CHAPTER 1

BACKGROUND TO THE INQUIRY

Introduction

1.1 Australian content quotas for commercial television broadcasters were first introduced in 1961 and have been progressively increased over the past 37 years, with strong support from the general public and bipartisan political support. A recent study of Australian content regulation found continuing widespread support for the current level of domestic programming on television and moderate support for an increase in local content.[1]

1.2 Several features of television conspire to create the need for regulation. Firstly, television is a most important medium for reflecting the tastes, concerns and aspirations of a society and as such, it is the main means of transmitting that society's culture through the 'stories' portrayed through the medium. Australians watch, on average, 3 hours and 13 minutes of television per day. As noted in the government's Explanatory Memorandum for the bill for the *Broadcasting Services Act 1992* -

> '…it is widely accepted that television is a powerful medium with the potential to influence public opinion, and that television has a role to play in promoting Australian's cultural identity…It is intended [in making an Australian content standard under section 122] that commercial television broadcasters broadcast Australian programming which reflects the multicultural nature of Australia's population, promotes Australian cultural identity and facilitates the development of the local production industry.'[2]

1.3 The implication of such statements is that transmission of Australian culture through television should be encouraged beyond what the private market would supply; or at the least it is too important a matter to be left to the vagaries of the unfettered market.

1.4 Secondly, the cost structure of television production is distinctive in that the fixed costs of producing programs and maintaining transmission facilities are relatively high but, once the fixed costs have been incurred, the extra marginal cost of selling a program in another market, or broadcasting it to extra viewers, is very low. Thus there is a strong incentive to show a program in as many places as possible.

1.5 Thirdly, the traditional structure of the television production industry is such that producers typically aim to recoup all or most of their costs in their primary national markets. Secondary (foreign) markets are then supplied at prices that need to

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1 *Cultural Regulation of Australian Television Programs*, Bureau of Transport and Communications Economics occasional paper 114, quoted in Papandrea F, *Trans-Tasman Blues: Australian Content on Television*, 1998, unpublished, p 3

2 DOCITA, Submission no. 32 p 2 quoting Explanatory Memorandum to *Broadcasting Services Bill 1992*

be little more than marginal cost.[3] This means that foreign programs can usually be bought for prices much cheaper than local programs. For example:

> 'In the USA, drama programs typically cost $US1.2 million per hour to produce. There programs are sold to US networks for $US800, 000 per hour, and subsequently sold around the world at whatever price the secondary market will stand. This can be as little as a few hundred dollars… a top-rating US drama still only costs Australian broadcasters A$30,000 to $70,000 an hour. This far less than the price broadcasters must pay for Australian drama programs. These range from a relatively low cost for series and serial (approximately $50,000 to $200,000 per hour) to considerably higher licence fees (approximately $200,000 to $400,000 per hour) for adult telemovies and mini-series…'[4]

1.6 The result is that '…despite the popularity of Australian programs, the comparative cost of making local, versus buying imported, programs means that ratings alone are insufficient to ensure high levels of Australian content on commercial television.'[5] In other words even if a foreign program rates poorly, it could still be an attractive proposition for a broadcaster (particularly outside prime time) if it can be bought very cheaply.

The Inquiry

1.7 The Senate referred the present inquiry to this Committee on 3 July 1998. The terms of reference are:

> The implications of retaining, repealing or amending paragraph 160(d) of the Broadcasting Services Act 1992, having regard to:
>
> (1) the meeting of Australia's cultural objectives;
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> (2) 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;

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3 This behaviour does not appear to be economically rational. In a competitive free market one would expect A, selling programs in market B, to seek prices as high as possible while still undercutting prices for local programs in market B; conversely, prices for A's programs in market A would drop under pressure from imports from B, and A would rely on increased income in market B to make up the difference. Thus in each market prices for local versus foreign programs would reach a relationship determined mainly by their relative appeal to viewers and advertisers. Some evidence to the committee implies this: see T Branigan (FACTS), evidence 4 December 1998 p 30: 'Over a decade *Neighbours* went from a situation where its entire production cost was recovered in Australia to a situation now where, I suspect, a relatively small proportion of its production cost is recovered in Australia.' Submissions did not offer any explanation for the reported actual behaviour.

4 Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1998, p 22

5 Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1998, p 23

(3) the object set out in paragraph 3(e) of the Broadcasting Services Act 1992;

(4) the role and functions of the Australian Broadcasting Authority in relation to the setting and the administration of Australian content standards; and

(5) the Australian Broadcasting Authority's draft revised Australian content standard for free to air commercial television

1.8 The Committee received 35 submissions (see Appendix 8) and held one public hearing in Canberra (see Appendix 9). The report of the inquiry, originally planned for the first sitting day after 31 October 1998, was delayed because of the general election on 3 October 1998.[6]

1.9 The need for a review of the implications of section 160 (d) of the *Broadcasting Services Act 1992* through a Senate Committee inquiry arose following a ruling of the High Court of Australia that the current Australian Content Standard developed by the Australian Broadcasting Authority (ABA) and applying to free-to-air commercial television broadcasters, was in breach of the *Broadcasting Services Act 1992* (*BSA*).

