members from being a party or entering into an agreement liberalising trade in services between or among parties". Member parties to such agreements are required to notify the Council for Trade in Services. The CER protocol has not been considered by the Council. Nor has the Basic Treaty with Japan.

Unless the CER Services Protocol falls within Article V of GATS, then Article II requires all other members of the WTO to be treated no less favourably than New Zealand.

In any event, unless the Basic treaty also falls within Article V of GATS, then if Japan has the benefits accorded to New Zealand by operation of the Basic treaty, Article II of GATS requires all other members to be treated no less favourably than Japan.

In any case it appears arguable as to whether the extension of the Australian Content standard to New Zealand constitutes a liberalisation measure.

So it appears that granting New Zealand programs access to the local content quotas will put Australia in breach of the general obligation under GATS not to discriminate amongst service providers.

As noted below, Australia retained the right to regulate for cultural policy purposes in the GATS negotiations.

The next round of World Trade Organisation negotiations are due to commence in 2000 and Australia will have to develop its position in relation to the audio-visual sector. In its submission to the ABA's Pay TV Inquiry, the Department of Foreign Affairs and Trade warned that "it is possible Australia will be asked by trading partners, and specifically the US, to remove or reduce the television local content quotas." (DFAT Submission to ABA Local Content on Pay TV Inquiry 20/12/96 ).

**Australia-Pacific Economic Co-operation Forum (APEC)**

The APEC standstill resolution, agreed by APEC leaders in 1994 and reaffirmed in 1995, commits Australia to endeavour to refrain from using measures which would have the effect of increasing levels of protection. An increase in the quotas could be seen as an obvious solution to the need to accommodate New Zealand, and has been supported by a number of parties, including Project Blue Sky. However such an approach would appear to conflict with our APEC obligations.

The Department of Foreign Affairs and Trade points out that developed country members of APEC, including Australia, are committed to further trade liberalisation by the year 2010 including in the services sector. Australia's Individual Action Plan (IAP) for APEC does not include commitments to liberalise local content standards. DFAT also advises that the US will expect us to include the reduction and removal of local content rules for audiovisual services in our IAP commitments.

We are aware of opinion that indicates that the concern about the 'flow on' to other international treaties is not warranted. However we do not believe the issues have been thoroughly examined and we are not aware of any opinion that leads us to different conclusions to those outlined above.

**A new Approach to Culture vs Trade**

The approach taken in relation to the CER agreement differs markedly from the approach taken in subsequent trade liberalisation discussions.

When the CER Protocol was negotiated Australia did not seek a reservation for cultural policy measures such as the content standard. By contrast in other forums there has been official recognition of the need to maintain Australia's right to maintain and establish support measures for cultural purposes.

**General Agreement on Trade in Services (GATS)**

The agreement contains national treatment provisions but rather than being a process for exemptions from these, countries have to make individual offers of services that will be subject to national treatment.

As mentioned above, Australia made no such offers and thus chose to be in a position where we could introduce new measures or adapt existing measures relating to our audio-visual and cultural industries. The GATS negotiations were marked by considerable and vigorous debate on the culture vs trade issue and by intense US pressure for cultural measures to be opened up to free trade.

The European community took the same position as Australia and was very active in insisting on maintaining the right to regulate for cultural purposes.

It is our understanding that Australia's position in relation to GATS is now in jeopardy as a result of the High Court decision. That is, that the effect of giving national treatment in respect of the content standard to New Zealanders pursuant to CER, could be that our audio-visual area is 'on offer' to other members of GATS.

**Multilateral Agreement on Investment (MAI)**

The OECD has been negotiating a treaty aimed at the liberalisation of rules on foreign investment, known as the MAI, although the process has now been put 'on hold' as a result of French government action.

The draft MAI was subject to considerable criticism in Australia and internationally because of the potential to restrict a nation's ability to pursue its own policies in a range of areas, including communications and cultural policy.

A number of parties, notably the Canadians and the French were seeking to have the cultural industries 'carved out' from the application of the treaty. Australia foreshadowed a growing list of exceptions to the application of the MAI to domestic measures, including cultural and audiovisual support measures.

Parliament has the power under the constitution to legislate in order to implement treaties. It also has a discretion to decide the reasonable application of any treaty obligation to the citizens of Australia. The Senate Legal and Constitutional References Committee noted in its 1995 report the comment of the High Court in Richardson v The Forestry Commission:

> *"when parliament exercises the external affairs power so as to carry into effect or give effect to such a treaty, it is for Parliament to choose the means by which this is to be achieved, provided at any rate that the means chosen are capable of being reasonably considered to be appropriate and adapted to that end."*

We believe there is now wider recognition within Australia that the way the CER treaty obligations were dealt with in 1992 in the Broadcasting Services Act is not appropriate.