The legal framework for the Australian Content Standard

The Objects of the Broadcasting Services Act 1992

1.10 The *Broadcasting Services Act 1992* has as one of its objects -

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

1.11 Section 122 of the Act requires the ABA to

122(1)(a) determine standards that are to be observed by commercial broadcasting licensees…
…
122(2) Standards under subsection (1) for commercial broadcasting licensees are to relate to: (a) programs for children; and (b) the Australian content of programs.
…
122(4) Standards must not be inconsistent with this Act or the regulations.

1.12 Commercial broadcasting licensees must comply with the standards as one of the conditions of their licenses (*BSA*, schedule 2 section 7(1)(b)). As well, under paragraph 160(d) of the Act -

6 At the time of the reference the committee was called the Environment, Recreation, Communications and the Arts Legislation Committee. Formally the reference had to be renewed in the new (39th) parliament. This was done on 30 November 1998.

> **160** The ABA is to perform its functions in a manner consistent with:
> …
> (d) Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

The issue in the Project Blue Sky High Court case was which of section 122 and section 160(d) of the *BSA* took priority.

1.13 Under the requirements of the *Broadcasting Services Act 1992* (*BSA*) as stated in the above paragraphs, the Australian Broadcasting Authority (ABA) is required to make a standard relating to the Australian content of television broadcasting (*BSA*, section 122). The current Australian Content Standard requires broadcasters to show Australian programs at least 55 per cent of the time between 6am and midnight. 'Australian' is defined according to criteria that are specified in the Standard. An outline of the current Standard follows:

The Australian Content Standard[7]

1.14 The present Australian Content Standard under section 122 of the *BSA* (the one that the High Court found was unlawful) has been in force since 1 January 1996. In brief, each free-to-air commercial broadcaster must -:

- show Australian programs at least 55 per cent of the time between 6am and midnight (tallied over a year);
- show a minimum quota of first release Australian drama in prime time (5pm-midnight). Programs are given a point score weighted for the perceived quality of the program type (for example, one-offs such as a telemovie get more points per hour than a serial). The quota of 225 points per year represents somewhere between 80 and 258 hours of programming per year, depending on what mix of program types a broadcaster chooses.
- show at least 10 hours of first release Australian documentaries each year;
- show at least 130 hours of Australian pre-school programs each year;
- show at least 260 hours of children's programs each year, of which at least 50 per cent must be Australian; at least 32 hours must be first release Australian children's drama; and at least 8 hours must be repeat Australian children's drama.

1.15 A program is 'Australian' if -

- it has a final certificate under section 124ZAC (Division 10BA of Part III) of the *Income Tax Assessment Act 1936*; or

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7 Information in this section is largely drawn from Department of Communications, Information Technology and the Arts, Submission no. 32, and Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1998.

- it is made pursuant to a official intergovernmental agreement between Australia and another country; or
- it satisfies a 'creative elements' test detailed in the Standard, which requires certain of the personnel involved in production to be Australians.

Australia and New Zealand CER Agreement

1.16 In 1983 Australia and New Zealand made a Closer Economic Relations Trade Agreement (CER). On 18 August 1988 the two countries made a Protocol extending the agreement to trade in services as well as goods.[8] The parts of it most relevant to the present report are:

> **Article 4: Market Access:** Each Member State shall grant to persons of the other Member State and services provided by them access rights in its market no less favourable than those allowed to its own persons and services provided by them.
>
> **Article 5: National Treatment:** Each Member State shall accord to persons of the other Member State and services provided by them treatment no less favourable than that accorded in like circumstances to its persons and services provided by them.

1.17 Annexed to the Protocol are 'negative lists' of matters that the parties wished to exclude. Australia's negative list, for example, includes 'limits on foreign ownership as set out in the *Broadcasting Act 1942*' - but does not make any reference to the content of television programs. Either party can remove matters from its negative list, but cannot add to it.

The High Court case

1.18 In December 1995 (on the day the ABA's new Standard was determined, Project Blue Sky Inc., a company representing the New Zealand film and TV industry and five New Zealand film production companies, commenced proceedings in the Federal Court of Australia to have the ABA's decision to determine the Standard reviewed. The challenge was made on the grounds that, because the Standard was inconsistent with the Closer Economic Relations (CER) Protocol agreed to by Australia and New Zealand, it breached paragraph 160(d) of the *Broadcasting Services Act 1992*, which requires the ABA to perform its functions in a manner consistent with Australia's obligations under international agreements.