### 6.3 AUSTRALIA'S INTERNATIONAL RELATIONS AND ITS TRADE AND TRADE POLICY INTERESTS.

Action by Australia to remedy the deficiency in the Broadcasting Services Act would, we believe, be considered reasonable and consistent with the approach taken by a great many countries on the application of trade liberalisation to the cultural industries.

It is worth noting there was considerable opposition within New Zealand to the MAI including from the audio-visual sector and that the New Zealand government decided in May this year to support a pause in the negotiations (The Dominion 22/4/98).

Although opinion in New Zealand on the Project Blue Sky action is split, the New Zealand government would be expected to express concern about moves to repeal s160(d).

However, in the broader scheme of the totality of Australian and New Zealand relations it is difficult to see that such action would be detrimental to Australia's longer term relations with New Zealand.

On the other hand, the weakening of the Australian content standard is likely to impact negatively on Australia's trade interests in the audio-visual area.

As discussed earlier, the Australian television industry has now matured to the stage where it is achieving significant overseas sales and slowly making some inroads into the very large negative balance of trade in cultural products. It is widely accepted that the years of development support provided by the content quotas have led to this position.

The table in Appendix 7 estimated that if each network bought just one New Zealand program, the impact would be a loss to the Australian industry of $22 million worth of production a year. The cumulative effects of this on the stability of the industry over even a few years would be significant.

Any contraction in the amount of Australian production is going to jeopardise the trend of recent years towards improved overseas sales.

We also believe the broader benefit to Australia's international profile and trade interests that results from the broadcast of our film and television programs overseas should not be overlooked.

Australian governments have concluded in recent years that in the international context, it is in the country's interest to maintain the right to implement assistance measures for cultural purposes.

Our ability to continue this approach is undermined as long as s160(d) remains and other countries can point to the special treatment being accorded to New Zealand.

Further, the contraction in the Australian production industry that will inevitably result from a weakening of the standard is both directly and indirectly contrary to our trade interests.

The Gonski report pointed to the 'threats and opportunities' in the current environment for the Australian film and television industry.

It warned that "international trade liberalisation will challenge the legality of local content regulations and the commercial distribution and exhibition of product will increasingly be decided by a small number of global information and entertainment companies." (Gonski p 5).

The opportunities lie in the increased demand for content created by a globalising market.

In this context, weakening the main support mechanism for television programming would appear to be a very risky move which is likely to undermine the industry's ability to capitalise on the future opportunities provided by the changing international environment.

# 7. THE ROLE AND FUNCTIONS OF THE AUSTRALIAN BROADCASTING AUTHORITY IN RELATION TO THE SETTING AND THE ADMINISTRATION OF AUSTRALIAN CONTENT STANDARDS.

## The ABA's draft revised Australian content standard for free to air commercial television.

### 7.1 THE CURRENT STANDARD.

Section 122 deals with the ABA's power to determine standards. It provides that the ABA must determine standards that are to be observed by commercial television broadcasting licensees, for children's programs and for the Australian content of programs.

As discussed in section 4, the standard sets minimum levels of Australian programming and in particular requires that minimum amounts of first release Australian drama, documentary and children's programs are to be broadcast on commercial television. A summary of the standard is set out in Appendix 2.

The standard defines Australian to mean a citizen or permanent resident of Australia. An Australian program is one that is produced under the creative control of Australians who ensure an Australian perspective by reference to a set of objective criteria referred to in this submission as the creative elements test.

These are as follows:

- the producer/s must be Australian (there can also be a foreign co-producer or executive producer);
- either the writer or director must be Australian;
- 50% of the leading actors/on screen presenters must be Australian;
- in the case of drama 75% of the major supporting cast must be Australian; and
- the program must be produced and post-produced in Australia but may be filmed anywhere; (news, current affairs and sports are exempted from this last requirement if necessary).

The principle behind the creative elements test is that for a program to be Australian it must be under the creative control of Australians.

In addition, a program is Australian if:

- it has been certified as being Australian by the Minister for Communications and the Arts pursuant to Division 10BA of Part 111 of the Income Tax Assessment Act; or

- it has been made pursuant to Australia's official co-production arrangements.

The current standard has been in operation since January 1996. The provisions relating to 10BA and official co-productions were introduced into the standard at that time as a way of providing flexibility for the production industry.

When announcing the new standard the ABA outlined the main features as including:

- a clearly stated cultural objective;
- an increase in the transmission quota from 50% to 55% commencing in 1998;
- a simplified measurement system which will **guarantee the current minimum levels of Australian drama;** (our emphasis);
- a progressive doubling of quality first release children's drama from 16 to 32 hours each year;
- a new requirement of 8 hours repeat children's drama each year;
- a new requirement that 100% of the quota for pre-school children's programs must be Australian;
- a definition of Australian program that requires programs of all categories to be produced under the creative control of Australians; and
- automatic recognition as Australian for programs with a 10BA certificate and for official Australian co-productions.

While increases were made to the children's drama in 1996 the quota for adult drama was not increased.

The 1996 standard replaced the requirements set out in Television Program Standard (TPS 14) which was inherited from the ABA's predecessor, the Australian Broadcasting Tribunal (ABT).

In relation to defining 'Australian', TPS14 had in essence the same approach as the current standard. There was a requirement that a program have an Australian theme and perspective but this was assessed against objective criteria relating to Australian creative control.

The relative merits of an 'on-screen test' (being one which refers to the 'look' of a program) or a 'creative elements test' (being one which refers to who makes a program) were debated at length during the two previous reviews of the standard.

It is now widely accepted that from a policy perspective a creative elements test is the most appropriate approach. The major problem with an on-screen test is, as the ABA has put it, that "the nationality of those making the programs would not matter and programs from anywhere else in the world could be eligible under the standard".[43]

## 7.2 A REVISED AUSTRALIA/NEW ZEALAND STANDARD

The High Court determined that given the scope and nature of s160(d), New Zealanders and New Zealand programs must be treated no less favourably than Australians and Australian programs in any standard.

This means that the standard is no longer an Australian standard but becomes an Australian and New Zealand standard.

With New Zealand programs given access to quota protection the Australian standard will serve to promote New Zealand culture and identity in place of Australian, and will act as a development mechanism for the New Zealand production industry to the detriment of the Australian industry.

The ABA is now obliged to revise the standard so that it affords equal treatment to Australian and New Zealand programs but, at the same time, somehow has to ensure that the standard will play a role in "developing and reflecting a sense of Australian identity, character and cultural diversity" and provide a regulatory environment that will facilitate "the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs".

The ABA has been given a fundamentally flawed task. It is, in our view, not possible to reconcile the ABA's obligations under section 122 of the Act requiring the ABA to develop a standard for Australian content and the obligations under section 160(d) as interpreted by the High Court.

The existence of s160(d) and its breadth and scope means the ABA is prevented from properly carrying out its obligations relating to Australian content and in fulfilling the objectives of the Act.

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43 ABA 1998, op cit, p32.

To fulfil its obligations under s122 and the cultural objects of the Act, the ABA must be in position where the latter are clearly paramount over any trade obligations.

This has become very apparent in the course of the current review of the standard by the ABA. The review is of course not complete and we are unable to comment in detail on the ABA's draft revised standard at this point.

However, detailed submissions from all major Australian parties indicate the extent of the problem.

As we outlined in section 5 of this submission the impact of the High Court decision is to actually give New Zealand programs an economic advantage over Australian programs.

The AFC and industry representative organisations have argued in their submissions to the ABA that a comprehensive approach is needed to redress this balance and that a package of radical measures should be instituted.

The ABA's draft standard has failed to incorporate most of the measures we proposed.

Even if our proposals were adopted in full there would be no guarantee that existing levels of Australian content could be maintained.

For example, it would still be possible for a New Zealand series to be screened in Australia in prime-time and for New Zealand children's drama to be screened as part of the 32 hours children's drama quota.

There is considerable opposition to the 'comprehensive' approach from the Federation of Commercial Television Stations and from the New Zealand parties.

The view taken by the Federation of Commercial Television Stations and indeed by some other Australian parties such as the Australian Film Finance Corporation, is that such an approach which involves wide ranging changes to the current operation of the standard may be harmful to the Australian industry.

The New Zealanders believe that several of the options previously flagged by the ABA are intended to exclude New Zealand programs and have threatened further legal recourse if introduced.

The ABA is faced with the option of introducing a standard which would be considered by many to be unduly restrictive and which may face further legal challenge, or making the minimal formal changes necessary to comply with the obligation to accommodate New Zealand.

The difference is a question of degree. All options will have the effect of giving New Zealand programs access to the Australian content quotas.

It is clear from submissions to the ABA and the ABA's initial discussion paper that none of the various options canvassed will maintain the integrity of the standard and the cultural objectives of the Act.