1.19 Davies J made a declaration that the Standard was "invalid to the extent to which it fails to be consistent with the Protocol" and ordered the Standard to be set aside from 31 december 1996 unless revoked or varied by the ABA. [9] The ABA appealed Davies's decision to the Full Court of the Federal Court. The Full Court of

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8 Australian Treaty Series, 1988 no. 20

9 *Project Blue Sky vs Australian Broadcasting Authority*, unreported ,19 July and 26 August 1996

the Federal Court found in favour of the ABA, finding that paragraph 122(2)(b) and paragraph 160(d) of the *BSA* were 'irreconcilable', and that the special provision in section 122 must prevail over paragraph 160(d).[10]

1.20 Project Blue Sky sought and was granted leave to appeal to the High Court of Australia. In the High Court appeal, it was common ground between the main parties that the Australian Content Standard *is* inconsistent with Australia's obligations under the CER Protocol, in that it discriminates against New Zealand programs, as compared with Australian programs, in the Australian television market.[11] The question for the court was whether the standard was 'lawful' in terms of the *BSA* although it was admittedly inconsistent with the CER.

1.21 The ABA had argued in the Federal Court that section 122 of the *BSA*, read with section 3(e), required it to make a standard along the lines that it did, and that section 122 took priority over paragraph 160(d).[12] The ABA had considered the problem and reached this conclusion before making the present standard: in a 1994 discussion paper it said:

> '…counsel was asked to advise on the duties to be performed by the ABA pursuant to s122…the ABA is now of the view that it is beyond the scope of the power implied by virtue of s122 to provide that the meaning of an 'Australian' extends to a person who is a New Zealander.'[13]

1.22 The High Court rejected the finding of the Full Court of the Federal Court that the special provision in section 122 must prevail over paragraph 160(d).[14] It concluded that a section 122 standard 'relating to' the Australian content of programs does not demand favouritism towards Australian programs and can also relate to other matters [for example, New Zealand programs]; accordingly the ABA can, and therefore should, make a standard consistent with both section 122 and paragraph 160(d).

> 'It is of course true that one of the objects of the Act is "to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity" (s3(e)). But this object can be

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10 *Australian Broadcasting Authority vs Project Blue Sky Inc. & ors*, 12 December 1996, (1996) 71 FCR 465

11 Some third parties intervened in the case as *amici curiae*. Not all of them agreed that the present standard is inconsistent with international obligations. See K Ireland (Australian Film Commission), Evidence, 4 December 1998 p 25.

12 This argument relies on two underlying principles: 1. where two parts of a statute are inconsistent (as the ABA argued for s122 and s160(d)), the more specific takes priority over the more general; 2. Australia's international treaties are not binding in Australian domestic law 'of their own motion': rather, to enforce a treaty in Australia appropriate Australian laws must be made. In the absence of these it is quite possible for an action to be lawful in Australian law although inconsistent with Australia's treaty obligations.

13 In the Federal Court, *Project Blue Sky & ors vs Australian Broadcasting Authority*, No. NG 807 of 1995 FED No. 600/96 Broadcasting, 19 July 1996, para. 11

14 *Australian Broadcasting Authority vs Project Blue Sky Inc. & ors*, 12 December 1996, (1996) 71 FCR 465

> fulfilled without requiring preference to be given to Australian programs over New Zealand programs. Thus, the ABA could determine a standard that required that a fixed percentage of programs broadcast during specified hours should be either Australian or New Zealand programs or that Australian and New Zealand programs should each be given a fixed percentage of viewing time. Such a standard would relate to the Australian content of programs even though it also dealt with the New Zealand content of programs. In any event, the existence of the object referred to in s3(e) cannot control the dominating effect of s160(d).'[15]

1.23 The High Court found therefore that the current Australian Content Standard is unlawful in that it breaches paragraph 160(d) of the *Broadcasting Services Act 1992* which requires the ABA to perform its functions in a manner consistent with Australia's international treaty obligations. [16]

1.24 Accordingly the ABA was obliged to review the standard to make it lawful. In July 1998 the ABA released for public comment a discussion paper which canvassed various options for making a lawful Australian Content Standard.[17] On 13 November 1998 the ABA released for public comment a draft new Standard.[18] The most significant change is that New Zealand programs will qualify for Australian content quotas equally with Australian ones.

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15 *Project Blue Sky vs Australian Broadcasting Authority*, 28 April 1998, HCA 28; (1998) 153 ALR 490, at para. 90

16 *Project Blue Sky vs Australian Broadcasting Authority*, HCA 28 (28 April 1998). Strictly speaking the judgment related only to clause 9 of the standard - the clause setting the general 55 per cent quota. But the same logic applies to the standard as a whole.

17 Australian Broadcasting Authority, *Review of the Australian Content Standard - Discussion Paper*, July 1988

18 Australian Broadcasting Authority, *Review of the Australian Content Standard - Proposed Standard*, November 1988